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October 19, 2010

**DOCKET**  
**08-AFC-13**

DATE OCT 19 2010

RECD. OCT 20 2010

California Energy Commission  
Attn: Docket Office, 08-AFC-13  
1516 Ninth Street  
Sacramento, CA 95814

Re: Calico Solar; Docket No. 08-AFC-13

Dear Docket Clerk:

Please process the enclosed CURE Initial Comments on the Presiding Member's Proposed Decision, conform the copy of the enclosed CURE Initial Comments on the Presiding Member's Proposed Decision, and return the copy in the envelope provided.

Thank you.

Sincerely,

/s/

Valerie Stevenson

:vs

Enclosures

**STATE OF CALIFORNIA**

**Energy Resources Conservation  
and Development Commission**

In the Matter of:

The Application for Certification for the  
Calico Solar Power Project  
(formerly SES Solar One Project)

Docket No. 08-AFC-13

**CALIFORNIA UNIONS FOR RELIABLE ENERGY  
INITIAL COMMENTS ON THE  
PRESIDING MEMBER'S PROPOSED DECISION**

October 19, 2010

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UNIONS FOR RELIABLE ENERGY

## I. Introduction

California Unions For Reliable Energy (“CURE”) submits these initial comments on the Presiding Member’s Proposed Decision for the Calico Solar Power Project (“Project”), pursuant to the Committee’s September 25, 2010 Notice of Availability of the Presiding Member’s Proposed Decision (“PMPD”). CURE may supplement these comments prior to the close of the Commission’s 30-day comment period.

CURE’s comments are tailored to specific sections of the PMPD including the introduction, project description, reliability, transmission system engineering, biological resources, soil and water resources and cultural resources, as indicated in the headings below.

## II. Introduction

**1) PMPD:** “Staff publishes its initial technical evaluation of the Project in its Preliminary Staff Assessment (PSA), which is made available for a 30-day public comment period. Staff’s responses to public comment on the PSA and its complete analyses and recommendations are published in the Final Staff Assessment (FSA, also Exhibit 300).” (Introduction p.3)

**Comment:** The PMPD should delete references to a “Preliminary Staff Assessment” and “Final Staff Assessment” since the Commission did not publish any documents entitled preliminary or final staff assessments in this proceeding. The PMPD should explain that Staff released a Staff Assessment in March 2010. Staff then released a Supplemental Staff Assessment (“SSA”) and an Errata to the SSA in July 2010. Staff subsequently issued a Second Errata to the SSA and Part 2 of the SSA and a third Errata to the SSA (incorrectly named 2<sup>nd</sup> errata) in August 2010. Finally, Staff issued a SSA Addendum in September 2010.

The Commission **did not provide notice, a 30-day public comment period or responses to comments** on Parts I and II of the SSA, the erratas or the addendum, which together provided substantial new information about significant environmental impacts. However, the California Environmental Quality Act (“CEQA”) requires that the Commission do so. Specifically:

- Public Resources Code § 21092 requires the Commission to provide public notice that specifies the period during which comments will be received. No such notice was issued on the SSA Parts I and II, the erratas or the addendum.
- Public Resources Code § 21091(a) provides that the Commission’s public review period may not be less than 30 days. Again, there was no 30-day public comment period provided on the SSA Parts I and II, the erratas or the addendum.

- Public Resources Code § 21091(d) requires the Commission to consider comments it receives on the draft assessment ***and prepare a written response***. The Commission did not provide any written response to comments on the SSA Parts I and II, the erratas or the addendum.

The Commission is not exempt from any of these mandatory CEQA requirements.

While the Commission did provide a public comment period and response to comments on the original Staff Assessment issued in March 2010, the Applicant substantially revised the Project description after that date, and the Commission subsequently identified new significant impacts and proposed new mitigation. The Commission never provided the public with a 30-day public comment period on Staff's analysis of new significant impacts or Staff's newly proposed mitigation for those significant impacts. Nor did the Commission provide responses to comments following a noticed public comment period.

For example, well after the Commission released the March 2010 Staff Assessment, the Applicant disclosed the desert tortoise translocation plan in August 2010. The translocation plan revealed that there would be significant impacts to offsite desert tortoise populations as a result of the Project. CURE and others submitted legal briefs explaining that these changes raised new significant impacts that have never been analyzed. Thus, CEQA prohibits the Commission from approving the Project prior to Staff's analysis, an opportunity for comment and responses to comments. Despite State law, the PMPD now proposes to approve the Applicant's revised Project. The Commission's approval of the Project would violate CEQA.

Additionally, after the Commission released the March 2010 Staff Assessment, the Applicant proposed to eliminate sediment and detention basins that would regulate the flow of storm water throughout the ten square mile site. Prior to that proposal, Staff concluded those basins were necessary to mitigate significant environmental impacts to soil and water resources. Although Staff testified that the basins may still be required, it is completely unknown what the design or capacity of these basins will be. The Applicant's last-minute proposal to remove these basins was never subject to public review and comment as required by CEQA.

Further, the March 2010 Staff Assessment includes no analysis of, and failed to provide any mitigation proposal for, significant impacts to cultural resources beyond a short description of a programmatic agreement to be developed at a later date. Since the release of the Staff Assessment, Staff identified additional potentially significant impacts to cultural resources and concluded that additional study is required. Moreover, all of the mitigation was developed after the release of the Staff Assessment. Again, the Commission has not provided notice to the public, a 30-day comment period or responses to comments on this new significant information. Therefore, the Commission's approval of the Project would violate CEQA.

Finally, the March 2010 Staff Assessment assumed the Project would rely upon water from the Cadiz Valley. Since that time, the Applicant has proposed to rely upon groundwater from the Lavic Valley. CURE submitted its briefing explaining that reliance on well water from the Lavic Valley would violate the County Groundwater Ordinance. The Commission has never noticed or provided a 30-day public comment period on Staff's analysis of this new water source, and no responses to comments have been provided. Thus, the Commission's approval of the use of this water source would violate CEQA.

The PMPD's public comment period does not remedy the Commission's failure to circulate the SSA Parts I and II, the erratas and the addendum for public review and comment, since circulation must occur early enough in the CEQA process to ensure that the environmental issues are addressed. The PMPD is issued too late in the Commission's approval process since the Project's momentum at the PMPD stage provides a strong incentive to ignore environmental concerns. SSA Parts I and II, the erratas and the addendum must be subject to the "critical evaluation that occurs in the draft stage," so that the public is not denied "an opportunity to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom."<sup>1</sup> Thus, the Commission's approval of the use of this water source would violate CEQA.

Furthermore, since the Commission has not yet provided public notice and a 30-day comment period on SSA Parts I and II, the erratas and the addendum, or provided responses to comments thereon, CURE attaches its briefing and testimony as Exhibit 1, incorporates the briefing and testimony as comments on the PMPD, and requests that the Commission provide responses to comments in a revised PMPD that is circulated for public review.

**2) PMPD:** "Throughout these proceedings, as reflected in the transcribed record, the Committee provided an opportunity for public comment at each Committee-sponsored conference and hearing." (Introduction, P. 7)

**Comment:** Although the PMPD is correct that opportunities were generally made for public comments at the hearings, the hearings were not held during hours that were conducive to any public participation. In fact, one hearing began at 1:00 PM on a weekday and continued relentlessly until 4:30 AM the next morning. The floor was literally made open for public comment for the first time at 4:00 AM to laughter and an empty lectern.

Furthermore, Staff witnesses testified from home near midnight and were obviously unprepared to testify without materials or information, significantly undermining the quality of the information gained during those proceedings. Although at 11:00 p.m. intervenors requested that the meeting be postponed to the

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<sup>1</sup> *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal. App. 3d 813,822.

next day, parties were informed that they had no other opportunity to testify and must remain if they wanted to enter their testimony in the record.

Almost without exception intervenors' witnesses were forced to testify in the evening hours after long days of testimony. This presented a situation where experts were unable to clearly articulate their opinions about the Project. The Warren Alquist Act provides that commission hearings "shall provide a reasonable opportunity for the public and all parties to the proceeding to comment upon the application and the commission staff assessment."<sup>2</sup> The hearings did not provide a reasonable opportunity for the public and all parties to comment. The length and duration of the hearings constitutes a clear violation of the Warren Alquist Act that fundamentally undermined the ability of intervenors and the public to meaningfully participate in the Calico proceeding.

### **III. The PMPD's Project Description Fails to Describe the Whole of the Project, as Required by CEQA**

**1) PMPD:** "The Calico Solar Project also includes a new 230-kilovolt (kV) Calico Solar Substation, **2.0 miles of electrical transmission line**, an administration building, maintenance complex, onsite routes interior to the project boundaries, a site access road, and a bridge over the Burlington Northern Santa Fe railroad tracks. Approximately 739 feet of the 2-miles of single-circuit, 230-kV generation interconnection transmission line would be constructed off the project site but still on BLM managed land. The transmission line would connect the proposed Calico Solar Substation **to the existing Southern California Edison (SCE) Pisgah Substation.**" (Project Description, p.1, *emphasis added in bold*)

**Comment:** The PMPD chapter on cultural resources acknowledges that the Pisgah substation will likely need to be relocated to accommodate the Project but this information is not included in the Project Description. (Cultural Resources, pp. 60-61.) The Project Description also fails to acknowledge the 67-mile Pisgah to Lugo transmission line that will be required to deliver the Project's power to market. Therefore, it is inconsistent and inaccurate for the PMPD to state that the Project will interconnect to the existing Pisgah substation and will only require two miles of transmission line. The record is clear that a new Pisgah substation may be required and that the transmission line will in fact need to be up to 8 miles long to interconnect to the Calico Solar Project. Additionally, it is clear that the Project will require a 67-mile transmission line to be built between the Pisgah and Lugo substation through desert tortoise critical habitat and areas of critical environmental concern.

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<sup>2</sup> Pub. Res. Code §25521

The Supplemental Staff Assessment Errata identifies the following major transmission facility upgrades as a condition-precedent for the Project to operate (among others):

### **Pisgah Substation Expansion**

The existing 5-acre Pisgah Substation would be expanded to approximately 40 acres to accommodate new electrical and communication facilities, including up to four AA banks (two AA-banks would initially be installed for the proposed Calico Solar Project) and new 500 kV and 220 kV switchracks... **However, the exact location of the new/expanded substation has not been determined and so a full analysis of its impacts is not possible at this time.** (Exh. 304, p. B.3-20 (emphasis added).)

...

### **500 kV Transmission Line Scope (Lugo-Pisgah No. 2)**

The proposed 850 MW Full Build-Out option would consist of the construction of a single-circuit 500 kV transmission line on 57.1 miles of existing ROW **and 9.8 miles of new ROW**. The existing 220 kV Lugo-Pisgah No. 2 transmission line would be replaced with the new 500 kV single-circuit structures.<sup>3</sup>

In fact, the record shows that many additional transmission upgrades will be required for this specific Project to proceed. These additional and required transmission upgrades must be described in the PMPD. A selection of supporting evidence is contained in the following exhibits: 28; 240; 430; 8/4/10 RT 58, 81-82.

Under CEQA, the definition of “project” is “given a broad interpretation in order to maximize protection of the environment.” (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4<sup>th</sup> 1170, 1180 (internal quotation omitted); see also, *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4<sup>th</sup> 372, 381-83; *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 796-97; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 277-81.) A “project” is “the whole of an action” directly undertaken, supported or authorized by a public agency “which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (Pub. Res. Code § 21065; 14 Cal. Code Regs. § 15378(a).) Under CEQA, “the term ‘project’ refers to the underlying activity and not the governmental approval process.” (*California Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4<sup>th</sup> 1225, 1241, (quoting *Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1171-72.) (14 Cal. Code Regs. § 15378(c) (“The term ‘project’ refers to the activity which is being approved and which may be

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<sup>3</sup> Id. at B.3-21 (emphasis added).

subject to several discretionary approvals by governmental agencies. The term ‘project’ does not mean each separate governmental approval.”.)

Failure to consider all phases of a Project constitutes “piecemealing” of a single project into two or more separate phases. CEQA prohibits piecemealing and requires the CEQA document to analyze the “whole project.” CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences.” (*Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283-84; *City of Santee v. County of San Diego*, (1989) 214 Cal.App.3d 1438, 1452.)

Before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project. (*Laurel Heights Improvement Assoc. v. Regents of the Univ. of Calif.* (1988) 47 Cal.3d 376, 396-97, 253 Cal.Rptr. 426). A public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences. As the Second District stated:

The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish . . . the purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. (*Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268.)

Recently, the First District Court of Appeal in *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70 (“*CBE v. Richmond*”) described CEQA’s statutory and regulatory requirements and existing case law regarding whether a lead agency unlawfully segmented its environmental review of a project under CEQA. The Court of Appeal explained that “[t]here is no dispute that CEQA forbids ‘piecemeal’ review of the significant environmental impacts of a project.” (*Id.* at p. 98, citing *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358 (“*Berkeley Jets*”).) Rather, CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences.” (*Id.*, citing *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.) Thus, CEQA defines “project” broadly as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .” (*Id.*, citing 14 Cal. Code Regs. § 15378(a).)



The Project Description must be substantially revised to include the transmission upgrades that must be studied as a part of the whole of the action under CEQA.

**2) PMPD:** “The project would be constructed in two phases. Phase 1a would consist of 60 SunCatchers configured in a single group and much of the support facilities. Phase 1b and then Phase 2 would contain the remaining 26,390 SunCatchers arranged in 1.5-MW solar groups of 60 SunCatchers per group, bringing the CSP to its **net nominal generating capacity of 663.5 MW.**” (Project Description, P.1)

**Comment:** The 663.5 Mw output estimate is based upon the Applicant’s Project design without detention basins. In the most recent iteration of the Project description, the detention basins took up a substantial amount of land, reducing the number of SunCatcher units, and significantly reducing the power output. Staff and intervenors testified that there is a likelihood that stormwater basins will be necessary in the final design. (9/20/10 RT 245-246.) Thus, there is absolutely no evidence in the record to show that the re-insertion of detention basins will not result in a significant decrease in the Project output. It is critical that the PMPD reflect an accurate estimated power output so that the Commission can accurately weigh the Project benefits against the Project impacts in deciding whether to approve the Project.

**Recommendation:** The Commission must extrapolate the likely power loss from installation of debris basins and this new information must be circulated to the public and all parties for review and comment. The estimated generating capacity of the Project must be updated to reflect an accurate range of output.

**3) PMPD:** “Except for the building sites, roads, and two evaporation ponds, the majority of the project site would remain pervious; only a negligible portion of the site would be affected by pavement and SunCatchers foundations.” (Project Description, p. 7.)

**Comment:** The Applicant’s expert testified that all of the unpaved roads will be treated with soil tackifiers, rendering them impervious. (9/20/10 RT 169.) There is no substantial evidence in the record to support the PMPD’s conclusion that only a negligible portion of the site would be impervious.

**Recommendation:** Revise the PMPD to state the number of roadways that will be treated with soil tackifiers and disclose that these roads will be impervious. This change must be reflected in the rest of the PMPD, as well.

**4) PMPD:** “If the distributed hydrogen supply system utilizing k-bottles at each SunCatcher PCU is utilized at the Calico Solar site, the system would use two redundant hydrogen generators and one steel storage tank located at the Main Services Complex as described in the centralized system.”

**Comment:** CURE raised concerns about the use of k-bottles in data requests during the data adequacy phase of the proceeding. The Applicant withdrew the proposal to use k-bottles and instead amended the AFC to rely upon a centralized hydrogen system.

**Recommendation:** Revise the PMPD to remove any discussion of use of k-bottles.

**5) PMPD:** “The Lavic Groundwater Basin will be used as the primary water source for the project.” (Project Description, p. 18.)

**Comment:** Staff and CURE testified that it was not possible to discern whether the groundwater from the Lavic Groundwater Basin was a reliable water supply based upon the limited testing conducted by the Applicant. To remedy this, Staff proposed Soil and Water 9 (in combination with Soil and Water 7) to require monitoring of the water table and the Applicant to develop a water conservation and alternative water supply plan in the event that the monitoring report shows water level and storage declines in the water bearing zone. These conditions of certification are included in the PMPD. Thus, it is inaccurate and misleading for the PMPD to conclude that the Lavic Groundwater Basin is a reliable water supply without acknowledging the uncertainties associated with this water supply.

#### **IV. The PMPD’s Reliability Section Fails to Ensure That the Project Is Appropriately Designed and Sited, as Required by the Warren-Alquist Act**

**PMPD:** “In order to ensure safe and reliable operation of the Calico Solar Project, the Commission must determine whether the project will be appropriately designed and sited. [Pub. Res. Code, § 25520(b); Cal. Code Regs., tit. 20, § 1752(c)(2).]” (Reliability, p. 1)

“In the AFC, the Applicant indicated that it expects the project to achieve an availability factor of 99%.” (Reliability, p. 2)

“Applicant’s witness testified to the equipment manufacturer’s warranty obligations and fulfillment program, which obligates the manufacturer to have sufficient spare parts on hand to maintain a 98 percent availability factor. (8/4/10 RT 167,174.)” (Reliability, p. 2.)

“Staff proposed, and the Applicant has not contested, a condition requiring periodic reports of the reliability and maintenance data from the Maricopa plant, which we adopt as Condition of Certification REL-1, below.” (Reliability, p. 4.)

**Comment:** Condition of Certification REL-1 requires the Applicant to provide valuable information to the Commission about the reliability of the technology as proven at Maricopa. However, this condition is meaningless unless it is coupled

with provisions for the Commission to take action if serious problems are disclosed in these reports.

The Bureau of Land Management (“BLM”) crafted a solution to this problem in the Imperial Valley Project (a project that would also utilize the relatively untested SunCatcher technology on a utility-scale.) Similarly here, CURE recommends that the Commission condition the Applicant’s right to move forward with development of the second phase of the Project upon meeting specific availability and reliability criteria.

CURE proposes a new condition of certification, REL-2 that is based upon the conditions included in the BLM’s Record of Decision for the Imperial Valley Project:

REL-2: Unless and until Phase 1 of the Project has achieved a 98% availability, as certified by the CPM, the Applicant cannot begin construction of Phase 2. Availability must be certified at two points: 1) one year after the first power from the project is brought online; and 2) prior to the commencement of construction of Phase 2.

Availability is defined to mean the ratio of the number of hours that the installed SunCatchers are generating electricity divided by the number of hours that the installed SunCatchers are capable of producing energy.

“Installed SunCatchers capable of producing energy” is defined as when 1) the sun is present and delivering direct energy to the SunCatchers in excess of 350 watts/square meter; 2) site conditions are within the technical limits of the equipment (i.e. wind is less than 35 miles/hour and ambient temperature is between 14 and 122 degrees Fahrenheit; 3) the delivery point on the transmission grid is capable of receiving energy; and 4) the power purchaser is willing to take the energy.

Verification: Commencement of construction of more than 275 Mw of SunCatchers will be conditioned on certification by the CPM of the availability of more than 98% for all SunCatcher megawatts online at the time certification is made, as described above.

## **V. The PMPD’s Transmission System Engineering Section Fails to Analyze Significant Impacts From the Whole of the Project, as Required By CEQA**

**PMPD:** “The transmission system engineering analysis examines whether the Calico Solar Project’s proposed interconnection conforms to all laws, ordinances, regulations, and standards (LORS) required for safe and reliable electric power transmission. The Commission’s jurisdiction includes “...any electric power line carrying electric power from a thermal power plant... to a point of junction with an interconnected transmission system.” (Pub. Res. Code § 25107.) Additionally, under

CEQA, the Energy Commission must conduct an environmental review of the “whole of the action,” which may include facilities not licensed by the Energy Commission (Title 14, California Code of Regulations Section 15378). The Energy Commission must, therefore, identify the system impacts and necessary new or modified transmission facilities downstream of the proposed interconnection that are required for interconnection and that, when included with the other project features, represent the whole of the action. (Ex. 300, p. D.5-1.)” (Transmission System Engineering, p. 1)

**Comment:** CURE agrees with the PMPD’s statement of State law that the Energy Commission must conduct environmental review of the “whole of the action” that includes downstream transmission facilities required for Project operation. However, the PMPD does not provide any analysis of most of the environmental impacts from these downstream transmission facilities.

The Commission failed to analyze significant impacts associated with the transmission upgrades required for the Project operations. For instance, the PMPD lists a number of facility upgrades that may be required as a part of the Calico Project on TSE p. 3, but fails to analyze any of the environmental impacts associated with these upgrades, some of which will be substantial and result in unanalyzed and unmitigated significant impacts. Facility upgrades required for the Project include:

- Upgrade of the Inyo 115kV Phase-Shift transformer
  - Inyokern substation conversion to 230kV
  - New Lugo-Kramer Transmission Line project
  - Construction of a third Lugo 500/230kV transformer Bank
  - Mountain Pass-El Dorado 115kV line reconductor
  - Replacing El Dorado 230/115kV transformer Bank with a larger size.
- [Ex. 300, p.D.5-7.]

CURE’s witness, Mr. David Marcus, testified that the New Lugo-Kramer Transmission Line Project will be approximately 50 miles of transmission line and will require the preparation of an EIR due to potentially significant impacts from construction and operation. (8/4/10 RT 239.) The new Lugo-Kramer Transmission Line is a part of the whole of the action under CEQA and must be analyzed now as a part of the Project.

Moreover, as CURE explained in briefing and testimony, the Project will require the installation of a 67 mile Lugo to Pisgah line and a potential new Pisgah substation in an unknown location. The PMPD scarcely considers the environmental impacts of this transmission line. Although the PMPD expressly recognizes that this transmission upgrade is part of the whole of the project, the PMPD does not

consistently analyze the environmental impacts of these upgrades in each resource area.

The PMPD's proposal to approve the Project without analysis of potentially significant environmental impacts of required transmission upgrades violates CEQA. The Commission cannot approve the Project until Staff analyzes the significant impacts from the transmission upgrades required for the Project and prepares a report prior to an evidentiary hearing.

**VI. The PMPD's Biological Resources Section Fails to Analyze Significant Indirect Impacts to Desert Tortoises in Desert Wildlife Management Areas and Fails to Require Any Mitigation for Admittedly Significant Impacts from Desert Tortoise Mortality; The PMPD Fails to Require the Applicant to Mitigate Potentially Significant Impact to Golden Eagles or Comply with the Bald and Golden Eagle Act**

**1) PMPD:** "Mitigation for the loss of 4,614 acres of desert tortoise habitat on the project site is not dependent on the successful relocation of tortoise found on the site. Rather, Staff, the applicant, representatives and the USFWS and CDFG, testified that the acquisition of and enhancement of habitat compensation lands, required by Condition BIO-17, serves as the mitigation for the habitat loss." (Biological Resources, p. 48.)

**Comment:** The land purchase required in BIO-17 purports to mitigate for habitat loss on the Project site. However, the PMPD completely failed to mitigate for the loss of individual desert tortoises on the Project site. Additionally, it is undisputed that the Project will result in disturbance to off-site populations of desert tortoises from proposed translocation activities. (Biological Resources, p. 48.) The PMPD fails to provide any mitigation for the loss of desert tortoises at the Ord-Rodman DWMA.

Under CEQA, the Commission may not certify the Project unless it specifically finds either (1) that changes or alterations have been incorporated into the Project that "mitigate or avoid" any significant effect on the environment, or (2) that mitigation measures or alternatives to lessen these impacts are infeasible, and specific overriding benefits of the Project outweigh its significant environmental effects. (Pub. Res. Code § 21081; 20 Cal. Code Regs. § 1755.) These findings must be supported by substantial evidence in the record. (Pub. Res. Code § 21081.5; 14 Cal. Code Regs. §§ 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4<sup>th</sup> 1212, 1222-23.)

The Applicant "shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility." (20 Cal. Code Reg. § 1748(d).) Commission Staff must review the

application, assess the environmental impacts and determine whether mitigation is required, and set forth this analysis in a report written to inform the public and the Commission of the Project's environmental consequences. (20 Cal. Code Reg. §§ 1744(b), 1742.5(a)-(b).) The report must be presented prior to evidentiary hearings. (20 Cal. Code Reg. §§ 1723.5(d), 1742.5(b).) Before approving a project, the Commission must conclude that Staff's report has been completed in compliance with CEQA, that the Commission has reviewed and considered the information in the report prior to approving the project, and that Staff's report reflects the Commission's independent judgment and analysis. (14 Cal. Code Regs. §15090(a); see Pub. Res. Code § 21082.1(c)(3).)

Once substantial evidence of a potential impact is presented to the lead agency, the burden shifts to the agency to investigate the potential significance of the impact. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4<sup>th</sup> 342, 385 (EIR inadequate for failing to investigate substantial evidence of Project's potential to impact protected steelhead trout).)

In this case, there is insufficient evidence to support the required findings and, therefore, the Commission cannot certify the Project without additional specific analysis and identification of mitigation.

**Recommendation:** The Commission must analyze and mitigate significant indirect impacts to individual desert tortoises that undisputedly will occur as a result of the Calico tortoise translocation.

**2) PMPD:** "USFWS guidelines require that, for every tortoise translocated, one tortoise in the receiving area and one tortoise in a control area be tested and radio-tagged for tracking. Those tortoises may suffer injury of [sic] die from the stress of handling or blood testing and those in the receiving area from the additional competition for food and shelter. A scenario postulated by Staff estimates that the number of tortoise perishing due to the translocation effort may could [sic] be as high as the number of tortoise that are relocated." (Biological Resources, p. 48.)

**Comment:** The PMPD's statement that one tortoise in the receiving area and one in the control area must be tested for every tortoise that is moved is no longer accurate based upon new guidance from the Desert Tortoise Recovery Office, as was testified to during evidentiary hearings before the Commission. (9/20/10 RT 504.)

Applicant's translocation plan identified the Ord-Rodman Desert Wildlife Management Area ("DWMA") as the primary receptor location for translocated tortoises from the Project site. The Ord-Rodman DWMA was specifically established as recovery area for desert tortoise. The PMPD fails to provide any mitigation for the loss of desert tortoise habitat at the Ord-Rodman DWMA. The BLM biologist, Chris Otahal, testified that if any desert tortoises are moved to the Ord-Rodman

DWMA (which is the Applicant's proposed receptor location for most of the tortoises that would need to be translocated from the Calico site), then ***approximately one hundred desert tortoises in the receptor areas would have to be handled and disease tested***. Moreover, if more than 5% test positive for disease, a different translocation location must be found and the disease testing, handling and disturbance would occur again in a new location. The PMPD fails to accurately establish the magnitude of significant indirect impacts to desert tortoises as a result of Project development.

Similarly, the statement that the number of desert tortoise perishing from Project development could be ***as high*** as the numbers that are relocated is also misleading and likely underestimates the potential mortality of desert tortoises. There is substantial evidence in the record that the surveying, disease testing, and other disturbance in the Ord-Rodman DWMA necessitated by use of that DWMA as a receptor site will result in substantial desert tortoise mortality at the Ord-Rodman DWMA. Staff estimated a 50% mortality rate associated with handled tortoises in receptor populations. (Exh. 310, p. 13.) Because approximately 100 tortoises must be handled and disease tested if any tortoises are moved to the Ord-Rodman DWMA, and because handling and disease testing is known to result in mortality, there is a potential for a ***much greater*** number of tortoises to perish than the actual number that are moved from the Calico site. The PMPD fails to require any mitigation for significant indirect impacts to desert tortoise populations in the Ord-Rodman DWMA, or any other off-site host population that ultimately is target to receive tortoises.

**Recommendation:** The Commission must analyze and disclose the likely significant indirect impacts to offsite desert tortoise preserves and identify mitigation for significant impacts to offsite desert tortoise communities in the Applicant's proposed receptor locations.

**3) PMPD:** "Mitigation for the loss of 4,614 acres of desert tortoise habitat on the project site is not dependent on the successful relocation of tortoise found on the site. Rather, Staff, the applicant, representatives and the USFWS and CDFG, testified that the acquisition of and enhancement of habitat compensation lands, required by Condition BIO-17, serves as the mitigation for the habitat loss. Translocation of tortoises serves to minimize harm, a requirement under the California Endangered Species Act, discussed below." (Biological Resources, p. 48.)

"The project owner shall develop and implement a final Desert Tortoise Translocation Plan (Plan) in conformance with standards and guidelines described in Translocation of Desert Tortoises (Mojave Population) From Project Sites: Plan Development Guidance (USFWS 2010), any more current guidance or recommendations as available from CDFG or USFWS, and meets the approval of USFWS, CDFG, BLM's Wildlife Biologist and the CPM. The goal of the Plan shall

be to safely exclude desert tortoises from within the fenced project area and translocate them to suitable habitat capable of supporting them, while minimizing stress and potential for disease transmission.” (Biological Resources, pp. 120-121.)

**Comment:** In order for a Certified Regulatory Program to comply with CEQA, the lead agency must ensure that the plan or other written documentation required by the regulatory program ... [i]ncludes a description of the proposed activity with alternatives to the activity, **and mitigation measures to minimize any significant adverse effect on the environment of the activity.**<sup>4</sup> Moreover, where mitigation measures would, themselves, cause significant environmental impacts, CEQA requires an evaluation of those secondary (indirect) impacts. (14 Cal. Code Reg. § 15064(d).)

The record in this proceeding contains no evidence that translocation would minimize significant impacts to desert tortoises. Therefore, the Commission has no evidence that translocation as a mitigation measure would be effective at reducing impacts to less than significant, as required by CEQA. Furthermore, the translocation efforts themselves will result in significant and unmitigated indirect impacts to off-site desert tortoise habitat.

Finally, due to the inherent risks and unknowns associated with desert tortoise translocation efforts, it is inappropriate for the Commission to permit the Project without a clearly defined translocation plan that has been subject to public review and comment. The risks, unknowns and novelty of this mitigation strategy makes it critical “that mitigation measures timely be set forth, that environmental information be complete and relevant, and that environmental decisions be made in an accountable arena.”<sup>5</sup>

**Recommendation:** The Commission must require and circulate for public review the Applicant’s proposed translocation plan prior to Project approval. In addition, the Commission must require mitigation for significant impacts to all desert tortoises and all desert tortoise habitat, including significant indirect impacts to tortoises and habitat offsite in the Ord-Rodman DWMA.

**4) PMPD:** “The project owner shall provide compensatory mitigation acreage of 10,302 acres of desert tortoise habitat lands, adjusted to reflect the final project footprint, as specified in this condition. In addition, the project owner shall provide funding for initial improvement and longterm maintenance, enhancement, and management of the acquired lands for protection and enhancement of desert tortoise populations, and comply with other related requirements of this condition.” (Biological Resources, p. 121.)

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<sup>4</sup> Public Resources Code § 21080.5(d)(3), emphasis added.

<sup>5</sup> *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 96; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 885.



**Comment:** The Commission has no substantial evidence to show that the purchase of land as compensatory mitigation for impacts to desert tortoise habitat is defined, feasible, effective or capable of implementation. (14 Cal. Code Reg. § 15126.4(a)(1)(B); *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1259, 1262.) The PMPD does not, and cannot, cite to any evidence to support conclusions that a) 10,302 acres of desert tortoise habitat is available for purchase, b) enhancement will increase the carrying capacity of desert tortoises to mitigate for the loss of desert tortoises, or c) habitat purchase and enhancement is likely to increase the carrying capacity of land for desert tortoises. These conclusions are unsupported.

**Recommendation:** The Commission must identify and circulate for public review what evidence it is relying on to conclude that mitigation would reduce significant impacts to desert tortoise to less than significant. Specifically, the Commission must identify and circulate for public review any evidence that it has that a) 10,302 acres of desert tortoise habitat is available for purchase, b) enhancement will increase the carrying capacity of desert tortoises to mitigate for the loss of desert tortoises, or c) habitat purchase and enhancement is likely to increase the carrying capacity of land for desert tortoises. Currently, there is no evidence to support these conclusions in the record.

**5) PMPD:** “As many as 4,614 acres of the compensation lands requirement may be satisfied by applicant’s compliance with the desert tortoise habitat acquisition or enhancement requirements of BLM, to be calculated as an acre-for-acre offset in the Energy Commission requirement for mitigation provided to satisfy BLM’s requirements. For purposes of this paragraph, credit will be given for BLM-required mitigation without regard to whether BLM uses the mitigation funds for habitat acquisition or for enhancement projects to benefit the species.” (Biological Resources, p. 122.)

**Comment:** BLM’s mitigation requirements are not subject to CEQA’s stringent requirements that they be defined, feasible, effective, and capable of implementation. The PMPD’s approval of the use of 4,614 acres of mitigation requirements to be used as directed by BLM does not comply with CEQA. The Commission cannot allow the Applicant to comply with whatever mitigation that BLM requires pursuant to NEPA for 4,614 acres.

**Recommendation:** Delete the provision that would allow the use of 4,614 acres of the 10,302 mitigation requirements to be used as directed by the BLM.

**6) PMPD:** “While the overall loss of foraging habitat for golden eagles within the region is a cumulatively significant impact, the contribution of Scenario 5.5 to that cumulative effect is less than significant after mitigation. Condition of Certification BIO 20 requires focused nest surveys within 1 mile of project activities and if nests

are identified, the project owner would establish a disturbance-free buffer around the nest. No construction activities would be authorized within the 0.5 mile buffer pending the successful fledging of the nest. Implementation of Condition of Certification BIO 17, the compensatory mitigation plan for desert tortoise, would offset foraging habitat loss by the preservation of similar plant communities.” (Biological Resources, p. 49.)

**Comment:** The Project may significantly impact golden eagles near the Project site.<sup>6</sup> The PMPD’s proposed mitigation for impacts to golden eagles does not prevent the take of golden eagles caused by loss of forage habitat and interruption of breeding activities.<sup>7</sup> Nest surveys in a one-mile radius are not adequate because the Project could interfere with eagle breeding and foraging three miles away or more.<sup>8</sup>

U.S. Fish and Wildlife Service regulations authorize permits for limited, non-purposeful take of golden eagles pursuant to the Bald and Golden Eagle Act.<sup>9</sup> “Disturb” is defined as “to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a ***decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.***”<sup>10</sup> “Take” of an eagle is defined to include a broad range of actions such as to “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb.”<sup>11</sup> The mitigation measures in the PMPD do not reduce the impacts to feeding behavior to a level that is less than significant. Thus, the Commission’s approval of the Project would violate the Bald and Golden Eagle Act.

Additionally, although the PMPD claims that the desert tortoise land mitigation (BIO-17) will also mitigate for loss of foraging impacts to golden eagle, the PMPD contains no requirement that desert tortoise mitigation lands be near golden eagle nests or that they provide appropriate habitat for golden eagle. Therefore, the Commission has no substantial evidence that BIO-17 will mitigate significant impacts to bald eagle to less than significant, or that BIO-17 will ensure compliance with LORS.

**Recommendation:** The Commission must a) require the applicant to obtain a take permit for golden eagles prior to project development, b) expand the mitigation

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<sup>6</sup> Exh. 424.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Final Rule No. 175, 74 Fed.Reg. 46842 (Sept. 11, 2009).

<sup>10</sup> 50 CFR 22.3.

<sup>11</sup> *Id.*

requirements to require the Applicant to rigorously monitor all golden eagles with active nests that forage in the Project area for signs of interference with breeding activities and c) establish a stand-alone land purchase requirement to mitigate impacts to golden eagles that would only allow nesting of the mitigation if certain criteria are met, similar to the nesting requirements for Mojave fringe-toed lizards (Biological Resources, p. 106), streambeds (Biological Resources, p. 179) and burrowing owls (Biological Resources, p. 138.)

CURE proposes the following language to mitigate as yet unanalyzed impacts to nesting golden eagles:

This compensation acreage for golden eagle may be included (“nested”) within the acreage acquired and managed as desert tortoise habitat compensation (Condition of Certification **BIO-17**) only if: a) Adequate acreage of qualifying desert tortoise compensation lands also meet the Selection Criteria (to be developed by Staff) as habitat for Golden Eagle; and b) The desert tortoise habitat compensation lands are acquired and dedicated as permanent conservation lands within 18 months of the start of project construction. If these two criteria are not met, then the project owner shall provide 4,614 acres of golden eagle habitat compensation lands, adjusted to reflect the final project footprint and additional delineation of suitable habitat, independent of any compensation land required under other conditions of certification, and shall also provide funding for the initial improvement and long-term maintenance and management of the acquired lands, and shall comply with other related requirements this condition. Costs of these requirements are estimated to be [to be provided by Staff] based on the acquisition of 4,614 acres. Regardless of actual cost, the project owner shall be responsible for funding all requirements of this condition.

**7) PMPD:** “Prior to construction, tortoises inhabiting the project site would be translocated to suitable receptor sites.” (Biological Resources pp. 41-42.)

**Comment:** Although the PMPD makes the affirmative statement that tortoises will be translocated to suitable receptor sites prior to construction, this is not a requirement in the conditions of certification. The PMPD should explicitly include this requirement in the Condition of Certification BIO-16. Revised language for BIO-16 is included below:

The project owner shall develop and implement a final Desert Tortoise Translocation Plan (Plan) in conformance with standards and guidelines described in *Translocation of Desert Tortoises (Mojave Population) From Project Sites: Plan Development Guidance* (USFWS 2010), any more current guidance or recommendations as available from CDFG or

USFWS, and meets the approval of USFWS, CDFG, BLM's Wildlife Biologist and the CPM. The goal of the Plan shall be to safely exclude desert tortoises from within the fenced project area and translocate them to suitable habitat capable of supporting them, while minimizing stress and potential for disease transmission. Tortoises to be moved farther than 500 meters shall be tested for disease prior to translocation. The Plan shall include written correspondence with CalTrans indicating whether tortoise exclusion fencing may be installed to prevent tortoises on the southern NAP area (between the project site and Interstate-40) to prevent tortoises from entering the highway. If CalTrans does not permit that fencing, then desert tortoises shall be translocated off the NAP site (see **BIO-15**). The final Plan shall be based on the draft Desert Tortoise Translocation Plan prepared by the applicant and shall include all revisions deemed necessary by USFWS, CDFG, BLM'S Wildlife Biologist, and staff. The Plan shall include but not be limited to, a list of the authorized handlers, protocols for disease testing and assessing tortoise health, proposed translocation locations and procedures, schedule of translocations, a habitat assessment of translocation lands, monitoring and reporting, and contingency planning (e.g., handling an injured or diseased tortoise). [Prior to construction, all tortoises inhabiting the project site would be translocated to suitable receptor sites.](#)

**Verification:** Within 30 days of publication of the Energy Commission License Decision or BLM's Record of Decision/ROW Issuance, whichever comes first, the project owner shall provide BLM's Wildlife Biologist and the CPM with the final version of a Desert Tortoise Translocation Plan that has been reviewed and approved by BLM's Wildlife Biologist and the CPM in consultation with USFWS and CDFG. The plan shall include the locations of the translocation sites. The project owner may not translocate more than 98 tortoises unless the project owner first provides the CPM with documentation demonstrating that adequate translocation sites have been identified, and obtains CPM approval of those translocation sites. All modifications to the approved Plan shall be made only after approval by BLM's Wildlife Biologist and the CPM, in consultation with USFWS and CDFG. Within 30 days after initiation of translocation activities, the Designated Biologist shall provide to BLM's Wildlife Biologist and the CPM for review and approval, a written report identifying which items of the Plan have been completed, and a summary of all modifications to measures made during implementation of the Plan. Written monthly progress reports shall be provided to the BLM's Wildlife Biologist and CPM for the duration of the Plan implementation, including the duration of monitoring of translocated tortoises. [Prior to construction the CPM shall verify that all tortoises inhabiting the project site have been translocated to suitable receptor sites.](#)

## **VII. The PMPD's Soil and Water Resources Section Is Internally Inconsistent and Incorporates Mitigation That is Not Feasible or Effective**

**1) PMPD:** "The record indicates that the newly constructed well will provide all water needs for the project and no back-up supplies are proposed." (Soil and Water Resources, p. 8.)

"The newly constructed Well #3 adjacent to the project site will provide all water needs for the project." (Soil and Water Resources p. 33.)

**Comment:** The record indicates that the Applicant did not conduct sufficient testing to determine whether its proposed water supply will be reliable and will not cause significant impacts:

The aquifer test conducted by the applicant provided limited information from which to estimate transmissivity and storage coefficient. The pumping rate (100 gpm) was too low to induce sufficient drawdown and recovery for analysis, and the test length (24 hours) was too short to influence water levels in nearby wells or reveal potential boundary effects. Furthermore, no pre-test data was collected to assess the influence of background trends, barometric effects, or other potential interferences on the test data. As a result, the applicant was limited to estimating transmissivity from the calculated specific capacity (estimated transmissivity of 3,500 ft<sup>2</sup>/d) and no estimate could be made of the storage coefficient." (SSA, p. C.7-34)

To ensure the well can provide an adequate water supply, staff recommends the applicant be required to comply with Condition of Certification SOIL&WATER-9 that requires a Water Conservation and Alternative Water Supply Plan should groundwater monitoring indicate long-term downward trends in water levels and storage. (SSA, p. C.7-39.)

The PMPD includes conditions of certification to require the Applicant to develop an alternative water supply if the monitoring report shows water level and storage declines in the water bearing zone. These conditions are not feasible or effective, because the Applicant identified no alternative water supply, as required by State law. Moreover, the Applicant had enormous difficulties in obtaining a water supply for the Project as has been chronicled by the Applicant. Thus, there is no substantial evidence in the record that the PMPD's mitigation measure that requires the Applicant to secure an alternative water supply is feasible or capable of implementation.

**Recommendation:** The Commission cannot approve the Project until either 1) the Applicant conducts additional testing to show that the water supply is reliable, 2) substantial evidence is put in the record that the proposed mitigation (water conservation and finding an alternative water supply) is feasible, or 3) the Applicant provides substantial evidence of an alternative reliable water supply now.

**2) PMPD:** “On-site debris basins will be constructed for the major site runoff discharge and will also provide for low flow detention.” (Soil and Water Resources, p. 13.)

**Comment:** Based upon recent filings, the Applicant removed on-site debris basins from the Project design. The PMPD variously refers to debris basins as a part of the Project, or as a potential part of the Project, or as removed from the Project. This inconsistency reflects the constantly changing project description that ultimately thwarts informed public participation. It also reflects the constantly shifting nature of the Project description.

Courts have repeatedly held that an accurate, stable and finite project description is the indispensable prerequisite to an informative and legally sufficient environmental analysis.<sup>12</sup> A project description that omits integral components of the project may result in an EIR that fails to disclose all of the impacts of the project.<sup>13</sup>

Moreover, there is not substantial evidence in the record to show that there will be feasible mitigation to reduce the flood hazard and sedimentation impacts associated with the installation of SunCatcher units to a level that is less than significant.

### **VIII. The PMPD’s Cultural Resources Section Fails to Establish the Cultural Resources Baseline and Fails to Analyze Potentially Significant Impacts to Cultural Resources, as Required By CEQA; The Conclusions Are Inconsistent with Substantial Evidence in the Record**

**1) PMPD:** “As explained by Staff, the Applicant’s investigation indicates that the axial channel and associated deposits may represent the only geomorphic feature in the Calico Solar project area where buried archaeological deposits (with no surface manifestation) may reasonably be expected.” (Cultural Resources, p. 12.)

“Desert pavements occur within the Calico Solar project area of analysis. In particular, the pavements on the slopes of the Cady Mountains are broader and better developed atop the older, up-slope Pleistocene fanglomerates as compared to the younger surfaces at lower elevations. The older surfaces, and likely the younger

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<sup>12</sup> 14 Cal. Code Regs § 15124; County of Inyo v. City of Los Angeles (1977) 71 CA3d 185.

<sup>13</sup> Santiago County Water Dist. V. County of Orange (1981) 118 CA3d 818, 829.

ones as well, predate the accepted presence of man in the new world. The most stable pavements, and likely the oldest, lie atop Quaternary alluvium woven among the fanglomerate hills and lava flows within the southern portion of the project area of analysis. **Buried cultural deposits are not likely to be found beneath these stable surfaces.** (Ex. 309, pp. C-2-22 – C-2-23.)” (Cultural Resources, p. 10 emphasis added in bold.)

**Comment:** The PMPD’s assumption that there are not likely to be subsurface resources on most of the Project site due to the presence of desert pavement was *repudiated* by Staff in a letter to the BLM submitted on September 17, 2010:

Among the most notable findings of this pavement quarry research, as it relates to the Calico Solar Project’s cultural resource investigation, is the assertion that, contrary to expectations, *sites on well-developed pavements have the potential for buried artifacts and may contain large quantities of subsurface material that cannot be anticipated by surface artifact counts* (Giambastiani 2006, p. 14). It should be noted that, while these deposits are not deep (typically extending to depths of only 20 centimeters or less), substantive archaeological data, contributing to the understanding of prehistoric desert adaptations, have been recovered from these relatively shallow subsurface investigations at pavement quarry sites (see Giambastiani 2009).

The PMPD’s assumption that subsurface resources would not exist below well-formed desert pavement was also dismissed in a letter from the California State Historic Preservation Officer (“SHPO”). (Exh. 311.) The PMPD fails to acknowledge the SHPO’s or Staff’s conclusions on the likelihood of subsurface resources under desert pavement and the need for testing of these resources.

A central purpose of an EIR is to “identify ways that environmental damage can be avoided or significantly reduced.” (CEQA Guidelines §15002(a)(2).) If the project has a significant effect on the environment, the agency may approve the project only upon finding that it has “eliminated or substantially lessened all significant effects on the environment where feasible,” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns” specified in CEQA section 21081. (CEQA Guidelines § 15092(b)(2)(A)-(B).) CEQA requires the determination of the potential adverse impacts of a proposed project *prior to project approval*. The intent of this requirement is clear: baseline data on potential impacts are necessary to develop appropriate mitigation measures that will reduce the impact of a project to a less than significant level.

**Recommendation:** The PMPD must be revised to acknowledge substantial evidence in the record that the Project may result in significant impacts to subsurface resources under desert pavement on the Project site.

**2) PMPD:** “Staff testified that the Applicant’s data regarding available prehistoric archaeological resources is not sufficiently refined to inform an adequate evaluation of the significance of these resources. According to Staff, the data potential of the prehistoric resources within the project area of analysis was not exhausted through recordation and additional investigation is warranted to more definitively draw conclusions regarding archaeological site significance.” (Ex. 309, p. C-2-91.) (Cultural Resources, pp. 35-36.)

“Despite the Applicant’s and BLM’s investigatory efforts, we are unable to conclude that all potentially significant datasets have been identified and that representative samples of archaeological data potential have been exhausted through recordation for the 100 remaining prehistoric archaeological sites in the project area.” (Cultural Resources, p. 38.)

**Comment:** The PMPD admits that the Applicant has not yet provided a complete evaluation of all potentially eligible resources. The PMPD’s proposal to approve the Project *prior to the analysis* of the Project’s impacts to cultural resources violates the basic principle of CEQA: to determine significant impacts prior to Project approval.

First, CEQA is designed to inform decision makers and the public about the significant environmental effects of a project before harm is done to the environment. (14 Cal. Code Regs. § 15002(a)(1); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.)

Second, CEQA directs public agencies to avoid or reduce environmental damage by requiring imposition of mitigation measures and by requiring the consideration of project alternatives. (CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th 1344, 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of California* (1988) 47 Cal.3d 376, 400.)

A central purpose of an EIR is to “identify ways that environmental damage can be avoided or significantly reduced.” (CEQA Guidelines §15002(a)(2).) If the project has a significant effect on the environment, the agency may approve the project only upon finding that it has “eliminated or substantially lessened all significant effects on the environment where feasible,” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns” specified in CEQA section 21081. (CEQA Guidelines § 15092(b)(2)(A)-(B).)

The PMPD explains that the Commission will identify the significance of specific cultural resources *after the Project is approved*. The PMPD’s deferral of the identification of significant cultural resources on the Project site, one of the first steps in a CEQA analysis, is a plain violation of CEQA.



The PMPD also improperly defers the development of mitigation until after project approval. The PMPD relies upon a Programmatic Agreement to be signed and finalized by the BLM pursuant to Section 106 of the National Historic Preservation Act, as the primary method for identifying significant cultural resources and appropriate mitigation measures, and for ensuring implementation of those mitigation measures. This deferral of analysis and mitigation is improper, and it violates CEQA.

Under CEQA, the details of mitigation may only be deferred until after Project approval in limited circumstances.<sup>14</sup> Deferral is permissible only if “the lead agency: (1) undertook a complete analysis of the significance of the environmental impact, (2) proposed potential mitigation measures early in the planning process, and (3) articulated specific performance criteria that would ensure that adequate mitigation measures were eventually implemented.”<sup>15</sup> The decision must commit the agency to a realistic performance standard or criterion that will ensure the mitigation of the significant effect; and disallow the occurrence of physical changes to the environment unless the performance standard is or will be satisfied.<sup>16</sup>

The Commission has an obligation under CEQA to conduct its own analysis of potentially significant environmental impacts to cultural resources and to formulate feasible mitigation measures or commit to specific feasible and effective performance standards whenever significant environmental impacts are identified. The PMPD does not do either.

**3) PMPD:** “CUL-3 Changes to the proposed project or to the character of its construction, operation, and maintenance that may become necessary subsequent to the approval of the project, were such approval to occur, may in turn require the re-consideration of the extent of the original project area.

Where such changes indicate the need to alter the original project area to include additional lands that were not elements of analysis during the certification process, the effects of any proposed changes on historical resources that may be on such lands would need to be taken into account. Changes in the character of the construction, operation, and maintenance of the proposed project may include such actions as decisions to use non-commercial borrow or disposal sites. Upon the recognition that proposed changes to the project would require the use of lands that were not a part of the original project area of analysis, the project owner shall ensure that the CRS surveys any such lands for cultural resources and record each newly found resource on DPR 523 Series forms.” (Cultural Resources, p. 74.)

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<sup>14</sup> *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670-671, quoting *Endangered Habitats League Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793.

<sup>15</sup> *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70.

<sup>16</sup> See Remy et al., *Guide to the California Environmental Quality Act* (11th ed. 2007), p. 551.

**Comment:** The PMPD improperly allows the Applicant to disturb areas that are not a part of the Project. Obviously, the Commission did not analyze potentially significant impacts to land that are not part of the Project. The PMPD cannot, as a matter of basic CEQA law, allow new development so long as some cultural investigation is done and a report is submitted to the Commission.

CEQA prohibits approval of development without conducting environmental review. The PMPD proposes to provide the Applicant with a blank check to disturb additional lands in an unknown location, of unknown size, for unknown purposes. CEQA requires a public process that studies all of the environmental impacts associated with all phases of the Project, as the Commission well knows.

**Recommendation:** CUL-3 must be stricken from the PMPD.

Dated: October 19, 2010

Respectfully submitted,

/s/

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Energy

Calico Solar – 08-AFC-13  
DECLARATION OF SERVICE

I, Valerie Stevenson, declare that on October 19, 2010, I served and filed copies of the attached CURE Initial Comments on the Presiding Member’s Proposed Decision, dated October 19, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at [www.energy.ca.gov/sitingcases/calicosolar/CalicoSolar\\_POS.pdf](http://www.energy.ca.gov/sitingcases/calicosolar/CalicoSolar_POS.pdf). The document has been sent to both the other parties in this proceeding as shown on the Proof of Service list and to the Commission’s Docket Unit electronically to all email addresses on the Proof of Service list; and by depositing in the U.S. mail at South San Francisco, CA, with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked “email preferred.”

AND

By sending an original paper copy and one electronic copy, mailed and emailed respectively to:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 08-AFC-13  
1516 Ninth Street, MS 4  
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I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, CA, on October 19, 2010

/s/

Valerie Stevenson

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