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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

**SAN JOAQUIN SOLAR 1 AND 2, LLC'S
RESPONSE TO
CALIFORNIA UNIONS FOR RELIABLE ENERGY'S
MOTION TO COMPEL PRODUCTION OF INFORMATION
FOR DATA REQUEST SET 4**

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San Joaquin Solar 1 LLC and San Joaquin Solar 2 LLC, collectively referred to as San Joaquin Solar (“SJS” or “Applicant”), provide this Response to “California Unions for Reliable Energy’s (“CURE”) Petition to Compel Production of Information in Response to CURE Data Requests, Set Four” (“Petition”). CURE filed its Petition on October 14, 2009.

Introduction

Premised on its remarkable and patently false allegation that the *purpose* of the San Joaquin Solar 1 & 2 Hybrid Energy Project (“Project”) is to "degrade area wage standards", CURE has sought to bury the Applicant in an avalanche of paper.¹ Over the past three months, CURE has tendered to the Applicant five sets of data requests containing 278 separate questions, including a number of multiple-part questions. To put the scope of these requests in perspective,

¹Although not relevant to this AFC, the facts are that the applicant has signed a power purchase agreement requiring that it pay prevailing wage and intends to use union labor for construction of this facility. The applicant has informed CURE of these facts both orally and in writing. Moreover, as CURE is also well aware and as discussed below, the applicant is prohibited by law from entering into a project labor agreement at this time.

the Commission Staff which is charged with conducting a thorough independent review of the Application, has submitted one set of 148 questions.

Moreover, CURE's data requests are not merely requests for information reasonably available to the Applicant. A substantial portion of the requests to which the Applicant has objected ask the Applicant to perform detailed research, complex analyses or detailed trivial investigations such as measuring the heights of trees not located on the Project site, or specifying to the month the last date that particular crops may have been planted. As we explain below, both the purpose and effect of the Data Requests posed by CURE is to burden and harass the applicant and to coerce the execution of a Project Labor Agreement ("PLA").

However, even if CURE's purpose in posing these requests was not to coerce a PLA, the requests would remain improper under the discovery standards set by the Commission. Particularly with respect to those requests by CURE that ask the Applicant to perform additional analysis, research or investigation, the Commission has consistently held that a party in a licensing proceeding is not required to perform research or studies for another party.² The Commission has been equally clear CEQA does not require that every study, research project or test recommended by every expert be carried out.³ Therefore, to the extent that CURE believes that these requests are relevant, the Commission may afford CURE the opportunity to research these matters. The Committee should not however, compel the Applicant to choose between conducting costly, time consuming and burdensome research for CURE or signing a PLA. CURE's petition to compel responses to Data Request Set 4 should be denied.

² 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, Dec. 26, 2008, p. 2.

³ Application for Certification for the Carrizo Energy Solar Farm, *Committee Order Responding to CURE's Motion to Compel Production of Information*, p. 2, Docket No. 07-AFC-8 (Dec. 3, 2008).

Procedural Background

Applicant filed its Application for Certification (“Application”) on November 26, 2008 and the Application was accepted as data adequate on March 11, 2009. The AFC referenced a future Project Labor Agreement (“PLA”) for the Project with a “local union.”⁴ There was no mention in the Application of how or when this agreement would appear, or what form this agreement would take. Shortly thereafter, CURE filed a Petition to Intervene and began propounding data requests. CURE’s first two sets of data requests, filed on May 28 and July 14, 2009, contained a total of 35 discrete requests.

On July 16, 2009, CURE’s attorney met with representatives from Applicant (the “July 16 Meeting”). At the July 16 Meeting, Applicant informed CURE’s attorney, as it had already stated publicly, that it planned to use Union labor on the Project and, as noted above, that the Applicant has signed a power purchase agreement requiring that it pay prevailing wage. However, because Applicant was not an employer primarily engaged in the construction industry, it was prohibited by federal law⁵ from entering a PLA. In order to have an entity that lawfully could enter a labor agreement for the Project, Applicant would first need to hire its general contractor. It is premature for the Applicant to solicit bids and hire a general contractor until the conditions of certification are clear and the scope of the construction work to meet such conditions is defined.

In addition, at the July meeting, Applicant explained the intent to hire a full EPC Contractor to construct the Project. Based upon construction schedules and financing requirements, the EPC Contractor should be hired in the first quarter of 2010. Once an EPC

⁴ San Joaquin Solar 1& 2 Hybrid Project, Application for Certification, Nov. 20, 2008 (“SJS AFC”), p. 3-25.

⁵ See 29 U.S.C. § 158(f); see also *Glens Falls Bldg. & Constr. Trades Council, Bricklayers Local 6 (Indeck)*, 350 NLRB 417 (July 31, 2007).

contractor has been hired (after a competitive bidding process), the EPC can enter into labor agreements with unions. CURE's counsel understood all of this information and scheduling constraints, and yet has continued to burden the Project with unnecessary and excessive data requests.

Eleven days later, on July 27, 2009, CURE propounded sixty-four (64) more data requests. More followed over the next three months, and as of the date of this filing, CURE has filed five sets of data requests containing 278 requests, which includes subparts totaling more than 300 distinct requests. To date, SJS has objected to 68 of CURE's 278 data requests in sets 1 through 5 and provided answers to the remaining 210 requests in a good faith effort at full disclosure. Of the 68 objectionable requests, CURE concedes that the objections to 32 requests were valid due to the fact that it has not sought to compel a response and the time for doing so has passed.

With respect to Set 4, CURE submitted 105 data requests. SJS objected to 17 of these requests. CURE's petition seeks to compel a response to 11 of these 17 objectionable requests. CURE's Petition also seeks to compel a further response to six (6) data requests in Set 4 because CURE is unsatisfied with the response or disagrees with the response provided by the Applicant.

In the Petition to Compel, CURE argues against objections by the Applicant to CURE's Data Requests Set 4. CURE's general arguments are (1) liberal rights to intervene under CEC rules do not allow the Agency "to divine the 'objective'" of CURE in weighing the relevance and appropriateness of CURE's intervention activities; (2) CURE's participation is appropriate under CEQA, and the CEC should not wander "into an arena wholly beyond its authority: namely labor relations;" (3) CURE's objectives, nonetheless, are "relevant;" and (4) Applicant's objections violate state anti-SLAPP laws.

CURE's arguments beg the question about what reasonable limits and restrictions should be placed around an intervener gone awry. Nothing in CURE's Petition to Compel demonstrates that the Commission lacks authority to balance an intervener's actions against the other legitimate statutory and regulatory objectives of the proceeding. The Applicant submits that where an intervener attempts to obstruct and delay a legitimate permitting proceeding in order to seek advantage in a labor dispute, decisive action must be taken to ensure that neither the Applicant nor the Commission's processes are abused or misused.

As demonstrated below, CURE's arguments should be rejected by the Commission for a number of reasons:

- (1) The First Amendment and state law do not allow CURE's actions and, in fact, the law prohibits using the First Amendment as a shield for illegal conduct;
- (2) The Commission has plenary authority to control CURE's actions in this matter; and
- (3) Anti-SLAPP law does not apply by its terms to this proceeding or to any of the federal labor laws at issue here.

CURE has not made these requests in good faith or with the purpose of assisting the Commission with its permitting decision. Rather, CURE has made these requests because Applicant has not signed a "take-it-or-leave-it" PLA with the State Building and Construction Trades Council— an agreement that itself would constitute a violation of federal labor law where the executing party, the Applicant, is not an employer engaged in the construction industry. CURE invites the Commission to turn a blind eye to its use of the Commission's procedures for the purpose of coercing a PLA with a developer which has, ironically enough, gone on the record stating that it intends to utilize union contractors when it is lawful to do so. That irony is compounded by the fact that even if CURE has any lingering, baseless distrust of the Applicant's

sincerity to engage union contractors when it is legal to do so, Applicant has signed a power purchase agreement requiring that it pay prevailing wage.

A. CURE's Conduct Is Not Protected by the First Amendment.

CURE has chosen to use the Commission proceedings for labor organizing, by demanding a PLA that the Applicant cannot legally sign under federal law, in return for less active intervention by CURE in the proceeding. CURE argues that it has the right to participate at the Commission regardless of the legality of its motive or the reasonableness of its participation. Yet, one cannot cleanse unlawful conduct by conducting the unlawful conduct through a lawful medium. The United States Supreme Court has recognized that “First Amendment rights may not be used as the means or the pretext for achieving ‘substantive evils.’”⁶ Indeed, the United States Supreme Court has observed that “there are many forms of . . . reprehensible practice which may corrupt the administrative or judicial processes”⁷ Engaging in administrative action to burden, oppress, and harass is an example of such conduct.⁸

CURE claims that it has a First Amendment right to participate in the instant proceeding and, in effect, use the state administrative proceeding to bring a target of union organizing to its knees when federal labor law does not permit it. However, the First Amendment is not a shield for this abusive litigation to achieve an unlawful end.

CURE argues that the motive for its litigious conduct is not a relevant consideration for the Commission, yet this is flatly rejected by the United States Supreme Court, which has held

⁶ *California Motor Transport Co., v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *see also C.J. Mozzochi v. Rogers*, Case No. 93-CV-1229, 1994 U.S. LEXIS 21674, at 14 (D. Conn. July 6, 1994) (“Just as false statements are not immunized by the First Amendment right to freedom of speech . . . baseless litigation is not immunized by the First Amendment right to petition”); Cal Const, Art. I § 2(a) (2009) (“Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right”) (emphasis added).

⁷ *California Motor Transport*, 404 U.S. at 513.

⁸ *See Id.* at 514.

that an agency is prohibited from interfering in labor organizing by premising its exercise of police power on its position in the dispute.⁹ CURE is using the administrative process to force Applicant to violate the National Labor Relations Act and federal case law by entering a PLA for the Project. This behavior is exactly the type of “reprehensible practice” denounced by the Supreme Court. The Commission has a duty to balance CURE’s actions against the interests of other parties, the resources available to address CURE’s actions, and the State’s interests in new, safe and reliable renewable energy resources.¹⁰

Oddly, while preaching to the Commission that it should not divine CURE’s objectives, CURE claims that those objectives are legitimate: to protect its members’ environmental and economic interests. CURE cannot have it both ways: either its objectives are relevant or they are not. The Applicant contends that CURE’s interests are for the purpose of labor organizing. CURE’s Petition to Compel confirms its unlawful purpose: “[w]hen a project proposes to degrade area wage standards . . . it is entirely appropriate that labor unions closely scrutinize the project.”¹¹ By justifying its “close scrutiny” of the Project on “area wage standards,” which have no bearing on the Project’s environmental impact and are not relevant to the Commission’s permitting decision, CURE proves the true organizational goal of its data requests.¹² Clearly,

⁹ See generally *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986) (holding that a public entity cannot condition the issuance of a license on the settlement of a labor dispute).

¹⁰ See also, e.g. *Int’l Longshoremen’s Ass’n v. Allied Int’l*, 456 U.S. 212, 226-27 (1982) (in discussing that the First Amendment does not protect a union’s political secondary boycott, the Supreme Court stated that it was clear that “conduct designed not to communicate but to coerce merits still less consideration under the First Amendment. The labor laws reflect a careful balancing of interests. There are many ways in which a union and its individual members may express [themselves] without infringing upon the rights of others.”) (internal citations omitted) (emphasis added).

¹¹ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 8 (filed on Oct. 14, 2009).

¹² *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 8 (filed on Oct. 14, 2009). This is particularly true here, where the Applicant is committed to the use of Union contractors on its Project.

such conduct is not protected by the First Amendment and thus has no place in the Commission's proceedings.

B. The Commission Has Plenary Authority to Control CURE's Unreasonable and Burdensome Discovery Actions.

The Commission has described its power facility licensing proceedings as “quasi-adjudicatory” or “adjudicative.”¹³ The term “adjudicate” means “to hear and settle (a case) by judicial procedure.”¹⁴ In acting the part of judge, the Commission has plenary authority to limit CURE's misuse of the Commission's discovery procedure.¹⁵ Section 1203(c) of the Commission's Rules empowers the Commission's Chairman and the Presiding Member to conduct proceedings and hearings, including, but not limited to, disposing of procedural requests, admitting or excluding evidence, receiving exhibits, designating the order of appearance of persons making oral comments or testimony, and continuing the hearings. This authority is further embodied in the Commission's Rules related to “Site Certification.” Specifically, Article 1 of Chapter 5 of the Commission's regulations (20 CCR 1701 *et seq.*) in general, and Section 1716, in particular, vest the Committee with the authority to conduct hearings in a fair, orderly, and timely fashion. In regulating the conduct of proceedings, care must be taken to ensure that there is no abuse of discretion.¹⁶ Fairness and efficiency have been identified as two hallmarks of an administrative process.¹⁷

¹³ *DFI Funding, Inc. v. California Energy Commission*, Case No. S172819, at 11 (Cal. Supreme Ct. May 18, 2009) (Commission's Preliminary Statement in Opposition to Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief).

¹⁴ <http://www.thefreedictionary.com/>.

¹⁵ Although the California Code of Civil Procedure is not binding on the Commission, it is instructive for the Commission's role as “adjudicator” that California's discovery rules allow courts to restrict discovery that is unduly burdensome and harassing. Cal. Code of Civil Proc. § 2019.030(a).

¹⁶ See Charles H. Koch, Jr., *Administrative Law and Practice*, § 10.6 (2d ed. 1997).

¹⁷ Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279-80 (1978).

Here, there is a danger that inaction could provide an unfair advantage to one intervener, if the Commission allows CURE's harassing litigation tactics to go unchecked. The citizens of California are entitled to be the beneficiaries of a fair and efficient administrative process that allows Applicants to bring renewable energy to the State in a timely manner. Actions, or inaction, that enable CURE to misuse the administrative processes plainly deprive the people of California of the important state interest in the timely licensing of new energy supplies, in general, and new renewable energy resources, in particular.

C. CURE's Anti-SLAPP Accusation is a Red Herring.

Finally, CURE argues that Applicant's general objection to CURE's coercive and harassing conduct constitutes unlawful "intimidation," and the "equivalent of a SLAPP suit."¹⁸ CURE claims that its "participation in the Energy Commission's certification process" are "acts in furtherance of CURE's constitutional rights of petition and free speech"¹⁹ protected by California's anti-SLAPP statute, Section 452.16 of the California Code of Civil Procedure. However, CURE incorrectly attempts to assert the protection of California's anti-SLAPP statute. The anti-SLAPP statute does not even apply in this context, as Applicant has only filed valid objections in an administrative proceeding. Applicant has not filed a civil lawsuit against CURE.

DISCUSSION

I. The information requested by CURE in Data Requests 102, 104(2), 125, 189, and 191 is not relevant or reasonably necessary for the Commission to make a decision on this application.

A. Information regarding the last date of planting of each crop type at the Project site (including year and month) is not relevant for the Commission to make a decision on this application, and is not reasonably available to the Applicant.

¹⁸ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 9 (filed on Oct. 14, 2009).

¹⁹ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 10 (filed on Oct. 14, 2009).

CURE's Data Request 102 requests "documentation reflecting the last date of planting of each crop type at the Project site"²⁰ in order to determine whether the "proposed project could have a potentially significant impact on agriculture," to "resolve the discrepancies in the AFC and between SJS's and the County's characterization of the Project site by obtaining information clearly describing the current use of the property," and to "provide information regarding the environmental baseline."²¹

CURE's request for the year and month of the last planting of each crop on the Project site should be rejected for three reasons.

First, the AFC clearly states that the current land use for the entire site is agriculture, and that the Project will result in impacts to agriculture amounting to the removal of 640 acres of farmland. If mitigation for these impacts is necessary, it will likely be in the form of a land use easement or mitigation fee and will be implemented per the Williamson Act Cancellation process. The "year and month" of the "last date of planting of each crop type at the Project site" is neither relevant nor reasonably necessary to determine the "potentially significant impacts" as the agricultural use of the property has already been acknowledged. Whether the crops were wheat or pistachios and whether they were planted in April or May will not materially affect the significance of any potential impact.

Second, this information is not reasonably necessary to resolve the alleged "discrepancies in the AFC and between SJS's and the County's characterization of the Project site."²² CURE mischaracterizes portions of Applicant's AFC to create the appearance of discrepancies where

²⁰ *California Unions for Reliable Energy Data Requests, Set Four*, Data Request 104, p. 2 (filed on Aug. 24, 2009).

²¹ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 23 (filed on Oct. 14, 2009).

²² *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 28 (filed on Oct. 14, 2009).

none exist. For example, the background section to CURE's Data Requests 100, 101, and 102 (and recreated verbatim in CURE's Petition to Compel) states:

The AFC's description is...inconsistent... For example, the AFC states that the Project site is currently active farmland recently cleared and planted with wheat and pistachios, including cotton, safflower and garlic. The AFC also states that the majority of the Project site is actively cultivated at this time, with pistachio and wheat cultivation in progress...In addition, the Project site is bare due to recent plowing.²³

The apparent inconsistency (as reinforced by CURE's Data Request 100, discussed below), lays with CURE's interpretation of Applicant's AFC as stating in one instance that the Project site is planted with wheat and pistachios, and stating in another instance that the site is "recently planted with wheat and pistachios, including cotton, safflower, and garlic."

However, CURE's interpretation of the AFC should be compared with the actual text of the application. For example, the AFC states:

The Project site is currently active farmland recently cleared and planted with wheat and pistachio crops, and *has supported* several types of crops in addition to wheat and pistachios, including cotton, safflower, and garlic.²⁴

The Project area is characterized by active cultivation of wheat and pistachio and is currently surrounded by fencing.²⁵

The majority of the Project site is actively cultivated at this time, with pistachio and wheat cultivation in progress.²⁶

There is no inconsistency in the AFC that will be resolved by the information requested in Data Request 102. Nowhere in the AFC is it mentioned that crops other than pistachios and wheat are

²³ *California Unions for Reliable Energy Data Requests, Set Four*, Data Request 125, p. 2 (filed on Aug. 24, 2009); *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 18,19 (filed on Oct. 14, 2009), citing to pages 5.6-1, 5.6-4, and 5.6-5 of Applicant's AFC.

²⁴ SJS AFC, p. 5.6-1 (emphasis added). The AFC also notes that the proposed transmission line area, as distinguished from the main Project site, is comprised of orchard and row crops.

²⁵ SJS AFC, p. 5.6-4.

currently planted. Thus, the requested information is not relevant to the Commission's determination of the application in this proceeding, as the necessary information is already available.

Third, the month and year that particular crops were last planted is not necessary, as CURE asserts, to establish the environmental baseline under CEQA. When establishing the environmental baseline, CEQA requires that the lead agency consider the existing physical conditions at the time the application is filed.²⁷ Thus, information relating to the "last date" a particular crop was planted is irrelevant to the baseline determination by the Commission. Either the Project site was in agricultural use at the time the Application was filed or it was not.

Furthermore, Applicant's statement that the Project is currently in agricultural use does not mean that the entire Project site is planted with concurrently grown crops. Agricultural cycles include plowing, growing, harvesting, and rotating crop locations in order to restore and maintain viable soils. CURE's Petition to Compel asserts that the AFC is "inconsistent" by noting that the site is "currently active farmland," that the "majority of the Project site is actively cultivated," and that a "portion of the Project site is not in agricultural production."²⁸ However, CURE creates this supposed inconsistency by establishing a false equivalence between active farmland, cultivated land and agricultural production. As noted above, the alleged inconsistencies by CURE are actually components of the agricultural cycle. The entire Project site is active farmland, cultivated and prepared for agriculture. Certain portions of the property are currently planted with crops and produce agricultural products for sale, whereas other

²⁶ SJS AFC, p. 5.6-4.

²⁷ 14 C.C.R. § 15125 (a),(e).

²⁸ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 18 (filed on Oct. 14, 2009).

portions remain unplanted to ensure that the soil remains viable. The descriptions of the agricultural uses of the Project are not inconsistent.

Finally, CURE cites the October 13, 2009 County of Fresno Agricultural Land Conservation Committee Staff Report which states that the Project site is “currently not in agricultural use.” Remarkably, CURE asserts that the data request it submitted on August 28, 2009 was an attempt to resolve this "fundamental discrepancy" between the AFC and the October 13, 2009 County Staff Report. CURE does not explain how it was aware of an October 13, 2009 report on August 28, 2009. The truth is that CURE's reference to the County Staff report is simply CURE's desperate, last minute attempt to justify a frivolous and irrelevant data request. Moreover, the reference in the County Staff Report that the Project site is currently not in agricultural use is a simple unintentional error, and CURE can easily confirm the error by calling the author of the County Staff Report. There is no need for the Applicant to resolve the alleged discrepancy by documenting the last date and type of crop planted on the Project site.

Therefore, Applicant’s Petition to Compel response to Data Request 102 should be denied.

- B. The LESA score requested in Data Request 104(2) is not necessary for the Commission to make a decision on this application and is not reasonably available to the Applicant.

CURE’s Data Request 104(2) requests “the LESA²⁹ score for the 640 acres that will be withdrawn from agricultural use” and the “analysis that supports the score obtained.”³⁰

CURE’s Petition to Compel further states that:

LESA was intended to provide CEQA lead agencies with a methodology to ensure that significant effects on the environment

²⁹ “LESA” refers to the California Agricultural Land Evaluation and Site Assessment Model .

³⁰ *California Unions for Reliable Energy Data Requests, Set Four*, Data Request 104, p. 2 (filed on Aug. 24, 2009).

from agricultural land conversions are quantitatively and consistently considered in environmental review processes.³¹

CURE's Petition to Compel then alleges that the AFC "does not cite to any LESA analysis or otherwise analyze significant impacts to agriculture."³²

CURE's Petition to Compel mischaracterizes the guidelines established in Section 21095 of the California Resources Code by omitting one significant word: optional.³³ Section 21095(a) provides:

The Resources Agency, in consultation with the Office of Planning and Research, shall develop an amendment to Appendix G of the state guidelines, for adoption pursuant to Section 21083, to provide lead agencies an *optional* methodology to ensure that significant effects on the environment of agricultural land conversions are quantitatively and consistently considered in the environmental review process. (emphasis added)

The LESA Manual published by the California Division of Land Resource Protection pursuant to its duty under Section 21095,³⁴ and information available from the Division of Land Resource Protection reinforces that the LESA methodology was developed to provide lead agencies an "optional" methodology to determine the potential significance of a project's conversion of agricultural lands.³⁵ Thus, LESA is one of many tools that can be employed to assess impacts on agriculture. There is nothing in Section 21095(a) or the Warren Alquist Act that requires an Applicant to undertake this analysis.

³¹ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 27 (filed on Oct. 14, 2009) (citing to California Public Resources Code § 21095).

³² *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 25 (filed on Oct. 14, 2009).

³³ We presume the omission was inadvertent and that CURE did not intentionally misquote Section 21095(a) so as to purposefully mislead the Commission,

³⁴ Department of Conservation, *California Agricultural Land Evaluation and Site Assessment Model Instruction Manual*, p. 1 (1997). A copy of the LESA Manual is available online at <http://www.conservation.ca.gov/dlrp/LESA/Documents/lesamodl.pdf>.

³⁵ http://www.conservation.ca.gov/dlrp/Pages/qh_lesa.aspx; Department of Conservation, *California Agricultural Land Evaluation and Site Assessment Model Instruction Manual*, p. 31 (1997).

An analysis of the impacts that would be caused by the conversion of agricultural lands to non-agricultural lands as a result of the Project and planned mitigation measures has already been provided by the Applicant.³⁶ Requiring an additional analysis under the LESA model, as requested by CURE, is not reasonably necessary to the Commission's determination of Applicant's AFC, as the potentially significant effects on agricultural land have already been identified and discussed.

Furthermore, an answering party does not have the burden to produce information not reasonably available to it. While a party may be required to produce "discoverable data,"³⁷ it is not "required to perform research or analysis on behalf of the requesting party".³⁸ Such a requirement crosses the line, and requires a party to produce undiscoverable analysis and research.³⁹ Although CURE asserts that its requested analysis and corresponding LESA score are "reasonably available" to Applicant,⁴⁰ CURE again fails to recognize the difference between asking for available information and requiring an Applicant to undertake a specialized analysis on CURE's behalf.⁴¹ Far from being a simple request for data reasonably available to Applicant, CURE's data request asks the Applicant to perform a specific, separate analysis using an optional methodology that Applicant is not required to use.

³⁶ SJS AFC Sections 5.9.1, 5.9.1.2, 5.9.1.32, 5.9.2, 5.9.3, 5.9.4, and p. 5.9-12.

³⁷ 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, Dec. 26, 2008, p. 2.

³⁸ 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, Dec. 26, 2008.

³⁹ 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, Dec. 26, 2008, p. 2.

⁴⁰ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 28 (filed on Oct. 14, 2009).

⁴¹ For example, in CURE's *Petition to Compel Production of Information in Response to CURE Data Requests, Set Three*, p.4, filed on Sept. 16, 2009, CURE requested that Applicant provide specialized costs analyses of an evaporation pond and an unspecified alternative ZLD system. CURE specifically requested that the analyses focus on a specific set of factors identified by CURE in its Data Request 57.

Finally, CURE seeks to bolster its Petition to Compel the Applicant to perform further analysis by citing a recent Draft Staff Report for Interim Guidance for Desert Renewable Energy Project Development.⁴² CURE asserts that this report recommended that "project developers for proposed renewable energy projects prepare a LESA analysis."⁴³ Again, CURE omits vital language. In fact, this draft report sets forth recommendations for *desert* renewable projects, not all renewable projects. Moreover, this report is still a *draft* and currently subject to a comment period. By its express terms, this draft interim guidance for desert renewable projects has not been reviewed or approved by the Commission. There is, therefore, no law, rule or policy that requires the Applicant to prepare a LESA.

Therefore, Applicant's Petition to Compel response to Data Request 104(2) should be denied.

- C. The information requested in Data Request 125 is not relevant or reasonably necessary for the Commission to make a decision on this decision, as the Applicant as provided sufficient information on this issue.

CURE's Data Request 125 requested Applicant to "provide the number of hours in which HTF leaks would be abated following detection."⁴⁴ CURE's Petition to Compel asserts that this information is requested to "seek information on SJS's response plan in the event of HTF leaks," as SJS has allegedly "failed to provide any information regarding its plans for responding to accidental leaks and spills of HTF."⁴⁵

⁴² CURE petition, p. 23

⁴³ Id.

⁴⁴ *California Unions for Reliable Energy Data Requests, Set Four*, Data Request 125, p. 11 (filed on Aug. 24, 2009).

⁴⁵ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 30, 31 (filed on Oct. 14, 2009).

CURE's Petition to Compel the information requested in Data Request 125 should be denied on two grounds. First, this data request is vague. Second, if this data request purports to request information relating to SJS's response plan to HTF leaks, Applicant's response plan in the event of HTF leaks has been provided in the AFC. CURE's statement that Applicant has "failed to provide" such information is patently false, as this information has been provided previously in response to CURE's Data Requests Set 3 and Set 4.⁴⁶

1. Data Request 125 is fatally vague.

CURE asserts that information regarding "the number of hours in which HTF leaks would be abated" is reasonably available to the Applicant.⁴⁷ However, the word "abate" possesses several meanings, and "stresses the idea of progressive diminishing."⁴⁸ Abate can mean "put an end to;" "to reduce in degree or intensity;" or even in some cases, "to become defeated or become null or void."⁴⁹ It is unclear to the Applicant whether CURE is asking how long it will take to stop a leak once it is detected or how long it will take to clean up a leak after it is detected.

If CURE is asking how long it will take to stop a leak after detection, the answer is obvious and has already been answered. Upon discovery of a HTF leak, either by visual inspection or via an alarm in the control system, action will be taken to stop the leak immediately. The leak will not be progressively diminished or "abated" over a "number of hours." As stated in Applicant's response to CURE's Data Request Set 3, pressure and

⁴⁶ Specifically, Applicant provided information regarding the HTF system and plans for containing and responding to potential HTF leaks in responses numbers 48, 49, 94 thru 96 to CURE's Data Requests Set 3, and responses numbers 112-124, 126-131, and 133 to CURE's Data Requests Set 4.

⁴⁷ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 32 (filed on Oct. 14, 2009).

⁴⁸ <http://www.merriam-webster.com/dictionary/abate>

⁴⁹ <http://www.merriam-webster.com/dictionary/abate>

temperature controls are located throughout each row in the solar field and monitor the HTF.⁵⁰ If a leak is detected, automatic isolation valves will close, and the leak isolated with isolation valves.⁵¹ Each HTF loop in the solar field will contain three isolation valves; each power block will have approximately twelve isolation valves. The total isolation valve count for the entire plant is approximately 600, although the exact valve count is not available until detailed design is completed. Additionally, routine shift inspections by plant personnel will occur on a regular basis. Historically, the process from leak detection to containment is fifteen minutes or less, although an exact number cannot be stated with absolute certainty.

If CURE is asking by use of the term "abate" how long it will take to clean up a leak under SJS's response plan, that question too has been answered, as we explain below.

2. Information relating to SJS's response plan in the event of HTF leaks has already been provided to the Commission and to CURE, and in multiple forms.

As stated above, if a HTF leak is detected, automatic isolation valves will close, and the leak will be isolated between isolation valves. As explained in the AFC, containment pits designed to contain up to the maximum spill that could occur in the power block area are located under the expansion vessels.⁵² The HTF expansion tank volume is 59,000 gallons. Although the operational liquid level in the vessel will vary slightly diurnally, the volume of HTF typically in the expansion vessel will be roughly 30,000 gallons.⁵³ The containment pit for the expansion vessel will hold 65,000 gallons. Any contaminated soil resulting from a leak in the solar field

⁵⁰ SJS Response to CURE Data Requests Set 3, response number 48.

⁵¹ Response to CURE Data Requests Set 4, response number 112.

⁵² SJS AFC, p. 5.14-10.

⁵³ SJS Response to CURE Data Requests Set 3, response number 94.

would be isolated and stored in a temporary storage area.⁵⁴ As noted in Applicant's response to CURE's Data Request Set 4, the temporary storage area would be constructed to meet the requirements of accumulation of hazardous waste. Signage, labeling and security would meet the applicable hazardous waste requirements of California Code of Regulations, Title 22.⁵⁵

In response to an earlier CURE data request, Applicant explained that the maximum spill in the solar field is limited to 1,000 ft of 70 millimeter ("mm") heat collector elements ("HCE") tubes, which is the maximum quantity of HTF between two isolation valves on a loop.⁵⁶ Using a tubing wall thickness of two mm, the maximum amount of HTF contained between two isolation valves in each solar loop is 275 gallons (66mm inner diameter of 1000 ft of tubing equals 36.8 cubic feet, or 275 gallons). The maximum quantity of HTF that could potentially leak from the system between two isolation valves not located on the solar field loops varies depending on the line size and distance between two isolation valves. Most of the HTF lines not located in the solar field will be within containment areas which means a leak of HTF will not impact soil or become a "spill". HTF lines in the power block and biomass areas will have isolation valves installed according to code and good engineering practices. The 250 gallons stated as the maximum spill during the August 6, 2009 workshop was an estimated value. A revised estimate of less than 300 gallons was presented in response number 48 to CURE's Data Requests Set 3.

As stated in the AFC, the amount of contaminated soil that may result from HTF spills or leaks should not exceed 20 cubic feet in a 3-month period.⁵⁷ The SJS estimate of 20 cubic yards of HTF contaminated soil for a 3-month period is based on operational experience at the SEGS facilities in Kramer Junction. However, the probative value of historical data from SEGS III thru

⁵⁴ SJS AFC, p. 5.14-10.

⁵⁵ SJS Response to CURE Data Requests Set 4, response number 128.

⁵⁶ SJS Response to CURE Data Requests Set 3, response number 48.

VII to predict the Project's HTF spill volume is limited. First, the SEGS III-VII solar fields produce over 180 MW, whereas SJS will produce at the maximum 106.8 MW. SEGS III-VII operate with a lower HTF temperature, and are roughly thirty percent less efficient than SJS. As a result, the size of the solar field required to produce the 180 MW is approximately two and a half times the size of SJS. The larger size of the SEGSS III-VII solar fields increases the potential for HTF leaks. Additionally, the HCE at Kramer Junction were designed and constructed over 20 years ago. The SJS Project will contain several design improvements that will reduce the potential for HTF leaks such as higher integrity welds between the glass and metal in the HCEs.

In response to another CURE data request, Applicant stated that contaminated soil will be transported to the temporary storage area via a front end loader.⁵⁸ Transportation will occur promptly after detection. The temporary laydown area is shown on the revised Figure 5.2-2 in Detail A (previously provided in the Response to CEC Data Request Set #1). The temporary storage area will include a concrete slab with eight foot concrete walls on three sides with water proof joints. The two acre parcel for temporary storage would be constructed to meet the requirements of accumulation of hazardous waste. Contaminated soil will be disposed at a certified disposal facility. Soil contaminated by HTF will be considered a hazardous waste, and would not be accumulated onsite for more than 90 days. Hazardous waste would be removed from the facility by a licensed hazardous waste hauler, and treated and disposed of at a licensed hazardous waste landfill in accordance with applicable regulations. Approximately one truck per quarter will be required to remove the expected amount of HTF contaminated soil.

⁵⁷ SJS AFC, p. 5.14-10.

⁵⁸ SJS Response to CURE Data Requests Set 3, response number 95.

Equipment design and employee training will include all potential safety concerns. All SJS operators and maintenance personnel will be certified with OSHA 40 hour HAZWOPER training.

This is but a sampling of the information that Applicant has already provided in regards to its plans for responding to potential HTF leaks. CURE's Petition to Compel response to Data Request 125 on the basis that it seeks information on SJS's response plan in the event of HTF leaks should be denied.

- D. The information requested in CURE's Data Request 189 to "characterize the Applicant's referenced disturbance" is already available, and further information is not relevant or necessary to make a decision on this Application.

CURE's Data Request 189 asks the Applicant to:

[C]haracterize the Applicant's referenced disturbance within the Valley Saltbush Scrub habitat 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.⁵⁹

CURE's Petition to Compel production of the information in Data Request 189 should be denied. First, information regarding the features that make the Valley saltbush scrub habitat disturbed has already been provided. Second, the portion of the data request requesting Applicant to "quantify" the level of disturbance is vague. Third, further quantification beyond the information the Applicant has provided is not reasonably available to the Applicant, and Applicant should not be required to conduct research and analysis on CURE's behalf.

⁵⁹ *California Unions for Reliable Energy Data Requests, Set Four*, Data Request 104, p. 27 (filed on Aug. 24, 2009).

1. Applicant has already provided information as to the features that make the Valley saltbush scrub habitat disturbed.

In its Petition to Compel CURE claims that Data Request 189 “seeks clarification” as SJS “refuses to define ‘disturbed,’” and “conclusions made in the AFC regarding the distribution of Valley Saltbush Scrub...appear to be in conflict.”⁶⁰ However, beyond making a general assertion that “conflicts” exist, CURE does not provide any reference to any conflicting sections in the AFC regarding the Valley Saltbush scrub. In addition, CURE’s assertions ignore information already provided by the Applicant in its AFC. The AFC specifically states

The observed habitat in the Project study area is disturbed in nature and includes disturbed and agricultural vegetation communities, as defined by Holland (1995).

Applicant has already provided the framework used to define “disturbed”- the Holland coding system. Furthermore, the AFC states:

All of the Project study area and the majority of the surrounding landscape has been chronically disturbed by extensive irrigated agricultural practices, including row crops and seasonal plowing and disking, as well as associated developed uses present on site.⁶¹

In addition, the AFC notes that:

[b]ecause the Valley saltbush scrub habitat that is present... is sparsely distributed within the non-native grassland community, it is considered disturbed.⁶²

Thus, the “feature” that makes the Valley saltbush habitat disturbed is its sparse distribution within the non-native grassland community, in addition to the chronic disturbance from extensive agricultural practices. As the information requested in Data Request 189 is already available, CURE’s Petition to Compel on this issue should be denied.

⁶⁰ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 38 (filed on Oct. 14, 2009).

⁶¹ SJS AFC, p. 5.6-4.

2. The term “quantifying the level(s) of disturbance” is vague.

As CURE notes in its Petition to Compel, to quantify is “to make explicit the logical quantity” of a “thing.”⁶³ However, there is no “logical quantity” used to measure “level(s) of disturbance” of which the Applicant is aware. As such, information regarding the level of disturbance is not reasonably available to the Applicant. Furthermore, neither the Applicant nor the Commission should be expected to read CURE's mind and guess as to what “logical quantity” CURE believes should be used to measure habitat disturbance.⁶⁴ Therefore, CURE's Petition to Compel response to Data Request 189 should be denied.

3. Applicant should not be required to “quantify” the level of disturbance.

Even if it was possible to ascribe a “logical quantity” to levels of disturbance, Applicant should not be compelled to provide such information. CEQA “does not require that every study, research project or test” be carried out, or that the analysis be exhaustive.⁶⁵ Although CURE states this information is “necessary” to determine impacts to special-status species, Applicant has already provided sufficient information on the issue of impacts to special-status species. URS biologists visited the Project site repeatedly throughout the survey periods in 2008 and 2009 to confirm that the ‘habitat’ that appears on aerial photographs was not suitable habitat for special-status species. While portions of the habitat within the proposed transmission line were determined to be “marginally suitable” for the Le Conte's Thrasher, neither this species, nor the

⁶² SJS AFC, p. 5.6-5.

⁶³ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 50 (filed on Oct. 14, 2009).

⁶⁴ *Goleta II*, supra note 12, at 576.

⁶⁵ Application for Certification for the Carrizo Energy Solar Farm, *Committee Order Responding to CURE's Motion to Compel Production of Information*, p. 2, Docket No. 07-AFC-8 (Dec. 3, 2008).

San Joaquin antelope squirrel, was observed during the 2008 surveys.⁶⁶ Thus, as sufficient information has already been provided, the information in Data Request 189 is not reasonably necessary to make a decision on the application. Furthermore, as parties are not required to conduct “analysis or research” on the behalf of a requesting party, Applicant should not be compelled to conduct an analysis to quantify the level of disturbance for CURE.

CURE’s Petition to Compel a response to Data Request 189 should be denied.

- E. The information requested in CURE’s Data Request 191 regarding the height range, abundance, density, distribution, and distance from the creek bank of tamarisk and cottonwood trees, is not reasonably necessary for the Commission to make a decision in this proceeding.

CURE states that Data Request 191 is necessary to obtain an "adequate characterization of the Zapato Chino Creek. However, the Applicant has adequately characterized the habitat along Zapato Chino Creek, and, therefore, a more detailed analysis is not required.⁶⁷ While CURE speculates about the presence of the Swainson's hawk,⁶⁸ further analysis to count or measure trees is not necessary for the Commission to make any necessary determination on this application regarding the Swainson's hawk.

1. SJS has adequately characterized the Zapato Chino Creek habitat.

In its Petition, CURE states that “an adequate characterization of riparian habitat along the Zapato Chino Creek within the Project study area is necessary to assess the presence of suitable habitat for the Swainson’s hawk, a state threatened species.”⁶⁹

⁶⁶ SJS AFC, p. 5.6-11.

⁶⁷ SJS AFC pp. 5.6-4, 6, 11, 17, 18, 21; URS, *Biological Resources Technical Report for the San Joaquin Solar Power Generating Facility, Fresno County, California*, p. 3-19, 20 (Jan. 22, 2009) included in SJS Supplemental Information in Response to CEC Data Requests, 08-AFC-12.

⁶⁸ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 45 (filed on Oct. 14, 2009).

⁶⁹ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 44 (filed on Oct. 14, 2009).

At the outset, it should be noted that CURE submitted eight data requests, numbered 181-188 in its Data Request Set 4, on the subject of the Swainson's hawk, and to which Applicant provided responses.⁷⁰ Significantly, CURE has not sought to compel further response to any of the data requests regarding the Swainson's hawk in its Petition to Compel.⁷¹ Therefore, the Applicant has already exhaustively addressed the subject of the Swainson's hawk in the AFC and in response to CURE's voluminous requests.

CURE makes a number of false statements in support of its Petition to Compel a response to Data Request 191. First, CURE alleges that "SJS has not yet undertaken any investigation of Project impacts on the Swainson's hawk."⁷² This is patently false. The Applicant's biologists devoted twenty days to field investigation and, and as previously reported, no Swainson's hawks were observed nesting in the trees along the creek or within the survey area of the Project during the 2008 surveys.⁷³ During a recent rare plant survey, a Swainson's hawk was observed flying over the creek. A letter report documenting this sighting was provided to the CEC on October 19, 2009. Raptor nest surveys will be conducted prior to construction to verify no new nests have been established. Any nests, if detected, will be avoided per the Migratory Bird Treaty Act.

⁷⁰ *California Unions for Reliable Energy Data Requests, Set Four*, Data Request 104, p. 24, 25 (filed on Aug. 24, 2009).

⁷¹ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 3 (filed on Oct. 14, 2009).

⁷² *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 46 (filed on Oct. 14, 2009).

⁷³ URS, *Biological Resources Technical Report for the San Joaquin Solar Power Generating Facility, Fresno County, California*, p. 3-12, (Jan. 22, 2009) included in SJS Supplemental Information in Response to CEC Data Requests, 08-AFC-12.

Second, CURE falsely states that the Applicant has not consulted the CDFG regarding potential Swainson's hawk habitat within the Project study area. Applicant provided CDFG consultation records on this issue to CURE in response to Data Request Set 4.

Third, CURE alleges that the AFC fails to include "[a] description and results of all field studies and seasonal surveys used to provide biological baseline information about the project site." This is obviously untrue. SJS has provided reports for all surveys that have been conducted, and the Commission has found the AFC to be data adequate.

Finally, CURE alleges that SJS is incorrect when it states that there are no nests within the vicinity of the Project site, and to support this contention CURE cites two potentially active nests identified in 2005 which CURE asserts are within 10 miles of the Project site. In fact, the nearest Swainson's hawk CNDDDB locations were identified in 2005 near Huron, greater than 10 miles from the SJS Project site (see attached Figure 1).

Therefore, CURE's allegations regarding purported inadequacies in the Applicant's investigation and analysis of Swainson's hawks are completely unfounded and form no basis to compel further detailed studies of the habitat along Zapato Chino Creek.

Because the Applicant has provided exhaustive information regarding the Swainson's hawk in its Application and in response to CURE's data requests, the Applicant submits that it is both frivolous and burdensome to count or measure the trees as CURE seeks to compel. For the foregoing reasons, the Committee should reject CURE's petition to compel a further response to Data Request 191.

Nevertheless, should the Committee seek further information regarding the creek habitat, the Applicant offers in summary here what can be addressed from existing field notes without the cost, time and delay of sending biologists back into the field. Should a further response to

Request 191 be compelled, the Applicant requests that the Committee find this response to be sufficient to address CURE Data Request 191.

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.

*Response: No tamarisk trees were present on the creek banks within the current transmission line alignment. The tamarisk was present in the creek near Jayne Avenue within the **northern** transmission line buffer (which is no longer a part of the project) and outside of the creek, near an access road on the western end of the transmission line corridor*

b. The height range of cottonwood trees.

Response: The height range was not measured. The average height of cottonwood trees along the creek bank is estimated to be approximately 10-12 meters.

d. [sic] The relative abundance of tamarisk trees to cottonwood trees.

*Response: No tamarisk trees were present on the creek banks within the current transmission line alignment. Cottonwood trees (*Populus fremontii*) were the dominant species along the creek. Mulefat was also present.*

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

Response: The cottonwood trees and mulefat were densest closest to Sutter Avenue.

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

Response: These distances were not calculated. All riparian trees were confined to the banks of the

creek, and did not extend beyond the banks except for their canopies.

II. The information requested by CURE in Data Requests 100, 101, 102, 103(2), 171, 173, and 174 has already been provided by the Applicant.

A. Further response to Data Request 100 is not relevant or reasonably necessary for a Commission decision on the application.

CURE's Data Request 100 requested "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."⁷⁴ As noted above, CURE misstates the AFC, and only wheat and pistachios are recently planted. Furthermore, as stated in Applicant's response to CURE's Data Request 100, the crop information contained in the AFC was based on oral communications with the property owners. Applicant has requested "documentation" from the property owners, and Applicant will provide that documentation if it becomes available.

Although Applicant is working with the property owner to purchase the property, historic information establishing crop types, dates, and acreage planted is not reasonably available to SJS. Obtaining this information for CURE would involve additional research, and CEQA does not require parties to conduct research on the behalf of requesting parties.⁷⁵ Furthermore, CEQA only requires "a sufficient degree of analysis" to enable the Commission to make a "decision which intelligently takes account of environmental consequences."⁷⁶ "Documentation" supporting the types of crops grown on the Project site is irrelevant to the consideration of environmental consequences, as the impacts to agriculture have already been identified.

⁷⁴ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 19 (filed on Oct. 14, 2009).

⁷⁵ Committee Ruling on Intervenor Center for Biological Diversity's Petition to Compel Data Responses, Application for Certification for the Carlsbad Energy Center, p. 2, Docket No. 07-AFC-6 (Dec. 26, 2008).

⁷⁶ 14 C.C.R. 15151.

Therefore, as Applicant has already provided a response to Data Request 100, further response would not be reasonably necessary for the Commission to make a decision on the application, CURE's Petition to Compel a response to Data Request 100 should be denied.

B. Further response to Data Request 101 is not necessary.

CURE's Data Request 101 requests that the applicant "explain the AFC's statement... that a 'majority of the Project site is actively cultivated at this time' by describing the number and location of acres actively cultivated at this time."⁷⁷ Applicant responded to this Data Request by providing the following information:

The Property has been tilled in 2009 and is planted seasonally. The number of acres actively planted varies depending on the season. Currently, pistachio trees are planted and cultivated on over 150 acres of the project site.

CURE claims that this "response is incomplete," claiming that Applicant has "only provide[d] information regarding approximately 150 acres of a 680 acre Project site."⁷⁸ This claim ignores the fact that the Project site is only 640 acres.

Furthermore, the plain language of Applicant's response addresses CURE's Data Request 101. Cultivate means to "prepare and use for the growing of crops."⁷⁹ The land has historically and currently been tilled and planted. This has been documented through DOC data, field visits and historic aerial photos.⁸⁰ The entire Project site is tilled and prepared for agriculture, thus the entire Project site is cultivated. It is unclear to the Applicant how further response to this data request can be provided.

⁷⁷ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 21 (filed on Oct. 14, 2009).

⁷⁸ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 21 (filed on Oct. 14, 2009).

⁷⁹ <http://www.merriam-webster.com/dictionary/cultivate>

Therefore, CURE's Petition to Compel a response to Data Request 101 should be denied.

C. Further response to Data Request 103(2) regarding the Project's impacts on agriculture is not necessary or relevant to the Commission's decision.

As discussed in Section I.A, the Project will result in impacts to agriculture amounting to the removal of 640 acres of farmland. If mitigation for these impacts is necessary, it will likely be in the form of a land use easement or mitigation fee and will be implemented per the Williamson Act Cancellation process. Applicant is baffled as to any other information regarding the impacts to agriculture that can be provided. The Commission should deny CURE's Petition to Compel further information on this subject as there is no more information to provide.

D. The information requested in CURE's Data Requests 171, 173, and 174 is already available, and further information is not reasonably necessary for a Commission decision.

CURE's Data Request 171 requests the Applicant to "cite the protocol used for the small mammal trapping study."⁸¹ CURE states that its Petition to Compel the production of information on this issue is necessary as "the information requested by CURE is not contained within the small mammal trapping report."⁸²

As stated above, one of the factors considered by the Commission is the availability of the requested information, specifically whether the information has "already been provided in some form."⁸³ The "protocol used for the small mammal trapping study" requested by CURE in Data Request 171 has already been provided by Applicant in its Small Mammal Trapping

⁸⁰ California State University, Stanislaus, Endangered Species Recovery Program, *Land use and land cover of the San Joaquin Valley of California and surrounding areas*(July 10, 2004) ; <http://esrp.csustan.edu/gis>.

⁸¹ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 33 (filed on Oct. 14, 2009).

⁸² *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 33, 34 (filed on Oct. 14, 2009).

⁸³ Committee Ruling on Intervenor Center for Biological Diversity's Petition to Compel Data Responses, Application for Certification for the Carlsbad Energy Center, p. 2, Docket No. 07-AFC-6 (Dec. 26, 2008).

Report.⁸⁴ The small mammal trapping surveys were conducted according to a protocol that was approved by CDFG two months prior to commencement of trapping activities. This approval was based on information that included the survey time frame, proposed trap line locations (and as a corollary, the habitat in which the traps would be placed), and total number of trap nights. A description of the protocol is described more fully in Section 2.0 of the small mammal trapping survey. It is unclear how CURE came to the conclusion that the protocol is “not contained within the small trapping report” when nearly a page of the report is devoted to the methods used to conduct the small mammal trappings. As the information contained in Data Request 171 has already been provided and “the regulations do not... require that the information provided necessarily satisfies the expectations of the requesting party,”⁸⁵ CURE’s Petition to Compel Response to Data Request 171 should be denied.

CURE states that the information in Data Request 173 and 174 is “reasonably necessary for a Commission decision,” as only “3 of the approximate 13 miles of the proposed transmission line” were surveyed, and that the “habitat variables associated with each trap site” should be available as a result of the survey of the three miles.⁸⁶ CURE notes that this information is relevant as the “Commission’s decisions must be made on the basis of facts and not conclusions alone.”⁸⁷

⁸⁴ The *Small Mammal Trapping Report* was provided as Appendix H to the *Biological Resources Technical Report for the San Joaquin Solar Power Generating Facility, Fresno County, California*, in Applicant’s *Supplemental Information in Response to CEC Data Requests 08-AFC-12* (Jan. 22, 2009).

⁸⁵ Application for Certification for the Carrizo Energy Solar Farm, *Committee Order Responding to CURE’s Motion to Compel Production of Information*, p. 2, Docket No. 07-AFC-8 (Dec. 3, 2008).

⁸⁶ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 34 (filed on Oct. 14, 2009).

⁸⁷ *California Unions for Reliable Energy Petition to Compel Production of Information in Response to CURE Data Requests, Set Four*, p. 35 (filed on Oct. 14, 2009).

However, CURE fails to take note of the fact that the northern alignment is no longer considered for the Project. At this time, only approximately six miles of transmission line alignment are considered a part of the Project.⁸⁸ As shown in the vegetation maps included in the AFC, the Biological Resources Technical Report, and the Small Mammal Trapping Report, the majority of the preferred transmission line is comprised of active agriculture. The trapping was planned and conducted in areas within the transmission line that were not active agriculture and that were potentially suitable for small mammals. Small-mammal trapping is not commonly conducted in active agricultural lands; therefore no justification is necessary to explain why portions of the proposed transmission line were not surveyed.

Furthermore, information regarding “habitat variables” has already been provided. Vegetation types for the corresponding trap areas are described in the AFC and Biological Resources Technical Report, and shown on several maps.⁸⁹ The trap lines are overlayed on the vegetation, and the data sheets identify the trap lines where the mammals were observed. Therefore, the vegetation and habitat characteristics of each trap site could be determined by reviewing the information provided. There are only 2 types of vegetation in which trapping occurred within the currently proposed transmission line corridor, and consist of non-native grassland in trap lines 5, 6, and 8, and sandy creek bed in trap line 7. In addition, as shown on the photographs of the trap lines in the trapping report, there are little to no habitat variables associated with each trap site for the proposed transmission line. It is important to note that not only were the study and corresponding study area approved by CDFG, but the Project was found data adequate.

⁸⁸ SJS AFC p. 3-27.

⁸⁹ For example, see Figures 2 and 3 attached to the URS, *Biological Resources Technical Report for the San Joaquin Solar Power Generating Facility, Fresno County, California* (Jan. 22, 2009) included in SJS Supplemental Information in Response to CEC Data Requests, 08-AFC-12

CEQA does not require an exhaustive analysis, only a “sufficient degree... to provide decision makers with information which enables them to make a decision which intelligently takes account environmental consequences.”⁹⁰ Applicant does not have the burden to prove a negative.⁹¹

CONCLUSION

For the reasons set forth above, CURE's petition to compel responses to CURE Data Request Set 4 should be denied.

Dated: October 29, 2009

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By 

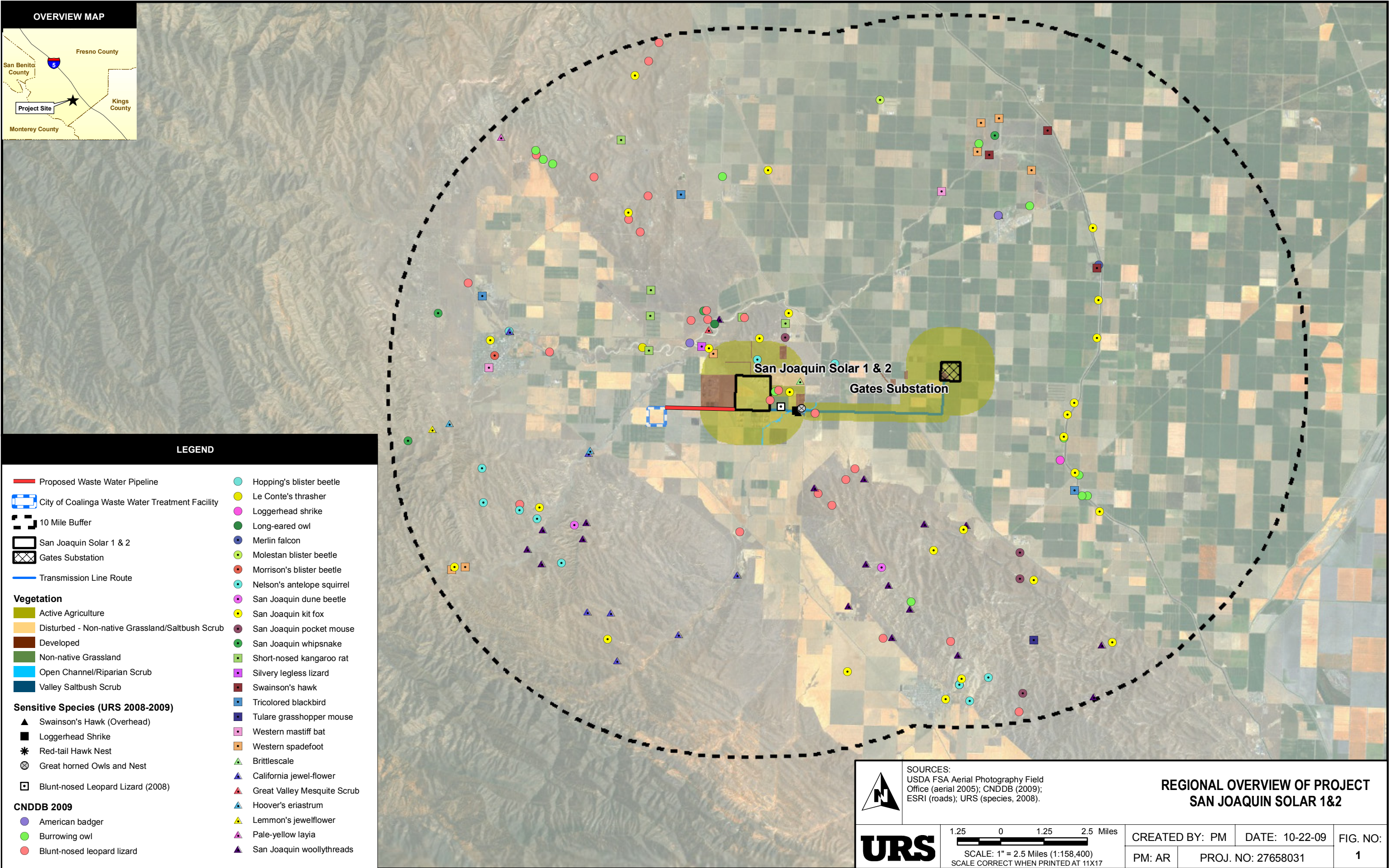
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⁹⁰ Application for Certification for the Carrizo Energy Solar Farm, *Committee Order Responding to CURE's Motion to Compel Production of Information*, p. 3, Docket No. 07-AFC-8 (Dec. 3, 2008); 14 C.C.R. 15151.

⁹¹ Application for Certification for the Carrizo Energy Solar Farm, *Committee Order Responding to CURE's Motion to Compel Production of Information*, p. 4, Docket No. 07-AFC-8 (Dec. 3, 2008); 14 C.C.R. 15151.

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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

Application for Certification for the SAN JOAQUIN)
SOLAR UNITS 1 AND 2 LICENSING PROJECT) Docket No. 08-AFC-12
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PROOF OF SERVICE

I, Karen A. Mitchell, declare that on October 29, 2009, I served the attached *San Joaquin Solar 1 and 2, LLC'S Response to California Unions for Reliable Energy's Motion to Compel Production of Information for Data Request 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.



Karen A. Mitchell

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08-AFC-12

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