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April 22, 2015

VIA FAX AND HAND DELIVERY

Chair Elizabeth Rider & Planning Commission
County Government Center
Covington Chambers
385 N. Arrowhead Avenue, 1st Floor
San Bernardino, CA 92415

VIA FAX

Tom Hudson, Director
San Bernardino County
Land Use Services Department
385 N. Arrowhead Avenue, 1st Floor
San Bernardino, CA 92415-0103
Fax: (909) 387-3223

Laura H. Welch, Clerk of the Board
San Bernardino County
385 N. Arrowhead Avenue, 2nd Floor
San Bernardino, CA 92415-0103
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VIA EMAIL ONLY

Tracy Creason, Senior Planner
Email: Tracy.Creason@lus.sbcounty.gov

Re: **Comments on the Proposed Notice of Exemption and
Conditional Use Permit for the Sunray Energy 2 Solar
Project (APN # 0516-341-14)**

Dear Chair and Planning Commission, Mr. Hudson, Ms. Welch, and Ms. Creason:

We are writing on behalf of **California Unions for Reliable Energy ("CURE")** to urge the Planning Commission to reject County Staff's proposal to exempt from environmental review, pursuant to the California Environmental Quality Act, Sunray Energy 2, LLC's ("Applicant") application for a Conditional Use Permit

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("CUP") and any and all other entitlements for its proposed solar photovoltaic ("PV") generating facility at 35100 Santa Fe Street, Daggett, California (collectively "Project"). Instead, we urge the Planning Commission to direct staff to prepare an Initial Study and either a Mitigated Negative Declaration or Environmental Impact Report for the Project, pursuant to CEQA. The Project requires a Conditional Use Permit ("CUP") to develop a 44 megawatt ("MW") solar PV generation facility in two phases on approximately 333 acres following the demolition and removal of the existing solar thermal facilities, Solar Energy Generating Systems ("SEGS") I and II. County staff recommends the filing of a Notice of Exemption ("NOE"), pursuant to CEQA.

As explained in more detail below, the County's proposal to approve the Project and file an NOE violates State law. First, the County failed to make available all public records relating to the Project in violation of the California Public Records Act and CEQA. Second, the County improperly determined that the Project is exempt from environmental review as a class 2 exemption for replacement or reconstruction of existing structures and facilities. Finally, even if the Project did qualify, the exemption cannot be used for this Project because there is a reasonable possibility that the Project will have a significant effect on the environment due to unusual circumstances. Accordingly, the County may not approve the Project until the County prepares an Initial Study ("IS") that adequately analyzes the Project's potentially significant direct, indirect, and cumulative impacts, and identifies all feasible mitigation measures, where necessary.

We prepared these comments with the assistance from former EPA senior scientist, and water quality and toxic chemical expert, Matthew Hagemann P.G., C.Hg (**Attachment E**). We request that the County address and respond to the comments of Mr. Hagemann separately.

I. STATEMENT OF INTEREST

CURE is a coalition of unions whose members help solve California's energy problems by building, maintaining, and operating renewable energy power plants. Union members support the development of renewable energy, and the critical role it plays in the effort to reduce greenhouse gas emissions, thereby avoiding the worst consequences of global warming. However, poorly designed renewable energy power plants may degrade the environment by causing air pollution, causing noise and visual intrusion, and polluting water and soil. Union members live in and around

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this community and have a direct interest in protecting the public health, groundwater, air and other resources in San Bernardino County.

Moreover, environmental degradation jeopardizes future growth and jobs by causing construction moratoriums, depleting limited air pollutant emissions offsets, threatening biological resources, and imposing other stresses on the environmental carrying capacity of the state. This in turn reduces future employment opportunities for CURE's members. Therefore, CURE has an interest in ensuring that the environmental impacts of such projects are fully analyzed and mitigated pursuant to federal, state, and local laws. CURE also has a direct interest in ensuring a safe workplace for workers during Project construction.

CURE's comments are intended to strengthen the environmental review process and ensure a real choice between viable alternatives that balance renewable energy development with the protection of the environment. Based on these concerns, CURE has a strong interest in ensuring projects comply with CEQA, as well as applicable federal, state, and local regulations. While CURE recognizes the benefits of solar as a renewable energy source, it is also cognizant of the health and safety and environmental risks associated with intensive industrial processes involved in the Project.

II. THE COUNTY'S FAILURE TO PROVIDE TIMELY DOCUMENTS VIOLATED THE CALIFORNIA PUBLIC RECORDS ACT

As an initial matter, the County failed to make available all public records relating to the Project in violation of the California Public Records Act ("CPRA"). Under the CPRA, all California agencies must make public records available to the public. It is also the County's obligation to inform requesting members of the public about what documents the County is relying upon to determine that a project falls within an exemption from environmental review under CEQA. Members of the public cannot fully and meaningfully comment on a project at the County's public hearing without timely access to the materials upon which the County's permitting decision will be based. For this reason, it is incumbent on the County to provide timely access to public records. The County's failure to meet this most basic good-government obligation has been further exacerbated by false information disseminated by the County to the public regarding the location of these public records and methods the public should use to acquire them.

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Here, the County violated the CPRA, which in turn compromised CURE's ability to fully comment on the Project. This situation is all the more inexcusable because CURE, based on past experience, anticipated it may have trouble obtaining timely documents from the County and therefore submitted its first CPRA request on December 10, 2014, four months prior to the April 23, 2015 public hearing on the Project. On January 15, 2015, the County provided three documents responsive to our request: 1) the Agency Notice; 2) the Applicant's application; and 3) the Project's Plot plan. However, absent from the provided documents were the Phase 1 and Phase 2 Environmental Site Assessments.

On April 14, 2015, we sent the County a *Request for Immediate Access* to all public records referring or related to the Project. The County responded by stating that "[a]ll documents associated with the upcoming Planning Commission hearing for the Sunray Energy 2 project are currently in draft form" and will be "posted for public review on our website at <http://cms.sbcounty.gov/lus/Planning/PlanningCommission.aspx>" on April 17, 2015.¹

However, the only documents made available on the County's website were the Agenda for the April 23, 2015 hearing and the County Staff Report for the Project. For that reason, CURE sent a follow-up letter to the County on April 20, 2015 informing Staff of the missing public records and requesting a postponement of the April 23, 2015 hearing on the Project until such time that the public has been provided access and adequate time to review the missing records.² At 4:50 PM on April 21, 2015, the County responded that its failure to provide all public records related to the Project was "not an intentional omission" and that Staff would not be requesting a continuance of the hearing.³ The County informed CURE that, "due to timing, the documents are readily available for *immediate review* at our Hesperia office."⁴ We responded with our intention of arranging a copy service to obtain all public records for the Project the following morning, April 22, 2015.

Remarkably, the County failed to respond to any of our emails or phone calls the morning of April 22, 2015 requesting the exact location of the files in order to direct our copy service. Instead, the County waited until the afternoon to respond

¹ See **Attachment A**, email from Tracy Creason, sent April 14, 2015 at 10:59 AM to Charissa Villanueva in response to the firm's CEQA Immediate access letter.

² See **Attachment B**, follow-up letter from CURE to the County, sent April 20, 2014.

³ *Id.*

⁴ See **Attachment C**, County's response to CURE's follow-up letter, sent April 21, 2014.

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with the location of the files.⁵ By then, our copy service was no longer available. This unnecessary delay prejudiced CURE's ability to review the Project files prior to the 9:00AM public hearing the following day. In sum, the County's failure to provide timely access to public records related to the Project and false information in its notice of public hearing violated State law.

III. THE PROJECT IS NOT EXEMPT FROM ENVIRONMENTAL REVIEW PURSUANT TO CEQA

A. The Project is Not Categorically Exempt as a Replacement or Reconstruction of an Existing Facility

The County improperly determined that the Project is exempt from environmental review under CEQA. CEQA is "an integral part of any public agency's decision making process."⁶ CEQA was enacted to require public agencies and decisionmakers to document and consider the environmental implications of their actions before formal decisions are made.⁷ CEQA requires an agency to conduct adequate environmental review prior to making any discretionary action that may significantly affect the environment unless an exemption applies.⁸

Under CEQA, the Secretary of California's Resources Agency has designated categories of projects that are accepted as having no potential to cause environmental harm.⁹ Because such projects are presumed to pose no danger to the environment, a public agency need not examine them under CEQA. The CEQA Guidelines enumerate thirty-two (32) classes of categorical exemptions.¹⁰ Class 2, the exemption invoked by County Staff, consists of "replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced . . ."¹¹ CEQA's exemptions are to be

⁵ See **Attachment D**, County's response to CURE's repeated request for the location of the Project files, sent at 1:58PM on April 22, 2015.

⁶ Pub. Res. Code, § 21006.

⁷ Pub. Res. Code, §§ 21000, 21001.

⁸ Pub. Res. Code § 21100(a); *see also* CEQA Guidelines § 15004(a).

⁹ Pub. Res. Code § 21084(a).

¹⁰ CEQA Guidelines, §§ 15300-15332.

¹¹ CEQA Guidelines § 15302.

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construed narrowly and are not to be expanded beyond the scope of their plain language.¹²

Here, the Project involves much more than a “replacement or reconstruction of existing structures.”¹³ The Project involves removing two solar thermal and natural gas-fired power plants and constructing a new and different photovoltaic energy generation facility. The existing system uses a technology whereby a heat transfer fluid (“HTF”) is heated up to 850 degrees Fahrenheit through concentrated solar energy focused by parabolic mirrors.¹⁴ The HTF is then run through a heat exchanger to generate steam which turns electric generating turbines. The existing solar thermal facilities also have the capability of running natural gas to supplement the facilities’ solar operation.¹⁵ In 2010, 11,856 of the 34,685 megawatts of electricity delivered to the grid from the SEGS II plant was generated from natural gas.¹⁶ The new plant will have none of the existing features. Instead, the Project proposes installing PV panels mounted on single axis trackers, supported by steel piles. The proposed design also includes inverters and transformers mounted on small concrete pads and distributed across the site. Therefore, the Project is not a “replacement or reconstruction of existing structures.”¹⁷

Accordingly, the County’s reliance on the class 2 exemption was improper and violates CEQA. The County must prepare an IS before any permits may be approved by the Planning Commission.

¹² *Castaic Lake Water Agency v. City of Santa Clarita*, 41 Cal. App. 4th 1257 (1995).

¹³ CEQA Guidelines § 15302.

¹⁴ See Letter from Matt Hagemann to Adam Regele, RE: Comments on the Sunray Energy 2 Solar Project, April 22, 2014 (hereinafter, “Hagemann Comments”), **Attachment E**.

¹⁵ See U.S. Energy Information Administration, Electricity Data Browser for SEGS I, available at: <http://www.eia.gov/electricity/data/browser/#/plant/10437> (last visited April 22, 2015); see also U.S. Energy Information Administration, Electricity Data Browser for SEGS II, available at: <http://www.eia.gov/electricity/data/browser/#/plant/10438> (last visited April 22, 2015).

¹⁶ *Id.*

¹⁷ CEQA Guidelines § 15302.

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B. The Project is Not Categorically Exempt Because There is a Reasonable Possibility that Construction and Operation of the New Power Plant Will Have a Significant Effect on the Environment Due to Unusual Circumstances

A categorical exemption shall not be used for an activity where there is a *reasonable possibility* that the activity will have a significant effect on the environment due to unusual circumstances.¹⁸ The Supreme Court recently established in *Berkeley Hillside Preservation v. City of Berkeley* a two-part test to determine whether a project presents “unusual circumstances” that require CEQA review.¹⁹ First, the determination as to whether there are “unusual circumstances” must be supported by substantial evidence.²⁰ Second, if there are “unusual circumstances,” the Court held that agencies must apply the fair argument standard to determine whether there is a reasonable possibility of a significant effect on the environment due to unusual circumstances.²¹ The fair argument standard creates a “low threshold” for further environmental review and “reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted.”²² Under this standard, a court does not weigh evidence, but only determines whether there is any substantial evidence of a possibility of environmental harm.²³

In this case, both prongs of the *Berkeley Hillside* two-part test are satisfied, as explained in the subsequent sections.

i. The Demolition of SEGS I & SEGS II Facilities Which Utilize HTF and Involved Spills and Fires from the Use of HTF After 30 Years of Operation is an Unusual Circumstance

The Project proposes to demolish two existing solar thermal facilities constructed in the early 1980s, the SEGS I and II facilities, and replace them with a new 44 MW solar PV energy generation facility. The demolition of the SEGS I and

¹⁸ CEQA Guidelines § 15300.2(c) (emphasis added); see also *Azusa Land Reclamation Company Inc. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th 1165 (1997).

¹⁹ See *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal. 4th 1086 (2015).

²⁰ *Id.* at 1114.

²¹ *Id.* at 1115.

²² *Sierra Club v. County of Sonoma*, 6 Cal. App. 4th 1307, 1316-1317 (1992).

²³ *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.*, 9 Cal. App. 4th 644, 647 (1995) (disapproved on other grounds).

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II facilities constitutes an unusual circumstance because the razing of these types of plants is particularly uncommon and involves disposing of significant quantities of highly flammable and hazardous material.²⁴ Unlike the Project, the existing SEGS I and II facilities utilize a technology whereby heat transfer fluid, Therminol, is heated to 850 degrees through concentrated solar energy focused by parabolic mirrors.²⁵ Therminol is an uncommon, highly flammable, and hazardous substance containing benzene (a known carcinogen) that requires disposal in accordance with Method 1311 for the compound D018 benzene.²⁶ Neither the County's Staff Report, nor the Applicant's application for the Project, explain how or where the almost one million gallons of Therminol will be disposed. Accordingly, substantial evidence demonstrates that the demolition of these unique solar thermal facilities constitutes an unusual circumstance.

As explained by former EPA senior scientist, Matt Hagemann, there is a reasonable possibility that the demolition of these two facilities will have a significant impact on the environment.²⁷ Mr. Hagemann states that spills may occur during demolition which may result in the Therminol contamination of the underlying soils.²⁸ Demolition may also disturb soils that may have been contaminated during the two-day long 1999 fire at SEGS.²⁹ Additionally, an incident involving the release of 60 gallons of heat transfer fluid was reported at the SEGS I and II facilities on May 15, 2010 and the San Bernardino County Fire Department was alerted.³⁰ This incident was never mentioned in the Staff Report and no evidence was uncovered indicating if the contaminated soils were cleaned up to a safe level of exposure to workers, the public and the environment and properly disposed of.³¹ The extent of any existing contamination that may remain from the 1999 fire and the 2010 spill are thus unknown because the Phase I and Phase II environmental site assessments were not disclosed to the public. For all these reasons, there is a reasonable possibility that the demolition of these two facilities will have a significant impact on the environment.

²⁴ See Hagemann Letter, p. 6.

²⁵ *Id.* at 1.

²⁶ *Id.*

²⁷ Hagemann Letter, p. 2.

²⁸ *Id.*

²⁹ *Id.*

³⁰ <http://docketpublic.energy.ca.gov/PublicDocuments/Regulatory/Non%20Active%20AFC%27s/09-AFC-5%20Abengoa%20Mojave%20Solar/2010/June/TN%2057264%2006-22-10%20San%20Bernardino%20County%20Fire%20Department%20-%20Response%20to%20Solar%20Thermal%20Power%20Plants.pdf>, p. 2

³¹ Hagemann Letter, p. 2.

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ii. *Valley Fever Endemic to County is an Unusual Circumstance*

The California Department of Public Health has reported, based on data from 2008 to 2012, that San Bernardino County is located in an area of California that has an elevated incidence of Valley Fever.³² The rate of Valley Fever in San Bernardino in 2013 was 2.3 cases per 100,000 people.³³ The SEGS I and II plants were built in 1984 and 1985, respectively, and thus predate the discovery that Valley Fever is endemic to the region. Therefore, environmental review conducted for the SEGS I and II plants did not evaluate public health impacts from exposure to Valley Fever spores at the Project site. The demolition of the SEGS I and II facilities on soils never before evaluated for the presence of Valley Fever spores constitutes an unusual circumstance.

The Staff Report makes no mention of Valley Fever and includes only standard dust mitigation measures which Mr. Hagemann contends are ineffective at reducing the incidence of Project-related Valley Fever.³⁴ Dust abatement measures required by Mojave Desert Air Quality Management District regulations, as briefly described on page 24 of the Staff Report, do not consider suppression methods that would be effective for controlling and minimizing exposure to Valley Fever spores. Mr. Hagemann states that conventional dust control measures that target PM10 and visible dust are not generally effective at controlling Valley Fever.³⁵ Valley Fever spores are 1 to 3 microns in diameter³⁶, and can be far smaller than particles of dust, which measure 2.5 to 100 microns in diameter.³⁷ A particle 50 microns in diameter is considered to be the smallest particle visible to the eye. Consequently, Mr. Hagemann warns that because *Coccidioides ssp.* spores are generally smaller than dust, they have the potential to spread much farther in air than dust, without detection by human eyesight. The spores, whose size is well below what is detectable by human vision, may be present in air that appears clear

³² Hagemann Letter, p. 3; *see also*

<http://www.cdph.ca.gov/HealthInfo/discond/Documents/EnglishValleyFeverBrochure.pdf>

³³ <http://www.cdph.ca.gov/data/statistics/Documents/YearlySummaryReportsofSelectedGeneralCommDiseasesinCA2011-2013.pdf>, p. 28

³⁴ Hagemann Letter, p. 4.

³⁵ *See, e.g.,* Cummings and others, 2010, p. 509; Schneider et al., 1997, p. 908 ("Primary prevention strategies (e.g., dust-control measures) for coccidioidomycosis in endemic areas have limited effectiveness.").

³⁶ <http://www.engr.psu.edu/iec/abe/database/fCocciI.htm>

³⁷ Hagemann Letter, p. 4.

and dust free. In Mr. Hagemann's professional opinion, the Project's demolition, construction, operation and decommissioning has a reasonable possibility of having a significant impact on the public's health from earth moving activities, one of the primary routes of exposure for contracting Valley Fever.

iii. California's Historic Drought is an Unusual Circumstance

Substantial evidence establishes California's historic drought is an unusual circumstance. In fact, California is in the midst of its worst drought in over 1,200 years.³⁸ On January 17, 2014, California's Governor declared the drought to be a State of Emergency.³⁹ According to the latest report from the U.S. Drought Monitor, which is produced in partnership between the National Drought Mitigation Center at the University of Nebraska, Lincoln, the U.S. Department of Agriculture ("USDA"), and the National Oceanic and Atmospheric Administration ("NOAA"), nearly the entire state is experiencing at least a severe drought.⁴⁰ There are five categories listed on the U.S. Drought Monitor, ranging in order of severity from abnormally dry, moderate drought, severe drought, extreme drought and exceptional drought.⁴¹ A significant percent of California is experiencing extreme drought; San Bernardino County is included in that category. To put that number into perspective, zero percent of the state was experiencing extreme drought two years earlier.⁴²

³⁸ <http://www.theguardian.com/environment/climate-consensus-97-per-cent/2015/feb/16/nasa-climate-study-warns-unprecedented-north-american-drought>; see also The National Drought Mitigation Center, U.S. Drought Monitor, National Drought Summary for April 14, 2015; <http://droughtmonitor.unl.edu/Home/Narrative.aspx>

³⁹ State of California, Office of Governor Edmund G. Brown, Governor Brown Declares Drought State of Emergency, January 17, 2014; <http://gov.ca.gov/news.php?id=18368>.

⁴⁰ The National Drought Mitigation Center, U.S. Drought Monitor, April 14, 2015; <http://droughtmonitor.unl.edu/Home/StateDroughtMonitor.aspx?CA>.

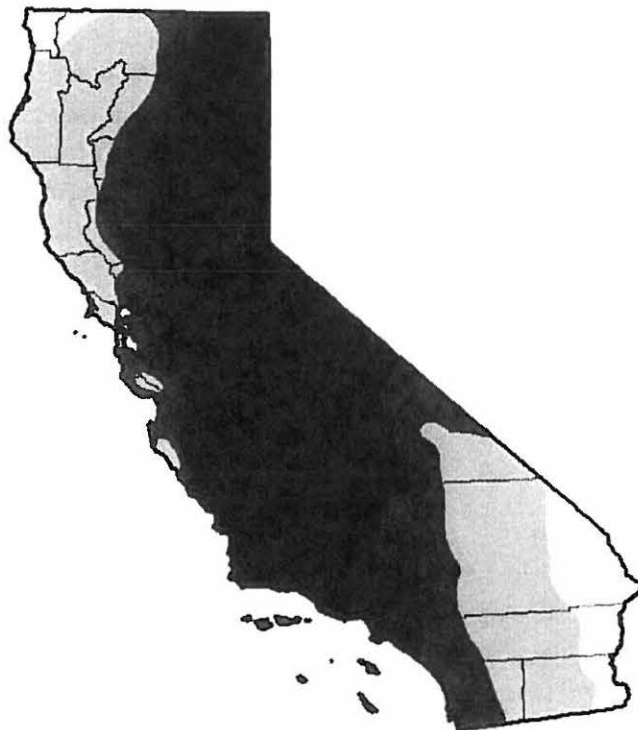
⁴¹ *Id.*

⁴² *Id.*

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U.S. Drought Monitor California

April 14, 2015
(Released Thursday, Apr. 16, 2015)
Valid 7 a.m. EST



Drought Conditions (Percent Area)

	None	D0-D4	D1-D4	D2-D4	D3-D4	D4
Current	0.14	99.86	98.11	93.44	66.60	44.32
Last Week 4/7/2015	0.15	99.85	98.11	93.44	66.60	44.32
3 Months Ago 1/13/2015	0.00	100.00	98.12	94.34	77.52	39.15
Start of Calendar Year 12/01/2014	0.00	100.00	98.12	94.34	77.94	32.21
Start of Water Year 9/01/2014	0.00	100.00	100.00	95.04	81.92	58.41
One Year Ago 4/15/2014	0.00	100.00	99.80	95.21	68.76	23.49

Intensity

D0 Abnormally Dry
D1 Moderate Drought
D2 Severe Drought
D3 Extreme Drought
D4 Exceptional Drought

The Drought Monitor focuses on broad-scale conditions. Local conditions may vary. See accompanying text summary for forecast statements.

Author:
Michael Brewer
NCDC/NOAA



<http://droughtmonitor.unl.edu/>

Figure 1: Drought status in California

From: The National Drought Mitigation Center, U.S. Drought Monitor, California, April 14, 2015; <http://droughtmonitor.unl.edu/Home/StateDroughtMonitor.aspx?CA>

There is a reasonable possibility that California's historic drought will have a significant impact on the environment and public health. As explained by Mr. Hagemann, drought may "increase the occurrence of Valley Fever cases" because the number of organisms competing with *Coccidioides ssp.* is thought to decrease while the fungus remains alive but dormant.⁴³ Mr. Hagemann notes that the Project's demolition, construction, operation and decommissioning will all generate dust which is one of the primary routes of exposure for contracting Valley Fever.

⁴³ Hagemann Letter, p. 5-6.
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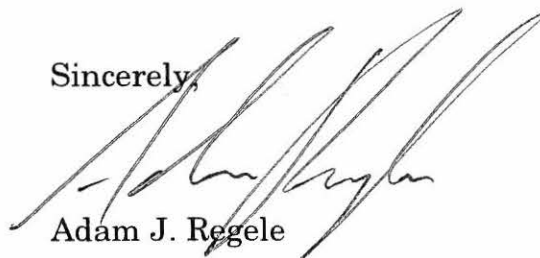
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For all these reasons, there is more than a reasonable possibility that California's historic drought will have a significant impact on the environment and public health.

IV. CONCLUSION

As set forth above, the County violated State law by providing incorrect information to the public and failing to provide timely access to public records related to the Project. As a result, the public was prejudiced in its ability to fully evaluate the Project and the County's proposed exemption prior to the Planning Commission hearing on the Project. Furthermore, the Project is not exempt from environmental review, pursuant to CEQA. Accordingly, the County as the lead agency must conduct an Initial Study pursuant to CEQA Guidelines Section 15063 to determine whether the Project will have a significant effect on the environment and public health. Until then, the County's approval of the Project, including the issuance of an NOE, would violate CEQA.

Sincerely,

A handwritten signature in black ink, appearing to read 'Adam J. Regele', is written over the typed name.

Adam J. Regele

AJR:
Attachments

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