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October 28, 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 original and conform the copy of the enclosed CURE'S AND MR. WILLIAM PEREZ COMMENTS ON THE PRESIDING MEMBER'S PROPOSED DECISION, and return the copy in the envelope provided.

Thank you.

Sincerely,

/s/

Carol N. Horton

:cnh
Enclosures

DOCKET	
08-AFC-13	
DATE	<u>OCT 28 2010</u>
RECD.	<u>OCT 28 2010</u>

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
AND MR. WILLIAM PEREZ
COMMENTS ON THE
PRESIDING MEMBER'S PROPOSED DECISION**

October 28, 2010

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I. The Commission Has Not Independently Analyzed the Feasibility, Effectiveness or Likelihood of Success of the Applicant’s Last-Minute Mitigation Proposal to Allow Construction Directly Around Hibernating Tortoises in their Burrows

Six days ago, the Applicant provided a new translocation plan to the parties and the Commission in this proceeding. The plan is unprecedented. The plan proposes to allow construction around hibernating tortoises that are in their burrows by placing a pen around the burrow with approximately 3 square feet of open area extending from the outer edge of the burrow. From our review of the Ivanpah, Abengoa, Genesis, Beacon and Blythe conditions of certification, it is clear that the Commission has not recently licensed a Project that would allow construction to occur adjacent to hibernating desert tortoises. Further, in the Calico proceeding this proposal was never independently analyzed by Staff in a document that was subject to public review. This proposal would have significant impacts to desert tortoises. Noise, construction vibration and construction activity could result in harm or even mortality to desert tortoises that are confined to their burrows. If the Commission approves this Project, thereby allowing the Applicant to construct in areas where desert tortoises are known to be hibernating, the Commission will violate CEQA.

II. The Commission’s Proposed Decision Would Violate CEQA’s Requirement that the Mitigation Be Effective and Capable of Implementation Based Upon Substantial Evidence in the Record

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, 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.¹ The PMPD does not, and cannot, cite to any evidence to support conclusions that a) 10,302 acres of high quality desert tortoise habitat is available for purchase, b) enhancement actions are likely to mitigate impacts to desert tortoise or c) habitat purchase and enhancement is likely to increase the carrying capacity of land for desert tortoises. Thus, these conclusions are unsupported. If the Commission fails to support its decision with substantial evidence that impacts to individual tortoises are mitigated and that the land mitigation is adequate, the Commission would violate CEQA.

¹ (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.)

III. The PMPD Violates CEQA's Requirement that an Agency Analyze Significant Impacts that Result from the Implementation of Required Mitigation

CEQA requires that all potential impacts be analyzed and all significant impacts be mitigated, *including impacts from mitigation measures themselves*. Where mitigation measures would cause significant environmental impacts, CEQA requires an evaluation of those secondary (indirect) impacts.² The PMPD fails to provide any mitigation for the impacts to desert tortoise habitat at the Ord-Rodman Desert Wildlife Management Area ("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 receptor location must be found and the disease testing, handling and disturbance would start all over again in a new location. The PMPD fails to accurately establish the magnitude of significant indirect impacts to desert tortoises in these offsite preserves as a result of Project development. If the Commission licenses the Project without identifying the receptor sites and the significant impacts to the receptor populations, the Commission will violate CEQA.

IV. The Presiding Member's Proposed Decision Would Violates CEQA's Requirement that the Lead Agency use Independent Judgment

The Commission's publicly-noticed environmental review document must reflect the independent judgment of the Energy Commission.³ The Commission proposes to rely upon the guidance of the US Fish and Wildlife Service, the Bureau of Land Management and the California Department of Fish and Game in determining adequate mitigation and in establishing performance standards to reduce impacts to desert tortoises on and off the Project site to less than significant. The Commission may consider the opinions of these agencies but must exercise its independent judgment and weigh the evidence and expert testimony of the agencies *before* the Commission issues its decision. It is not sufficient for the Commission to assume impacts will be mitigated to a level that is less than significant when the Staff has not analyzed the Desert Tortoise Translocation Plan or Biological Opinion.

² 14 Cal. Code Reg. § 15064(d).

³ CEQA Guidelines section 15084(e).

V. The Committee's Proposed Decision Violates CEQA's Requirement that the Project Have a Stable, Finite and Accurate 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.⁴ 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.⁵ The PMPD fails to disclose the description of a number of integral components of the Project such as the detention basins or the hundreds of miles of impervious surfaces required for the Project operations. These detention basins and treated road surfaces could have significant environmental impacts on the site hydrology and environmental resources that have not been analyzed by Staff. Additionally, as mentioned, the Project will rely on off-site locations for translocation of desert tortoises that will result in significant offsite indirect impacts to desert tortoise populations. This aspect of the Project proposal is not yet adequately defined to enable an analysis of significant impacts. Finally, the Project will require transmission upgrades that are part of the whole of the Project under CEQA but are, to date, unidentified.⁶ Commission Staff failed to analyze many of the significant impacts associated with the 67-mile Lugo to Pisgah transmission line, an additional Pisgah substation in an unknown location, and other transmission upgrades that will be required for the Project to bring its power to market. (It isn't even clear where ten miles of an off-site transmission line and an 100-acre substation will be built!) 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. The required transmission will substantially impact offsite desert tortoise habitat, among other resources, and should have been disclosed in the project description and analyzed as a part of the Project.

VI. The PMPD Violates the California Endangered Species Act's Requirement that Impacts to Desert Tortoise be Fully Mitigated

The desert tortoise is listed as threatened under the California Endangered Species Act ("CESA"). Impacts to desert tortoise must be fully mitigated in accordance with guidelines established by the California Department of Fish and Game ("CDFG").⁷ *Under these guidelines, a permit may only be issued if the*

⁴ 14 Cal. Code Regs § 15124; County of Inyo v. City of Los Angeles (1977) 71 CA3d 185.

⁵ Santiago County Water Dist. V. County of Orange (1981) 118 CA3d 818, 829.

⁶ Pub. Res. Code § 21065; 14 Cal. Code Regs. § 15378(a); 14 Cal. Code Regs. § 15378(c). 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. The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies.

⁷ Title 14 CCR, § 783.4.

applicant will minimize and fully mitigate the impacts of the take authorized under the permit.⁸ All required measures must be capable of successful implementation (i.e. the measures must be legally, technologically, economically and biologically practicable.)⁹ The Commission lacks any evidence to support a conclusion that impacts to desert tortoise will be fully mitigated as is required by CESA. In fact, the evidence in the evidentiary and administrative record clearly shows otherwise.

Dated: October 28, 2010

Respectfully submitted,

/s/

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⁸ *Id.*

⁹ *Id.*

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