

Central Valley Regional Water Quality Control Board

Fresno Office

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Attention: Debra Mahnke

Email Address: [dmahnke@waterboards.ca.gov](mailto:dmahnke@waterboards.ca.gov)

*Sent via email*

March 13, 2013

Re: Pending Water Quality Certification Application for the Panoche Solar Facility, located in Panoche Valley in eastern San Benito County, California. Project 5C35CR00002

Dear Ms. Mahnke,

This letter responds to the Pending Water Quality Certification Application for the Panoche Solar Facility, located in Panoche Valley in eastern San Benito County, California - Project 5C35CR00002. It is our understanding that the current public notice specifically addresses water quality certification for impacts to waters of the U.S. / State, and that there will be a subsequent public comment period to address Waste Discharge Requirements for impacts specific to those waters that are considered non-federal waters, i.e. waters of the State.

The project involves the construction of a 247 Megawatt solar photovoltaic energy generating facility on approximately 2, 506 acres. The project will result in impacts to 5 waters of the U.S. in addition to thirty-two waters of the State. Based upon our review of the information provided, we urge the Central Valley Regional Water Quality Control Board (CVRWQCB) to suspend the public notice process. Failing suspension of the permit application review, the CVRWQCB has no recourse but to deny the permit application without prejudice as the California Environmental Quality Act (CEQA) Supplemental Environmental Impact Report (SEIR) has not yet been finalized, and the U.S. Army Corps of Engineers (Corps) Environmental Impact Statement (EIS) has not yet been released.

The "Instructions for Completing the Clean Water Act Section 401 Water Quality Certification Application" advise:

If another local or State agency is the lead agency for CEQA, obtain the final environmental documentation and determination before the certification application is

submitted. If the Regional (or State) Board must be the CEQA Lead Agency, contact that agency well before submitting the application. [Emphasis is as in the original instructions]

Clearly there is a strong preference that the CEQA environmental review process be completed prior to the submittal of any application for water quality certification, and with good reason. The purpose of the CEQA process is to identify and analyze all potential significant impacts to the environment, and provide mitigation measures to reduce significant adverse impacts to levels that are less than significant. Should the environmental review document fail to do so, resource and regulatory agencies and members of the public have the opportunity to inform the review process through the public comment process. As stated above, the SEIR for the revised Panoche Solar Facility has not yet been finalized. Neither the CVRWQCB, nor the public have had the opportunity to review the comments submitted, or the responses to the comments provided by the lead agency. Thus, it is impossible at this time to know whether substantive issues have been identified that could result in additional impacts to waters of the U.S. and waters of the State.

Similarly, an Environmental Impact Statement (EIS) is the National Environmental Policy Act (NEPA) disclosure document that is meant to identify and analyze all known impacts to the environment, including aquatic resources. Like CEQA review, an EIS must consider more than just the significant impacts to waters of the U.S., including, but not limited to, geologic, hazardous materials, public safety, cumulative impacts, irretrievable commitment of resources, etc. It is entirely possible that mitigations proposed to address significant impacts to one resource (aesthetic, cultural, biological, geological, hydrological, public safety, etc.) could result in an alteration of the project design, and could result in greater impacts to Waters of the State. The Corps issued a Notice of Intent to prepare a Draft EIS July 19, 2012. It is our understanding that the Corps is still several months away from releasing the DEIS. Why would the CVRWQCB issue its water quality certification in advance of the Corps' Record of Decision? Just as with the CEQA process, mitigation measures to address impacts to endangered species, public safety, geological and soil issues, etc., may result in additional changes to the proposed project. It is premature for the CVRWQCB to consider issuance of water quality certification for the proposed project until the NEPA and CEQA processes have concluded.

Initiation of the public notice process at this time, prior to the conclusion of the CEQA and NEPA review processes, is thwarting the public's ability to provide substantive comments regarding protection of waters of the State. Nor does it allow the CVRWQCB to review the finalized project.

Errata Sheet #2 to the Final EIR (2010) acknowledged that in accordance with the Basin Plan, all natural surface waters in the project area, including intermittent or ephemeral drainages, are considered “westside streams” and as designated in Table II-1 of the Basin Plan, are managed for the following Beneficial Uses:

- Agricultural supply
- Industrial Service and Process Supply
- Water Contact Recreation
- Non-Water Contact Recreation
- Warm Freshwater Habitat
- Wildlife Habitat
- Rare, Threatened or Endangered Species Habitat
- Groundwater Recharge

In response to an email from the Central Valley Regional Water Quality Control Board (see attached), an Errata Sheet was introduced as a last-minute revision at the San Benito Board of Supervisor’s meeting on the same night that the FEIR for Project was approved. The Final EIR was written based on the erroneous assumption that Panoche Valley streams, washes and surface flow had no identified beneficial uses. This error meant that there was no analysis or mitigation for impacts on the streams in the 2010 FEIR. This omission has not been corrected in the DSEIR, which is currently under consideration by San Benito County. Significant impact to beneficial uses can be expected. We attach the following comment letters on the SEIR and ask that you consider all the comments within these letters as comments on the Water Quality Certification Application for the Panoche Solar Facility. We are especially concerned with “take” of rare and endangered species, including the Blunt-nosed Leopard lizard, a fully protected species under California law.

- A letter regarding blunt-nosed leopard lizard from the Department of Fish and Wildlife
- Comment letter on the Draft Supplemental EIR from the Department of Fish and Wildlife
- Comment letter on the Draft Supplemental EIR from the Sierra Club and Santa Clara Valley Audubon Society
- Comment letter on the DSEIR from Defenders of Wildlife, the Nature Conservancy, Santa Clara Valley Audubon, Sierra Club, Audubon California and Center for Biological Diversity

Based on the information provided in these letters, we expect Project-related activities, including grading, to impact all the “westside streams”, vernal pools and surface flows to cause significant and irreversible harm to the following beneficial uses:

- Warm Freshwater Habitat
- Wildlife Habitat
- Rare, Threatened or Endangered Species Habitat
- Groundwater Recharge

The Basin Plan directs the Water Board to protect and enhance both existing and potential Beneficial Uses of Waters of the State. To offset the adverse impacts of the project on waters of the U.S. and waters of the State, the applicant has provided a Draft Mitigation and Monitoring Plan (MMP). We have only recently (March 10, 2015), received a copy of the MMP. Although we have only had a limited time to review the MMP, we find the MMP fails to adequately mitigate impacts to waters of the U.S. and State.

The MMP states as mitigation for impacts to 0.12 acres (3,504 LF) waters of the U.S. and to 7.60 acres (16,935 LF) waters of the State, the project proponent will remove and enhance five debris dump sites (0.42 acres) "with seeding of native vegetation and potential erosion control measures if necessary," create a 0.15 acres California tiger salamander (CTS) breeding pond within the Valadeao Ranch Conservation Lands, and partially exclude livestock to restore native vegetation on portions of Panoche Creek totaling 11.16 acres within the Silver Creek Ranch Conservation Lands. Aside from the potential creation of the CTS breeding pond, the MMP focuses on preservation and enhancement of waters of the U.S. and State and does not ensure there will be no net loss.

The CVRWQCB should require the MMP clarify how many linear feet of creeks these actions will enhance.

The MMP should incorporate monitoring of the creek beds upstream and downstream of the project impact sites to ensure the road crossings, etc., do not result in, or exacerbate, existing bed and bank instability.

The Draft MMP, contrary to the Errata Sheet mentioned above, states there are no Beneficial Uses for the surface waters occurring within the project site. The MMP should include a discussion of how the proposed mitigation measures will protect or enhance Beneficial Uses.

The MMP states, "Mitigation activities within the Conservation Lands will occur six months to 12 months after completion of the Project." This is unacceptable. There is no reason the proposed mitigation should not be completed prior to the construction of the proposed project. If the CVRWQCB allows the mitigation to be constructed, after the project is completed, there is little incentive to the project proponent to implement the mitigation plan.

With regards to the debris dump sites, while it is certainly preferable from a water quality perspective that tires, appliances and old cars are removed from the drainages, the language in the MMP does not guarantee this action will occur. The MMP states, "During implementation,

if it is determined that removing debris would cause instability in the drainage the material will be left in place." [emphasis added]

And under the Performance Criteria, "Indicate that all debris has been removed (unless specifically left in the creek channel to maintain stability)..." [emphasis added]

The MMP also includes the following language:

...the Applicant will remove debris from these areas allowing the natural environment to stabilize. Once the debris is removed the Applicant will seed the area as deemed necessary by the biologist, with a native seed mix sourced locally to prevent erosion and allow the natural plant and animal species to thrive in the area. [emphasis added]

And, "Once the debris is removed the Land Manager will reseed with a native seed mix in the debris removal area as deemed necessary by a qualified biologist, with native plants locally sourced to prevent erosion."

This approach is completely inadequate. First, the question of whether the debris can and will actually be removed, should be determined in advance of proposing the action as a mitigation measure. Second, plans for bank and creek bed stabilization should be prepared and included within the MMP. Photos of "Trash Removal" sites 1a, 1b, 4, and 5, provided in the MMP, show signs of significant bank erosion. The MMP should include measures that will specifically ensure further bank-slope erosion will not occur once the debris is removed from the creek bed. Will the areas of debris removal be temporarily fenced to promote success of any seeding efforts? As a side note, any "native seed mix sourced locally" should be approved by the U.S. Fish and Wildlife Service (USFWS) and California Department of Fish and Wildlife (CDFW) in advance of its use.

The MMP discusses the creation of a breeding pond for the California tiger salamander. While the monitoring plan mentions specific depth and duration of ponding criteria, the plan does not consider the possibility of the CTS mitigation pond silting-in over time. It is impossible to determine from the information provided whether this is an issue for the site proposed. If it is, the MMP must acknowledge this concern, and discuss how this would be addressed in the long-term. The MMP should also include monitoring to determine if the pond is successfully used by CTS, and to ensure bullfrog do not utilize the pond during the CTS breeding season.

In conclusion, and based upon the comments above, we urge the CVRWQCB to deny without prejudice the permit application for water quality certification for the Panoche Solar Facility, or to suspend the permit review process until the CEQA and NEPA review are completed.

Thank you for the opportunity to provide comments. We request notification for any future public comment periods, and of any agency decisions.

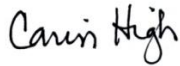
Sincerely,



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