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STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of:)
)
Application for Certification for the)
Rio Mesa Solar Electric Generating Facility)
)
_____)

Docket No. 11-AFC-04

**APPLICANT'S NOTICE PURSUANT TO 20 C.C.R. § 1716(f)
FOR CALIFORNIA ENERGY COMMISSION STAFF'S
DATA REQUESTS SET 1A**

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February 27, 2012

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**STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission**

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DATA REQUESTS SET 1A**

On February 7, 2012, Rio Mesa Solar I, LLC, Rio Mesa Solar II, LLC, and Rio Mesa Solar III, LLC (collectively, the “Applicant”), received the California Energy Commission (“CEC”) Staff’s Data Requests, Set 1A. Except as noted below, the Applicant will respond to these requests on or before March 8, 2012. There are, however, specific data requests to which the Applicant objects, and others that will require further time to prepare a response. Pursuant to Title 20, California Code of Regulations, Section 1716(f), Applicant hereby provides notice of its objections to Data Requests 44, 54, 58, 45, 49, 55, and 57, its partial objections to Data Request 63, and the need for additional time to respond to Data Requests 5, 8, 15, 16, 22, 43, 55, and 57.

I. GENERAL OBJECTIONS

Section 1716 of the Commission's regulations provides:

Any party may request from the applicant any information reasonably available to the applicant which is relevant to the . . . application proceedings or reasonably necessary to make any decision on the . . . application.¹

¹ 20 C.C.R. § 1716(b).

Pursuant to Section 1716, a party may request from an applicant information that is *reasonably available* to it. Section 1716 does not require that an applicant “perform research or analysis on behalf of the requesting party.”²

In evaluating whether a data request involves “discoverable information” or “undiscoverable analysis or research”, the Commission considers four factors: (1) the relevance of the information; (2) whether the information is available to the applicant, or from some other source, or whether the information has been provided in some other form; (3) whether the request is for data, analysis, or research; and (4) the burden on the applicant to provide the data.³

The California Environmental Quality Act (“CEQA”) does not require that either the Applicant, or the “lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required.”⁴ Moreover, “CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors.”⁵

Rather, CEQA requires an Environmental Impact Report (“EIR”) to “be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes into account environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible.”⁶

² See Committee Ruling on Intervenor Center for Biological Diversity’s Petition to Compel Data Requests, Docket No. 07-AFC-6 (Dec. 26, 2008).

³ See Committee Ruling on Intervenor Center for Biological Diversity’s Petition to Compel Data Requests, Docket No. 07-AFC-6 (Dec. 26, 2008).

⁴ *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1396 [133 Cal.Rptr.2d 718].

⁵ 14 C.C.R. § 15204(a).

⁶ 14 C.C.R. § 15151.

With respect to Biological Resources, the Applicant has already provided a significant amount of information that is consistent with BLM approved protocols. Staff's Data Requests regarding biological resources do not reflect the work Applicant has already accomplished with respect to avian surveys, which was submitted to the agencies on October 14, 2011 as part of the Application for Certification for the Project. Staff's Data Requests ask the Applicant to engage in extensive new surveys entailing significant burdens - time, resources, and cost. These Data Requests will impose millions of dollars in additional survey costs. In addition, the delay in the permitting schedule will impose significant costs in-and-of-itself and is inconsistent with the Commission's statutory requirement to provide a determination on an application for certification within one year of data adequacy.⁷

Given the thoroughness of the Applicant's investigation to date, and the significant cost of the additional requested surveys, the Staff's requests for further "detailed", "complete", or exhaustive surveys and analyses are unduly burdensome and unnecessary. Applicant objects to those specific data requests where the information requested is not reasonably available to the Applicant. The Applicant also objects to those data requests that are not relevant to the proceeding or reasonably necessary to make any decision on the AFC for the Rio Mesa Solar Electric Generating Facility ("Project"). Without waiving any of these objections, Applicant reserves the right to provide and will endeavor to provide responses, in whole or in part, to some or all of these Data Requests.

⁷ Cal. Pub. Res. Code Sec. 25522(a).

A. SPECIFIC OBJECTIONS

1. Data Requests 44, 54 and 58

Data Request 44 asks that Applicant provide “quarterly results of the migratory bird surveys to the Energy Commission, BLM, USFWS, and CDFG within two weeks of their completion. . . From late July to April, weekly surveys should be conducted within the project area and four miles of the project footprint . . . Qualified biologists should be stationed at 5 to 10 migration count locations throughout the site . . . From August to April, weekly surveys should be conducted using unlimited distance bird migration survey methods. . .”⁸

Data Request 54 requests that the Applicant incorporate “complete survey results” for breeding, migratory, and special status birds and bats in preparing a draft bird and bat conservation strategy.⁹

Data Request 58 requests Applicant use a complete year of survey data to provide a risk assessment for birds and bats.¹⁰

Applicant objects to Data Requests 44, 54 and 58 for several reasons. First, these data requests do not request information that is reasonably available to the Applicant, but instead request that Applicant perform surveys that will be extremely costly and time consuming to perform. The surveys would entail a huge undertaking, requiring multiple resource experts a year or more to complete, at a cost of millions of dollars. In addition to being burdensome, the information requested is not reasonably necessary for the Commission to make a decision in this proceeding. The existing survey results, supplemented with additional information concerning the impact of the project on biological resources (which the Applicant has agreed to provide), will provide the Commission with substantial evidence to evaluate the impact of the Project on

⁸ Staff Data Requests Set 1A at p. 22.

⁹ Staff Data Requests Set 1A at p. 32.

¹⁰ Staff Data Requests Set 1A, p. 33.

avian species. More than a year's worth of additional avian surveys is not reasonably necessary for a Commission decision in this proceeding. Finally, these requests for lengthy additional studies are not consistent with the Commission's statutory directive to issue a decision on an Application within twelve months of data adequacy.¹¹ Therefore, Applicant objects to Data Requests 44, 54 and 58.

2. Data Request 45

Data Request 45 asks the Applicant to "provide results of the breeding bird and Gila woodpecker surveys. . . . At least eight full coverage surveys beginning in early March and continuing on 8-10 day intervals through early May. . ." ¹²

Applicant objects to Data Request 45. The requested surveys are burdensome and are not reasonably necessary for a Commission decision in this proceeding. The requested surveys are based on survey protocols for much less conspicuous species (e.g., Bell's vireo and southwestern willow flycatcher), which are both relatively small, blandly-colored bird species that typically inhabit dense riparian areas. For these species, very intensive surveys are required. In contrast, Gila woodpecker is a much more conspicuous species, being larger, distinctly colored, and having an obvious call, and will be much more easily identified on the large open areas of the project site. Thus, the requested level of survey information is not reasonably necessary for a Commission decision because far less intensive survey results can provide the same information. For these reasons, Applicant objects to Data Request 45.

¹¹ Cal. Pub. Res. Code Sec. 25540.6.

¹² Staff Data Requests Set 1A, p. 25.

3. Data Requests 49 and 63

Data Request 49 asks Applicant to “conduct focused nocturnal elf owl surveys throughout the microphyll woodland in the project area and within one mile using line transects or comparable technique with recorded calls (play-back method).”¹³

Data Request 63 requests the Applicant prepare and submit an Incidental Take Permit application which includes elf owl.¹⁴

Applicant objects to Data Request 49 in whole and Data Request 63 in part because the requested survey and incidental take permit application is burdensome and is not reasonably necessary to a Commission decision in this proceeding. The literature on the nesting preference of elf owl is well established and the desert wash woodlands present on the Rio Mesa site are not suitable for elf owl. Moreover, Applicant has already provided sufficient information demonstrating that elf owl is not expected to occur on the Project site due to a lack of suitable habitat, as well as the absence of suitable habitat within 13.3 miles of the site.

The nearest detection is 13 miles from the project site and 2 miles south of the I-10 crossing at the Colorado River. However, this observation was deemed a migrant individual and not a breeding site⁵. Within California in the vicinity of the RMS project, there are no known elf owl breeding sites that are within desert wash habitat that is not closely associated (i.e., within the river flood plain) with the Colorado River (Please see Figure 2). The Rio Mesa project site is too far away from the Colorado River to be considered potential habitat. CDFG has conducted surveys since 1978 and all surveys have been concentrated within the river floodplain. The two most consistently occupied sites in California are 10 miles north of Needles and 22 miles north of Blythe. These areas are described as being dense woodlands composed of sycamores with

¹³ Staff Data Requests Set 1A, pp. 28-29.

¹⁴ Staff Data Requests Set 1A p. 36.

willow and palo verde understory. The microphyll woodlands on the Rio Mesa project site are sparsely scattered palo verde and ironwood trees with sparse desert scrub understory.

The last major attempt to describe the status and distribution of elf owls in California was in 1987. In 1998 and 1999, CDFG surveyed much of the same area that was surveyed in 1987 including those sites where elf owls were previously located, and found no elf owls⁶. In 2000, CDFG performed a survey of a few selected sites with no detections. A few elf owls have been either heard or identified from 2000-2002 but all observations were north of Needles or far to the south of the project near Imperial National Wildlife Refuge. Staff suggests that the observance of an elf owl at the Wiley's Well campground approximately 5 miles to the west of the project site is sufficient reason to conduct surveys. After consulting with Mr. Robert McKiernan the ornithologist that observed the elf owl, it was discovered that the event took place 36 years ago in 1976. In addition, the habitat at Wiley's Well campground is substantially different from the project site in that a wind row stand of large fairly densely located palo verde trees exist at Wiley's Well, and only smaller sparsely located palo verde trees are present on the project site.

Since no incidental take of elf owl can be reasonably expected, Data Request 49 is not reasonably necessary to a Commission decision in this proceeding. Moreover, an incidental take permit application for elf owl is not necessary, and thus Data Request 63 (as it applies to elf owl) is not reasonably necessary for a Commission decision in this proceeding.

4. Data Requests 55 and 57

Data Request 55 asks the Applicant to “provide data (developed using Pro E, Solid Works or other equivalent 3D modeling package) showing expected energy flux emitted from each tower over a 24-hour period under several different weather (e.g., wind speed) scenarios. [Data Request 55 requests that the Applicant] translate this energy flux into expected increases in

ambient temperature applied to a body located between the receiver, standby points/ring, and heliostats as well as changes in light and humidity between these locations. Based on 1-hour intervals, [the Applicant is requested to] state the temperature applied to a body, humidity, and light at the top of the tower, and extending outward at reasonable, regularly occurring heights and distances. [Finally, Data Request 55 requests that Applicant] provide staff both a model and to-scale renderings shown in top down and side view.”¹⁵

Data Request 57 asks the Applicant to provide energy flux modeling and computations from the Applicant’s January 6, 2012 presentation.¹⁶

Applicant objects to Data Requests 55 and 57. The requested modeling will be very expensive to provide. In addition, Data Requests 55 and 57 call for information that is proprietary in nature and if released to the public could result in a substantial harm to the Applicant’s competitive position. The model to create the data is a key intellectual property for Applicant and this information cannot be released, as there would be no way to guaranty its confidentiality. The risk of confidentiality is exacerbated due to the training of Staff personnel that would be required to understand the input and output data and the purpose of the various complex algorithms. If a Staff member were to leave Agency service, there would be nothing preventing him/her from using this training with a competitor of Applicant. Data Requests 55 and 57 are therefore burdensome. Without waiving this objection, Applicant reserves the right to provide and will endeavor to provide a response to Data Requests 55 and 57, in whole or in part.

¹⁵ Staff Data Requests Set 1A, p. 32.

¹⁶ Staff Data Requests Set 1A pp. 32-32.

II. NEED FOR ADDITIONAL TIME TO RESPOND

In agreeing to provide a response to these requests, with a slight extension in the time for our response, it is Applicant's expectation that our responses will not delay this proceeding. Should Staff believe that our request for an extension of time on any of these items would be cause for delay, we wish to be advised immediately, so that we may revisit the timetable for providing the information or the necessity of providing the information in the first instance.

A. Data Request 5

Data Request 5 requests information and a revised analysis of construction emissions and impacts, as well as the tier levels of all of the off-road equipment and associated emissions factors.¹⁷ Recalculating the construction emissions to account for the use of Tier 2 engines and remodeling the construction impacts will be time consuming. In addition, the Applicant plans to optimize its use of the boilers. Applicant therefore requires more time to respond to Data Request 5, and will respond by April 15, 2012.

B. Data Request 8

Data Request 8 requests information concerning emissions from mirror washing activities in the total facility emissions and corresponding impact analysis.¹⁸ In order to ensure that the emissions information accounts for Applicant's boiler optimization plans, Applicant requires additional time to respond to this request. Applicant will submit a response to this data request on or before April 15, 2012.

¹⁷ Staff Data Request Set 1A, p. 1.

¹⁸ Staff Data Request Set 1A, p. 2.

C. Data Requests 15 and 16

Data Request 15 asks Applicant to explain why and how the same auxiliary boilers are used differently compared to the Hidden Hills SEGS project (11-AFC-02).¹⁹ Data Request 16 asks Applicant to provide a spreadsheet of the GHG emissions calculations for the auxiliary boilers.²⁰ In order to ensure that the emissions information and the comparison accounts for Applicant's boiler optimization plans which are being performed for both the Hidden Hills SEGS project and RMS, Applicant requires additional time to respond to this request. Applicant will submit a response to these data requests on or before April 15, 2012.

D. Data Request 22

Data Request 22 asks Applicant to check and correct the inconsistencies between modeling files and the AFC, including construction emission rates, emission rates for startup boilers, and inversion fumigation impact of nighttime preservation boilers.²¹ As noted above, Applicant requires more time to revise its air modeling to account for Applicant's boiler optimization plans. Applicant will require more time to address the aforementioned inconsistencies, and will respond to this Data Request by April 15, 2012.

E. Data Requests 43

Data Request 43 requests a letter, email, or record of conversation with the Riverside County Fire Department that confirms the absence of any expected impacts on the local fire district resulting from construction and operation of the proposed project. In the absence of such communication, Staff requests that the Applicant provide a Fire Protection and Emergency Services Needs Assessment ("Assessment").²² Applicant is currently in the process of preparing

¹⁹ Staff Data Request Set A1, p. 4.

²⁰ Id.

²¹ Staff Data Requests Set A1, pp. 5-6.

²² Staff Data Requests Set A1, p. 18.

the Assessment. Due to the scope of the Assessment and need for coordination with Riverside County, Applicant will require more time to prepare the Assessment. Applicant will respond to this Data Request as soon as the Assessment is completed, which will be no later than April 15, 2012.

F. Data Request 55 and 57

Data Request 55 asks the Applicant to “provide data (developed using Pro E, Solid Works or other equivalent 3D modeling package) showing expected energy flux emitted from each tower over a 24-hour period under several different weather (e.g., wind speed) scenarios. [Data Request 55 requests that the Applicant] translate this energy flux into expected increases in ambient temperature applied to a body located between the receiver, standby points/ring, and heliostats as well as changes in light and humidity between these locations. Based on 1-hour intervals, the Applicant is requested to state the temperature applied to a body, humidity, and light at the top of the tower, and extending outward at reasonable, regularly occurring heights and distances. [Finally, Data Request 55 requests that Applicant] provide staff both a model and to-scale renderings shown in top down and side view.”²³ Data Request 57 requests the raw input data, boundary conditions, model parameters, output data and an electronic copy of Applicant’s model which is key intellectual property. Staff also requests the Applicant to disclose how the model was developed and any relevant publications that may have been used in its development.

The requested modeling is very complex and producing the data will be an extremely time consuming effort. As noted under Applicant’s objections above, Applicant may respond to Data Requests 55 and 57 in whole or in part without waiving Applicant’s objections. Should Applicant respond to these requests, Applicant will require more time to prepare the requested modeling and may provide the results under confidential cover on or before April 15, 2012.

²³ Staff Data Requests Set 1A, p. 32.

Dated: February 27, 2012

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By  _____

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Energy Resources Conservation
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Rio Mesa Solar Electric Generating Facility)
_____)

PROOF OF SERVICE

I, Karen Mitchell, declare that on February 27, 2012, I served the attached
***APPLICANT'S NOTICE PURSUANT TO 20 C.C.R. § 1716(f) FOR CALIFORNIA ENERGY
COMMISSION STAFF'S DATA REQUESTS SET 1A***, via electronic and U.S. mail to all
parties on the attached service list.

I declare under the penalty of perjury that the foregoing is true and correct.



Karen Mitchell



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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**APPLICATION FOR CERTIFICATION
FOR THE RIO MESA SOLAR
ELECTRIC GENERATING FACILITY**

DOCKET NO. 11-AFC-04
PROOF OF SERVICE
(Revised 2/27/12)

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