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May 4, 2010

California Energy Commission
Attn Docket No. 09-AFC-8
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: Genesis Solar Energy Project; 09-AFC-8

Dear Docket Clerk:

Enclosed are an original and one copy of **California Unions for Reliable Energy Status Report Number 4 for the Genesis Solar Energy Project**. Please docket the original, conform the copy and return the copy in the envelope provided.

Thank you for your assistance.

Sincerely,

/s/

Carol N. Horton

REK:cnh
Enc.

2364-054d

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of: The Application for Certification for the GENESIS SOLAR ENERGY PROJECT	Docket No. 09-AFC-8

CALIFORNIA UNIONS FOR RELIABLE ENERGY STATUS REPORT NUMBER 4

May 4, 2010

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Attorneys for the CALIFORNIA UNIONS FOR RELIABLE ENERGY

California Unions for Reliable Energy ("CURE") submits this fourth status report pursuant to the Committee's December 22, 2009 Scheduling Order.

CURE has actively participated in the proceeding for the Genesis Solar Energy Project ("Project") since it was granted intervenor status on December 15, 2009. CURE has submitted three sets of data requests, submitted comments on the Mojave Desert Air Quality Management District's Preliminary Determination of Compliance, and participated in all status conferences and workshops for the Project. In addition, the Bureau of Land Management granted CURE consulting party status for the National Historic Preservation Act Section 106 consultation process.

The currently proposed schedule for this proceeding, which has not been published but which was discussed at the April 26, 2010 Status Conference, prohibits meaningful review of the Project and prohibits full participation by the public, as required by the Warren-Alquist Act and the California Environmental Quality Act ("CEQA"). CURE strongly urges the Commission to reconsider the schedule for this case as set forth below.

CEQA and the Energy Commission's regulations require that the public and decisionmakers be fully informed of the adverse environmental impacts of a project.[1] Commission Staff must assess the environmental impacts and determine whether mitigation is required, and set forth this analysis in a report written to inform the public and the Commission of the Project's environmental consequences.[2]

[1] 20 Cal. Code Reg. § 1742.5; 14 Cal. Code Regs. §§15002-15003.
[2] 20 Cal. Code Reg. §§ 1744(b), 1742.5(a)-(b).

Despite these requirements, the Staff Assessment/Draft Environmental Impact Statement ("SA/DEIS") fails to inform the public of the Project's impacts in a way that enables the decisionmakers and the public to intelligently weigh the environmental effects of the Project. *The SA/DEIS is admittedly incomplete.*

At the March 18, 2010 and April 26, 2010 status conferences, Staff indicated that the SA/DEIS would need to be revised because it was incomplete in several areas including air quality, biological resources, cultural resources, transmission system engineering, and water and soil resources. Staff is working diligently to complete its analyses for publication of the Revised Staff Assessment ("Revised SA") on June 11, 2010.

The Revised SA will, but does not yet, provide critical information about the Project's environmental setting, analyses of significant impacts, and required mitigation for three of the core resource areas impacted by the Project: soil and water resources; biological resources; and cultural resources. When significant new information is added to an environmental review document prior to certification, CEQA requires the agency to revise, renotice, and recirculate the document for public review and comment.[3] 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.[4] New information is "significant" when its addition

[3] Pub. Resources Code, § 21092.1; 14 Cal. Code Regs., § 15088.5.
[4] *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 Cal.App.3d 813, 822.

deprives the public of a meaningful opportunity to comment on substantial adverse impacts from projects or feasible mitigation measures.[5]

Here, the Revised SA will contain many new analyses and mitigation measures for significant, unresolved issues. For example, the Revised SA will include wholly new mitigation measures for cultural resources, never seen before by the public. In addition, the Revised SA will contain never before disclosed mitigation measures for admittedly significant impacts from the Applicant's proposal to pump groundwater for power plant cooling, including significant impacts to the adjudicated Colorado River. The Revised SA will also recommend measures to reconcile the inconsistency between the Project's proposed use of groundwater for cooling and LORS. As the SA/DEIS stands now, Condition of Certification SOIL&WATER-18, which attempts to reconcile the inconsistency, is meaningless. It states ***in full***:

> SOIL&WATER-18 Pending agreement on the actions needed to bring the project into compliance with the water policy.[6]

It provides no information to the public that would enable any meaningful review of the proposed condition.

The Revised SA will also provide a new analysis, based on an as of yet unprepared report from the Applicant, of potentially significant impacts to the golden eagle, a California fully protected species and federal sensitive species. In addition, the Revised SA will provide a new analysis, based on new survey results

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[5] *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1129-1130.
[6] SA/EIS, p. C.9-110.

from the Applicant, of potentially significant impacts to the desert tortoise. The Revised SA may also include numerous new analyses and/or mitigation measures as a result of forthcoming information from the Applicant regarding impacts to the Mojave fringe-toed lizard, special status plants, and desert tortoise, as discussed at the April 20, 2010 staff assessment workshop.

Further, we already know that the Revised SA will be inadequate to inform the public and decisionmakers of the Project's adverse environmental effects. Surveys for Couch's spadefoot toad and four special status plant species, including Abrams's spurge, lobed ground cherry, glandular ditaxis, and flat-seeded spurge, are currently proposed to take place *after* release of the Revised SA, testimony, and evidentiary hearings.

The environmental setting is the "physical environmental conditions in the vicinity of the Project, as they exist at the time the notice of preparation is published."[7] "The environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant."[8] In order for the Committee to make the findings required for certification of the Project (e.g., compliance with all laws and regulations, and adequate mitigation of impacts), the results of the surveys of existing conditions must be analyzed, and any significant impacts that are identified must be avoided or mitigated, as feasible.

[7] CEQA Guidelines § 15125.
[8] *Id.*

Although the SA/DEIS attempts to analyze the impacts and formulate mitigation measures for Couch's spadefoot toad and special status plants, this analysis may bear little resemblance to the analysis and mitigation that will be required after significant impacts to Couch's spadefoot toad and rare plants are actually identified through an adequate survey effort. Therefore, the Revised SA will not provide an adequate description of the environmental setting, analysis and identification of mitigation for these biological resources. Once the Applicant submits the results of the summer Couch's spadefoot toad surveys and late-summer/early-fall rare plant surveys, and all parties have an opportunity to review this analysis, testimony and evidentiary hearings on impacts to Couch's spadefoot toad and rare plants can proceed. The Commission has recently discovered in this Applicant's other case, the Beacon Solar Energy Project, that it will be required to reopen the evidentiary hearing because the Staff and Applicant failed to provide all of the evidence needed for a legally supportable decision. Any hearing held before the summer surveys in this proceeding will suffer the same fate.

At the April 26, 2010 status conference, CURE explained that substantial and significant new information has not yet been provided to inform the public and the Commission of the Project's environmental consequences, as required by the Commission's regulations.[9] CURE also explained that CEQA requires the agency to recirculate the Revised SA for public review and comment,[10] the purpose of which is to give the public and other agencies an opportunity *to evaluate the new data and*

[9] 20 Cal. Code Reg. § 1742.5
[10] Pub. Resources Code, § 21092.1; 14 Cal. Code Regs., § 15088.5.

the validity of conclusions drawn from it[11] and *a meaningful opportunity to comment* on substantial adverse impacts from projects or feasible mitigation measures.[12] Therefore, CURE requested that the Commission comply with its regulations by recirculating the Revised SA for public review and comment in order to provide CURE, as an intervenor in this proceeding, and the public with an opportunity to review and comment on Staff's analysis. CURE also requested that all parties be given adequate time to submit testimony and rebuttal testimony on the Revised SA. However, CURE's requests were ignored.

Instead, CURE was directed to prepare testimony on the anticipated June 11, 2010 Revised SA by June 17, 2010, only *four working days* after release of the Revised SA. This schedule does not address the public's right to review and comment on the Revised SA, or the Commission's responsibility to provide responses to comments. Also, four days is a patently inadequate amount for time for any party to adequately evaluate new data and the validity of conclusions drawn from it in the Revised SA, prepare testimony, including any necessary exhibits, regarding impacts and mitigation measures, and produce a final document for filing. Further, no rebuttal testimony will be allowed. This schedule completely prohibits meaningful review of significant new information, as required by CEQA and the preparation of testimony.[13] We cannot identify any other time in the history of this Commission where such a patently unreasonable schedule has been

[11] *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 Cal.App.3d 813, 822.
[12] *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1129-1130.
[13] *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 Cal.App.3d at 822.

adopted. Therefore, CURE urges the Commission to reconsider the schedule for this case.

The Commission's reason for such a hasty schedule is the Applicant's purported need to receive a permit in September in order to qualify for funding pursuant to the American Recovery and Reinvestment Act of 2009 ("ARRA"). However, the recently published Program Guidance for the American Recovery and Reinvestment Act of 2009 ("Program Guidance")[14] eliminates the Applicant's need for a permit from the Commission by the end of the year.[15] According to the Program Guidance, "[c]onstruction begins when physical work of a significant nature begins" and "physical work of a significant nature" may be "when more than 5 percent of the total cost of the property has been paid or incurred."[16] The five percent can be spent solely on purchasing equipment without any site disturbance, and thus there is no need for a permit prior to the end of the year. Therefore, there is no reason why the schedule cannot be revised to allow for meaningful public review of the proposed Project and full participation in the Commission's proceeding by all parties and the public.

CURE proposes the following schedule for the Commission's consideration in order for the Commission to comply with its statutory and regulatory responsibilities and the intent of CEQA and the Warren-Alquist Act to ensure

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[14] Payments for Specified Energy Property in Lieu of Tax Credits Under the American Recovery and Reinvestment Act of 2009, Program Guidance, U.S. Treasury Department Office of the Fiscal Assistant Secretary, July 2009/Revised March 2010, available at: http://www.ustreas.gov/recovery/docs/guidance.pdf.
[15] *Id.* at pp. 6-7.
[16] *Id.*

meaningful participation by the public. Note that this schedule does not include the necessary reopening of the evidentiary record to incorporate the results of the summer surveys.

Release of Revised SA	June 11, 2010
Testimony on Revised SA	July 2, 2010
Rebuttal Testimony on Revised SA	July 16, 2010
Prehearing Conference Statements	July 30, 2010
Prehearing Conference	August 13, 2010
Evidentiary Hearings	August 26 and 27, 2010

Dated: May 4, 2010

Respectfully submitted,

/s/

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Attorneys for the CALIFORNIA UNIONS FOR RELIABLE ENERGY

DECLARATION OF SERVICE

I, Carol N. Horton, declare that on May 4, 2010, I served and filed copies of the attached **Status Report Number 4**, dated May 4, 2010. The original document, filed with the Docket Office, 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/genesis_solar.

The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Office via email and U.S. mail.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California on May 4, 2010.

/s/
Carol N. Horton

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