

environmentalcommons

November 8, 2010

Allison Shaffer, Project Manager
Palm Springs South Coast Field Office
Bureau of Land Management
1201 Bird Center Drive
Palm Springs, California 92262

RE: Comments Concerning Desert Sunlight Solar Farm DEIS

Dear Ms. Shaffer,

After reviewing the Draft Environmental Impact Statement (DEIS) for the Desert Sunlight Holdings, LLC (Sunlight) proposed project to construct and operate the Desert Sunlight Solar Farm (DSSF), Environmental Commons respectfully offers the following comments.

Before addressing the more substantive matters of the DEIS for the proposed project, there are some more minor matters that require attention.

Minor Issues

1. The Notice of Intent issued in January, 2010 names First Desert Solar, Inc. as the applicant whereas the DEIS names Sunlight Holdings as the project proponent. The applicant's name should be clarified and made consistent with additional explanation.
2. Within the Executive Summary, the applicant uses the word "only" in describing permanent disturbance of acreage. The use of this word connotes a value judgment as well as possible bias and should be eliminated from use.

Substantive Issues

1. Purpose & Need of Project

According to the Council on Environmental Quality's regulations, the purpose and need of the proposed project "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."¹ The DEIS' purpose and need statement should define the goals of the project to allow for the review of an appropriate range of alternatives.²

According to the DEIS, BLM's stated purpose and need for the project is "to respond to Sunlight's application for a ROW grant to construct, operate, maintain, and decommission a . . . solar energy facility."³ This purpose as stated in the DEIS is uncommonly limited in its scope. Its narrowness subsequently skews the range of alternatives provided. Instead of stating a bureaucratic purpose and need, BLM should provide a purpose that describes the specific need for this type of facility at this location. If such a specific need does not exist, the purpose and need should be expanded to the more general goal of expanding solar electric production. This purpose and need discussion should be expanded to include consideration of all of the other pending proposals for solar generating facilities in the region. In light of those projects, both proposed and approved, is there still the need for this project?

Although an agency has "considerable discretion" to define the purpose of a project,⁴ it cannot narrow its objectives as to unreasonably limit the alternatives presented.⁵ When an agency's purpose is drafted in light of the private proponent's objectives rather than its own, the court may find the project's goals so narrowly drawn as to "foreordain approval of the proposed

¹ Council on Environmental Quality, Regulations for Implementing NEPA, 40 C.F.R. § 1502.13 (2009).

² Stop the Pipeline v. White, 233 F. Supp. 2d 957, 971 (S.D. Ohio 2002) (stating the purpose and need statement, required by NEPA regulation for proposed project, should define the goals of the project to allow for the review of an appropriate range of alternatives).

³ U.S. Dep't of the Interior, Bureau of Land Mgmt., Draft Environmental Impact Statement and Draft Plan Amendment to the California Desert Conservation Area Plan for the Proposed Desert Sunlight Solar Farm [hereinafter "DSSF DEIS "], ES-2 (Aug. 2010).

⁴ Friends of Se. Future v. Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998).

⁵ Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997); Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1070 (9th Cir. 2010).

action.”⁶ In the recently decided Nat’l Parks & Conservation Association v. Bureau of Land Management, the Ninth Circuit Court of Appeals held BLM’s purpose unreasonably constrained the possible range of alternatives for the project.⁷ Finding only one of the four stated goals related to a valid agency purpose, the Court determined BLM’s purpose to be driven by the externally generated action.⁸ The Court relied on the DOI NEPA Handbook for its analysis.⁹ DOI’s NEPA guidelines explain the “purpose and need statement for an externally generated action must describe a BLM purpose, not an applicant’s purpose.”¹⁰ Responding to Desert Sunlight’s application appears to be more of the applicant’s purpose rather than BLM’s purpose.

2. Alternatives

Under NEPA, agencies must prepare an EIS to include a detailed statement of alternatives to the proposed action.¹¹ Broadly speaking and in light of the narrow purpose, although BLM provides six alternatives for the proposed project (three action and three no-action), it is questionable whether the agency has developed a reasonable range of alternatives.

Specifically, the scope and level of analyses of the alternatives offered in the EIS raise concern. The environmentally preferable alternative discussion serves as a good example of the deficient scope of alternatives analyzed. Under NEPA, BLM is encouraged to identify the environmentally preferable alternative(s) in the EIS. Although action alternative #3 appears to impact the environment the least because of its decreased affected acreage, there is inadequate discussion of the eliminated and remaining acreage (i.e. what resources are on those acres) to ascertain whether this is the preferable alternative with respect to environmental impacts. Does

⁶ Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt., 606 F.3d 1058,1062 (9th Cir. 2010)

⁷ Id.

⁸ Id. at 1072.

⁹ Id.

¹⁰ Dep’t of Interior, Bureau of Land Mgmt., National Environmental Policy Act Handbook H-1790-1 77 (Jan. 30, 2008), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook (last visited Oct. 12, 2010). The purpose and need statement frames the range of alternatives. Id.

¹¹ NEPA § 102(2)(C)(iii), 42 U.S.C.A. § 4332(2)(C)(iii) (West 2010).

the reduced acreage in alternative #3 avoid highly sensitive areas? In addition, why would the agency not combine the decreased acreage of alternative #3 with substation B as an alternative? Please review this latter combination as a potential environmentally superior alternative.

In addition, no-action alternatives #5 and #6 conflate permitting action with the proposed action. Without an amendment to the CDCA, the application would not be able to begin development. Specifically, for the NEPA analysis of alternative #6 (no ROW grant would be issued to the applicant yet the CDCA would be amended to identify the project area as suitable for future large-scale solar energy development) to be reasonable, BLM should be assessing the largest development that could occur on this site. In other words, this alternative should take into consideration maximum potential build-out under the amended CDCA. Is alternative #6 limited to this project and its alternatives, or could a larger project be constructed under this amendment? Under NEPA, BLM's examination of alternatives must be more than pro forma ritual and instead must seriously consider alternatives to avoid environmental costs.¹²

In regards to the environmental consequences by alternative, Table ES-2 seems to indicate a failure to conduct the detailed analysis needed to provide decision-makers and the public with adequate information upon which to consider the project in light of potential alternatives. In a number of the resources described, the impacts listed under Alternatives #2 and #3 claim the impacts are "same as the proposed action" or "similar to the proposed action." Either the data from the impacts are so broad that the alternatives are not detecting a difference, or there really are not enough substantive differences between the alternatives. As such they do not meet NEPA objectives. The alternatives presented should "sharply defin[e] the issues and provid[e] a clear basis for choice among options."¹³ The "environmental consequences" section should form the analytic basis for the concise comparison in the "alternatives" section.

As an example, under the visual and water resource impacts, according to the agency, alternatives #2 and #3 would create "similar" impacts as described for the proposed project. How could alternative #3, with its 1000+ less acres create similar impacts as the proposed

¹² S. Utah Wilderness Alliance v. Norton, 237 F. Supp. 2d 48, 53 (D.D.C. 2002).

¹³ 40 C.F.R. § 1502.13 (2009).

project? Under “cultural resources” for the proposed action the EIS states that Native American consultation is ongoing and that sacred sites may be present. Under alternative #2 and #3, the agency states the impacts are the “same as the proposed project.” Although we assume that the referral to similarity pertains to the ongoing consultation with Native American tribes, the impacts to the Native American sacred sites that may be affected under the various alignments are not addressed. The EIS should be revised to be clear and the analyses of the impacts of the alternatives should reflect the changes in impacts to the sacred sites. As described in below, this “ongoing consultation” is an inappropriately deferred analysis and therefore inadequately presents the impacts to the sites in question. The direct and indirect impacts should be provided for each alternative.

3. Mitigation Measures

The DEIS for the proposed project contains a large number of deferred studies in the form of mitigation measures. The main purposes of the EIS are to present an analysis of potential impacts and then identify measures to reduce or eliminate those impacts. Therefore deferral of analysis to some future study is counter to the basic disclosure purposes of the law. Deferring important studies makes it virtually impossible to completely identify the affected environment and whether adverse impacts can be reduced. According to 40 C.F.R. § 1502.25, a draft EIS must “to the fullest extent possible” integrate “surveys and studies” required by statutes and environmental review laws. Further, future studies in now way have any mitigatory effect, and therefore do not constitute adequate mitigation of significant impacts.

A few examples include the mitigation measures proposed for Vegetation and Cultural Resources. In particular the Vegetation BIO5 applicant mitigation measure includes the future preparation of a Vegetation Resources Management Plan. How can the environmental impacts and reductions be adequately assessed without this plan in place prior to the environmental review? In addition, the DEIS identifies impacts to cultural resources including a number of sites that are eligible for listing both in the State as well as nationally. The agency acknowledges that the possible impacts, particularly with the Tribal communities identification and mitigation of sacred sites and traditional use areas are incomplete as consultation with the Native American

tribes continues. Yet, BLM also acknowledges that one the sacred sites are characterized, re-design of the project may be necessary. The placement of the needed sacred sites survey within the mitigation measures is puzzling. It would seem prudent to identify the impacts of the proposed project on all cultural resources prior to the issuance of the DEIS so that adequate consideration of the effects can be ascertained.

4. Environmental Justice

Lastly, while BLM did complete a screening and detailed analysis identifying the proposed project's surrounding population constituted an environmental justice community, the conclusion that no disproportionate adverse impacts would result is incomplete and may be inadequate. The analysis only considered demographic and socioeconomic impacts and did not take into account the disproportionate effects of the project on cultural and natural resources for the Tribal communities.

In addition, a key component in protecting environmental justice communities involves providing opportunities for effective community participation in the NEPA process. Such outreach elicits statements from the community as to what is important and what impacts need evaluation. To date, BLM has engaged the environmental justice community by using routine, and possibly deficient, notification practices. Its sole outreach to the Native American population consists of a letter sent to fourteen local tribes seeking input on traditional use areas that may impact the Native American population. The letter was sent to the tribes on April 15, 2010, nearly three months after the proposed project's notice of intent was published that initiated the public comment period.

Properly considering and recognizing the unique values, history, and culture in the environmental justice analysis may better fulfill the mandate of Executive Order 12898.

Conclusion

In summary, we respectfully request BLM address the inadequacies of the Desert Sunlight Solar Farm's DEIS. In particular, we request BLM examine further the limited nature of the project's stated purpose and need, the scope and analysis of the provided range of

alternatives, the sheer amount of deferred mitigation related studies, and the incomplete and inadequate environmental justice analysis. By addressing the above issues, BLM will more effectively follow the purpose of NEPA to ensure that information on the environmental impacts of any Federal, or federally funded, action is available to public officials and citizens before decisions are made and before actions are taken. Should you have any questions regarding this submission, please feel free to contact me at 808-285-5222.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. Britt Bailey". The signature is fluid and cursive, with a long horizontal stroke at the end.

Britt Bailey, Executive Director