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California Energy Commission DOCKETED 08-AFC-8A
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STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:)	Docket No. 08-AFC-8A
)	
AMENDED APPLICATION FOR)	APPLICANT’S RESPONSE TO SIERRA
CERTIFICATION FOR THE HYDROGEN)	CLUB’S MOTION TO COMPEL
ENERGY CALIFORNIA POWER PLANT)	PRODUCTION OF INFORMATION IN
PROJECT (“HECA”))	RESPONSE TO DATA REQUESTS
)	

Background

On August 2, 2012, Intervenor Sierra Club issued its Data Requests, Set 1. On August 22, 2012, Applicant filed timely objections to certain of the data requests and requested additional time to respond to others. On September 4, 2012, Applicant provided timely responses to the remainder of the data requests consisting of 171 pages of additional information. On October 3, 2012, Applicant provided an additional 40 pages of responsive information related to data requests for which it had requested additional time to respond.

On September 10, 2012, Sierra Club sent a letter to Applicant setting forth its responses to Applicant’s objections and asking that Applicant reconsider its objections. On September 18, 2012, Applicant and Sierra Club participated in a conference call to discuss the data requests to which Applicant had objected. As a result of that conversation, on September 20, 2012, Applicant informed Sierra Club that it would provide responses to an additional 15 data requests. Applicant is in the process of preparing responses to these data requests.

On September 21, 2012, Sierra Club filed its Motion To Compel Production of Information in Response to Data Requests (“Motion”). At issue are eight of the data requests to which Applicant initially objected, and to which Applicant did not subsequently agree to respond. For the reasons set forth below, Applicant continues to object to the data requests that are the subject of the Motion.

Appropriate Scope of Data Requests

Title 20, California Code of Regulations, Section 1716(b) sets forth the authority for parties to issue data requests to the Applicant:

Any party may request from the applicant any information reasonably available to the applicant which is relevant to the notice or application proceedings or reasonably necessary to make any decision on the notice or application. All such requests shall include the reasons for the request.

As set forth above, an appropriate data request must seek information that is “relevant to the notice or application proceedings” or “reasonably necessary to make any decision on the notice or application.” Thus, in order to evaluate the appropriateness of a data request, one must consider the nature and scope of the proceedings and decisions before the Commission. When evaluating an Application for Certification, the Commission is charged with two primary tasks: i) evaluating compliance with applicable laws, ordinances, regulations and standards (“LORS”); and ii) ensuring compliance with the California Environmental Quality Act (“CEQA”). These obligations are set forth in the California Public Resources Code.

Public Resources Code Section 25523 sets forth the Commission’s obligation with respect to LORS compliance and provides in pertinent part:

The commission shall prepare a written decision after the public hearing on an application, which includes all of the following:

(d)(1) Findings regarding the conformity of the proposed site and related facilities with standards adopted by the commission pursuant to Section 25216.3 and subdivision (d) of Section 25402, with public safety standards and the applicable air and water quality standards, and with other applicable local, regional, state and federal standards, ordinances, or laws.

Public Resources Code Section 25519 sets for the Commission’s obligation with respect to CEQA and provides in pertinent part:

(c) The commission shall be the lead agency as provided in Section 21165 for all projects that require certification pursuant to this chapter and for projects that are exempted from such certification pursuant to Section 25541.

Thus, the proceedings and decisions before the Commission are those necessary to determine whether or not the proposed project will comply with applicable LORS and to ensure compliance with CEQA. Therefore, to be permissible under Title 20, Section 1716(b), information sought in a data request must be relevant or reasonably necessary to make a decision about the project’s compliance with applicable LORS or the evaluation of the project pursuant to CEQA. Conversely, data requests that seek information that is not relevant or reasonably

necessary to make a LORS determination or complete the CEQA process are outside the scope of 20 CCR Section 1716(b) and impermissible.

In ruling on motions to compel filed pursuant to 20 CCR Section 1716(g), the Commission has put the following additional gloss on the appropriate scope of data requests:

In evaluating the requests, we consider the following general factors:

The relevance of the information.

Is the information available to the Applicant or from some other source, or has it already been provided in some form?

Is the request for data, analysis, or research?

The burden on the Applicant to provide the data.¹

As explained below, when these factors are applied to the data requests that are the subject of the Motion, it becomes clear that they do not satisfy the requirements of 20 CCR Section 1716(b).

Evaluation of Specific Data Requests

Data Request No. 17(b)

b) Please discuss whether the Applicant has procured a contract with Peabody Energy and discuss the specified duration and costs.

Applicant continues to object to Data Request No. 17(b) on the basis that the requested information is not relevant or reasonably necessary to make a decision about the Project's compliance with applicable LORS or the evaluation of the project pursuant to CEQA. In addition, the data request calls for confidential business information.

Objection Based on Relevancy of Requested Information

Applicant's relevancy objection is premised on the fact that the information requested is unrelated to the analysis of potential environmental impacts associated with the project (i.e., the CEQA analysis). CEQA requires a good faith analysis of potential environmental impacts from a project. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988). It does not require an evaluation of issues outside the scope of the Project. *See Anderson First Coalition, supra*, 130 Cal. App. 4th at 1182. The courts have recognized "... that the Legislature cannot have intended . . . unfettered discretion in the type of information that it [public agency] may require. Section 21160 limits the agency's power to compel information to

¹ Committee Ruling on Intervenor Center for Biological Diversity's Petition to Compel Data Responses, Application for Certification for the Carlsbad Energy Center, Docket No. 07-AFC-6 December 26, 2008.

that ‘data and information which may be necessary to enable the public agency to determine whether the proposed project may have a significant effect on the environment’ *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1234.

Sierra Club initially responds that Applicant’s CEQA based objections are misplaced because the scope of the proceedings is not limited to compliance with CEQA, but also includes compliance with applicable LORS. As discussed above, Applicant agrees that the scope of the proceedings includes both CEQA and compliance with LORS. However, in both the initial data request and in the Motion, Sierra Club argues only that the requested information is necessary to evaluate the Project’s environmental impacts. At no point does the Sierra Club identify any LORS other than CEQA or even suggest that the requested information is necessary to evaluate compliance with LORS other than CEQA. Since Sierra Club has argued only that the requested information is necessary to evaluate CEQA compliance, objections based on the permissible scope of inquiry under CEQA are appropriate and sufficient. Since Sierra Club never suggested that the requested information was necessary to evaluate compliance with LORS other than CEQA, it was not appropriate or necessary for Applicant to object on the basis that the requested information was not relevant to LORS compliance. For the record, Applicant is not aware of any applicable LORS for which the requested information would be relevant.

Turning then to whether or not the requested information is relevant to review of the Project pursuant to CEQA, Sierra Club has failed to identify any connection between the existence or terms of a procurement contract with Peabody and potential environmental impacts of the Project. The preamble to Data Request 17(b) set forth in the Motion cites selected facts to suggest that the Lee Ranch Mine may not be able to supply the needs of the HECA Project. Specifically, the preamble points out that the Lee Ranch Mine shipped about 1.7 million tons of coal in 2010, which is close to the Project’s projected annual demand of 1.6 million tons.² The intended suggestion appears to be that the Lee Ranch Mine may not be able to meet the needs of the Project, and, therefore, the Applicant must produce proof of a contract with Peabody in order to ensure that feedstock meeting the specifications identified in the AFC will be available for the life of the Project. In this manner, Sierra Club has attempted to link the procurement contract to potential environmental impacts of the Project.

The problem with Sierra Club’s argument is that it omits certain other relevant facts which make it clear that the suggested supply shortage is unfounded. The complete sentence from the document cited to in the preamble reads as follows: “Lee Ranch mine shipped 1.7 million tons of coal in 2010, **and owns or controls approximately 145 million tons of recoverable low sulfur coal reserves.**”³ (emphasis added) Furthermore, the preamble fails to acknowledge that in response to Sierra Club Data Request 17(a) Applicant stated as follows: “Peabody Energy will supply the coal from their portfolio of mines, including, but not limited to, Lee Ranch; and more likely, El Segundo.”⁴ The El Segundo Mine, located adjacent to the Lee Ranch Mine, is one of the most productive mines in the Southwest. El Segundo shipped 6.6

² Motion at page 3. (Note: Since the pages of the Motion are not numbered, for purposes of this Response, Applicant is designating page 1 as the first page behind the caption page.)

³ <http://www.peabodyenergy.com/content/278/Publications/Fact-Sheets/Lee-Ranch-Mine>

⁴ Applicant’s Responses to Sierra Club Data Requests: Nos. 1 through 97, August 2012.

million tons of coal in 2010 and owns or controls approximately 182 million tons of coal reserves.⁵ When all of the facts are taken into consideration, any suggestion that Peabody will be unable to supply coal meeting the specifications underlying the analysis in the AFC becomes absurd.

Thus, Applicant has provided all necessary and relevant information regarding the proposed source and composition of coal feedstock necessary for the parties and the Commission to evaluate LORS compliance and to complete a CEQA review. The quantity of available supply from the proposed source should put to rest any concerns about whether or not it is reasonable to assume that coal meeting the identified specifications will, in fact, be available to the Project. The existence of a contract for the procurement of the coal, and the specific terms of that contract, would add nothing to the analysis.

Objection Based on Confidentiality of Requested Information

The requested information is confidential as a trade secret. Under controlling law expressed in *Uribe v. Howie*, 19 Cal. App. 3d 194, 206-207 (1971):

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

To determine whether certain information is a trade secret, one must evaluate whether the matter sought to be protected is information (1) which is valuable because it is unknown to others, and (2) which the owner has attempted to keep secret. (*Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1454 (2002).)

Whether or not Applicant has procured a contract with Peabody, and the terms of any such contract, is information valuable to HECA because it is unknown to others, and it is information that HECA has attempted to keep secret. The dissemination of this information could impact ongoing or future negotiations related to feedstock procurement for the Project. For example, if HECA were engaged in negotiations with other potential suppliers of coal, its leverage in those negotiations would be materially affected if the other party knew whether or not HECA had already secured a contract with Peabody or the terms of such a contract.

In response to Applicant's objections based on the confidential nature of the requested information, Sierra Club indicates that it is willing to enter into a protective order before reviewing the data. Even if there was a mechanism for seeking and obtaining protective orders within the Commission's procedures, and Applicant is not aware that there is, this would not address Applicant's concerns. The requested information is highly sensitive, and Applicant is not willing to provide it to anyone under any circumstances. Furthermore, there is no adequate remedy for Sierra Club's failure to abide by the terms of a protective order.

⁵ <http://www.peabodyenergy.com/content/277/Publications/Fact-Sheets/El-Segundo-Mine>

Data Request No. 17(g)

g) Please identify the rail carrier(s) that would transport coal from the Lee Ranch Mine in New Mexico to California. Please provide any procurement contracts or documents of discussions with the respective rail carrier(s).

Although the Motion suggests that Applicant has failed to respond to this data request in its entirety,⁶ Applicant did respond to the first sentence of this data request identifying the rail carrier as BNSF.⁷ Applicant continues to object to the second sentence of Data Request No. 17(g) on the basis that the requested information is not relevant or reasonably necessary to make a decision about the Project's compliance with applicable LORS or the evaluation of the project pursuant to CEQA. In addition, the second sentence of the data request calls for confidential business information.

Objection Based on Relevancy of Requested Information

Applicant's relevancy objection is premised on the fact that the information requested is unrelated to the analysis of potential environmental impacts associated with the project (i.e., the CEQA analysis). CEQA requires a good faith analysis of potential environmental impacts from a project. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988). It does not require an evaluation of issues outside the scope of the Project. *See Anderson First Coalition, supra*, 130 Cal. App. 4th at 1182. The courts have recognized ". . . that the Legislature cannot have intended . . . unfettered discretion in the type of information that it [public agency] may require. Section 21160 limits the agency's power to compel information to that 'data and information which may be necessary to enable the public agency to determine whether the proposed project may have a significant effect on the environment' *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1234.

Sierra Club initially responds that Applicant's CEQA based objections are misplaced because the scope of the proceedings is not limited to compliance with CEQA but also includes compliance with applicable LORS. As discussed above, Applicant agrees that the scope of the proceedings includes both CEQA and compliance with LORS. However, in both the initial data request and in the Motion, Sierra Club argues only that the requested information is necessary to evaluate the Project's environmental impacts and transportation costs. Sierra Club does not identify any LORS other than CEQA, including any LORS for which the Project's transportation costs would be relevant. Since Sierra Club has not identified any relevant LORS other than CEQA, objections based on the permissible scope of inquiry under CEQA are appropriate and sufficient. For the record, Applicant is not aware of any applicable LORS for which the requested information would be relevant.

In its Motion, Sierra Club states that it "needs this information to assess the potential environmental impacts and costs related to the transportation of coal to the Project."⁸ Sierra

⁶ Motion at page 6.

⁷ Responses to Sierra Club Data Requests: Nos. 1 through 97, August 2012.

⁸ Motion at page 6.

Club fails to provide any explanation as to how or why the procurement contracts are relevant to assessing the environmental impacts of the Project or why it must analyze the costs related to transportation of the coal. Sierra Club goes on to state: “The action of shipping coal by rail to be used as a feedstock for the Project is directly related to the action of operating the Project and all of its potential impacts and costs are relevant.”⁹ The meaning of this sentence is not entirely clear, but again, Sierra Club fails to draw any logical connection between the procurement contracts it seeks and the impacts of the Project or to justify its need to analyze the Project costs. Finally, Sierra Club cites an example of what it is attempting to analyze: “For one example, information about the specific rail carrier is relevant to verify emission factors assumed by the Applicant for the respective rail carrier’s locomotive fleet for quantifying emissions of air pollutants.”¹⁰ Applicant agrees with this statement, which is why it agreed to identify the rail carriers and has done so. Thus, Sierra Club already has the one piece of relevant information that it has identified in this data request.

Objection Based on Confidentiality of Requested Information

The requested information is confidential as a trade secret. Under controlling law expressed in *Uribe v. Howie*, 19 Cal. App. 3d 194, 206-207 (1971):

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

To determine whether certain information is a trade secret, one must evaluate whether the matter sought to be protected is information (1) which is valuable because it is unknown to others, and (2) which the owner has attempted to keep secret. (*Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1454 (2002).)

Procurement contracts and other documents sought pursuant to this data request are information valuable to HECA because it is unknown to others, and it is information that HECA has attempted to keep secret. The dissemination of this information could impact ongoing or future negotiations related to transportation procurement for the Project. For example, if HECA were engaged in negotiations with other potential transporters of coal, its leverage in those negotiations would be materially affected if the other party knew whether or not HECA had already secured a contract for transportation with another carrier, or the terms of such a contract.

In response to Applicant’s objections based on the confidential nature of the requested information, Sierra Club indicates that it is willing to enter into a protective order before reviewing the data. Even if there was a mechanism for seeking and obtaining protective orders within the Commission’s procedures, and Applicant is not aware that there is, this would not address Applicant’s concerns. The requested information is highly sensitive, and Applicant is not willing to provide it to anyone under any circumstances. Furthermore, there is no adequate remedy for Sierra Club’s failure to abide by the terms of a protective order.

⁹ Motion at pages 6-7.

¹⁰ Motion at page 7.

Data Request Nos. 20(b) and 20(c)

b) Please provide an inventory of older high-emitting agricultural equipment in the SJVAPCD and in Kern County (including age, expected remaining useful life, horsepower, location) that could be addressed by the Agreement and estimate their annual emissions.

c) Please identify and discuss any other rules, regulations, and agreements that are expected to reduce emissions from such older high-emitting agricultural equipment. Please specify the time frame in which these rules, regulations, and agreements would take effect and discuss their impact.

Applicant continues to object to Data Request Nos. 20(b) and 20(c) on the basis that the requested information is not relevant or reasonably necessary to make a decision about the Project's compliance with applicable LORS or the evaluation of the project pursuant to CEQA. Furthermore, the data requests seek not merely information but research and analysis which would be burdensome for the Applicant to conduct. Finally, the information upon which such research and analysis might be completed is not in Applicant's possession; it is in the possession of the San Joaquin Valley Air Pollution Control District ("SJVAPCD") and is as available to the Sierra Club from the SJVAPCD as it is to the Applicant.

Objection Based on Relevancy of Requested Information

The Voluntary Air Quality Improvement Program, also sometimes referred to as the Voluntary Emission Reduction Agreement or VERA, was previously negotiated and agreed to between the Applicant and the SJVAPCD. This document is available at the following link: http://www.valleyair.org/Board_meetings/GB/agenda_minutes/Agenda/2010/August/Agenda%20Item_08_Aug_19_2010.pdf The VERA focuses on NOx emissions, and the structure of the agreement was premised on the NOx emission rate of the HECA Project as previously configured with GE technology. The NOx emission rate of the re-configured HECA Project with Mitsubishi Heavy Industries (MHI) technology is considerably lower. As a result, it is necessary to revisit the approach previously taken in the VERA, but Applicant remains committed to entering into a mutually acceptable VERA.

The VERA is a commitment on the part of the Applicant to provide additional air quality improvements in the San Joaquin Valley above and beyond any applicable legal or regulatory requirements. Potential emission reductions associated with the VERA have not been included in any of Applicant's assessment of the HECA Project's air quality impacts or compliance with applicable LORS. Nor was the VERA provided to the CEC staff for consideration in its evaluation of the Project's air quality impacts or compliance with applicable LORS. In other words, the intent is that the HECA Project will demonstrate that emissions are mitigated below a level of significance, and that LORS compliance is achieved, without taking into consideration any additional emission reductions that would be achieved through the VERA. Therefore, implementation of the VERA, and the information sought by Sierra Club related thereto, is not relevant to the Project's compliance with LORS or its evaluation pursuant to CEQA.

Objection Based on Nature of Requested Information

As stated above, the Commission has identified a number of factors that it deems relevant to evaluating whether or not a data request is permissible under 20 CCR Section 1716(b):

In evaluating the requests, we consider the following general factors:

The relevance of the information.

Is the information available to the Applicant or from some other source, or has it already been provided in some form?

Is the request for data, analysis, or research?

The burden on the Applicant to provide the data.¹¹

In denying motions to compel, the Commission has previously stated that “[t]he provision of ‘information’ by the Applicant or any other party includes data and other objective information available to it. The answering party is not, however, required to perform research or analysis on behalf of the requesting party.”¹² Data Requests 20(b) and 20(c) clearly call for the Applicant to conduct research and analysis. Furthermore, the nature of the requested research and analysis – collecting detailed information on what could be hundreds, if not thousands, of pieces of agricultural equipment, is very burdensome. Finally, the information upon which such analysis might be completed is not in the possession of the Applicant; it is in the possession of the SJVAPCD and is as available to Sierra Club as it is to the Applicant. Thus, in addition to failing the relevancy factor, as discussed above, Data Requests 20(b) and 20(c) fail the remaining three factors as well.

Data Request No. 24

Please provide all Excel spreadsheets used to support the emission estimates in the AFC, Appendices E and M, in their native electronic format and unprotected (i.e., showing formulas), if necessary under confidential cover and/or pass-word protected.

Applicant continues to object to Data Request No. 24 on the basis that the requested information includes confidential business information related to emission rates provided by equipment vendors. Applicant is bound by confidentiality agreements not to release the subject information.

¹¹ Committee Ruling on Intervenor Center for Biological Diversity’s Petition to Compel Data Responses, Application for Certification for the Carlsbad Energy Center, Docket No. 07-AFC-6, December 26, 2008.

¹² Id.

Objection Based on Confidentiality of Requested Information

The requested information is confidential as a trade secret. Under controlling law expressed in *Uribe v. Howie*, 19 Cal. App. 3d 194, 206-207 (1971):

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

To determine whether certain information is a trade secret, one must evaluate whether the matter sought to be protected is information (1) which is valuable because it is unknown to others, and (2) which the owner has attempted to keep secret. (*Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1454 (2002).)

The requested information includes data that is a trade secret, not of the Applicant's, but of the Applicant's vendor, Mitsubishi Heavy Industries (MHI). Applicant and its engineering firm, Fluor, are bound by confidentiality provisions in their agreements with MHI not to disclose the requested information. To do so would subject Applicant and Fluor to potentially serious liability for breach of their commitments to MHI.

Sierra Club indicates that it is willing to enter into a protective order before reviewing the data. Even if there was a mechanism for seeking and obtaining protective orders within the Commission's procedures, and Applicant is not aware that there is, this would not address Applicant's concerns. Applicant and Fluor are bound by confidentiality provisions in their agreements with MHI not to disclose the requested information to anyone under any circumstances, including under a protective order.

Finally, the fact that other project applicants may have provided similar information in other proceedings is irrelevant. Those applicants may not have been bound by similar provisions related to confidentiality. Applicant also notes that the other projects identified in the Motion all involved more traditional generating technology -- unlike that proposed for the HECA Project. Emissions data associated with these other technologies may have been less sensitive.

Objection Based on Relevancy of Requested Information

Contrary to Sierra Club's statements in the Motion, the requested information is not necessary to evaluate the HECA Project's compliance with LORS or to evaluate its environmental impacts pursuant to CEQA. Applicant notes that neither the CEC staff, SJVAPCD staff or United States Environmental Protection Agency staff, all of which are in the process of evaluating the Project's LORS compliance and environmental impacts, have requested the information that Sierra Club seeks.

Data Request No. 47(b)

The latter two stated objectives (b and c) for the Project could also be achieved by the combustion of natural gas or the combustion or gasification of biomass or biomass blends with solid fossil feedstocks.

i. Please indicate whether you acknowledge that b) the generation of low-carbon electricity and nitrogen-based products and c) the capture of CO₂ and transporting CO₂ for use in enhanced oil recovery products could also be achieved by a natural gas-fired combined-cycle plant.

ii. Please indicate whether you acknowledge that b) the generation of low-carbon electricity and nitrogen-based products and c) the capture of CO₂ and transporting CO₂ for use in enhanced oil recovery products could also be achieved by combustion or gasification of biomass or biomass blends with solid fossil feedstocks.

Data Request 47(b) essentially posits arguments that some of the HECA Project's objectives could be accomplished with the use of fuel feedstocks other than those proposed by Applicant, and then asks Applicant to concur with those arguments. These are not requests for information and are clearly outside the scope of permissible data requests. Furthermore, the acknowledgements sought, even if permissible in nature, are not relevant or reasonably necessary to make a decision about the Project's compliance with applicable LORS or the evaluation of the project pursuant to CEQA.

Objection Based on Nature of Requested Information

Title 20, California Code of Regulations, Section 1716(b) sets forth the authority for parties to issue data requests to the Applicant:

Any party may request from the applicant any **information** reasonably available to the applicant which is relevant to the notice or application proceedings or reasonably necessary to make any decision on the notice or application. All such requests shall include the reasons for the request. (emphasis added)

Data Request 47(b) does not seek information; rather, it seeks Applicant's "acknowledgement" of certain statements regarding the ability to achieve certain Project objectives utilizing alternative fuels. As such, the request is clearly outside the scope of Section 20 CCR 1716(b) and must be denied on that basis alone. Furthermore, to the extent that the data request includes an implied request to conduct the research and analysis necessary to provide, or decline to provide, the requested acknowledgments, the request is further flawed. In denying motions to compel, the Commission has previously stated that "[t]he provision of "information" by the Applicant or any other party includes data and other objective information available to it. The answering party is not, however, required to perform research or analysis on behalf of the requesting party."¹³ 20 CCR Section 1716(b) does not obligate the Applicant to render expert opinions or to conduct the research and analysis that might be required to render expert opinions.

Objection Based on Relevancy of Requested Information

Even if Data Request 47(b) was not fatally flawed based on the nature of the request, it would be objectionable based on relevancy. This is because even if one were to accept the

¹³ Id.

underlying premises of the requests (i.e., that certain project objectives could be achieved utilizing natural gas, biomass, or biomass blends as fuel), such an acknowledgement would not materially alter evaluation of the Project for LORS compliance or under CEQA. Sierra Club suggests in the Motion that such an acknowledgement would be relevant to the best available control technology (BACT) review and to the analysis of alternatives pursuant to CEQA. Sierra Club is mistaken on both fronts.

BACT Analysis

With respect to Sierra Club's assertion that the Clean Air Act requires analysis of natural gas and biomass as alternative fuels as part of the BACT analysis, Applicant disagrees with Sierra Club's unsupported assertion that "the Project's emissions of criteria pollutants, toxic air contaminants ("TACs"), hazardous air pollutants ("HAPS"), and greenhouse gases could be reduced by using alternative fuels/feedstocks, such as natural gas or biomass."¹⁴ Furthermore, it is well settled that when conducting a BACT analysis permitting authorities are not required to consider alternatives that would require "redefining the design" of the project as proposed by the applicant.¹⁵ U.S. EPA's NSR Manual explains:

Historically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives. For example, applicants proposing to construct a coal fired generator have not been required by EPA as part of the BACT analysis to consider building a natural gas fired electric turbine although the turbine may be inherently less polluting per unit of product (in this case electricity) . . . [note that this discussion pertains to a traditional coal fired boiler, not an IGCC] Thus, a natural gas turbine normally would not be included in the list of control alternatives for a coal fired boiler. NSR Manual at B.13.

U.S. EPA's Environmental Appeals Board ("EAB") and the federal courts have consistently upheld permitting decisions that appropriately apply EPA's policy against requiring permit issuers to consider alternatives that would redesign the source proposed by a permit applicant. *See, e.g., RCEC*, slip op. at 95-100, 15 E.A.D. at __; *In re Prairie State Generating Co.*, 13 E.A.D. 1, 14-28 (EAB 2006), *aff'd sub. nom Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. __, 136 (EAB 1999); *In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 29-30 n.8 (EAB 1994); *In re Haw. Commercial & Sugar Co.*, 4 E.A.D. 95, 99-100 (EAB 1992); *see also In re Old Dominion Elec. Coop.*, 3 E.A.D. 779,793 n.38 (Adm'r 1992). In *Sierra Club*, the Seventh Circuit Court of Appeals upheld the EPA's application of its policy against redefining the source. 499 F.3d at 655 ("[T]o exclude redesign is the kind of judgment by an administrative agency to which a reviewing court should defer.").

¹⁴ Motion at page 13.

¹⁵ Office of Air Quality Planning and Standards, U.S. EPA, New Source Review Workshop Manual 1 (draft October 1990) ("NSR Manual") at B.13; *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 136 (EAB 1999).

Many of the decisions cited above specifically addressed the issue of whether the BACT analysis should include alternative fuel designs for electric power generating stations. See *Prairie State*, 13 E.A.D. at 25 (“It has . . . been long-standing EPA policy that certain fuel choices are integral to the electric power generating station’s basic design.” (citing NSR Manual at B.13)); *SEI Birchwood*, 5 E.A.D. at 29-30 n.8 (switching to natural gas would redefine coal-fired electric generating plant); *Haw. Commercial*, 4 E.A.D. at 99-100 (switching from coal to oil-fired combustion turbine not required); *Old Dominion*, 3 E.A.D. at 793 (switching to natural gas would redefine coal-fired electric generating plant); *In re Pennsauken Cnty.*, 2 E.A.D. 667, 673 (Adm’r 1988) (replacing proposed municipal waste combustor with plan to use a 20/80 mixture of refuse derived fuel/coal at existing plants would redefine the source). In *Sierra Club*, the Seventh Circuit observed that requiring a BACT analysis for a coal-fired power plant to consider using alternate fuel sources would produce extreme results: “That approach would invite a litigation strategy that would make seeking a permit for a new power plant a Sisyphean labor, for there would always be one more option to consider.” 499 F.3d at 655.

Recent EPA guidance addressing greenhouse gases in the permitting context confirms that the redefining the source policy applies to permitting for GHGs. The guidance states:

While Step 1 [of a BACT process] is intended to capture a broad array of potential options for pollution control, this step of the process is not without limits. EPA has recognized that a Step 1 list of options need not necessarily include lower polluting processes that would fundamentally redefine the nature of the source proposed by the permit applicant. BACT should generally not be applied to regulate the applicant’s purpose or objective for the proposed facility.¹⁶

Applying the above law and guidance to HECA, it is clear that a switch to an alternative fuel would constitute an impermissible redesign of the source, and, therefore, need not be considered as an option in the BACT analysis. Utilization of coal as a fuel feedstock is fundamental to the design and purpose of the HECA Project. The United States Department of Energy (DOE) is providing financial assistance to the Project for the definition, design, construction, and demonstration of the HECA Project.¹⁷ DOE has selected the Project through a competitive process under the Clean Coal Power Initiative Round 3 (CCPI) program.¹⁸ Clearly, utilization of coal is a design element that is inherent to Applicant’s purpose.

Thus, long-standing and well-established policy, affirmed in numerous administrative and judicial decisions, makes clear that Sierra Club’s assertion that the requested acknowledgement is necessary for a valid BACT analysis is clearly erroneous. Therefore, the requested acknowledgement is not relevant to a determination of LORS compliance (i.e., BACT) as suggested by Sierra Club.

¹⁶ U.S. EPA, EPA-457/B-11-001, *PSD and Title V Permitting Guidance for Greenhouse Gases* 26 (Mar. 2011) (citing *Prairie State*, 13 E.A.D. at 23).

¹⁷ Amended AFC at page 2-7.

¹⁸ *Id.*

CEQA Alternatives Analysis

With respect to Sierra Club’s assertion that CEQA requires analysis of natural gas and biomass as alternative fuels as part of the alternatives analysis, it is well established that “[a]n EIR need not consider every conceivable alternative to a project or alternatives that are infeasible.” *In re Bay-Delta etc.* (2008) 43 Cal. 4th 1143, 1163 (citation omitted). Furthermore, “an EIR need not study in detail an alternative that is infeasible or that the lead agency has reasonably determined cannot achieve the project’s underlying fundamental purpose.” *In re Bay-Delta etc.* (2008) 43 Cal. 4th 1143, 1165 (citation omitted)

“As stated in *Residents Ad Hoc Stadium Committee v. Board of Trustees* (1979) 89 Cal.App.3d 274, 286-287 [152 Cal.Rptr. 585]: [¶] ‘The discussion of alternatives need not be exhaustive, and the requirement as to the discussion of alternatives is subject to a construction of reasonableness. The statute does not demand what is not realistically possible given the limitation of time, energy, and funds [P] Absolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned. It is only required that the officials and agencies make an objective, good-faith effort to comply. That requires a “hard look” at environmental consequences in recognition of the factors described in [CEQA]; the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion as to the choice of the action to be taken.’” *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1751, 1752.

One of the underlying fundamental purposes of the HECA Project, and the basis of the U.S. DOE funding, is to demonstrate advanced solid fuel (i.e., coal) based technologies that can generate clean, reliable, and affordable electricity in the United States and prove out carbon capture and sequestration as a viable method for reducing the carbon footprint of power generation and manufacturing.¹⁹ Consideration of an alternative that involves an alternative fuel source is contrary to this fundamental purpose and not required by CEQA. Thus, Sierra Club’s assertions that CEQA requires the acknowledgements set forth in the data request are unfounded.

Data Request Nos. 48 and 49

Data Request 48

The AFC concludes that use of natural gas would require substantial redesign of the facility and lists a number of Project units that would be affected. Please discuss how each of these units would be affected if using natural gas.

Data Request 49

The AFC does not discuss the use of biomass as an alternative feedstock or the use of feedstock blends with different percentages than proposed, for example by reducing or eliminating the amount of fuel in the feedstock blend (e.g., 50% coal/50% petcoke, 25% coal/75% petcoke, or 100% petcoke) or substituting biomass for a portion of the feedstock blend. Please discuss

¹⁹ Amended AFC at page 2-10.

whether these alternative fuels or fuel blends would require substantial redesign of the facility and indicate which process units would be affected and how the design would have to be changed.

Data Request Nos. 48 and 49 tee off from the acknowledgements sought in Data Request 47. Like Data Request 47, they are not requests for information but requests that Applicant conduct research and analysis to support Sierra Club's arguments that certain Project objectives could be achieved with the use of alternative fuels. As such, they are clearly outside the scope of permissible data requests. Furthermore, the research and analysis sought, even if permissible in nature, are not relevant or reasonably necessary to make a decision about the Project's compliance with applicable LORS or the evaluation of the project pursuant to CEQA.

Objection Based on Nature of Requested Information

Title 20, California Code of Regulations, Section 1716(b) sets forth the authority for parties to issue data requests to the Applicant:

Any party may request from the applicant any **information** reasonably available to the applicant which is relevant to the notice or application proceedings or reasonably necessary to make any decision on the notice or application. All such requests shall include the reasons for the request. (emphasis added)

Data Request Nos. 48 and 49 do not seek information; rather they request that Applicant conduct research and analysis to support Sierra Club's arguments that certain of the Project's objectives could be achieved with the use of alternative fuels, namely natural gas and biomass. As such, the request is clearly outside the scope of Section 20 CCR 1716(b) and must be denied on that basis alone. In denying motions to compel, the Commission has previously stated that "[t]he provision of 'information' by the Applicant or any other party includes data and other objective information available to it. The answering party is not, however, required to perform research or analysis on behalf of the requesting party."²⁰ 20 CCR Section 1716(b) does not obligate the Applicant to render expert opinions or to conduct the research and analysis that might be required to render expert opinions.

Objection Based on Relevancy of Requested Information

Even if Data Request Nos. 48 and 49 were not fatally flawed based on the nature of the requests, they would be objectionable based on relevancy. This is because the research and analysis sought (i.e., the feasibility of utilizing natural gas, biomass, or biomass blends as fuel) is not relevant or reasonably necessary to make a decision about the Project's compliance with applicable LORS or the evaluation of the project pursuant to CEQA. Sierra Club suggests in the Motion that such research and analysis would be relevant to the best available control technology

²⁰ Id.

(BACT) review and to the analysis of alternatives pursuant to CEQA. For the reasons set forth above with respect to Data Request 47, Sierra Club is mistaken on both fronts.

Conclusion

For the reasons set forth above, Sierra Club's Motion should be denied in its entirety.

DATED: October 8, 2012

Respectfully submitted,

/S/ Michael J. Carroll

Michael J. Carroll
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Counsel to Applicant

**STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION**

In the Matter of:)	Docket No. 08-AFC-08A
)	
REVISED APPLICATION FOR)	PROOF OF SERVICE
CERTIFICATION FOR THE HYDROGEN)	
ENERGY CALIFORNIA POWER PLANT)	(October 8, 2012)
PROJECT (“HECA”))	
_____)	

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HYDROGEN ENERGY CALIFORNIA PROJECT
CEC Docket No. 08-AFC-08A

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DECLARATION OF SERVICE

I, Paul Kihm, declare that on October 8, 2012, I served and filed copies of the attached:

**APPLICANT'S RESPONSE TO SIERRA CLUB'S MOTION TO COMPEL
PRODUCTION OF INFORMATION IN RESPONSE TO DATA REQUESTS**

to all parties identified on the Proof of Service List above in the following manner:

California Energy Commission Docket Unit

Transmission via electronic mail to:

CALIFORNIA ENERGY COMMISSION
Attn: DOCKET NO. 08-AFC-08A
1516 Ninth Street, MS-4
Sacramento, California 95814-5512
docket@energy.state.ca.us

For Service to All Other Parties

Transmission via electronic mail to all email addresses on the Proof of Service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 8, 2012, at Costa Mesa, California.

/S/ Paul Kihm

Paul Kihm