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September 16, 2009

VIA OVERNIGHT MAIL
CONFIDENTIAL MATERIALS ENCLOSED

Ms. Melissa Jones
Executive Director
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512
(916) 654-4996

Re: Application for Confidential Designation, *Cultural Resources Technical Report*
Attachments, Palen Solar Power Project AFC (Docket No. 09-AFC-7)

Dear Ms. Jones:

Enclosed please find the original and five paper copies, and one electronic copy, of Solar Millennium LLC's and Chevron Energy Solutions' ("Applicants") "Application for Confidential Designation" pursuant to the California Public Records Act ("PRA"), Cal. Gov't Code §§ 6250-6276.48 and 20 C.C.R. § 2505 et seq. The Applicants seek confidential designation for the information contained in certain attachments to the Class III *Cultural Resources Technical Report* for the Palen Solar Power Project, which was submitted as Appendix G to the Palen Solar Power Project Application for Certification ("AFC"), CEC Docket No. 09-AFC-7 (submitted August 24, 2009).

As indicated in the enclosed Application, the Class III Report Attachments are exempt from disclosure under the PRA or any other law pursuant to: (1) California Government Code § 6254.10, as protected archaeological site information and reports; (2) Government Code § 6255, as information whose nondisclosure is in the public interest; (3) Government Code § 6254(k) and the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as information "specifically exempted from disclosure by statute," specifically the Archaeological Resources Protection Act, 16 U.S.C. § 470hh; and (4) Government Code § 6254(e), as "information related to utility systems development."

The Applicants understand that it may take up to thirty days for the CEC to make a decision on the enclosed Application. However, the Applicants request that, while this review is occurring, the information that is the subject of the Application be forwarded to the appropriate technical staff who are reviewing the Applicants' AFC. We think this is a sensible approach and will avoid any unnecessary delay in that review process.

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If the enclosed Application is granted, the Applicants respectfully request that you promptly notify them of any request that you receive seeking disclosure of the Class III Report Attachments, in whole or in part, under the PRA or any other law.

We appreciate your consideration of the enclosed Application.

Sincerely,



Matthew J. Sanders
PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc: Josef Eichhammer, Chief Executive Officer, Solar Millennium LLC
Ralph Hollenbacher, Senior Manager – Technical Services,
Chevron Energy Solutions

1(b). Specify the part(s) of the information or data for which you request confidential designation.

As indicated in the answer to Question 1(a), the Applicants seek confidential designation for the Class III Report Attachments.

If the Applicants' request for confidential designation is granted, the Applicants respectfully request that the CEC promptly notify the Applicants of any request that the CEC receives seeking disclosure of any part of the information in the Attachments under any law.

2. State and justify the length of time the Energy Commission should keep the information or data confidential.

The CEC should keep the Class III Report Attachments confidential for the duration of the CEC's certification or the operating life of the Palen Solar Power Project, whichever is longer.

The information in the Class III Report Attachments applies to the Palen Solar Power Project throughout its operational life. The sensitivity of the Attachments' cultural resources information does not change over time.

3(a). State the provision(s) of the Public Records Act (Gov. Code § 6250 et seq.) or other law that allows the Energy Commission to keep the information or data confidential, and explain why the provision(s) apply to that material.

The Class III Report Attachments are confidential and exempt from disclosure pursuant to the following provisions of law:

- (1) Public Records Act ("PRA") (Cal. Gov't Code) § 6254.10;
- (2) PRA § 6255;
- (3) PRA § 6254(k); the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552; and the federal Archaeological Resources Protection Act, 16 U.S.C. § 470hh; and
- (4) PRA § 6254(e).

PRA § 6254.10: Archaeological Site Information and Reports

Designating the Class III Report Attachments confidential and exempt from disclosure is consistent with Section 6254.10 of the PRA, which provides that:

Nothing in this chapter requires disclosure of records that relate to archaeological site information and reports maintained by, or in the possession of, the Department of Parks and Recreation, the State

Historical Resources Commission, the State Lands Commission, the Native American Heritage Commission, another state agency, or a local agency, including the records that the agency obtains through a consultation process between a California Native American tribe and a state or local agency.

PRA § 6254.10. The Class III Report Attachments contain “archaeological site information and reports.” In addition, because the Attachments are required to be submitted to the CEC as part of the CEC’s certification process, the Attachments are “maintained by” or “in the possession of” the CEC, a state agency. For these reasons, Section 6254.10 exempts the Class III Report Attachments from disclosure. (This is akin to the confidentiality afforded “records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects” under PRA § 6254(r).)

PRA § 6255(a): The Public Interest Favors Nondisclosure

Section 6255(a) of the PRA exempts from disclosure records where the public’s interest in disclosure “clearly outweighs” the public’s interest in disclosure. Thus, an agency may withhold documents where it determines that the public interest clearly favors nondisclosure. *See, e.g., City of San Jose v. Superior Court*, 74 C.A. 4th 1008, 1022-25 (1999) (explaining that § 6255(a) provides an exemption separate from express exemptions such as § 6254(k)); *see also Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1345-46 (1991); *Wilson v. Superior Court*, 51 C.A. 4th 1136, 1141 (1996).

Here, the public interest’s is in the *nondisclosure* of the Class III Report Attachments because the Attachments contain information regarding the locations of sensitive archaeological, paleontological, and/or cultural resources that, if disclosed, could lead to the vandalism, destruction, or theft of those resources. Nondisclosure is key to preventing this harm.

In contrast, the public has little interest in the *disclosure* of the Class III Report Attachments. The CEC’s certification process is designed to provide a full and fair assessment of the potential environmental impacts of the Palen Solar Power Project, and the information that the Applicants have provided and continue to provide through this process, including in the Cultural Resources evaluation and Class III Report (Appendix G in the Project AFC, is sufficient to accomplish that purpose. None of the information in the Class III Report Attachments is necessary for the public to understand and evaluate the Palen Solar Power Project and, in any event, the CEC will have that information available to it during its review.

For these reasons, the public’s interest in nondisclosure of the Class III Report Attachments clearly outweighs any public interest in disclosure.

PRA § 6254(k); FOIA, 5 U.S.C. § 552; and 16 U.S.C. § 470hh:
Federal Law and the Archaeological Resources Protection Act

Section 6254(k) of the PRA exempts from disclosure “[r]ecords, the disclosure of which is exempted or prohibited pursuant to *federal* or state law” (emphasis added).

FOIA, 5 U.S.C. § 552, is a federal law that protects from disclosure records that are “specifically exempted from disclosure by statute.” The California Supreme Court has held that the PRA and FOIA “should receive a parallel construction.” *Am. Civil Liberties Union Found. V. Deukmejian*, 32 Cal. 3d 440, 451 (1982); *see also Braun v. Taft*, 154 C.A. 3d 332, 342 (1984) (using FOIA to construe PRA); *S. Coast Newspapers v. Oceanside*, 160 C.A. 3d 261, 267 (1984) (same).

The federal Archaeological Resources Protection Act, 16 U.S.C. § 470hh, establishes a clear, national legal policy that archaeological, paleontological, and cultural resource information must be kept confidential in order to preserve those resources. Specifically, the Act provides that

[i]nformation concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under this chapter or under any other provision of Federal law may not be made available to the public under subchapter II of chapter 5 of Title 5 or under any other provision of law unless the Federal land manager concerned determines that such disclosure would (1) further the purposes of this chapter or the Act of June 27, 1960 (16 U.S.C. 469-469c), and (2) not create a risk of harm to such resources or to the site at which such resources are located.

16 U.S.C. § 470hh. Because removal of the resources identified and discussed in the Class III Report Attachments would require a permit under federal law, the Attachments “may not be made available to the public” under federal law absent special findings by, in this case, the U.S. Bureau of Land Management (“BLM”). BLM has not made any such findings for the resources in the Attachments.

For these reasons, the Class III Report Attachments must be kept confidential under the Archaeological Resources Protection Act, FOIA, and PRA Section 6254(k).

PRA § 6254(e): Information Relating to Utility Systems Development

Section 6254(e) exempts from disclosure under the PRA “[g]eological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.”

The Class III Report Attachments concern cultural resources that may be affected by, and are in the vicinity of, the Palen Solar Power Project, a proposed utility-scale solar energy generation facility. The Attachments therefore fall within the “information relating to utility systems development” protected under PRA Section 6254(e).

- 3(b). Discuss the public interest in nondisclosure of the material submitted for a confidential designation. If the material contains trade secrets or its disclosure would otherwise cause loss of a competitive advantage, please state how it would be lost, the value of the information to the applicant and the ease or difficulty with which the information could be legitimately acquired or duplicated by others.**

As discussed above in response to Question 3(a), the public has an acute interest in the nondisclosure of the Class III Report Attachments. The Attachments contain information identifying the nature and location of sensitive cultural resources that, if disclosed, could lead to the vandalism, destruction, or theft of those resources. Nondisclosure of the Attachments is key to preventing this harm.

If the CEC does not grant this application, the Class III Report Attachments presumably will be posted on the CEC’s web site with other Project-related submissions and will be searchable via search engines and Adobe Acrobat. In addition, presumably the Attachments would be available through a PRA request. There would be no difficulty for any member of the public to obtain the confidential information in the Attachments. Moreover, it would not matter if there were a delay in the CEC’s publication of the Attachments, since the sensitivity of the information in the Attachments does not diminish over time. *See* response to Question 2, *supra*.

- 4. State whether the information or data can be disclosed if it is aggregated with other information or masked to conceal certain portions (including but not limited to the identity of the applicant). State the degree of aggregation or masking required. If the data cannot be disclosed even if aggregated or masked, explain why.**

Non-confidential cultural resources information in an aggregated form already is included in the Palen Solar Power Project AFC. Further aggregation of the information in the Class III Report Attachments is neither possible nor helpful.

Masking the information contained in the Attachments would render the information useless, hindering the CEC’s and CEC staff’s evaluation of the Palen Solar Power Project and adding nothing to the public’s evaluation of the Project. The aggregated information included in the Project AFC can serve as a generalized basis for the CEC’s, CEC staff’s, and public’s analysis of the Project without disclosing confidential information about sensitive cultural resources.

Because the Applicants have disclosed aggregated cultural resource information in the Project AFC, they have done everything possible to limit the amount of information for which they seek confidential designation.

5. **State how the material is kept confidential by the applicant and whether it has even been disclosed to a person other than an employee of the applicant. If it has, explain the circumstances under which disclosure occurred.**

The Applicants have taken all reasonable efforts to keep the Class III Report Attachments confidential. The Applicants have not disclosed the Attachments in whole or in part to anyone other than their employees, contractors, and consultants who are working on the Palen Solar Power Project, all of whom are subject to confidentiality agreements. The Applicants have marked, and will continue to mark, the Attachments "CONFIDENTIAL," and store them separately from other Project files. The Applicants will make the Attachments available on a "need-to-know" basis as determined by the Applicants or their consultants, attorneys, or contractors, and only pursuant to a confidentiality agreement.

I certify under penalty of perjury that the information contained in this application for confidential designation is true, correct, and complete to the best of my knowledge, and that I am authorized to make the application and certification on behalf of the Applicant.

Dated: 9/16/09
Signed: J. Eichhammer
Name: Josef Eichhammer
Title: Chief Executive Officer
Representing: Solar Millennium LLC

Dated: 9/15/09
Signed: Robert Redlinger
Name: FOR Ralph Hollenbacher
Title: Senior Manager, Technical Services
Representing: Chevron Energy Solutions

ATTACHMENTS

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| Attachment 2 | Records and Literature Search |
| Attachment 3 | Native American Historical Contact Program |
| Attachment 4 | Project Maps |
| Attachment 5 | DPR Forms |
| Attachment 6 | Historic Architectural Field Survey Report |