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DOCKET
08-AFC-5
DATE AUG 18 2010
RECD. AUG 18 2010

August 18, 2010

Docket Office
Attn: Docket No. 08-AFC-5
California Energy Commission
1516 Ninth Street, MS-4
Sacramento, CA 95814

Re: Imperial Valley Solar Project (08-AFC-5)

Dear Docket Clerk:

Enclosed are an original and copy of **REPLY BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY**. Please process this document, conform and return the copy in the envelope provided.

Sincerely,

/s/

Tanya A. Gulesserian

TAG:bh
Enclosure

2218-152a

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**STATE OF CALIFORNIA**
**California Energy Commission**

| In the Matter of:<br><br>The Application for Certification<br>for the IMPERIAL VALLEY SOLAR<br>PROJECT (formerly SES Solar Two) | Docket No. 08-AFC-5 |
|---|---|

# REPLY BRIEF
# OF
# CALIFORNIA UNIONS FOR RELIABLE ENERGY

August 18, 2010


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## I. INTRODUCTION

The Applicant is seeking to build one of the largest solar power plants in the world. Unfortunately the Applicant has chosen an approximately ten square mile area of relatively undisturbed desert public land on which to build that is literally laden with an ***extraordinary number of cultural resources*,** according to CEC staff archeologist Mike McGuirt; and that serves a number of regionally and, ***nationally significant biological and hydrologic functions***, according to the U.S. Environmental Protection Agency ("EPA").

In reviewing a project with impacts of this magnitude, it would be reasonable to expect that the Commission would not cut-corners in its analysis pursuant to the California Environmental Quality Act ("CEQA"), but cut-corners it has, and in the most critical resource areas. While there is no dispute that Staff has made great strides towards identifying and analyzing a number of significant impacts from the Imperial Valley Solar project ("Project"), an enormous amount of work has yet to be done before the analysis of this Project complies with CEQA.

The rushed analysis has resulted in a disorderly process that has *overtly* deferred the Commission's environmental review until *after* project approval. Impacts of this magnitude need to be analyzed and mitigated by the Commission before the Project is approved, as required by CEQA, rather than left until later for others to work out. In fact, impacts of this magnitude cry out for the Commission to look more carefully at alternative locations for this Project. Thus, the Commission cannot approve this Project because, thus far, Commission Staff has not completed the analysis required by CEQA.

The Opening Briefs *from Staff and the Applicant* make clear that there is a lot more work to be done. For example, *the very basic design* of the Project has not been agreed upon. The Applicant submitted one design in the original AFC for a 750 Mw project, and that design was refined and parsed and studied in a number of onsite alternatives by Staff, in consultation with the US Army Corps of Engineers ("Corps") over the course of two years. This design was also circulated to the public for review and comment. The hearings held by the Commission were on this design and Staff's alternatives to that design.

Now, the Applicant has re-worked the design of its Project *without Staff input* resulting in a *new design* that changed fundamental assumptions about the Project, such as whether there would be 30,000 stabilized spur roads to each of the approximately 30,000 SunCatcher units, or if all travel to the units for maintenance and washing would be done "over land," and how many of the main stem washes will be impacted.

In fact, in the Applicant's new design, now referred to as the 709 Mw alternative, the number of impacted main stem washes is more than those impacted in Staff's preferred alternative. Specifically, the Applicant's 709 Mw design will impact ***seven*** ***additional*** main stem washes than Staff's preferred alternative. The Applicant argued that this increase is irrelevant because the overall acreage of impacts to waters of the U.S. is lower. However, Staff correctly responded that it isn't just a matter of acreage. The number of impacted washes matters in a number of ways, including for species attempting to move through the site.

Although Staff did not evaluate the Applicant's newly proposed project in any detail, the Applicant is requesting that the Commission approve its newly proposed 709 Mw redesigned Project. To further complicate the situation, Staff explained that the 709 Mw version *may change again* because it is currently under evaluation by the Army Corps, Bureau of Land Management ("BLM") and EPA. The recently proposed Project is also being circulated to the public and other agencies for further comment. Thus, even if the Commission approves the Applicant's newly proposed 709 Mw redesigned project, which it cannot, the currently proposed project may not be the alternative that is ultimately permitted by the Corps.

The bottom line is that the Commission cannot abdicate its responsibility under CEQA and approve the Applicant's newly proposed 709 Mw redesigned project without conducting an independent analysis of potentially significant unmitigated impacts. If it did, the approval would be tantamount to giving the Applicant a blank check and holding them to the honor system, a manifest violation of CEQA.

Finally, *the Project does* ***not*** *have a reliable primary or back-up water supply* as required by CEQA, the Warrren-Alquist Act and the Commission's regulations. The significance of this fact in the Colorado Desert cannot be overstated. The lack of a reliable water source violates State laws. The lack of a reliable water source is a public health issue due to the potential dust emissions that would be generated in an area already plagued by Valley Fever and asthma problems. The lack of a reliable water source means the Project is not reliabile. The Applicant's own testimony acknowledged that water is critical to maintaining the construction and operation schedule necessary to meet contract milestones and maintain funding.

As CURE has stated to the Commission throughout this proceeding, the Commission's consideration of the Project must be suspended until the Applicant can provide substantial evidence of a reliable water supply.

## II. PROJECT DESIGN, IMPACTS AND MITIGATION HAVE FUNDAMENTALLY CHANGED SINCE THE RELEASE OF THE STAFF ASSESSMENT; NOTICE AND RECIRCULATION ARE REQUIRED

The Project has changed in a number of significant ways since the release of the Staff Assessment ("SA"). The SA assumed that the Seeley Waste Water Treatment Facility ("SWWTF") would serve as the Project's water needs. Moreover, the SA was released well before the Applicant proposed the use of the Dan Boyer well, the water supply determined to be the Project's primary supply and the source of new significant unmitigable environmental impacts.

The initial SA did not find significant unmitigated impacts to a flat-tailed horned lizard ("FTHL") movement corridor – an impact that was determined to be *significant and unmitigable* in the Supplemental Staff Assessment ("SSA"). The SSA also abandoned the mitigation proposal to translocate FTHL, a central aspect of the overall mitigation strategy in the SA.

Finally, the SSA correctly did an about-face on impacts to an endangered species, the peninsular bighorn sheep ("PBHS"). The SSA found a significant impact to forage habitat for this species.

Although Staff is entitled to change its mind about impacts to species when the evidence demonstrates a new significant impact, the public is entitled to learn about a new significant impact and weigh in on the mitigation strategy under CEQA. Because the SSA was not circulated for public review and comment, the public and agencies have not been able to weigh in on the proposed water supply and new significant impacts.

Finally, if the Commission seeks to consider permitting a new project design that would conform to the Army Corps of Engineers ("Corps") least environmentally damaging practicable alternative ("LEDPA"), this too would trigger the obligation to re-notice and recirculate a draft CEQA document for review and comment. And, importantly, the Commission must identify where in the record Staff reviewed the LEDPA's potentially significant environmental impacts under CEQA.

CEQA does not require recirculation for each and every project change, but CEQA does require the renoticing and recirculation of an EIR, or EIR equivalent, for public review and comment when significant new information is added to the EIR following public review but before certification.[1] The CEQA Guidelines clarify that ***new information is significant if "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a***

[1] Pub. Resources Code, § 21092.1.

***substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect."***[2]

The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it.[3] Clearly the changes outlined above are substantial enough to require the Commission to re-notice and recirculate the SA. The Committee must revise the schedule to incorporate this legally mandated procedure.

## III. CURE AGREES THAT THE COMMISSION CANNOT PERMIT THE LEDPA WITHOUT ENVIRONMENTAL REVIEW BY STAFF; STAFF'S ANALYSIS MUST BE SUBMITTED IN A REPORT PRIOR TO FURTHER EVIDENTIARY HEARINGS

Staff concluded that the Commission should not approve a Draft LEDPA that has not been the subject of thorough analysis of potentially significant impacts and feasible mitigation. (*Staff Opening Brief p. 2.*) Commission Staff correctly point out that the Draft LEDPA reduces the overall number of acres, but that it "does so by different means." (*Staff Opening Brief p. 3.*) CURE adds that the different means would result in new potentially significant and unmitigated impacts. The Commission's approval of Draft LEDPA without further environmental analysis would violate CEQA.

The 709 Mw Project first appeared in Applicant's additional opening and rebuttal testimony (*Exhibit 129.)* By attaching it to testimony, the proposal is not even a part of the Application for Certification. If the Applicant seriously sought to have this alternative considered, it should have been a formal Supplement to the Application for Certification subject to review by Staff in a formal report. In keeping with standard Commission process, all parties must be given an opportunity to seek data and submit testimony on these Project changes.

The Applicant "shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility." (*20 Cal. Code Reg. § 1748(d).)* Commission Staff must review the application, assess the environmental impacts and determine whether mitigation is required, and set forth this analysis in a report written to inform the public and the Commission of the Project's environmental consequences. (*20 Cal. Code Reg. §§ 1744(b), 1742.5(a)-(b)*.) Staff's analysis must reflect the "independent judgment" of the Commission. (*14 Cal. Code Regs. § 15084(e).)* Before approving a project, the Commission must conclude that Staff's report has been completed in compliance with CEQA, that the Commission has reviewed and considered the information in the report prior to approving the project, and that Staff's report

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[2] CEQA Guidelines, § 15088.5.
[3] *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 Cal.App.3d 813, 822.

reflects the Commission's independent judgment and analysis. (*14 Cal. Code Regs. §15090(a); see Pub. Res. Code § 21082.1(c)(3).)*

Because the Applicant failed to provide information regarding its newly proposed Project until after Staff completed both the initial SA and SSA on the Applicant's previously proposed Project, this information was not analyzed by Staff in a report and was not presented to the Commission or other parties. Therefore, the Commission cannot approve it because it cannot make the required finding that Staff"s report reflects the Commission's independent judgment and analysis of the new Project.

Moreover, if submitting a newly proposed Project at the 11th hour – during evidentiary hearings – is accepted by the Commission, every Applicant would do well to save the most controversial evidence for the last minute so it would receive less scrutiny and analysis. The Commission should reject the proposal for the 709 Mw alternative outright.

**a. Applicant Has Not Submitted Substantial Evidence that a Smaller Project is Infeasible**

CURE also agrees with Staff that the Applicant has not provided substantial evidence to prove a smaller project is economically infeasible. Indeed, perhaps the best evidence of economic feasibility is the Applicant's contract with San Diego Gas and Electric ("SDG&E") for a 300 Mw project on this Project site. (*Exhibit 499-M.)* ***The Applicant's commitment to SDG&E to develop a 300 Mw Project is clear evidence that a 300 Mw Project is economically feasible.***

CEQA mandates that an agency not approve a project with significant environmental impacts if "there are feasible alternatives or mitigation measures" that can substantially lessen or avoid those impacts. (*Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 134; *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233; *see also* Pub. Res. Code § 21002 ("public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects"); *see also* 14 Cal. Code Regs. § 15091(a).) CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Res. Code 21061.1.) "The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project." (*Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181; Exh. 500, p. 6-11.)

In the Beacon Solar Energy Project ("Beacon") proceeding, Commission staff established reasonable benchmarks for the expected rate of return on investment, or "internal rate of return (IRR)," in order to determine economic feasibility. Staff determined that for solar plants around 250 Mw the "upper end of profitability" is 14% and that "a fair representative of the marketplace" is an 8% IRR.[4] Staff concluded that "economic feasibility for solar energy power plants appears to be achieving an internal rate of return (annualized net profit margin) of 11% or more.

It is commonplace for applicants to argue that mitigation and alternatives are infeasible and that the approval of scaled-down alternatives would result in the Project not being economically viable. However, the Applicant in this proceeding has not provided substantial evidence to date of the economic basis for its conclusions that a 300 MW alternative is economically infeasible.

### b. The Applicant Has Not Provided Evidence of Agency Approval of the LEDPA

The Applicant claimed, without support, that the U.S. Fish and Wildlife Service ("USFWS"), the EPA, the Corps, and other agencies concluded that the 709 Mw alternative is the LEDPA. (*Applicant's Opening Brief p. 7.*) This claim is not supported in the record.

Although the Corps may support a 709 Mw alternative, the Corps is currently in the process of taking public comments on the document and may modify the analysis as a result. Staff agreed that the Corps' review may change and no final decision has been made. In addition, there is no evidence in the record that the USFWS, EPA or "other agencies" have concluded the draft LEDPA submitted as a part of the Applicant's Rebuttal testimony is actually the least environmentally damaging feasible alternative.

It defies logic that agencies without jurisdiction to determine compliance with the Clean Water Act would attempt to conclude what the least environmentally damaging alternative to the Project is under that statute.

### c. Applicant's Legal Argument That The Commission Can Approve the LEDPA Without Additional Review Doesn't Withstand Scrutiny

The Applicant argues that the draft LEDPA is within the range of alternatives that have already been analyzed by the Commission and no additional analysis is necessary. (*Exhibit 129; Applicant's Opening Brief p. 11.*) The Applicant's argument is incorrect.

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[4] *Id.*

First, the description of the Project in the Corps' Draft 404(b)(1) analysis shows that roads to each and every SunCatcher were eliminated from the Project design. Now, as demonstrated by the Applicant's testimony, cars will drive to each and every one of the SunCatcher units "over land." (*Exhibit 129; - Hearing Transcript Fitzgerald Testimony 7/27/2010.)*

The Applicant misleads the Commission by arguing that "the Commission is free to approve a project smaller than that described as the proposed project in the SSA." However, the issue here is that the draft LEDPA is not simply a "smaller" version of the proposed Project. The draft LEDPA is new and different.

Similarly, the cases that the Applicant cites, *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523 and *Dusek v. City of Anaheim (*173 Cal.App.3d 1029, are inapposite. Both cases analyze situations where the CEQA lead agency approved only a part of the Project, rather than a redesign of the Project. The Applicant's draft LEDPA Project is distinguishable from those cases because the draft LEDPA Project is significantly different.

Therefore, the Commission cannot approve the draft LEDPA Project without further environmental review of new and different potentially significant and unmitigated impacts.

## IV. THE COMMISSION CANNOT MAKE A FINDING THAT THE PROJECT HAS A RELIABLE WATER SUPPLY

Commission Staff conducted an analysis of the water options proposed by the Applicant and found that the Applicant has not proposed an adequate and reliable water supply for the Project.

### a. The Committee Should Agree With Staff That The Outcome of SWWTF EIR Process Cannot be Predetermined

The outcome of the EIR for the SWWTF is far from certain. The Seeley County Water District has not completed preparation of or circulated a Draft EIR for the SWWTF in order to determine whether it is even possible to provide water to the Project. Once the Draft EIR is circulated, the Distict must review and respond to agency and public comments that may identify concerns, including significant impacts from the project.

As CURE's Opening Brief discussed, there is no evidence that the Imperial Irrigation District concerns have been considered or addressed: that the loss of effluent could have a significant cumulative impact on the canals system. Additionally, no study has been done to analyze how the reduction of flows into the

New River would affect the wetlands in the immediate vicinity beyond Wildcat drain. The Applicant has not even provided the results of its hydrologic study or several of the biological surveys required by the agencies. (This is consistent with the Applicant's approach throughout this proceeding of withholding documents from the public and agencies in order to ensure timely review.) Therefore, it is still uncertain what the outcome will be from the EIR process.

CURE agrees with Staff "there is a possibility that environmental impacts will prove more challenging than anticipated and delay the completion of the Project." (*Staff's Opening Brief p. 19.)* It is entirely possible that the Seeley County Water District will conclude that the release of its effluent into Wildcat drain was a mitigation measure established in 2003 to protect the adjacent wetlands and that mitigation cannot be discontinued. Thus, the Commission cannot rely upon the SWWTF as a viable water supply for the Project.

### b. There is No Evidence that the Upgrade Project Would Occur Without Tessera Solar Funding

Although the Applicant made it clear that the SWWTF would like to upgrade their facilities to avoid discharge violations, there is no evidence that the SWWTF would have the means to upgrade their facilities without funding from the Project Applicant. In addition, there is no evidence that even if the SWWTF was upgraded in the absence of the Project, the effluent would be diverted from the outfall to the Wildcat drain, New River and Salton Sea. Finally, although there is no evidence of any potential upgrade apart from the proposed Project, a hypothetical potential upgrade could be to eliminate contaminants in the discharge, rather than to eliminate the discharge itself, for the continued benefit of biological resources in the New River and Salton Sea. In contrast, approving the Project's use of recycled water would result in a wholesale removal of the outfall for use by the Project Applicant.

### c. The Dan Boyer Well is Not a Reliable Long-term Water Supply

The Applicant has not provided ***any*** evidence that Dan Boyer is willing to sell sufficient water to meet the needs of the Project. The letter from Dan Boyer Water Company expressed a willingness to provide water for only approximately 6 to 11 months and did not state an amount.

In addition, CURE provided substantial evidence showing that Staff and the Applicant *underestimated* the amount of water needed to operate the Project. (*Exhibit 499-I, pp. 2-4.)*

Furthermore, the Applicant admitted that it would require water from the SWWTF within a year to meet contractual requirements. (*Hearing Transcript of July 26, 2010, p. 116.*)

Thus, as concluded by Staff, even if the Dan Boyer well provided some water to the Project, the water would admittedly be an insufficient amount for the 40-year operating life of the Project. (*Exhibit 302, pp. C.7-53 and 54.*)

Finally, the Dan Boyer well does not have an export permit that is required by the County before any potential water could flow to the Project. As explained in CURE's opening brief, the plain language of the County's groundwater ordinance states that an export permit is separate from a registration and has an entirely separate approval process.

The County Code prohibits the Planning Commission from issuing a permit to export water from the County or from the groundwater basin unless the applicant has established that there is an available supply in excess of the amount currently required for reasonable and beneficial uses within the County, and that the Planning Commission determines that such export, if permitted, would not adversely affect the rights of groundwater users within the County or the groundwater basin from which the groundwater is derived. (Imperial County Municipal Code, Div. 22, Chap. 3 § 92203.02.) The Ordinance defines the groundwater basin **as the basin, or portions thereof, within the boundaries of the County and any sub-basins located therein.** (*Id.* at § 92201.04(O).)

The County's Ordinance, and the process set forth therein, was developed to ensure that the water needs of overlying users are satisfied before users that are outside the basin (or outside of the distinct portion of the basin or sub-basin). This is a basic principle of water law. The Applicant must find a reliable water supply that is then scrutinized by the Commission before a license can be issued for this Project.

#### d. Commission Should Only Re-Initiate Project Review After SWWTF is a Permitted Source

The Dan Boyer Water Company well is not a reliable water supply for this Project, because it cannot provide the amount of water required for the Project. The SWWTF upgrade is not a reliable water supply, because it is undergoing environmental review and may never be permitted, depending on the outcome of a number of studies and agency decisions.

An alternative to suspending this proceeding until the Applicant provides evidence of a feasible, reliable water supply is for the Commission to condition the start of Project construction on a fully permitted and operational SWWTF upgrade.

This would require modifying condition of certification Soil and Water 9 in the SSA. CURE proposes modifying Soil and Water 9 as follows:

**ASSURED WATER SUPPLY SOIL&WATER-9**

The project owner shall provide the CPM two copies of the following: The Notice of Determination from the Seeley County Water District for the SWWTF upgrade project; (2) a take permit from the US Fish and Wildlife Service for the SWWTF, if necessary and appropriate; (3) a permit from the RWQCB Division of Water Rights for diversion of flows from the New River to the Imperial Valley Solar project; (4) any needed approval from the US Army Corps of Engineers; (5) the current executed recycled water purchase agreement for the long-term supply (40 years) between the project owner and the Seeley County Water District with a cap on the delivery rate of 51 AFY for construction and 33 AFY for operations and all terms and costs of delivery and use of recycled water by the Imperial Valley Solar project.

The project owner shall comply with the requirements of Title 22 and Title 17 of the California Code of Regulations and section 13523 of the California Water Code. The project owner must also submit to the CPM evidence that metering devices are operational on the water supply and distribution system to record, in gallons per day, the total volume of water supplied to the Project from the SWWTF for the life of the Project.

For the first year of operation, the project owner shall prepare an annual Water Use Summary, which will include the monthly average of daily water usage in gallons per day, and total water used by the project on a monthly and annual basis in acre-feet. For subsequent years, the annual Water Use Summary shall also include the annual water used by the project in prior years. The annual Water Use Summary shall be submitted to the CPM as part of the annual compliance report.

**Verification:** No later than 60 days prior to construction, the project owner shall submit two copies of the Seeley County Water District Notice of Determination, including the necessary documentation and proof that the specific terms of the permit have been met, the executed agreement for the supply of recycled water for the project, a take permit from US Fish and Wildlife Service if necessary and appropriate, a permit from the RWQCB Division of Water Rights, and any needed approval from the US Army Corps of Engineers. The agreement shall specify that the water purveyor can provide water at a maximum of 51

AFY for construction and 33 acre feet per year for operation to the Imperial Valley Solar project.

This modified condition would require that the Project have a firm and reliable water supply prior to constructing the Project, as is required by CEQA.

## V. BIOLOGICAL IMPACTS HAVE NOT BEEN FULLY IDENTIFIED OR MITIGATED

CURE's testimony provides substantial evidence that a number of significant biological impacts have not been adequately identified or mitigated. These significant unmitigated impacts include impacts to burrowing owl, golden eagles, FTHL, PBHS and migrating birds.

CURE also demonstrated that the proposed compensation land mitigation is not feasible, effective or capable of implementation. CURE addressed this in detail in our Opening brief. Staff and the Applicant did not address these impacts and legal issues in their brief, so CURE cannot reply to their response. However, there are several issues that were raised by Staff and the Applicant relating to biological resources that we respond to below.

### a. CURE Agrees With Staff That Tamarisk Removal Will Not Mitigate Impacts to PBHS Foraging Habitat

The Applicant's proposal to rely upon Tamarisk removal from Carrizo Creek *instead of* land acquisition was mentioned for the first time in the 404(b)(1) analysis in July, 2010, after the SSA was published. In fact, this was inserted in testimony only days before evidentiary hearings. This proposal was not accompanied by a detailed plan. The Applicant has not provided substantial evidence to show that this mitigation plan would be effective or is even reasonably likely to meet the requirements of CEQA.

CEQA guidelines require "a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences . . . [t]he courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (*County of Amador v. El Dorado County Water Agency* (1999), 76 Cal.App.4th 931, 954, quoting CEQA Guidelines § 15151; *see also Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Commrs.* (2001) 91 Cal.App.4th 1344, 1367.) Only "where substantial evidence supports the approving agency's conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy." (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027 (*SOCA*), citing *Laurel Heights*

*Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 407.)

As CUREs witness Dr. Vernon Bleich testified, the removal of Tamarisk is not likely to mitigate the significant impacts posed by the Project:

> MS. MILES: So would you expect there to be benefits to the species as a result of a removal of Tamarisk along Carrizo Creek and the associated marsh?
>
> DR. BLEICH: In terms of foraging value of the area, not necessarily. Big horn sheep are not marsh-dwelling creatures, nor do they regularly inhabit riparian areas unless those riparian areas are the ephemeral desert washes, similar to those occurring on the project site, and that produce high-quality forage, sought in particular by female big horn sheep during late gestation.
>
> Benefits incurred by big horn sheep through the removal of Tamarisk would, in my opinion, likely be limited to increased visibility and would not necessarily result in an increase in forage availability. Virtually all investigators agree that the more open an area, the more apt it is to be used by big horn sheep, and these opinions are voiced repeatedly in the recovery plan prepared by the Fish & Wildlife Service.

Again, the Applicant is relying on documentation filed in testimony that should have been a part of the Application for Certification that the Applicant concludes serves as evidence of the baseline "quality and functionality of land." Moreover, CURE has submitted uncontroverted expert testimony that the removal of Tamarisk at Carrizo Creek does not mitigate for loss of foraging habitat to bighorn sheep. Additionally, as CURE explained in our Opening Brief, the removal of Tamarisk at the Carrizo Creek will run the risk of impacting two endangered species, the Southwestern Willow Flycatcher and the Least Bell's Vireo, and the potentially significant impacts to these listed species has been given no study whatsoever.

**b. CURE Agrees With Staff That Phasing Mitigation Requires Additional Factual Analysis and Adds That This Analysis Must Be Included In a Report Circulated To All Parties**

At this time, CURE has not seen any evidence that the phasing of mitigation payments would per se violate CEQA. However, the Applicant should not be able to

fence, disturb or build upon any land that has not been mitigated for prior to the disturbance, because this would be a plain violation of CEQA.

However, since this late-proposal involves the regulation of ground disturbance, it should be analyzed in a report rather than in a behind-the-scenes piecemeal fashion. The phasing of disturbance and mitigation is complex and all parties deserve an opportunity to weigh in on a complete proposal. Legally, the Commission is required to provide an opportunity for public review and comment on this proposal since it is a new mitigation measure designed to mitigate significant impacts on biological resources. (14 Cal. Code Reg. §15088.5.) Nowhere in the record has Staff or the Applicant presented a complete proposal of how this would work.

**c. The Commission Should Reject the Applicant's Argument That the Amount of Compensatory Mitigation Should Be Reduced to Reflect the Quality and Functionality of Land**

The Applicant's analysis did not provide substantial evidence to evaluate the quality and functionality of the land. The Applicant is relying upon California Rapid Assessment Model data that submitted on July 21, 2010 as Supplemental Rebuttal Testimony ***after the release of the Supplemental Staff Assessment***, and thus was not analyzed by Staff to serve as the baseline analysis for the purposes of CEQA review. Moreover, the analysis itself states that the biological estimates were problematic:

> The results of this baseline study indicate that the theoretical construct of CRAM can be applied to arid, ephemeral streams, but certain metrics in the current Riverine Module will need to be recalibrated for these systems. The Landscape and Buffer Attribute can potentially apply to arid systems as currently constructed. The Hydrology Attribute performs reasonably well for arid systems, but some of the current indicators and field techniques will need to be revised in order to assess specific metrics. ***The Physical and Biotic Structure attributes were the two most problematic attributes to apply to a condition assessment of drainages in the study area.*** (Exhibit 129.)

The Applicant's argument that 28% of the washes serve as viable forage for PBHS is not only based on an analysis that itself concedes is not adequate for that purpose but is also factually inaccurate. The CRAM modeling only states that there is an average of 28% cover on the washes. This average cover on the washes doesn't stand for the proposition that 28% of the washes are suitable habitat for PBHS.

> MS. MILES: In your opinion, do you think that the CRAM modeling should be used to establish the baseline

conditions of the project site for big horn sheep habitat?

DR. BLEICH: No, I do not.

(…)

DR. BLEICH: In my experience, 28 percent is a tremendous amount of cover in a Sonoran Desert wash. I would expect, and based on work I've personally been involved with, that 10 to 15 percent cover in a wash is a very high amount of biomass.

(*Hearing Transcript of July 27, 2010, pp. 333-334.*)

This un-rebutted testimony of Dr. Bleich provides substantial evidence that there is no threshold of cover for forage requirements for bighorn sheep. It would be unreasonable for the Commission to give any weight to the Applicant's unanalyzed late-filed CRAM modeling that on its face admits that the biological conclusions that it drew were problematic. This document can in no way serve as substantial evidence of the amount of forage currently available on the Project site for PBHS.

## VI. RELIABILITY: INFORMATION FROM MARICOPA IS A GOOD STEP BUT DOESN'T MITIGATE THE IMPACT

Commission Staff have proposed as a condition of certification that the Applicant provide Staff with confidential reports from the operations of the Applicant's Maricopa power plant. CURE agrees that this condition is needed. However, this condition is meaningless unless it includes language that would allow the CPM to halt construction if serious concerns arise. For example, if there is a major breakdown of operations at the Maricopa facility and it is determined that the design of the SunCatcher units has a fatal flaw, the Energy Commission should have the authority to halt further ground disturbance until the Applicant can present evidence that the problems have been addressed.

## VIII. CONCLUSION

The Commission cannot approve the Project as proposed. Until the Applicant can provide a permitted, reliable, long-term water supply and a clear description of the Project for which it seeks a license, the Commission should suspend this proceeding. If the Commission approves the Project as proposed, the Commission will violate CEQA and the Warren-Alquist Act.

Dated: August 18, 2010 Respectfully submitted,

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**STATE OF CALIFORNIA**
**California Energy Commission**

| In the Matter of:<br><br>The Application for Certification for the Imperial Valley Solar Project (formerly known as SES Solar Two) | Docket No. 08-AFC-5 |
|---|---|

PROOF OF SERVICE

I, Bonnie Heeley, declare that on August 18, 2010, I served and filed copies of the attached **REPLY BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY.** 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 http://www.energy.ca.gov/sitingcases/solartwo/Imperial_Valley_POS.pdf. The document has 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 via email and by U.S. Mail with first-class postage thereon, fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred." An original paper copy and one electronic copy, mailed and emailed respectively, were sent to the Docket Office.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on August 18, 2010.

_________/s/________________________
Bonnie Heeley

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