

# DOCKET

**08-AFC-12**

DATE 9/14/2009

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## STATE OF CALIFORNIA

### Energy Resources Conservation and Development Commission

In the Matter of: )  
 )  
Application for Certification for the )  
San Joaquin Solar 1 and 2 Hybrid Power Plant )  
 )  
San Joaquin Solar 1 and 2 LLC )

Docket No. 08-AFC-12

### OBJECTIONS TO DATA REQUESTS OF CALIFORNIA UNIONS FOR RELIABLE ENERGY, SET 4

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**STATE OF CALIFORNIA**

**Energy Resources Conservation  
and Development Commission**

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**OBJECTIONS TO DATA REQUESTS  
OF  
CALIFORNIA UNIONS FOR RELIABLE ENERGY,  
SET 4**

On August 24, 2009, San Joaquin Solar 1 LLC and San Joaquin Solar 2 LLC, collectively referred to as San Joaquin Solar or “Applicant”, received California Unions for Reliable Energy (“CURE”) *Data Requests, Set 4*. Set 4 is one of five sets of Data Requests tendered by CURE. CURE has tendered to date 278 Data Requests, which including subparts totaling more than 300 distinct requests. CURE has tendered approximately twice the number of requests submitted by Staff.

In addition to the specific grounds set forth below in reference to specific questions, Applicant objects to CURE's data requests on the grounds that they are calculated to harass, burden, and oppress Applicant and delay Applicant's Application for Certification (“AFC”). Should CURE file any motion in reference to any outstanding request to CURE, the California Energy Commission (“Commission”) should relieve the Applicant from responding to the data requests or severely limit the responses required by the Applicant. Justifications for this objection are set forth below.

**1) CURE's goal is labor organizing under the National Labor Relations Act and not legitimate CEQA or other objectives within the Commission's jurisdiction.**

CURE engages in a pattern and practice of Commission intervention to promote labor organizing objectives of CURE's member unions rather than for legitimate objectives under CEQA or Commission regulations. The Applicant submits that a full investigation of CURE's activities will demonstrate that where projects that are the subject of applications for certification are covered by CURE construction labor agreements, CURE does not and will not take any action within Commission jurisdiction to negatively impact the review or processing of the covered projects. CURE only takes negative action such as the service of burdensome and oppressive data requests like the ones at issue here when applicants cannot or do not enter construction labor agreements in what CURE considers to be a sufficient time period before or shortly after filing the AFC. This practice calls into question the legitimacy of CURE's intervention and justifies severely curtailing and restricting CURE's rights in proceedings like this one where but for failed organizing objectives, there would be no or little CURE activity. Failure to curtail and severely restrict CURE merely emboldens the organization and motivates it to become more entrenched in resistance to the AFC and the Project covered by the AFC.

**2) CURE's labor organizing is illegal and, despite the Applicant's efforts to meet and resolve the labor issues with CURE, CURE is using the Commission to coerce the Applicant to engage in illegal activity.**

a. *CURE is a labor organization.* CURE is comprised of officials from the California State Building & Construction Trades Council ("Council") and a small number of local mechanical building and construction trades unions in California representing workers in the construction industry. CURE's president, Robert Balgenorth, is also the

president of the Council. CURE's attorney who negotiates labor agreements with Commission applicants is the legal counsel in this matter before the Commission, Adams Broadwell Joseph & Cardozo. Consistent with CURE's pattern and practice of labor organizing through the Commission, after Applicant filed its AFC in this matter, CURE and its legal counsel initiated efforts to seek construction labor agreements for the Project. Finalizing construction labor agreements as demanded by CURE appears to be the only way Applicant will cause CURE to cease or limit its data requests and other activity in this proceeding.

b. *The Applicant is prohibited from entering construction labor agreements sought by CURE in return for CURE's cooperation before the Commission.* The Commission should sustain the Applicant's objection in view of the fact that the Applicant does not have legal standing to satisfy CURE's organizational goals to avoid further adverse action in the permitting proceeding. Applicant does not have legal standing to enter the construction labor agreements demanded by CURE under the National Labor Relations Board decision in *Glens Falls Building and Construction Trades Council*, 350 NLRB No. 42 (July 31, 2007) (*Indeck II*). The *Indeck II* case concluded that several construction industry unions violated the NLRA by coercing a project owner to sign a project labor agreement for construction similar to what CURE has demanded of the Applicant in this case. The construction labor agreement at issue in *Indeck II* was rendered void and unenforceable as an illegal agreement. Illegal construction labor agreements could expose owners who sign them to liability under federal labor law and other jurisprudence. Therefore, entering into the labor agreements that CURE demands, in order to settle any issues and/or eliminate CURE's intervention

activity in this proceeding, could subject Applicant to legal exposure under federal labor law and possibly other jurisprudence.

c. *The Applicant made an effort to appease CURE and relieve the Commission and the Applicant from CURE's activities.* The Commission should sustain the Applicant's objection in view of the fact that Applicant has attempted to meet and resolve any issues with CURE in good faith, including the representation that the Applicant will retain union contractors who may lawfully execute agreements with CURE for labor. Representatives from Applicant met with CURE's legal counsel in July. At that time, Applicant stated that it intended to use Union labor on the Project, but that the Applicant did not have legal standing to enter into labor agreements for construction under the NLRB's decision in *Indeck II*. CURE demanded that Applicant secure union contractors immediately. Applicant explained that it cannot secure contractors prior to certification and financing of the Project. Nonetheless, CURE has continued to interfere in the AFC process. Under these circumstances, Applicant is highly prejudiced by CURE's actions in this proceeding whereas there is little harm to CURE if its actions in this matter are restricted to more reasonable participation

d. Notwithstanding the fact that CURE's data requests are not intended to serve any legitimate purpose under CEQA or the Commission rules, the Applicant has acted, at considerable expense, to provide requested data that is reasonably available to the Applicant and reasonably necessary for the Commission to reach a decision on the Application.

Section 1716 of the Commission's regulations (Cal. Code Regs., tit. 20 § 1716) contains the basic framework for information exchanges between parties in licensing proceedings:

“A party may request from an Applicant ... information which is reasonably available to the Applicant which is relevant to the application proceedings or reasonably necessary to make any decision on the ...application.” (Cal. Code of Regs., tit. 20 § 1716(b).) The Applicant may then answer or object to the request. The Applicant hereby objects to those requests that do not meet this standard.

In addition to the general objections set forth above, the Applicant objects to those specific data requests that request information that is not reasonably available to San Joaquin Solar. The Applicant also objects to those data requests that are not relevant to the proceeding and reasonably necessary to make any decision on the Application. Finally, the Applicant objects to those data requests that ask the Applicant to prepare or revise analyses based on specifications, assumptions or speculations provided by CURE. The Applicant believes that the analyses it has prepared are sufficient for its Application. CURE is free to disagree and it may, if it so desires, prepare its own calculations or estimates regarding any relevant issue. However, CURE should not confuse the discovery phase with the evidentiary phase of this proceeding. As noted in a recent ruling by the Committee in the Carlsbad Energy Center proceeding, "The 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."<sup>1</sup> This is particularly true where the requested research or analysis is intended to harass or burden the Applicant and serves no legitimate purpose under CEQA or the Commission rules. While the Committee also recognized that the line between discoverable data and undiscoverable analysis and research is dependent on the particulars of a request and cannot be drawn with precision, San Joaquin Solar submits that

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<sup>1</sup> 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.

CURE's request for new or revised analyses have crossed far beyond the line of discoverable data.

Except as noted below, the Applicant will respond to CURE's data requests Set 4 on or before September 23, 2009. There are, however, specific questions in Set 4 to which the Applicant objects. Pursuant to Title 20, California Code of Regulations, Section 1716(f), Applicant hereby objects to CURE's Data Requests 100, 102, 104, 100 (2)<sup>2</sup>, 104 (2), 110, 125, 132, 142, 143, 146, 147, 165, 178, and 189 through 191.

The Applicant's specific objections are set forth below.

### **SPECIFIC OBJECTIONS**

#### **Data Request 100**

*Please provide documentation supporting the AFC's statement on page 5.6-1 that the Project site is recently planted with wheat and pistachios, including cotton, safflower and garlic.*

#### **Objection:**

The referenced AFC statement was based on oral communications with the property owners. The Applicant has requested "documentation" from the owner's of the Project site and will provide it, if it is reasonably available. However, to the extent that the "documentation" is not available, the Applicant objects to this request on the grounds that the "documentation" is not reasonably available to the Applicant. The Applicant also objects on the grounds that the information is not reasonably necessary for the Commission to make a decision on the Application.

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<sup>2</sup> CURE has inadvertently duplicated the numbering of data requests 100 through 104. We have marked the duplicate numbers as (2)

**Data Request 102**

*Please provide documentation reflecting the last date of planting of each crop type at the Project site. The response should provide the year and month.*

**Objection:**

The Applicant does not have such documentation of the "last date" of planting of "each crop type". The Applicant objects to the question on the grounds that the information is not reasonably available to the Applicant and that the information is not reasonably relevant to any decision the Commission must make on this Application. We are not aware of any Commission decision that has discussed, much less made findings, concerning the last date of planting of each crop type on a proposed project site.

**Data Request 104**

*Please clarify what the AFC means by a "majority" of the transmission line has been comprised of orchards and row crops, by stating how many acres of the proposed southern and northern transmission line alignments are in active agricultural production, and provide documentation to support your answer. Please provide the zoning of the proposed transmission line alignments for both the southern and northern route alignments. Your response should include acreages subject to each type of zone.*

**Objection:**

A majority means more than 50%. The Applicant objects to calculating the specific number of acres along the transmission alignments, the specific acreages subject to each type of zoning along the alignments, or providing specific documentation on the grounds that: (1) The request is vague because CURE does not define what it means by "active agricultural production" or the specific time period for this calculation, (2) the specific information is not reasonably available



to the Applicant and would require the Applicant to perform research and analysis for CURE, and (3) the requested calculations and analyses are not reasonably relevant to a decision that the Commission must make on this Application.

**Data Request 100 (2)**

*Please clarify when the site was last irrigated and planted.*

**Objection:**

The Applicant has requested this clarification from the property owner. If the information is reasonably available to the Applicant, it will be provided. To the extent that this clarification is not provided by the property owner, the Applicant objects to the question on the grounds that the information is not reasonably available to the Applicant and not reasonably relevant to a decision that the Commission must make on this Application.

**Data Request 104 (2)**

*Please provide the LESA score for the 640 acres that will be withdrawn from agricultural use as a result of the Project and the analysis that supports the score obtained.*

**Objection:**

The Applicant has not calculated the "LESA" score. The Applicant objects to the question on the grounds that the information is not reasonably available to the Applicant and would require the Applicant to conduct analyses for CURE. The Applicant also objects to the question on the grounds that the information is not reasonably relevant to any decision the Commission must make on this Application.

**Data Request 110**

*Please provide documentation to support the statement that the Project will not substantially diminish the agricultural productivity of the region. Your response should include dollar amounts lost due to cessation of agricultural production on the Project site.*

**Objection:**

The Applicant objects to the question on the grounds that the requested "documentation" is not reasonably available to the Applicant. In addition, the request is vague because CURE does not specify the form of "documentation" that would satisfy its request, nor does CURE explain the manner of analysis necessary to calculate the "dollar amounts lost" due to cessation of agricultural production. Finally, even if the request was not fatally vague and even if the documentation was available, such information is not necessary for the Commission to find that the Project will not substantially diminish agricultural productivity of the region.

**Data Request 125**

*Please provide the number of hours in which HTF leaks would be abated following detection.*

**Objection:**

The Applicant has no idea what this question means. The Applicant objects to the question on the grounds that it is vague.

**Data Request 132**

*Please state the number of gallons of HTF that would be necessary to generate 53.4 MW.*

**Objection:**

The Applicant objects to this question on the grounds that it is vague. HTF does not generate electricity. Any calculation of the number of gallons that would be used in a facility that generates 53.4 MW, depends upon whether the referenced megawatts are nominal, name plate or

intended to represent a specific period of time. CURE does not explain what specific information it seeks or why it is reasonably necessary to any decision the Commission must make on this Application.

**Data Request 142**

*Please provide a revised Sensitive Species Locations map that accurately depicts historic burrowing owl occurrences within the Project vicinity.*

**Objection:**

The Applicant does not agree with the premise of the question that the map does not accurately depict historic burrowing owl occurrences. The preparation of a map that depicts CURE's view of what may be "accurate" is not information that is reasonably available to the Applicant. If CURE has a different view, it may prepare the map itself. Therefore, the Applicant objects to the question on the grounds that it is vague and that the information is not reasonably available to the Applicant.

**Data Request 143**

*If the Applicant intends to apply for a Section 404 permit, please describe the Project component that would require such permit.*

**Objection:**

Once the Applicant has determined whether to apply for a Section 404 permit, it will identify in the permit the project component that requires the permit. At such time as the Application is made, the Applicant will provide a copy of the Application to the Commission and the parties to this proceeding. Until such time as that determination is made, further information is not reasonably available to the Applicant.

**Data Request 146**

*Please list the species that will be subject to Section 7 consultation between USACE and USFWS.*

**Objection:**

This information will be included in any permit application. The information is not available at this time.

**Data Request 147**

*Please provide any correspondence or other documentation among the Applicant, federal action agencies, and state and federal wildlife agencies regarding Section 7 consultation for the Project.*

**Objection:**

The Applicant objects to this question on the grounds that the information regarding "Section 7" is outside the scope of this proceeding. If CURE seeks any correspondence, it may file a public records act request with the relevant Federal agency. In addition, while the determination by a Federal agency on a Section 7 permit may be relevant to the Commission's decision on this application, mere correspondence is not reasonably necessary to a decision by the Commission on the application. Finally, the Applicant objects on the grounds that the term "other documentation" is vague.

**Data Request 165**

*Please provide a discussion of the Project's impacts on migratory birds traveling through the Pacific Flyway.*

**Objection:**

The Applicant objects to this question on the grounds that it is vague and is not necessary to a decision that the Commission must make on the Application. The Pacific Flyway extends from Alaska to Patagonia. The Applicant disagrees with the premise of CURE's question that the project will have an impact on migratory birds through the Pacific Flyway. If CURE wishes to discuss fictional impacts of the Project, it should do so at its own time and expense.

**Data Request 178, 178a, 178b, 178c**

*Please specify the biological resources that will be monitored and the contents of the associated compliance reports. In your response please include:*

- a. The frequency and duration of monitoring and reporting.*
- b. Monitoring methods.*
- c. Success criteria and triggers for additional mitigation if success criteria are not met.*

**Objection:**

A discussion of compliance and monitoring programs to ensure the effectiveness of impact avoidance and mitigation measures incorporated into the project is set forth in Section 5.64 of the AFC. The specific details requested by CURE are either not reasonably available at this time or are not reasonably necessary for a decision by the Commission on the Application.

Notwithstanding these objections, the Applicant may provide an additional response to CURE's request at a later date.

**Data Request 189**

*Please characterize the Applicant's referenced disturbance within the Valley Saltbrush Scrub habitat present in the Project study area by discussing the features that make it disturbed (e.g.,*

*roads, recent agricultural activity, off-road vehicle use) and quantifying the level(s) of disturbance.*

**Objection:**

The applicant objects to the question on the grounds that (1) it is vague (CURE does not explain what it means by "quantifying the level of disturbance," (2) such calculations are not reasonably available to the Applicant, and (3) this level of specificity is not necessary for the Commission to make a decision on this Application.

**Data Request 190**

*Please provide a more thorough description of the vegetation present along Zapato Chino Creek within the Applicant's Project study area and justify the inclusion of bank vegetation in the Non-Vegetated Channel community.*

**Objection:**

The Applicant objects to question 190 on the grounds that the request requires a level of specificity that is not reasonably necessary for the Commission to make a decision on this Application. This "more thorough description" is not reasonably available to the Applicant without significant additional fieldwork and would serve no purpose other than to harass and burden the Applicant. In addition, the question is vague because it does not explain how much "more thorough" the discussion would have to be to satisfy CURE.

**Data Request 191, 191a, 191b, 191d, 191e, 191f<sup>3</sup>**

*Please characterize the vegetation along the creek bank in the Applicant's Project study area such that its ecological values can be inferred. In particular, please provide:*

*a. The height range of tamarisk trees.*

*b. The height range of cottonwood trees.*

*d. The relative abundance of tamarisk trees to cottonwood trees.*

*e. The density and distribution of trees along the creek banks.*

*f. The approximate minimum, maximum, and mean distance trees extend from the bank.*

**Objection:**

The Applicant objects to question 191 and its various subparts on the grounds that the request requires a level of specificity that is not reasonably necessary for the Commission to make a decision on this Application. This degree of "characterization" is not reasonably available to the Applicant without significant additional fieldwork and would serve no purpose other than to harass and burden the Applicant. If CURE believes that the height of a tamarisk tree is relevant to the Commission's decision on this Application, it may measure the tree itself.

Dated: September 14, 2009

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By  \_\_\_\_\_

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<sup>3</sup> CURE did not provide data request 191c.

STATE OF CALIFORNIA

Energy Resources Conservation  
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<u>San Joaquin Solar 1 and 2 LLC</u>	)	

**PROOF OF SERVICE**

I, Karen A. Mitchell, declare that on September 14, 2009, I served the attached  
*OBJECTIONS TO DATA REQUESTS OF CALIFORNIA UNIONS FOR RELIABLE ENERGY,*  
*SET 4* 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.



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Karen A. Mitchell



**SERVICE LIST**  
**08-AFC-12**

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