

THE BOARD OF SUPERVISORS OF THE COUNTY OF STANISLAUS  
ACTION AGENDA SUMMARY

DEPT: Chief Executive Office

BOARD AGENDA # \*B-5

Urgent

Routine

AGENDA DATE December 22, 2009

CEO Concurs with Recommendation YES  NO   
(Information Attached)

4/5 Vote Required YES  NO

SUBJECT:

Authorization to Enter Into a Twelve Month Exclusive Right to Negotiate Agreement with Sol Orchard, LLC for a Potential Solar Farm Ground Lease on the Geer Road Landfill

STAFF RECOMMENDATIONS:

Authorize the Chairman of the Board to enter into a 12-month Exclusive Right to Negotiate Agreement with Sol Orchard, LLC for a potential solar farm ground lease on the Geer Road Landfill.

FISCAL IMPACT:

While the potential annual revenue generated from a new ground lease is yet to be negotiated, staff anticipates that an added potential solar farm use could generate lease rates in the range of \$400 - \$1,000 per acre to assist with remediation efforts occurring on the site.

All normal costs associated with the due diligence period, including environmental review and land use approvals, will be borne by the selected candidate.

BOARD ACTION AS FOLLOWS:

No. 2009-863

On motion of Supervisor Chiesa, Seconded by Supervisor Grover  
and approved by the following vote,

Ayes: Supervisors: O'Brien, Chiesa, Grover, Monteith, and Chairman DeMartini

Noes: Supervisors: None

Excused or Absent: Supervisors: None

Abstaining: Supervisor: None

1)  Approved as recommended

2)  Denied

3)  Approved as amended

4)  Other:

MOTION:



ATTEST: CHRISTINE FERRARO TALLMAN, Clerk

File No.

**DISCUSSION:**

On October 20, 2009, the Board of Supervisors approved Addendum No. 1 to the Agreement between the City of Modesto and County of Stanislaus relating to the administration, development and operation of the Geer Road Sanitary Landfill and authorized staff to issue a Request for Qualifications (RFQ) to select the most qualified candidate interested in entering into a long-term ground lease for a potential solar farm operation. The selected candidate would be given an opportunity to enter into an Exclusive Right to Negotiate agreement (Attachment A) with the County for a 12 month period, which would allow the selected candidate to perform their due diligence, including but not limited to, environmental review and clearance, land use approvals, negotiation of a Power Purchase Agreement, financing, construction contracts and the negotiation of a long-term ground lease with the County.

RFQ No. 09-48-CEN was issued on October 30, 2009. Three firms provided submittals in response to the RFQ by the November 30, 2009 deadline. Those firms were:

- JKB Energy
- Sol Orchard, LLC
- White Hat Renewables, LLC

All three firms met individually with a Selection Committee on Friday, December 4, 2009. The Selection Committee was composed of:

- Brad Hawn, Councilmember, City of Modesto
- Matt Machado, Director of Public Works
- Sonya Harrigfeld, Director of Environmental Resources
- Angela Freitas, Deputy Director of Planning
- Stan Risen, Assistant Executive Officer

Scoring of the Candidates was based on their qualifications, understanding of the project, management concept, financial strength and capacity, and other factors. The highest scoring Candidate was Sol Orchard, LLC. Factors considered by the Committee that favored Sol Orchard included an innovative financing approach; a proposed partnership with Solar Power Partners, the third largest solar energy developer in the United States; and the proposed use of ballasted ground mounted solar system that doesn't penetrate the soil at a cost per watt similar to traditional fixed mounted systems.

Under the proposal, Stanislaus County would contract with Sol Orchard, LLC for the ground lease. Sol Orchard, LLC is proposing and has assembled the following participating partners:

- ◆ Solar Power Partners: project financing and development
- ◆ SPG Solar: installation contractor

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- ◆ SunLink: mounting system manufacturer
- ◆ Sperry Capital: alternative financing

A schedule of key milestones and deliverables (Attachment B) has been developed to guide Sol Orchard, LLC and County staff through the 12-month negotiation period. While Sol Orchard, LLC will maintain an exclusive right to negotiate for a 12-month period, all parties will be striving to conclude ground lease negotiations at the earliest date possible.

**POLICY ISSUES:**

The Board of Supervisors is asked to consider whether the negotiation of a long term ground lease with the potential for a solar farm operation is consistent with the priority of efficient government operations and a well planned infrastructure.

**STAFFING ISSUES:**

There are no staffing issues associated with this item. If approved, staff from the Chief Executive Office, County Counsel, Environmental Resources and Planning and Community Development will be involved in the review, evaluation, permitting and contract negotiations for a long term ground lease.

Attachment A

## **Exclusive Right to Negotiate Agreement**

This AGREEMENT is made and entered into this date of December 22, 2009 (“Effective Date”) by and among Sol Orchard, LLC (SOL ORCHARD) and Stanislaus County (COUNTY).

### **RECITALS**

- A. COUNTY jointly owns with the City of Modesto approximately 164 acres on the closed Geer Road Landfill in Stanislaus County depicted in Exhibit A (the “Site”). The County is interested in entering into a long-term ground lease for the Site for potential solar energy production.
- B. On October 27, 2009, the City of Modesto and COUNTY amended their Agreement regarding the administration, development and operation of the Landfill to grant the COUNTY sole authority to solicit proposals and enter into a lease for portions of the Geer Road Landfill site for potential solar farm operations.
- C. On October 30, 2009, COUNTY issued a Request for Qualifications (RFQ NO. 09-48-CEN) and associated Addendum, hereinafter RFQ, requesting submission of a statement of qualifications from firms interested in entering into the long-term ground lease.
- D. Upon completion of the evaluation process, SOL ORCHARD, a private development company specializing in the development of renewable energy power plants, was selected as the candidate to be given the opportunity to enter into an “Exclusive Right to Negotiate” agreement for a twelve (12) month period.
- E. At the December 22, 2009 Board of Supervisors meeting, COUNTY authorized the Chairman of the Board of Supervisors to enter into an “Exclusive Right to Negotiate” agreement with SOL ORCHARD.
- F. SOL ORCHARD would immediately begin due diligence associated with the development of a minimum 10MW solar energy plant (Project).
- G. SOL ORCHARD has prepared for COUNTY a preliminary milestone schedule outlining key deliverables and expected completion dates during the 12-month due diligence period (Exhibit B).

The Parties agree to negotiate exclusively and in good faith to enter into a Ground Lease upon the following terms and conditions:

**1. Agreement to Negotiate Exclusively: Good Faith Negotiations.**

COUNTY agrees that, during the Negotiation Period (as defined in Section 2 below), and provided that SOL ORCHARD is not in default of its obligations under this Agreement, COUNTY shall negotiate exclusively and in good faith with SOL ORCHARD with respect to the Ground Lease to be entered into between COUNTY and SOL ORCHARD concerning the rights and obligations of the Parties respecting the Site. During the negotiation period, COUNTY shall

not solicit or entertain offers or proposals from other parties concerning similar Projects at the Site.

The Parties agree, in consideration of this Agreement, to negotiate in good faith with each other with respect to the proposed Ground Lease, and to cooperate in the preparation of necessary government approvals and environmental review under the California Environmental Quality Act ("CEQA"). The Parties shall provide each other with any available information regarding the Site that may be reasonably requested by the other Party.

## **2. Period of Negotiation.**

The Parties agree to negotiate in good faith for a period of three-hundred and sixty days (360) days from the Effective Date of this Agreement ("Negotiation Period"). If the Parties have not executed the Ground lease by the end of the Negotiation Period, then this Agreement shall automatically terminate, provided, however, that the Parties may mutually agree to extend the term of this Agreement for an additional period of up to six months, subject to approval by the County Board of Supervisors. If the Parties cannot agree upon such an extension, this Agreement shall automatically terminate upon the conclusion of the Negotiation Period.

This Agreement may be terminated at any time upon the mutual consent of both parties. COUNTY further retains the right to terminate this Agreement if SOL ORCHARD has not met to the satisfaction of COUNTY key deliverables as outlined in Exhibit B within ninety (90) days following the expected completion date.

Upon termination of this Agreement, any interest that SOL ORCHARD may have hereunder shall cease.

## **3. Access to Site and Premises Liability.**

In consideration for the County hereby granting to SOL ORCHARD and its employees, agents, or contractors, a limited right of access to enter upon County owned property on reasonable notice for the purpose of conducting work or studies related to the project, SOL ORCHARD agrees that (1) any entry upon County property by SOL ORCHARD, or its employees, agents or contractors, shall be at SOL ORCHARD's sole risk and expense; (2) SOL ORCHARD shall assume responsibility for damages resulting from negligence or improper actions by SOL ORCHARD, or its employees, agents or contractors occurring on the property and arising out of SOL ORCHARD's use of the property for the above stated purposes; (3) SOL ORCHARD agrees to return the property to its condition prior to such entry and to keep the property free of liens and encumbrances, including, but not limited to, mechanic's liens, arising out of the activities and conduct of SOL ORCHARD and its agents, employees and contractors thereon; and (4) without limiting any other indemnity provisions set forth in this Agreement, to the fullest extent permitted by law, SOL ORCHARD agrees to indemnify, defend and hold the County and the property harmless from and against all claims, damages, losses, judgments, liabilities, expenses and other costs, including litigation costs and attorneys' fees, arising out of, resulting from, or in connection with SOL ORCHARD's use of the property resulting in or attributable to personal injury, death, or damage or destruction to tangible or intangible property,

including the loss of use; and (5) SOL ORCHARD agrees not to interfere with the landfill remediation efforts occurring on Site.

**4. Ground Lease Negotiations.**

The Ground Lease shall include, without limitation, all of the obligations and restrictions outlined in RFQ including, but not limited to:

- a. The tenant shall be required to pay all costs and expenses relating to the solar energy production, including all operation and maintenance costs, repair costs, water, utilities, taxes, labor, equipment costs, fencing, no trespassing signs, etc... Property shall be managed in such a way to prevent re-seeding of weeds. Tenant shall be responsible and take steps to prevent soil erosion and keep in good repair all terraces, ditches, inlets and outlet of drains, preserve all established water courses and irrigation systems, and refrain from any practices which will injure such structures and systems.
- b. The tenant shall be a good steward of the land. Tenant will be sensitive to the remediation efforts ongoing on the site, including the protection of the final cover with the geomembrane below it. Tenant will obtain all necessary clearances from all the appropriate regulatory agencies before commencing any operations on the site.
- c. The tenant shall be a good neighbor.
- d. Transfer or assignment of rights and interests in the Ground Lease will be subject to County approval.

**5. Costs incurred during Negotiation Period.**

All costs associated with due diligence during the Negotiation Period including, but not limited to, all normal costs associated with environmental review and land use approvals, will be borne by the selected candidate.

SOL ORCHARD shall bear all costs that may arise associated with making COUNTY's third party consultants and engineers available to SOL ORCHARD. Any studies, plans, or other documents made available to SOL ORCHARD by COUNTY shall be held in confidence, may not be disclosed to third parties without the consent of COUNTY, and shall be returned to COUNTY upon expiration or termination of this Agreement.

SOL ORCHARD shall bear all costs to be incurred as a result of compliance with the California Environmental Quality Act and the National Environmental Protection Act, including, but not limited to, preparation of an environmental impact report, if required, or any other required studies or documents. SOL ORCHARD shall also indemnify COUNTY and bear all costs, expenses, and attorneys fees associated with responding to or defending against claims that may be filed against itself, or COUNTY in connection with defending such environmental studies or documents from challenge by third parties.

6. **Topics for Negotiation.**

The topics for negotiation shall include, among other things: (i) SOL ORCHARD's right to lease the site; (ii) method of calculating and paying Ground Lease rents or equivalent payments; (iii) the terms of the proposed Ground Lease including necessary covenants, conditions and restrictions affecting the Site; (iv) air rights use; (v) availability of the Site to the SOL ORCHARD; (vi) proposed land uses; (vii) Site layout; (viii) aesthetic considerations; (ix) environmental responsibilities; (x) the SOL ORCHARD's responsibility to obtain environmental clearances, licenses and other entitlements, and project financing; and (xi) any other considerations necessary to fully meet the objectives of COUNTY and SOL ORCHARD.

7. **Broker's Fees.**

The Parties represent and warrant to each other that no broker or finder has been engaged or is in anyway connected with the transactions contemplated by this Agreement. In the event any claim for brokers' or finders' fees is made in connection with the transactions contemplated by this Agreement, the Party upon whose statement, representation or agreement the claim is made shall indemnify, save harmless and defend the other Party from and against such claims.

8. **Assignment.**

SOL ORCHARD shall not assign any interest in this Agreement without the express written consent of COUNTY, which consent shall not be unreasonably withheld, and any purported transfer or assignment without prior consent of the COUNTY shall be null and void. As a condition to any proposed assignment of this Agreement, SOL ORCHARD shall be required to make full disclosure to COUNTY of the principals, officers, stockholders, partners, etc., and all other pertinent information concerning the assignee of SOL ORCHARD and its associates. Subject to the immediately preceding sentence, this Agreement is not intended to benefit and shall not run to the benefit of or be enforceable by any other person or entity other than the parties and their permitted successors and assigns.

Nothing contained herein shall prohibit or in any way limit SOL ORCHARD's selection, and/or replacement, of such consultants and other third parties as SOL ORCHARD shall designate from time to time to perform services relating to the Project.

9. **Mutual Rights and Responsibilities.**

COUNTY and SOL ORCHARD each expressly reserve the right to decline to enter into a Ground Lease in the event the Parties fail to negotiate an agreement to the mutual satisfaction of COUNTY and SOL ORCHARD. Except as expressly provided in this Agreement, COUNTY and SOL ORCHARD shall have no obligations or duties hereunder and shall have no liability whatsoever in the event the Parties fail to timely execute a Ground Lease.

By its execution of this Agreement, COUNTY is not committing to or agreeing to undertake: (i) disposition of land to SOL ORCHARD; (ii) any other acts or activities requiring

the subsequent independent exercise of discretion by COUNTY; or (iii) approval of the Project as submitted to the COUNTY for approval. The Parties recognize that one or more of the conditions to SOL ORCHARD's proposal set forth herein may fail to be met as a result of subsequent studies, reviews and proceedings invoking the exercise of discretion by COUNTY or any public agency having regulatory jurisdiction.

SOL ORCHARD shall be responsible for obtaining all approvals required by the COUNTY or any other public agency for the Project in accordance with the COUNTY's standard application process for discretionary land use entitlements, including payment for all of County's costs of processing such approvals. Nothing set forth herein shall be construed as a grant of any such approvals, or as an obligation on the part of the County to grant such approvals.

Any approval by the COUNTY shall be subject to and in full compliance with the California Environmental Quality Act, Sections 21000 et seq. of the Public Resources Code and the CEQA Guidelines set forth in Sections 15000 et seq. of Title 14 of the California Code of Regulations.

During the Term of this Agreement, the Parties agree to make good faith efforts to ensure the timely review and revision of all documents, reports, schedules or plans.

SOL ORCHARD acknowledges and agrees that COUNTY has not agreed to fund, subsidize or otherwise financially contribute in any manner toward the development of the Project.

**10. No Liability.**

SOL ORCHARD shall defend, indemnify and hold harmless the County and its agents, officers and employees from any claim, action, or proceeding by third parties against the County or its agents, officers or employees to attack, set aside, void, or annul the project, ground lease or approvals regarding the project or project condition imposed by the County or any of its agencies, departments, commissions, agents, officers or employees concerning the said project, or to impose personal liability against such agents, officers or employees resulting from their involvement in the project, including any claim for private attorney general fees claimed by or awarded to any party from County. The County will promptly notify SOL ORCHARD of any such claim, action, or proceeding that is or may be subject to this indemnification and will cooperate fully in the defense.

The County may, within its unlimited discretion, participate in the defense of any such claim, action, or proceeding if the County defends the claim, actions, or proceeding in good faith. To the extent that County uses any of its resources responding to such claim, action, or proceeding, SOL ORCHARD will reimburse County its reasonable expenses upon demand. Such resources include, but are not limited to, staff time, court costs, County Counsel's time at their regular rate for external or non-County agencies, and any other direct or indirect cost associated with responding to the claim, action, or proceedings. Managerial staff time shall not be reimbursable.

**11. Entire Agreement: Attorneys' fees.**

This Agreement represents the entire agreement of the Parties with respect to the matters set forth herein. This Agreement may not be amended except in writing signed by all of the Parties hereunder. If any Party brings an action or files a proceeding in connection with the enforcement of its respective rights or as a consequence of any breach by another Party of its obligations hereunder, then the prevailing Party in such action or proceeding shall be entitled to have its reasonable attorney's fees and costs paid by the losing Party.

**12. Notices.**

All notices required or permitted hereunder shall be delivered in person, by overnight courier, or by registered or certified mail, postage prepaid, return receipt requested to such Party at its address shown below, or to any other place designated in writing by such Party.

COUNTY: Stan Risen  
Assistant Executive Officer  
1010 10<sup>th</sup> Street, Suite 6800  
Modesto, CA 95354

SOL ORCHARD: Jeff Brothers  
P.O. Box 222416  
Carmel, CA 93923

Any such notice shall be deemed received upon delivery, if delivered personally, the next business day after delivery by a courier, if delivered by courier, and three (3) days after deposit into the United States Mail, if delivered by registered or certified mail.

**13. CEQA Documentation and Review.**

SOL ORCHARD shall prepare and submit to the COUNTY such plans, specifications, drawings, and other information as specified by the COUNTY as are reasonably necessary for the COUNTY to perform the environmental review process required by CEQA.

SOL ORCHARD acknowledges that the environmental review process under CEQA will involve preparation and consideration of additional information as well as consideration of input from interested organizations and individuals; that approval or disapproval of the Project following completion of the environmental review process is within the sole, complete, unfettered and absolute discretion of the COUNTY without limitation by or consideration of the terms of this Agreement; and that the COUNTY makes no representation regarding the ability or willingness of the COUNTY to approve development of the Project at the conclusion of the environmental review process required by CEQA, or regarding the imposition of any mitigation measures as conditions of any approval that may be imposed on the Project. The parties recognize that if as a result of the environmental review process, the Project is not approved for development, both the COUNTY and SOL ORCHARD each have an independent right to terminate this Agreement. In addition, SOL ORCHARD acknowledges that any required approvals by any other local, state or federal agency may require additional environmental

review, and that any approval by the COUNTY shall not bind any other local, state or federal agency to approve the Project or to impose mitigation measures which may or may not be consistent with the terms of this Agreement.

Nothing in this Agreement or otherwise shall bind or otherwise affect the COUNTY's discretion in (1) requiring the preparation of any CEQA review document in accordance with CEQA and normal COUNTY land use entitlement procedures; (2) approving or rejecting such CEQA review in accordance with CEQA standards; (3) making or declining to make any findings necessary under CEQA to grant the land use approvals and the proposed development of the Project contemplated by this Agreement and SOL ORCHARD's application for the land use approvals; or (4) imposing such mitigation measure(s) as condition(s) of the land use approvals as COUNTY deems appropriate under CEQA as a result of its consideration of the CEQA review documents.

**14. Relationship of Parties.**

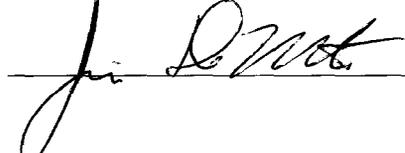
The parties agree that nothing in this Agreement is intended to or shall be deemed or interpreted to create among them the relationship of buyer and seller, or of partners or joint venturers.

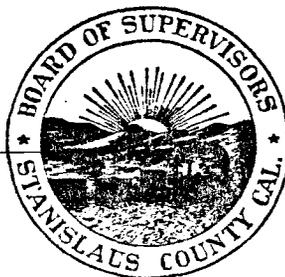
**15. Governing Law and Venue.**

This Agreement shall be deemed to be made under, and shall be governed by and construed in accordance with, the laws of the State of California. Any action brought to enforce the terms or provisions of this Agreement shall have venue in the County of Stanislaus, State of California.

IN WITNESS WHEREOF, COUNTY and SOL ORCHARD have signed this Agreement as of the dates set forth below.

STANISLAUS COUNTY:

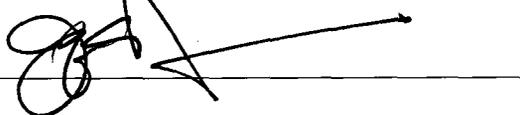
By: 



APPROVED AS TO FORM:

By: 

SOL ORCHARD:

By: 

Tues 12/15/09

**Sol Orchard, LLC**  
**Geer Road Tentative Due Diligence Schedule**

<u>ID</u>	<u>k Name</u>	<u>Duration</u>	<u>Start</u>	<u>Finish</u>
1	<b>PROJECT: Geer Road</b>	<b>220 Days</b>	<b>12/23/2009</b>	<b>11/1/2010</b>
2	Due Diligence			
3	Project Studies			
4	<b>PROJECT AGREEMENT</b>	14 days	12/15/2009	1/6/2010
5	Draft Agreement - ERN	5 days	12/15/2009	12/22/2009
6	Execute Agreement - ERN	9 days	12/23/2009	1/6/2010
7	<b>PROJECT SITE VISIT</b>	1 day	12/23/2009	12/23/2009
8	Conduct Project Site Visit	1 day	12/23/2009	12/23/2009
9	<b>PPA</b>	180 days	12/16/2009	8/30/2010
10	Meeting with utility re project	1 day	12/16/2009	12/16/2009
11	Execution of Interconnect Agreement	60 days	1/11/2010	3/8/2010
12	Finalization of PPA	40 days	3/9/2010	5/6/2010
13	Approval of PPA by the CPUC	60 days	5/10/2010	8/10/2010
14	Negotiate Funding/Financing Arrangements	45 days	5/10/2010	7/14/2010
15	Finalization of Funding/Financing Arrangements	45 days	7/15/2010	9/16/2010
16	<b>JURISDICTIONAL ANALYSIS (From Neg Dec to Use Permit Approval)</b>	22 days	3/15/2010	4/13/2010
17	Introduction	1 day	3/15/2010	3/15/2010
18	Project Description	5 days	3/16/2010	3/22/2010
19	Project Profile	5 days	3/23/2010	3/29/2010
20	Contact Information	1 day	3/30/2010	3/30/2010
21	Building Requirements Analysis	5 days	3/31/2010	4/6/2010
22	Summary of Development Issues	5 days	4/7/2010	4/13/2010
23	<b>GEOTECHNICAL INVESTIGATION</b>	25 days	4/14/2010	5/18/2010
24	Review site documents	20 days	4/14/2010	4/27/2010
25	Determine Ballast Type	5 days	5/12/2010	5/18/2010
26	<b>UTILITY ANALYSIS - WET (Sewer, Water and Storm Constraints)</b>	30 days	4/14/2010	5/25/2010
27	Analyze Sewer Main Line	10 days	4/14/2010	4/27/2010
28	Analyze Water Main Line	10 days	4/28/2010	5/11/2010
29	Analyze Storm Drainage Main Line	10 days	5/12/2010	5/25/2010
30	<b>UTILITY ANALYSIS - DRY (Power, Gas, Methane Monitoring)</b>	20 days	4/29/2010	5/27/2010
31	Analyze Power	10 days	4/29/2010	5/12/2010
32	Analyze Gas and Methane	10 days	5/13/2010	5/26/2010
33	<b>ADJACENT LAND USE IMPACT (Analysis of Neighboring Influences)</b>	20 days	4/14/2010	5/11/2010
34	Boundary and Easement Requirements	20 days	4/14/2010	5/11/2010
35	<b>AERIAL SURVEY</b>	30 days	4/14/2010	5/25/2010
36	Aerial control	10 days	4/14/2010	4/27/2010
37	Aerial survey	10 days	4/28/2010	5/11/2010
38	Aerial Mapping and Field topography	10 days	5/12/2010	5/25/2010
39	<b>SITE PLAN (Prelim. Site Plan and Yield Study)</b>	30 days	5/26/2010	7/6/2010
40	Land Use Concept Alternatives	15 days	5/26/2010	6/15/2010
41	Draft Land Use/Site Plan Concept	15 days	6/16/2010	7/6/2010
42	<b>CONDITIONAL USE PERMIT</b>	83 days	7/7/2010	10/29/2010
43	Application	2 days	7/7/2010	7/8/2010
44	Staff Review and comments	10 days	7/9/2010	7/22/2010
45	Revise	15 days	7/23/2010	8/12/2010
46	Staff Review and comments	10 days	8/13/2010	8/26/2010
47	Public Review	20 days	8/27/2010	9/23/2010
48	Planning Board Hearing	10 days	9/24/2010	10/7/2010
49	Board of Supervisors Hearing	15 days	10/8/2010	10/28/2010
50	<b>PROJECT APPROVAL</b>	1 day	10/29/2010	10/29/2010
51	<b>GROUND LEASE</b>	70 days	6/14/2010	9/17/2010
52	Negotiate Ground Lease	60 days	6/14/2010	9/3/2010
53	Execution of Ground Lease - Upon Final Approval of PPA & Funding	10 days	9/6/2010	9/17/2010
54	<b>CONSTRUCTION START UP</b>	1 day	11/1/2010	11/1/2010
55	Preconstruction Meeting	1 day	11/1/2010	11/1/2010