

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

DOCKET 08-AFC-13c
DATE <u>05/23/11</u>
RECD. <u>05/23/11</u>

In the Matter of:) Docket No. 08-AFC-013C
CALICO SOLAR PROJECT)
AMENDMENT) **STAFF'S RESPONSE TO COMMITTEE**
) **BRIEFING ORDER**

I. INTRODUCTION

On April 20, 2011, the Committee for the Calico Solar Amendment (Committee) held a site visit and Informational Hearing. During the hearing, the Committee indicated that it would be requesting all parties brief several issues. On May 2, 2011, the Committee issued a Scheduling, Briefing and Procedures Order. The following is the California Energy Commission Staff's brief in response to the three topics outlined by the Committee and to the Sierra Club's Motion to Dismiss.

II. BACKGROUND

On December 1, 2010, the California Energy Commission (Energy Commission) approved the Application for Certification (AFC) of the Calico Solar Project, which will be located within San Bernardino County on 4,613 acres of public land managed by the Bureau of Land Management, 37 miles east of Barstow, California. The project as licensed will produce 663.5 MW of electricity from solar collectors called SunCatchers. The approved project will deliver electricity to the Southern California Edison's Pisgah Substation.

On March 18, 2011, Calico Solar, LLC (Calico), filed and served a proposed amendment to the licensed Calico Solar Project. The proposed modifications include changing the technology from 663.5 MW of SunCatchers to 100.5 MW of SunCatchers and 563 MW of single-axis tracker photovoltaic (PV) technology. Although the amended project would have the same footprint and boundaries of the approved project, the proposal would change the phasing of the project to "resolve access issues to the northern portion of the site involving BNSF Railroad..." (Petition to Amend, p. 1-1.) Furthermore, Staff is informed that Calico is planning to propose a new access road

for the site. Currently, all Conditions of Certification from the approved project remain in effect, and the Energy Commission maintains jurisdiction over the project during construction and operation. Calico is expected to meet the requirements and deadlines listed in the approved Conditions of Certification as the proposed amendment is being considered by the Energy Commission.

III. ANALYSIS

A. Energy Commission's Jurisdiction

The Energy Commission has licensing authority over thermal power plants 50 MW or greater. Pursuant to the Energy Commission's enabling statute, the Warren-Alquist Act, the Energy Commission has exclusive jurisdiction over certifying power plants and proposed changes to existing facilities, stating as follows:

In accordance with the provisions of this division, the commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. 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, or federal agency to the extent permitted by federal law. (Pub. Resources Code, § 25500; emphasis added.)

In its Motion to Dismiss, the Sierra Club argues that the Energy Commission "is precluded from considering the Project Owner's request because the Modified Project is currently a PV facility outside the Commission's jurisdiction, but one that may contain a thermal component one day." (Sierra Club, p. 4) The Sierra Club is incorrect because it fails to acknowledge that the Petition to Amend is a proposed modification to a site and its related facilities previously certified by the Energy Commission in accordance with Public Resources Code, section 25500. Moreover, there is no debate that the Energy Commission has authority to license solar thermal power plants and related facilities.

Pursuant to the California Code of Regulations, title 20, section 1769(a)(H)(3), petitions to amend a licensed project that may result in a significant impact to the environment "must be processed as a formal amendment to the decision and must be

approved by the full commission at a noticed business meeting or hearing.” (Cal. Code Regs., tit. 20, §1769(a)(H)(3).)

Accordingly, the Energy Commission has jurisdiction to preside over this proposed amendment to a solar thermal power plant.

1. The Energy Commission has licensing authority over solar thermal technology.

The Energy Commission clearly has authority to license solar thermal power plants and by statute, has authority over proposed changes to the existing solar thermal portion and related facilities of the proposed amendment. As stated above, the Warren-Alquist Act gives the Energy Commission exclusive licensing authority over “all sites and related facilities.” Public Resources Code, section, 25110 defines “facility” as “any electric transmission line or thermal power plant, or both electric transmission line and thermal power plant, regulated according to the provisions of this division.” (Pub. Resources Code, §25110.) California Code of Regulations, title 20, section 1702(n) defines “related facility” as “a thermal power plant, electric transmission line, or any equipment, structure, or accessory dedicated to and essential to the operation of the thermal power plant 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....” (Cal. Code Regs., tit. 20, §1702(n).) Further, “thermal power plant” is defined as “any stationary or floating electrical generating facility using any source of thermal energy, with a generating capacity of 50 megawatts or more, and any facilities appurtenant thereto.” (Pub. Resources Code, §25120.)

The Calico Amendment does not propose to change the size, boundary, or generating capacity of the Energy Commission-approved project. It proposes a modification to the solar collector technology used on the site. The proposal would generate 100.5 MW of power using SunCatcher technology and 563 MW using single axis tracker photovoltaic (PV) technology. Both the SunCatchers and the PV collectors will be integrated components of the power plant, operate from a single control room, utilize the same transmission interconnection system, access a common water system and road network, and depend upon the same construction and operation personnel.

(Petition to Amend, Cover Letter.) In addition, Calico will be proposing a new access road.

The Petition to Amend is a proposed modification to an Energy Commission approved site, and the Energy Commission is given express authority to consider petitions to amend a licensed project. The Energy Commission has express authority to license thermal solar power; therefore, Energy Commission has jurisdiction over this amendment proceeding.

2. The Calico Amendment is a hybrid of technologies not anticipated by the Warren-Alquist Act and should continue to be under the permitting jurisdiction of the Energy Commission.

The Calico project, which the Commission licensed in 2010 as a thermal solar facility, is now proposed as a hybrid power plant, part solar thermal and part solar photovoltaic (PV). This is the first instance at the Energy Commission of such a hybrid facility, but based upon conversations the Siting Division has had with developers, there could be additional hybrid projects proposed. In addition to hybrid solar projects, the Energy Commission may also see hybrid natural gas and PV projects proposed in the future which will also raise jurisdictional issues.

The Warren-Alquist Act, which established Commission jurisdiction, did not envision such hybrid projects. As such, there is no clear statutory guidance on how to resolve jurisdictional issues when part of a project has a thermal generation source and part is non-thermal. In the interest of government efficiency and good public policy there should be one licensing agency for a single power plant, regardless of whether it is a thermal or hybrid project. To require otherwise creates a situation where two agencies may reach opposite conclusions on whether a facility should be licensed. Such an outcome is antithetical to the Warren-Alquist Act, which was purposely enacted to address the problems associated with a power plant developer having to obtain multiple permits from multiple agencies. Splitting the jurisdiction over the Calico Amendment would be contrary to the intent of the Warren-Alquist Act.

There is only one power plant at the Calico site, which is a distinct, contiguous geographic parcel. The fact that there are different generation sources does not create

multiple power plants. The electricity that Calico sends to the grid will not be differentiated by its generating source.

This is no different than a natural gas-fired power plant that has multiple turbine generators which can, and often do, operate independently. If a natural gas-fired facility has six units, each capable of generating 60 megawatts (MWs), it is not regarded by the Energy Commission as six power plants. For jurisdictional purposes it is a single power plant with a generating capacity of 360 MWs. The proposed Calico Amendment still maintains more than 50 MWs of thermal generating capacity, which is the minimum threshold for Energy Commission permitting authority.

Just like a natural gas plant with multiple turbine generators, the Calico power plant has other electrical infrastructure components which will be used by both the solar thermal and PV generation and which are essential to the operation of the facility. As described above, these include the control room, the transmission generation tie line, the water line, access roads, and other facilities. If jurisdiction on one power plant were to be split between two or more agencies, it would be difficult for the project developer and the agencies to describe the project to be evaluated and who would license/permit all the shared facilities on the site. It is not hard to imagine a situation in which two agencies could not agree on the location of a water well to serve the project and each could require a different well location. Another example is if the two agencies conducted separate parallel CEQA proceedings and could not agree on biological mitigation for the impacts of a single shared access road.

It is appropriate for the Energy Commission to exercise jurisdiction over the Calico hybrid facility amendment, including the PV portion, because doing so will promote "good government," avoid absurd outcomes, avoid government inefficiencies, create legal certainty, and conform to the intent of the Warren-Alquist Act. While the Commission does not have jurisdiction over PV facilities, it does have jurisdiction over any power plant with a thermal generating capacity 50 MWs or greater. Public Resources Code section 25218.5 states: "The provisions specifying any power or duty of the commission shall be liberally construed, in order to carry out the objectives of this division."

Therefore, for the reasons set forth above, the Energy Commission has jurisdiction to permit the PV portion of the Calico Amendment in this proceeding.

3. If the Committee finds that the Energy Commission does not have jurisdiction over PVs, it is still the appropriate Lead Agency.

Notwithstanding the issue over the Energy Commission's permitting jurisdiction over PVs, the Energy Commission has jurisdiction over the entire amendment proceeding and thus, is the most appropriate agency to serve as the lead agency for the PV portion of the proposed amendment.

The CEQA Guidelines provide guidance for how a lead agency should be determined. Section 15050(a) states: "Where a project is to be carried out or approved by more than one public agency, one public agency shall be responsible for preparing an EIR or negative declaration for the project. This agency shall be called the lead agency." (Cal. Code Regs., tit. 14, §15050(a).) The criteria outlined in the Guidelines, state in part, that

Where two or more public agencies will be involved with a project, the determination of which agency will be the lead agency shall be governed by the following criteria:

(b) If the project is to be carried out by a nongovernmental person or entity, the lead agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole.

(1) 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...

(c) Where more than one public agency equally meet the criteria in subdivision (b), the agency which will act first on the project in question shall be the lead agency. (Cal. Code Regs., tit. 14, §15051.)

The Energy Commission has already licensed a power plant on the exact site where the amendment is being proposed. Through many months of workshops and hearings, the Energy Commission Staff worked diligently and closely with other federal, state and local agencies to produce a comprehensive analysis of environmental impacts and impacts to public health and safety. Furthermore, many of the existing Conditions

of Certification are likely to remain unchanged because the modifications to the project do not necessarily impact every technical area in the same way.

The Sierra Club argues that the Department of Fish and Game (DFG) should become the Lead Agency for the entire project. Staff disagrees. First, the Energy Commission has exclusive statutory authority over the solar thermal portion of the project and its related facilities, including central facilities, transmission lines and roads. It would be duplicative and a waste of valuable state resources to have two agencies preside over the same amendment. Second, the Energy Commission has regulatory jurisdiction over any proposed modifications to a licensed project and Calico is proposing an amendment to a licensed project. Third, the Energy Commission has already conducted an extensive environmental review of the site, which included input from DFG. The entire Calico Solar Project proceeding lasted nearly two years, including many intervenors and days of evidentiary hearings. Finally, many of the issues raised by the proposed amendment do not involve just one technical area and might be outside of the expertise of DFG or other agencies that would otherwise serve as a Responsible Agency.

4. As Lead Agency, the Energy Commission would review the amendment in its entirety.

With the Energy Commission as Lead Agency for the entire project, Staff will thoroughly review the amendment and analyze any potential impacts to the environment and/or public health regardless of the technology proposed. Because the Energy Commission retains jurisdiction over the solar thermal portion of the amendment under Public Resources Code, section 25500, Staff would propose any additions or changes to the Conditions of Certification as it would with any other Application for Certification or amendment that would come before the Commission. In other words, the Energy Commission would serve as the “one stop shop” for the solar thermal portion of the amendment and its certification would be in lieu of all federal, state and local permits as permitted by federal law. The Energy Commission would then take discretionary action on solar thermal portion of the amendment.

For the PV portion of the amendment, as the Lead Agency, the Energy Commission would modify Conditions of Certification accordingly as Calico will be

required to obtain the required permits from the appropriate Responsible Agencies that would be required for the PV portion of the project. The Energy Commission's power plant site certification program is a certified regulatory program under CEQA (Cal. Code Regs., tit. 14, §15251(j)) and as such Staff generally prepares a Staff Assessment as opposed to an EIR. However, the CEQA Guidelines allows an EIR substitute document prepared under a certified regulatory program to be used by other agencies to approve the same project if the certified agency is the first agency to grant discretionary approval, the environmental document identifies significant environmental effects within the jurisdiction or special expertise of the responsible agency, alternatives or mitigation measures are identified that could avoid or reduce the severity of significant adverse impacts, and the certified agency consults with the responsible agencies. (Cal. Code Regs., tit. 14, §15253.)

Having the Energy Commission act as Lead Agency is "good government" since Staff has already conducted a comprehensive analysis of the site and will be providing another environmental/public health and safety analysis of the entire proposed amendment. If another agency served as the Lead Agency, that agency would need to start its review without the expertise and understanding the Energy Commission Staff possesses about this project, thus potentially causing undue delay of approval of Calico's proposal.

B. Baseline for Environmental Conditions

The Petition to Amend proposes major modifications to the licensed Calico Solar Project, primarily the change in technology and phasing of the construction, although other technical areas will be impacted as well.

1. Staff will review all potential impacts of the proposed modification in all technical areas.

The Petition to Amend has the potential to impact all technical areas of the Commission's Decision of the Calico Solar Project. Staff has issued Data Requests to the Project Owner and has received only a portion of the Data Responses from the Project Owner. Therefore, it is still too early in the process for Staff to identify the extent of any potential impacts from the proposed amendment or what changes, if any, will

need to be made to the Conditions of Certification. In discussing the “baseline” for commencing environmental review, CEQA Guidelines, section 15125 states:

(a) An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.... (Cal. Code Regs., tit. 14, §15125(a).)

In this amendment proceeding, an existing CEQA analysis of the site and the related facilities already exists. The court in *Communities for a Better Environment v. South Coast Air Quality Management District* stated that an increased use of equipment was to be evaluated as part of the project and as part of the baseline setting. The court stated that “neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review...for support by substantial evidence.” (*Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal 4th 310, 328.)

Staff is reviewing the potential environmental, public health or safety impacts of the proposed amendment in all technical areas. Staff intends to use the Energy Commission’s Decision as the baseline to determine if the proposed modification to the licensed Calico Solar Project will result in additional impacts, if further mitigation will be required and then recommend changes or modifications to the Conditions of Certification as supported by substantial evidence.

2. Staff proposes to prepare a subsequent EIR equivalent document.

The original Calico Solar Plant was licensed in accordance with the Energy Commission’s certified regulatory program. However, the Energy Commission does comply with all substantive requirements of CEQA. In accordance with the CEQA Guidelines, when substantial changes are proposed to a project or new information shows that the project will have one or more significant effects not discussed in the

previous EIR, a “subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any.” (Cal. Code Regs., tit. 14, §15162.)The subsequent EIR is required to be given the same notice and public review as an EIR.

As stated above, Staff is still in the Discovery phase of the process and, therefore, is unable to determine if the proposed modifications will have one or more significant effects not addressed in the Commission’s Decision. However, Staff maintains that the Petition to Amend proposes a substantial change to the licensed project that the Energy Commission is the appropriate public agency to prepare a subsequent EIR.

3. Potential Biological Impacts

Since the project’s impacts to biological resources have been and will continue to be a source of particular concern among the parties, a more specific discussion may be appropriate here as to how the CEQA baseline would be applied to the analysis of biological impacts. For the reasons described above, the analysis will focus on whether the proposed changes in the project will create new significant environmental effects or will cause a substantial increase in the severity of previously identified significant effects. CEQA Guidelines § 15162(a)(1).

The project as approved assumed a total loss of habitat on site for a number of sensitive species, including desert tortoise. Since the proposed changes in solar technology and development phasing will not likely change this assumption, Staff might conclude early in its analysis that the project amendment will not cause new significant impacts or a substantial increase in the severity of previously analyzed impacts in this area, in which case the Staff ‘s analysis would include a brief description of why certain on-site biological impacts would not be significantly or substantially higher compared to the approved project. Of course, Staff will undertake a fuller analysis of specific biological impacts if it identifies new significant impacts or a substantial increase in previously analyzed impacts that may occur because of: 1) a new access road that is proposed outside the original project footprint, 2) differences between the original placement of SunCatchers and the proposed new placement of photovoltaic panels and

SunCatchers, 3) differences between the photovoltaic panels' profile and that of the SunCathcers, 4) the new sequence and timing of site development, or 5) any other change in the project related to the pending amendment.

Staff would welcome Committee guidance as to how, in the context of these proceedings, it would like to handle revisions to the project's desert tortoise translocation plan. The translocation plan is currently being revised by the Project Owner at the request of federal and state agencies, in part to change the area into which tortoises from the project site may be moved. Condition of Certification BIO-16 of the Commission's Decision required that a final translocation plan be prepared and approved by the Compliance Project Manager prior to construction. The anticipated translocation plan revisions are not themselves expected to require revisions in BIO-16. Neither are they expected to have any potential to cause a new significant impact or a substantial increase in severity of previously analyzed impacts, or involve new information meeting the criteria in CEQA Guidelines § 15162(a)(3). In short, staff does not believe revisions to the translocation plan will need to be addressed as part of these amendment proceedings, but acknowledges that interveners and perhaps the Committee itself may be interested in reviewing and commenting on the revised plan. For this reason, Staff included the tortoise translocation issue in the Issues Identification Report it filed April 14, 2011. Staff would welcome guidance from the Committee on the extent to which it would like to have translocation plan revisions and related issues addressed as part of staff's analysis, even if these issues are not directly related to the project amendment.

IV. CONCLUSION

The Energy Commission has statutory and regulatory authority to preside over the Calico Solar Project Petition to Amend proceedings. Staff asserts that the Energy Commission has jurisdiction over the site and the entire amendment, or in the alternative, at least the solar thermal portion of the project. However, the Energy Commission is the appropriate agency to serve as the Lead Agency in this case. Once

all Data Requests are responded to, Staff is prepared to publish a document equivalent to a subsequent EIR in accordance with the CEQ Guidelines.

Dated: May 23, 2011

Respectfully submitted,



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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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DECLARATION OF SERVICE

I, Chester Hong, declare that on May 23, 2011, I served by U.S. mail and filed copies of the attached California Energy Commission "**STAFF'S RESPONSE TO COMMITTEE BRIEFING ORDER**", 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:
[\[www.energy.ca.gov/sitingcases/calicosolar/compliance/index.html\]](http://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:

(Check all that Apply)

FOR SERVICE TO ALL OTHER PARTIES:

- sent electronically to all email addresses on the Proof of Service list;
 by personal delivery;
 by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

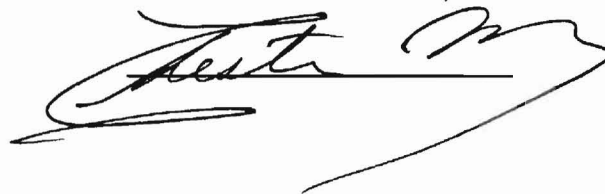
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- delivering an original paper copy and sending one electronic copy by e-mail to the address below (**preferred method**);
OR
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CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-13C
1516 Ninth Street, MS-4
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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.



*indicates change