



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
 COMMISSION OF THE STATE OF CALIFORNIA
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APPLICATION FOR CERTIFICATION
 FOR THE *CARRIZO ENERGY SOLAR FARM*
 BY CARRIZO ENERGY, LLC

DOCKET No. 07-AFC-8

**COMMITTEE ORDER RESPONDING TO
 CURE’S MOTION TO COMPEL PRODUCTION OF INFORMATION**

I. SUMMARY

On October 24, 2008, Intervenor California Unions for Reliable Energy (CURE) filed its *Motion to Compel Production of Information* (Motion or Motion to Compel). This Order responds to CURE’s Motion, in part **GRANTING** it (as to Data Requests 37, 38, 51, 52, 56 – 59, 64, 67) and in part **DENYING** it (as to Data Requests 36, 53, 54, 60- 63, 66 68, 69, 75, 76). CURE has withdrawn its Motion as to Data Requests 73 and 74.

II. BACKGROUND

Pursuant to Commission regulations, CURE served upon Applicant a first set of Data Requests¹, to which Applicant answered with Data Responses². In addition, Applicant served on all parties its 2008 Biological Surveys Letter Report.³ CURE next served upon Applicant a second set of Data Requests⁴, some of which Applicant answered with Data Responses.⁵ However, on September 25, 2008, Applicant filed its *Objections to California Unions for Reliable Energy’s (“CURE”) Data Requests 47, 53, 54, 55-64, 73, 74, 75 and 76*, (Objections). On October 24, 2008, CURE responded by filing its Motion to Compel. The

¹ Filed on June 13, 2008.

² Filed on July 11, 2008.

³ Filed on October 10, 2008.

⁴ Filed on September 25, 2008.

⁵ Filed on September 26, 2008.

Motion addressed twenty-four Data Requests submitted by CURE to Applicant.⁶ On November 10, 2008, Applicant filed a written response⁷ to CURE's Motion. The Committee conducted a public hearing to receive arguments on the Motion to Compel on November 17, 2008.

III. DISCUSSION

Section 1716 of our regulations (Cal. Code Regs., tit. 20 § 1716) contains the basic framework for information exchanges (i.e., Data Requests and Responses) for licensing proceedings. The procedure is straightforward. A party may request from an Applicant "... information which is reasonably available to the Applicant which is relevant to the application proceedings or reasonably necessary to make any decision on the ...application." [§ 1716(b).] The Applicant may then answer or object to the request. If the Applicant objects, the requesting party may then forego the request, seek alternative means of obtaining the desired information, or petition for an Order directing the Applicant to provide the information. The regulations do not, however, require that the information provided necessarily satisfies the expectations of the requesting party. In considering the present Motion, we have disregarded the rhetorical elements of the pertinent filings and have evaluated whether the information sought appears to be reasonably available, relevant, or necessary for us to reach a decision in this proceeding. This Order reflects the Committee's careful consideration of all written and oral information provided by the parties.

However, we must note that this project presents some unusual challenges regarding our need to assess any significant cumulative impacts. A project may result in a significant adverse cumulative impact where its effects are found to be "cumulatively considerable," meaning that the incremental effects of the proposed project are significant when viewed in connection with the effects of past, current, and probable future projects.⁸ In the case of the Carrizo Energy Solar Farm (CESF) site, the dismantled Arco Solar facility directly east of the site remains fenced, excluding wildlife. Two additional solar projects are proposed in the vicinity of the one square mile CESF, including the proposed Optisolar Topaz Photovoltaic Project which may occupy 8.5-square miles north and west of the project site, and the proposed 4.5-square mile Sun Power Project six miles east of the project site. Thus, we must evaluate the cumulative impacts of at least this 14 square mile accumulation of possible solar projects.

⁶ CURE's Motion included Data Requests 36-38, 51-52, and 66-69, which Applicant answered by referring to its 2008 Biological Surveys Letter Report, served on October 10, 2008. CURE argued that the answers were nonresponsive. Data Requests 47 and 55 were not included in CURE's Motion.

⁷ Carrizo Energy, LLC's Response to California Unions for Reliable Energy's Motion to Compel Production of Information.

⁸ Cal. Code Regs., tit. 14, § 15130.

To properly conduct our cumulative impact analysis the Committee must first determine if the combined effects of these projects would be cumulatively significant. If the answer is yes, we must then determine whether the incremental effects of the CESF are “cumulatively considerable.” We expect both Applicant and Staff to thoroughly analyze these potential cumulative impacts as required by the California Environmental Quality Act (CEQA).

1. Potential Increased Raptor Predations and Collisions

Data Request 36: *The Data Request asks for an evaluation of impacts due to increased predation by raptors hunting from project-related perches, preying upon threatened and endangered species. It also asks for recommended mitigation of any impacts.*

Committee Response: Applicant’s two years of field studies in 2007 and 2008, revealed no threatened or endangered prey species on the site. Further, project development will severely limit on-site habitat for prey. In addition, this request has been answered in Applicant’s Responses to CEC Data Request 12, filed February 27, 2008. CEQA does not require that every study, research project or test recommended by every expert be carried out. The analysis need not be exhaustive. **Denied.**

Data Request 37: *This Data Request asks for a discussion of potential risks from bird collisions with the various structures proposed for the project, including 56-foot high receivers. CURE asks for a comparison of potential impacts with the results of a 1986 study of avian mortality at a different solar plant.*

Committee Response: The complexity and height of the various structures proposed for the project make it reasonable that Applicant analyze potential project-related collision risks to birds. The response should take into account the potential risk to migratory as well as birds known to inhabit the area and possible mitigation measures to reduce any risks from collision. In its Preliminary Staff Assessment (PSA) Staff noted, that the effects of the CESF type of solar collector on wildlife are currently unknown and that guy wires on the 56-foot tall receiver structures may pose a collision threat.⁹ However, we are not persuaded that CURE’s reference to the 1986 study of the Solar One facility is relevant. That solar project was of a completely different technology and design from the proposed project and was located in a very different environmental setting. Thus, as to this Data Request, CURE’s Motion is, in part, **Granted.**

Data Request 38: *The Data Request asks for “any studies” supporting the Application for Certification (AFC) conclusion that project receivers would not present a substantial collision risk to birds.*

⁹ Preliminary Staff Assessment, Carrizo Energy Solar Farm, November 2008, p. 4.2-19.

Committee Response: As noted in the above discussion of Data Request 37, we deem the study cited by CURE to be inapplicable to CESF. Furthermore, CEQA does not require Applicant to prove a negative. Nevertheless, Applicant must make a reasonable literature search to determine if any bird collision studies exist that could help the Committee determine potential collision risks from the proposed project. **Granted.**

2. Impacts to the California Condor

Data Request 51: *The Data Request asks for an analysis of CESF project impacts on the foraging habitat and on restoration of the California condor population.*

Committee Response: The Applicant's analysis to date indicates that the endangered California condor is not currently active in the vicinity of the project. However, CURE argues that the condor can travel as much as 150 miles foraging for food, which could potentially place condors at the project site. Staff also notes in its PSA (p. 4.2-11) "the possibility that condors may be encouraged to return to the area." Applicant argues that the cattle operator at the site now removes dead cattle, thereby limiting attractions for foraging condors. However, local residents have commented that leaving dead cattle on other adjacent properties is a more common practice. The Motion on this request is **Granted.**

Data Request 52: *The Data Request asks for an analysis of cumulative impacts of the CESF and other projects in the Carrizo Plain, including the neighboring Optisolar Topaz Solar Farm and the Sun Power Project on the foraging habitat and restoration of the California condor population.*

Committee Response: Two additional projects are proposed in the vicinity of the one square mile CESF, including the proposed Optisolar Topaz project, which may occupy 8.5 square miles north and west of the project site, and the proposed 4.5-square mile Sun Power project located six miles east of the project site. The Committee has a duty under CEQA to analyze the potentially significant cumulative impacts of at least 14 square miles of project development in the Carrizo Plain environment. The Motion on this request is **Granted.**

3. Impacts to Western Spadefoot Toad

Data Request 53: *This Data Request asks Applicant to perform an on-site breeding survey during the rainy season for western spadefoot toad, a California Species of Special Concern.*

Committee Response: In its Motion, CURE argues that the project site contains suitable breeding habitat for the western Spadefoot toad and that toad eggs and larvae have been observed in rivers, creeks, and pools. However, Commission staff responded that the pools are approximately eight miles distant from the project site. Furthermore, in two years of surveys of the project site and laydown area, including multiple site visits during and shortly after heavy rains, Applicant's biologists found no suitable habitat for the toad and observed no signs of the western Spadefoot toad. It therefore appears to us that CURE's request is not reasonable at this point and the request is **Denied**.

Data Request 54: *This Data Request asks for a survey for western Spadefoot toad in areas upland of the seasonal creek associated with the project site.*

Committee Response: Again, we find that in light of Applicant's surveys, which revealed no suitable habitat and no sign of western Spadefoot toad, CURE's request for an additional survey is not reasonable and is **Denied**.

4. Impacts to Special Status Species

Data Requests 56-64: *In this series of Data Requests, CURE asks Applicant to address project impacts to the bald eagle, ferruginous hawk, golden eagle, loggerhead shrike, mountain plover, San Joaquin whipsnake, Kern primrose sphinx moth, coast horned lizard and Oregon vesper sparrow.*

Applicant responds that based on surveys conducted in 2007 and 2008, none of the above-listed species have been observed or documented on the CESF project site and that it is not appropriate to address impacts to species not documented on site. Applicant argues that it is not required to prove a negative nor is it required to survey and provide an impact analysis for all conceivable species.

Committee Response: While we acknowledge Applicant's frustration that its field studies to date are not being accepted as adequate, several parties expressed concern that special status species have been observed on or near the project site. CURE's Motion alleges examples tying special status species to the site or to nearby areas.¹⁰ A local resident commented on seeing several of the species on or near the site (11/17/08 RT 115, see *also* 78:16-18.) and a Commission staff biologist expressed the need for more information about special status species on or near the project site. (*Id.* RT 77.) Specifically, Staff requests additional information on the bald eagle, ferruginous hawk, golden eagle, loggerhead shrike, and vesper sparrow. (*Id.*)

¹⁰ CURE Motion to Compel, pp. 27-28.

We believe that Applicant's efforts to date still leave gaps in the database the Committee requires in order to address potential project impacts to the avian species of special status noted above by the Staff. This is particularly true regarding potential cumulative impacts to these birds. The fact that the birds were not observed on the project site at the time Applicant's biologists conducted their field surveys does not foreclose the need to evaluate the project's potential for direct, indirect and cumulative impacts on the species. Accordingly, we **GRANT** Data Requests 56-59 and 64. However, the Motion regarding Data Requests 60-63 is **DENIED**.

***Data Requests 66-69:** This series of Data Requests asks for information concerning potential bird mortality resulting from concentrated heat generated by the by the project, to which birds may be exposed.*

CURE bases its requests on the 1986 avian mortality survey for the Solar One facility referenced above. Applicant responded that the mortality survey focused on a completely different solar technology than the one that will be employed at CESF. The technology that will be used at CESF is entirely different in that it will utilize proprietary CLFR solar concentrating lines that will focus sunlight on many shorter 56-foot tall receivers spread throughout the project site. Therefore, the heat that is concentrated on these receivers is much less than that of the one large receiver used at the Solar One plant. Applicant noted that CESF employs a low temperature solar technology wherein the amount of solar energy in any one location along the receiver is orders of magnitude less than the energy concentrated at a single point from Solar One.

Committee Response: It is clear to us that study results and bird burn incidents from the Solar One facility are inapplicable to CESF. Nevertheless, Applicant should provide any data reasonably available to it concerning heat-related risks to birds from solar facilities which are actually similar to the proposed project. The response must also include estimates of elevated temperatures on surfaces at the proposed facility to which birds could reasonably be exposed. With these modifications Data Request 67 is **GRANTED**. However, CURE has not adequately supported its requests for additional analysis, monitoring, and mitigation discussions concerning heat-related risks to birds. Therefore, Data Requests 66, 68, and 69 are **DENIED**.

5. Water Quality and Water Resources

***Data Requests 73-76:** At the hearing on November 17, 2008, CURE withdrew its Data Requests 73 and 74. Data Requests 75 and 76 ask for identification and analysis of all wells within three miles of the project site.*

Applicant responded that it has provided all information on wells available through records searches as well as door-to-door surveys in the area. Applicant did not dispute CURE's assertion that its surveys may have missed three additional wells discovered by CURE. However, modeling performed by Applicant to analyze potential project impacts to ground water included conservatisms which more than account for the few additional wells found by CURE.

Committee Response: We find that CURE has not made a persuasive case for additional information beyond the hydrological analysis already provided by Applicant. Therefore, Data Requests 75 and 76 are **DENIED**.

Where the Committee has indicated that CURE's Motion to Compel is granted, Applicant shall respond to the relevant Data Requests within 30 days of the date of this Order.

Dated December 3, 2008, at Sacramento, California.

Original signed by

JACKALYNE PFANNENSTIEL
Chairman and Presiding Member
Carrizo AFC Committee

Original signed by

JEFFREY D. BYRON
Commissioner and Associate Member
Carrizo AFC Committee