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May 11, 2010

**DOCKET**  
**08-AFC-2**

DATE MAY 11 2010

RECD. MAY 11 2010

California Energy Commission  
Attn: Docket No. 08-AFC-2  
1516 Ninth Street, MS 4  
Sacramento, CA 95814-5512

Re: 08AFC2 Beacon Solar Energy Project

Dear Docket Clerk:

Enclosed are an original and one copy of: Response of California Unions for Reliable Energy to Staff's Motion to Reopen the Record. Please process this document and return a conformed copy in the envelope provided.

Thank you.

Sincerely,

/s/

Tanya A. Gulesserian

TAG:bh  
Enclosures

**STATE OF CALIFORNIA**  
**California Energy Commission**

In the Matter of:

The Application for Certification  
for the BEACON SOLAR ENERGY  
PROJECT

Docket No. 08-AFC-2

**RESPONSE OF**  
**CALIFORNIA UNIONS FOR RELIABLE ENERGY**  
**TO STAFF'S MOTION TO REOPEN THE RECORD**

May 11, 2010

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Attorneys for the CALIFORNIA  
UNIONS FOR RELIABLE ENERGY

Pursuant to section 1716.5 of Title 20 of the California Code of Regulations, California Unions for Reliable Energy (“CURE”) files this response to Staff’s Motion to Reopen the Record, which was filed with Staff’s post-evidentiary hearing reply brief for the Beacon Solar Energy Project (“Project”).

The California Environmental Quality Act (“CEQA”) requires the Commission to analyze and mitigate significant impacts from the whole of the Project. As now proposed by the Applicant, the whole of the Project includes developing a sewer system and wastewater treatment facility expansions and pipelines for recycled water to be used for power plant cooling.

CURE has been advising Staff that it must conduct its own *analysis* of the impacts of the recycled water options *since December 2009* when the Applicant decided to try to use recycled water for some of the power plant’s cooling needs. However, since that time, CURE has been admonished in nearly every public forum that CURE was not permitted to ask any questions about whether environmental review has occurred for these wastewater treatment expansions and upgrades, and told that sufficient information is already in the record in order for the Committee to make the required findings for the Project.

CURE’s advice was ignored until now. After a substantial expenditure of resources by all parties and the Commission, Staff belatedly proposes to reopen the record to include evidence on a few of the very issues CURE has been raising. Staff proposes to conduct an analysis and hold a new evidentiary hearing. If the Committee is inclined to grant this motion, it must only do so in a manner that

follows the legally required process mandated by the Commission's regulations. Otherwise, we will again be faced with still unpatched holes in the record and yet another request to reopen that record. Simply throwing a few more documents into the record is not enough.

The Commission should not fear complying with the law. For two reasons, complying with the law will not jeopardize this Project. First, as we explained in our opening and reply briefs, the Commission's only legal path to approve this Project is to require dry cooling. Staff's and Applicant's last minute attempt to repair the record to salvage the reclaimed water options does not change this obligation. The proposed repair still leaves gaping holes in the record needed to authorize either of the recycled water options. Approving the Project with dry cooling will remain the only legal path for the Commission.

Second, contrary to arguments by the Applicant, the schedule need not be expedited to allow construction by the end of the year. Not only does the Project not have a power purchase agreement or an interconnection agreement (both prerequisites to obtaining financing for the Project), ground disturbance is no longer necessary to qualify for funding under the American Recovery and Reinvestment Act.

In our Response which follows, we first explain, yet again, the Commission's obligations to analyze the whole of the Project, including any facilities that would be used to supply recycled water for power plant cooling. Then, we summarize our history of asking in vain for the analysis that Staff now seems to concede is

necessary, why merely adding a few documents to the record does not satisfy the obligation for the Staff to **analyze** the impacts, why there is no time constraint preventing the required analysis, and what the Committee must do next.

**A. The whole of the project includes wastewater treatment facility projects necessary to serve recycled water to the power plant**

CEQA requires that the Commission analyze and mitigate significant impacts from the whole of the Project. According to the Applicant, the Project now includes either California City’s development of a centralized sewer system and expansion of a wastewater treatment facility or Rosamond’s expansion of its wastewater treatment facility, and a 2.8 mile segment of the California City pipeline, a 17.6-mile segment of the California City and Rosamond pipeline and a 23-mile segment of the Rosamond pipeline.

The definition of “project” is “given a broad interpretation in order to maximize protection of the environment.” (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4<sup>th</sup> 1170, 1180 (internal quotation omitted); see also, *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4<sup>th</sup> 372, 381-83; *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 796-97; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 277-81.) A “project” is “the whole of an action” directly undertaken, supported or authorized by a public agency “which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (Pub. Res. Code § 21065; 14 Cal. Code Regs. § 15378(a).) Under CEQA, “the term ‘project’ refers to the underlying activity and not the governmental

approval process.” (*California Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4<sup>th</sup> 1225, 1241, (quoting *Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1171-72.) (14 Cal. Code Regs. § 15378(c).) A cumulative impacts discussion of necessary actions related to a project does not cure the failure to conduct project-level environmental review. CEQA requires an analysis of direct, indirect, *and* cumulative impacts. (Pub. Res. Code §§ 21083, 21065, 21065.3 (emphasis added).)

The California Supreme Court in *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 390 (“*Laurel Heights I*”) set forth a two-part test that requires an analysis of the environmental impacts of a future expansion or other action if (1) “it is a reasonably foreseeable consequence of the initial project,” and (2) “the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.” In that case, the Court set aside an EIR for failing to analyze the impacts of a reasonably foreseeable second phase of a multi-phased project. The EIR, which analyzed a university plan to move its school to a new building, of which only about one-third was initially available to UCSF, was set aside for failing to analyze the environmental effects of the eventual occupation of the remainder of the building once that space became available.

“[A] proposed project is part of a larger project for CEQA purposes if the proposed project is a crucial functional element of the larger project such that, without it, the larger project could not proceed.” (*Communities for a Better*

*Environment v. City of Richmond*, 2010 WL 1645906 (Cal.App. 1 Dist.) (April 26, 2010) (“*CBE v. Richmond*”), p. 20.) For example, in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713 (“*San Joaquin Raptor*”), “the court concluded the description of a residential development project in an EIR was inadequate because it failed to include expansion of the sewer system, even though the developer recognized sewer expansion would be necessary for the project to proceed.” (*CBE v. Richmond*, p. 20, citing *San Joaquin Raptor*, 27 Cal.App.4th at 729-731.) “Because the construction of additional sewer capacity was a ‘required’ or ‘crucial element[ ]’ without which the proposed development project could not go forward, the EIR for the project had to consider the environmental impacts from such construction.” (*CBE v. Richmond*, p. 20, citing *San Joaquin Raptor*, 27 Cal.App.4th at 731-732.)

In *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214 (“*Tuolumne County*”), “the court held that a proposed Lowe’s home improvement center and a planned realignment of the adjacent Old Wards Ferry Road were improperly segmented as two separate projects in light of the dispositive fact that the road realignment was included by the City of Sonora as a condition of approval for the Lowe’s project.” (*CBE v. Richmond*, p. 20, citing *Tuolumne County*, 155 Cal.App.4th at 1220.) The court held that the road alignment must be analyzed as part of the development project, because “[t]heir independence was brought to an end when the road realignment was added as a

condition to the approval of the home improvement center project.” (*Tuolumne County*, 155 Cal.App.4th at 1231.)

In *CBE v. Richmond*, the court explained that “[t]here is no dispute that CEQA forbids ‘piecemeal’ review of the significant environmental impacts of a project.” (*Id.* at p. 19, citing *Berkeley Keep Jets Over the Bay Com. V. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358 (“*Berkeley Jets*”).) Rather, CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences.” (*Id.* citing *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.) The court explained that the question of which acts constitute the “whole of an action” for purposes of CEQA is “one of law which we review de novo based on the undisputed facts in the record.” (*CBE v. Richmond* at p. 19, citing *Tuolumne County*, 155 Cal.App.4th at 1224.)

In *CBE v. Richmond*, the court applied these principles and the Supreme Court’s two part test and concluded that a hydrogen pipeline to supply excess hydrogen from the refinery to consumers was not part of a refinery project because the two projects “are not interdependent.” (*CBE v. Richmond* at p. 21.) According to the Court,

The Contra Costa [hydrogen] Pipeline Project is not a crucial or functional element of the Chevron Renewal [refinery] Project. The Chevron Renewal Project does not depend on the Contra Costa Pipeline Project in order to proceed, and would be implemented with or without a [hydrogen] pipeline being constructed by Praxair. The scope

of the remainder of the Chevron Renewal Project is not dependent upon, and would not change if the pipeline is, or is not, constructed.”

(*Id.* at 18.) However, the court found that the City analyzed the two projects’ cumulative impacts because the two projects were related. (*Id.* at 17.)

In the FSA for the Beacon Project, Staff did neither. The FSA did not analyze Rosamond’s wastewater treatment plant expansion and upgrade or California City’s development of a sewer system and wastewater treatment plant upgrade as part of the Project or a 2.8-mile segment of the California City pipeline to deliver recycled water as part of the Project. The FSA also did not independently analyze the 17.6 mile pipeline segment and failed to conduct any surveys for protected plant or animal species along the 23 mile segment (as was required for every other project area). Finally, the FSA did not analyze either of the wastewater treatment plant expansions and upgrades as part of the cumulative impact analysis. The FSA is clearly inadequate.

Both Staff and the Applicant suggest that the Commission is not required to analyze impacts from the wastewater treatment projects because an expansion and/or upgrade would have occurred regardless of the Project and will be subject to environmental review. However, the issue is not whether the wastewater treatment projects will ultimately undergo environmental review, but whether environmental review has already occurred, thereby rendering an analysis unnecessary. Here, there is no dispute that environmental review has not yet occurred. Also, the issue is not whether the *wastewater treatment facility* could proceed without the power plant, but whether the *power plant* can proceed

without a wastewater treatment facility. Here, there is no dispute that it cannot, if recycled water is used, as required by Staff's final conditions of approval. (Exh. 337.)

The facts in this proceeding present a similar scenario to those considered in *San Joaquin Raptor* and *Tuolumne County*. Like the residential development and expansion of the sewer system in *San Joaquin Raptor*, a wastewater treatment project is necessary for the power plant, if it is to use recycled water for power plant cooling, as required by the FSA. (*San Joaquin Raptor*, 27 Cal.App.4<sup>th</sup> at 729-731.) There is no dispute that the Project would be dependent upon upgrades to either the Rosamond or California City wastewater treatment facilities, neither of which currently exists, if the Project is required to use recycled water for power plant cooling, as proposed by Staff. Based on evidence provided by Staff and the Applicant, upgrades to one of these facilities are necessary, conditions-precedent for the Project to operate. As Staff and the Applicant readily argue (March 22, 2010 Tr., p. 121-123), Condition of Certification Soil&Water-1 and -18 prohibit operation of the Project without documentation that either California City or Rosamond will provide disinfected tertiary recycled water to meet the Project's operational cooling water requirements. (Exh. 337 and 501.) Because the construction of a wastewater treatment upgrade is a "required" or "crucial element" without which the proposed power plant could not go forward, the FSA had to consider the environmental impacts from such construction. (*San Joaquin Raptor*, 27 Cal.App.4<sup>th</sup> at 731-732.)

Like the home improvement center and road alignment in *Tuolumne County*, the power plant and one of the wastewater treatment plant projects are part of a single “project” for purposes of CEQA review. Like the road alignment, even though Rosamond and California City may have historically recognized the advantages of expanding and upgrading their wastewater treatment facilities and/or developing a centralized sewer system, because the Project cannot proceed without them, the projects must be considered together. (*Tuolumne County, supra*, 155 Cal.App.4<sup>th</sup> at 1227-1228 (rejecting the argument that a CEQA project excludes a planned activity that was not necessitated by the project under consideration or “if the need for that activity was not fully attributable to the project as originally proposed”).) Unlike the home improvement center and road alignment which could be achieved independently of one another, *yet were found to be part of one project*, the power plant could not be achieved independently of a wastewater treatment project capable of providing recycled water to the Project. Finally, like *Tuolumne County*, because approval of the power plant is conditioned upon a signed agreement with a recycled water purveyor to provide disinfected tertiary recycled water to meet the Project’s operational cooling water requirements and this requirement is clearly identified in the FSA, the two actions are part of a single “project” for purposes of CEQA review. (See Exh. 501 (Soil & Water-18).) “Their independence was brought to an end” when an executed Recycled Water Purchase Agreement “was added as a condition to the approval” of the Project. (*Tuolumne County Citizens for Responsible Growth v. City of Sonora*, 155 Cal.App.4<sup>th</sup> at 1231.)

**B. CURE has been advising Staff to conduct an analysis of the whole of the Project since December 2009**

Since at least December 1, 2009, CURE has been advising Staff, the Applicant, the Hearing Officer and the Committee that CEQA and the Commission's regulations require Staff to *analyze* the "whole" of the Project, including the recycled water pipelines and California City's and Rosamond's development of a centralized sewer system and/or wastewater treatment expansions and upgrades that are necessary to serve recycled water to the Project, as required by the FSA. Following the Applicant's November 17, 2009 motion for a new schedule<sup>1</sup> to discuss a "refined water plan" with the parties, CURE specifically urged Staff to submit a proposed schedule for Staff to prepare an environmental analysis of the Project's proposed water source "at a level of detail that would be required" for the parties to participate in evidentiary hearings.<sup>2</sup> Again, in subsequent discussions with Staff and the Applicant regarding the Applicant's proposed stipulation to not discuss dry cooling any further, CURE urged Staff to conduct environmental review of the wastewater treatment projects prior to the parties spending time and resources submitting testimony and preparing for hearings on the Applicant's recent decision to try to use recycled water for some of the power plant's cooling needs. CURE's advice was ignored.

At the prehearing conference, CURE reiterated that neither Staff nor the Applicant analyzed potentially significant impacts from construction and operation

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<sup>1</sup> The Applicant's motion was filed less than two days before the deadline to file rebuttal testimony on dry cooling.

<sup>2</sup> [http://www.energy.ca.gov/sitingcases/beacon/documents/2009-12-01\\_Transcript.pdf](http://www.energy.ca.gov/sitingcases/beacon/documents/2009-12-01_Transcript.pdf), p. 55.

of the wastewater treatment plants.<sup>3</sup> CURE advised the parties that this issue would be subject to cross examination of the Applicant or Staff's witnesses during evidentiary hearings. CURE also explained that

And right now there is no evidence that there is even any *analysis* of these recycled water alternatives. We believe that the Commission will not be able to approve a project without such *analysis* under CEQA; and based on the evidence that is in the record that there are potentially significant impacts.<sup>4</sup>

CURE also warned that “[i]n that case, the Commission would be required to look at other feasible measures” and CURE “would need to present the feasibility of dry cooling.”<sup>5</sup>

At the prehearing conference, CURE explained that in evidentiary hearings CURE would seek “clarification from the project manager so we can make sure the evidence is in the record regarding what is and is not being *analyzed* as part of the project.”<sup>6</sup> The Hearing Officer responded that the wastewater treatment plant projects would not be part of the Energy Commission’s analysis. “We don’t go there.”<sup>7</sup>

At the March 22, 2010 evidentiary hearings, CURE made an effort to clarify the evidentiary record for this proceeding – knowing it was too little too late since Staff refused to conduct any independent *analysis* of the wastewater treatment projects that are required to serve recycled water to the Project. CURE specifically

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<sup>3</sup> [http://www.energy.ca.gov/sitingcases/beacon/documents/2010-03-15\\_Beacon\\_prehearing\\_conf\\_transcript.pdf](http://www.energy.ca.gov/sitingcases/beacon/documents/2010-03-15_Beacon_prehearing_conf_transcript.pdf), p. 27.

<sup>4</sup> Id. (emphasis added).

<sup>5</sup> Id. at pp. 27-28.

<sup>6</sup> Id. at p. 69 (emphasis added).

<sup>7</sup> Id. at 70.

asked Staff's witness from Rosamond, "[h]ave you conducted an environmental review for your upgrades to your wastewater treatment system?"<sup>8</sup> Before receiving an answer, however, the Hearing Officer stated, "this is something that really doesn't have any relevance to our proceeding whether there has been environmental reviews of their upgrades."<sup>9</sup> After CURE explained that "it is relevant to the Commission's environmental review process, since the Commission, as lead agency, needs to analyze the whole of the project and can't piecemeal," CURE was again admonished that "the environmental review isn't relevant..."<sup>10</sup> Thus, CURE was also unable to ask the questions of the witness from California City.

In CURE's opening and reply briefs, we pointed out that the Commission does not have the authority, consistent with the Warren-Alquist Act and the California Constitution, to approve the use of recycled water for power plant cooling in this case. Here, Staff has no independent *analysis* of large portions of the recycled water pipelines, no analysis whatsoever of an almost 3-mile segment of pipeline from California City and no analysis of the wastewater treatment plant upgrades. Since these aspects of the Project are all likely to result in significant short-term and long-term impacts, CURE provided unrebutted testimony that dry cooling is feasible for this Project. Therefore, using recycled water, when dry cooling is feasible, would *not* promote all feasible means of water conservation (Pub. Res. Code § 25008) and would *not* put water resources "to beneficial use to the fullest extent of which they are capable." (California Constitution, Art. X, §2.) Staff

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<sup>8</sup> [http://www.energy.ca.gov/sitingcases/beacon/documents/2010-03-22\\_Revised\\_Transcript.pdf](http://www.energy.ca.gov/sitingcases/beacon/documents/2010-03-22_Revised_Transcript.pdf), p. 142.

<sup>9</sup> Id.

<sup>10</sup> Id. at p. 143.

and the Applicant's cites to the Water Code only show that the Legislature put a high value on recycled water, which is another reason recycled water should not be used when dry cooling is feasible for this Project.

### **C. Staff and the Applicant now agree with CURE**

Staff now apparently agrees with CURE that the record is deficient. In Staff's motion, Staff admits that no entity has ever conducted any *analysis* of the facilities required to provide recycled water to the Project. This is not a case of deferring to another agency, because no agency has *ever* conducted an analysis of the wastewater treatment facilities that would be necessary to serve the Project.

Furthermore, Staff's proposed conditions of certification make recycled water "necessary" for this Project to proceed. Condition Soil&Water-1 states, in part:

The project owner shall use recycled water for all power plant cooling needs. On a temporary basis, groundwater may only be used for cooling purposes while the California City recycled water option...is being developed and until it becomes fully implemented.<sup>11</sup>

Condition Soil&Water-18 states, in part:

The project owner shall provide the CPM two copies of the executed Recycled Water Purchase Agreement (agreement) with the recycled waste water purveyor for the long-term supply (30-35 years) of disinfected tertiary recycled water to the BSEP.<sup>12</sup>

Therefore, according to Staff's proposed conditions, the "whole of the project" uses one of the recycled water options.

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<sup>11</sup> Exh. 337 (also at [http://www.energy.ca.gov/sitingcases/beacon/documents/2010-02-01\\_Supplemental\\_Soil+Water\\_Conditions\\_of\\_Certification.PDF](http://www.energy.ca.gov/sitingcases/beacon/documents/2010-02-01_Supplemental_Soil+Water_Conditions_of_Certification.PDF)).

<sup>12</sup> Exh. 501 (also at [http://www.energy.ca.gov/sitingcases/beacon/documents/2010-02-01\\_Supplemental\\_Soil+Water\\_Conditions\\_of\\_Certification.PDF](http://www.energy.ca.gov/sitingcases/beacon/documents/2010-02-01_Supplemental_Soil+Water_Conditions_of_Certification.PDF)).

Staff and the Applicant now recognize their legal positions and those posited by the Hearing Officer throughout this proceeding were fatally flawed. They now seek to admit evidence of environmental review and potential impacts related to the wastewater treatment facilities. Staff and the Applicant realize that without evidence of environmental review under CEQA, the Commission has two options:

1. Approve the Project with dry cooling, or
2. Deny the Project.

Seeking to patch the gaping hole in the record, Staff and the Applicant now want to admit new evidence into the record. This new evidence consists of a myriad of new documents and declarations, some of which are provided, others of which are expected later. The new information that Staff and the Applicant seek to admit include declarations from representatives of California City and Rosamond, a 1999 initial study for the City's current expansion to 0.5 MGD, a Recycled Water Facilities Plan Final Report, California City's Draft General Plan, various figures, and other documents.

The documents that Staff and the Applicant seek to admit do not patch the hole in the record because none of the documents is *Staff's analysis* of the potential impacts of the recycled water facilities.

**D. CEQA and the Commission's regulations require the *Staff* to conduct an independent *analysis* and present its analysis in a report**

Staff's motion seeks to reopen the record to submit additional evidence of future environmental reviews by other agencies, and, although arguing that no additional analysis is required, requests to submit its "brief *evaluations* of the

upgrades to identify the possible impacts and potential mitigation.”<sup>13</sup> Staff then proposes a filing date for additional testimony regarding recycled water options by May 18, 2010 and a hearing on the additional testimony. Read in its most generous light, Staff finally acknowledges that CURE has been right all along – Staff must analyze the whole of the Project and present its analysis in the report mandated by section 1742.5(b). In other words, Staff apparently seeks to supplement its assessment and hold a hearing as required by the Commission’s regulations.

Supplementing the Staff Assessment is exactly what CURE requested at the status conference and in subsequent discussions in an effort to resolve issues. CURE requested this analysis during the time that the parties had to discuss the Applicant’s revised water plan and before utilizing limited resources on further testimony and hearings in this proceeding.

The Commission’s regulations clearly state that the Applicant “shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility.” (20 Cal. Code Reg. § 1748(d).) Commission Staff must review the application, 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. (20 Cal. Code Reg. §§ 1744(b), 1742.5(a)-(b).) Staff’s analysis must be prepared directly by, or under contract to, the Commission and must reflect the “independent judgment” of the Commission. (Pub. Res. Code §21082.1; 14 Cal. Code Regs. § 15084(e).)

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<sup>13</sup> Staff’s Reply Brief at 9 (emphasis added).

Extra time needed now to conduct that assessment, respond to comments, provide for testimony on the supplemental assessment and evidentiary hearings is solely due to the parties who failed to heed CURE's proposed schedule. CURE agrees that Staff must comply with these requirements. Of course, none of this patching and filling is needed if the Commission were to require dry cooling. For this mitigation measure, the record is complete and undisputed.

In any event, for all the patches, Staff has not addressed the need to complete its review of the proposed pipelines to deliver recycled water to the Project. Staff effectively concedes the issue by not replying to CURE's explanation to the Commission that Staff failed to conduct an independent analysis of 17.6 miles and approximately 3 miles of pipeline. Staff should also take this opportunity to obtain the required information from the Applicant on the recycled water pipelines and to conduct an analysis of all of the facilities needed if the Project were to use recycled water for power plant cooling.

Finally, of course, even if Staff performs all of the missing analysis, it will not fix the fundamental problem – for this Project, only dry cooling complies with the California Constitution, the Warren-Alquist Act, State Board Policies 75-58 and 88-63, and the Commission's 2003 Integrated Energy Policy Report.

**E. The Applicant incorrectly claims that it must start on-site construction on the Project in 2010**

The Applicant claims in its reply brief that to obtain funding under section 1603 of the American Recovery and Reinvestment Act of 2009 ("ARRA"), "Beacon

must start construction on the Project in 2010.”<sup>14</sup> The Applicant argues that the conditions of certification would not allow the disturbance of a small area targeted for work to satisfy ARRA’s start of construction requirements. Thus, the Applicant argues that the Commission should allow plans, such as the Biological Resources Mitigation Implementation and Monitoring Plan (“BRMIMP”), to be “tailored to address just those limited ARRA-related construction activities.” However, the Applicant is not being candid with the Committee.

As a major national corporation with more than \$21 billion in market capitalization,<sup>15</sup> the Applicant is no doubt aware that recently published Program Guidance for ARRA<sup>16</sup> eliminates the Applicant’s need to begin physical on-site construction by the end of the year.<sup>17</sup> Indeed, this new guidance was just discussed at a status conference for this Applicant’s other pending power plant application. 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.”<sup>18</sup> The five percent can be spent solely on *purchasing equipment* without *any* site disturbance, and thus there is no need for last minute changes to conditions for the BRMIMP and other plans to allow construction prior to the end of the year.

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<sup>14</sup> Applicant Reply Brief at 15.

<sup>15</sup> <http://finance.yahoo.com/q/ks?s=FPL+Key+Statistics>, May10, 2010.

<sup>16</sup> <http://www.ustreas.gov/recovery/docs/guidance.pdf>, revised March, 2010.

<sup>17</sup> Id. pp. 6-7.

<sup>18</sup> Id. pp. 6-7.

## **F. Conclusion**

If the Committee is unwilling to go directly to the legally mandated requirement of dry cooling, and wishes to continue Applicant's fantasy of evaporating water in the desert to cool the power plant, Staff must present an analysis of all of the required facilities for obtaining and delivering water in the report mandated by section 1742.5. The schedule must provide time for Staff to conduct this analysis, followed by meaningful public review and comment on that analysis, and then a new evidentiary hearing with testimony by all parties and subsequent briefing.

Dated: May 11, 2010

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

Tanya A. Gulesserian  
Marc D. Joseph  
Adams Broadwell Joseph & Cardozo

Attorneys for CALIFORNIA UNIONS FOR  
RELIABLE ENERGY

STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

In the Matter of:

The Application for Certification for the  
BEACON SOLAR ENERGY PROJECT

Docket No. 08-AFC-2

PROOF OF SERVICE

I, Bonnie Heeley, declare that on May 11, 2010 I served and filed copies of the attached **RESPONSE OF CALIFORNIA UNIONS FOR RELIABLE ENERGY TO STAFF'S MOTION TO REOPEN THE RECORD**. 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/beacon](http://www.energy.ca.gov/sitingcases/beacon). 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 Unit via email and by U.S. Mail with first-class postage thereon, fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred." An original paper copy and one electronic copy, mailed and emailed respectively, was sent to the Docket Office.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on May 11, 2010.

\_\_\_\_\_/s/\_\_\_\_\_  
Bonnie Heeley

CALIFORNIA ENERGY  
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