



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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California Energy Commission

DOCKETED
11-AFC-02

TN # 70184

MAR. 29 2013

***APPLICATION FOR CERTIFICATION FOR THE
HIDDEN HILLS SOLAR ELECTRIC
GENERATING SYSTEM***

Docket No. 11-AFC-02

ENERGY COMMISSION STAFF'S OPPOSITION TO APPLICANT'S MOTION TO SUPPLEMENT THE EVIDENTIARY RECORD

I. Introduction

In a motion comprised of baseless and exaggerated assertions, Applicant moves with unclean hands to admit more testimony to rescue its moribund case regarding solar flux. Because Applicant's claims of offended due process are unfounded (and ironic), the motion should be denied.

The proffered testimony of Dr. Johnsen includes entirely new assertions not previously provided to Staff or other parties, interspersed with repetitious testimony. Moreover, Applicant's own unfair tactics prejudicing Staff, intervenors and the public compel denial of the motion.

Alternatively, should the motion be granted, Staff and other parties deserve the opportunity to present evidence responding to these new assertions that were not made by the Applicant's witness in his filed testimony or asserted at the evidentiary hearing held March 14, 2013. Further, the briefing schedule should be adjusted accordingly.

II. Brief Statement of Relevant Facts

Applicant argues that Staff presented at the evidentiary hearing a "new theory" of significance under the California Environmental Quality Act, "new testimony regarding applicable regulatory guidelines", and "new graphs" on the issue of potential impacts to avian species from concentrated solar flux. (Motion, p. 3.) These assertions are simply incorrect. To appreciate the impropriety of Applicant's motion, one must review aspects of the prior proceedings on this issue and read the pre-filed testimony closely – which Applicant apparently failed to do.

The Final Staff Assessment (FSA) was filed December 21, 2012. (Exh. 300.) The FSA included Staff's initial analysis of the potential risks to avian resources posed by concentrated solar flux, specifically discussed in:

- the Biological Resources section of the FSA, p. 4.2-95, et seq.; 4.2-100 – 107;
- Appendix Bio 1 [describing risk assessment methodology]; and
- Appendix Bio 2 [model of solar flux effects on feathers].

Among other things, the FSA discussed the following aspects of Staff's significance analysis:

- potential damage from solar flux to plumage and flight feathers that was not limited to the tips of the wings (Exh. 300, p. 4.2-102-103; App. Bio 1, p. 12 [modeled initial half-thickness of material, at and just beneath the surface – not at the tip, which Applicant's experts discussed]);
- potential damage from a compromised ability to regulate body temperature (Exh. 300, p. 4.2-103);
- risk of hyperthermia (Exh. 300, p. 4.2-108); and
- that there are expected to be "takes" of golden eagles and that this would be significant (Exh. 300, p. 4.2-108).

This last is apparently the "new threshold" of which Applicant complains, but which was explicitly discussed in the FSA filed at least three months before the evidentiary hearing.

In addition, the FSA discussed the impacts on avian resources by the proposed facility as a whole beyond solar flux, including from collisions with the power tower, heliostats and other facility structures, and other aspects of the project. For example, Staff described the basis for its conclusion that the risk from collisions with heliostats was significant at pages 4.2-96 – 98 of Exhibit 300.

Appendices BIO 1 and 2 to the FSA presented Staff's "Risk Assessment" of solar flux impacts. Pages 6-21 of Appendix Bio 1 described the risk assessment methodology Staff applied. It specifically discussed at pages 8-10 feather structure and composition, and the effects of heat on the keratin of which feathers are comprised. Pages 29, 30, 35 and 36 of Appendix Bio 2 discussed and accounted for light (or optical) transmissivity through bird wings.

On February 11, 2013, Staff timely filed its testimony in rebuttal to Applicant's opening testimony. (Exh. 301.¹) Staff addressed Dr. Johnsen's criticisms, Applicant's testimony about potential ocular effects on avian species, and Applicant's testimony about the presence of avian resources at the proposed facility site and surrounding area. (Exh. 301, pp. 27-58.) Staff reiterated that the potential of the proposed facility to "kill a lot of birds across a broad range of species" posed a significant impact. (Exh. 301, p. 52.)

¹ Staff filed an administrative correction February 12, 2013.

As permitted by Committee order, Staff filed additional rebuttal testimony in response to Applicant's solar flux experiments and the information it presented at a workshop on February 11, 2013, to avoid facing a subpoena from Staff. (Exh. 302.²) This testimony described, among other things, how Staff's risk assessment estimated Lowest and No Observed Adverse Effect Levels, in accordance with longstanding federal and State risk assessment methodologies. (Exh. 302, pp. 2, 7 [citing Cal EPA 1993 - Guidance for Ecological Risk Assessment at Hazardous Waste Sites and Permitted Facilities, Part A: Overview, State of California Environmental Protection Agency, Department of Toxic Substances Control, Human and Ecological Risk Division, July 4, 1996 (See Page 22); U.S. EPA 2012 - Reference Dose (RfD): Description and Use in Health Risk Assessment, Background Document 1A, March 15 1993, Integrated Risk Information System (IRIS), Last updated on Wednesday, September 26, 2012 (See page 5, Table 1)].) This was Staff's purported "new testimony regarding applicable regulatory guidelines" that had been filed a month before the hearing.

Applicant's opening testimony was filed January 22, 2013. (Exh. 71.) It included Dr. Johnsen's testimony critiquing Staff's analysis. The intervenor Center for Biological Diversity (Center) filed its opening testimony on solar flux impacts on avian species on February 4, 2013. (Exh. 500.) In less than two pages, it expressed support for Staff's analysis of the risks posed by solar flux from the proposed facility. It contained no analysis, independent or otherwise. (See Exh. 500, pp. 7-8.)

Nevertheless, Applicant filed a purported rebuttal to the Center's opening testimony on February 11, 2013. (Exh. 72, p. 27.) While it may have been timely filed according to the Committee's schedule for rebuttal testimony,³ it was substantively improper. To Staff's surprise, it was new and different from that previously presented in Applicant's opening testimony. It contained more than eight pages of detailed expert testimony from three additional experts not previously disclosed, Dr. Caretto and Messrs. Franck and Rubenstein, two of whom did not execute affidavits in support of Applicant's Biological Resources testimony,⁴ and criticizing Staff's analysis. It also differed from its previously-filed testimony in several respects. For instance:

² For additional discussion of the issues and events that led to this testimony, see Staff's Motion For Subpoena Duces Tecum and Motion For Extension of Time For Rebuttal Testimony, or, In the Alternative, Motion To Strike Testimony, filed February 1, 2013. In response, the Committee issued its Order Regarding Staff's Motion for Subpoena Duces Tecum and Motion for Extension of Time for Rebuttal Testimony or, In the Alternative, Motion to Strike Testimony and Motion to Withdraw that Motion, February 8, 2013.

³ Notice of Prehearing Conference and Evidentiary Hearing and Order, December 21, 2012. The Order established deadlines for opening and rebuttal testimony. It contained no provision for additional sur-rebuttal. However, the Committee subsequently allowed limited rebuttal and sur-rebuttal following a workshop on Applicant's experiments exposing euthanized birds to solar flux at its Solar Energy Development Center facility in Israel. See Order Re: Staff's Motion For Subpoena Duces Tecum And Motion For Extension Of Time For Rebuttal Testimony Or, In The Alternative, Motion To Strike Testimony And Motion To Withdraw That Motion, February 8, 2013.

⁴ See Declaration of Dr. Caretto, Exh. 72, p. 43 of 103 [supporting Applicant's Air Quality testimony]; Declaration of Mr. Rubenstein, Exh. 71, p. 872 [supporting Applicant's Air Quality and Public Health testimony]. The lack of proper testamentary support provided additional grounds to strike Applicant's Rebuttal to the Center's testimony.

- Applicant's rebuttal testimony explicitly considered heat transfer from the top of a bird's wing by both convection and radiation, unlike either Staff's analysis (due to the thickness of a wing), or Dr. Johnsen's analyses (which only implicitly considered it – see Exh. 72, pp. 29 [“Johnsen . . . multiplied the conventional coefficient . . . by two to account for heat transfer from both wing surfaces (upper and lower)”], 32; cf. Exh. 71, Biological Resources pp. 37-39.)
- Applicant's rebuttal used a higher heat transfer coefficient than Dr. Johnsen. (Exh. 72, p. 34.)

Applicant's rebuttal testimony was patently improper because it was beyond the scope of Applicant's opening and the Center's rebuttal testimony. Staff had no opportunity to respond in writing before the evidentiary hearing because it was purportedly filed in response to the Center's testimony, at the same time as Staff filed its rebuttal (Exh. 301) to Applicant's testimony, and after which no additional sur-rebuttal was permitted according to the schedule set by the Committee.

Moreover, Staff was well aware of the Committee's desire for a full discussion of the issues by the experts, which was among the reasons to conduct the evidentiary hearings informally, and carried through to how the Committee conducted the hearings. (See 3/14 Tr: 281:20-22.) Staff made the strategic choice to conserve State resources and not file a motion to exclude Applicant's improperly filed rebuttal. Similarly, Staff decided not to divert resources to a motion to file additional testimony, and instead focused on preparing for the evidentiary hearings.

At the evidentiary hearing on these issues on March 14, 2013, Staff presented its prior testimony and responded to all of Applicant's evidence, both new and previously filed. Other than the image of a well-known public building in Sacramento overlaid on a document previously prepared and filed by the Applicant itself (Exh. 330, p. 3), and one of the graphs presented at the hearing identified below, all of the evidence and documents presented at the hearing were either previously disclosed by the applicable deadlines ordered by the Committee or prepared by the Applicant. Indeed, to ensure there would be no question as to this, Staff labeled each document it presented at the hearing with the Exhibit from which it was taken – and thus did not mark them cumulatively as distinct exhibits.

Specifically, the graph presented by Staff's witness Mr. Greenberg was from Brebu, Spiridon 2011 - Thermal Degradation of keratin waste, Journal of Analytical and Applied Pyrolysis 91 (2011) 289, cited as a reference in Appendix BIO1 to FSA, P.22 - Exhibit 300. Similarly, the graphs and images that Staff's witness Mr. Lesh presented were from:

1. Drysdale 1998 - An Introduction to Fire Dynamics, 2nd Ed., Dougal Drysdale, John Wiley and Sons, 1998 Alerstam 2007 - Alerstam T, Rosen M, Backman J, Ericson P, Hellgren O, Flight Speeds among Bird Species: Allometric and Phylogenetic Effects, PLoS Biol. 2007 Aug;5(8):e 197. **Please note, Staff recently realized the reference as presented at the hearing is erroneous. The reference should have been to Fundamentals of Fire Phenomena,**

James G. Quintiere, Wiley, 2006, p. 187. Further, the figure was not cited in the FSA. Staff described the figure but failed to cite it in Staff's rebuttal testimony, Exh. 301, p. 56.⁵ Applicant's experts did respond to this graph at the hearing. (See 3/14 Tr: 306:1-16.)

2. USGS 1998 - U.S. Geological Survey Migration of Birds. Northern Prairie Wildlife Research Center. Circular 16, revised 1935, 1979, 1998. Available at <http://www.npwrc.usgs.gov/resource/birds/migration> Referenced in Biological Resources Section of FSA, p. 4.2-314 - Exhibit 300.
3. Burtt Jr., E. H. (1986), An Analysis of physical, physiological, and optical aspects of avian coloration with emphasis on wood-warblers, Ornithological Monographs No. 38. Referenced in Applicant's Opening Testimony, p. 37 - Exhibit 71.
4. Osorio 2002 - Osorio D, and Ham AD, Spectral reflectance and directional properties of structural coloration in bird plumage, Journal of Experimental Biology 205, 2017-2027 (2002). Referenced in Biological Resources Section of FSA, Appendix BIO1, p. 24 - Exhibit 300.
5. Stoddard 2011 - Stoddard MC, and Prom RO, How Colorful are Birds? Evolution of the Avian Plumage Color Gamut, Behavior Ecology, June, 2011. Referenced in Biological Resources Section of FSA, Appendix BIO1, p. 24 - Exhibit 300.
6. Ward 1999 - Ward S, Reyner JM, Moller U, Jackson DM, Nachtigall W, Speakman JR, Heat Transfer from Starlings *Sturnus Vulgaris* During Flight, J Exp Biol., 1999 Jun; 202 (pt 12): 1589-602. Referenced in Biological Resources Section of FSA, Appendix BIO1, p. 25 - Exhibit 300.
7. Cengel 2007 - Cengel YA, Heat and Mass Transfer - A Practical Approach, 3rd Ed., McGraw-Hill Publ. 2007. Referenced in Biological Resources Section of FSA, Appendix BIO1, p. 22 - Exhibit 300.
8. Cengel 2007 - Cengel YA, Heat and Mass Transfer - A Practical Approach, 3rd Ed., McGraw-Hill Publ. 2007. Referenced in Biological Resources Section of FSA, Appendix BIO1, p. 22 - Exhibit 300.
9. Ward 1999 - Ward S, Reyner JM, Moller U, Jackson DM, Nachtigall W, Speakman JR, Heat Transfer from Starlings *Sturnus Vulgaris* During Flight, J Exp Biol., 1999 Jun; 202 (pt 12): 1589-602, Figure 2. Referenced in Biological Resources Section of FSA, Appendix BIO1, p. 25 - Exhibit 300.

⁵ Staff stated in Exhibit 301:

Staff has compared its risk assessment model's predicted surface temperatures to measured equilibrium temperatures of other materials under varying flux levels with known convection heat losses. It matches available data to within published measurement accuracy limits, thus correlating as well as reasonably as can be expected to available "real world" materials test data for the mechanisms being modeled. The response curve of staff's model matches the response of other published models, which in turn match actual measurements.

10. Ward 1999 - Ward S. Reyner JM, Moller U, Jackson DM, Nachtigall W, Speakman JR, Heat Transfer from Starlings *Sturnus Vulgaris* During Flight, *J Exp Biol.*, 1999 Jun;202 (pt 12): 1589-602, Table 1. Referenced in Biological Resources Section of FSA, Appendix BIO1, p. 25 - Exhibit 300.
11. Ward 1999 - Ward S. Reyner JM, Moller U, Jackson DM, Nachtigall W, Speakman JR, Heat Transfer from Starlings *Sturnus Vulgaris* During Flight, *J Exp Biol.*, 1999 Jun;202 (pt 12): 1589-602, Table 1 (continued). Referenced in Biological Resources Section of FSA, Appendix BIO1, p. 25 - Exhibit 300.
12. Ward 1999 - Ward S. Reyner JM, Moller U, Jackson DM, Nachtigall W, Speakman JR, Heat Transfer from Starlings *Sturnus Vulgaris* During Flight, *J Exp Biol.*, 1999 Jun;202 (pt 12): 1594. Referenced in Biological Resources Section of FSA, Appendix BIO1, p. 25 - Exhibit 300.
13. Ward 1999 - Ward S. Reyner JM, Moller U, Jackson DM, Nachtigall W, Speakman JR, Heat Transfer from Starlings *Sturnus Vulgaris* During Flight, *J Exp Biol.*, 1999 Jun;202 (pt 12): 1601. Referenced in Biological Resources Section of FSA, Appendix BIO1, p. 25 - Exhibit 300.

If Applicant had read Staff's testimony closely, and checked the references when it conducted its own analysis of the issues, it would have been familiar enough with Staff's testimony at the evidentiary hearing to know Staff's testimony was not "new". Applicant should not impose on the Committee and other parties the burden of preparing separate exhibits of every authority cited in support of a party's testimony, where those authorities are "the sort . . . on which responsible persons are accustomed to rely in the conduct of serious affairs." (See tit. 20 Cal. Code Regs., section 1212(a).) Moreover, Applicant fails to note that it too has not introduced as separate exhibits all the authorities on which its experts relied, or that its experts also relied on many of the documents about which it complains (e.g., the Ward 1999 paper, cited in Exh. 71, Biological Resources section, p. 38; Exh. 72, p. 29).

Applicant further fails to appreciate the greater irony of its objection to the documents presented. Almost immediately after objecting to "new" presentational material at the close of Staff's opening testimony, Applicant's witnesses similarly introduced their own new document that had not been previously disclosed - not "even five minutes" before presenting it. (Exh. 85; see 3/14 Tr: 285:21-287:10; 222:23-25.) Intervenor Cindy MacDonald argues that Applicant engaged in similar unfair tactics during the evidentiary hearing on Traffic, Transportation and Noise issues. (See Intervenor Cindy R. MacDonald's Response To Applicant's Motion To Supplement Evidentiary Record And Motion For Subpoena Duces Tecum Or, In The Alternative, Motion To Strike Testimony, filed March 27, 2013, p. 7.) As MacDonald correctly points out, Applicant has itself sometimes introduced new analysis in both rebuttal testimony and at the hearing itself. Accordingly, it has no grounds to claim unfairness now.

III. Unclean Hands Precludes Relief

Applicant has no grounds on which to contend it was treated unfairly or shore up its misanalysis with new testimony. As described above, it initiated the unfair introduction of new evidence on multiple occasions. Staff was merely rebutting Applicant's comments directed to the Center for the first time at the evidentiary hearings. Applicant should not be allowed to take advantage of its own wrongdoing. (See Civ. Code, section 3517.)

IV. The Affidavit is Untimely

After the evidence on biological impacts was presented at the evidentiary hearing on Thursday, March 14, 2013, the Committee closed the evidentiary record on biology. (See Tr., 490:23-491:1.) The offered evidence is untimely, and is (again) presented at a point at which Staff is unable to respond. It is manifestly unfair.

V. The Testimony is Cumulative

Portions of the evidence presented are cumulative. For example, Dr. Johnsen repeats statements that engineering models like that presented by both Staff and Applicant are of limited use in predicting what will happen when live, wild birds are exposed to concentrated solar flux. (Aff. p. 2, para. 3.)

VI. The Testimony is Prejudicial

Applicant's untimely evidence is prejudicial. Staff has no opportunity to respond with additional evidence or testimony before briefing is due. It presents new testimony on several issues. For instance, contrary to his prior pre-filed written testimony, Dr. Johnsen now testifies⁶ that:

- the bottom surface of wings will be exposed to flux (Aff., p. 1, para. 1)
- bottom surfaces "invariably" lighter than top surfaces (Aff., p. 1, para. 1.) Staff notes that Dr. Johnsen mis-quotes the source for this proposition, which actually states: "**Almost** invariably, the ventral mean absorbance is less than the dorsal mean absorptance by about 10%..." **on average in the animal kingdom** with respects to animals as well as birds. There is no mention of wings, specifically. The average change from front (ventral) to back (dorsal) side includes the breasts, which are often lighter than the

⁶ It should also be noted that Dr. Johnsen's testimony fails to state it was executed under penalty of perjury of the laws of the State of California, as required by Code Civ. Proc. section 2015.5.

undersides of wings, which are the parts of the birds analyzed by Staff. Gates' Biophysical Ecology, p. 258, emph. added.

- black feathers are inherently "shiny" (Aff., p. 1., para. 1; note this assertion is unsupported)
- the index of refraction for keratin is 1.5 (Aff., p. 1, para. 1; note this assertion is unsupported)
- the reflectance of feathers asserted by Staff is incorrect (Aff., p.1, para. 1; note this assertion is unsupported)
- the absorptivity of black feathers used to estimate impacts should be an average of 0.50 or a conservative value of 0.85 (Aff., p. 1., para. 1; cf. Exh. 71, p. 36, where Dr. Johnsen asserted the absorptivity of black feathers is 0.904).

Further, nothing precluded Applicant from introducing this testimony in advance of the evidentiary hearings. Applicant had every reason to know of Staff's analysis. There is no basis on which to admit this evidence that would prejudice Staff, intervenors and the public.

Moreover, there has been no harm to the Applicant that needs to be remedied by another chance to offer testimony. Staff did not present "new" evidence at the hearings. Staff properly provided at the hearing nothing more than an explanation of its model, calculations, and bases for its estimates of impacts on avian resources. To the extent these explanations rebutted for the first time Applicant's purported rebuttal to the Center's opening testimony, this was due to Applicant's own gamesmanship.

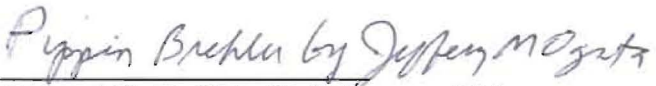
VII. Conclusion

Applicant has no grounds on which to cry foul and seek to introduce new evidence. If there was a foul, it was by Applicant. Moreover, it is too late. Applicant's motion should be denied.

If the Committee wishes to receive this evidence, it should afford Staff and other parties the opportunity to file responsive evidence, and adjust the briefing schedule accordingly. However, Staff does not encourage additional rounds of written sur-rebuttal.

Date: March 29, 2013

Respectfully Submitted,


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Docket No. 11-AFC-02

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DECLARATION OF SERVICE

I, **Pamela Fredieu**, declare that on **March 29, 2013**, I served and filed copies of the attached **ENERGY COMMISSION STAFF'S OPPOSITION TO APPLICANT'S MOTION TO SUPPLEMENT THE EVIDENTIARY RECORD**, dated **March 29, 2013**. This document is accompanied by the most recent Proof of Service, which I copied from the web page for this project at: <http://www.energy.ca.gov/sitingcases/hiddenhills/>.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am over the age of 18 years.

Dated: March 29, 2013

/s/
Pamela Fredieu
Legal Secretary