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May 28, 2009

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-5
1516 Ninth Street, MS-15
Sacramento, CA 95814-5512

Re: SES Solar Two Project; Docket 08-AFC-5

Dear Docket Clerk:

Enclosed are an original and two copies of CURE's Biological Resource Letter. Please process the document and return a conformed copy in the envelope enclosed.

This document has previously been emailed to the Docket Office.

Thank you for your assistance.

Sincerely,

Carol Horton

Carol Horton

:cnh
Enclosures

2218-024d

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Re: Biological Resource Survey Techniques for the Solar Two Project

Dear Mr. Meyer and Mr. Stobaugh:

California Unions for Reliable Energy (CURE) submits this letter in response to Staff's request at the May 7, 2009 data request workshop that CURE provide written comments on biological survey techniques used by Sterling Energy System Solar Two LLC (the applicant) for the Sterling Energy System Solar Two Project (Project). We prepared these comments with the technical assistance of biological resources consultant Scott Cashen. CURE requests that the Energy Commission and BLM Staff take these comments into consideration when evaluating the biological resources section of the Application for Certification (AFC) and all supplemental information submitted for the SES Two Project.

This letter focuses on: 1) the adequacy of the applicant's surveys in establishing the existing biological resources in the Project area (the "baseline"); and 2) the appropriateness of using the resulting baseline to analyze the Project's impacts. In conducting surveys, the applicant did not follow the survey protocols established by the resource agencies (e.g., California Department of Fish and Game,

California Native Plant Society, Burrowing Owl Consortium). As a result, the survey data provided in the AFC and the applicant's supplemental documents is not adequate to inform the public and decision-makers about the Project area's existing biological resources or the Project's potentially significant impacts on those resources. Specifically, the survey is unreliable because:

1. The applicant failed to follow rare plant and burrowing owl survey protocols, rendering much of the data not credible and possibly misleading.
2. The applicant failed to dedicate the level of survey effort needed for an adequate impact assessment, which in turn reduces the possibility of effective mitigation.
3. The applicant used survey data to assume species absence even though some of the surveys were conducted outside of the time periods most conducive to detection of the organisms of concern.
4. Some surveyors had no prior experience with the surveyed species and evidence shows that the same individual surveyed in both Imperial County and San Bernardino counties on the same day.[1]

In the California Energy Commission's (CEC) siting process, the CEC acts as lead agency under the California Environmental Quality Act (CEQA).[2] In this proceeding, the Bureau of Land Management (BLM) acts as the lead agency under National Environmental Policy Act (NEPA).[3]

CEQA has two basic purposes. First, CEQA is designed to inform decision-makers and the public about the potential, significant environmental effects of a project.[4] CEQA requires "a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes

[1] *See* AFC for SES Solar Two, Table 5.6-2 and AFC for SES Solar One, Appendix A of Appendix Y.
[2] Pub. Resources Code, § 25519(c).
[3] *See* Memorandum of Understanding Between the U.S. Department of the Interior, Bureau of Land Management California Desert District and the California Energy Commission Staff, Concerning Joint Environmental Review For Solar Thermal Power Plant Projects, p. 4, available at http://www.energy.ca.gov/siting/solar/BLM_CEC_MOU.PDF ("[t]he assessments provided by the Parties must be sufficient to meet all federal and state requirements for NEPA and CEQA and shall be included as part of the joint Preliminary Staff Assessment/Draft Environmental Impact Statement and the Joint Final Staff Assessment/Final Environmental Impact Statement.")
[4] 14 Cal. Code Regs. ("CEQA Guidelines"), § 15002(a)(1).).

account of environmental consequences."[5] Further, in preparing an environmental document, "an agency must use its best efforts to find out and disclose all that it reasonably can."[6] Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.[7]

CEC siting regulations require that the applicant conduct biological resource surveys using appropriate field survey protocols during the appropriate season(s), and that State and federal agencies with jurisdiction be consulted for field survey protocol guidance prior to surveys if a protocol exists.[8] Of the species identified as having potential to occur on the Project site, survey protocols exist for the flat-tailed horned lizard, burrowing owl, and sensitive botanical resources. For these species there is insufficient information in the record to evaluate the Project's biological impacts.

The Applicant's Rare Plants' Surveys Are Not Adequate

Several special-status plant species have the potential to occur on the Project site. Thurber's pilostyles (*Pilostyles thurberi*) has been documented as occurring along the northern boundary of the Project site, and Harwood's milk-vetch (*Astragalus insularis var. harwoodii*) and annual rock nettle (*Eucnide rupestris*) have been documented as occurring approximately two miles west of the Project site.[9] Several other special-status species have been documented as occurring within approximately 10 miles of the Project site.[10] Many of the special-status species that have been documented as occurring in the Project region are associated with the general and microhabitat conditions present on the Project site.[11] [12]

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[5] CEQA Guidelines, § 15151.
[6] CEQA Guidelines, § 15144.
[7] CEQA Guidelines, § 15002(a)(2) and (3). *See also Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 400.
[8] California Energy Commission. 2007. Appendix B *of* Rules of practice and procedure & power plant site certification regulations. Document No. CEC-140-2007-003. Also see the updated Appendix B from July 2008 at http://www.energy.ca.gov/2008publications/CEC-140-2008-003/CEC-140-2008-003.PDF.
[9] California Natural Diversity Database. 2009. Rarefind [computer program]. Version 3.1.0. 2009 May 2. Sacramento (CA): Wildlife & Habitat Data Analysis Branch. California Department of Fish and Game.
[10] *Id.*
[11] *Id.*
[12] Reiser, C. 1994. Rare Plants of San Diego County. Imperial Beach, CA: Aquafir Press. Available at: http://sandiego.sierraclub.org/rareplants/.

The AFC did not report the methods that were used to conduct rare plant surveys. However, in response to one of CURE's data requests, the applicant indicated surveyors followed meandering transects to survey the entire Project area.[13] These surveys did not adhere to any of the established protocol survey guidelines (e.g., California Department of Fish and Game [CDFG], California Native Plant Society [CNPS], U.S. Fish and Wildlife Service [USFWS]).

Rare plant surveys were conducted in March and May of 2007, and again in March and May of 2008 due to low rainfall in 2007.[14] CDFG and CNPS survey protocols require botanical surveyors to possess experience conducting floristic field studies, knowledge of plant taxonomy, and familiarity with special-status species that occur in the region being surveyed.[15] [16] Most members of the Project survey team lacked this knowledge and experience, and based on their resumes, it appears several had never conducted botanical surveys.[17] The applicant has stated that biologists conducting the surveys were distributed into groups of two or three such that more experienced botanists were paired with less experienced surveyors.[18] A guide of rare plants that potentially occur in the Project vicinity was distributed to all members of the survey team.[19]

The applicant has stated that approximately 165 person-days were devoted to rare plant surveys in 2007 and 2008.[20] However, this number is misleading because: 1) the applicant conducted other surveys (e.g., flat-tailed horned lizard, general surveys, and site assessment) on the same days as rare plant surveys, and the applicant has not provided the total number of hours that were specifically

[13] Applicant's response to CURE data request 31.
[14] AFC, p. 5.6-6.
[15] California Department of Fish and Game. 2000. Guidelines for Assessing the Effects of Proposed Projects on Rare, Threatened, and Endangered Plants and Natural Communities. (Revision of 1983 Guidelines.) Sacramento, CA.
[16] California Native Plant Society. 2001. CNPS botanical survey guidelines. Pages 38-40 *in* Conservation and management of rare and endangered plants: proceedings of a California conference on the conservation and management of rare and endangered plants (T.S. Elias, editor). California Native Plant Society, Sacramento, CA, 630 pp.
[17] Applicant's response to data adequacy request #1 *in* Supplemental information in response to CEC data adequacy requests and BLM minimum requirement comments. September 2008. Log #48223.
[18] Applicant's response to CURE data request 31.
[19] *Id.*
[20] *Id.*

dedicated to identification of rare plants (as opposed to lizards or other wildlife);[21] 2) teams of two or three individuals cannot devote the same level of effort as individuals working independently due to redundancy in effort; and 3) for the dates 11 and 12 March 2008, the applicant lists Michelle Balk as one of the Project surveyors.[22] However, Ms. Balk was also reported to be surveying the Solar One Project site in San Bernardino County on those days.[23]

The purpose of rare plant survey protocols is to establish when surveys are needed, who is qualified to conduct such surveys, how field surveys should be conducted, and what information should be contained in a survey report.[24] Because the protocols establish the minimum requirements for botanical surveys used to evaluate project impacts, resource agencies recommend that lead agencies not accept non-protocol survey data.

Specific flaws with the applicant's rare plant surveys include:

1. Surveyors did not visit a reference site to confirm target species were identifiable at the time of the surveys.
2. Many members of the survey team lacked appropriate qualifications. Specifically, surveyors lacked:
    a. Prior experience conducting floristic field surveys;
    b. Knowledge of plant taxonomy and plant community ecology and classification; and,
    c. Familiarity with the plants of the area, including special-status and locally significant plants.

    Lack of surveyor experience is especially problematic given the similarity among potentially occurring rare plants and species reported to occur at the Project site (i.e., species contained on the applicant's site list).
3. The applicant's surveys were not conducted using systematic field techniques to ensure thorough coverage of potential impact areas.

[21] AFC, p. 5.6-7.
[22] Biological Resources Technical Report, p. 8.
[23] AFC for Solar One, Appendix A.
[24] California Department of Fish and Game. 2000. Guidelines for Assessing the Effects of Proposed Projects on Rare, Threatened, and Endangered Plants and Natural Communities. (Revision of 1983 Guidelines.) Sacramento, CA.

Meandering transects do not constitute a systematic technique unless routes are established before surveys are conducted.

4. Surveyors did not conduct the sufficient number of site visits necessary to make observations during the appropriate phenological stage of all target species.

5. The intent of rare plant surveys is to document any rare plants that occur, not simply the ones that were subjectively predetermined to have potential of occurring (and included on the photo guide made by the applicant).

6. Surveys efforts were improperly documented.

We recommended that the applicant conduct rare plants surveys in 2010 to obtain reliable data on the occurrence of rare botanical resources within the Project area. Surveys should adhere to protocol guidelines established by the CDFG, CNPS, and USFWS. Surveyors should have prior experience with botanical field surveys, possess knowledge of plant taxonomy, and be familiar with plant species that occur in the Colorado Desert (including but not limited to the target species). Surveys should be conducted using systematic sampling techniques. In addition to conducting supplemental surveys, the applicant should contact the California Native Plant Society and any local experts to obtain information that may assist in establishing baseline conditions. In the alternative, the existence of special-status plant species on the Project should be assumed.

The Applicant's Burrowing Owl Surveys Are Not Adequate

The AFC did not report the methods that the applicant used to survey the site for burrowing owls other than to say that the applicant characterized the site's vegetation to determine habitat suitability for the species.[25] In response to CURE data request 48, the applicant stated that protocol burrowing owl surveys were determined to be unnecessary due to the extensive coverage provided by other focused surveys conducted onsite during 2007 and 2008. Although the applicant did not provide any other information on its survey methods, the applicant's response to CURE's data request suggests that observations of burrowing owls (or sign of owls) were incidental, and that the applicant did not actively survey for owls or owl

[25] AFC, p. 5.6-6.

burrows. As a result, it is unclear how much of the site was passively surveyed for burrowing owls or how many hours were dedicated to identifying species presence. The majority of the applicant's survey efforts were devoted to detecting flat-tailed horned lizards (FTHL) within surveys plots that collectively covered 38% of the site.[26] As a result, any efforts to search for burrowing owls concurrent with FTHL surveys would have resulted in a survey of only 38% of the site. This level of effort is not adequate to establish baseline conditions, assess impacts, or propose effective mitigation for burrowing owls.

The AFC did not indicate the times of day when surveyors searched for burrowing owls. However, if the applicant searched for owls concurrent with FTHL, surveys were likely not conducted during the times of day conducive to owl detection. To meet protocol survey requirements, flat-tailed horned lizard surveys need to be conducted when the air temperature is between 75 and 100 °F.[27] This requirement has the tendency to conflict with the burrowing owl protocol requirement of conducting surveys in the hours around sunrise and sunset (i.e., when temperatures may be below 75 °F).[28]

The applicant did not follow established burrowing owl survey protocol or otherwise conduct focused surveys for the species. To mitigate impacts to burrowing owls, the applicant has proposed pre-construction clearance surveys.[29] This approach does not provide adequate information on the presence of owls on the Project site until ground disturbance is imminent. At that point there will be insufficient time to evaluate impacts to owls and establish compensatory mitigation.

In sum, specific flaws with the applicant's burrowing owl surveys include:

1. Because burrows are the essential component of burrowing owl habitat, habitat suitability cannot be determined solely by characterizing vegetation (as indicated in the AFC).[30]

[26] *Id.*
[27] Flat-tailed Horned Lizard Interagency Coordinating Committee. 2003. Flat-tailed horned lizard rangewide management strategy, 2003 revision. 80 pp. plus appendices.
[28] The California Burrowing Owl Consortium. 1993. Burrowing Owl Survey Protocol and Mitigation Guidelines. Available online at: http://www.dfg.ca.gov/wildlife/species/docs/boconsortium.pdf.
[29] AFC, p. 5.6-22.
[30] The California Burrowing Owl Consortium. 1993. Burrowing Owl Survey Protocol and Mitigation Guidelines. Available online at: http://www.dfg.ca.gov/wildlife/species/docs/boconsortium.pdf.

2. Surveys were not conducted during those times of day when owls are most detectable.
3. No winter surveys were conducted.
4. Surveyors did not implement recommended survey techniques (e.g., use of transects that provide 100% site coverage) or use methods conducive to owl detection.
5. Surveys did not include the recommended number of site visits.
6. Surveyors did not conduct follow-up burrow monitoring.
7. Survey efforts were improperly documented.
8. Several surveyors lacked prior burrowing owl survey experience.

CURE recommends that the applicant conduct focused surveys for the presence of burrowing owls during the 2009 breeding season. Surveys should adhere to the protocol guidelines issued by the California Burrowing Owl Consortium. In particular, the applicant must identify and map burrows within the Project area. The applicant has already proposed clearance surveys for burrowing owls before each phase of Project construction.[31] Clearance surveys require locating and inspecting burrows. As a result, there is considerable overlap between our recommendation and what the applicant has already proposed. Our recommendation simply shifts the timing of the applicant's proposal such that useful information on owl abundance can be evaluated during the information gathering and analysis phase of the siting process.

CURE also recommends follow-up burrow monitoring at all potentially occupied burrowing owl burrows. Monitoring should include multiple site visits to account for variation in burrowing owl activity (and as recommended by the protocol). Follow-up burrow monitoring will provide an estimate of abundance, use patterns, and detectability during the breeding season when the population is relatively stable.

Finally, CURE recommends winter surveys be conducted to obtain an index of abundance of wintering owls and to compare the relative abundance of breeding and wintering owls within the Project area. Once protocol surveys have been completed, the applicant should develop a mitigation and compensation plan that is

[31] AFC, p. 5.6-22.

consistent with the guidelines issued by the California Burrowing Owl Consortium and the California Department of Fish and Game. The applicant has stated that compensatory mitigation for the FTHL will mitigate for impacts to owls if they are detected during pre-construction surveys.[32] The applicant anticipates submitting its compensation proposal in December 2009.[33] Our recommendation for a burrowing owl mitigation and compensation plan based on protocol survey results fits within the applicant's anticipated schedule for submittal of the proposed compensation plan.

The Applicant's Surveys for FTHL Are Not Adequate

The applicant conducted FTHL sampling throughout the Project site and concluded that 20 to 30 FTHL occupy the site where suitable habitat is present.[34] It's currently unclear how this occupancy estimate will be applied to impact evaluation or mitigation.

The Distribution Monitoring Protocol used by the applicant is not the appropriate procedure for estimating FTHL abundance (or population size). In 2003, the Flat-tailed Horned Lizard Interagency Coordinating Committee recommended that the protocol be implemented on a trial basis because it was untested.[35] Use of this protocol to estimate that 20 to 30 FTHL occupy the Project site provides misleading information on the number of lizards potentially impacted by the Project.

The applicant's occupancy estimate hinges on the assumptions that surveys constituted a representative sample, were properly implemented, and provided a 25% detection rate. The last assumption is perhaps the most significant. The applicant stated that the 25% detection rate estimate was provided by the BLM, and that it is based on extensive experience in use of the Distribution Monitoring Protocol by the BLM and wildlife agency staff.[36] The 25% detection rate estimate represents a mean value that we presume accounts for variation among observers, years, sites, and individual lizards (among other variables). However, a 25% detection rate is not appropriate without consideration of statistical variance,

[32] Applicant's response to CURE data request 50.
[33] Applicant's response to CURE data request 23.
[34] AFC: Bio Tech report, p. 11.
[35] Flat-tailed Horned Lizard Interagency Coordinating Committee. 2003. Flat-tailed horned lizard rangewide management strategy, 2003 revision. 80 pp. plus appendices.
[36] Applicant's response to CURE data request 24.

unless the applicant can demonstrate its survey variables exhibited the same range of values as those incorporated by the BLM. For example, FTHLs are a cryptic species that on average are more often detected by experienced surveyors. Therefore, use of BLM's estimate is only valid if BLM's surveyors had the same level of experience as the applicant's (i.e., no prior experience). This assumption appears to be invalidated by the applicant's statement that BLM's estimate is based on "extensive experience" conducting distribution surveys. By contrast, other than a one-day training, it does not appear that anyone on the applicant's survey team had any prior experience conducting surveys for flat-tailed horned lizards.[37] The distribution monitoring protocol implemented by the applicant requires the surveys to be conducted by personnel who have demonstrated competence at locating FTHLs.[38]

If the applicant's FTHL occupancy estimate will be used for impact assessment or proposed mitigation, then a more reliable estimate of FTHL abundance should be obtained through use of the appropriate sampling protocol.

The Applicant's Surveys for the American Badger Are Not Adequate

Suitable habitat for badgers is characterized by herbaceous, shrub, and open stages of most habitats with dry, friable soils.[39] These conditions exist on the Project site and badgers have been documented as occurring in the Project region.[40] The AFC indicates several potential badger burrows were observed on the Project site.[41]

The applicant indicated that the Project is not expected to have an impact on the American badger because no badgers or definitive evidence of badger presence was detected onsite during two years of field surveys. Although the applicant did not implement any specific methods for documenting American badgers, the

[37] Applicant's response to data adequacy request #1 *in* Supplemental information in response to CEC data adequacy requests and BLM minimum requirement comments. September 2008. Log #48223.
[38] Flat-tailed Horned Lizard Interagency Coordinating Committee. 2003. Flat-tailed horned lizard rangewide management strategy, 2003 revision. 80 pp. plus appendices.
[39] California Wildlife Habitat Relationships System. 2005. California Department of Fish and Game. California Interagency Wildlife Task Group. CWHR version 8.1 personal computer program. Sacramento (CA).
[40] California Natural Diversity Database. 2009. Rarefind [computer program]. Version 3.1.0. 2009 May 2. Sacramento (CA): Wildlife & Habitat Data Analysis Branch. California Department of Fish and Game.
[41] AFC, p. 5.6-5.

applicant stated that it expected any potential burrows or other badger sign would have been documented through conduction of other survey efforts.[42]

The applicant's conclusion that badger burrows or sign would have been documented through other surveys is misleading for a number of reasons. First, several potential badger burrows were detected within the Project site, and the applicant did not implement the measures required to determine whether these burrows were built (or used) by badgers.[43] [44] Second, although not specified in the AFC, it appears that the applicant's survey efforts were limited to daytime hours when badgers are rarely observed (the American badger is primarily a nocturnal species). Third, identifying badger sign can be difficult. Badgers often occur below ground and they leave much of their scat in their burrows. Badger scats deposited above-ground may be difficult to distinguish from scats of other carnivores, and should be confirmed with DNA screening. Intact badger tracks are distinct, but tracks are often swept away by the badger as it walks. Fourth, badger burrows (or dens) are the most conspicuous indication of badger presence, but they may be difficult to differentiate from dens of other animals. Therefore, personnel familiar with identifying badger sign are essential for accurate results. Because badgers are rarely seen (even at night), remote cameras or hair snag stations are used to provide direct evidence of badger occurrence. It does not appear that the applicant's surveys applied any of these recommended techniques. Thus, given the extremely low likelihood of incidental badger detection during daytime surveys, and the apparent lack of personnel familiar with identifying badger sign, the applicant's surveys do not provide a reliable estimate of badger presence within the Project area.

To obtain reliable information on badger presence in the Project area, we recommend that the applicant conduct surveys specifically designed to detect badger presence. Efforts to detect badger sign (e.g., burrows, scat, tracks) should incorporate appropriately trained personnel that possess experience in badger sign identification. Alternatively, the applicant can make efforts to obtain direct evidence of badger presence through use of remote cameras and/or hair snag stations.

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[42] Applicant's response to CURE data request 40.
[43] AFC, p. 5.6-5.
[44] The Province of British Columbia, Ministry of Environment, Ecosystems Branch for the Resources Information Standards Committee. 2007. Inventory methods for medium-sized territorial carnivores: badger [electronic resource]. Available at: http://ilmbwww.gov.bc.ca/risc.

Conclusion

The applicant's survey data is unreliable to support an adequate description of the existing biological resource baseline or to support an adequate analysis of significant impacts and feasible mitigation measures under CEQA. Thus, CURE recommends reasonable and timely additional surveys as set forth herein.

Thank you for your consideration of these comments.

Sincerely,

Loulena Miles BY C.N.H.

Loulena Miles
Attorney for CURE

LAM:cnh

cc: Docket (08-AFC-5)
Proof of Service List (08-AFC-5)

DECLARATION OF SERVICE

I, Carol Horton, declare that on May 28, 2009, I served and filed copies of the attached CALIFORNIA UNIONS FOR RELIABLE ENERGY BIOLOGICAL RESOURCES LETTER, DATED May 28, 2009. 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/solartwo. The document has been sent (1) electronically, and (2) via US Mail by depositing in the US mail at Sacramento, California, with first-class postage thereon fully prepaid and addressed as provided on the attached Proof of Service list to those addresses NOT marked "email preferred." It was sent for filing to the Energy Commission by sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address shown on the attached Proof of Service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California, this 28th day of May, 2009.

Carol Horton

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