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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 Analysis of Project Water
Supply

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 Analysis of Project Water Supply.

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

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)	
)	
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)	

**BRIEF OF APPLICANT IMPERIAL VALLEY SOLAR, LLC
REGARDING ANALYSIS OF PROJECT WATER SUPPLY**

June 14, 2010

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Applicant for the Imperial Valley Solar (SES
Solar Two) Project

I. INTRODUCTION AND SUMMARY

Imperial Valley Solar, LLC (IVS) has filed an Application for Certification with the California Energy Commission for a solar facility to be located in Imperial County, California. Parties to the proceeding have suggested that the CEC delay its consideration of this Project to allow for additional studies or other information related to the Project's primary and alternative water supplies. However, the record contains more than sufficient information to demonstrate that adequate water supply will be available to serve the Project, and that the impacts of supplying this water to the Project will be less than significant. This information satisfies the CEC's obligations under CEQA, the Warren-Alquist Act and the CEC's regulations. Therefore, the CEC need not wait for additional analysis before the Commission makes its decision. Instead, at the Committee Status Conference scheduled for June 21, 2010, the Committee should instruct Staff to review the information already provided and include its analysis of potential impacts related to water supply issues in the Supplemental Staff Assessment to be released on June 28th. The Applicant further requests that the Commission complete its consideration of the Project without delay.

The IVS Project proposes to use recycled water from the Seeley Wastewater Treatment Facility (SWWTF) as its primary water supply. The Seeley County Water District is proposing to construct the upgrades necessary to achieve statutorily-required water standards. The upgrades will be funded by IVS. Following completion of the upgrade project, the SWWTF will have a supply of reclaimed water that meets the Title 22 Standards for unrestricted use. The SWWTF has provided the IVS Project with a letter documenting that it will make sufficient amounts of water available to the Project to support the Project's construction and operational needs. However, the District has not yet approved the upgrade project or constructed the upgrades. The District has published an initial study on the environmental impacts of that plant upgrade, and has given notice that it is preparing an Environmental Impact Report.

The CEC can and should proceed with the IVS Project, and not await final certification by the District of its EIR. The CEC's obligation to evaluate environmental impacts is satisfied so long as the CEC conducts its own evaluation and does not simply defer to an EIR that has not yet been certified by the District. The analyses and information already in the record satisfy that obligation.

Until the SWWTF supply is available, the IVS Project proposes to obtain its water supply from an existing private water purveyor, the Dan Boyer Water Company, which operates a licensed well in Ocotillo, California, in the Coyote Wells basin (Boyer Well). The Applicant will use this well on a temporary basis until the Seeley Wastewater Treatment Facility upgrades are completed and the facility is able to supply the IVS Project with reclaimed water. The Dan Boyer Water Company has provided the Applicant with a will-serve letter that demonstrates that an adequate water supply will be available to the Project until the SWWTF supply is available. The well regulation conditions the County has imposed allow pumping at 40 acre-feet per year

(AFY), and the Applicant will adjust the construction schedule to ensure its demands are not more than 40 AFY. The Applicant has submitted extensive information regarding the quantity and quality of water available from the Boyer Well. This information is sufficient to demonstrate that there will be no significant adverse environmental impacts from the temporary and relatively small amount of pumping the Project proposes.

Furthermore, to ensure there are no impacts, the Applicant proposes an additional mitigation measure under which it will offset the amounts it actually pumps from the Boyer Well. It will purchase the rights necessary to ensure that, after the IVS Project stops obtaining its temporary supply from the Boyer Well, an amount of water equal to the amount the IVS Project used will remain unpumped and in the Coyote Wells basin, rather than being sold to third parties. Accordingly, the Staff has sufficient information to assess the potential impacts associated with both the temporary and long term water supply that the Applicant intends to use for the Project's water needs. The Committee should therefore instruct Staff to complete its analysis of these issues and include the analysis in the SSA that it has agreed to publish on June 28, 2010. Additional studies and information are not necessary either for the Staff to complete the Staff Assessment or for the Commission to act on the Project.

II. DISCUSSION

A. **The CEC Can And Should Determine The Impacts Of The SWWTF Water Supply Without Waiting For The District To Complete An EIR.**

IVS has provided information that demonstrates that there is an adequate and reliable source of water. The Project proposes to obtain reclaimed water from the SWWTF once plant upgrades are completed. IVS has submitted information describing the nature of the plant upgrades, and how they will operate. It has documented the amount of reclaimed water that will be available. It has also proposed and studied potential locations for a pipeline that IVS would build as part of the IVS Project to bring that reclaimed water to the IVS site. (*E.g.*, Staff Assessment, pp. ES-4, ES-20, B.1-2, B.1-6, B.1-14) This information is sufficient to meet the CEC's requirements for a description of water supply. 20 C.C.R. Division 2, Chptr 5, Appendix B, §§ (b)(1)(C) (project description in the AFC is to include "A detailed description of the design, construction and operation of the facilities, specifically including the . . . water supply and treatment.") and (b)(14)(describing information regarding water resources that must be included in an AFC).

This description is also sufficient to describe a reasonably certain source of water under CEQA. *See, e.g., Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 436-437 (2007). In *Vineyard*, the court addressed the question of how certain a description of water supply must be to enable an adequate CEQA analysis. The court held sufficient a water supply description which noted that a future pipeline would connect the water supply to the project, for which developers would pay a special fee, and that the water supply

was not already allocated to other uses. All those same factors are present for the Seeley plant supply.

The record evidence regarding the impacts of upgrading the SWWTF and supplying approximately 33 to 50 acre-feet per year to the IVS Project is also sufficient as an analysis of environmental impacts under CEQA. CEQA does prohibit an agency from simply noting that environmental impacts of another project will be analyzed in a future EIR. *Vineyard*, 40 Cal.4th at 440. However, the prohibition is only against failing to perform an analysis. So long as the analysis of environmental impacts of a future project is included in the EIR (or its certified regulatory program equivalent) for the project under consideration, there is no need to wait until a separate EIR is certified for that separate project at a future date. *See Vineyard*, 40 Cal.4th at 440 (“if the environmental impact analysis the [agency] expects to perform on its [future project] is important to understanding the long-term water supply for the [current project], it should be performed in the [current project] FEIR . . .”).

The record for the IVS Project includes voluminous evidence about the impacts of using recycled water from the SWWTF to serve the Project. This evidence includes analysis of the impacts of upgrading the SWWTF to treat to tertiary standards, and use of a sufficient amount of recycled water to serve the construction and operational demands of the Project. The evidence includes construction impacts, the additional vehicle trips that are projected, transportation of the chemicals used to treat the wastewater, and sludge disposal. The analyses presented also address the reduction of some of the effluent flows¹ in the drainage ditch located immediately northwest of the SWWTF property, which then discharges to New River. Biological surveys that were promised have been completed, and additional surveys are being required to confirm the initial conclusions. (Applicant’s Supplement to the AFC, docketed May 5, 2010, (“Supplement”), Appendix H; Testimony submitted May 10, 2010 from Matt Moore, Robert Scott and Patrick Mock [Q 13]; Testimony submitted May 17, 2010 from Matt Moore and Robert Scott.) Nonetheless, IVS proposes additional surveys and studies later, to confirm the conclusions of the initial studies. IVS has also proposed a matrix detailing what mitigation would be implemented depending which of the detailed, possible survey outcomes occur. (Supplement, Appendix H, Table 2.6.4) For example, if Yuma Clapper Rail is unexpectedly encountered in the unnamed drainage, offsetting habitat restoration or creation elsewhere will be required. (*Id.* at page 2.6-29) Accordingly, there is sufficient information for the CEC to reach conclusions about the impacts of the primary water supply for the IVS Project.

¹ The consequence of the IVS Project that is before the CEC is that an average of 50 AF per year during construction, and 33 AF per year during operation, will be diverted from that ditch to the IVS Project site. The CEC need not evaluate impacts of the plant upgrade not associated with the Project before it. *See Communities For A Better Environment v. City of Richmond*, Case No. A125618 (4/26/2010) (upholding decision to treat pipeline for transporting additional hydrogen produced as result of refinery plant upgrades as project separate from refinery project).

Moreover, while the CEC has no jurisdiction to require that the Seeley County Water District, in evaluating and approving its plant upgrade project, implement any specific mitigation measures, the CEC does, under CEQA and under its own regulations, have the power to determine that the District can and should adopt certain measures, and approve the IVS Project on that basis. Pub. Res. Code §§ 21081(a)(2) (lead agency may find, with respect to significant impact, that mitigation is “within the responsibility and jurisdiction of another public agency and [has] been, or can and should be, adopted by that other agency”); 21080.5(c) (a certified regulatory program, such as the CEC’s licensing process, is exempt from chapters 3 and 4 of CEQA, but is subject to the chapter that contains section 21081(a)(2).); 20 C.C.R. § 1755 (A finding the CEC may adopt for potentially significant impacts is that “With respect to matters not within the commission's authority but within the authority of another agency, that changes or alterations required to mitigate such effects have been adopted by such other agency, or can and should be adopted by such other agency.”)

B. There Is Voluminous Evidence In The Record About The Boyer Well To Support A Determination That There Will Be No Significant Impacts.

1. There is sufficient information about the impacts of operating the Boyer Well.

The Boyer Well has been in operation for decades, and has been pumped almost continuously over the years. The IVS Project proposes to use that well as a temporary supply. Accordingly, the CEC must evaluate the impacts of any incremental increase in pumping the Project could cause. Taking an ultra-conservative approach, IVS has submitted extensive information and analyses addressing the impacts of using all 40 acre-feet per year the Project proposes to purchase from the Dan Boyer Water Company, without netting out the impacts of current ongoing pumping.

The AFC, in sections 5.5.1.2 and 5.5.2.2, discusses the Coyote Wells Groundwater Basin. The Applicant’s response to CEC/BLM data request 18 proffers information gleaned from nearby operations. The Applicant’s opening testimony, submitted March 15, 2010, includes information from two witnesses about the Boyer Well supply. The Applicant’s Supplement to the AFC, docketed May 5, 2010 (“Supplement”), contains extensive information regarding the well, the basin, and water quality. (See sections 1.4 and 2.5, and appendices C and D.) In addition, the Applicant submitted testimony on May 24 and 25 from Marc Van Patten and Robert Scott about the history, operation and impacts of the well. Mr. Van Patten confirmed that if the SWWTF source is not available at the time of Project construction, the construction activities will be conducted in a manner that accommodates the well’s 40 acre-feet per year production. (Transcript of 5/24/10 hearing, pp. 97-98.)

This information reveals that the temporary pumping of 40 acre-feet per year from the Boyer Well would not make any noticeable difference in the functionality of the basin or any of its

wells; it will not noticeably shorten the time period within which the basin wells can operate and will not substantially deplete the amount of water available. As concluded in the Groundwater Evaluation Report:

- The aquifer penetrated by the well can support water demands for the Imperial Valley Solar Project during construction and the lifespan of its operations (as needed).
- Continuous pumping of the well at [about 25 gallons per minute, or approximately 40 acre-feet per year] for a period of one, two or three years will have no significant impact on water levels in the area, as the [zone of influence of the well] is considerably less than the distance to the closest well, which is approximately 500 feet away.
- This analysis regarding the amount of supply and pumping indicates that the incremental amount of water demanded by the project is so small as to provide no reasonable scientific basis for concluding that it would cause or exacerbate any overdraft. The pumping required for the Project would continue for a relatively short duration that is generally accepted as not having any substantial effects on basin levels.

(Supplement, appendix D, section 6.2.) Moreover, the analyses and conclusions of this report were confirmed in a peer review conducted by Eric M. LaBolle, PhD. (Ex. 40)

This evidence is to be measured against the CEQA threshold:

Would the project substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table (e.g. the production rate of pre existing nearby wells would drop to a level which would not support existing land uses or planned uses for which a permit has been granted).

CEQA Guidelines, Appendix G, Question VIII(b). Here, the Groundwater Evaluation Report establishes that the relatively small amount pumping over a one to three year period will not have any substantial effects, and will not be observable at even the nearest well. Accordingly, under the applicable CEQA threshold, there is more than sufficient evidence to conclude that impacts will be less than significant.

2. Offsets will be provided in any event.

Despite the evidence indicating that there will be no impacts, the Applicant offers to provide a 1:1 offset for every acre-foot of water the Project uses from the Boyer Well. The Applicant proposes to enter into an arrangement whereby, once its temporary use of the Boyer Well as a water supply ceases, it pays for water from the Boyer Well but does not pump that water. The situation is akin to offsetting loss of habitat by conserving existing habitat elsewhere, protecting it from future development or other impacts. *See* CEQA Guidelines § 15370 (mitigation includes compensating for the impact); *Environmental Council of Sacramento v. City of Sacramento*, 142 Cal.App4th 1018 (2006) (mitigation requiring, among other things, conservation of one-half acre of land for every acre impacted upheld as adequate). The difference would be that, instead of placing a conservation easement on acres of land, the IVS Project would protect acre-feet of water from impacts.

IVS suggests the following conditions of certification and language regarding verification:

Condition - The Applicant shall monitor and record the amount of water purchased from the Boyer Well. Upon the completion of the Seeley Wastewater Treatment Facility upgrades and the first delivery of reclaimed water to the IVS Project, water purchases from the Boyer Well shall cease.

Verification – Applicant shall monitor water purchased from the Boyer Well on a daily, monthly and annual basis. These records shall be made available to the CPM. Upon the completion of the Seeley Waste Water Treatment facility upgrades and the first delivery of reclaimed water to the IVS Project, Applicant shall submit a summary report to the CPM containing information on all Boyer Well water used. In the event Applicant desires to use a water source other than the SWWTF water in the future, Applicant shall obtain approval from the CPM for such use.

Condition – Upon the commencement of water deliveries from the SWWTF, Applicant shall continue to purchase water from the Boyer Well, but not pump or accept delivery of these “pay back” water amounts. Applicant shall purchase “pay back” water in an equivalent amount (1:1) until such time as the “pay back” water left in the basin equals the amount of water used by the IVS Project. Such purchases shall not hinder the casual and intermittent purchase of water from other users.

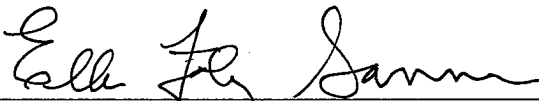
Verification - Within sixty (60) days following the first delivery of reclaimed water from the SWWTF, Applicant shall submit a “pay back” water report. This report shall contain evidence of water purchases from the Boyer Well, or other proof that an equivalent amount of water shall be left in the basin.

III. CONCLUSION

The CEC has before it voluminous information about the impacts of supplying water to the IVS Project and the Applicant has made an affirmative presentation that it has an adequate water supply available, the obtainment of which will not result in significant environmental impacts with mitigation incorporated. Staff should be instructed to review this information and include its assessment of the additional analyses the Applicant has prepared in the Supplemental Staff Assessment to be released on June 28th. Additional studies and information are not necessary. Moreover, awaiting the additional information would likely lead only to a cycle of never-ending request for further details. As the California Supreme Court explained, “A project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR. That further study . . . might be helpful does not make it necessary.” *Laurel Heights Improvement Ass’n v. Regents of Univ. of Calif.*, 47 Cal. 3d 376, 415 (1988). Accordingly, there is no cause for delay and the Commission should consider the Project in keeping with its current schedule.

Dated: June 14, 2010

Bingham McCutchen LLP

By: 

Ella Foley Gannon

Attorneys for Imperial Valley Solar, LLC, Applicant
for the Imperial Valley Solar
(SES Solar Two) Project



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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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 Analysis of Project Water Supply. 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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CALIFORNIA ENERGY COMMISSION

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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