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August 20, 2010

Mr. Christopher Meyer
Project Manager
Attn: Docket No. 08-AFC-5
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: Imperial Valley Solar (formerly Solar Two) (08-AFC-5)
Applicant's Post-Hearing Brief Regarding Mitigating for Cultural
Resources Impacts

Dear Mr. Meyer:

On behalf of Imperial Valley Solar (formerly Solar Two), LLC, URS Corporation Americas (URS) hereby submits the Applicant's Post-Hearing Brief Regarding Mitigating for Cultural Resources Impacts.

I certify under penalty of perjury that the foregoing is true, correct, and complete to the best of my knowledge. I also certify that I am authorized to submit on behalf of Imperial Valley Solar, LLC.

Sincerely,

Angela Leiba
Project Manager

AL: ml

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

In the Matter of:)
Application for Certification of the)
Imperial Valley Solar Project)
_____)

Docket No. 08-AFC-5

**APPLICANT'S POST-HEARING BRIEF
REGARDING MITIGATION FOR CULTURAL RESOURCE IMPACTS
IMPERIAL VALLEY SOLAR**

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STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

In the Matter of:)	Docket No. 08-AFC-5
Application for Certification of the)	
Imperial Valley Solar Project)	Applicant's Post-Hearing Brief
)	Regarding Mitigation For Cultural
_____)	Resource Impacts

I. INTRODUCTION

The Applicant has reviewed and agrees with Staff's Opening Brief on Cultural Resources filed August 19, 2010. The Applicant agrees with Staff that mitigation measures in addition to Staff's proposed Condition of Certification CUL-1 are not required. In the event, however that the Commission decides to supplement Condition CUL-1, this brief describes how mitigation measures could be added without creating conflict with the governing Programmatic Agreement on cultural resources. The Applicant submits that if the Commission decides to supplement Condition CUL-1, it should adopt the succinct language originally proposed by the Applicant in March 2010. If the Commission instead decides to adopt BLM measures CUP-1 through CUP-11, which are much more extensive, the Applicant recommends prefatory language explaining the relationship between those measures and the final BLM Programmatic Agreement.

II. IF THE COMMISSION DECIDES TO SUPPLEMENT CONDITION OF CERTIFICATION CUL-1, IT SHOULD CLARIFY THAT THE BLM PROGRAMMATIC AGREEMENT WILL GOVERN

The Commission is the lead state agency responsible for evaluating the environmental effects of the Project and complying with the California Environmental Quality Act ("CEQA"). BLM is also tasked with evaluating the effects of the Project and complying with the National Environmental Policy Act ("NEPA"). Final Environmental Impact Statement (hereinafter "FEIS") at ES-iii. To address the requirements of these laws, Commission Staff and BLM prepared a joint environmental compliance document - Staff

Assessment/Draft Environmental Impact Statement (“SA/DEIS”). However, the agencies have since published separate final documents to describe the Project’s effects on cultural resources, the Staff Supplemental Assessment, Part II (“Cultural Resources SSA”) and a Final Environmental Impact Statement (“FEIS”), on July 28, 2010 and August 2, 2010, respectively. *Id.*

In the Cultural Resources SSA, Staff concludes that the Project would have significant impacts on a presently unknown subset of approximately 330 known prehistoric and historical surface archaeological resources. Cultural Resources SSA at C.3-1. There may also be significant impacts on an unknown number of buried archaeological deposits, many of which may be eligible for the National Register of Historic Places (“NRHP”) and the California Register of Historical Resources (“CRHR”). *Id.* Even with mitigation, cultural resources impacts may remain significant. *Id.*

Staff proposes to address impacts on cultural resources by imposing a condition of certification (CUL-1) on the Applicant. Cultural Resources SSA at C.3-1. CUL-1 requires the Applicant to comply with BLM’s Programmatic Agreement (“PA”). Cultural Resources SSA at C.3-11. The PA will allow the Applicant to reduce the potential impacts of the Project on the information values of the archaeological resources to less than significant under CEQA and to resolve similar impacts under Section 106 of the National Historic Preservation Act. *Id.* at C.3-1. Adoption of the PA will also ensure no LORS violations. *Id.* In addition, the implementation of the PA will lessen the significant impacts of the Project on associative values of the archaeological and ethnographic resources. *Id.*

A Programmatic Agreement is used for the “resolution of adverse impacts for complex project situations” and when the impacts on significant cultural resources and historic properties cannot be fully determined before a decision on a proposed action. Cultural Resources SSA at C.3-11. The PA results from a consultation process that includes the Commission, other agencies, tribes, and interested parties. *Id.* The final PA for the Project will include all feasible mitigation measures. See Applicant’s Opening

Testimony, Prepared Direct Testimony of Rebecca Apple, March 15, 2010, (hereinafter "Apple Prepared Testimony") at 2; see *also* FEIS, Appendix G at G-1.

The Staff's proposed condition in the SA/DEIS stated:

CUL-1 The applicant shall be bound to abide, in total, to the terms of the programmatic agreement that the BLM is to execute under 36 CFR § 800.14(b)(3) for the proposed action. If for any reason, any party to the programmatic agreement were to terminate that document and it were to have no further force or effect for the purpose of compliance with Section 106 of the National Historic Preservation Act, the applicant would continue to be bound to the terms of that original agreement for the purpose of compliance with CEQA until such time as a successor agreement had been negotiated and executed with the participation and approval of Energy Commission staff.

Verification: Under the terms of the programmatic agreement, the applicant shall submit all documentation required by the agreement to the Compliance Project Manager (CPM) for review and approval.

Ex. 300 (Staff Assessment/Draft Environmental Impact Statement) (hereinafter "SA/DEIS") at C.2-145.

The Applicant's cultural resources consultant, Rebecca Apple, a senior archaeologist with AECOM, suggested the following changes to CUL-1:

BLM will consult with SHPO, ACHP, and invited and concurring parties to execute a PA under 36 CFR 800.14(b)(3) prior to the ROD. The PA will specify that the Applicant will prepare a Historic Properties Treatment Plan (HPTP) subject to BLM and CEC review and approval. The HPTP will require compliance with the treatment standards set forth in this condition. In the event that the PA covers substantially the same requirements as set forth in this condition, with approval of the Compliance Project Manager (CMP), the applicant may satisfy such requirements in lieu of this condition. The HPTP will:

(1) Identify all eligible resources in the Project's Area of Potential Effects (APE)

(2) Identify the resources that the Project will avoid

(3) Specify how the Applicant will avoid, minimize, or mitigate impacts that the Project may have on eligible resources

a. Avoidance measures may include, but not be limited to, temporary or permanent fencing & flagging, staking, or monitoring

b. Measures to minimize or mitigate impacts may include, but not be limited to, placement of construction within portions of eligible properties that do not contribute to the qualities that make the resources eligible, data recovery, or offsite mitigations such as public interpretation or interpretive materials or displays

(4) Include provisions for additional cultural resources inventory and evaluation procedures

(5) Include an unanticipated discoveries plan

(6) Provide for the disposition of recovered materials and records.

The HPTP will be implemented prior to issuance of a Notice to Proceed for those portions of the Project addressed in the HPTP.

In the event that Native American human remains or funerary objects found in association with such human remains are encountered on private or state land, the Applicant will treat the remains and objects in accordance with California Public Resources Code 5097.98.

Verification: The HPTP will be submitted to the CPM for review and approval. In the event that the PA covers substantially the same requirements as set forth in this condition, with approval of the CPM, the Applicant may satisfy such requirements in lieu of this condition.

See Apple Testimony at 29-30; see also Ex. 38 (Applicant's Proposed Conditions and Verification) at 19.

In the SSA, Staff did not revise CUL-1 to reflect these suggestions and the wording of the condition has remained the same. See Cultural Resources SSA at C.3-158 to C.3-

159. If the Commission decides to supplement CUL-1, the Applicant continues to request that its proposed language be used. The Applicant's language is short and to the point. It focuses on substance rather than procedure. Most importantly, the proposed language explains, in its Verification provision, how any difference between the Programmatic Agreement and the condition is to be resolved.

At the August 16 hearing, it was suggested that eleven measures identified in BLM's FEIS, Measures CUP-1 through CUP-11, be adopted by the Commission. Transcript, Apple Testimony, August 16, 2010, at 28. The Applicant shares Staff's concern that Measures CUP-1 through CUP-11, which span more than eight pages of the FEIS (FEIS at 4.5-23 to 4.5-31), could create, or appear to create, requirements inconsistent with the final PA. The Applicant believes, however, that if the Commission decided to include Measures CUP-1 through CUP-11 in its own Conditions of Certification, any inconsistency would be resolved by adding the following language:

The following conditions are from the BLM's FEIS, and represent the most recent public pronouncement the BLM has made regarding how it intends to implement the Programmatic Agreement. The final Programmatic Agreement will set forth the final version of the BLM's mitigation requirements, which may supersede these conditions. However, to provide an extra level of assurance, the following measures are required unless the CPM determines that the Programmatic Agreement provides different requirements that are at least as protective of resources as measures CUP-1 through CUP-11.

III. ALL OF THE PROPOSALS FOR CULTURAL RESOURCES MITIGATION MEET CEQA STANDARDS

The Commission will meet CEQA's requirements by requiring compliance with the Programmatic Agreement. In *Defend the Bay v. City of Irvine*, the court held that although the EIR did not set out a mitigation plan, the EIR was adequate because it committed the lead agency to mitigate according to the requirements of a NCCP/HCP and in coordination with federal agencies. 119 Cal. App. 4th 1261, 1265 (2004).

Similarly, in *Endangered Habitats League, Inc. v. County of Orange*, the court held that

relying on a fuel modification plan in the EIR to mitigate was adequate because the plan had to comply with the Orange County Fire Authority guidelines for such plans and had to be approved by the Authority. 131 Cal. App. 4th 777, 794-95 (2005); see also *Id.* at 795 (holding that EIR was adequate when it called for a restoration, maintenance, and monitoring plan to be prepared to “detail long-term maintenance and monitoring,” included requirements for replanting, and included a contract with an arborist for 10 years prior to permit issuance); *Sacramento Old City Ass’n v. City Council*, 229 Cal. App. 3d 1011, 1028-1030 (1991) (holding that “deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan.”) (emphasis added); *Endangered Habitats League, supra.*, 131 Cal. App. 4th 777, 794 (2005) (allowing deferred mitigation of gnatcatcher impacts from construction because “the EIR set out the possibilities – on-site or off-site preservation of similar habitat at a ratio of at least two to one” or “one of several possible habitat loss permits from relevant agencies”). “[W]hen a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project.” *Cal. Native Plant Soc. v. City of Rancho Cordova*, 172 Cal. App. 4th 603, 621 (2009) (concluding that a mitigation measure to preserve or create replacement habitat offsite in ratio to onsite loss was sufficient despite not saying exactly where the offsite location would be, and stating that “under [*Sacramento Old City*], the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a study.”).

Similarly here, the Project cannot proceed without a Programmatic Agreement and HPTP, which must be completed in accordance with specific legal requirements. Compliance with the law can be presumed. *Laurel Heights Improvement Ass’n v. Regents of the Univ. of Calif.*, 47 Cal. 3d 376, 416 (1988) (holding that the lack of detailed promises to deploy measures to control carcinogen emissions were not required because “[c]ompliance [with the law] can be reasonably presumed”).

IV. CONCLUSION

For the foregoing reasons, the Commission should either adopt Condition CUL-1 without change or adopt additional measures clearly stating how any differences between those measures and the Programmatic Agreement will be resolved.

Date: August 20, 2010

Respectfully submitted,



Ella Foley Gannon
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**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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**APPLICATION FOR CERTIFICATION FOR THE
IMPERIAL VALLEY SOLAR PROJECT**
(formerly known as SES Solar Two Project)
IMPERIAL VALLEY SOLAR, LLC

**Docket No. 08-AFC-5
PROOF OF SERVICE
(Revised 6/8/10)**

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DECLARATION OF SERVICE

I, Jennifer Draper, declare that on August 20, 2010, I served and filed copies of the attached Applicant's Post-Hearing Brief Regarding Mitigating for Cultural Resources Impacts. The original documents, filed with the Docket Unit, are accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [\[http://www.energy.ca.gov/sitingcases/solartwo/index.html\]](http://www.energy.ca.gov/sitingcases/solartwo/index.html)

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)

FOR SERVICE TO ALL OTHER PARTIES:

- sent electronically to all email addresses on the Proof of Service list;
- by personal delivery;
- by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses NOT marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

- sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

OR

- depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 08-AFC-5
1516 Ninth Street, MS-4
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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.

Original Signed By
Jennifer Draper