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June 14, 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 Brief of Applicant Regarding Timing of Supplemental Staff Assessment

Dear Mr. Meyer:

On behalf of Imperial Valley Solar (formerly Solar Two), LLC, URS Corporation Americas (URS) hereby submits Applicant's Brief of Applicant Imperial Valley Solar, LLC Regarding Timing of Supplemental Staff Assessment.

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

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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA

Application for Certification for the	)	**Docket No.**
	)	
Imperial Valley Solar, LLC	)	**08-AFC-5**
(SES Solar Two) Project	)	
	)	
	)	

BRIEF OF APPLICANT IMPERIAL VALLEY SOLAR, LLC REGARDING TIMING OF SUPPLEMENTAL STAFF ASSESSMENT

June 14, 2010

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Solar Two) Project

I. INTRODUCTION

Imperial Valley Solar, LLC (IVS) has filed an Application for Certification with the CEC for a solar facility. Because of its effects on ephemeral drainages, the IVS Project also requires a Clean Water Act permit from the U.S. Army Corps of Engineers (the Corps). To issue the CWA permit, the Corps must identify the Least Environmentally Damaging Practicable Alternative – the LEDPA. Some parties to the AFC proceedings have indicated that completion of the Supplemental Staff Assessment (SSA) must await the Corps's identification of the LEDPA. As is explained below, however, it is fully lawful and appropriate for the Staff to issue the SSA, and the Commission to consider the Project, before the Corps makes its LEDPA determination. The record in this proceeding includes sufficient information for the Staff and ultimately the Commission to evaluate the impacts on aquatic resources associated with the proposed Project, to establish necessary mitigation measures, and to determine if the Project will comply with applicable laws, ordinance, regulations and standards (LORS), including the federal CWA. Given the Corps regulatory requirements, it is impossible that the alternative ultimately determined by the Corps to be the LEDPA will have more impacts to aquatic resources or other environmental resources than those described in the Project's Staff Assessment/Draft Environmental Impact Statement (SA/DEIS). Accordingly, the Applicant requests that at the Committee Status Conference scheduled for June 21, 2010, the Committee instruct Staff to publish an SSA that fully addresses all impacts to biological resources, including impacts to waters of the United States, and that Staff do so on June 28, 2010, consistent with the Committee's previous orders. See Notice of Mandatory Status Conference (June 8, 2010). The Applicant further requests that the Commission complete its consideration of the Project without delay.

II. FACTUAL BACKGROUND

One of the significant impacts identified in the Project's SA/DEIS issued on February 12, 2010, is the effect of locating some of the Project features, including SunCatchers and portions of supporting infrastructure, in ephemeral washes on the Project site. The SA/DEIS finds that the Project, as originally proposed, would result in loss of 165 acres determined to be waters of the United States, and that a permit from the Corps under section 404 of the CWA will be required. SA/DEIS at C.2-1, C.2-59. Under the Environmental Protection Agency's CWA regulations known as the 404(b)(1) Guidelines, 40 CFR 230 *et seq.*, a permit applicant must show that impacts to U.S. waters are avoided or minimized "to the maximum extent practicable," and the USACE may only issue a permit for the LEDPA.[1] SA/DEIS at A-17. For this reason, the SA/DEIS examined in detail two alternatives proposed by the USACE that were specifically

[1] Under the Guidelines, "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 CFR 230.10 (a)(2); SA/DEIS at C.2-58.

designed to reduce impacts to ephemeral washes.[2] It also considered, but rejected as inconsistent with Project objectives, a third alternative that would avoid impacts to all primary and secondary drainages within the site.[3]

On June 3, the applicant submitted a section 404(b)(1) Alternatives Analysis prepared by Ecosphere Environmental Services to the Corps and the EPA. The Alternatives Analysis thoroughly evaluated six Project alternatives for practicability considering cost, logistics and technology and identified an alternative that would achieve Project objectives and at the same time, further reduce impacts to ephemeral washes in comparison with the proposed Project. This alternative, the "Avoidance of the Highest Flow Aquatic Resources Alternative," was identified in the Alternatives Analysis as the LEDPA: It would limit permanent impacts to only 39.1 acres, yet it would substantially achieve Project objectives by providing 709 MW of new solar generating capacity.

Given the determination that there was a practicable alternative to the proposed Project that would reduce impacts to aquatic resources, the Applicant has amended its application with the Corps, requesting authorization to proceed with this alternative. The Applicant has provided the Commission with a description of the proposed modifications to the proposed Project. *See* Applicant's Supplement to the AFC, submitted on May 20, 2010. Accordingly, the Applicant requests that a description of the reduced impacts to aquatic resources be included in the SSA. Because the Project changes only result in reductions of environmental impacts, the SSA need only discuss the reductions as modifications to the proposed Project.

III. DISCUSSION

A. There Is No Need to Delay Completion of the SSA On the Theory That It Must Describe the LEDPA.

Contrary to the suggestion at the May 24 hearing that the Corps' final determination regarding the LEDPA must be described in the SSA (Transcript of 5/24/10 hearing, p. 200), the record provides a sound basis for completion of the SSA without awaiting the final word from the Corps. The SA/DEIS contains a legally adequate discussion and analysis of alternatives, and there is no legal requirement that the SA be supplemented to describe the LEDPA once the USACE makes its decision.

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[2] The first alternative, Drainage Avoidance Alternative #1, would avoid permanent impacts within the ten primary drainages on the site, reducing impacts to 48 acres; the second, Drainage Avoidance Alternative #2, would remove from development two areas (the eastern and westernmost parts of the site) where the largest ephemeral drainage complexes are located, reducing impacts to 71 acres. SA/DEIS at ES-8, C.2-1—C.2-4.

[3] This alternative was designed by the USACE to avoid entirely impacts to the primary and secondary drainages within the project site. SA/DEIS at B.2-138. The SA/DEIS found that this alternative would not meet the project objectives, and would not satisfy its purpose and need, because it would only allow generation of less than 100 MW. SA/DEIS at B.2-138.

The alternatives examined in the SA/DEIS are more than adequate for purposes of CEQA. As noted above, the SA/DEIS examines in detail two Drainage Avoidance Alternatives proposed by the Corps – alternatives that were specifically designed to meet CWA requirements that the Corps evaluate ways to avoid impacts to the desert washes within its jurisdiction. It also analyzes a 300 MW alternative, three offsite alternatives, and a no project alternative, and discusses 18 other alternatives that were eliminated from detailed analysis for failure to substantially reduce impacts, infeasibility, or inability to achieve project objectives. SA/DEIS B.2-1—140.

Under CEQA, an analysis of alternatives must "describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project." CEQA Guidelines § 15126.6(a). An EIR need not discuss every conceivable alternative to the project. Instead, an EIR should present "a reasonable range of potentially feasible alternatives." *Id.* The broad range of alternatives in the SA/DEIS unquestionably meets these standards.

The courts routinely uphold EIRs that include several alternatives which present a range of several options to the decision-makers.[4] When an EIR includes such a reasonable range of alternatives, the EIR need not also discuss potential variations on those alternatives. *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App3d 1022(upholding EIR for plan calling for 20,000 housing units that considered alternatives of 7500 units, 10,000 units, 25,000 units, and a no development alternative.) *See also Save San Francisco Bay Ass'n v. San Francisco Bay Conserv. & Dev. Comm'n* (1992) 10 Cal.App.4th 908.

The fact that the Corps will identify the LEDPA at some time in the future does not alter the conclusion that the alternatives analysis in the SA/DEIS is legally adequate. When an EIR analyzes an adequate range of alternatives the lead agency is not required to supplement the EIR with other alternatives that might surface later on, even alternatives that are environmentally superior to the alternatives examined in the EIR. Thus, under CEQA Guideline § 15088.5(a)(3)

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[4] *See, e.g., Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912 (EIR for supermarket that considered industrial project, increased store size, and smaller parking lot alternatives); *City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.App.4th 889 (EIR for school that included a reduced size alternative but not alternative sites); *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523 (EIR for 6800-acre project that included two reconfiguration alternatives, a reduced project alternative and three no development alternatives); *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477 (EIR for condominium project that included two low-density alternatives and one high-density alternative); *Mann v. Community Redev. Agency* (1991) 233 Cal.App3d 1143 (EIR for residential and commercial development that included three alternative types of projects); *Save San Francisco Bay Ass'n v. San Francisco Bay Conserv. & Dev. Comm'n* (1992) 10 Cal.App.4th 908 (EIR for aquarium project that included four alternative locations); *Sequoyah Hills Homeowners Ass'n v. City of Oakland* (1993) 23 Cal.App.4th 704 (EIR for housing project that discussed three alternatives); *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490 (EIR for winery that included a wetlands avoidance alternative, a reduced project alternative, and a no project alternative).

information about a new alternative that will further reduce project impacts will only trigger the need to augment and recirculate the EIR if the alternative is "feasible," it is "considerably different from others previously analyzed" and "the project proponents decline to adopt it." None of these conditions apply here. In fact, as explained above, the alternative identified by the Applicant as the LEDPA represents a reduced version of the proposed Project, not a "considerably different" project. Additionally, the Applicant has requested that the alternative identified as the LEDPA in the Alternatives Analysis that was submitted to the Corps be described and assessed in the Supplemental Staff Assessment as a modified version of the Project.

B. A Final Determination by Corps Regarding the LEDPA Is Not Necessary to Identify Mitigation Measures for Impacts to Waters of the U.S.

Staff's proposed Condition of Certification BIO-17 requires purchase of compensation land to mitigate impacts to jurisdictional state waters and Waters of the U.S. C .2-92-96. The SA/DEIS specifically finds that with implementation of BIO-17, impacts to "jurisdictional state waters and loss of the hydrological and biological functions of the project site desert washes would be mitigated to less than CEQA significant levels." C.2-102. It thus correctly concludes that no further mitigation is needed for purposes of CEQA compliance.

The SA/DEIS also recognizes the possibility, however, that the Corps might come up with additional mitigation measures to satisfy CWA requirements. C.2-102. To account for this possibility, Condition of Certification BIO-17 specifies that for Waters of the U.S "The project owner *would* follow mitigation requirements stated in the Clean Water Act 404 permit issued by the USACE." C.2-96 (emphasis added). It also states that BIO-17 will be updated to reflect the mitigation requirements of the Corps and the California Department of Fish and Game. C.2-92-93.

Although the SA/DEIS suggests the Commission should wait for the requirements of the Corps permit to come out before it approves the Project and adopts conditions (see C.2-92-93, 103) the Commission need not do so. Instead, the Commission can ensure compliance with Corps mitigation requirements by making a minor modification to the language of Condition of Certification BIO-17. It can do so simply by changing the language referred to above to read: "The project owner *shall* follow mitigation requirements stated in the Clean Water Act 404 permit issued by the USACE." Indeed, it is standard practice for Staff to find adequate mitigation based solely on a Condition of Certification requiring that permit requirements imposed in the future by federal agencies be satisfied.[5]

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[5] *See, e.g.*, Sutter Power Project (97-AFC-2) (USACE Section 404 permit, federal PSA permit and USFWS Biological Opinion, FSA at 28, 33, 446); La Paloma Generating Project (98-AFC-2) (USFWS Biological Opinion, FSA at 277-78); Palomar Power (01-AFC-24) (USACE Section 404 permit, USFWS Biological Assessment, FSA at 4.2-19—20, 4.2-24—25).

C. A LEDPA Determination by the Corps Is Not Necessary for a LORS Assessment of Clean Water Act Compliance and the Commission May Approve the Project Without Waiting for the Corps to Issues Its Permit.

A permit from the Corps under section 404 of the CWA is required by federal law because the Project will impact ephemeral washes classified as Waters of the U.S. The Corps is currently evaluating the information relevant to the permit application and its LEDPA determination. This information includes the two Drainage Avoidance Alternatives it proposed for examination in the SA/DEIS for precisely that purpose, together with the Applicant's Alternatives Analysis. Because the Applicant cannot go forward with the Project until it has the required section 404 permit from the Corps in hand, compliance with the CWA is not "unknown" (ES-23) as asserted in the Staff Assessment; to the contrary, compliance with LORS is a certainty. Furthermore, the Commission can ensure this result by adding a Condition of Certification requiring receipt of the permit.

IV. CONCLUSION

There is no legal or practical reason to delay completion of the SSA pending the Corps's LEDPA determination under the CWA. The information currently available to the Staff and the Commission provides all that is needed for a determination regarding the Project's impacts to waters of the U.S., to identify mitigation measures necessary to reduce impacts to waters of the U.S. to a less than significant level, and to determine compliance with applicable LORS. The Corp's ultimate identification of the LEDPA could only result in a reduction of impacts and, therefore, is not needed prior to the SSA or the Commission's determination on the AFC.

Accordingly, the Applicant respectfully requests that the Committee direct Staff to include in the SSA to be released on June 28, 2010, a complete analysis of impacts to aquatic resources, draft mitigation measures that are necessary to reduce such impacts to a less than significant level, and a determination regarding the Project's consistency with all applicable LORS. All parties to this proceeding will then have the opportunity to present rebuttal testimony and the Commission can render a decision on the Project's application in keeping with its existing schedule.

Dated: June 14, 2010

BINGHAM McCUTCHEN LLP

By: _____

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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, Corinne Lytle, declare that on June 14, 2010, I served and filed copies of the attached, Applicant's Submittal of Brief of Applicant Imperial Valley Solar, LLC Regarding Timing of Supplemental Staff Assessment. 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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__X__ 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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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
Corinne Lytle

*indicates change

*indicates change