DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
1455 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94103-1398

REPLY TO
ATTENTION OF

Regulatory Division

DEC 06 2010

SUBJECT: File Number 2010-00021S

DEC 1 1 2010

SunPower Corporation Systems
Attn: Renee Robin
1414 Harbour Way South
Richmond, California 94804

Dear Ms. Robin:

This letter is in regard to your request dated March 26, 2010, concerning Department of the Army authorization for plans to conduct the California Valley Solar Ranch Project, on a 4,365 acre site bisected by State Route 58 and bounded by the California Valley subdivision to the South (approximate center of project: 35.32885 N, -119.90547 W), in San Luis Obispo County, California.

We have determined that there are no waters of the U.S. as defined by Section 404 of the Clean Water Act and no navigable waters of the U.S. as defined by Section 10 of the Rivers and Harbors Act of 1899 within the boundaries of the project site shown in the attached delineation map for your project. Therefore, a Department of the Army authorization will not be required to complete the activity you are proposing.

We have determined that construction of your project will not involve the discharge of fill materials into regulated waters of the United States pursuant to the U.S. Supreme Court decision in Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). The SWANCC identified water bodies are not "waters of the United States" because they are: (1) not navigable waters, (2) not interstate waters, (3) not part of a tributary to item (1) or (2), (4) not wetlands adjacent to any of the foregoing waters, or (5) not an impoundment of any of the foregoing waters. In addition, the interstate commerce nexus to these particular waters is insufficient to establish Clean Water Act jurisdiction. These waters are therefore not subject to regulation by the U.S. Army Corps of Engineers (Corps) under Section 404 of the Clean Water Act.

This approved jurisdictional determination is presumed to be consistent with the U.S. Supreme Court decision of June 19, 2006, concerning *Rapanos v. United States*, 126 S. Ct. 2208 (2006) ("Rapanos"). In the Rapanos decision, the Court determined, in part, that jurisdiction may not be asserted over certain categories of waters that lack a "significant nexus" effect with a traditional navigable waters. Those categories of waters requiring a significant nexus effect determination include: Non-navigable tributaries that are not relatively permanent (do not typically flow year-round or have continuous flow at least seasonally); wetlands adjacent to non-

navigable tributaries that are not relatively permanent; and wetlands adjacent to but not directly abutting a relatively permanent non-navigable tributary.

Enclosed is a map labeled "File #2010-00021S – California Valley Solar Ranch," dated November 22, 2010, showing no Corps jurisdiction within the project site. This map, and the determination that a permit is not required for your activity, are based upon on-site inspections of the project by our staff on March 24, 2010, June 30, 2010, August 23, 2010, and October 6, 2010, and our review of the project documents, including the "California Valley Solar Ranch Project, San Luis Obispo County, California; Preliminary Delineation of Wetlands and Other Waters," dated 29 December 2009, and the packages of further information submitted by H.T. Harvey and Associates. This jurisdictional delineation will expire in five years from the date of this letter. However, if there has been a change in circumstances that affects the extent of Corps jurisdiction, a revision may be completed before that date. A change to your project could also change the determination that no permit is required.

You are advised that the Corps has established an Administrative Appeal Process, as described in 33 C.F.R. Part 331 (65 Fed. Reg. 16,486; March 28, 2000), and outlined in the enclosed flowchart and "Notification of Administrative Appeal Options, Process, and Request for Appeal" form (NAO-RFA). If you do not intend to accept the approved jurisdictional determination, you may elect to provide new information to the District Engineer for reconsideration or submit a completed NAO-RFA form to the Division Engineer to initiate the appeal process. You will relinquish all rights to appeal, unless the Corps receives new information or a completed NAO-RFA form within sixty (60) days of the date of the NAO-RFA.

This determination does not obviate the need to obtain other Federal, State or local approvals required by law, including compliance with the Federal Endangered Species Act (ESA) (16 U.S.C. Section 1531 et seq.). Even though this activity is not prohibited by, or otherwise subject to regulation under Section 404, the take of a threatened or endangered species as defined under the ESA is not authorized. In the absence of a separate authorization from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, both lethal and non-lethal takes of protected species are a violation of the ESA. Similarly, the appropriate State of California, Regional Water Quality Control Board may still regulate your proposed activity because of impacts to a "water of the State". Therefore, you should also contact appropriate Federal, State and local regulatory authorities to determine whether your activity may require other authorizations or permits.

If you have any questions regarding this matter, please call Ian Liffmann of our Regulatory Division by phone at (415) 503-6769 or by email at ian.liffmann@usace.army.mil. Please address all correspondence to the Regulatory Division and refer to the File Number at the head of this letter.

Sincerely,

Jane M. Hicks
Chief, Regulatory Division

Copy furnished:

CA RWQCB, San Luis Obispo, CA
CA SWRCB, Sacramento, CA
H.T. Harvey and Associates; Attn: Pat Boursier