

CALIFORNIA ENERGY COMMISSION

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March 30 2009

Kent Larson
Martifer Renewables Solar Thermal LLC
12555 High Bluff Drive, Suite 100
San Diego CA 92130

DOCKET 08-AFC-12	
DATE	MAR 30 2009
RECD	MAR 30 2009

RE: **Application for Confidentiality, Emission Reduction Credits**
San Joaquin Solar 1 & 2
Docket No. 8-AFC-12

Dear Mr Larson:

On March 2, 2008, San Joaquin Solar, LLC, and San Joaquin Solar 2, LLC (collectively referred to herein as "Applicant") filed an application for confidentiality in the above-captioned Docket. Applicant seeks confidentiality for the letter to San Joaquin Valley Air Pollution control District ("SJVAPCD"), dated February 26, 2009, regarding the Authority to Construct Application for the San Joaquin Solar 1&2 Project. Specifically, Applicant requests that the Emission Reduction Credit ("ERC") information, including the timing of control and transfer to the SJVAPCD, be kept confidential through the end term of the agreement.

Applicant bases the request upon the Public Records Act, Govt. Code § 6254.7(f), which provides for the confidentiality of data used to calculate the costs of obtaining omissions offsets, and upon section 6254.11, which provides for the confidentiality of records relating to volatile organic compounds information received by an air pollution control officer.. The application states, in part:

The information should be kept confidential through the end term of the agreement to protect the Applicant and project's economic/financial trade secrets identified in the materials. Public disclosure of the proposed timing of ERC purchase would impact market cost and availability. The information includes data used to calculate the costs of obtaining emissions offsets. . . The material contains trade secrets and its disclosure would cause a loss of the Applicant's competitive advantage.

A properly filed application for confidentiality shall be granted under the California Code of Regulations, title 20, § 2505(a)(3)(A), "if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the [Energy] Commission to keep the record confidential." The California Public Records Act allows for the non-disclosure of trade secrets. Gov. Code, § 6254(k); Evid. Code, § 1060. The California courts have traditionally used the following definition of trade secret:

a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and

which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . .

(*Uribe v. Howe* (1971) 19 Cal.App.3d 194, 207-208, from the Restatement of Torts, vol. 4, § 757, comments b, p.5.)

The Public Records Act allows for data used to calculate the costs of obtaining emissions offsets to be confidential. Gov. Code, § 6254.7(f). However, that same section states that at the time that an air pollution control district issues a permit to construct to an applicant, data obtained from the applicant regarding offsets purchases becomes a public record.

The application makes a reasonable argument under the California Energy Commission's regulations for classifying the data used to calculate the costs of obtaining emissions offsets as a trade secret, providing the applicant with a competitive advantage over potential competitors, in accordance with the above standards. Cal. Code Regs., tit. 20, § 2505. Therefore, it is in the public interest that data used to calculate emissions offsets be given confidentiality, so as not to interfere with offset negotiations.

However, Applicant requests that the information be kept confidential "through the end term of the agreement." The Public Records Act does not allow for such information to be kept confidential indefinitely, as stated above. Additionally, the term of confidentiality needs to be carefully specified to ensure conformance with the policies of both the Environmental Protection Agency (EPA) and the Energy Commission. The identification and evaluation of offset sources is a critical component of the Energy Commission's licensing process, including our review of environmental impacts as the lead agency pursuant to the California Environmental Quality Act (CEQA). The confidentiality of potential offset sources can only be maintained until that point when public participation in review of the project's proposed offsets becomes necessary. This will likely occur when the air district issues its Preliminary Determination of Compliance (PDOC).

As interpreted by the EPA, the Clean Air Act requires "federally enforceable" emission reduction credit banking actions to be completed before the air district's PDOC is issued. 42 U.S.C. § 7503(a)(1). EPA's policy is that an air district's PDOC should satisfy all the requirements of a Determination of Compliance so it can be the subject of meaningful public review. 40 C.F.R. § 51.161.

Moreover, Public Resources Code § 25523, subdivision (d)(2), requires that compete emissions offsets for a proposed facility be identified before the Energy Commission licenses that facility. Staff's first use of an applicant's proposed offset sources is normally in the Preliminary Staff Assessment, which reviews the air district's PDOC. Following issuance of the PDOC, public workshops involving the Energy Commission staff, the air district, other interested agencies, intervenors, and members of the public

will be held. At that time, certain aspects of your ERC Acquisition Plan will be discussed.

Thus, detailed information on the source, ownership, and characteristics of the offsets proposed for your project needs to become public as part of a properly issued PDOC. I therefore grant **temporary confidentiality** to Applicant's ERC Acquisition Plan, only until such time as the air district issues the PDOC. Accordingly, it is in your best interests that negotiations for offset sources be completed by that time.

Any subsequent submittals related to ERC offsets can be deemed confidential for the temporary term specified in this letter without the need for a new application, provided that you file a certification under penalty of perjury that the new information is substantially similar to that which is granted confidential status by this determination. California Code of Regulations, title 20, § 2505, subdivisions (a)(1)(G) and (a)(4).

Persons may petition to inspect or copy the records that I have designated as confidential. The procedures and criteria for filing, reviewing, and acting upon such petitions are set forth in the California Code of Regulations, title 20, § 2506. If you have any questions concerning this matter, please contact Deborah Dyer, Senior Staff Counsel, at (916) 654-3870.

Sincerely,



MELISSA JONES
Executive Director

cc: Docket Unit
Joseph Douglas, Project Manager
Lisa DeCarlo, Project Staff Counsel