

**STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

In the Matter of:)	Docket No. 08-AFC-5
)	
Application for Certification for the)	June 15, 2010
Imperial Valley Solar Project (formerly)	
known as SES Solar Two Project),)	
<u>Imperial Valley Solar, LLC</u>)	

**Staff's Response to Applicant's June 14, 2010 Motion
Regarding Responses to Applicant's Briefs**

On June 14, 2010, the Applicant for the Imperial Valley Solar Project (project) filed two briefs and a motion. The briefs address mixed issues of fact and law concerning project water supply and the United States Army Corp of Engineer's (U.S.A.C.E.'s) identification of the Least Environmentally Damaging Practicable Alternative (LEDPA). The motion requests a Committee Order that responses to the two briefs be filed on June 18. Staff opposes this motion, because briefing many of the legal issues raised by the applicant is unnecessary at this time, and briefing factual issues is premature because there is not yet a complete evidentiary record. Simply stated, staff is troubled to be spending time responding to these filings instead of assisting in preparation of the June 28 filing. Staff urges the Committee to deny the applicant's motion.

Brief Regarding Timing – Alternatives and the LEDPA

Although styled as a brief and not a motion, the Applicant's Brief Regarding Timing of Supplemental Staff Assessment contains two requests: 1) that the Committee instruct staff to publish a Supplemental Staff Assessment (SSA) on June 28 that "fully addresses all impacts to biological resources", and 2) that the SSA include a description of the reduced impacts to aquatic resources based on project modifications contained in the applicant's May 20 filing to the U.S. A.C.E. The remainder of the brief addresses the legal question of whether the California Energy Commission (Energy Commission) is legally required to await the U.S.A.C.E.'s identification of the LEDPA before issuing a decision on the project. Staff addresses each of these issues separately.

While staff intends to issue a final SSA on June 28 that addresses all project impacts, if there are outstanding issues associated with the identification of impacts or mitigation, the SSA will reflect that fact. Staff will not sponsor testimony that it does not believe to be true and complete.

The SSA will not include a description of the applicant's most recent alternatives submission to the U.S.A.C.E. Staff has no indication that the latest alternative is any more acceptable to the U.S.A.C.E. than the other alternatives the applicant has presented, and believes it to be a poor use of scarce resources to take time to make additional revisions to the SSA, particularly when these revisions do not reflect a final determination by the U.S.A.C.E. The SSA will contain an analysis of the project as proposed, as well as of the alternatives identified in the Staff Assessment/Draft Environmental Impact Statement (SA/DEIS).

Staff agrees that the final determination of the LEDPA is not a legal prerequisite for a Energy Commission decision on the project and is in the process of preparing its testimony without having information about the LEDPA. We note that the LEDPA is not merely an analysis of a potential alternative, as is contained in the alternatives section of the SA/DEIS, but is an actual regulatory requirement that will apply to this project. As a result, the LEDPA *will* be implemented, and the project may have a different footprint than identified in the SA/DEIS and the SSA. However, staff agrees that implementation of the LEDPA is not likely to create new significant impacts that have not already been analyzed. Because staff is in agreement with the applicant's position that the Energy Commission can proceed without identification of the LEDPA, staff does not believe that briefing is required. Moreover, to the extent that other parties disagree with the staff and applicant's position on this issue, there is no benefit to briefing this issue now, when parties are busy preparing testimony, rather than at the close of hearings. Staff urges the Committee to deny the applicant's request for briefing on this issue.

Brief Regarding Project Water Supply – Seeley Wastewater Treatment Plant and Dan Boyer Well

Applicant's brief on water supply makes one legal assertion and one factual assertion: 1) that the California Environmental Quality Act (CEQA) does not require that the Energy Commission wait for final certification of the environmental impact report (EIR) for the Seeley Wastewater Treatment Plant (SWWTP) expansion prior to issuing a decision on the project; and 1) that there is sufficient information in the record about the Dan Boyer well for staff to complete its analysis. The brief concludes with a request that the Committee instruct staff to review only the information provided by the applicant and to include its analysis of water supply impacts in the SSA. Staff addresses each of these issues separately.

Staff is not aware of any dispute over the legal requirements associated with analysis of project use of water from the SWWTP expansion. Staff believes that all parties agree that CEQA requires a Lead Agency to include an identification of potential impacts associated with this project – which includes supporting the upgrades to the SWWTP. As a result, staff is including in its testimony an identification of the impacts that could be associated with the expansion and the project's diversion of water, and description of the types of mitigation measures that could be required should these impacts be significant. This analysis will be included in the June 28th filing. Therefore, it is not necessary to brief the scope of analysis of the SWWTP that the Energy Commission must include in its final decision, unless staff is incorrect in its understanding of other parties' position on this issue. However, even if that is the case, there is no reason to brief the issue now, when parties are busy preparing testimony, rather than at the close of hearings.

Applicant's statement that there is no evidence of adverse impacts associated with its recent proposal to use the Dan Boyer water is supported only its own assertions. In fact, staff finds the statement to be presumptuous at best and legally insufficient at worst. Staff – as well as other parties and members of the public -- has identified concerns about the project's current water supply proposal and is undertaking extraordinary efforts to respond to the applicant's recent identification of the Dan Boyer well as a potential water source. By hiring an additional consultant and assigning additional resources to this project, we are hopeful that our June 28th filing will include a complete water supply analysis. We note that in an effort to accommodate the applicant's ill-timed identification of a new water source, staff has been gathering information that

we would typically require the applicant to provide. Staff will not reach a conclusion about the project's impacts without having completed this analysis; nor should the Committee reach a conclusion without allowing staff and other parties to present their own evidence at the hearings.

Staff finds the request that staff be instructed to only examine the applicant's information about water supply to be extremely ill-advised. It violates Energy Commission regulations (e.g., Cal. Code Regs. Tit. 20 §§ 1712, 1716, 1718, 1742, 1742.5) as well as principles of CEQA. Staff looks forward to presenting its independent analysis of the project's water supply and to briefing the legal implications of the evidence presented at hearings on water supply *after* the close of hearings. Staff urges the Committee to deny the Applicant's motion and allow parties to present evidence at hearings and brief issues after the hearings are completed.

Date: June 15, 2010

Respectfully submitted,

/S/

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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, Chester Hong, declare that on June 15, 2010, I served and filed copies of the attached, **Staff's Response to Applicant's June 14, 2010 Motion Regarding Responses to Applicant's Briefs**. 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>]

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)

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- sent electronically to all email addresses on the Proof of Service list;
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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***);

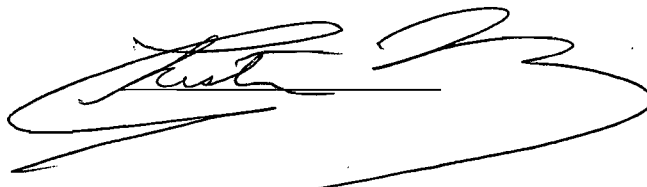
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.



*indicates change