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March 2, 2010

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 08-AFC-5

1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: Imperial Valley Solar Project; Docket 08-AFC-5

Dear Docket Clerk:

Enclosed are an original and copy of letter re: Revision and Recirculation of Staff Assessment/Draft Environmental Impact Statement – SES Solar Two.

Please process the document and return a conformed copy in the envelope enclosed.

This document has previously been sent via email.

Thank you for your assistance.

Sincerely,

/s/

Bonnie Heeley

:bah

2218-080a

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Via Email and US Mail

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**Re: Revision and Recirculation of Staff Assessment / Draft
Environmental Impact Statement – SES Solar Two**

Dear Mr. Meyer and Mr. Stobaugh:

We are writing on behalf of California Unions for Reliable Energy (“CURE”) regarding the SES Solar Two Power Project (“Project”) Staff Assessment/Draft Environmental Impact Statement (“SA/DEIS”) released on February 12, 2010 by the Energy Commission, and published in the Federal Register on February 22, 2010 by the Bureau of Land Management (“BLM”). The SA/DEIS must be revised and recirculated because it fails to adequately describe, analyze and identify potentially significant impacts and required mitigation for the Project’s proposed water supply. Moreover, the Commission and BLM staff must make an *independent* evaluation of the Project’s significant water supply impacts and mitigation measures and a

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determination regarding whether the Project complies with all laws, ordinances, regulations and standards prior to releasing the revised SA/DEIS.

CURE sent a letter to the Commission more than three months ago, in November 2009, describing the Commission's responsibility to analyze significant environmental impacts associated with the Project's water supply in the SA/DEIS. That advice was ignored. Instead, the recently released SA/DEIS fails to adequately analyze these significant environmental impacts because it relies on a Mitigated Negative Declaration ("MND") that was proposed by the Seeley County Water District ("SCWD"). The SCWD has since abandoned the proposed MND, realizing belatedly that the MND did not comply with CEQA. Commission and BLM staff cannot now meet the requirements of CEQA merely by preparing an addendum to the SA/DEIS or deferring the identification and analysis of these impacts to a Supplemental SA/Final Environmental Impact Statement.

While we could wait until the end of the comment period to provide these comments, we again provide early notice of the Commission's and BLM's fatally flawed path so that it can be corrected in a timely manner and so that the schedule in this proceeding can be adjusted accordingly.

I. The SA/DEIS Fails to Analyze and Mitigate Potentially Significant Impacts from the Project Water Supply

According to the SA/DEIS, the sole water source for construction and operation of the Project would be reclaimed water from the Seeley Waste Water Treatment Facility ("SWWTF"). The SWWTF is located about 13 miles east of the proposed Project site. The SWWTF would require significant upgrades in order to provide the Project's water supply.

The SA/DEIS admits that there is currently no backup water supply for the project.¹ The SA/DEIS assumes that upgrades to the SWWTF, which are necessary to provide water to the proposed Project, would be complete prior to initiation of Project construction. However, the SA/DEIS' assumptions are incorrect.

There is no evidence that the SWWTF would be able to supply the construction or operational water for the proposed Project. The SWWTF does not currently have the infrastructure to supply water for the proposed Project, and it is

¹ SA/DEIS Soil and Water Resources p. C.7-40.
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far from certain that this infrastructure will be available by the time the Project would be licensed by the Energy Commission, or ever. In order to provide the Project's water supply, the SWWTF would need to undergo an upgrade that would require grading, excavation and construction of a California Title 22 treatment plant with tertiary effluent suitable for unrestricted recycled use. The SWWTF would also need to eliminate a water outfall that currently feeds an adjacent wetland before flowing into the New River and the Salton Sea. The SWWTF would divert that water to the proposed Project. Finally, the SWWTF would need to pump the water through a proposed pipeline approximately 13 miles to the proposed Project site.

The SCWD recently considered this proposal to modify the SWWTF and prepared an MND. The MND concluded that the proposed upgrade would not result in a significant impact on the environment. However, the MND completely failed to recognize potentially significant impacts to numerous federal and state endangered and special-status species that depend on the wetlands along the New River and upon the Salton Sea for forage and breeding habitat.

Several state and federal resource agencies and members of the public submitted comments critical of the MND's deficiencies. Specifically, comments were submitted by the Department of Toxic Substances Control, the US Fish and Wildlife Service, the Imperial Irrigation District, the San Diego Chapter of the Sierra Club and CURE, among others. The US Fish and Wildlife Service ("USFWS") commented:

Adequate information has not been provided for us to conclude that the proposed project would not result in adverse impacts, either directly or through habitat modifications, to sensitive species within the proposed project area. Of particular concern is the approximately 2-acre wetland currently supported by treatment plant effluent that is potential habitat for the Yuma clapper rail (*Rallus longirostris yumanensis*), a species listed under the Act as endangered.²

The Imperial Irrigation District ("IID") also raised serious concerns about impacts to the New River and Salton Sea, and compliance with existing mitigation measures developed by IID. The IID comments provide numerous examples of potentially significant impacts that were not considered in the MND. Based on this

² Letter from US Fish and Wildlife Service to Sandra Estigoy (February 2, 2010).
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substantial evidence, the SCWD voted on February 22, 2010 to not approve the MND and instead prepare a full Environmental Impact Report (“EIR”), as required by CEQA.

In turn, the SA/DEIS now fails to meet the requirements of CEQA and the National Environmental Policy Act (“NEPA”), because the SA/DEIS relies on the analysis in the MND in evaluating the impacts associated with the proposed Project’s water supply. The SA/DEIS states:

A Mitigated Negative Declaration has been prepared for the proposed improvements to the SWWTP (Dudek, 2009). This document is incorporated herein by reference.³

The SA/DEIS repeatedly cites to the MND as the basis for the SA/DEIS’ conclusions that the SWWTF upgrades will not result in significant environmental impacts. For example, the SA/DEIS states: “Upgrades to the SWWTP would have no impact on groundwater (Dudek, 2009)” and “[u]pgrades to the SWWTP would have a less than significant hydrology or flooding impact (Dudek, 2009.)”⁴ Notably nowhere in the SA/DEIS is there any consideration of the biological impacts that would result from the modification to the SWWTF.

The Staff Assessment admits that “[s]ince the environmental review of the SWWTF upgrade was completed prior to the completion of the SA/DEIS, staff did not independently review this related project.”⁵ However, the SCWD voted to reject the MND and prepare an EIR, and environmental review is not complete. Thus, the Commission and the BLM cannot rely on a fatally flawed and rejected MND to fulfill the Commission’s requirements under CEQA or the BLM’s requirements under NEPA. Because it attempted to rely on the rejected MND, the SA/DEIS fails to analyze a number of potentially significant environmental impacts associated with the proposed Project’s sole water source for construction and operation.

³ SA/DEIS Soil and Water Resources p. C.7-28.

⁴ SA/DEIS Soil and Water Resources p. C.7-39.

⁵ SA/DEIS Proposed Project p. B.1-20.

II. The CEC Is Required by CEQA and the Warren Alquist Act to Analyze the Entire Project, Including its Water Supply

The Commission is required to fully evaluate the reliability of and significant impacts from a Project's proposed water supply. The Warren Alquist Act requires the Commission to "review the factors related to safety and reliability of the facilities at each of the alternative sites..."⁶ The Act requires the Commission to analyze the information provided by the applicant and supplement it, where necessary, by onsite investigations and other studies.⁷

As lead agency under CEQA, the Commission must study "the whole of an action" which has the potential to result in a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.⁸ The "Project" refers to the activity being approved and which may be subject to several discretionary approvals by governmental agencies. This ensures that "environmental considerations do not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences."⁹ *Because the proposed modifications to the SWWTF result in direct, indirect and cumulative impacts from the proposed Project*, the Commission must fully analyze the modifications' potentially significant impacts and identify mitigation measures required to reduce those impacts to a less than significant level.

In *Tuolumne County Citizens for Responsible Growth v. City of Sonora*,¹⁰ the Court examined a proposed home improvement center and road realignment that had been studied under separate CEQA reviews. The Court reasoned that these two actions were part of single "project" for purposes of CEQA review, even though the City had historically recognized the advantages of realigning the road and both activities could be achieved independently of each other. The Court held that because approval of the home improvement center was *conditioned upon completion of road realignment*, and the *activities were related in time, physical location, and entity undertaking actions*, the two proposals must be studied in one CEQA

⁶ Warren Alquist Act (Pub. Res. Code §25511.)

⁷ *Id.*

⁸ CEQA Guidelines § 15378.

⁹ *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.

¹⁰ *Tuolumne County Citizens for Responsible Growth v. City of Sonora* (2007) 155 Cal.App.4th 1214. 2218-079a

document. “Their independence was brought to an end when the road realignment was added as a condition to the approval of the home improvement center project.”¹¹

Similarly in *County of El Dorado v DOT*,¹² the court reviewed whether a casino and highway expansion should be studied in one CEQA review. The court held: “Where an individual project is a necessary precedent for action on a larger project...with significant environmental effect, an EIR must address itself to the scope of the larger project.”¹³ The court further found that an EIR must include an analysis of the environmental effects of another action if that action (1) is a reasonably foreseeable consequence of the initial project, and (2) will likely change the scope or nature of the initial project or its environmental effects.¹⁴

Here, the SWWTF modifications are a necessary precedent for the Solar Two power plant that is related in time, physical location and underlying entities. Furthermore, the Staff Assessment makes it clear in Soil and Water Proposed Condition of Certification #9 regarding “Assured Water Supply” that documentation is required to show that the SWWTF will be available to reliably meet the Project’s maximum operation requirements.¹⁵ The Commission must independently analyze potentially significant environmental impacts from the SWWTF upgrades as a part of the ‘whole of the action’ under CEQA.

III. BLM Responsibility Under NEPA

The BLM is responsible for reviewing the impacts from the modification of the SWWTF in the DEIS for the proposed Project, because the modification to the SWWTF is an action that is connected to the proposed Project. Under NEPA, actions are connected if they:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

¹¹ *Id.* at 1231.

¹² *County of El Dorado v. Department of Transportation* (2005) 35 Cal.Rptr.3d 533.

¹³ The Court was citing CEQA Guidelines, § 15165.

¹⁴ Citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396.

¹⁵ SA/DEIS p. C.7-63.

- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.¹⁶

Connected actions are those actions that are “closely related” and “should be discussed” in the same NEPA document.¹⁷ A non-Federal action may be a connected action with a BLM proposed action.¹⁸

Here, it is undisputed that the proposed Project cannot be constructed or operated without a reliable source of water and the SWWTF is the only source of water proposed to meet the Project’s water needs. Thus, the SWWTF is so closely connected to the Project that the Project cannot function without the modifications to the SWWTF. As such, the SWWTF modifications must be studied as direct, indirect and cumulative impacts of the Project in the BLM’s Draft EIS.

Additionally, the modifications to the SWWTF will result in the diversion of water that is likely to deleteriously affect the habitat for a number of threatened or endangered species including the Yuma clapper rail, the vermilion flycatcher and the California black rail. Impacts to these species may require an incidental take permit (“ITP”) issued by the USFWS. The issuance of an ITP, in itself, may require a federal agency to prepare an EIS, pursuant to NEPA.¹⁹

The SWWTF water diversion will also directly impact a two-acre wetland that is connected to a larger riparian area along the New River and the Salton Sea. These impacts to wetlands and navigable water bodies are federally regulated by the US Army Corps of Engineers, pursuant to the Clean Water Act.²⁰ The permitting and mitigation of impacts to wetlands and navigable waters of the United States are federal actions that may also independently trigger preparation of an EIS.

¹⁶ CEQ Regulations (40 CFR §1508.25).

¹⁷ 40 CFR §1508.25(a)(1).

¹⁸ BLM NEPA handbook p. 46.

¹⁹ See 42 U.S.C. § 4332(2)(C) (mandating that federal agencies prepare an EIS for “major federal actions” “significantly affecting the quality of the human environment”); see also *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S.Ct. 2373, 2384, 159 L.Ed.2d 137 (2004) (“NEPA requires a federal agency to prepare an environmental impact statement (EIS) as part of any ‘proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.’”); *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir.1996) (holding that if a federal takings permit is a prerequisite for a project with an adverse impact on the environment, the relevant federal agency may be required to prepare an EIS).

²⁰ Seeley Wastewater Reclamation Facility Improvements Mitigated Negative Declaration, p. 4-22. 2218-079a

The BLM NEPA handbook instructs BLM to evaluate whether studying connected actions in a single NEPA document would improve the quality of analysis and efficiency of the NEPA process, and provide a stronger basis for decision-making.²¹ The inclusion of the modification to the SWWTF in the same joint NEPA/CEQA review will undoubtedly result in a more integrated, logical and efficient analysis of the direct, indirect and cumulative impacts of the Project. Moreover, the BLM is legally required under NEPA to study the potentially significant environmental impacts of the SWWTF modifications as a connected action in the DEIS.

IV. An Addendum is Improper to Correct the Deficiencies in the SA/DEIS and a Revised and Recirculated SA/DEIS is Required

Commission and BLM Staff propose issuing an addendum to the SA/DEIS, as is indicated on the CEC website for the Solar Two Siting Proceeding:

The BLM and Energy Commission staff are currently preparing an addendum to the Staff Assessment and Draft Environmental Impact Statement (SA/DEIS) to address comments received on the Mitigated Negative Declaration (MND) prepared by the Seeley County Water District Board of Directors. The analysis in this addendum will be incorporated in the Supplemental SA/Final EIS that will be published following the 90-day comment period on the SA/DEIS.

An addendum is only proper when an EIR, or EIR-equivalent document, has been certified and the lead agency determines that limited changes or additions are necessary.²² An addendum is not proper when significant new information is added to an environmental impact report after notice has been given and consultation has occurred, but prior to certification.²³

Instead, CEQA requires recirculation of an EIR, or EIR equivalent, when significant new information is added to the EIR following public review but before certification.²⁴ The CEQA Guidelines clarify that new information is significant if

²¹ BLM NEPA handbook p. 45.

²² CEQA Guidelines § 15164.

²³ Pub. Res. Code § 21092.1 Addition of New Information; Notice and Consultation.

²⁴ Pub. Res. Code § 21092.1.

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“the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect.”²⁵ 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.²⁶

In this proceeding, the Project Applicant filed information four days ago related to the proposed water supply. CURE is currently reviewing the filing. However, CURE notes that the Applicant stated it is only now undertaking a hydrology study to evaluate impacts on wetlands from the proposed water supply. The Applicant also explained that it will conduct focused surveys of wildlife in the spring and summer of this year in order to evaluate impacts to wildlife. Not until this data collection and analysis occurs can the Energy Commission Staff conduct its analyses of impacts from the proposed water supply. Thus, as currently drafted, the SA/DEIS incomplete.

Commission and BLM staff must withdraw the SA/DEIS, prepare an analysis of the proposed Project’s water supply, and recirculate the revised SA/DEIS for public review and comment. Moreover, an addendum is improper since the SA/DEIS was not certified, and there is already significant new information regarding potentially significant impacts that were not analyzed in the SA/DEIS.

V. Conclusion

The Commission and BLM should withdraw the SA/DEIS because it fails to identify a reliable water supply and fails to adequately describe, analyze and identify required mitigation for significant impacts from the development of the proposed water supply. As the agencies well know, it is the Applicant’s responsibility to submit a reliable water supply and a back-up water supply as part of the proposed Project. Therefore, the SA/DEIS should be withdrawn from public review until the Applicant can ensure a reliable water supply for its proposed Project. Without a reliable water supply, moving forward with this Project is an inefficient use of Commission and BLM resources when these resources are already stretched to the breaking point.

²⁵ CEQA Guidelines § 15088.5.

²⁶ *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 Cal.App.3d 813, 822. 2218-079a

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Once the SA/DEIS is revised to include an analysis of a reliable water supply, the Commission and BLM must recirculate the document for public review and comment.

Sincerely,

/s/

Loulena A. Miles

LAM:bh
Attachment

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DECLARATION OF SERVICE

I, Bonnie Heeley, declare that on March 2, 2010, I served and filed copies of the attached letter re: Revision and Recirculation of Staff Assessment/Draft Environmental Impact Statement – SES Solar Two dated March 2, 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: http://www.energy.ca.gov/sitingcases/solartwo/Solartwo_POS.pdf. The document has been sent (1) electronically, and (2) via US Mail by depositing in the US mail at South San Francisco, 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 South San Francisco, CA, this 2nd day of March, 2010.

_____/s/_____
Bonnie Heeley

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