

Supreme Court of California	Supreme Court Case Number: S189402				
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APPELLANT/PETITIONER: CALIFORNIA UNIONS FOR RELIABLE ENERGY and WILLIAM PEREZ RESPONDENT/REAL PARTY IN INTEREST: CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION/CALICO SOLAR, LLC	FOR COURT USE ONLY <div style="border: 2px solid black; padding: 10px; text-align: center;"> <h2 style="margin: 0;">DOCKET</h2> <h3 style="margin: 0;">08-AFC-13C</h3> </div> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 2px;">DATE</td> <td style="padding: 2px;">JAN 10 2011</td> </tr> <tr> <td style="padding: 2px;">RECD.</td> <td style="padding: 2px;">JAN 13 2011</td> </tr> </table>	DATE	JAN 10 2011	RECD.	JAN 13 2011
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<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b> (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE					
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1. This form is being submitted on behalf of the following party (name): Calico Solar, LLC

2. a.  There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b.  Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) K Road Sun LLC	K Road Sun, LLC owns more than 10% of Calico Solar, LLC
(2) K Road Power Holdings LLC	K Road Power Holdings, LLC owns more than 10% of K Road Sun LLC
(3) William Kriegel	William Kriegel owns more than 10% of K Road Power Holdings LLC
(4)	
(5)	

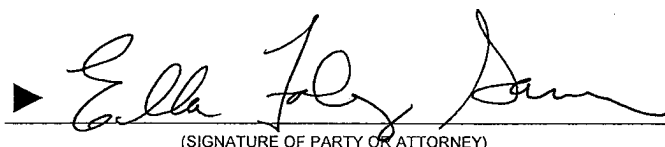
Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 10, 2011

Ella Foley Gannon

(TYPE OR PRINT NAME)

▶ 

(SIGNATURE OF PARTY OR ATTORNEY)

Case No. S189402

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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CALIFORNIA UNIONS FOR RELIABLE ENERGY  
and WILLIAM PEREZ,

Petitioners,

v.

CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION,

Respondent,

TESSERA SOLAR, INC., CALICO SOLAR, LLC and  
Does 1 through 100,

Real Parties in  
Interest.

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After a Decision of the Energy Resources Conservation and  
Development Commission of the State of California  
Docket No. 08-AFC-13, Order No. 10-1028-03

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**PRELIMINARY OPPOSITION TO  
PETITION FOR WRIT OF MANDATE**

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## I. INTRODUCTION

Due to the importance of a stable power supply, as well as the complex nature of the technical and environmental factors that must be considered, the Legislature has vested all authority over approval of new and expanded thermal power plants in the California Energy Resources Conservation and Development Commission. The Warren-Alquist Act establishes a comprehensive fact finding process that the Commission follows to gather technical data, consult other agencies, conduct evidentiary hearings, weigh evidence, and reach a decision in light of the information before it and discretionary matters of public policy. Pub. Res. Code §§ 25000 *et seq.*

There can be no debate that, when it approved the Calico Solar Project, the Commission issued all required reports, admitted all relevant evidence, and conducted all required hearings. The Commission's staff and Presiding Member issued comprehensive reports assessing the technical, safety, reliability and environmental data presented by the applicant, staff, federal, state and regional agencies, and intervenor organizations. 5 CSP App. 1116-1119 (Decision).<sup>1</sup> The Commission held six hearings to admit

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<sup>1</sup> To differentiate between appendices, Petitioner's appendix is labeled "CU App.," with page numbers listed as "PA#####." Real Parties' appendix is labeled "CSP App.," with page numbers listed as "#####."



evidence through direct and cross examination and written documents. *Id.* The Commission issued both a proposed decision and a final decision resolving factual issues and requiring implementation of over 150 conditions of project approval. 5 CSP App. 1104-7 CSP App. 1839 (Decision). Moreover, due to the concerns raised by intervenors, the Commission reduced the size of the Calico Solar Project from 8,230 acres to 4,613 acres, avoiding development of the most sensitive habitat for the desert tortoise. 5 CSP App. 1359 (Decision).

California Unions attempts to create an impression that the Commission rushed to judgment on the Calico Solar Project when, in fact, the opposite occurred. The Commission took almost two years to collect data, hear testimony and reach a decision. *Id.* at 1116-1119. While the Commission's regulations require only distribution of one report from staff, the Commission's staff issued eight reports to continuously incorporate and respond to data provided by the applicant and the intervenors, including California Unions. *Id.* at 1116-1119; 7 CSP App. 1828-1829. While the Commission's regulations require one evidentiary hearing on a project's environmental effects, the Commission conducted six. *Id.* at 1116-1119. As intervenors raised questions, the Commission conducted further hearings to fully consider the issues that had been raised. *Id.* It is undisputed that the Commission scheduled its proceedings so that they could be completed prior to expiration of the deadline for federal tax

incentives. *Id.* at 1140. Such scheduling decisions are well within the Commission's discretion, and did not short change the Commission's fact finding process.

California Unions' challenges boil down to nothing more than a complaint that after hearing evidence on all sides, and weighing that evidence, the Commission reached a decision that California Unions does not like. Such complaints do not provide grounds for judicial review, much less issuance of a petition for writ of mandate by this Court. Therefore Real Party Calico Solar, LLC, asks that the Court summarily deny the petition.

## **II. BRIEF RESPONSES TO ISSUES PRESENTED**

California Unions poses four questions in its statement of issues presented.<sup>2</sup> Each question is addressed in detail in the following points and authorities. This section presents a brief summary.

Did the Commission violate the Warren-Alquist Act and the

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<sup>2</sup> It is not clear that California Unions and William Perez can pass the requisite beneficial interest test for standing to bring their claims under the California Environmental Quality Act. Unions typically are interested in protecting their workers, not the desert tortoise. Mr. Perez, who jointly signed one letter with California Unions at the end of the proceedings but never attended a hearing, states that he has an interest in protecting the Mojave Desert. That is a large place. He has not said how close to the Project Site he lives, nor has he expressed more than the most general interest. If additional briefing is requested, Calico reserves its right to raise

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California Environmental Quality Act by:

1. Not analyzing, as part of a power plant project, the impacts caused by a new 67-mile transmission line and a substantial expansion to an electrical substation necessary for the project to function?

Brief response: There is no legal dispute. As required by CEQA and the Commission's Regulations, the Commission analyzed the environmental effects of the transmission upgrades, which include re-conductoring<sup>3</sup> an existing 67-mile Southern California Edison transmission line and expanding an SCE sub-station. The Commission treated the upgrades as part of the "whole of the action" for purposes of its environmental review. California Unions disagrees with the Commission's factual determination that the *level of detail* provided in the environmental analysis was sufficient for the Commission to reach a decision on the Calico Solar Project. This Court repeatedly has held that reviewing courts do not resolve such factual disputes or re-weigh factual evidence. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 393,

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objections based on standing.

<sup>3</sup> California Unions refers to the transmission line as "new." But, as California Unions acknowledges at pages 17-18 of its Petition, the 67-mile line exists. To transmit the energy from Phase 2 of the Calico Solar Project, the line needs to be upgraded, which technically is called "re-conductoring."

407, 409 (1988). *See* Section IV.B below.

2. Omitting findings concerning mitigation that another agency “can and should” adopt to address impacts caused by the new 67-mile transmission line and the electrical substation expansion?

Brief response: There is no legal dispute. As required by CEQA and the Commission’s Regulations, the Commission’s Decision includes a finding that other agencies “can and should” adopt the mitigation measures to reduce impacts caused by the transmission upgrades. California Unions simply disagrees with the level of detail underlying the finding. *See* Section IV.B below.

3. Not analyzing the significant impacts to desert tortoise, a threatened species, that will be caused by mitigation measures?

Brief response: There is no legal dispute. As recommended by the USFWS, Calico twice reduced the size of the Project to protect the desert tortoise. 5 CSP App. 1359-1378 (Decision). The Commission acknowledged the potential effects of translocating the few remaining tortoises on the Project site. 5 CSP App. 1380-1382 (Decision). Further, the Commission considered the efficacy of protecting tortoises in place during the initial phase of construction. CU App. PA04314-4315 (Oct. 22 Transcript). While California Unions disagrees with these measures, it cannot demonstrate the Commission failed to evaluate them. *See* Section IV.C, below.

4. Not providing meaningful opportunities for public review of the constantly changing project and environmental analysis, and by not responding to public comments?

Brief response: There is no legal dispute. The Commission granted California Unions' application to intervene and allowed it to participate throughout the fact-finding proceedings. Far from ignoring comments, the Commission cut the Calico Solar Project's footprint roughly in half to respond to the comments. This is the process contemplated by CEQA and the Commission's regulations. California Unions simply disagrees with the factual determinations the Commission made in response to some of its comments. *See* Section IV.D, below.

### **III. STATEMENT OF THE CASE**

#### **A. The Calico Solar Project**

The Calico Solar Project is a solar power facility to be constructed on approximately 4,613 acres of federal lands in San Bernardino County. The Project site is approximately 37 miles east of Barstow, 17 miles east of Newberry Springs, 57 miles northeast of Victorville, and 115 miles east of Los Angeles. The Project is proposed for development in two phases, with Phase 1 located on approximately 1,876 acres and Phase 2 on the remaining 2,737 acres. 5 CSP App. 1113-1114 (Decision).

The Calico Solar Project is expected to produce 663.5 megawatts of renewable electricity that does not depend on foreign sources and would

advance the state-mandated Renewable Energy Portfolio. The Project will contribute to the decommissioning of dirtier coal-burning power plants as well as aging coastal power plants that use ocean water for cooling and cause significant harm to marine life. 5 CSP App. 1241 (Decision). It also will help to implement California's legislative imperative – established by AB 32 – to substantially reduce greenhouse gas emissions. 5 CSP App. 1243-1246 (Decision).

**B. The Commission's Proceedings**

The Calico Solar Project and its related facilities are subject to the exclusive permitting jurisdiction of the California Energy Resources and Development Commission. Pub. Res. Code §§ 25500 *et seq.* In December 2008, a predecessor-in-interest to Calico submitted an application with the Commission for site certification. The original Project would have generated 850 MW on 8,230 acres. 5 CSP App. 1113 (Decision); 2 CSP App. 260 (SSA).

The Commission acted as the state lead agency for studying environmental impacts of the Calico Solar Project. Under its certified regulatory program, the Commission prepares a set of environmental documents and conducts evidentiary hearings that the Secretary of Resources has determined are equivalent to compliance with the California

Environmental Quality Act's requirements for environmental review. *See* Commission Regulations<sup>4</sup> 1741 *et seq.*; Pub. Res. Code § 21080.5.

The Commission commenced review by first obtaining environmental data and studies submitted by Calico in the Application for Certification. 5 CSP App. 1118 (Decision). *See* Commission Regulation 1742(a) (information about environmental effects and mitigation measures shall be provided in the application). Staff also collected other sources of information through a series of workshops. *See* 5 CSP App. 1118 (Decision). Next the Commission's staff prepared a Staff Assessment, which is a written report to review the information provided by the applicant and other sources, and assess the environmental impacts of the project, the completeness of proposed mitigation, and the need for, and feasibility of, additional mitigation. *See* Commission Regulation 1742.5. On March 30, 2010, the Commission distributed the Staff Assessment for the Calico Solar Project, along with reports on safety and reliability, and compliance with local regulations.<sup>5</sup> 5 CSP App. 1118 (Decision).

Following publication of the Staff Assessment and based on

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<sup>4</sup> The Commission's regulations are found at Title 20 of the California Code of Regulations.

<sup>5</sup> The Staff Assessment and the Bureau of Land Management's draft Environmental Impact Study were published jointly. 5 CSP App. 1118

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recommendations from various agencies, Calico reduced the size of the Calico Solar Project from 8,230 acres to 6,215 acres to avoid the most sensitive environmental resources. 2 CSP App. 260 (SSA). A Supplemental Staff Assessment was prepared to address this size reduction, and distributed on July 21, 2010. 2 CU App. 755 *et seq.* (SSA).

Early in the permitting process, the Commission appointed a committee consisting of two Commission members to conduct its proceedings. On June 22, 2009, the Committee conducted a site visit to tour the Calico Solar Project site and held a public informational meeting. 5 CSP App. 1117 (Decision). The Commission and BLM held joint workshops to resolve technical issues, identify alternatives, and respond to data on September 16, 2009 and April 16, 2010 in Barstow; on December 22, 2009, August 24, 2010, and September 9, 2010 in Sacramento; and on August 12, 2010 via the web. 5 CSP App. 1118 (Decision). The Committee conducted a prehearing conference on July 30, 2010 and held formal evidentiary hearings on the Calico Solar Project and its environmental effects and mitigation on August 4, 5, 6, 18 and 25, 2010.

*Id.*

As evidence and testimony was submitted during the hearings,

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(Decision).



Commission staff prepared a series of documents to respond to comments and to track the information: Staff Rebuttal Testimony and Errata dated July 29; Staff Errata to SSA dated August 4; SSA Part 2 dated August 9; and Staff's Second Errata to SSA dated August 17. 5 CSP App. 1118, 7 CSP App. 1829-1830 (Decision); 4 CU App. PA02093 (Second Errata to SSA); 6 CU App. PA03082 (SSA Addendum); 3 CU App. PA01327 (Aug. 4 Transcript).

On September 3, 2010, the Committee directed Calico and other interested parties to explore a further size reduction. 5 CSP App. 1118 (Decision). In response, Calico presented six alternatives. Following a staff-conducted workshop and an additional evidentiary hearing, one of these reduced-size alternatives – Scenario 5.5 – emerged as the preferred alternative of both Calico and Commission staff. 5 CSP App. 1118 (Decision). Scenario 5.5 shrank the Calico Solar Project to 4,316 acres, just over half the originally proposed size. The smaller project is expected to produce 663.5 MW of electricity. 5 CSP App. 1120 (Decision).

The Committee published a Presiding Member's Proposed Decision (PMPD) on September 25, 2010 recommending approval of the twice-reduced 4,316 acre Calico Solar Project. 5 CSP App. 1118 (Decision); *see* Commission Regulation 1749. The PMPD included over 150 Conditions of Certificate, which are designed to ensure that all the Project's environmental impacts are mitigated to the extent feasible. The Committee

held a conference on the PMPD on October 22, 2010, which it continued to October 26, 2010 to receive further comments from the public and intervenors in response to a staff workshop held on October 25th. 5 CSP App. 1118 (Decision).

The full Commission held a hearing on October 28, 2010 to consider the PMPD and the recommendations of the Committee and the various commenting parties. 5 CSP App. 1118-1119 (Decision); *see* Commission Regulation 1754. Following six lengthy hearings featuring extensive public comment and deliberation, the Commission issued its final Decision certifying the Calico Solar Project. 5 CSP App. 1118 (Decision); *see* Commission Regulation 1755.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

California Unions ignores the standard of review applicable to this petition. It asks this Court to step into the shoes of the Commission, re-weigh evidence, and decide factual questions. The law is to the contrary.

The Legislature expressly limited judicial review of the Commission's site certification decisions. Section 25531 of the Warren-Alquist Act<sup>6</sup> decrees that review be available only in this Court, and that the

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<sup>6</sup> The Warren-Alquist Act is the Commission's enabling statute. Pub. Res.

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scope of review be limited:

The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution.

Pub. Res. Code § 25531.

California Unions' petition raises no constitutional question.

Accordingly, judicial review is limited to whether the Commission has regularly pursued its authority. Such a standard affords the Commission's factual and policy determinations extraordinary deference.

Deference to the Commission's fact finding is based upon Legislative policy direction that, to the fullest extent permitted by the Constitution, all decisions regarding power plant siting be vested in the Commission as the agency with the expertise and resources appropriate to the task. Pub. Res. Code § 25500 (vesting exclusive jurisdiction in the Commission, whose approval "shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law"), 25201 (requiring specific technical (including environmental) expertise of Commission members).

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Code § 25000.

The Legislature recognized the importance power plants have in California, and the Commission's expertise in evaluating complex technical factors relevant to site certification. *E.g.*, Pub. Res. Code §§ 25001 (Legislative declaration that electrical energy is essential, and that the State has a responsibility to ensure a reliable supply), 25005 (Legislative recognition that expanded state authority and technical capability are required to address delays and interruptions in the orderly provision of electrical energy, protection of environmental values, and conservation of energy resources), 25009 (recognizing in part the need to "ensure the timely construction of new electricity generation capacity").

The presence of CEQA claims in this proceeding does not negate the judicial deference due to Commission decisions. CEQA does not envision a judicial reweighing of evidence or de novo review of factual or scientific questions. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 393, 407, 409 (1988); *Western States Petroleum Ass'n v. Superior Court*, 9 Cal.4th 559, 573-574 (1995). A reviewing court does not perform its own scientific critique of the technical studies, or pass judgment on the validity or correctness of the agency's factual environmental findings, even if other experts might disagree with the underlying data, analysis, or conclusions. *Laurel Heights*, 47 Cal.3d at 392-393, 409;

CEQA Guidelines § 15151.<sup>7</sup> Instead, as this Court explained in *Western States*, judicial deference to the agency is required both to adhere to constitutional principles invoking the separation of powers doctrine, and recognize the expertise of the reviewing agency:

Agencies must weigh the evidence and determine which way the scales tip, while courts conducting substantial evidence review generally do not. If courts were to independently weigh conflicting evidence in order to determine which side had a preponderance of the evidence, this would indeed usurp the agency's authority and violate the doctrine of separation of powers.

*Western States*, 9 Cal. 4th at 576 (quoting party's brief with approval; quotations omitted).

This judicial deference extends not only to the evidence upon which the agency relied, but also to the agency's inferences and conclusions.

"When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the agency]." *Id.*

Moreover, the agency's decision is presumed correct, and it is the challenger's burden to demonstrate otherwise.

Even when the challenge presents a question regarding appropriate

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<sup>7</sup> The CEQA Guidelines are found at Title 14 of the California Code of  
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procedures, judicial review is not unbounded. The question whether an agency conformed to procedures required by law entails a de novo determination whether the agency has employed the correct procedures. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 435 (2007). However, the decision is still presumed correct and it is petitioners' burden to prove otherwise. *Sierra Club v. City of Orange*, 163 Cal.App.4th 523, 530 (2008); Evid. Code § 664 (presumption that official duties regularly performed). Moreover, petitioners must also establish that any error was prejudicial, and not just a technical defect. *See Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection*, 43 Cal.4th 936, 944, 948-949 (2008) (noting that agency implementing certified regulatory program technically failed to follow certain procedure, but holding that even if question were treated as one of procedure rather than a question of fact, decision would be upheld since record as a whole demonstrated compliance with substance of the requirement); *see also* Pub. Res. Code § 21005 (noting that an error *may* constitute a prejudicial abuse of discretion).

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Regulations.

**B. The Commission Regularly Pursued its Authority in Describing and Analyzing the Transmission Upgrades Beyond the First Point of Interconnection.**

**1. The description of the transmission upgrades remained stable throughout the proceedings.**

The Calico Solar Project will use solar technology to generate electrical energy. Within the Project site, power lines will interconnect the individual energy generating units. Power from the lines will be collected at a new 230-kilovolt (kV) Calico Solar Substation. An electrical line will transport the energy from the Calico Solar Substation to a Southern California Edison substation near the Project site. 1 CSP App. 17 (Application); 3 CSP App. 703 (Staff Addition of Project Related Future Act on Language). The substation will convert the power to a form that can then be transported to the California grid along larger transmission lines. 5 CSP App. 1214 (Decision). Calico described these various power transmission components in the initial application (1 CSP App. 7-18, 28-29 (Application)), and those components remained substantially the same throughout the siting approval process. 7 CU App. PA03822 (PMPD); 5 CSP App. 1214-1215 (Decision).

Calico also stated in its application that, beyond the Project boundaries, Southern California Edison (SCE) would need to construct other upgrades in order to transmit the power to be generated by the Project. 1 CSP App. 28-31 (Application) (discussion of interconnection to

grid in application); 1 CU App. PA191 (Revised Data Adequacy Recommendation) (discussion of transmission corridor in application) Those upgrades also remained the same throughout the approval process. 3 CU App. PA01643-01673 (SSA Errata); 5 CSP App. 1214-1215 (Decision).

The Commission received testimony and evidence regarding the transmission upgrades. The Calico Solar Project is phased. Based on modeling conducted by SCE, to transmit the energy generated by Phase 1 of the Project, SCE will need to perform some minor transmission upgrades but no substantial changes to the existing 220-kV SCE Pisgah-Lugo transmission line or Pisgah substation will be needed. 3 CU App. PA01646-1652 (SSA Errata). To transmit the power generated under Phase 2 of the Calico Solar Project, SCE preliminarily has determined that other upgrades will be needed, including expanding the existing 230 kV SCE Pisgah substation to a 230/500 kV substation and re-conductoring approximately 67 miles of the existing SCE Lugo-Pisgah number two 230 kV transmission line to upgrade it to a 500 kV line. 5 CSP App. 1214 (Decision). To re-conductor the transmission line, SCE has indicated that existing poles will need to be replaced with stronger support structures, which likely will be placed in the same location, but SCE has also indicated it cannot commit to use the same location in every case. 3 CU App. PA01581 (Aug. 4 Transcript). The route of ten miles of the corridor is not



yet determined. 3 CU App PA01569 (Aug. 4 Transcript). These ten miles are on the western end of the corridor in populated areas near the SCE Lugo Substation near Hesperia, where SCE will need to pass through an urban area. 1 CSP App. 41 (Application); 3 CU App PA01580 (Aug. 4 Transcript). This segment will not be near critical habitat for the desert tortoise. 1 CSP App. 41 (Application).

California Unions argues that CEQA requires an “accurate, stable, and finite” project description. CU Petition at 25. We agree. However, California Unions cannot point to any component of the transmission system that was substantially changed in a manner that violated CEQA<sup>8</sup> during the Commission’s approval process.

From a CEQA perspective, California Unions’ only complaint is that the section of the PMPD and Decision labeled “Project Description” did not include the SCE transmission upgrades. But this portion of the Decision described the approval action *the Commission* was taking. In siting thermal power plants, the Commission only has jurisdiction over transmission lines up to the first point of interconnection with the existing transmission grid.

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<sup>8</sup> CEQA does not require that a project never change. *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 199-200 (1977). Indeed, it is the purpose of CEQA that “new and unforeseen insights” trigger revisions in projects. *Id.* at 199. Instead, CEQA requires that “a narrow project” description not be used as a “launching pad” for a buried or later announced

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*San Diego Gas & Electric Co. v. Superior Court*, 13 Cal.4th 893, 925 & n.21 (1996); *Public Util. Comm'n v. Energy Resources Conservation and Development Comm'n*, 150 Cal.App.3d 437, 454 (1984); Pub. Res. Code § 25107; 20 Cal. Code Regs. § 1702(n). Beyond the first point of interconnection, the California Public Utilities Commission (CPUC) and not the Commission has jurisdiction. *San Diego Gas & Electric Co.*, 13 Cal.4th at 925. California Unions does not dispute that the new 230-kV Calico Substation and the two miles of electrical lines from that substation to the Pisgah substation are the transmission facilities up to the first point of interconnection. They are described under the “Project Description” heading.

Given that the Commission had no jurisdiction over the remaining transmission upgrades, it is not at all confusing that the Commission did not include such upgrades under the project description heading in its Decision. As California Unions concedes, the Commission nevertheless treated the transmission upgrades as part of the “whole of the action” for purposes of its CEQA documentation and compliance. *See* CU Petition at 40 (“Although CEC Staff repeatedly acknowledged that the 67-mile transmission line and substation expansion were part of the whole of the

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“vastly wider proposal.” *Id.* at 199-200.

project, . . .”); CU Petition at 41 (“... four chapters of the Final Decision acknowledge . . . that, in order for the Calico Solar Project to transmit all of its electricity to consumers, the Project will require expanding the existing substation and a new transmission line.”) The Decision specifically recognized that the transmission upgrades would be needed. 5 CSP App. 1215-1216 (Decision); *see also* 3 CU App. PA01643-01673 (Supplemental Staff Assessment description of the nature of the upgrades to meet transmission requirements).

California Unions also claims that by failing to include the transmission upgrades in its project description, the Decision violates section 25523 of the Warren-Alquist Act and the Commission’s own regulations. Section 25523(d)(1) of the Act obliged the Commission to make findings regarding the conformity of the site and “related facilities” with “other applicable local, regional, state, and federal standards, ordinances, or laws.” Pub. Res. Code § 25523(d)(1). Under the Commission’s regulations, related facilities include “transmission and fuel lines up to the first point of interconnection.” Commission Regulation 1702(n). While the overall definition of “related facilities” is non-exclusive, the use of the language “up to the first point of interconnection” as to transmission lines makes it clear that related facilities do not include

transmission lines beyond that point. Under any other reading, the modifying language would be surplusage.<sup>9</sup>

2. **Based on the evidence before it, the Commission decided it had sufficient information about the environmental effects of the transmission upgrades to make its decision.**

While transmission upgrades outside of the Commission's jurisdiction are not "related facilities" as defined by the Warren-Alquist Act, for the purposes of CEQA compliance the Commission requires applicants to provide information regarding such facilities. 20 Cal. Code Regs., Div. 2, Ch. 5, Art. 6, Appendix B. Calico did so, and the Commission also obtained additional information about the transmission upgrades from SCE and the CPUC, and through data requests to the applicant. 1 CU App. 119-190 (Application) (Environmental Summary Report for the Proposed Lugo-Pisgah 500kV Transmission Line and Substation Upgrades); 3 CU App. PA01579 (Aug. 4 Transcript); 1 CSP

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<sup>9</sup> In any event, "related facilities" *cannot be* facilities outside of the Commission's jurisdiction because the Commission "is vested with exclusive authority to certify sites and *related facilities*." *Public Util. Comm'n*, 150 Cal.App.3d at 440 (emphasis supplied); *see* Pub. Res. Code § 25500 ("the commission shall have the exclusive power to certify all sites and related facilities in the state"). Beyond the first point of interconnection, the CEC has no jurisdiction. *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal.4th 893, 925 & 925 n.21 (1996); Pub. Res. Code § 25107.

App. 47 (Applicant's Response to the CEC Transmission Line Upgrade Memo, January 8, 2010); 1 CSP App. 197 (Applicant's Responses to the CEC Transmission Line Upgrades Memo - Cultural Resources Responses, January 29, 2010).

Based on available information, the Commission considered the transmission upgrades outside of its jurisdiction as Project-related future actions. 3 CU App. PA01643-01644 (SSA Errata). The Commission disclosed the available information about the reasonably foreseeable future transmission projects, their environmental effects, and measures to reduce those effects, appropriately focusing on impacts to biological and cultural resources.<sup>10</sup> 2 CSP App. 314-315, 358-359 (SSA); 3 CSP App. 883-888 (SSA Part II); 2 CU App. PA00887-0896, PA01054, PA01061-1062, PA01065, PA01068-1069, PA01077, PA01081, PA01084, PA01087, PA01091, PA01096, PA01101-1102 (SSA). The SSA describes the types and acreages of the vegetation communities, and it reports the results of reconnaissance level surveys of sensitive and endangered species in the

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<sup>10</sup> California Unions ignores the environmental analysis found in the Staff Assessment and Supplemental Staff Assessments based upon the incorrect view that only the PMPD and Decision can contain the necessary environmental analysis. The Commission can and does use multiple “documents ... in the place of an environmental impact report.” See Pub. Res. Code. § 25519(c); Pub. Res. Code § 21080.5 (certified regulatory program is based on a “plan or other documentation”).

transmission corridor. 3 CSP App. 523-526 (SSA). The SSA describes the potential impacts to biological resources, and identifies mitigation. 3 CSP App. 526-529 (SSA). The SSA also described the likely presence of cultural artifacts in the area in light of the area's history. 3 CSP App. 883-886 (SSA Part II).<sup>11</sup>

California Unions contests the sufficiency of the information that the Commission's staff provided about the environmental effects of the transmission upgrades, and the level of detail in the Staff Assessment and Supplemental Staff Assessment about measures to reduce those effects. These are nothing more than factual disputes. California Unions' comments about this information were considered by the Commission. 9 CU App. PA04793 (California Unions Comment on PMPD). Having considered the available information, the Commission determined that it was sufficient. 5 CSP App. 1217 (Decision).

As California Unions' witnesses pointed out in their own testimony, the transmission upgrades are being designed by SCE, an entity outside of

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<sup>11</sup> California Unions complains that a literature review was conducted rather than a pedestrian survey for cultural artifacts, claiming that the applicant "refused" to do the survey for biological or cultural resources. CU Petition at 20. Calico did not refuse to conduct studies as California Unions suggests. Rather, in light of the status of the SCE's planning, both Calico and the Commission staff deemed it appropriate to conduct such surveys when they would be relevant to more concrete proposals. 3 CSP

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Calico's and the Commission's control, and the CPUC will make the final determinations about the those facilities. At the time of the Commission's Decision, SCE had not completed its designs, and accordingly had not yet filed an application for approval by the CPUC. 3 CU App. PA01643-01644 (SSA Errata). The preliminary information regarding the transmission upgrades is an estimate based on modeling and SCE's consultation with the California Independent System Operator. 3 CU App. PA01562-1563 (Aug. 4 Transcript); 2 CU App. PA01111-1115 (SSA). SCE, not Calico or the Commission, will determine the specific transmission upgrades it believes are necessary and then apply to the CPUC for a Certificate of Public Convenience and Necessity. SCE will base its proposal on its needs in light of the Calico Solar Project, but it may also consider its transmission needs in light of other projects. 1 CU App. PA00125 (Application). The CPUC has jurisdiction over the transmission upgrades and will be the entity that approves the extent and location of the upgrades in response to SCE's application. *See* Pub. Util. Code. § 1001 *et seq.*; 2 CU App. PA01105-1106 (SSA); 3 CU App. PA01662 (SSA Errata). While SCE shared preliminary information about its plans, the timeline for SCE's application and the timeline for CPUC's consideration had not been established. 3 CU App.

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App. 883 (SSA Part II).

PA01567-1569 (Aug. 4 Transcript).

Pragmatic jurisdictional issues appropriately may be considered when determining how much detail an agency needs in order to reach its decision. *See Riverwatch v. County of San Diego*, 76 Cal.App.4th 1428, 1448 (1999) (where, in light of a funding dispute, CalTrans was unwilling to undertake additional studies until a quarry that required road widening was approved, and where the available analysis was nonetheless sufficient for an intelligent decision, “the fact the final EIR deferred until a later point more detailed analysis of the realignment ... did not violate CEQA”). The Commission’s decision to utilize available information did not violate CEQA. *See Towards Responsibility in Planning v. City Council*, 200 Cal.App.3d 671, 681 (1988) (“Adoption of an EIR need not be interminably delayed to include results of works in progress which might shed some additional light on the subject.”). Contrary to California Unions’ basic premise, there is no legal requirement to jettison practical considerations regarding timing and the availability of information when evaluating disclosure under CEQA. This Court has applied a standard that “gives due deference to the fact that premature environmental analysis may be meaningless and financially wasteful,” but that requires disclosure of what is known even if “precision” is not available. *Laurel Heights*, 47 Cal.3d at 396, 398.

The Commission considered and disclosed what it knew,



recognizing that further, more detailed environmental review would be conducted by the CPUC. This approach is precisely what this Court has long required, and there is nothing here warranting further briefing or review. *Id.* at 398 (citing *No Oil, Inc. v. City of Los Angeles*, 196 Cal.App.3d 223, 233 (1987)). In *No Oil*, the City of Los Angeles authorized exploratory wells, created oil drilling districts, and authorized drilling and production facilities at two locations to tap large pools of oil and natural gas. 196 Cal.App.3d at 230. The EIR discussed the contemplated impacts of pipelines that would serve the facilities, but discussed the location of the pipeline in only general terms because more specific information about the pipelines was not known. *Id.* The petitioners argued that the failure to fully analyze the location, extent, and environmental impacts of the pipeline routes improperly fragmented the project and deferred consideration of the impacts. Because the EIR allowed “an informed decision,” and because further environmental review would occur on pipeline proposals when those proposals became more concrete, the court of appeal rejected these arguments. *Id.* at 234-35, 237; *see also*, *National Parks and Conservation Ass’n v. County of Riverside*, 42 Cal.App.4th 1505, 1518 (1996) (“discussion of a support facility (such as an oil pipeline) is not required in an EIR for the project the facility is to serve if: (1) obtaining more detailed useful information is not meaningfully possible at the time when the EIR for the project is prepared, and (2) it is

not necessary to have such additional information at an earlier stage in determining whether or not to proceed with the project”); *see* CEQA Guidelines § 15151 (“An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences.”).

The Commission decided not to wait for SCE to initiate CPUC proceedings in order to conduct further analysis because it made a determination that additional information was not necessary to make an informed decision. 5 CSP App. 1217 (Decision). The Commission weighed the available information, and notably also considered a 275 MW reduced acreage alternative because this alternative would not require an upgrade to 65 miles of the existing 220-kV SCE Pisgah-Lugo transmission line. 5 CSP App. 1144 (Decision). California Unions has identified no omissions or errors in the project description or the Commission Decision’s discussion of transmission, let alone a prejudicial error precluding informed decisionmaking and informed public participation. Pub. Res. Code § 21005(b); *Dry Creek Citizens Coalition v. County of Tulare*, 70 Cal.App.4th 20, 26 (1999).

**3. The Commission consulted with the CPUC before reaching its decision.**

California Unions faults the Commission for not consulting with the

CPUC regarding the transmission upgrades, when in fact it did. 3 CU App. PA01579-01580 (Aug. 4 Transcript). As the Commission staff's project manager for the Calico Solar Project explained in a hearing that California Unions attended, there was a series of meetings between the Commission staff, CPUC, BLM and SCE "trying to resolve ... how to deal with this uncertainty of where the line was going to be when the application – the CPUC application was going to go from Edison to the PUC, when Edison would actually have a final route, and the environmental engineering information on this line for staff to review." *Id.* at PA01579. The Commission obtained the information about SCE's proposal that it was reasonably able to obtain. *Id.*; 3 CU App. PA01567-1564, PA01579-01580 (Aug. 4 Transcript); *see* 14 Cal. Regs. § 15144.

Even though SCE has not submitted its application for a Certificate of Public Convenience and Necessity to CPUC, California Unions asserts now, and for the first time, that the Commission was obliged to ask CPUC to precisely delineate the transmission line proposal, independently from SCE's application. First, this claim does not merit consideration because it was not raised before the Commission. *See Sierra Club v. California Coastal Comm'n*, 35 Cal.4th 839, 864 n.20 (2005) ("We do not ordinarily consider issues that were not raised below."). Second, precise delineation of the SCE transmission corridor or the SCE substation would have required the CPUC to guess what SCE would ultimately propose in terms

of engineering. Such speculation about the specifics of the transmission upgrades SCE would seek from the CPUC would have been “reading tea leaves.” 3 CU App. PA01580 (Aug. 4 Transcript); *see* CEQA Guidelines § 15151 (“The sufficiency of an EIR as an informative document is judged ‘in light of what is reasonably feasible.’”).

**4. The Commission made the applicable “can and should” findings regarding mitigation the CPUC could later adopt.**

Because the transmission upgrades were at a conceptual design stage, the mitigation measures to address impacts of the upgrades were also conceptual. Nevertheless, the Commission described the relevant mitigation measures in the Supplemental Staff Assessment. 2 CU App. PA00893 (SSA); 4 CSP App. 887-888 (SSA Part II); *see also* 6 CSP App. 1632 (Decision) (referencing the cultural resources mitigation measures discussed in the SSA). The measures address identification of sensitive areas, mitigation and avoidance of impacts to wildlife and water quality, and compensation for permanent impacts. They also address avoidance of impacts and data recovery with respect to cultural resources. Further, in response to California Unions’ comments and testimony, Hearing Officer Kramer *sua sponte* inquired further into “downstream” transmission upgrades and whether unusual circumstances indicated that well understood mitigation measures would not be feasible. 3 CU App. PA01562, PA01579-01580 (Aug. 4 Transcript). Having reviewed the evidence, the

Commission ultimately made a factual determination that the “transmission line construction and reconductoring is commonly understood and mitigation strategies for any potential impact likely to occur are widely known and understood.” 5 CSP App. 1216 (Decision). California Unions suggests that more detail about mitigation within the CPUC’s authority was required, but the Commission reached the opposite conclusion based upon the evidence before it. Such a factual dispute does not warrant further briefing or review.

According to California Unions, the Commission failed to make requisite findings that the CPUC “can and should” adopt changes or alterations to reduce the impacts resulting from the transmission upgrades. *See* Pub. Res. Code. § 21081(a)(2). However, the Commission did make such a finding. 5 CSP App. 1216 (Decision).

Again, California Unions quibbles with the level of detail provided, not whether the Commission regularly pursued its authority. Such questions are well within the Commission’s discretion. California Unions cannot contend that members of the public, other agencies, or the Commission was unaware of the issues surrounding the transmission lines or their resolution.

**C. The Commission Regularly Pursued its Authority in Adopting Desert Tortoise Mitigation Measures**

**1. The Commission's factual determinations regarding impacts to the desert tortoise were supported by substantial evidence.**

As originally proposed, the Calico Solar Project encompassed 8,230 acres where 104 desert tortoises were found. 5 CSP App. 1358-1359 (Decision). Minimization of and compensation for impacts to the desert tortoise occupied much of the Commission's and resource agencies' attention throughout the CEQA process. Calico twice reduced the acreage of its proposed Project to reduce impacts to desert tortoise, as recommended by the USFWS Desert Tortoise Recovery Office and required by the Commission. 5 CSP App. 1359-1378 (Decision).

The result was a 4,613-acre Project site where USFWS-protocol surveys discovered only 10 tortoises. 4 CSP App. 1059 (Biological Opinion). The Commission's Decision reflects its careful consideration of ways to mitigate the reduced Calico Solar Project's remaining impacts to the species. 5 CSP App. 1378-1383 6 CSP App. 1451-1469 (Decision).

The centerpiece of the Commission's mitigation for impacts to the desert tortoise is habitat acquisition, improvement, and long-term management. 5 CSP App. 1383, 6 CSP App. 1456-1467 (Decision). The Project is required to acquire 10,302 acres of desert tortoise habitat. 6 CSP App. 1456-1467 (Decision). Calico must fund initial enhancements to the

acquired lands as well as their long-term management for the benefit of the species. 6 CSP App. 1461-1463 (Decision). The estimated cost of the Commission's Desert Tortoise Compensatory Mitigation alone exceeds \$31 million. 6 CSP App. 1456-1458 (Decision). The Commission found that with these measures, the Calico Solar Project's impacts to the desert tortoise would be mitigated. The Commission concluded: "Staff believes that habitat enhancement measures, in combination with habitat acquisition, would feasibly and effectively mitigate the project's impacts to desert tortoises.... We agree." 5 CSP App. 1383 (Decision) (internal citation omitted).

In addition to the Desert Tortoise Compensatory Mitigation, the Commission and the resources agencies also required Calico to try to save the lives of as many individual desert tortoises found on the Project site as possible. Based upon survey results revealing ten tortoises on the site, and application of the USFWS formula to estimate the potential for others, the Commission's experts estimated that approximately 22 tortoises actually used the site. If not moved out of harm's way, individual desert tortoises would likely be injured or killed by construction and operation of the Calico Solar Project. 5 CSP App. 1379 (Decision); 2 CU App. PA00841 (SSA). Therefore, exclusion fencing will be used to prevent desert tortoises from entering the Project site. 5 CSP App. 1379-1380 (Decision). To minimize harm and mortality to tortoises that are already on the site, Calico

will be required to “translocate” them – *i.e.*, locate, capture, in some cases disease-test, tag, and move the tortoises to habitat outside the Project site. 5 CSP App. 1379, 6 CSP App. 1456 (Decision); 4 CSP App. 1025-1103 (Biological Opinion); 8 CU App. PA04313-04315 (Oct. 22 Transcript). Translocation is required to be conducted in accordance with USFWS Desert Tortoise Recovery Office Guidance and a detailed Desert Tortoise Translocation Plan. 5 CSP App. 1380-1382 (Decision); 4 CSP App. 1036-1037 (Biological Opinion); 8 CU App. PA4377-4442 (Desert Tortoise Translocation Plan).

The Commission, its experts, USFWS, and other experts all recognized the possibility that translocation itself could cause harm to individual desert tortoises. Translocated desert tortoises may not survive; tortoises already living at the translocation receptor site may be adversely affected by competition or disease from the translocated tortoises; even tortoises simply monitored at control locations may suffer from being handled and tagged. 5 CSP App. 1380-1382 (Decision); 4 CSP App. 1062-1072 (Biological Opinion); 2 CU App. PA00842-00844 (SSA). After extensive discussion, the Commission, its experts, and USFWS all concluded that translocation was worthwhile and would minimize harm to individual desert tortoises. 5 CSP App. 1380-1382 (Decision); 4 CSP App. 1025-1103 (Biological Opinion); 2 CU App. PA00844 (SSA).

With translocation, the Commission estimated desert tortoise



mortality at 29 individuals. 6 CU App. PA03108-03109 (SSA Addendum). This number comprised on-site tortoises that would not be found for translocation, as well as translocated, receptor-site and control-site tortoises that would die as a result of the translocation process. *Id.*

On October 15, 2010, USFWS issued its Biological Opinion for the Calico Solar Project as required under section 7 of the Endangered Species Act. The Biological Opinion identifies measures to minimize adverse effects to the desert tortoise. Like the Commission, USFWS required general protective measures, including exclusion fencing; management of common ravens; weed management; desert tortoise translocation and monitoring in accordance with the USFWS Guidance and the Desert Tortoise Translocation Plan; and 10,302 acres of habitat compensation. 4 CSP App. 1029-1034 (Biological Opinion).

USFWS estimated desert tortoise mortality resulting from the Calico Solar Project at 30 animals, using a slightly different approach than the Commission's. USFWS anticipated that none of the juvenile tortoises on the Project site would be successfully translocated because they would not likely be found during clearance surveys, and if found, were unlikely to survive translocation. USFWS further noted, however, that because "juvenile desert tortoises experience high mortality rates under natural circumstances, many of these individuals would likely not survive to reproductive age in the absence of project-related effects." 4 CSP App.

1071 (Biological Opinion). With respect to the adult/subadult tortoises being translocated and the off-site tortoises being handled for disease testing and tracking, USFWS explained its confidence in the ability of professional biologists to avoid tortoise mortality. USFWS concluded that “the mortality of translocated and resident desert tortoises is not likely to differ significantly from that of control animals.” 4 CSP App. 1071 (Biological Opinion).

USFWS also compared the numbers of desert tortoises estimated to be lost as a result of the Calico Solar Project to its estimates of desert tortoises in the Western Mojave Recovery Unit where the Project site is located – 182,399 to 256,847 tortoises. USFWS concluded that the Project-related loss of 30 tortoises “comprises a relatively small portion of the overall population in the Western Mojave Recovery Unit.” 4 CSP App. 1082 (Biological Opinion).

USFWS’s Biological Opinion concludes that the Calico Solar Project will not “result in effects that appreciably reduce the current distribution, numbers, or reproduction of the overall population within the Western Mojave Recovery Unit or range wide.” Instead, USFWS anticipates that the Project’s compensation programs “will result in an increase in the amount of habitat that is managed for the conservation of this species and will result in many advances in the implementation of recovery actions. We anticipate that this compensation will offset many

adverse effects associated with this project. Taking into consideration the compensation that is proposed and considering the relative scale of the adverse effects in context with our current estimates of the species' status in the Western Mojave Recovery Unit and range wide, we do not anticipate that construction of this project would appreciably reduce our ability to recover the desert tortoise.” 4 CSP App. 1083 (Biological Opinion).

The Commission considered and cited the Biological Opinion 8 CU App. PA04364-04367 (Oct. 22 Transcript); 8 CU App. PA04614-04637 (Oct. 26 Transcript); 5 CSP App. 1399, 1452 (Decision). The Biological Opinion itself represents substantial evidence supporting the Commission's decision.

**2. The Commission considered all potentially significant impacts to desert tortoise including those that could result from required mitigation.**

California Unions asserts that the Commission was required to fully analyze all impacts to desert tortoise associated with the Project, including the required mitigation measures. There is no legal dispute as we agree and the record shows that the Commission fulfilled its obligation.

California Unions makes much of the decision to permit Calico to begin construction of the Calico Solar Project at a time of year when translocation cannot be performed. Calico will be permitted to construct Phase 1a of the Project—a maximum of 250 acres—after conducting surveys to locate tortoises, placing fenced buffers around any occupied

burrows, monitoring them, and, if an animal leaves hibernation, moving it to a quarantine pen elsewhere on the site to await the translocation season. CU App. PA04314-4315 (Oct. 22 Transcript). This procedure was intended to allow the Calico Solar Project to begin construction in time to meet the then-applicable December 31, 2010 deadline for American Recovery and Reinvestment Act funding. USFWS, BLM, and CDFG, and Commission staff all considered and agreed to this procedure. *Id.*; 4 CSP App. 1034 (Biological Opinion). The agreement of these experts represents substantial evidence that the overall mitigation program for the desert tortoise, including this measure, reduces impacts to the species to a less-than-significant level.

California Unions insists that the Commission's Decision did not report the magnitude of the potential impacts of translocation because it did not mention a recent change in federal translocation guidelines that would require 100 desert tortoises at the Ord-Rodman DWMA to be handled and disease-tested if, as the translocation plan anticipates, some tortoises from the Project site will be translocated there. CU Petition at 52-54. USFWS, however, and the Desert Tortoise Translocation Plan upon which USFWS relied, do anticipate this level of testing at the Ord-Rodman DWMA. 4 CSP App. 1065 (Biological Opinion) (up to 105 tortoises to be disease-tested at Ord-Rodman DWMA). Despite this difference, USFWS reached virtually the same conclusion the Commission did regarding desert tortoise

mortality as a result of the Calico Solar Project—up to 30, as opposed to 29, tortoises. 4 CSP App. 1071, 1073 (Biological Opinion). Substantial evidence supported the Commission’s conclusions regarding overall desert tortoise mortality resulting from the Calico Solar Project.

**D. The Commission Regularly Pursued Its Authority By Following Its Procedures For Implementing Its Certified Regulatory Program.**

The Commission conducted an extensive, two-year process to review and approve the Calico Solar Project.

California Unions contends that the Commission truncated its review and ignored its own rules and regulations; however, that is not the case. The Commission followed each of the procedures required by its regulations, and published more reports and held more hearings than its regulations required. *See* Section III.B above.

Failing to find studies not completed, California Unions instead complains that the Commission staff continuously updated and revised its analysis in response to comments and information submitted by California Unions and others. California Unions apparently believes the Commission staff was required to produce letter-perfect, final documents that would not be edited, “provide an opportunity to comment on the final analyses,” and then adopt only the precise language that had been distributed earlier. CU Petition at 63. To the contrary, the Commission’s regulations require it to engage in a comprehensive fact-finding process to ensure the environmental

impacts of the proposal are fully considered and measures to reduce those impacts are identified. This is precisely what the Commission did here.

California Unions also complains that the Commission's process involved numerous written reports rather than single draft environmental report, followed by a single final environmental report. But there is nothing in the Commission's regulations or statutes that precludes the Commission from producing a series of reports, rather than just one or two.

**1. The Commission's regulations allow publication of more than one environmental report.**

Applicable statutes and caselaw do not restrict an agency administering a certified regulatory program to preparation of a single draft report and a single final report. Instead, CEQA states that when the regulatory program of a state agency requires a plan "or other written documentation" containing environmental information, the plan or other written documentation may be submitted in lieu of the environmental impact report required by CEQA, as long as the Secretary of the Resources Agency has certified the regulatory program. Pub. Res. Code §§ 21080.5(a). Similarly, the Warren-Alquist Act refers to preparation of "a document or documents in place of an environmental impact report." Pub. Res. Code § 25519(c); *see also City of Arcadia v. State Water Resources Control Bd.*, 135 Cal.App.4th 1392, 1424 (referring to a certified regulatory agency's "documentation"). Accordingly, there is no

requirement that the Commission include all of its environmental analysis in one document. Nor is it accurate to suggest that the PMPD or Decision must contain all of the requisite analysis. The Commission's certified regulatory program specifically includes and requires preparation of a Staff Assessment in addition to the PMPD and Decision documents. *See* Commission Regulation 1742.5.

Nor is there any prohibition against producing information that supplements a Staff Assessment, as California Unions contends. California Unions cannot cite a single regulation that precludes this process; it instead cites only Commission Regulation 1747. Regulation 1747 requires that the Commission distribute three specified reports that together comprise the Final Staff Assessment "at least 14 days before the start of the evidentiary hearings pursuant to section 1748 or *at such other time as required by the presiding member . . . .*" Commission Regulation 1747 (emphasis supplied). Regulation 1747 does not require a 14-day circulation of a document equivalent to a Final EIR that responds to comments or addresses evidence obtained after the original Staff Assessment was published. Instead, Regulation 1747 requires publication of a document 14 days before the first hearing that consists of (1) the original Staff Assessment; (2) staff's review of Safety and Reliability Factors, and (3) staff's review of Compliance with Applicable Laws (LORS). Commission Regulation 1747. CEC staff went beyond what the regulations require by publishing

additional information, including staff's response to comments that had been received on the original Staff Assessment, as part of their Supplemental Staff Assessment. The Commission published all three reports in a document labeled "Staff Assessment" on March 30, 2010, and held its first hearing on August 4, 2010, far more than 14 days later. 1 CSP App. 236 (SA Notice of Availability); 1 CSP App. 244 (Notice of Hearings). In addition to publishing the Staff Assessment, the Commission's staff elected to publish a Supplemental Staff Assessment (SSA) on July 21, 2010, which also was distributed 14 days before the first hearing on the project. 3 CSP App. 735 (SSA Notice of Availability).

Later, the Commission's staff prepared and distributed two more documents closer to the hearing. 7 CSP App. 1829 (Decision). California Unions objects to the length of time it had to review those documents, but the Commission's Regulations do not address review of supplemental SAs or errata. What California Unions is complaining about is that the staff revised, supplemented and updated its analysis instead of letting the Staff Assessment lie static. California Unions can cite no regulation that prohibits the Commission from doing so, because the process is not only lawful, but laudable.

The Commission's regulations envision an ongoing, fluid series of reports, comments, public hearings, recommendations, responses and analyses leading up to the final Commission decision. Commission



Regulations 1701-1770. The Final Staff Assessment, in particular, is intended to be subject to substantial revision, addition and rebuttal through comments, witnesses, contrary testimony, cross-examination and other evidence presented by Commission staff and other parties. *Id.* The regulations contemplate that the Final Staff Assessment will be evaluated at hearings (Commission Regulation 1748); addressed in a PMPD (Commission Regulation 1749), which will itself be addressed in additional hearings (Commission Regulation 1754); and that the Commission will then adopt a final decision based on all this evidence. Commission Regulation 1755. For the Calico Solar Project proceedings, the Commission produced not only the required reports, but also provided updates and revisions as additional information became available.

As the hearing officer explained in response to complaints about the need to review documents quickly, and the Commission's 14-day rule for publication of its Final Staff Assessment:

Well, we certainly understand, because we have about the same time that you do to review some of these documents. I think it misinterprets though our regulatory requirements to characterize everything the staff files as, in effect, a new staff assessment that resets that clock in the regulation that you're referring to. It is additional testimony, but it's really – it's not the final word. We're not here to adjudicate whether the staff performed an adequate analysis of the project, we're here to analyze the environmental impacts of the project and its compliance with LORS, and staff's work is

simply one element in that analysis. It's an important element, many people choose to rely on that as the basis for their own work; but in reality, all of the parties are obligated to come to the hearings ready to talk about the merits of the project on the basis of their own work and research as well as their critique of what others have done.

4 CU App. PA02249-2250 (Aug. 18 Transcript).

Moreover, the Commission's regulation allows the Commission staff to publish the Final Staff Assessment less than 14 days before a hearing "as required by the presiding member" of the siting committee. Commission Regulation 1747. Here, the committee members, including its presiding member, were kept well-apprised of the status of documents, the nature of edits and supplementations, and the schedule. The Commission considered and evaluated any requests for additional time and necessarily determined that time periods of less than 14 days were appropriate. *See e.g.*, 3 CU App. PA01329 (Aug. 4 Transcript) (hearing officer noting that errata provided description of transmission line improvements, noting that analysis of those improvements had been provided in the SSA, and explaining that requests for additional time to address the errata would be considered).

As Presiding Member Eggert explained, the committee understood that "the important thing is that the case is properly heard." He indicated that a premature decision on the project would probably be "no," and

considered it “critical” that actions were taken along a time frame that would “[make] sure that we have everything in front of us for purposes of . . . putting forth a sound PMPD.” 4 CU App. PA02641-2642 (Aug. 18 Transcript); *see also id.* at PA02648 (committee convened to discuss scheduling issues in light of comments and reached determination to extend a hearing another day).

**2. The PMPD includes responses to comments raised during the previous hearings.**

The PMPD includes responses to significant environmental points raised during the application process pursuant to Commission Regulation 1752.5. California Unions simply disagrees with the responses. California Unions claims the PMPD “dismisses” comments from its biologist concerning impacts to desert tortoise and their habitat caused by the translocation plan. In fact, the PMPD expressly responded to comments by California Unions’ witness and others regarding the translocation plan and its potential impacts. CU PA03886-03888 (PMPD). The PMPD explained that the reduction in project size substantially reduced the number of desert tortoises requiring translocation; described how USFWS Guidance would minimize harm to tortoises in the translocation process; explained that condition BIO-16 established clear standards for the translocation plan’s content; discussed the potential for tortoise mortality during translocation; and described the BLM biologist’s opinion that higher receptor site density

at the Fort Irwin translocation project could explain that project's relatively high mortality rate. *Id.*

Similarly, California Unions mistakenly asserts that the PMPD does not address comments regarding the need for the transmission upgrades. In fact, the PMPD recognizes the need for the transmission upgrades. 7 CU App. PA03824 (PMPD) (listing required transmission facilities); *see also* 4 CSP App. 1013 (PMPD) (comparing required transmission facilities between the reduced acreage alternative and the proposed Project).

California Unions complains that the PMPD stated that no one commented on the Transmission System Engineering Chapter. CU Petition at 28. But California Unions neglects to inform the Court that, in response, the final Decision expressly recognizes that BNSF and California Unions had argued in their PMPD comments that further analysis of the transmission upgrades was necessary prior to approving the Calico Solar Project. 5 CSP App. 1216 (Decision).

**3. The Commission's regulations do not require a 15-day review period for an errata to the PMPD that does not reveal significant new information.**

California Unions' final procedural complaint is that Commission did not comply with its regulations pertaining to the public comment period for the Presiding Member's Proposed Decision. Commission Regulation 1749 states that the Presiding Member shall set a comment period of at least 30 days from distribution of the proposed decision. Commission

Regulations 1749. There is no dispute that the September 25 PMPD was available for comment for 30 days before the full commission's October 28, 2010 hearing on the PMPD and Project. California Unions' dispute is limited to whether the Commission was required to provide an additional 15-day review period for an errata to the PMPD. In making this argument, California Unions misunderstands Commission Regulation 1753. The regulation provides that, after the close of the comment period on the PMPD, the Presiding Member in consultation with the Commission may prepare a revised PMPD. In that case, the revised PMPD must be distributed for a 15-day comment period prior to the full commission's hearing. Commission Regulation 1753. Here, the Commission simply released an errata to the PMPD not a wholesale revision. California Unions characterizes the errata: "The Errata included a few new paragraphs that purport to respond to the issues raised by CURE and others, new mitigation measures and some minor changes to the PMPD."<sup>12</sup> CU Petition at 29; *See* 9 CU App. PA04798-4843 (PMPD Errata).

Again, this document was one that was not required by the

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<sup>12</sup> CURE complains about the size of the errata. Its size is irrelevant. However, the size was due largely to the fact that the document was published in redline format, and included several lengthy segments of unedited text from the original PMPD only to provide context for the edits the errata contained. 9 CU App. PA04798-4843 (PMPD Errata).

Commission regulations, and represents an additional step the Commission offered between the PMPD and the final Commission Decision.

Commission Regulations 1754, 1755 (hearing on PMPD, followed by final Commission Decision). The only question presented is whether the document should be treated as a “revision” to the PMPD requiring another round of comment, or whether it could simply be presented as information to the Commission without an additional comment period. *See, e.g.*, 8 CU App. PA04373-4374 (Oct. 22 Transcript) (hearing officer explaining that whether the corrections would take the form of a revisions to the PMPD or an errata depended on whether recirculation was required).

CEQA generally envisions a once-around comment period in which an agency circulates a Draft EIR for public review and comments. The agency typically responds to the comments, and edits, corrects and supplements the Draft EIR text to produce the Final EIR. CEQA Guidelines §§ 15088, 15089. There is no requirement to circulate the Final EIR for comment, and commenters generally have no right to review or analyze the changes that were made to the Draft EIR. CEQA Guidelines § 15089 (noting that agency *may* provide for review of a Final EIR). A limited exception exists when “significant new information” is added to the Draft EIR, in which case the new information must be recirculated for another round of comment and review. CEQA Guidelines § 15088.5. Recirculation is required when the new information reveals a new or more

severe significant environmental impact, a feasible project alternative or mitigation measure that would clearly reduce significant impacts that the project sponsor refuses to adopt, or the draft was so fundamentally flawed that meaningful public review and participation was precluded. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 6 Cal.4th 1112, 1129-30 (1993) (*Laurel Heights II*); CEQA Guidelines § 15088.5.

The Commission's regulatory process implements this concept by requiring a 15-day comment period for PMPD "revisions." Commission Regulation 1753. Commission staff instead uses an "errata" to the PMPD when the changes do not trigger the need for recirculation. *See, e.g.*, 8 CU App. PA04374 (Oct. 22 Transcript) (hearing officer explaining that changes to the PMPD would be issued in a revised PMPD, or, "if there is no need to recirculate, then the notice of the changes will take the format of an errata that will be distributed and considered along with the PMPD at the already noticed business meetings").

Whether new information rises to the level of requiring recirculation is a factual determination reviewable under the substantial evidence standard. *Laurel Heights II*, 6 Cal.4th at 1135. Here, the Commission determined the errata did not embody the type of changes that required recirculation. The errata contains clerical corrections and information that did not reveal a new or substantially more severe project impact. 9 CU App. PA04798-4843 (PMPD Errata). It explains that the already-studied

greenhouse gas emissions would also comply with the recently-enacted thresholds in Senate Bill 1368. *Id.* at PA 04801. It contains information clarifying and strengthening the language of mitigation measures [*E.g., id.* at PA 04803, PA 04805-4806]. It addresses water supply and hydrology issues that arose during processing by imposing additional requirements on the applicant and the Project. *Id.* at PA 04817-4842.<sup>13</sup>

California Unions has not met its burden of proving that the PMPD errata qualified as the type of revision requiring recirculation under Commission Regulation 1753. The only specific new information that California Unions claims required recirculation is the Desert Tortoise Relocation Plan. CU Petition at 58. That plan was introduced into evidence by the applicant, not through the PMPD errata. Further, as explained in Section IV.C, substantial evidence supports a conclusion that the Relocation Plan would not result in new or substantially more severe impacts than previously disclosed, and therefore does not trigger recirculation. *Laurel Heights II*, 6 Cal.4th at 1129-1130; CEQA Guidelines § 15088.5.

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<sup>13</sup> The document also proposed edits to some environmental impact findings [9 CU App. PA04842 (PMPD Errata)], which are not required to be circulated for comment under CEQA. CEQA Guidelines § 15091 (noting that finding must be adopted for a project “for which an EIR has been certified,” establishing that the findings are adopted apart from the

(Footnote Continued on Next Page.)



**4. The Commission provided more review than would be required by CEQA.**

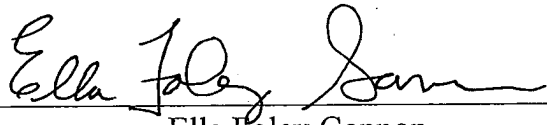
California Unions closes its petition with sweeping arguments that the Commission's review process failed to fulfill CEQA's fundamental goals of public disclosure and participation. As explained in the preceding sections, the Commission did not ignore issues nor did it truncate the environmental review process for the Calico Solar Project. The only public comment period required under CEQA is a single 30 to 45 day period to review a draft EIR. Here, the Commission provided no fewer than six evidentiary hearings and numerous opportunities for public participation and comment, totaling over 17 months.

**V. CONCLUSION**

For the foregoing reasons, California Unions' Petition for Writ of Mandate should be denied.

DATED: January 10, 2011

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(Footnote Continued from Previous Page.)

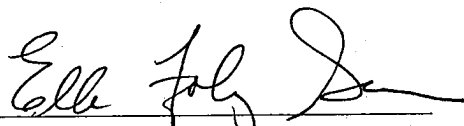
EIR.)

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Dated: January 10, 2011

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PROOF OF SERVICE

I am over 18 years of age, not a party to this action and employed in the County of San Francisco, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence for next business day delivery by Federal Express, and correspondence is deposited with Federal Express that same day in the ordinary course of business.

Today I served the attached:

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FOR WRIT OF MANDATE

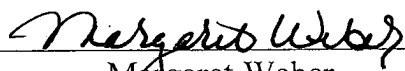
and

REAL PARTY IN INTEREST'S APPENDIX  
VOLUMES 1 THROUGH 7

by causing a true and correct copy of the above to be delivered by Federal Express from San Francisco, California in sealed envelope(s) with all fees prepaid, addressed as follows:

See attached service list

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 10, 2011.

  
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