SIERRA CLUB
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September 9, 2010

California Energy Commission
Attn: Docket No. 08-AFC-13
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: **Sierra Club Comments on the Proposed Calico Solar Project Final Environmental Impact Statement**

To Whom It May Concern:

Please find enclosed Sierra Club's Comments on the Final Environmental Impact Statement for the Calico Solar Project, originally sent to Jim Stobaugh, Bureau of Land Management Nevada State Office. For references to attachments within the comments, please find the Attachments Index at the end, which lists transcripts and documents already entered into the record for this proceeding. Thank you.

Sincerely,

Jeff Speir

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September 7, 2010

Via Electronic and U.S. Mail

Jim Stobaugh
Project Manager
BLM Nevada State Office
P.O. Box 12000
Reno, NV 89520
cacalicospp@blm.gov

RE: Sierra Club Comments on the Proposed Calico Solar Project Final Environmental Impact Statement

On behalf of the Sierra Club, we are writing to provide you with comments on the *Final Environmental Impact Statement and Proposed Amendment to the California Desert Conservation Area Plan for the Calico Solar (formerly SES Solar One) Project* ("FEIS"), which the Bureau of Land Management ("BLM") noticed and distributed on August 6, 2010.[1] The FEIS addressed the righ-of-way ("ROW") grant application submitted by Calico Solar, LLC (the "Applicant") to construct, operate and decommission the Calico Solar Project (the "Project") on the proposed project site. Sierra Club strongly objects to the FEIS and respectfully requests that BLM either reject the ROW application or withdraw the FEIS and issue a supplemental environmental impact statement ("SEIS") prior to issuing a record of decision.

INTRODUCTION

Sierra Club's single most important priority is to help speed the country's transition from an energy economy dependent on cheap fossil fuels to a robust clean energy economy based on renewables. We believe solar energy is the cleanest, most abundant, renewable energy source available, particularly in the West. At the same time, Sierra Club is a long time protector of our public lands. We believe solar projects can and must be sited in an environmentally responsible way in order to protect important desert ecosystems from poorly realized projects. Thus for any utility-scale solar project

[1] Sierra Club submits these comments by email and mail. Due to file size constraints and in accordance with instructions from the project manager Jim Stobaugh, Sierra Club submits Attachments 1-17 to these comments by mail on a CD-ROM for inclusion in the evidentiary record.

to be acceptable in the Mojave desert, they must be sited and configured on our public lands in a manner that fully considers both the requirements of a given project and the existing desert ecosystem. Unfortunately, as shown below, the Calico project has simply been shown to pose far too many unmitigable impacts to justify its construction and operation at this particular site. Therefore, Sierra Club opposes the Calico Project because of its dramatic and unmitigated impacts on a unique and vital area of the Mojave Desert. The Calico Project, though well intentioned, is simply the wrong Project in the wrong location.

The Project, as currently proposed, would devastate over 6,000 acres of vital and irreplaceable habitat in the Mojave Desert. It would result in the deaths of hundreds of threatened desert tortoises, result in the local extinction of the Mojave fringe-toed lizard, destroy an exceedingly rare desert plant, obstruct bighorn sheep movement, risk the survival of local golden eagles and impact burrowing owls, desert kit fox, and American badger. The mere fact that each of these species is even present on the Calico site is astounding. The fact that the Calico site provides an irreplaceable balance for the overall ecosystem of the desert and the long-term survival of these species is treasured. This is a resource that we simply cannot sacrifice.

There has been a frantic push to complete this proceeding in time for the artificial deadline imposed by the availability of funding from the American Recovery and Reinvestment Act ("ARRA"). Likewise, there is a legitimate public and political pressure to increase the nation's renewable generation capacity. These pressures, however, do not absolve the BLM from its legal duties to comply with the National Environmental Policy Act ("NEPA") or any other federal law. More importantly, these pressures do not justify the reckless and irresponsible sacrifice of an irreplaceable resource. Additional funding sources will appear in the future, and the nation's need for renewable electricity will certainly persist, but the impacts to the desert that would result from the Project are permanent. The desert is an exceedingly fragile habitat that cannot recover from the impacts that this Project would create. It is therefore incumbent upon the BLM to fully identify, assess, and mitigate the significant environmental impacts that the Project would create. The FEIS put forth by the BLM failed to achieve that goal. It is a hastily prepared document that did not identify the full range of environmental impacts that would result from the project, nor did it propose mitigation measures that would effectively reduce those impacts. This fast-tracked review of the Calico Project simply did not meet the requirements of NEPA. As a result, the BLM must withdraw the FEIS and reinstitute environmental review of the proposed Project by drafting a supplement environmental impact statement ("EIS").

BACKGROUND

The Sierra Club is a national, non-profit membership organization with over 700,000 members nationwide, and over 200,000 members in California. Sierra Club is steadfastly committed to preserving the legacy of California's wildlands for future generations, while simultaneously recognizing that climate change has the potential to

make radical changes to our habitats and landscapes. Sierra Club is working aggressively to reduce carbon emissions by supporting large scale renewable projects and by quickly ramping up energy efficiency and rooftop solar.

Many Sierra Club members visit and actively use the public lands that would be affected by this Project for recreational and aesthetic purposes such as hiking, nature study, and the study of historic and cultural effects and would be harmed by the direct, indirect and cumulative impacts of the BLM's proposed decision that would allocate over 6,000 acres of public land to a single use, the Calico Solar Project. Sierra Club submitted comments on this project on July 1, 2010. Sierra Club also intervened and actively participated in the CEC proceedings on the application for certification of the Calico Solar Plant.

The Applicant, which is a wholly owned subsidiary of Tessera Solar, originally proposed the Calico Project as an 850 MW solar thermal facility. In consultation with BLM, the Applicant in 2004 identified the proposed Project site on 8,230 acres in the Mojave Desert that stretches south from the base of the Cady Mountains across pristine and undisturbed desert habitat to Interstate 40 and the BNSF Railway. The Project would use 34,000 individual "SunCatchers", which consist of an array of mirrors mounted on a pedestal that focus solar energy onto a Stirling Engine receptor. To date, this technology has only been applied in commercial operation since March 2010 at a pilot-project facility in Maricopa, Arizona that consists of 60 individual SunCatchers.

Under California law, the Applicant must apply for a siting license from the California Energy Commission ("CEC") to construct the facility.[2] The CEC is also the lead agency under the California Environmental Quality Act ("CEQA"). The CEC proceeding and BLM's review of the ROW application began on simultaneous, and sometimes overlapping, tracks. On March 30, 2010, CEC and BLM jointly released the Staff Assessment/Draft Environmental Impact Statement ("SA/DEIS"), intended to satisfy both CEQA and NEPA requirements. Subsequent to releasing the SA/DEIS, however, the BLM and CEC processes diverged. CEC issued a Supplemental Staff Assessment ("SSA") on July 21, 2010, which the BLM did not support, and CEC subsequently issued several revisions to the SSA and the conditions of certification throughout its ongoing proceeding. In addition, subsequent to the release of the SA/DEIS, the Applicant submitted a revised application that reduced the footprint of the proposed Project to 6,215 acres while maintaining an expected capacity of 850 MW. Despite this substantial change, BLM did not issue a supplemental EIS ("SEIS"), and instead simply incorporated the Applicant's altered design as a new alternative in the FEIS. Several other details of the Calico Project continued to change subsequent to the BLM's release of the FEIS on August 6, 2010, yet the BLM did not issue any supplemental environmental analysis in direct violation of NEPA.

[2] The Warren-Alquist Act requires the CEC to approve all thermal power plants greater than 50 MW. Cal. Pub. Res. Code § 25500 *et seq.*

The CEC conducted evidentiary hearings in Barstow from August 4-6, 2010, as well as hearings in Sacramento on August 18 and 25, 2010. BLM and the U.S. Fish and Wildlife Service participated extensively in those hearings. Throughout both the CEC and the BLM processes, the agencies and the Applicant haphazardly rushed through the legally required environmental review as quickly as possible. As noted above, the impetus for this rushed and sloppy review was solely the product of the Applicant's application for ARRA funding, which may require the initiation of construction activities prior to December 31, 2010 if the applicant chooses not to avail itself of other options in the Act. To date, the Department of Energy has not approved the Applicant's application for ARRA funding, and it is unclear whether the Project will receive such funding.

THE FEIS CONTAINED SUBSTANTIAL CHANGES FROM THE DEIS THAT REQUIRED BLM TO ISSUE A SUPPLEMENTAL EIS

Given the massive number of recent changes in agency analyses for the Project, the FEIS is an entirely new document from that which BLM circulated on March 30, 2010. BLM's issuance of the FEIS therefore violated NEPA's requirement that, "environmental impact statements shall be prepared in two stages and may be supplemented."[3] Thus, rather than issuing an FEIS, NEPA required BLM to prepare a supplemental EIS ("SEIS") to address the substantial changes made in the document.[4] BLM must prepare a supplemental NEPA document and circulate it for public review and comment.

BLM's March 30, 2010 DEIS was jointly prepared with the CEC Staff. This SA/DEIS was, however, a completely different document in both form and substance.[5] For example, the SA/DEIS disclosed the potential for occurrence of Prairie Falcon (*Falco mexicanus*) on the Project site, thus requiring mitigation;[6] however, the FEIS did an about face and omitted any mention whatsoever of the Prairie Falcon and did not provide any explanation of why the species was no longer a concern. Conversely, the FEIS discussed the Mountain Plover (*Charadrius montanus*),[7] which the SA/DEIS did not address. These examples are just two of the many divergences between the FEIS and the SA/DEIS. These differences are not minor. The organization of the FEIS is completely different, the analysis on multiple issues has changed, and the recommended alternative was entirely new. It is impossible for the public or other reviewing agencies to meaningfully compare the two documents because they offer completely different assessments of the proposed Project.

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[3] 40 CFR § 1502.9.

[4] 40 CFR § 1502.9(c)(1)(i).

[5] FEIS at ES-1. BLM asserted that the SA/DEIS was a joint effort that followed the conditions discussed by the CEC and BLM in a Memorandum of Understanding ("MOU") concerning joint review of solar thermal projects. The MOU, however, does not relieve BLM from its obligations under NEPA, and in any case the FEIS was prepared only by BLM and diverges dramatically from the jointly prepared SA/DEIS.

[6] SA/DEIS at C.2-30.

[7] FEIS at 3.39.

The FEIS also included a far more troubling and problematic change with respect to the proposed alternatives. The FEIS included, for the first time, "Alternative 1a" as the "Agency Preferred Alternative."[8] The SA/DEIS did not include any analysis of Alternative 1a, and it did not even list it as one of the options that were given cursory review.[9] BLM acknowledged that CEQ regulations require an EIS "…to identify the agency's preferred alternative…**in the draft statement** and identify such alternative in the final statement unless another law prohibits the expression of such preference."[10] Despite this clear requirement to identify and analyze the preferred agency alternative at the draft stage, BLM simply crafted a new alternative that it described and analyzed **for the first time** in the FEIS. This was a clear violation of NEPA.

A recent appeals court decision enjoined BLM from finalizing a similarly flawed NEPA analysis of an energy project on New Mexico's Otero Mesa.[11] According to the court, BLM's attempt to craft an entirely new alternative at the FEIS stage, instead of selecting from among the alternatives analyzed in the DEIS, violated NEPA. The court required BLM to issue a supplemental EIS on grounds that, "[i]f a change to an agency's planned action affects environmental concerns in a different manner than previous analyses, the change is surely 'relevant' to those same concerns."[12] The court concluded that BLM's modified alternative was qualitatively different from the previously analyzed alternatives and therefore necessitated a supplemental EIS.[13]

Here, BLM attempted to engage in similarly unlawful actions by proposing Alternative 1a, which did not appear in the DEIS. BLM attempted to shore up its flawed process by asserting that it made a "determination of NEPA adequacy", which it included as a seven-page Appendix C to the FEIS.[14] Appendix C, however, only served to reinforce the conclusion that the modified alternative constituted a substantial change that necessitated a supplemental EIS. For example, Appendix C included a list of "benefits" that the modification to the proposed action would allegedly create. These included: reduction in desert tortoise mortality; retention of habitat connectivity; protection of hydrologic function; protection of several species of rare plant; etc.[15] Rather than establishing NEPA adequacy, however, this list reinforced the notion that the modified alternative resulted in, "a change to an agency's planned action [that] affects environmental concerns in a different manner than previous analyses."[16] Alternative 1a

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[8] Alternative 1a consisted of the Applicant's revised footprint that reduced the area of the Project to 6,215 acres by pulling down the northern border of the project away from the Cady Mountains. FEIS at 2-25.

[9] SA/DEIS at B.2-3:5.

[10] FEIS at 2-25 (citing 40 CFR § 1502.14(e) (emphasis added)).

[11] *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 707 (10th Cir. 2003).

[12] *Id.*

[13] *Id.*

[14] FEIS at 2.25.

[15] FEIS, Appendix C at C-5:6.

[16] *New Mexico ex rel. Richardson*, 565 F.3d at 707.

does not protect hundreds of desert tortoises that will remain onsite, it does not provide an adequate connectivity corridor, and it ignores impacts to sensitive plant species. These and other issues were not the subject of Sierra Club's or other parties' comments to the SA/DEIS because Alternative 1a did not exist at that time. Following *New Mexico ex rel. Richardson*, NEPA requires BLM to issue a supplemental EIS to disclose and analyze the myriad of alleged environmental benefits related to Alternative 1a.[17] Without such a supplement, the public will not have an opportunity to comment on the adequacy of BLM's determination that the benefits were legitimate or that they adequately addressed the overall impacts of the Project.[18]

The changes in the FEIS constituted a "substantial change" in BLM's analysis, which triggered NEPA's requirement to prepare a supplemental EIS and to circulate it for review.[19] BLM did not issue a supplemental EIS and thereby deprived the public and other agencies of a meaningful opportunity to review and comment on its analysis.[20] Prior to issuing a record of decision, BLM must issue a supplemental EIS for public review and comment that reflects all of the Project revisions since issuance of the DEIS.

THE TRANSLOCATION PLAN

As part of its proposed mitigation measures, BLM appended a Draft Desert Tortoise Translocation Plan ("Draft Translocation Plan") to the FEIS (Appendix I). It appears that the Draft Translocation Plan was prepared entirely by the Project Applicant, with little to no agency oversight, and was only recently provided to the wildlife agencies for review. Both BLM and the Applicant touted the Draft Translocation Plan as a keystone mitigation measure that would significantly reduce the impacts to desert tortoise from the construction of the Calico Project. In reality, implementation of the Draft Translocation Plan, as it is currently proposed in the FEIS, would be devastating to the desert tortoise population present at the Calico site and for the species as a whole. The desert tortoise is a state and federally listed species that has experienced continual decline throughout its range. A thriving population of juvenile and adult desert tortoises exists on the Project site and within its footprint at very high densities. CEC Staff's most recent calculations estimated that the site likely contains approximately 189 desert tortoises, and it could contain as many as 281 tortoises.[21] According to CEC Staff estimates, the Calico

[17] *Id.* ("Because location…affects habitat fragmentation, Alternative A-modified was qualitatively different and well outside the spectrum of anything BLM considered in the Draft EIS, and BLM was required to issue a supplement analyzing the impacts of that alternative under 40 CFR § 1502.9(c)(1)(i)").

[18] *Id.* at 708 ("A public comment period is beneficial only to the extent the public has meaningful information on which to comment, and the public did not have meaningful information on the [impacts of the proposed alternative].")

[19] 40 CFR § 1502.9(c).

[20] BLM's provision of a 30-day comment period on the FEIS does not cure its NEPA violations. In *New Mexico ex rel. Richardson*, BLM attempted a similar procedural maneuver whereby it released a 23-page "supplement" to the FEIS and allowed for a 30-day comment period on the supplement. 565 F.3d at 694. The court rejected this approach and found that NEPA required a supplemental EIS that fully evaluated the environmental impacts of the changed project.

[21] CEC Ex. 310, Staff's Second Errata to the SSA, Table 6a, p.5.

Project and the impacts of the proposed Draft Translocation Plan would result in the destruction of over 6,000 acres of high quality desert tortoise habitat, the mortality of up to 282 individual desert tortoises, and the destruction of up to 863 desert tortoise eggs.[22] This proposed travesty directly contradicts the clearly articulated policy of the Endangered Species Act ("ESA"), which requires BLM and all other Federal departments and agencies to use their authorities to conserve, protect and restore the desert tortoise.[23]

1. The Draft Translocation Plan is Inadequate and Will Not Reduce Impacts to Desert Tortoise.

According to the FEIS, "[t]he risks and uncertainties of translocation to desert tortoise are well recognized in the desert tortoise scientific community."[24] Nevertheless, the FEIS omitted any meaningful analysis of those risks. In fact, translocation is a measure that simply does not work. Recent data from the Fort Irwin translocation program is unequivocal that translocating desert tortoises results in substantial and unacceptably high mortality.[25] A study conducted as part of the Fort Irwin translocation project involved the tracking of 158 desert tortoises that had been translocated from Fort Irwin's Southern Expansion Area in the spring of 2008.[26] During CEC evidentiary hearings on August 18, 2010, every wildlife expert agreed that the 2009 Gowan and Berry study provided the most comprehensive and up-to-date analysis of desert tortoise translocation.[27] After only two years, the study found that over half of the translocated tortoises were dead or missing. "Combining the data from 2008 and 2009, from the time of initial translocation of 158 tortoises in March-April of 2008, 70 **(44.3%) tortoises have died** and an additional 20 (12.7%) are missing."[28]

Dr. Berry, the lead scientist and author of the Fort Irwin study, appeared at the CEC evidentiary hearings on August 25, 2010 and confirmed that: "there's very little scientific evidence that translocation is a successful mitigation or minimization measure for Desert Tortoise."[29] Dr. Berry went on to show that the translocation of desert tortoises may actually cause more harm than good because of the impacts to host and

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[22] *Id.* at 14.

[23] 16 U.S.C. § 1532(3) ("The terms 'conserve', 'conserving', and 'conservation' means to use and **the use of all methods and procedures** which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary") (emphasis added).

[24] FEIS at 4-54.

[25] The Fort Irwin translocation program is a component of an ongoing project to assess, identify, and mitigate the potential effects of expanded military training activities on endangered and threatened species at the National Training Center at Fort Irwin.

[26] CEC Ex. 439, App. 3, Gowan and Berry 2009, *Progress Report on the Health Status of Translocated Tortoises in the Southern Expansion Area*.

[27] CEC Reporter's Transcript ("RT"), Aug. 18, 2010, p.368:3-21.

[28] CEC Ex. 439, App. 3, Gowan and Berry 2009 at p.10 (emphasis added).

[29] CEC RT, Aug. 25, 2010 (Berry) p. 19:14-16.

control sites, particularly where, as here, the translocation plan does not adequately evaluate the receptor sites.[30]

According to CEC Staff's findings, the Draft Translocation Plan could result in the mortality of up to 282 tortoises, an estimate that included mortality in the host/receptor population and the control population of tortoises.[31] Despite these acknowledged impacts, the FEIS discussion of the Draft Translocation Plan did not include any analysis of the impacts that the plan would cause to the host/receptor sites or the control sites. It also did not include a quantification of the expected mortality to the translocated tortoises. In fact, the FEIS included only one oblique reference[32] to the tragic experience at Fort Irwin despite abundant recent data from that federal effort. It is incumbent on any federal agency approving the translocation of the listed desert tortoise to carefully study and then remedy to the maximum extent feasible the errors made at Fort Irwin. It would be unconscionable for the BLM to repeat the Fort Irwin mistakes at the Calico site. The importance of this issue alone dictates a supplemental EIS that properly analyzes the translocation of a listed species.[33]

BLM attempted to defend the wholly inadequate Draft Translocation Plan by claiming that it was not necessary for the plan to meet rigorous scientific standards.[34] This is a federal project on federal land. Section 7 of the Endangered Species Act provides: "Each Federal agency shall…insure that any [agency action] is not likely to jeopardize the continued existence of any endangered or threatened species…"[35] The goal of the Translocation Plan, or any mitigation for that matter, should be to protect, conserve and restore the desert tortoise. The Translocation Plan failed to achieve that goal. Ms. Blackford of U.S. Fish and Wildlife acknowledged that the Translocation Plan was deficient on that issue: "I think one of the primary concerns or criticisms is that the plan…is not focused on the recovery and targeted for the recovery of the Desert Tortoise…this project does not focus on that."[36]

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[30] *Id.* at p.83:11-24.

[31] CEC Ex. 310, Staff's Second Errata to the SSA, p.14.

[32] FEIS at 4-53:54 ("recent evidence from the desert tortoise translocation effort conducted in support of the Fort Irwin Land Expansion Project indicates that mortality rates may be closer to 25 percent per year") (citing Gowan and Berry 2010).

[33] *Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) ("The EIS did not address in any meaningful way the various uncertainties surrounding the scientific evidence upon which the [plan] rested").

[34] CEC RT, Aug. 25, 2010 (Otahal/Miles) p.137:14-18:

> MS. MILES: …I think I just heard you say [the Translocation Plan] is not designed as a research program and so it shouldn't be held to the standards of a research program; is that correct?
>
> MR. OTAHAL: That is correct.

[35] 16 U.S.C. § 1536(a)(2).

[36] CEC RT, Aug. 25, 2010 (Blackford) p. 119:24-120:5.

There is no dispute that the desert tortoise continues to decline throughout its habitat. Dr. Berry, the preeminent expert on desert tortoise with over 35 years of experience and a federal employee for USGS, summarized the status of the desert tortoise: "With the continuing declines in the population [of desert tortoise] in California and our inability to stabilize any populations, I would say that populations such as the one in the Calico area become more and more important."[37] Dr. Berry concluded that the Draft Translocation Plan would likely result in additional negative impacts to the desert tortoise population.[38] BLM did not adequately address the cumulative impacts to the species in either the FEIS or the Draft Translocation Plan. To the contrary, the Draft Translocation Plan was underdeveloped and poorly planned, and it ignored the overall impacts to desert tortoise that threatens to result in substantial mortality to both the translocated tortoises and tortoises at the receptor and control sites. BLM's support of the Draft Translocation Plan violates the ESA's requirement to conserve and restore the desert tortoise and insure the BLM's actions do not jeopardize the continued existence of the species.

2. BLM Failed to Properly Notice and Analyze the Draft Translocation Plan.

In addition to wreaking havoc on the desert tortoise population, the impacts that would result from the proposed Draft Translocation Plan require BLM to engage in a full NEPA review of its environmental impacts. As a reasonably foreseeable consequence of the proposed Project, and in fact a necessary component of the proposed mitigation, NEPA requires BLM to assess the cumulative impacts to the desert tortoise that would result from the Translocation plan, which the FEIS did not do. NEPA requires an agency to assess at the earliest practicable point all of the "reasonably foreseeable" impacts that a project will create.[39] The Draft Translocation Plan constitutes a reasonably foreseeable consequence of the Calico Project because it is, in BLM's opinion, a key mitigation measure required by both the FEIS and the proposed CEC conditions of certification.[40] The FEIS, however, contains only a cursory discussion of the Draft Translocation Plan. Instead of analyzing the impacts that would result from the Draft Translocation Plan, the BLM simply attached the company's plan as an appendix.[41] This treatment does not meet the standards of review required by NEPA.

The Applicant intends to commence Project construction and begin moving tortoises under the Draft Translocation Plan in October 2010.[42] The Applicant and BLM

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[37] CEC RT, Aug. 25, 2010 (Berry) p. 87:13-18.

[38] CEC RT, Aug. 25, 2010 (Berry) p. 90:3-5 ("I don't think as written the plan is likely to be a sound, productive plan [or] that it's likely to have great success for the tortoises").

[39] *New Mexico ex rel. Richardson*, 565 F.3d at 718.

[40] FEIS at 4-53 ("In order to prevent the direct impact of tortoises from the construction of the Proposed Project, a Desert Tortoise Translocation Plan is being developed…").

[41] FEIS, Appendix I.

[42] CEC RT, Aug. 25, 2010 (Huntley/Ritchie) p.201:13-23:

are in no way ready to approve the translocation of desert tortoises given the skeletal nature of the Draft Translocation Plan. In fact, during CEC evidentiary hearings, BLM staff reiterated that the Draft Translocation Plan was incomplete and required further review: "Again, this is a draft that we have put out. And we are soliciting public comments. We do have a 30-day review period where any of the intervenors or anyone else from the public…will be providing comments."[43] Mr. Otahal was apparently referring to the current 30-day comment period that BLM solicited for the FEIS, but there is absolutely no mention of the Draft Translocation Plan or a corresponding comment period in the Federal Register notice that initiated the FEIS comment period.[44] As such, it is unclear which process BLM is relying on for the public to comment on the company's Draft Translocation Plan or what deadline defines the 30-day comment period. The Draft Translocation Plan is clearly not the subject of an independent DEIS, although it should be, and BLM did not officially notice an EIS that fully assesses the plan.

BLM's treatment of the Draft Translocation Plan is wholly inadequate under NEPA. BLM should have included a full description and analysis of the Draft Translocation Plan in the DEIS and FEIS for the Calico Project. "In evaluating whether an agency's EIS complies with NEPA's requirements, we must determine whether it contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences."[45] In *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 812 (9th Cir. 1999), the court reviewed two planned land exchanges contemplated by the U.S. Forest Service. The court rejected the adequacy of the EIS on the first exchange (Huckleberry Exchange) because it failed to consider the cumulative impacts that would result from the second exchange (Plum Creek Exchange). "Given the virtual certainty of the transaction and its scope, the Forest Service was required under NEPA to evaluate the cumulative impacts of the Plum Creek transaction."[46] The court concluded that the U.S. Forest Service violated NEPA because it failed to take a "hard look" at the cumulative environmental impacts that would result from the two transactions.[47]

> MR. RITCHIE: And do you believe that [additional criteria] would be required to be implemented before the translocation plan began moving tortoises?
>
> MR. HUNTLEY: Yes, we need to incorporate many of these factors and clarify many of these factors in the translocation plan.
>
> MR. RITCHIE: And so that clarification and then implementation of the factors based on that clarification would have to happen before October of this year in order to be able to move tortoises?
>
> MR. HUNTLEY: Ideally.

[43] CEC RT, Aug. 25, 2010 (Otahal) p. 141:7-11.

[44] Fed. Reg. Vol. 75, N. 151, Friday, August 6, 2010.

[45] *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 809 (9th Cir. 1999).

[46] *Id.* at 812..

[47] *Id.*

The Calico Project and its accompanying Draft Translocation Plan present a similar scenario as the land exchanges addressed in *Muckleshoot Indian Tribe.* In the present case, it is a "virtual certainty" that the Draft Translocation Plan would be implemented as a necessary component of the Calico Project. As such, NEPA required BLM to include a thorough discussion of the cumulative impacts that would result from both the Calico Project and the Draft Translocation Plan in the DEIS and the FEIS. This did not occur, and in fact it could not occur because BLM failed to gather the required information to fully analyze the impacts of the Draft Translocation Plan.[48] This omission violated NEPA's requirement to take a hard look at the impacts of the proposed plan.[49]

The CEC Staff, U.S. Fish and Wildlife Service and California Department of Fish and Game all agreed that the proposed Draft Translocation Plan, as presented in the FEIS, is incomplete and inadequate to fully evaluate the impacts that would result.[50] In fact, the Applicant admitted that approximately 6,000 of the proposed 9,000 acres of long distance translocation sites have not even been surveyed yet.[51] Neither the Applicant nor BLM have any idea whether the receptor sites are sufficient for the Draft Translocation Plan, and as a result they could not make any informed conclusions regarding the impacts that the Draft Translocation Plan would have on the translocated tortoises or the receptor sites.

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[48] *See, e.g.,* CEC RT, Aug. 18, 2010 (Otahal/Ritchie) p.339:14-20:

> MR. RITCHIE: So you did not consider growth rates [for the receptor sites]?
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> MR. OTAHAL: No.
>
> MR. RITCHIE: -- because you did not have the data?
>
> MR. OTAHAL: Well, we don't have those data yet, so we can't look at that.

See, also, CEC RT, Aug. 25, 2010 (Otahal/Ritchie) p.145:4-12:

> MR. RITCHIE: But of those 9,000 acres [identified in the Ord Rodman recipient areas], the surveys have only been conducted on a portion of that, correct?
>
> MR. OTAHAL: The –yes…I believe about half of those…have been actually surveyed for tortoise. The rest will be done in the fall.

[49] *National Audubon Soc. v. Dep't. of the Navy*, 422 F.3d 174, 188 (4th Cir. 2005) (finding that the Navy's incomplete site visits did not meet NEPA's requirement to take a hard look at the potential impacts because the Navy did not adequately examine the relevant data); *see, also, New Mexico ex rel. Richardson,* 565 F.3d at 715 ("we are wholly unable to say with any confidence that BLM examined the relevant data") (internal quotations omitted).

[50] CEC RT, Aug. 25, 2010 (Huntley) p.108:20-22 ("As the translocation plan stands now, [CEC] staff does not consider it adequate"); CEC RT, Aug. 18, 2010 (Moore) p.270:17-22 ("from what we have at the translocation sites…it appears to [California Department of Fish and Game] that we don't have enough translocation areas [and] we cannot anticipate and/or analyze what will happen to the recipient/host…population with the information that we have"); *Id.* (Blackford) p.290:6-12 ("currently the [U.S. Fish and Wildlife Service] is proceeding with the project as it was originally proposed, and any expansion of the translocation areas would result in a change in the project, and that would trigger a reinitiation for that expansion").

[51] CEC RT, Aug. 25, 2010 (Otahal/Ritchie) p.145:4-12 ("The total is 9,833 acres [of identified receptor sites] in the DWMA. And we surveyed 3,644 acres, and there's 6 [thousand acres] left to survey in the fall").

As a result of this lack of data, BLM cannot make an informed and reasoned assessment of the impacts that the Draft Translocation Plan would have. "NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide these from the public…"[52] Therefore, it is a violation of NEPA for BLM to approve the Calico Project and the Draft Translocation Plan without having first identified and analyzed the environmental impacts in the EIS.[53] "[A]ssessment of all reasonably foreseeable impacts must occur at the earliest practicable point, and must take place before an irreversible commitment of resources is made."[54] The FEIS contemplated the start of construction activities in October of this year. That construction would also necessitate initiation of the incomplete Draft Translocation Plan. BLM's grant of the ROW to the Applicant would constitute an irreversible commitment of resources because it would result in immediate impacts to desert tortoise and their habitat. NEPA prohibits BLM from committing these resources without first assessing the impacts that the Draft Translocation Plan would have. BLM must therefore withhold its record of decision until it gathers sufficient information on the Draft Translocation Plan and distributes a supplemental EIS for public review and comment.

BLM's assertion that it did not have sufficient data to evaluate the impacts of the Draft Translocation Plan does not relieve it of its obligations under NEPA.[55] The CEQ regulations provide: "If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and **the overall cost of obtaining it are not exorbitant**, the agency **shall include** the information in the environmental impact statement."[56] BLM did not assert that exorbitant costs had anything to do with the lack of information on the receptor sites for the Draft Translocation Plan. Rather, the constraints that BLM and others have acknowledged on this project relate to the artificial and external time deadline for ARRA funding.[57] Ms. Blackford of U.S. Fish and Wildlife summarized the constraints as follows: "I would agree that if we had started two years ago and we didn't have ARRA pushing us, that [additional] information would be – we would be looking to achieve that information."[58]

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[52] *New Mexico ex rel. Richardson*, 565 F.3d at 707.

[53] *Id.* at 708 ("NEPA required an analysis of the site-specific impacts of the … lease **prior to its issuance**") (emphasis added); *National Audubon Soc. v. Dep't. of the Navy*, 422 F.3d at 188 (finding that the Navy's incomplete site visits did not meet NEPA's requirement to take a hard look at the potential impacts because the Navy did not adequately examine the relevant data).

[54] *New Mexico ex rel. Richardson*, 565 F.3d at 718.

[55] CEC RT, Aug. 18, 2010 (Otahal) p.340:17-19 ("And if [BLM] can obtain those data in a timely manner, we would be more than happy to refine our criteria").

[56] 40 CFR § 1502.22(a) (emphasis added).

[57] *See, e.g.,* CEC RT, Aug. 4, 2010 (Gallagher) p. 51; *Id.* Aug. 5, 2010 (Kramer) p.52; *Id.* (Bellows) p.87.

[58] CEC RT, Aug. 25, 2010 (Blackford) p.128P:12-15.

NEPA does not allow for the exclusion or deferral of relevant information due to the Applicant's funding deadline.[59]

The fact that BLM did not conduct surveys on the receptor sites and that the Draft Translocation Plan in general lacks fundamentally important information clearly violated NEPA's requirement to take a hard look at the impacts of the Project.[60] Moreover, there is nothing in ARRA that exempts BLM or any federal agency from complying with existing environmental protections. If Congress had intended to include such an exemption, it could have done so. It did not. Therefore, the ARRA funding deadline does not provide BLM with an adequate excuse for its failure to properly gather the relevant information necessary to assess the impacts of the Draft Translocation Plan.

THE FEIS ANALYSIS OF ENVIRONMENTAL IMPACTS WAS INADEQUATE

The FEIS omitted disclosure of the full range of potentially significant impacts associated with the Project. Sierra Club addressed several of these deficiencies that were apparent in the SA/DEIS through comments that it submitted on July 1, 2010. The FEIS failed to cure these deficiencies, and Sierra Club therefore reiterates and incorporates by reference those comments here. Sierra Club also actively participated in the parallel process for the Calico Project before the CEC. Many of the deficiencies of the Calico Project that relate to both the CEC process and the FEIS were addressed by parties in that proceeding through the submission of written testimony, evidentiary hearings and briefing. Two federal agencies, BLM and U.S. Fish and Wildlife Service, also actively participated in the CEC proceeding and are therefore aware of the arguments and controversies raised about the Calico Project. Sierra Club attaches hereto Attachments 1 - 17, which consist of written testimony and attachments, hearing transcripts, and briefing documents from the CEC proceeding, and Sierra Club incorporates by reference those documents in its comments here. As participants in the CEC proceeding, BLM and U.S. Fish and Wildlife had full access to these documents, and the agencies responded to the issues raised by Sierra Club and other parties.

In addition to the issues addressed in Sierra Club's previous comments and the CEC proceeding, the FEIS revealed additional deficiencies in BLM's analysis that constituted violations of NEPA's requirement to provide a full and fair discussion of significant environmental impacts in a supplemental analysis.[61]

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[59] *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998) ("NEPA requires consideration of the potential impact of an action before the action takes place") (emphasis in original) (citing *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th cir. 1990)).

[60] *National Audubon Soc. v. Dep't. of the Navy*, 422 F.3d at 188 (finding that the Navy's incomplete site visits did not meet NEPA's requirement to take a hard look at the potential impacts because the Navy did not adequately examine the relevant data); *see, also, New Mexico ex rel. Richardson*, 565 F.3d at 715 ("we are wholly unable to say with any confidence that BLM examined the relevant data") (internal quotations omitted).

[61] 40 CFR § 1502.1.

1. BLM's Proposed Mitigation Measures Were Unclear and Inadequate.

BLM failed to provide adequate mitigation measures to reduce the the Project's environmental impacts. NEPA requires BLM to, "[i]nclude appropriate mitigation measures not already included in the proposed action or alternative."[62] Under NEPA, BLM must discuss these mitigation measures in sufficient detail to ensure that environmental consequences have been fairly evaluated.[63]

The FEIS simply cut and pasted the proposed conditions of certification drafted by CEC Staff and proposed in the SA/DEIS.[64] However, many of these conditions were preliminary and have long since changed as a result of additional agency discussions and Project refinement. As noted in Sierra Club's earlier comments, these proposed mitigation measures fail to adequately reduce the impacts to biological resources that the Project would cause. Notwithstanding its inclusion of the flawed CEC conditions of certification, the FEIS indicated that BLM might ultimately reject some or all of the conditions from its record of decision. "When developing the Record of Decision for the proposed Calico Solar Project…the BLM **may consider** the SA/DEIS Conditions of Certification, additional Conditions of Certification from the Supplemental SA, and other mitigation measures developed by the BLM and other regulatory agencies."[65] In other words, the FEIS stated that BLM has not finalized **any** of the proposed mitigation measures related to the Calico Project, and all of those mitigation measures are subject to change depending on BLM's whim. The FEIS's ambiguous assertions regarding the proposed mitigation measures make it impossible for the public or any agency to determine what the actual impacts from the Project would be. This is a clear violation of NEPA.[66]

The FEIS's analysis of impacts to the Mojave fringe-toed lizard provides an example of BLM's failure to discuss adequate mitigation measures. The FEIS concluded that the Project would result in the disruption of an estimated 164.7 acres of Mojave fringe-toed lizard habitat.[67] "Impacts on the Mojave fringe-toed lizard would be unavoidable, **but would be minimized and mitigated** through the implementation of project-specific mitigation measures."[68] The FEIS provided no additional discussion or analysis of which mitigation measures would reduce those impacts or what the likely outcome of the mitigation would be. The only subsequent mention of mitigation for the

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[62] 40 CFR § 1502.14(f).

[63] *Neighbors of Cuddy Mountain*, 137 F.3d at 1380 ("The Forest Service's perfunctory description of mitigation measures is inconsistent with the 'hard look' it is required to render under NEPA").

[64] FEIS at 4-113:197.

[65] FEIS at 4-202 (emphasis added).

[66] *Neighbors of Cuddy Mountain,* 137 F.3d at 1380 (finding a violation of NEPA where, "[i]t is also not clear whether any mitigating measures would in fact be adopted. Nor has the Forest Service provided an estimate of how effective the mitigation measures would be if adopted…").

[67] FEIS at 4-59.

[68] *Id.* (emphasis added).

impacts to the Mojave fringe-toed lizard occurred in the mitigation section of the FEIS under BIO-13. That measure, which addressed CEC's compensatory mitigation condition, is the **only** specific mitigation measure for the Mojave fringe-toed lizard. However, the FEIS stated that, "this [BIO-13] is not a mitigation measure that is proposed by the BLM."[69] The FEIS indicated that BLM would modify BIO-13 if the CEC in its own review modified the measure. It is impossible for BLM to conclude, therefore, that the impacts to the Mojave fringe-toed lizard would be "minimized and mitigated" because BLM has not independently proposed any mitigation measures. BLM relied solely on the CEC's condition, which condition the CEC could water-down or eliminate altogether. As a result, the FEIS did not contain any indication or assurance that BLM will require mitigation for the recognized impacts to the Mojave fringe-toed lizard.

To further complicate the issue, several of the CEC's proposed conditions of certification remain a moving target. The Supplemental Staff Assessment ("SSA"), which BLM did not sponsor, contained numerous substantial changes to the proposed conditions of certification. Those conditions of certification continued to change as the CEC conducted evidentiary hearings on biological resources and other issues. In fact, at the close of evidentiary hearings on August 25, 2010, CEC Staff was still engaged in modifying the proposed conditions of certification.[70] The final draft of the CEC Staff's proposed conditions was not distributed to the parties until shortly before 5:00 pm on Friday, August 27, 2010, after the close of the evidentiary record.[71] As of this writing, it remained unclear which proposed conditions of certification the CEC may ultimately adopt. It was premature, therefore, for the FEIS to conclude that, "Mitigation measures described here address environmental impacts …to reduce intensity or eliminate the impacts."[72] BLM could not possibly make this determination prior to knowing what the final mitigation measures will be. Furthermore, if BLM adopts the CEC's final conditions of certification in the Record of Decision, it will have violated NEPA's requirement to discuss the mitigation measures, "in sufficient detail to ensure that environmental consequences have been fairly evaluated."[73]

2. The FEIS Did Not Include Sufficient Information to Analyze the Effectiveness of Impacts from Compensatory Mitigation.

The FEIS relied on several proposed CEC conditions of certification that would require the Applicant to pay compensatory mitigation.[74] These measures would require

[69] FEID at 4-155.

[70] CEC RT, August 25, 2010 (White) p.262:25 – 263:1 ("[Staff] still want to work on [the conditions of certification] a little bit longer").

[71] As a reference, BLM released the FEIS three weeks earlier on August 6, 2010.

[72] FEIS at 4-113; *see* 40 CFR § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens **before** decision are made…") (emphasis added).

[73] *Neighbors of Cuddy Mountain*, 137 F.3d at 1380.

[74] Mitigation measures BIO-12, BIO-13, BIO-17, BIO-21, and BIO-26 involved compensatory mitigation. FEIS at 4-134 to 4-197.

the Applicant either to acquire and protect alternative habitat lands or to pay an in-lieu fee for an agency or third party to acquire such lands. However, the public and other agencies cannot evaluate or consider the potential impacts of this proposed mitigation because neither BLM nor the Applicant identified which lands would serve as compensatory habitat. The Applicant admitted that it had not determined whether such land is even available for acquisition,[75] and Ms. Fesnock of BLM further explained the strain on mitigation land inventory in the California desert that will result from the current rush of proposed solar projects:

> [W]e have 75,000 acres of projects proposed in the desert that haven't been proposed before. If you look historically at the number of acres that BLM has been trying to mitigate on an annual basis, we're not even close to that…there's going to be a huge demand for the remaining supply that exists.[76]

The compensatory mitigation proposals completely fail as a mitigation strategy under NEPA because they did not adequately identify or analyze the lands that the Applicant would acquire to purportedly reduce the impacts of the Project. "NEPA requires consideration of the potential impact of an action **before** the action takes place."[77] The public cannot meaningfully comment on the proposed mitigation without knowing the specific location of the compensatory lands. "A public comment period is beneficial only to the extent the public has meaningful information on which to comment, and the public did not have meaningful information…"[78] Moreover, the BLM once again relied on the CEC conditions of certification to determine the adequacy of mitigation measures, and those conditions remained uncertain regarding the extent and cost of compensatory mitigation at the close of the CEC evidentiary record. Therefore, it was impossible for BLM even to know how much compensatory mitigation would be required, let alone whether it would be sufficient to reduce the impacts of the Calico Project.

3. The FEIS Failed to Analyze Impacts to Golden Eagle.

Golden eagles are known to nest within a few miles of the Project site.[79] The golden eagle is a federally protected species. Based on U.S. Fish and Wildlife Service's analysis of golden eagle populations across the nation, there is no safely allowable take level for golden eagles.[80] In other words, the status of the golden eagle is so dire that the

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[75] CEC RT, August 5, 2010 (Brizee/Bellows) p.95.

[76] CEC RT, August 5, 2010 (Fesnock) p.147

[77] *Neighbors of Cuddy Mountain*, 137 F.3d at 1380 (emphasis in original) (citing *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th cir. 1990)).

[78] *New Mexico ex rel. Richardson,* 565 F.3d at 708.

[79] FEIS at 3-38.

[80] CEC RT, August 5, 2010 (Blackford) p.269.

U.S. Fish and Wildlife Service completely prohibits the taking of a golden eagle. A "take" means to "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb."[81] Further, "disturb means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior."[82] Therefore, it is completely prohibited to create a disturbance that will substantially interfere with the breeding, feeding or sheltering behavior of a golden eagle.

The Project would affect 6,215 acres of golden eagle foraging habitat. The FEIS did not and cannot analyze the full impacts that the Project would have on the golden eagle because there was insufficient information on the existing population near the Project. In addition, CEC Staff acknowledged that the potential impacts to golden eagles colliding with SunCatchers while foraging remained unclear: "We don't know what effects the SunCatchers will have on bird collisions. We know from other studies in other projects in the region that birds do collide with these kinds of structures."[83] The U.S. Fish and Wildlife Service witness stated that the Applicant should conduct golden eagle surveys during the breeding season in order to determine the impact that the Project would have on golden eagle foraging and other behavior and to determine whether an Avian Bat Protection Plan should be developed, and the FEIS required the Applicant to develop such a plan as a mitigation measure.[84]

The FEIS acknowledged the risk of bird strikes and other risks, including golden eagle impacts, yet it did nothing to analyze or address those impacts.[85] This omission violated NEPA's hard look requirement.[86] In *National Audubon Society v. Department of the Navy*, 422 F.3d 174, 188 (4th Cir. 2005), the court rejected the Navy's EIS because it failed to collect sufficient information on the risks to local bird populations that would result from the construction of an aircraft landing field.[87] The court found that NEPA's requirement to take a "hard look" at the impacts to nearby bird populations is particularly relevant where Congress has specifically identified protection for those birds. "NEPA's national policy …to promote efforts which will prevent or eliminate damage to the environment is surely implicated when the environment that may be damaged is one that Congress has specially designated for federal protection."[88] In the context of the Calico

[81] 50 CFR § 22.3.

[82] *Id.*

[83] CEC RT, August 5, 2010 (Huntley) p.281.

[84] CEC RT, August 5, 2010 (Blackford) p.270; FEIS at 4-187.

[85] FEIS at 4-63.

[86] *National Audubon Soc. v. Dep't. of the Navy*, 422 F.3d at 188 (finding Navy did not take a hard look because evidence in the record indicated that impacts on waterfowl were a possibility, and no evidence pointed to the opposite conclusion).

[87] *Id.*

[88] *National Audubon Soc. v. Dep't. of the Navy*, 422 F.3d at 187 (internal citations and quotations omitted).

Project, the FEIS did not gather sufficient data or address the known risks to the golden eagle and other birds from potential collisions with the solar facilities. This omission was particularly concerning given the sensitive status of golden eagles and Congress' clear intention, articulated through the Eagle Act, to protect that species. Following, *National Audubon Society v. Department of the Navy*, BLM's failure to analyze the risks to golden eagles prior to issuing the DEIS or the FEIS constituted a violation of NEPA.

4. The FEIS Failed to Analyze Impacts to White-margined Beardtongue

The Project would result in substantial direct impacts to white-margined beardtongue, which is a CNPS 1B special status species.[89] The FEIS failed to provide sufficient information or quantitative data to fully evaluate or mitigate the impacts that the Project would have on white-margined beardtongue and other sensitive plant species. BLM's conclusion that the mitigation measure BIO-12 would mitigate the impacts to white-margined beardtongue is unsupported by the record. The white-margined beardtongue, like many desert plants, does not germinate every year.[90] However, the FEIS based its evaluation and proposed mitigation of the white-margined beardtongue on the 2010 spring surveys prepared by the Applicant. Given the nature of the white-margined beardtongue, a single survey in spring is not adequate to determine the presence of the plant on the site. Mr. Andre explained in his written testimony that, "a large percentage of the seed bank will not germinate and many living plants remain dormant underground."[91] The FEIS's evaluation of the 2010 botany surveys would therefore only provide information on the bare minimum of existing plants on the site. It is extremely likely that several additional unidentified plants are located on the project site. BLM's failure to obtain sufficient information on the presence of this species prior to conducting its analysis violated NEPA's requirement that BLM take a hard look at the information on potential impacts prior to issuing a decision.[92]

The FEIS also failed to explain how the proposed mitigation measure to create a 250-foot buffer around existing white-margined beardtongue within the Project site would prevent direct impacts to the population. The white-margined beardtongue exhibits population fluctuation within its habitat. Therefore, although the 250-foot buffer may protect an individual plant during one season, the shifting nature of the species over time would likely result in the extirpation of the on-site population.[93] There is no evidence showing that this population could survive in the 250-foot buffers that would be

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[89] FEIS at 3-32.

[90] CEC Ex. 601, Andre Rebuttal Testimony, July 29, 2010, p.3.

[91] *Id.*

[92] *National Audubon Soc. v. Dep't. of the Navy*, 422 F.3d at 188 (finding that the Navy's incomplete site visits did not meet NEPA's requirement to take a hard look at the potential impacts because the Navy did not adequately examine the relevant data); *see, also, New Mexico ex rel. Richardson*, 565 F.3d at 715 ("we are wholly unable to say with any confidence that BLM examined the relevant data") (internal quotations omitted).

[93] CEC RT, August 5, 2010 (Andre) p.399.

surrounded by the wholly altered landscape among the SunCatchers.[94] Under NEPA, a proposed mitigation measure is inappropriate where there is no evidence in the record showing that the proposed measure would be effective.[95] Therefore, BLM's adoption of the ineffectual measure for the white-margined beardtongue would violate NEPA.

5. BLM Impermissibly Omitted Analysis of the Private Lands Alternative.

The FEIS did not evaluate the private lands alternative, which would involve the Applicant's acquisition of private parcels for development of the solar plant. The SA/DEIS included a private lands alternative, but the FEIS dropped the issue and did not consider or analyze it as an alternative. Instead, BLM asserted that it was not required to review this alternative: "The BLM considers the Private Lands Alternative as essentially equivalent to the No Action Alternative for the purposes of this NEPA analysis."[96] BLM went on to argue that the private lands alternative was not appropriate to consider because BLM did not have discretionary approval authority over the use of private lands.[97] This argument completely disregarded NEPA's requirement to, "[r]igorously explore and objectively evaluate all reasonable alternatives…"[98] NEPA regulations expressly require agencies to look at reasonable alternative, **even if they are not within the jurisdiction of the lead agency**.[99] The private lands alternative clearly falls within the range of reasonable alternatives because it would potentially allow the Applicant to develop a solar facility on previously disturbed desert lands, which could dramatically reduce the impacts from the Project. The private lands alternative was therefore **not** equivalent to the no action alternative because it could still result in the development of a solar thermal plant with the capacity to generate renewable energy, which the no action alternative would not achieve. BLM's failure to even consider the private lands alternative was therefore unjustified and constituted a violation of NEPA.[100]

CONCLUSION

As discussed above, BLM did not follow well established NEPA requirements for issuing draft, supplemental and final environmental analysis. In addition, to date the

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[94] The Project would also result in the loss of more than 50 acres of suitable habitat for the white-margined beardtongue. This loss of habitat would violate the 50 acre limit imposed by the BLM's West Mojave Plan.

[95] *Neighbors of Cuddy Mountain,* 137 F.3d at 1380 (finding a violation of NEPA where, "[i]t is also not clear whether any mitigating measures would in fact be adopted. Nor has the Forest Service provided an estimate of how effective the mitigation measures would be if adopted…").

[96] FEIS at 2-47.

[97] *Id.*

[98] 40 CFR § 1502.14(a).

[99] 40 CFR § 1502.14(c).

[100] *Muckleshoot Indian Tribe*, 177 F.3d at 814 (holding that the U.S. Forest Service's failure to consider an alternative that clearly falls within the range of reasonable alternatives violated NEPA).

NEPA documents have omitted critical information regarding the full range of potentially significant environmental impacts that would result from the Calico Project and the accompanying Draft Translocation Plan. NEPA requires BLM to withdraw the FEIS and produce a SEIS for public review and comment. The SEIS must address and remedy both the deficiencies in BLM's impacts analysis as well as the significant and cumulative environmental impacts that would result from the Translocation Plan. Therefore, Sierra Club respectfully requests that BLM draft and circulate a SEIS consistent with these comments, or in the alternative reject the ROW application.

Dated: September 7, 2010

Respectfully submitted,

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APPLICATION FOR CERTIFICATION

***For the CALICO SOLAR** (Formerly SES Solar One)*

Docket No. 08-AFC-13

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(Revised 8/9/10)

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DECLARATION OF SERVICE

Sierra Club Comments on the Final Environmental Impact Statement

I, Jeff Speir, declare that on September 9, 2010, I served and filed copies of the attached Impact Statement, dated September 7, 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/solarone]**.

The documents have 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)

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CALIFORNIA ENERGY COMMISSION
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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, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

Jeff Speir

*indicates change