

DOCKET

08-AFC-13C

DATE May 23 2011

RECD. May 23 2011

STATE OF CALIFORNIA

**Energy Resources Conservation and
Development Commission**

In the Matter of:

The Application for Certification for the
Calico Solar Project Amendment

Docket No. 08-AFC-13C

**CALICO SOLAR, LLC'S BRIEF RE JURISDICTION OF
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION**

May 23, 2011

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Calico Solar, LLC ("Calico") is seeking to amend the license to construct the 663.5 megawatts (MW) Calico Solar Project issued by the California Energy Commission ("Commission") on December 1, 2010. Pursuant to the Committee Scheduling, Briefing, and Procedures Order of May 2, 2011,¹ Calico Solar files its brief concerning the Commission's jurisdiction over the proposed project modifications set forth in Calico's Petition to Amend.

As is explained below, the Commission has jurisdiction to consider the proposed amendments (Modified Project) to the license it issued to Calico (Approved Project). Furthermore, even if the Commission did not have authority to approve the installation of photovoltaic technology on a portion of the site, it still has the responsibility to consider the nature of the proposed modifications to the existing license, and under CEQA, it has the

¹ This brief is one of two briefs filed concurrently pursuant to the Committee's Order. The third brief regarding Evidentiary Hearings will be filed in accordance with the timeline to be set by the Committee.

responsibility to analyze all potential impacts associated with the proposed amendment as the lead agency.

I. BACKGROUND

On December 2, 2008, the Applicant (then Stirling Energy Systems, Inc.) filed its Application for Certification for the Calico Solar Project. Two years later, on December 1, 2010, the Commission approved Calico's application for certification for the Calico Solar Project and licensed construction of the Approved Project in San Bernardino County. The project licensed by the Commission has a generating capacity of 663.5 megawatts (MW) produced by thermal SunCatchers. The permitting for the Calico Solar Project involved an extraordinary amount of time on the part of Staff and the Commission to address the extremely varied issues raised by the parties and by the general public. After the Commission's certification decision, two intervenors challenged in the California Supreme Court the Commission's license for the Calico Solar Project. The California Supreme Court denied both petitions for review on April 13, 2011.

On March 18, 2011, Calico filed a Petition to Amend the Approved Project. As amended, the project would generate 100.5 MW using SunCatchers and 563 megawatts using single-axis tracker photovoltaic (PV) technology. Section 25500 of the Warren-Alquist Act gives the Commission the exclusive power to approve "sites and related facilities" in California. Section 25500 provides:

In accordance with the provisions of [the Warren-Alquist Act], the commission *shall have the exclusive power to certify all sites and related facilities in the state*The issuance of a certificate by the commission 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, for such use of the site and related facilities, and shall supersede any applicable statute,

ordinance, or regulation of any state, local, or regional agency to the extent permitted by federal law.

After the effective date of this division, no construction of any facility or modification of any existing facility shall be commenced without first obtaining certification of any such site and related facility by the commission, as prescribed in this division.

Pub. Res. Code § 25500 (emphasis added). The Commission’s Siting Committee requested briefing on five separate legal issues related to the Commission’s authority to consider the Petition to Amend, each of which will be addressed below in turn.

II. THE COMMISSION HAS AUTHORITY TO CONSIDER APPROVAL OF THE PROPOSAL TO REDUCE ELECTRICITY GENERATED FROM SUNCATCHER SOLAR THERMAL TECHNOLOGY FROM 663.5 MW TO 100.5 MW

The Committee asks: “Does the Energy Commission have authority to consider approval of the proposal to reduce electricity generated from Sun Catchers solar thermal technology from 663.5 MW to 100.5 MW?” The answer to this questions is irrefutably “yes.”

Solar thermal technology is squarely within the Commission’s exclusive jurisdiction as provided by the Warren-Alquist Act. *See* Pub. Res. Code §§ 25500, 25110, 25120.

Solar thermal technology triggering the Commission’s jurisdiction is present within both the Approved Project and the Modified Project proposed in the Petition to Amend. For the reasons explained at more length below, the Commission has approval authority over the entirety of the Modified Project. However, even if this were not the case, the Commission’s obligation “to consider” an amendment is not the same as its jurisdiction to approve a new site certification. The entirety of the “site” is currently within the Commission’s jurisdiction. If the Commission were to act to limit its jurisdiction to a portion of the site in response to the Petition to Amend, this decision would require an

amendment that would affect the entirety of the current site. The Commission therefore must consider the entirety of the new proposal. In sum, the existence of the current site certification requires that the Commission consider the entirety of the proposed changes to the existing license even if the Commission does not have “approval” authority over portions of the Modified Project.

III. THE COMMISSION HAS AUTHORITY TO CONSIDER APPROVAL OF THE ENTIRETY OF THE PETITION TO AMEND

The Committee asks: “Does the Energy Commission have authority to consider approval of the proposal to install photovoltaic (PV) facilities generating 563 MW on the Calico Solar Project site?” The answer to this question is “yes.” Calico does not contend that a “solar photovoltaic electrical generating facility” is within the Warren-Alquist Act’s definition of a “thermal powerplant.” Pub. Res. Code § 25120. However, the Commission authority is not limited to thermal power plants; rather, it includes the related facilities and the entire site on which the thermal power plant and related facilities are located. The Commission has authority to approve the entirety of the Petition to Amend because it has exclusive jurisdiction over the Calico Solar Project site. Pub. Res. Code § 25500.

The Warren-Alquist Act gives the Commission exclusive authority over both “sites and related facilities.” *Id.* The term “[s]ite” means any location on which a facility is constructed or proposed to be constructed,” and the term “facility” means “any electrical transmission line or thermal power plant.” Pub. Res. Code §§ 25110, 25119. In light of the definition of “facility,” a “site” must *have* a “thermal powerplant” or an “electrical transmission line.” What the Warren-Alquist Act does *not* say is that *only* a “thermal powerplant” or “electrical transmission line” may be constructed on a “site.” *See Security*

Pacific National Bank v. Wozab, 51 Cal.3d 991, 998 (1990) (inserting additional language into a statute “violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes”); *Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal.App.4th 338, 363 (2010) (“We cannot insert qualifying language where it is not stated or rewrite the statute to conform to a presumed intention that is not expressed.”). Accordingly, any argument that the “plain” text of the Warren-Alquist Act precludes photovoltaic technology on “sites” within the Commission’s jurisdiction is simply wrong.

Reading the term “site” in section 25110 to allow the Commission to permit other types of renewable electrical generation *in combination* with thermal powerplants advances the express purposes of the Warren-Alquist Act. *See* Pub. Res. Code. § 25218.5 (“The provisions specifying any power or duty of the commission shall be liberally construed, in order to carry out the objectives of this division.”); § 25006 (“It is the policy of the state and the intent of the Legislature to *establish and consolidate* the state’s responsibility for energy resources, ..., and *for regulating electrical generating and related transmission facilities.*”); § 25008 (“It is further the policy of the state and the intent of the Legislature to promote all feasible means of energy and water conservation and all feasible uses of *alternative energy* and water supply sources.”). Such a reading is also consistent with the liberal construction of the Warren-Alquist Act that the Legislature required in enacting section 25218.5. *See, e.g., Capon v. Monopoly Game LLC*, 193 Cal.App.4th 344, 356 (2011) (legislative directive to construe legislation “liberally” means that “it is appropriate to construe the exceptions narrowly”). The exclusion of photovoltaic technology from the term “thermal powerplant” in section 25120 was not born out of hostility to non-thermal generation or photovoltaic technology, and it is not the intent of the Warren-Alquist Act to

affirmatively prohibit the inclusion of photovoltaic technology within thermal powerplant projects. Pub. Res. Code § 25008. Nor is it the intent of the Warren-Alquist Act to give the Commission piecemeal authority over the “sites” within its jurisdiction, which would be the result if the term site is read narrowly. Pub. Res. Code §§ 25006, 25500.

It is absolutely consistent with the intent of the Warren-Alquist Act for the Commission to exercise its jurisdiction to approve hybrid projects like the one proposed in the Petition to Amend. The entire project is dedicated to electrical power generation. *See* Pub. Res. Code § 25006. If the Commission finds that it has authority over hybrid thermal and non-thermal generation projects, applicants remain free to avoid the Commission’s jurisdiction by proposing non-thermal projects, but applicants with hybrid thermal and non-thermal generation projects also remain free of the burdens of the piecemeal permitting that the Legislature expressly sought to eliminate. *Id.* In sum, the intent of *both* section 25110 *and* section 25006 is reconciled, implemented, and preserved by this reading. *See City of Huntington Beach v. Bd. of Admin.*, 4 Cal.4th 462, 468 (1992) (“[A]ll parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others.”). Moreover, it is particularly appropriate for the Commission to exercise its jurisdiction to permit photovoltaic technology on a site that is *already* within the Commission’s exclusive authority pursuant to section 25500. Such action does no more than exercise the Commission’s exclusive authority over power generation at an existing site.

A broad reading of the term site is also consistent with the Commission’s expansive definition of related facility:

“Related Facility” means a thermal powerplant, electric transmission line, or any equipment, structure, or accessory dedicated to and essential to the operation of the

thermal powerplant or electric transmission line. These facilities include, but are not limited to, transmission and fuel lines up to the first point of interconnection, water intake and discharge structures and equipment, access roads, storage sites, switchyards, and waste disposal sites. Exploratory, development, and production wells, resource conveyance lines, and other related equipment used in conjunction with a geothermal exploratory project or geothermal field development project, and, absent unusual and compelling circumstances, the thermal host of a cogeneration facility, are not related facilities.

20 Cal. Code Regs. § 1702 (n); *see also* 61 Ops. Cal. Atty. Gen. 127, 1978 WL 22741 at *4

(Related facilities include “those things promoting the ease of operations of any thermal power plant. Such things would include access roads, outbuildings, parking lots and service and storage areas.”). Calico proposes a two-phase project in which the thermal SunCatchers will be installed in a concentrated area in Phase 2, but in which many of the most important related facilities for the thermal components of the project will span the entire site and be constructed as part of Phase 1. The perimeter and access roads and the on-site substation are related facilities that are equally necessary for the thermal and the photovoltaic components of the Project. The main services complex and water line are related facilities that will serve both the thermal and non-thermal components of the project. The SunCatchers will be assembled at the main services complex. The related facilities in Phase 2, including the bridge, the various maintenance roads leading from the PV portion of the site into the thermal portion of the site, and the collection lines leading to the substation, permeate the PV components of the project. The related facilities for the thermal and non-thermal components of the Modified Project overlap and the Commission has exclusive jurisdiction for all related facilities. Pub. Res. Code § 25500. It would be fundamentally impractical and inconsistent with the Commission’s exclusive authority over sites within its jurisdiction to insist on severing the thermal from the non-thermal generation facilities.

IV. THE COMMISSION MAY ACT AS THE LEAD AGENCY TO PERFORM THE REQUIRED CEQA EVALUATION OVER BOTH THE SOLAR THERMAL AND PHOTOVOLTAIC COMPONENTS OF THE PROPOSED PROJECT MODIFICATIONS

The Committee asks: “May the Energy Commission act as the lead agency to perform the required CEQA evaluation over both the solar thermal and photovoltaic components of the proposed project modifications? Are there any legal impediments to such an approach?” There are no impediments to the Commission acting as lead agency to consider the whole project. In fact, given the Commission’s broad authority over the Calico Solar Project, and given the fact that it will be the first, and likely only, state agency to evaluate the proposed amendment, the Commission has an obligation to do so.

As previously discussed, Calico believes that the Commission has exclusive jurisdiction over the entirety of the Petition to Amend. Even if this were not the case and another public agency would have some permitting authority over the PV portion of the Amended Project, the Commission should still act as the lead agency. In fact, the Warren-Alquist Act requires that the Commission assume the role of lead agency with respect to site certifications within its jurisdiction. Pub. Res. Code § 25519(c). There is only one lead agency, and the Commission cannot be both the lead agency and a responsible agency for the same project. 14 Cal. Code. Reg. § 15050(a).

Further, the CEQA Guidelines provide that the agency with the greatest responsibility for approving the project as a whole should act as the lead agency. 14 Cal. Code Regs. § 15051(b). “The lead agency will normally be the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited purpose such as an air pollution control district or a district which will provide a public service or public utility to the project.” *Id.* If there is more than one agency that

meets the criteria for acting as a lead agency, the agency that acts first should be the lead agency. 14 Cal. Code Regs. § 15051(c).

Here, the Commission has, at a minimum, exclusive jurisdiction over the thermal power portions of the Amended Project as well as all the related facilities, including the road network, the main services complex, the substation, the collector system and lines to and from the substation, the well, the water line, and the bridge. Even if another agency would have some authority over the PV components of the Amended Project, its authority would clearly not exceed the Commission's authority. Further, because the Calico Project site is located almost exclusively on federal land, there is no other state or local agency with plenary land use planning authority over the project. The state agencies that could have permitting authority over the PV portion of the Amended Project are limited purpose agencies, such as the California Department of Fish and Game and the Regional Water Quality Control Board. No other agency has jurisdiction to evaluate compliance with all "applicable state, local, or regional standards, ordinances, or laws." Pub. Res. Code § 25525; 20 Cal. Code Regs. § 1744(a). Finally, the Commission was the first agency to act on the Approved Project and will clearly be the first state agency to act on the proposed amendment to the Approved Project as it is currently evaluating the Petition to Amend. 14 Cal. Code Regs. § 15051(c); *Citizens Task Force on Sohio v. Board of Harbor Commissioners*, 23 Cal.3d 812, 814 (1979). For all these reasons, the Commission should act as the lead agency in evaluating the potential environmental effects associated with the Petition to Amend.

V. AS THE LEAD AGENCY, THE COMMISSION MUST CONSIDER THE “WHOLE OF THE ACTION” AND EVALUATE THE POTENTIAL IMPACTS OF THE ENTIRE PROPOSED AMENDMENT.

The Committee asks: “In the Energy Commission’s consideration of the proposed amendment to its permit, what are the Energy Commission’s responsibilities under CEQA with respect to the proposal to install PV facilities?” As the lead agency, the Commission must evaluate whether the proposed amendment to the Approve Project, including the installation of PV facilities, will result in any new or more severe significant environmental impacts than the Approved Project.

CEQA requires that a lead agency consider the “whole of the action” when evaluating potential environmental effects. 14 Cal. Code Regs. § 15378(a). This includes components over which the lead agency has directly permitting authority as well as those that it does not. *California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.*, 178 Cal.App.4th 1225, 1242 (2009). Therefore, the Commission must evaluate the incremental impacts associated with replacing a portion of the SunCatcher technology with PV technology whether or not it has authority to approve installation of the PV technology.

VI. THE COMMISSION HAS THE REQUIRED EXPERTISE TO ANALYZE THE PROJECT’S PUBLIC BENEFITS AND ENVIRONMENTAL IMPACTS

The Committee asks: “Are there any other considerations relevant to the Energy Commission’s jurisdiction with respect to the proposal?” Yes. If the Commission acts as the permitting authority over the entire Petition to Amend, it will ensure that the Modified Project “can be sited in a timely manner” as required by the Warren-Alquist Act. *See, e.g.*, Pub. Res. Code §25543(a). It will help encourage the legislative goals of developing

needed solar energy in a timely way. *See, e.g.,* Pub Res Code §§ 25740, 25780(a).

Finally, it will avoid the wasteful duplication of permitting efforts by sister state agencies and ensure a cohesive and comprehensive consideration of all issues in a single permitting process.

The Commission has more familiarity with the project than any other agency, and it has presided over all relevant proceedings to this point. No agency with energy expertise would approve the non-thermal components of the project if the Commission declines to do so, but decisions made regarding the non-thermal components of the project will inevitably affect the thermal components of the project. Conversely, it is also inevitable that the Commission's decision will affect the entire project. The Commission's retention of jurisdiction over the entire project will further the Legislature's original policy goals in passing the Warren-Alquist Act, namely, the consolidation of the state's responsibility for energy resources. *See* Pub. Res. Code § 25006 ("It is the policy of the state and the intent of the Legislature to *establish and consolidate* the state's responsibility for energy resources, ..., and *for regulating electrical generating and related transmission facilities.*") (emphasis supplied).

VII. CONCLUSION

The Commission drove the entire process leading to its decision to license the Calico Solar Project. Calico Solar respectfully submits that it would be both efficient and would serve the policy goals of the Warren-Alquist Act for the Commission to retain jurisdiction over the entirety of the Modified Project. If the Commission does not retain exclusive jurisdiction over the Modified Project, it nonetheless must serve as lead agency in reviewing the changes in the Modified Project pursuant to CEQA.

Date: May 23, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ella Foley Gannon", written over a horizontal line.

Ella Foley Gannon
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DECLARATION OF SERVICE

I, Margaret Pavao, declare that on May 23, 2011, I served by U.S. mail and filed copies of the attached Brief Re Jurisdiction of Energy Resources Conservation and Development Commission, dated, May 23, 2011. 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/compliance/index.html].

The documents have 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, in the following manner:

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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding


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**FOR THE CALICO SOLAR PROJECT
AMENDMENT**

**Docket No. 08-AFC-13C
PROOF OF SERVICE
(Revised 5/18/2011)**

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