

DOCKET

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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 5**

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STATE OF CALIFORNIA
Energy Resources Conservation
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SET 5

On September 4, 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 5*. Set 5 is one of five sets of Data Requests tendered by CURE. CURE has tendered to date 278 Data Requests, which includes 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 and as we explained in our response to CURE's Set 4 data requests, 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."¹ 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 CURE's request for new or revised analyses have crossed far beyond the line of discoverable data.

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.

Except as noted below, the Applicant will respond to CURE's data requests Set 5 on or before October 5, 2009. There are, however, specific questions in Set 5 to which the Applicant objects. Pursuant to Title 20, California Code of Regulations, Section 1716(f), Applicant hereby objects to CURE's Data Requests 221, 223 through 225, 232, 236, 237, 239, 242 through 244, 246, 249, 253, 254, 257, 259, 261, 266 through 274, and 278.

The Applicant's specific objections are set forth below.

SPECIFIC OBJECTIONS

Data Request 221

Please explain how the addition of the Project would impact total miles traveled for delivery of fuel for biomass within the San Joaquin Valley Air Pollution Control District.

Objection:

The Applicant has not calculated the total number of miles traveled for delivery of fuel of biomass within the San Joaquin Valley Air Pollution Control District. Therefore, the Applicant objects to this request on the grounds that the requested information is not reasonably available to the Applicant. In addition, the requested information is not reasonably necessary to make a decision on this Application.

Data Request 223

Please provide N₂O and CH₄ emission factors for the Project's biomass combustors for the various types of fuel mixes and combustion temperatures. Please document all your assumptions.

Objection:

The Applicant has not calculated N₂O and CH₄ emission factors for "various types" of fuel mixes and combustion temperatures. The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 224

Please provide estimates of annual carbon dioxide-equivalent emissions of N₂O and CH₄ for the Project biomass combustors. Please document all your assumptions.

Objection:

The Applicant has not estimated the annual carbon dioxide-equivalent emissions of N₂O and CH₄ for the Project biomass combustors. The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 225

Please revise the entrained road dust emissions estimates for vehicle travel on off-site paved roads based on emission factors for the fleet-average weight of all vehicles traveling the respective roads tributary to the Project site (rather than based on emissions factors for each vehicle class) and the appropriate silt loading factors. Please calculate emissions for vehicle travel for each road type, i.e., freeway, major arterials, collector, local, and rural roads tributary to the Project site.

Objection:

As the Applicant will explain in its response to Data Request 225, the Applicant does not accept CURE's assertion that the entrained road estimates were incorrectly calculated. Therefore, the Applicant objects to this request to revise the estimates on the grounds that the information is not reasonably available to the Applicant and that the information is not relevant.

Data Request 232

Please discuss potential mitigation measures to mitigate the Project's mobile source emissions, including the feasibility of a "Clean Air Truck" program (retrofit and replacement of trucks owned by trucking firms delivering biomass) such as proposed by the Liberty Quarry Applicant.

Objection:

As set forth in the Applicant's response to CEC Data Requests 24, the mobile source emissions of the project do not constitute a significant impact. In the absence of significant impacts, mitigation measures are not required. Therefore, a discussion of "potential mitigation measures" is not reasonably necessary to any decision the Commission must make on this Application.

Data Request 236

Please provide vendor specifications for the fluidized bed combustors that will be installed at the Project including toxic air contaminant emission factors.

Objection:

The Applicant is unsure what is meant by "vendor specifications". The Applicant has provided in the Application and in response to CEC Staff Data Requests, many specifications for the fluidized bed combustors from the vendor including fuel requirements, heat and energy production, criteria pollutant and air toxic contaminant emission factors, etc. If CURE is requesting the vendor specifications for the fluidized bed combustors such as equipment dimensions or materials of construction, these are not available until the final design is completed. Therefore, the Applicant objects to the question on the grounds that it is vague and the information is not reasonably available to the Applicant.

Data Request 237

Please provide source tests for the Mendota Biomass Power Plant for toxic air contaminant emissions including a description under which these emissions were measured (load, fuel mix including specification of the fraction of C&D wood, combustion temperature, control equipment, etc.).

Objection:

The Applicant is not in possession of the source tests for the Mendota Biomass Power Plant. The Applicant objects to the question on the grounds that the information is not reasonably available to the Applicant. If CURE desires this information, it is free to request the information from the Mendota Project or the Air District.

Data Request 239

Please provide emission factors for toxic air contaminant emissions measured at a plant with bubbling fluidized bed combustors and under similar conditions (load, fuel mix, combustion temperature, control equipment, etc.) as proposed for the Project.

Objection:

The Applicant is not in possession of the requested information. The Applicant objects to the request on the grounds that the information is not reasonably available to the Applicant.

Data Request 242

Please provide a comparison of the TPH-d sample concentrations to regulatory agency screening levels.

Objection:

The Applicant understands that this information will be included in a Phase 2 ESA that we expect will be completed and docketed in October 2009.

Data Request 243

Please evaluate individual, rather than average, toxaphene soil exceedences of ESLs and CHHSLs in determining whether they would pose a risk to site workers and if they would constitute hotspots that would require excavation, removal, and confirmatory sampling.

Objection:

The Applicant understands that this information will be included in a Phase 2 ESA that we expect will be completed and docketed in October 2009.

Data Request 244

Please document if notification of Fresno County or the Regional Water Quality Control Board (RWQCB) is required under the Aboveground Storage Tank program requirements.

Objection:

The Applicant objects to this request on the grounds that the “documentation” is not reasonably available to the Applicant.

Data Request 246

Please provide any agency communication regarding whether site assessment is conducted to regulatory standards.

Objection:

The Applicant objects to the question on the grounds that it is vague. We do not know what CURE intends by the phrases “any agency communication”, “site assessment” or “regulatory standards.”

Data Request 249

Please provide a revised comprehensive and Site-specific Erosion and Sediment Control Plan that incorporates pesticide and TPH-d data.

Objection:

A draft DESCP was submitted with the response to CEC data Requests on July 14, 2009 and a revised draft DESCP was submitted on August 21, 2009. The Applicant objects to CURE’s request to revise this plan again on the grounds that the information is not reasonably available to

the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 253

Please provide the status of the WWTF annexation application to the Fresno LAFCo.

Objection:

The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application. The proposed WWTF is not the subject of this Application. If CURE seeks information regarding the WWTF, CURE may ask LAFCO.

Data Request 254

Please provide a schedule of construction for the proposed WWTF.

Objection:

The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 257

Please provide supporting evidence that any portion of the tested aquifer is truly confined.

Objection:

The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 259

Please provide comparative analysis of the time-drawdown data using the conventional Cooper-Jacob (“steady-state”) technique for a confined aquifer, Hantush (“leaky semi-confined

aquifer”) technique, and unconfined aquifer techniques (Neuman and Moench methods, at a minimum).

Objection:

The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 261

Please explain the resultant uncertainties introduced to estimates of long-term aquifer yield and drawdown as a result of the Applicant’s test well partial penetration. Please provide all data that supports your answer.

Objection:

The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 266

Please provide logs for a minimum of six additional nearby wells, spaced at distances greater than 230 feet from the Project site test well.

Objection:

The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 267

Please provide the Applicant’s pump test (specific capacity) test data from each of the additional nearby wells.

Objection:

The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 268

Please use data requested in Data Request Nos. 259 to 261 to provide a revised conceptual model of the local aquifer system surrounding the proposed Project site (at least 1.5 miles from the on-site test well).

Objection:

The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 269

Please evaluate and comment on the impacts of the Applicant's revised conceptual model provided in response to Data Request 268 on the results of the aquifer test, and upon the predicted Theis drawdown estimates after 1, 10 and 20 years of continuous pumping from the test well.

Objection:

The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 270

Please provide the Applicant's evaluation of perennial yield (operational safe yield) of the PVB that establishes the baseline for the Project's analysis of the proposed Project water demand impacts.

Objection:

The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 271

Please provide an evaluation of perennial yield (operational safe yield) of the PVB, in order to establish a defensible baseline for justifying proposed Project water demands, using the following:

- a. Data as far back as 1950, if possible; and*
- b. Total basin groundwater extractions from as many pumpers as possible; and*
- c. Water level data from a minimum of six (6) wells within a 1.5 mile radius of the proposed Project site.*

Objection:

The Applicant does not have the data requested in Data Request 271. The task of acquiring this information would be time consuming, costly and burdensome. The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 272

Please explain the effects of foreseeable future continued drought and climate change conditions on availability and sustainability of future groundwater extractions in the PVB, and their

bearing on availability of groundwater to meet proposed Project demands. Please provide as probability values and quantitative estimates of uncertainty in support of your answer. Data for this analysis may be found via the State DWR, AWWA, ACWA, US Geological Survey, academic research institutions and/or the National Resources Defense Council. Extrapolations of historic effects from the Westside Basin can be used for comparison.

Objection:

The Applicant has not performed a probability analysis or quantitative estimate of the matters requested by CURE in data request 272. The Applicant does not have the benefit of CURE's crystal ball to know which future drought or climate change conditions are "foreseeable".

The Applicant objects to this request on the grounds that the request is vague and that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application

Data Request 273

Please provide the Applicant's evaluation of the potential effect of continued restricted imported water supplies to PVB via the CVP-SWP system, as a result of Bay-Delta legal decisions, CEQA process and uncertainties. Please assume that future restrictions may be even less than the prevailing 40% allocation. Extrapolations from the conditions in the adjacent Westside Basin may be useful, but should not form the sole basis for the evaluation.

Objection:

The Applicant has not undertaken an evaluation of the potential effect of speculative future possible restrictions to PVB as a result of unspecified legal decisions or other unidentified uncertainties. Therefore, the Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 274

If the Applicant disagrees that future restrictions may be even less than the current 40% allocation, please demonstrate how the effect of continued restricted imported water supplies to the PVB will impact A) the Project and B) the groundwater basin, based on the Applicant's scenario of future CVP-SWP allocations during the proposed 20-year Project duration. Please justify your allocations based the Applicant's information and analysis of possible future drought and political scenarios.

Objection:

The Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant nor reasonably relevant to any decision the Commission must make on this Application.

Data Request 278 and All Subparts

Responses to Data Request No. 277 notwithstanding, as an alternative to the simple Theis analytical method, please develop a robust three-dimensional conceptual and numerical groundwater flow model for the northern portion of the PVB where the proposed SJS 1 & 2 Project is to be located, to simulate effects of Project groundwater withdrawals on neighboring pumpers and planned PVWD groundwater recharge facilities. Please use some form of conventional and reasonably available commercial software, such as WHI Visual Modflow© (version 3.1 or greater) or an equivalent. If an existing groundwater flow model has been developed for the Project area and is available and not subject to proprietary use restrictions, that may be considered for the simulations. The following conditions should be met by any such model used or developed:

- A. *Please adhere to prevailing Standard Guides developed by the American Society for Testing and Materials (ASTM) for developing, calibrating, verifying and performing*

sensitivity analyses of groundwater flow models, as well as defining initial model conditions and boundary conditions.

- B. A model domain of not less than six square miles, centered on the proposed Project extraction well(s), should be used.*
- C. In order to avoid “forced” boundary condition behavior, model boundaries should be set so as to not coincide with geologic or suspected hydrogeologic boundaries, such as the Gujarral Hills to the north, Kreyenhagen Hills to the west, or the subsurface Kettleman Hills anticline across Polvadero Gap east of the Project site.*
- D. Horizontal discretization (gridding) of the domain should be constructed so as to have as many grid-centered wells as possible. Grid dimensions need not be any finer than necessary to reasonably simulate heads produced by the number of pumping wells or recharge sites presently in the domain, and new wells or recharge sites reasonably expected to be installed within the domain within the expected duration of the proposed Project.*
- E. Vertical discretization should include as many discrete layers as are adequate for representation of the different physical properties and flow behavior of all significant aquifers and aquitards identified within the domain from review of local well logs. As many well logs as illustrated on Figure 5.5-4 of the AFC should be used as possible, in addition to an adequate number of wells east of Polvadero Gap within the Westside Groundwater Basin to simulate the potential boundary condition in that area. The bottom layer of the discretized domain should include the base of the fresh water zone. Layer discretization should be able to lead to reasonable simulations of well capture zones developed due to preferential flow pathways in zones of higher hydraulic conductivity (something that a simplified Theis analysis cannot achieve).*

- F. *Static (non-pumping) water-level data should be used from as many local wells as possible for steady-state model calibration. It is recommended that heads measured during historic periods of maximum CVP-SWP imported water to PVB (and minimal groundwater pumping) be considered for steady-state calibration.*
- G. *Recovery data from the February 2009 aquifer test may be used for transient model calibration, but only if uncertainties with the “State Prison” test observation well can be resolved (e.g., aquifer stratigraphy and well construction details). Transient calibration should comparatively also involve heads measured from as many idle (non-pumping) wells as possible during historic periods of heavy groundwater pumping in other wells, although such a condition may not have ever existed. Nevertheless, a comprehensive review of local area wells should be performed to evaluate whether or not this is feasible.*
- H. *Assignment of “no-flow” and “constant head” boundary conditions in particular should only be used with extreme prejudice, and be well-justified from suitable historic data.*
- I. *Following a reasonable effort at model calibration, the model should initially be verified by pumping simulations of the Applicant’s aquifer test well using rates and time periods similar to those used for the previous Theis simulations, with all other wells in the domain set for non-pumping conditions. Subsequent model verification should be performed using those same Project test well extraction rates, in addition to other wells in the domain set to achieve cumulative extractions comparable to historic maximum pumping periods recorded in the PVB.*
- J. *If model calibration and verification efforts provide reasonable results, please use the model to verify PVB perennial yield.*
- K. *Please perform conventional sensitivity and uncertainty analyses for the model.*

Objection:

The Applicant is not in possession of a robust three-dimensional conceptual and numerical groundwater flow model for the northern portion of the PVB. Therefore, the Applicant objects to this request on the grounds that the information is not reasonably available to the Applicant. Under the Commission's discovery rules, the Applicant has no obligation to perform analyses of this nature and complexity at the request or direction of CURE.

Dated: September 24, 2009

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By  _____

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STATE OF CALIFORNIA

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PROOF OF SERVICE

I, Karen A. Mitchell, declare that on September 24, 2009, I served the attached
OBJECTIONS TO DATA REQUESTS OF CALIFORNIA UNIONS FOR RELIABLE ENERGY,
SET 5 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 A. Mitchell

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08-AFC-12

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