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June 18, 2010

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-5
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: Imperial Valley Solar, LLC; Docket 08-AFC-5

Dear Docket Clerk:

Enclosed are an original and one copy of CURE's Response to Applicant's June 14, 2010 Motion Regarding Responses to Applicant's Briefs. Please process the document and return a conformed copy in the envelope enclosed.

Thank you for your assistance.

Yours truly,

/s/

Carol N. Horton
Assistant to Loulena A. Miles

LAM:cnh
Enclosures

2218-124d

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

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

CALIFORNIA UNIONS FOR RELIABLE ENERGY RESPONSE TO APPLICANT'S JUNE 14, 2010 MOTION REGARDING RESPONSES TO APPLICANT'S BRIEFS

June 18, 2010

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INTRODUCTION

Two weeks prior to the release of Staff's Revised Staff Assessment ("RSA"), which would include Staff's analysis of soil and water resources, Imperial Valley Solar LLC ("Applicant") filed a motion requesting that the Committee direct all parties to brief issues relating to whether Staff should independently analyze the Project's water supply and wait for the U.S. Army Corps of Engineers' ("USACE") analysis of the Least Environmentally Damaging Practicable Alternative ("LEDPA"). As Staff has repeatedly stated, these issues will be addressed in the RSA anticipated for release on June 28th. The Applicant's motion for legal briefing at this time is impetuous and premature.

The Applicant made similar requests at the evidentiary hearing in El Centro on May 24th and on May 25th and at that time the Committee declined to order all parties to brief these matters. An order for Staff and all parties to brief these matters now would only result in delay of Staff's work to complete the RSA and circulate it to all parties for review. The Applicant's motion is simply an ill-timed tactic to compensate for delays primarily caused by the Applicant's late-filings and repeated project changes. Therefore, CURE joins Staff in opposing the Applicant's motion. CURE urges the Committee to again decline to order parties to prematurely brief legal issues in this proceeding.

DISCUSSION

a. Groundwater Supply

There are still unresolved questions about the impacts associated with the Project's newest water supply: the Dan Boyer groundwater well. The Applicant should have had a firm water supply and a backup water supply prior to filing its Application for Certification ("AFC"), as is required by Commission Rules of Practice and Procedure and by CEQA. Commission Rules require the AFC to identify sources of the primary and back-up water supplies and the rationale for their selection at the data adequacy phase.[1] CEQA requires that "decision makers must be presented with sufficient facts to evaluate the pros and cons of supplying the amount of water that the project will need."[2]

The Applicant filed its proposal to rely on the Dan Boyer groundwater well for construction and operation of the power plant for the first time ***three months after*** the Staff Assessment was released and nearly ***two years after*** the application was deemed data adequate. Any blame for the delay caused by this very late filing falls squarely upon the Applicant. In fact, there was no good cause for this late filing. The Applicant has known for over a year that the Seeley Waste Water Treatment Facility would require environmental review pursuant to CEQA and that the Applicant had no back-up water supply. Further, the Dan Boyer well is not a new well or a new water purveyor, but has been a sole source of drinking

[1] California Energy Commission (2007) Appendix B of Rules of Practice and Procedure and Power Plant Site Certification Regulations, Water Resources section.
[2] Vineyard v. City of Rancho Cordova (2007) 40 Cal.4th 412 (citing Santiago County Water Dist. V. County of Orange (1981) 118 Cal.App.3d 818.)

water for over a decade. Therefore, this drinking water source could have been identified by the Applicant as its proposed source of water for the power plant earlier than just a few months ago. Instead, the Applicant failed to conduct due diligence in finding a water supply for the Project's needs and, now, is attempting to pressure Staff into curtailing its review under CEQA.

Moreover, the Applicant's proposal to rely on this potable groundwater well is riddled with potentially significant environmental impacts. First, the Dan Boyer groundwater well provides drinking water for California communities in Painted Gorge and West Texas. The Applicant has not provided sufficient information about the existing use of water from this well by these communities. Second, this well is in a sole source aquifer, regulated by the Safe Drinking Water Act ("SDWA"). The SDWA's Sole Source Aquifer program authorizes EPA to conduct environmental review of any project which is financially assisted by federal grants or federal loan guarantees that may result in contamination of a sole source aquifer.[3] To date, there is no evidence offered by the Applicant that EPA has conducted the review.

Third, as is evident from the Applicant's filings, this well is in an aquifer that is already in overdraft with little or no recharge. There are other Projects currently seeking to rely upon this aquifer, and there may be significant unresolved and unmitigated direct and cumulative impacts associated with these competing water needs. Finally, the Applicant has not provided consistent information about how

[3] Section 1424(e) of the Safe Drinking Water Act of 1974. EPA's Sole Source Aquifer Program, Accessed at: http://www.epa.gov/region9/water/groundwater/ssa.html.

much water it proposes to use from this well and for how long the project would use this water.

Staff is making a herculean effort to obtain data necessary for an adequate analysis and is attempting to draft the analysis by month's end. The Applicant's late filings of critical information have unnecessarily overburdened Staff. If the Committee seeks to ensure that a legally defensible environmental review of this Project is completed, the Committee should deny the Applicant's motion and allow Staff the time it needs to complete its review of this late-filed, yet vital, aspect of the proposed Project.

b. Least Environmentally Damaging Practicable Alternative

The Applicant requested that the Committee direct Staff to complete its analysis prior to the USACE determining the LEDPA under the Clean Water Act. Staff responded that it intends to issue its analysis prior to the USACE's determination.

CURE cautions Staff and the Commission that a premature conclusion regarding compliance with the Clean Water Act may result in more work and further delay once the USACE makes its determination of the LEDPA. As described below, the USACE determination may result in inconsistencies with Staff's analysis that may require the Commission to conduct additional environmental review under CEQA at a later date. This could be avoided if the agencies coordinate their analyses prior to releasing Staff's analysis.

It is only because the Applicant repeatedly denied that waters on the Project site were waters of the United States and, hence, within the jurisdiction of USACE under Section 404 of the Clean Water Act that Staff and USACE are belatedly performing their analyses of the Project's impacts to approximately 840 acres of waters of the United States. The delay of these analyses is due to the Applicant's failure to seek the regulatory permits needed for Project approval at an early stage. The Applicant has no valid excuse for failing to timely apply for the appropriate permit.

The USACE's Clean Water Act Guidelines are clear: "No discharge of dredged or fill material [into waters of the U.S.] shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem."[4] Practicable is defined as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[5]

The Clean Water Act regulations presume that there is a less damaging alternative that ***does not*** involve the release of dredged or fill material into waters of the United States if a project is not water dependent, such as this Project. The burden to demonstrate otherwise is placed upon the Applicant.[6] Because this Project is clearly not water-dependent, one or more offsite alternatives must be studied that do not involve a discharge of dredged or fill material into waters of the

[4] 40 CFR § 230.10.
[5] 40 C.F.R. § 230.10(a)(2).
[6] *Utahns for Better Transportation v. United States Department of Transportation*, 305 F.3d 1152, 1163 (2002) (citing 40 C.F.R. § 230.10(a)(3)).

United States. The U.S. Environmental Protection Agency's ("EPA") May 12, 2010 letter to the USACE outlined the importance of the proposed Project site to the aquatic environment:

> *[T]he 878 acres of jurisdictional desert streams on the project site are a critical part of the Salton Sea Transboundary Watershed…the streams at this project site perform critical hydrologic, biogeochemical and habitat functions directly affecting the integrity and functional condition of the New River and Salton Sea, both listed as impaired water bodies under the Clean Water Act.* ***As proposed, the Project's discharges may result in substantial and unacceptable impacts to aquatic resources of national importance.*** (Emphasis added.)

In fact, the EPA determined that the Project will impact Aquatic Resources of National Importance ("ARNI") and has taken steps to elevate the review of this Project to USACE and EPA Washington D.C. headquarters for additional review following the completion of review by USACE's Los Angeles District office.[7] In EPA's May 27, 2010 NEPA comment letter to BLM, EPA specifically called for BLM to conduct a full analysis of offsite alternatives as an integral component of the CWA 404 analysis to demonstrate compliance with the Clean Water Act Guidelines.[8]

For these reasons, Staff's analysis of significant impacts to waters of the U.S. and alternatives may be premature. USACE and EPA are likely to indentify a new onsite or offsite alternative as the LEDPA that would likely present new or different impacts than the Project and alternatives that are analyzed by Staff. Therefore, Staff would be required to analyze and propose mitigation for these impacts in a

[7] Outlined in US EPA's comment letter to the BLM on May 27, 2010, pursuant to section 404(q) of the Clean Water Act.
[8] Id. at p. 3.

report to be presented prior to evidentiary hearings. CURE urges Staff and the Commission to make all efforts towards the efficient use of the parties' and the State's resources, and to avoid delay by planning for the likely eventualities in this proceeding.

c. Public Process under CEQA

The most disturbing aspect of the Applicant's late-filed water supply analysis and the Applicant's failure to timely acknowledge waters of the U.S. on the Project site is that these delays have only harmed the public process. Each late filing by the Applicant is another example of information that was not reviewed in the Staff Assessment/Draft Environmental Impact Statement ("SA/DEIS") that was circulated for public review and comment.

CEQA requires the Commission to provide public notice of the availability of Staff's environmental review document, an opportunity for public comment on the environmental assessment, and responses to public comments. Specifically, Public Resources Code section 21092 requires the Commission to provide public notice that specifies the period during which comments will be received, a description of the proposed project and its significant effects, and the address where copies of all documents referenced in the environmental review document are available for review.[9] Public Resources Code section 21091(a) provides that the Commission's public review period may not be less than 30 days. Public Resources Code section 21091(d) provides that the Commission shall consider comments it receives on the

[9] Pub. Res. Code § 21092(a), (b)(1).

draft assessment and shall prepare a written response. The Commission is not exempt from any of these mandatory CEQA requirements.

There has been no discussion to date about when the RSA will be circulated for public comment or when the Commission will respond to public comments received on the RSA. Due to the significant changes that have been made between the SA/DEIS and the RSA, the Commission must formally circulate the RSA for a 30-day comment period and respond to comments.

CONCLUSION

For the foregoing reasons, CURE urges the Committee to deny the Applicant's motion to order parties to brief the legal issues at this time to allow Staff to work on completing its environmental review. CURE also urges the Committee to ensure that Staff provides notice of its RSA, a 30-day public comment period on the RSA, and responds to comments prior to further testimony in this proceeding.

Dated: June 18, 2010

Respectfully submitted,

/s/

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DECLARATION OF SERVICE

I, Carol N. Horton, declare that on June 18, 2010, I served and filed copies of the attached CALIFORNIA UNIONS FOR RELIABLE ENERGY CALIFORNIA UNIONS FOR RELIABLE ENERGY RESPONSE TO APPLICANT'S JUNE 14, 2010 MOTION REGARDING RESPONSES TO APPLICANT'S BRIEFS, dated June 18, 2010. 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: www.energy.ca.gov/sitingcases/solartwo. The document has been sent (1) electronically, and (2) via US Mail by depositing in the US mail at Sacramento, California, with first-class postage thereon fully prepaid and addressed as provided on the attached Proof of Service list to those addresses NOT marked "email preferred." It was sent for filing to the Energy Commission by sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address shown on the attached Proof of Service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, CA, this 18th day of June, 2010.

/s/
Carol N. Horton

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