DOWNEY | BRAND
ATTORNEYS LLP

555 Capitol Mall, 10th Floor
Sacramento, CA 95814

P: 916/444-1000
F: 916/444-2100
downeybrand.com

Jane E. Luckhardt
jluckhardt@downeybrand.com

DOCKET
07-AFC-8
DATE APR 28 2008
RECD. APR 28 2008

April 28, 2008

VIA FACSIMILE AND MAIL

Mary Dyas, Project Manager
California Energy Commission
1516 Ninth Street, MS-15
Sacramento, CA 95814

Re: Docket No. 07-AFC-8, Carrizo Energy, LLC's Response to the San Luis Obispo County Department of Agriculture's Review of the Carrizo Energy Solar Farm Application for Certification

Ms. Dyas:

This letter responds to the San Luis Obispo County Department of Agriculture's March 20, 2008 comment letter to the California Energy Commission ("CEC") regarding Carrizo Energy, LLC's ("Carrizo Energy") Application for Certification ("AFC") for the Carrizo Energy Solar Farm ("CESF"). This letter responds to concerns expressed by the San Luis Obispo County Department of Agriculture ("Department of Agriculture") regarding CESF's agricultural land use impacts. Some local residents have voiced their concerns to Carrizo Energy regarding conversion of the CESF site to a solar field. Furthermore, the Department of Agriculture has expressed concerns about removing farm land from production. One question faced by the CEC is whether such impacts rise to the level of a significant environmental impact. What follows is a discussion explaining why CESF's impact to agricultural lands in San Luis Obispo County will not be significant and will therefore, not require mitigation.

I. Background

Much of the land within the CESF Project area is fallow disturbed ranchland, not currently in agricultural production. According to the Shandon-Carrizo Inland General Plan, there are 637,660 acres of agricultural land within the rural areas of the planning area, which contains over 608,660 acres of parcels of Williamson Act protected farmland; however, the Project is not situated on Williamson Act lands. Additionally, the Project area does not contain prime, unique or farmland of statewide importance as defined by the California Department of Conservation.[1]

[1] See CESF AFC Section 5.9.

The Department of Agriculture declares the Project site to be considered farmland of local importance, as defined by San Luis Obispo County ("County") and 7 CFR § 657.5(d). The County defines "farmland of local importance" as "areas of soils that meet all the characteristics of Prime or Statewide, with the exception of irrigation. Additional farmlands include dryland field crops of wheat, barley, oats, and safflower." The Department of Agriculture goes on to state that conversion of such farmland would be considered a significant impact based upon "the high storie index," the project size and surrounding agricultural land.[2] However, no state law, ordinance, regulation or standard ("LORS") establishes conversion of farmland of local importance as a significant environmental impact under the California Environmental Quality Act (CEQA).

The Department of Agriculture also recommends that Carrizo Energy add a separate agricultural resource section to the AFC as well as feasible mitigation options for farmland conversion.

II. The Conversion of Farmland of Local Importance at the CESF Project Site Does Not Meet the CEQA or CEC Thresholds of Significance

The CEQA Guidelines Appendix G Environmental Checklist sets forth the following three questions, the answers to which determine "whether impacts to agricultural resources are significant environmental effects":

> a. Would the project convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency, to non-agricultural use?
>
> b. Would the project conflict with existing zoning for agricultural use, or a Williamson Act contract?
>
> c. Would the project involve other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to non-agricultural use?

The CEC's Data Adequacy Worksheet (taken from Appendix B of the CEC Siting Regulations) similarly asks whether "farmland affected by the project is prime, of statewide importance, or unique as defined by the California Department of Conservation."[3]

In answering the first question, neither of these regulatory schemes refers to farmlands of local importance at all, much less establishes the conversion of such farmlands as a threshold of significance. It is clear, as stated by both the CESF AFC and the Department of Agriculture, that

[2] March 20, 2008 Department of Agriculture Letter to the CEC at p. 3.

[3] CEC Siting Regulations Appendix B (g)(3)(D)(ii).

no prime farmland, unique farmland or farmlands of statewide importance, as defined by the Department of Conservation, exist at or within the vicinity of the Project site. Therefore, according to CEQA and CEC Siting Regulations, there would be no significant impact where farmlands of local importance are converted to another use as a result of build out of the CESF.

The CESF AFC previously established that the Project would not conflict with the existing County zoning ordinance or the general plan and that no Williamson Act lands would be affected as a result of the construction and operation of the CESF.[4] In addition, there are 637,660 acres of agricultural land within the rural areas of the Shandon-Carrizo Inland General Plan planning area, which contains over 608,660 acres of parcels of Williamson Act protected farmland.[5] This fact reveals the wide availability within the Carrizo Plains of underutilized agricultural lands of the same quality or better (prime or Williamson Act protected) than those on the CESF site.

Finally, the CESF Project would involve only minor additional changes in the existing environment, beyond the direct conversion of farmlands of local importance, that could result in the conversion of *additional* farmland to non-agricultural use. The CEC has previously interpreted this threshold of significance as a question of whether a proposed project's ancillary facilities and transmission lines would convert existing farmland to non-agricultural uses.[6] This would occur here in a minimal fashion as the CESF would require the additional construction of one transmission line almost entirely within the Project site boundary, auxiliary buildings, and storage tanks as well as seven miles of paved road and a small parking lot.[7] These additional conversions would not be considered significant because only farmland of local importance is involved and their footprint comprises only a small portion of the total converted acreage.

Therefore, pursuant to CEQA and CEC Siting Regulations, there would be no significant impact to agricultural resources as a result of build out of the CESF. Because there would be no significant impact, no mitigation measures related to farmland conversion need be considered in the AFC as requested by the Department of Agriculture. Furthermore, no additional discussion of impacts to farmland within a separate agricultural resource section is necessary precisely because there will be no significant impact to agricultural resources.

III. CEQA Caselaw and Regulations Do Not Support the Use of Arbitrary Thresholds of Significance

Under 14 CCR § 15064(b), "[t]he determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data." This means that a lead agency has

[4] See CESF AFC Section 5.9.

[5] See CESF AFC at 5.9-4.

[6] Colusa Generating Station FSA, November 2007, at 4.5-5 to 4.5-6.

[7] CESF AFC at 3-24 to 3-27.

discretion to formulate standards of significance for use in an EIR as long as a reasonable basis exists for using those standards. This requires that the agency make a policy judgment about where the line should be drawn.

In *Mira Mar Mobile Community v. City of Oceanside,*[8] the court opined that "a lead agency must necessarily make a policy decision in distinguishing between substantial and insubstantial adverse environmental impacts . . . ."[9] This policy judgment must, however, be reasonable and based on scientific information and other evidence.

The above case and CEQA regulation require a lead agency's policy judgment as to where the line of significance should be drawn be based on reason. The Department of Agriculture has failed to set forth any reasonable basis for its determination that conversion of the CESF site to non-agricultural uses would present a significant impact. This is especially true when one considers that the site consists only of farmland of local importance, the loss of which is not considered a significant impact under CEQA or CEC Siting Regulations.

IV. It Is the County's Duty to Establish Development Policies for the County

It is not up to the Department of Agriculture to establish development policies for the County. Only the County, through the Planning Commission and the Board of Supervisors, is in a position to properly evaluate the needs of the County in light of the benefits of a proposed project. In looking at the CESF Project's impacts, the Department of Agriculture only considered the Project's agricultural impacts, as is its duty. However, as qualified as it is to analyze the agricultural impacts of a project, the Department of Agriculture is not capable of balancing the plethora of other planning interests and needs of the County as a whole. That job is rightfully attributed to the County Planning Commission and the Board of Supervisors. The Department of Agriculture is simply not equipped to weigh the benefits and drawbacks of proposed projects against the planning and development requirements of the County. This also means that the Department of Agriculture cannot appropriately require specific mitigation measures without proper evaluation of a proposed project by the County.

Therefore, pursuant to the CEQA caselaw and regulations, it is unreasonable for the Department of Agriculture to declare the Project's agricultural impacts to be significant without taking into account the County's stated desire to develop solar energy projects on the Carrizo Plains (see following discussion). Thus, if the CEC were not the lead agency, it would be up to the County and not the Department of Agriculture to make a reasonable policy determination of what constitutes a significant agricultural impact.

---

[8] (2004) 119 Cal.App.4th 477.

[9] *Id.* at 493.

A. The General Plan and Zoning Designations for the CESF Site Allows For and Promotes Solar Energy Development

As stated in the AFC, the CESF Project, as proposed, is consistent with the County General Plan and zoning designations for the site, with the approval of a Conditional Use Permit ("CUP"). The Project site is zoned Agriculture District (AG). Energy production is an unclassified conditional use in the AG zone district. According to Section 22.06.010-22.06.030 and Section 22.32.060, electrical generation is an allowable (A2) use within the AG zone, subject to the approval of an CUP required for a solar generation facility with a footprint greater than 40,000 square feet.[10]

What's more, the County General Plan's Energy Element declares that the County should make better use of its available solar resources and one way is "through the construction of large-scale solar conversion facilities in the Carrizo Plains."[11] Policy 28 of the Energy Element asserts that the second preference for meeting the County's electricity needs is for facilities that use renewable resources such as solar.[12] Policy 37 encourages the development of sustainable energy sources and renewable energy projects. Policy 38 specifically encourages the use of solar electric power generating facilities, "especially in areas remote from utility services and in places where such systems can meet specialized power needs cost effectively." And Policy 39 of the Energy Element encourages and supports the development of solar power systems as commercial energy enterprises, as long as the visual and environmental impacts can be mitigated.

The County's support of energy generation activities in this predominantly agricultural region of the County could be said to reveal the County's desire to make productive use of otherwise commercially marginal land. By incorporating policies into the General Plan supporting the location of solar energy resources in the Carrizo Plains specifically, the County seems to acknowledge the fact that the remote location of the Carrizo Plains makes commercially productive agricultural uses more difficult, despite the presence of purportedly suitable soils. The long distance required to transport any agricultural goods from the Carrizo Plains makes large-scale commercial farming economically difficult there. As a result, the County has made a reasoned policy decision that solar energy production would make better use of the unique environmental characteristics and location of the land than grazing and dryland farming.

Therefore, the Department of Agriculture must keep in mind that the County has expressly declared the Carrizo Plains as its preferred site for the establishment of solar energy projects in the County. Not only is this the policy established in the General Plan, but the zoning designation for the CESF site specifically allows for solar electrical generation. The support of the County for the development of the Carrizo Plains as the exclusive site for solar energy

[10] See Section 5.9 of the CESF AFC.

[11] General Plan Energy Element at 2-7.

[12] General Plan Energy Element at 4-7.

production shows that the County prefers this relatively unproductive farmland to be put to a use that maximizes the area's potential while benefiting the greater population.

Because the County has designated this area in the General Plan as its choice location for solar farming, it must weigh the greater benefits of the CESF Project against the current lesser use of the site in its recommendations to the CEC, before a determination of significant impact and application of mitigation measures can be made.

V. Past CEC Siting Cases Have Not Established Impacts to Farmlands of Local Importance as a Threshold of Significance

Recent siting cases before the CEC involving projects that would convert farmland to a non-agricultural use did not set forth the conversion of farmland of local importance as a threshold of significance.

The San Joaquin Valley Energy Center ("SJVEC") was proposed to be located on 85 acres in the City of San Joaquin (Fresno County) on a site used for cotton production.[13] In listing its thresholds of significance in the Land Use section of the Staff Assessment, CEC Staff did not include conversion of farmland of local importance as a threshold of significance. As is standard practice under CEQA and CEC Siting Regulations, CEC Staff only considered conversion of prime or unique farmland or farmland of statewide importance as a valid significance criteria.

The Tesla Power Plant was proposed to be located on a 60-acre parcel in eastern Alameda County previously used as rangeland.[14] The impacts discussion of the Land Use section of the Final Staff Assessment ("FSA") did not include conversion of farmland of local importance as a significance criteria.[15] The FSA only referenced conversion of prime, unique or farmland of statewide importance as significance criteria.[16]

More recently, the Colusa Generating Station case proposed to construct a project on 100 acres in Colusa County used for production of rice and dryland farming.[17] Just as with the SJVEC, the agricultural resources discussion within the Land Use section of the FSA did not include the conversion of farmland of local importance as a threshold of significance. It did, however, state

[13] SJVEC Staff Assessment, July 16, 2002, at 5.4-6.

[14] Tesla Power Plant FSA, April 2003, at 4.5-4.

[15] Although the Alameda County Board of Supervisors has determined that there will be no farmland of local importance in Alameda County, the fact remains that the CEC did not identify the conversion of that type of farmland as a significant impact.

[16] Tesla Power Plant FSA at 4.5-5.

[17] Colusa Generating Station FSA at 4.5-3.

that the conversion of prime farmland, unique farmland or farmland of statewide importance would be considered significant.[18]

As can be seen from these three recent examples, the CEC does not regard conversion of farmland of local importance as a threshold of significance. The CEC follows the CEQA Guidelines Appendix G Environmental Checklist and questions only whether the project would convert prime farmland, unique farmland, or farmland of statewide importance (in addition to the other land use-related thresholds).

VI. Conclusion

Despite the Department of Agriculture's insistence on the inclusion of a separate agricultural resources section in the AFC as well as additional mitigation options pertaining to farmland conversion, the lack of significant impacts upon agricultural resources by the CESF Project negates any need for these additions to the AFC. The Project site sits upon farmland that is classified merely as that of local importance, the conversion of farmland of this classification is not recognized under either the CEQA Guidelines or the CEC Siting Regulations as an accepted threshold of significance. Furthermore, CEQA regulations and related caselaw require thresholds of significance to be reasonable and based on scientific information, which has not been satisfactorily established by the Department of Agriculture here. In addition, past CEC siting cases have not recognized the conversion of farmlands of local importance as a threshold of significance. And finally, it is up to the County, not the Department of Agriculture, to establish development policies for the County and the County General Plan and zoning designations for the CESF site not only allow for a solar energy project, but specifically promote its establishment in the Carrizo Plains.

Very truly yours,

DOWNEY BRAND LLP

Jane E. Luckhardt

JEL:np
920847.2

[18] Colusa Generating Station FSA at 4.5-3 and 4.5-5.

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION FOR THE CARRIZO ENERGY SOLAR FARM BY CARRIZO ENERGY, LLC	DOCKET NO. 07-AFC-8 **PROOF OF SERVICE (Revised 2/5/2008)**

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-8
1516 Ninth Street, MS-14
Sacramento, CA 95814-5512
docket@energy.state.ca.us

Perry H. Fontana, QEP Vice President-Projects Ausra, Inc. 2585 East Bayshore Road Palo Alto, CA 94303 perry@ausra.com	Angela Leiba, GISP Senior Project Manager GIS Manager/Visual Resource Specialist URS Corporation 1615 Murray Canyon Road, Suite 1000 San Diego, CA 92108 angela_leiba@urscorp.com
Kristen E. Walker, J.D. URS Corporation 1615 Murray Canyon Road, Suite 1000 San Diego, CA 92108 Kristen_e_walker@urscorp.com	Jane Luckhardt, Esq. Downey Brand LLP 555 Capitol Mall, 10th Floor Sacramento, CA 95814 jluckhardt@downeybrand.com
Larry Tobias Ca. Independent System Operator 151 Blue Ravine Road Folsom, CA 95630 ltobias@caiso.com	Electricity Oversight Board 770 L Street, Suite 1250 Sacramento, CA 95814 esaltmarsh@eob.ca.gov
California Unions for Reliable Energy (CURE) c/o Tanya Gulesserian Adams, Broadwell, Joseph & Cardozo 601 Gateway Blvd., Suite 1000 South San Francisco, CA 94080 tgulesserian@adamsbroadwell.com	

ENERGY COMMISSION	Mary Dyas Project Manager mdyas@energy.state.ca.us
Jackalyne Pfannenstiel, Chair Presiding Committee Member jpfannen@energy.state.ca.us	Caryn Holmes Staff Counsel cholmes@energy.state.ca.us
Jeffrey D. Byron Commissioner and Associate Member jbyron@energy.state.ca.us	Michael Doughton Staff Counsel mdoughto@energy.state.ca.us
Gary Fay Hearing Officer gfay@energy.state.ca.us	Public Adviser's Office pao@energy.state.ca.us

DECLARATION OF SERVICE

I, Lois Navarrot, declare that on April 28, 2008, I deposited copies of the attached Carrizo Energy, LLC's Response to the San Luis Obispo County Department of Agriculture's Review of the Carrizo Energy Solar Farm Application for Certification in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of the California Code of Regulations, title 20, sections 1209, 1209.5 and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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

Lois Navarrot

Lois Navarrot