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March 7, 2003

Michael Krolak
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

Re: Salton Sea Geothermal Power Plant (CEC Docket No. 02-AFC-02)

Dear Mr. Krolak:

We are writing on behalf of the California Unions for Reliable Energy ("CURE") regarding the legally appropriate description of existing water use at the Salton Sea Unit 6 ("SSU6") project site, pursuant to the California Environmental Quality Act ("CEQA"). To date, CE Obsidian Energy LLC ("Applicant") and the Imperial Irrigation District ("IID") have failed to provide the necessary information to accurately determine or verify the baseline water use. Therefore, CURE urges the Commission to request that IID provide the Commission and the public with a copy of the complete set of water delivery data for Vail 4A during the period from 1987 to 2002. Without this information and an accurate description of the existing water demand baseline, it will be impossible for the Commission and the public to accurately measure SSU6's impacts on water resources.

I. Baseline Water Use Under The California Environmental Quality Act

The Commission must evaluate the significance of SSU6's impacts on water resources, pursuant to the CEQA. (Pub. Res. Code §§ 21000 et seq.) To do so, the Commission must accurately describe the existing water use at the SSU6 project site. (CEQA Guidelines §15125(a).) In order to accurately evaluate impacts under CEQA, an environmental review document must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time that environmental review commences. (CEQA Guidelines §15125(a).) This environmental setting will constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. (*Id.*) In assessing the

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impact of a proposed project on the environment, the lead agency should limit its examination to changes in the existing setting in the affected area, as they exist at the time environmental analysis is commenced. (CEQA Guidelines §15126.2(a).)

The courts have made it clear that an accurate description of the baseline is essential for determining whether an impact is significant. “[T]he impacts of the project must be measured against the ‘real conditions on the ground.’” (*Save Our Peninsula Committee v. Monterey Board of Supervisors* (2001) 87 Cal.App.4th 99, 121 [104 Cal.Rptr.2d 326], citing, *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246 [227 Cal.Rptr. 899]; *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354 [182 Cal.Rptr. 317]; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952 [91 Cal.Rptr.2d 66]; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1122 [71 Cal.Rptr.2d 1].) While the absence of information in an environmental impact report (“EIR”) does not per se constitute a prejudicial abuse of discretion, “a prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*Berkeley Keep Jets Over The Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1355 [111 Cal.Rptr.2d 598].)

The importance of having a stable, finite, fixed baseline for purposes of an environmental analysis was recognized decades ago in the case of *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185. More recently, in *Galante Vineyards v. Monterey Peninsula Water Management Dist.*, *supra*, 60 Cal.App.4th at 1122, the court held that “[d]ue to the inadequate description of the environmental setting for the project, a proper analysis of project impacts was impossible.” (*Id.*) The Court held that an EIR for a dam was inadequate as it related to viticulture, because the description of the existing setting made cursory references to viticulture, despite being advised of the importance of viticulture in the area.

The recent case of *County of Amador vs. El Dorado County Water Agency*, *supra*, 76 Cal.App.4th 931, provides a comprehensive explanation of the baseline water condition. In that case, a water agency described the baseline as historic water releases, measured by month-end lake levels. The agency’s description was challenged as inadequate, because it was limited to a recitation of end-of-month lake levels and failed to explain how those lake levels were derived or maintained. The court agreed and found that a mere recitation of end-of-month lake levels does not provide an adequate description of the existing environment. According to the

court, environmental review “must focus on impacts to the existing environment, not hypothetical situations,” and the presentation of baseline information must be sufficiently detailed to make further analysis possible. (*Id.* at 954.) The court found that CEQA requires raw data *and* analysis to provide decision makers with sufficient information to make intelligent decisions. (*Id.* at 955.)

II. The Applicant And IID Have Failed To Accurately Describe The Baseline Water Use At The SSU6 Project Site

To date, the Applicant and IID have failed to provide the necessary information to accurately describe and verify the existing water use at the SSU6 project site. The Application for Certification (“AFC”) assumes that the existing annual average consumptive water demand is about 865 acre-feet per year (“afy”), or 5 afy per acre for 173 acres of agricultural land that will be converted by the SSU6 project. (AFC, p. 5.4-8.) This estimate is not, however, supported by any documentation in the AFC. Thus, additional information is needed to support and verify the existing water use baseline.

On November 21, 2002, CURE requested all information, including IID irrigation water delivery data, that supports the AFC’s suggested existing water demand of 865 afy. (CURE Data Requests, Set One, No. 84.) In response, the Applicant provided a January 28, 2002 memorandum from the Imperial Irrigation District (“IID”). (Responses to CURE Data Requests, Set One, Attachment CDR-84.) The IID memorandum does not, however, accurately describe the existing water use for two reasons.

First, the IID memorandum only provides data for the years 1987 to 1995. CEQA requires a description of the physical environmental conditions in the vicinity of the project, as they exist *at the time that environmental review commences*. (CEQA Guidelines §15125(a).) In this case, environmental review commenced in 2002. Therefore, data must also be provided for the years 1996 to 2002. A complete data set will enable the Commission to determine the appropriate existing baseline.

Second, the IID memorandum excludes “any year of zero water use in the baseline conditions.” (Responses to CURE Data Requests, Set One, Attachment CDR-84.) Excluding zero water use years in the baseline calculations overestimates the baseline consumptive water use and thus underestimates the net increase in water demand due to the Project. CEQA clearly prohibits this manipulation.

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Environmental review “must focus on impacts to the existing environment, not hypothetical situations.” (*County of Amador vs. El Dorado County Water Agency, supra*, 76 Cal.App.4th 931.) Therefore, a complete data set must include all zero water use fields and/or years.

To clarify the CEQA baseline issue, CURE repeated its request for the complete set of water delivery data, including all zero use years, for the years 1987 through 2002. (CURE Data Requests, Set Four, No. 317 (January 31, 2003).) In response, the Applicant did not provide any additional water delivery data. Instead, the Applicant stated that it “relied on the data provided by IID and no additional irrigation data is available to the applicant.” (Responses to CURE Data Requests, Set Fourth, No. 317 (March 7, 2003).)

Anticipating a non-responsive answer and in an effort to proceed as expeditiously as possible, CURE also submitted a California Public Records Act request to IID seeking a copy of the complete set of data for water delivered to Vail 4A, Gates 458 and 460, for each year from 1987 to 2002.¹ However, on February 26, 2003, IID declined to provide the requested information.² IID stated that “utility usage data” is exempt from the Public Records Act disclosure requirements, unless another governmental agency needs the information to perform its official duties. (Gov. Code § 6254.16(b).) Thus, to date, IID has not provided the necessary information to determine the baseline water use at the SSU6 project site.

III. The Commission Must Request A Complete Set Of Water Delivery Data For Vail 4A through 2002.

To adequately perform its statutory duties under CEQA, CURE urges the Commission to request that IID provide a copy of the complete set of water delivery data for Vail 4A for the period from 1987 to 2002. This data is readily available to the Commission and, in fact, “shall be made available upon request...to an officer or employee of another governmental agency when necessary for the performance of its official duties.” (Gov. Code § 6254.16(b).) Pursuant to its statutory duties under CEQA, the Commission must accurately describe the existing water use at the SSU6 project site, as it exists at the time that environmental review commences. (CEQA Guidelines §15125(a).) Only by obtaining this complete set of data will the

¹ Letter from Andrew Levine to Susie Carrillo and Carrie Downey, Re: Vail 4A Water Delivery Data, January 8, 2003.

² Andrew Levine personal communication with Carrie Downey, February 26, 2003.

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Commission be able to accurately describe the existing water demand baseline and hence, comply with its statutory responsibilities. To date, there is no evidence to support the Applicant's estimate of the existing water use at the SSU6 project site.

In sum, without an accurate evaluation of the water use baseline, it will be impossible for the decisionmakers and the public to determine whether the proposed SSU6 project will have a significant impact on water resources. Thus, the Commission must obtain the necessary information, which is readily available from IID.

Thank you for your attention to this matter.

Sincerely,

Tanya A. Gulesserian

TAG:bh

cc: Electronic Proof of Service List 02-AFC-02