

4/18/09, CC. J.B. DR. Jo.

Case No: \_\_\_\_\_

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

DFI Funding, Inc.,

Petitioner

v.

California Energy Commission,

Respondent

and

Orange Grove Energy, L.P. and J-Power USA Development Co., LTD,

Real Parties In Interest.

<b>DOCKET</b>	
<b>08-AFC-4</b>	
DATE	MAY 08 2009
RECD.	MAY 11 2009

---

**PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR  
OTHER APPROPRIATE RELIEF, REQUEST FOR STAY;  
MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING  
EXHIBITS  
(CEQA)**

---

BEST BEST & KRIEGER LLP  
 Cyndy Day-Wilson (Bar No. 135045)  
 Melissa Woo (Bar No. 192056)  
 G. Andre Monette (Bar No. 248245)  
 655 West Broadway, 15th Floor  
 San Diego, CA 92101  
 Phone: (619) 525-1300  
 Fax: (619) 233-6118

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Petitioner hereby certifies that it is not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

## TABLE OF CONTENTS

I.	INTRODUCTION .....	11
II.	STANDARD OF REVIEW .....	12
III.	RELEVANT FACTS .....	14
IV.	DISCUSSION .....	15
	1. Greenhouse Gas Emissions .....	16
	2. Water Supply .....	20
	3. Traffic .....	23
	4. Land Use .....	24
	B. The CEC refused to provide Petitioner with the due process required by law .....	26
	1. The CEC Failed to provide Petitioner with Notice of the Proceedings, then Refused to allow Petitioner to intervene .....	26
	2. The CEC was required to provide Petitioner with notice of the Orange Grove Project Proceedings .....	27
V.	CONCLUSION .....	30

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Board of Regents v. Roth</i> (1972) 408 U.S. 564.....	29
<i>Boddie v. Connecticut</i> (1971) 401 U.S. 371.....	29
<i>Brown v. Hot, Sexy and Safer Productions, Inc.</i> (1st Cir. 1995) 68 F.3d 525 [cert. denied by, 116 S. Ct. 1044, 134 L. Ed. 2d 191 (U.S. 1996)].....	30
<i>Farthing v. City of Shawnee, Kansas</i> (10th Cir. 1994) 39 F.3d 1131.....	30
<i>Goss v. Lopez</i> (1975) 419 U.S. 565.....	29
<i>Mallette v. Arlington County Employees' Supplemental Retirement System II</i> (4th Cir. 1996) 91 F.3d 630.....	30
<i>North Georgia Finishing, Inc. v. Di-Chemical, Inc.</i> (1975) 419 U.S. 601.....	29
<i>Patel v. Penman</i> , 103 F.3d 868.....	16
<i>Rogal v. American Broadcasting Companies, Inc.</i> (3rd Cir., 1996) 74 F.3d 40.....	30
<i>Sniadach v. Family Finance Corp.</i> (1969) 395 U.S. 337.....	29

### STATE CASES

<i>Beaudreau v. Superior Court</i> (1975) 14 Cal.3d 448.....	29
<i>County of Sonoma v. State Energy Resources Conservation and Dev't Committee</i> (1985)	

40 Cal.3d 361 .....	7
<i>Horn v. County of Ventura</i> (1979)	
24 Cal.3d 605 .....	30
<i>Kings County Farm Bureau v. City of Hanford</i> (1990)	
221 Cal.App.3d 692 .....	20
<i>Laurel Heights Improvement Association v. Regents of University</i> <i>Cal.</i> (1988)	
47 Cal.3d 376 .....	12, 16, 22, 23
<i>Oro Fino Gold Mining Corp. v. County of El Dorado</i> (1990)	
225 Cal.App.3d 872 .....	18
<i>Quail Botanical Gardens Foundation, Inc. v. City of Encinitas</i> (1994)	
29 Cal.App.4th 1597 ["the City cannot rely upon post approval mitigation measures adopted during the subsequent design review process"] .....	18
<i>Randone v. Appellate Department</i> (1971)	
5 Cal.3d 536 .....	29
<i>Santa Teresa Citizen Action Group State Energy Resources</i> <i>Conservation and Dev't Committee</i> (2003)	
105 Cal.App.4th 1441 .....	7
<i>Skelly v. State Personnel Board</i> (1975)	
15 Cal.3d 194 .....	29
<i>Sundstrom v. County of Mendocino</i> (1988)	
202 Cal.App.3d 296 .....	18

#### STATE STATUTES

20 Cal. Code Regs. §1752 .....	24
20 Cal. Code Regs. §2324(a) .....	28, 29
20 Cal. Code Regs. §15130 .....	17, 24, 27, 28, 29
14 Cal. Code Regs. § 15251(j) .....	13, 21

Code Civ. Proc. §1094(c) .....	13
Code Civ. Proc. § 1094.5 .....	12
Code Civ. Proc. § 1094.5 .....	13
Pub. Resources Code §§ 21080.5 .....	13, 21
Pub. Resources Code § 21080.5(d) .....	13
Pub. Resources Code § 21080.5(d)(3)(A) .....	14
Pub. Resources Code § 21168 .....	13
Pub. Resources Code, § 25500 .....	26
Pub. Resources Code § 25510 .....	13
Pub. Resources Code § 25514 .....	13
Pub. Resources Code, § 25519 .....	26
Pub. Resources Code, § 25523(d)(1) .....	13, 21
Pub. Resources Code § 25531(b) .....	12, 16
Pub. Resources Code, §25531 .....	1, 7, 12

**PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR  
OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS  
AND AUTHORITIES; SUPPORTING EXHIBITS**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT  
OF CALIFORNIA:

**INTRODUCTION**

Respondent California Energy Commission ("Commission") has approved an application for the construction of a 96-megawatt thermal electric power plan, identified as the Orange Grove Project ("Project") without complying with the requisite environmental statutory and regulatory requirements which must be met prior to the approval of a power plant.

Pursuant to Public Resources Code section 25531, Petitioner DFI Funding, Inc. ("Petitioner") respectfully files this petition for writ of mandate challenging the decision of the Respondent Commission, in Docket No. 08-AFC-4, filed on or about April 8, 2009, approving the application for the Orange Grove Project in violation of the California Environmental Quality Act ("CEQA").

Petitioner requests that this Court issue a writ of mandate directing Respondent Commission to (1) set aside and vacate its Final Commission Decision of April 8, 2009 approving the Application for Certification pertaining to the construction of the Orange Grove Project, and (2) reopen the proceedings related to the Project. The Petitioner further seeks a reasonable amount of additional time in which to prepare for further hearing on the reopened proceedings. The Petitioner also requests that construction of the Project be stayed pending the vacation of the Commissions' Decision and the reopening of the proceedings.

This case presents an issue of public and constitutional significance affecting private property owners who may find a power plant in their backyard but without the legally required environmental review. The Commission failed to follow the requirements of CEQA and ignored significant impacts that will occur due to the Project.

The Commission's failure to abide by CEQA, will have a profound impact on all private property owners. Without clear guidance from this Court, the Commission will continue to ignore and circumvent the environmental review process. Therefore, this Court should grant this petition because the Commission failed to "regularly pursue [] its authority" by not complying with the relevant statutes and guidelines and by applying them in an inconsistent and arbitrary fashion.

## **PETITION FOR WRIT OF MANDATE/PROHIBITION OR OTHER EXTRAORDINARY RELIEF**

### **Authenticity of Exhibits**

1. All exhibits accompanying this petition are true and correct copies of original documents [or excerpts of the same] on file with the Respondent Commission. The one volume of exhibits is incorporated herein by reference as thought fully set forth in this petition. The exhibits are paginated consecutively from page PA 1 through page PA 163 and page references in this petition are to the consecutive pagination.

### **Beneficial Interest of Petitioner; Capacities of Respondent and Real Party in Interest**

2. Petitioner is petitioning this Court for an order directing the Commission to allow it [Petitioner] to reopen the proceedings and administrative record and reconsider its final order of April 8, 2009, in the administrative proceedings in a California Energy Commission proceeding

entitled Orange Grove Project Application for Certification, Docket No. 08-AFC-4. The Petitioner further seeks a reasonable amount of additional time in which to prepare for further hearing on the reopened proceedings.

3. Petitioner is a California Corporation engaged in the business of lending money with its principle place of business in Emeryville, California. Petitioner has entered into various loan transactions secured by real property located in San Diego County, at 36570, and 36211 Pala del Norte Road, 92059. This real property is identified by assessors parcel numbers ("APN") 110-072-05-00, 110-072-13-00, 110-072-14-00, and 110-072-17-00.

4. On or about October 3, 2005, Petitioner accepted a promissory from Prominence Partners, Inc. ("Prominence Partners") in the principal amount of Four Million Seven Hundred Fifty Thousand Dollars (\$4,750,000.00). To secure payment of the principal sum and interest on the promissory note, Prominence Partners, made, executed, and delivered to Petitioner, a Construction Deed of Trust and Security Agreement and Assignment of Rents. This Deed of Trust was amended several times. The original and each amended version was recorded with the County of San Diego. By virtue of the terms of the Deed of Trust and its subsequent amendments, Prominence Partners conveyed to Petitioner, as trustee, the real property located at APN 110-072-05-00, 110-072-13-00, 110-072-14-00, and 110-072-17-00. These properties (jointly the "Pala del Norte Properties") are adjoining and/or within close proximity to the proposed location for the Orange Grove Power Plant. In particular, a portion of APN 110-072-5-00 abuts the proposed location for the Orange Grove Power Plant.

5. Respondent is the California Energy Commission ("Commission"). Applicant Orange Grove Energy, L.P. is named herein as a Real Party in Interest. Applicant Orange Grove Energy, L.P. is a

limited partnership owned by J-Power USA Development Co., LTD. J-Power is named herein as a Real Party in Interest.

#### **Chronology of Pertinent Events**

6. The Real Party in Interest Orange Grove Energy, L.P. ("RPI") filed its Application for Certification ("AFC") for the Orange Grove Project on June 20, 2008. (PA 9)

7. The Project is planned for what is currently an undeveloped property in the San Luis Rey River Valley, just west of the Pala Indian Casino. The Project will be constructed on an approximately 8.5-acre site that is part of an approximately 202-acre property and will be a peaking power plant. According to the AFC, the Project is a 96-megawatt simple-cycle electric generating facility designed as a peaking facility to serve loads during peak demand. The Project will use two combustion turbine generators that will be fueled with natural gas. (PA 135)

8. According to the AFC, the Project will also require approximately 62 acre feet per year of fresh water and 38.7 acre feet per year of reclaimed "tertiary treated" water to meet its operational needs. The Project is the first to be approved by the Commission in which the water will be trucked to the Project using semi-trucks with a capacity of approximately 6,500 gallons. Water delivery will require approximately one truck per hour for fresh water and one truck per hour for reclaimed water. (PA 128)

9. Petitioner has a significant interest in property near the Orange Grove Project site. Specifically, Petitioner has entered into various loan transactions secured by real property located at 36570, and 36211 Pala del Norte Road, 92059. These properties are adjacent to and/or in close proximity to the proposed project site.

10. Following submission of the AFC, the Commission held an informational meeting on July 29, 2008. (PA 43) Following the

informational meeting, the Commission issued a staff assessment of the Orange Grove Project on November 3, 2008. (PA 54) The Commission held a workshop on the assessment on November 17, 2008. (PA 71) Two weeks later, on December 1, the CEC held a pre-hearing conference to discuss issues and testimony to be raised at the December 19, 2008 evidentiary hearing on the staff assessment. (PA 71)

11. As part of its AFC, the RPI filed a list of current APNs and owners names and addresses for all properties within 5000 feet of the proposed transmission line, and 1000 feet of the proposed power plant site. (PA 20-41) Notably, Petitioner was not included on that list, though other lenders including Countrywide Home Loans, were included in RPI's list. Following the RPI's submittal of the AFC, Commission staff was required to notify the individuals listed on the RPI's service list of the Orange Grove Project AFC proceedings. (PA 49) Petitioner has no knowledge as to whether Commission staff provided the required notification. Nevertheless, even if Commission staff provided proper notice, because the Petitioner was not on the service list, it was never provided with notice of the proceedings. Additionally, although the Petitioner may have had general knowledge of the Orange Grove Project, because the Petitioner is located in Northern California, it had no opportunity to obtain constructive notice of the project related proceedings. The Petitioner was also not informed about the proceeding related to the Orange Grove Project AFC, the December 19, 2008 evidentiary hearing, until December 11, 2008. (PA 83) Again, the Petitioner was never given notice of which agency was overseeing the project approvals, whether the proceedings would be open to the public, and more importantly, whether hearings and other approval related proceedings had in fact begun.

13. When the Petitioner became aware of the December 19, 2008 evidentiary hearing on the Orange Grove Project AFC, it took immediate steps to participate in the proceedings as an intervening party. The Petitioner immediately retained counsel to review and comment on the Commission staff's analysis of the Orange Grove Project, and file a Petition for Intervention in the proceedings. The Petitioner's Petition for Intervention was filed three business days later, on December 16, 2008. (PA 79)

14. The Petitioner's comments on the Commission staff's analysis of the project was filed the following day, on December 18, 2008. (PA 83 – 98)

15. At the evidentiary hearing on December 19, 2008, the Siting Committee charged with issuing a determination on the Orange Grove Project AFC, denied the Petitioner's Petition for Intervention on the grounds that it was untimely, and that pursuant to Commission Regulations it should have been filed before the December 1, 2008 deadline. (PA 102; 112) The Petitioner appealed that decision but it was denied by the Commission. (PA 109)

16. The Petitioner, in its December 18, 2008 comments, raised numerous issues relating to the failure of the Commission staff's analysis to comply with CEQA. (PA 83) As noted in the comment letter, Petitioner is concerned about the failure of the Commission and the RPI to fully evaluate the impacts that will occur from siting a power plant at the site. The Staff Assessment's analysis of the environmental impacts created by the Project, its analysis of mitigation measures and its conclusions regarding the significant of impacts is, in some instances, factually and legally defective. Further compounding the errors is the fact that the Petitioner was not provided with the legally required notice so that

it could participate in the review and approval process regarding the Project. (PA 83)

17. More importantly, there is a questionable need for this Project. California is currently undertaking an aggressive approach to address the impacts of climate change within the state. The Project fails to address energy alternatives that could lessen environmental impacts and meet the state goals of reducing greenhouse gas emissions by 30% in 2020. The Project, instead of providing a "green" form of energy, will significantly impact the environment through the use of natural gas, the use of valuable potable water, and increased truck traffic in the local area. (PA 84)

18. The Commission, however, rejected the Petitioner's environmental arguments against the Orange Grove Project site. (PA 142-146)

19. It is undisputed that the Commission approved the construction of the Orange Grove Project on or about April 8, 2009. (PA 121-123)

#### **BASIS FOR RELIEF**

20. The issue presented in this writ petition is whether the California Energy Commission failed to regularly pursue its authority by failing to comply with the statutory requirements of CEQA. This failure has interfered with the Petitioner's private property rights and has also deprived the Commission of information relevant to its decision.

#### **ABSENCE OF OTHER REMEDIES**

21. Public Resources Code section 25531 provides for exclusive Supreme Court review for the decisions of the Commission on any application for certification of a thermal power plant site. (Pub. Resources

Code, §25531(a); *County of Sonoma v. State Energy Resources Conservation and Dev't Comm.* (1985) 40 Cal.3d 361.) Challenges to thermal power plant site certification decisions may not be brought in the Superior Court. (*Santa Teresa Citizen Action Group State Energy Resources Conservation and Dev't Comm.* (2003) 105 Cal.App.4th 1441.) Writ of mandate is appropriate because of the urgent public importance of the issues. The Petitioner reserves its right to supplement this petition, accompanying memorandum of points and authorities and exhibits.

22. Petitioner has performed all conditions precedent to the filing of this Petition and has exhausted all available administrative remedies.

23. Petitioner has served a written notice of this action on all parties and the State Attorney General concurrent with this action and pursuant to Public Resources Code section 21167.5 and 21167.7.

---

### PRAYER

Petitioner prays that this Court;

1. Issue an alternative writ directing Respondent California Energy Commission to set aside and vacate its Final Commission Decision of April 8, 2009, approving the Application for Certification for the Orange Grove Project, or to show cause why it should not be ordered to do so, and upon return of the alternative writ issue a peremptory writ of mandate and/or prohibition or such other extraordinary relief as is warranted, directing the Commission to set aside and vacate the Final Commission Decision of April 8, 2009; to reopen the administrative proceedings and the evidentiary record to allow the Petitioner a reasonable amount of time to prepare and present additional comments, analysis, evidence, and recommendations;

2. That construction of the Project be stayed pending the vacation of the Commission's Decision and the conclusion of further Commission proceedings consistent with this Court's final decision;

3. Award Petitioner is costs pursuant to the California Rules of Court;

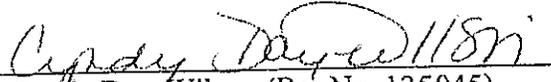
4. Grant such other relief as may be just and proper.

Respectfully submitted,

Dated: May 8, 2009

BEST BEST & KRIEGER LLP

By:



Cindy Day-Wilson (Bar No. 135045)

Melissa Woo (Bar No. 192056)

G. Andre Monette (Bar No. 248245)

Attorneys for Petitioner

DFI Funding, Inc.

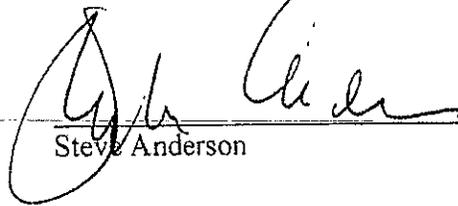
---

VERIFICATION

I, Steve Anderson, declare:

I am a Petitioner in the above-entitled action. I have read the foregoing Amended Petition for Writ of Mandate and know the contents thereof. I am informed and believe and based on said information and belief allege that the contents therein are true.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Emerjville, California on May 7, 2009.

  
Steve Anderson

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION  
OR OTHER APPROPRIATE RELIEF, REQUEST FOR STAY**

**I. INTRODUCTION**

On June 19, 2008, Orange Grove Energy, L.P. filed its Application for Certification (AFC) with the California Energy Commission for the construction and operation of the Orange Grove Project. DFI Funding Inc. ("Petitioner") has a substantial interest in property located immediately adjacent to the Orange Grove Project site, at 36570 Pala Del Norte and 36211 Pala Del Norte, San Diego County, California. As an interested party, Petitioner is concerned about the lack of notice the public was given on the power plant siting process, and the obvious significant impacts associated with the project that have not been mitigated.

---

Petitioner is additionally concerned with the questionable need for this Project. California is currently undertaking an aggressive approach to address the impacts of climate change within the state. Californians are being encouraged to "turn the tide" in the fight against global warming yet the Project, as proposed, does not directly or indirectly address the issues surrounding the impacts from greenhouse gas emissions. The Project likewise fails to address energy alternatives that could lessen environmental impacts and meet the state goals of reducing greenhouse gas emissions by 30% in 2020. The Project, instead of providing a "green" form of energy, will significantly impact the environment through the use of natural gas, and the use of potable water that will need to be trucked to the project site in order for it to operate.

For the reasons set forth below, Petitioner respectfully requests that the Court grant its Petition for Writ of Mandate.

## II. STANDARD OF REVIEW

Review of CEC siting decisions is limited to a determination of whether the CEC adequately discharged its statutory duties when making the decision, and whether the decision violates any of the petitioners rights under the United States Constitution and the California Constitution. (Pub. Resources Code § 25531(b).) Subdivision (b) of Public Resources Code, section 25531 limits venue for review of CEC siting decisions to the California Supreme Court, and provides in pertinent part:

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. The findings and conclusions of the commission on questions of fact are final and are not subject to review, except as provided in this article. These questions of fact shall include ultimate facts and the findings and conclusions of the Commission.

Key factors that determine “whether the Commission has regularly pursued its authority” are whether the CEC proceeded in the manner required by law, and whether the CEC abused its discretion when making the decision on a power plant siting application. (*See*, Code Civ. Proc., § 1094.5.) By definition, an administrative agency abuses its discretion when it fails to base its decision on substantial evidence in the record. (*See id.*; *see also Laurel Heights Improvement Association v. Regents of Univ. Cal.* (1988) 47 Cal.3d 376.) Failure to proceed in the manner required by law, or base decisions on substantial evidence in the record represents a failure on the part of the CEC to “regularly pursue its authority.”

This is the same standard applied to public agency decisions under the California Environmental Quality Act (“CEQA”). The California Public Resources Code requires a petitioner to challenge a public agency decision on the grounds that it violated CEQA with a writ of mandate filed

pursuant to California Code of Civil Procedure section 1094.5. (Pub. Resources Code § 21168.) Section 1094.5 provides that review in such cases is limited to “whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.” Section 1094.5 further provides that “[a]buse of discretion is established if the respondent has not proceeded in the manner required by law” or “the findings are not supported by substantial evidence in the light of the whole record.” (Code Civ. Proc. § 1094.5(c).)

It is appropriate that CEC citing cases and public agency decisions involving CEQA would be subject to the same standard of review. The CEC siting process is an expedited CEQA proceeding. (Pub. Resources Code § 21080.5 [setting forth the criteria for a "certified regulatory program" under CEQA].) Review of environmental impacts of a proposed project is done through the production of a Staff Assessment. (Pub. Resources Code § 25510) The Staff Assessment is then incorporated into the Final Decision on the project application. (Pub. Resources Code § 25514) The Staff Assessment and Final Decision are the equivalent of an EIR, and for every significant impact identified, the CEC must identify and require mitigation measures to eliminate significant environmental impacts. (Pub. Resources Code §§ 21080.5; 25523(d)(1); 14 Cal. Code Regs. § 15251(j).)

Additionally, the determination of what constitutes a significant impact is not limited to restrictions imposed by local or state law. Where an equivalent document is produced in lieu of an EIR, the California Public Resources Code requires the lead agency, to avoid all significant environmental impacts as defined under CEQA. (Pub. Resources Code § 21080.5(d)(3)(A).) For that reason, case law interpreting CEQA is directly applicable to a determination of whether the CEC “regularly pursued its

authority” when approving a power plant siting application.

As explained more fully below, in approving the Orange Grove Project the CEC not only failed to regularly pursue its authority, but in so doing, violated Petitioner’s rights to Substantive and Procedural Due Process under the California and United States Constitutions.

### III. RELEVANT FACTS

On June 19, 2008, Orange Grove Energy, L.P. a limited partnership owned by J-Power USA Development Co., LTD, through intermediate entities filed an Application for Certification with the CEC for the construction and operation of the Orange Grove Project. The project consists of a 96 megawatt (MW) simple-cycle electric generating plant and ancillary facilities to be located on unincorporated lands north of State Route (SR) 76 and east of Interstate (I) 15 in rural San Diego County, California. (PA 135)

The applicant, Orange Grove Energy, is proposing the Project in response to a Request for Offers by San Diego Gas & Electric (SDG&E). The Project is designed as a peaking facility to serve loads during peak demand. The Orange Grove Project site is on SDG&E-owned land and is located about five miles east of the City of Fallbrook and approximately two miles west of the community of Pala. (PA 127)

The Project will use two combustion turbine generators that will be fueled with natural gas. Output of the generators will be connected to step-up transformers within an on-site switchyard that will require construction of an underground transmission circuit to be interconnected within an existing Pala substation. An approximately 2.4-miles underground natural gas pipeline will also be constructed to provide gas from an existing SDG&E gas line. (PA 136-137)

Notably, the power plant will use up to 62 acre-feet of freshwater per year. Because utility lines do not reach the project location, and fresh water

is thus not available, this water will have to be trucked to the project site. During operation, the Orange Grove Project will require deliveries from large, unwieldy 6,500-gallon water trucks at a rate of two deliveries to the project site per hour. (PA 152)

Petitioner is a California Corporation with its principle place of business in Emeryville, California. Petitioner has entered into various loan transactions secured by real property located in San Diego County, at 36570, and 36211 Pala del Norte Road, adjacent to the proposed Orange Grove Project site.

Orange Grove Energy filed its AFC for the Orange Grove Project on June 20, 2008. As part of its AFC, Orange Grove Energy filed a list of interested parties with the CEC. (PA 20-41) Notably, Petitioner was not included on that list, though other lenders with interests in nearby properties were. CEC staff was also required to notify interested parties of the Orange Grove Project proceedings. Nonetheless, Petitioner was never provided with notice of the proceedings. (PA 49) Despite this lack of notice, the CEC refused to allow Petitioner to intervene in the proceedings when it was finally notified that they were occurring. (PA 112; 116-117) The CEC further failed to address Petitioner's concerns with the Orange Grove Project, expressed through comments on the Staff Assessment and through counsel at hearings on the project.

#### **IV. DISCUSSION**

##### **A. The CEC Failed to Lawfully Discharge its Regulatory Obligations**

Review of CEC siting decisions is limited to a determination of whether the CEC adequately discharged its statutory duties when making the decision, and whether the decision violates any of the petitioners rights under the United States Constitution and the California Constitution. (Pub. Resources Code § 25531(b).)

In approving the Orange Grove Project, the CEC failed to adequately analyze, and mitigate for the project's significant impacts. The CEC's determination of the facts underlying its decision is subject to deference under the substantial evidence test. (*Laurel Heights Improvement Association v. Regents of Univ. Cal.* (1988) 47 Cal.3d 376, 393.) In contrast, the CEC's failure to adequately analyze the significant impacts, and failure to adequately mitigate for those impacts represents a failure to proceed in the manner required by law. A failure that is entitled to no deference. (*Id.*, at 392["Abuse of discretion is established if the agency has not proceeded in a manner required by law"].)

By approving the Orange Grove Project without adequately analyzing, and mitigating for the project's significant impacts, the CEC abused its discretion, and denied Petitioner its right to Substantive Due Process under the California and United States Constitutions. (*See Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996) [to establish a violation of substantive due process a petitioner is required to prove that the government action was clearly arbitrary and unreasonable].) As described more fully below, the CEC failed to adequately analyze the Orange Grove Project's significant impacts, and/or require Orange Grove Energy to mitigate for those impacts. In so doing, it abused its discretion, and violated Petitioner's right to due process.

#### **1. Greenhouse Gas Emissions**

The Staff Assessment, and the CEC's final decision failed to adequately address the Orange Grove Project's potential direct and cumulative impacts from Greenhouse Gas Emissions ("GHG"). State law is clear that this issue must be analyzed, and that this analysis must include an assessment of the direct and cumulative impacts of a proposed project's GHGs. (PA 86) At a minimum, State law required the Staff Assessment and the Final Decision to discuss the incremental and cumulative impacts

of the Orange Grove Project, since there is a potential for an incremental effect that is cumulative considerable. (20 Cal. Code Regs. §15130.)

If operated at its maximum capacity, the Orange Grove Project would emit over 160,000 metric tonnes of CO<sub>2</sub>-equivalent per year. (PA 150) While the Final Decision includes a cursory analysis of GHG impacts, it fails to quantify the Project's direct and cumulative contribution to GHGs, or the components of that contribution. (PA 149) Such an analysis was required in this case where different aspects of a multi-phased project will have different GHG impacts. For instance, there is no discussion of what percentage of the stated 160,000 metric tonnes of CO<sub>2</sub>-equivalent per year will come from the diesel trucks delivering water to the power plant when it is operational. (149) Without this information, the public and the CEC cannot adequately determine alternatives to the proposed project that may include fewer GHG impacts.

Instead, the Final Decision states that it is difficult to determine whether the Project will result in a net increase of GHG emissions, and, if so, by how much. (PA 150) The Final decision further states that it would "be speculative to conclude that any given project results in a cumulatively significant adverse impact resulting from greenhouse gas emissions." (PA 150) This reasoning ignores the framework set by the State to address GHGs.

On September 27, 2006, Governor Schwarzenegger signed Assembly Bill 32, the Global Warming Solutions Act of 2006. (PA 147) AB 32 requires a reduction of GHG emissions to 1990 levels by 2020. (PA 147) The California Air Resources Board ("ARB") is the lead agency for implementing AB32. (PA 147) ARB first developed a list of early discrete actions to begin reducing GHGs, established GHG emission reporting requirements, and set 2020 emissions limits. (PA 147) ARB recently drafted a Scoping Plan which proposed a comprehensive set of actions

designed to reduce overall greenhouse gas emissions in California, improve the environment, reduce our dependence on oil, diversify energy resources, save energy, create new jobs, and enhance public health. (PA 147) This Scoping Plan calls for a reduction of California's carbon footprint which means a cut of approximately 30 percent of emission levels projected for 2020, or about 15 percent from today's levels. (PA 147)

The Final Decision, however, fails to address how the Orange Grove Project fits into the ARB Scoping Plan and meets the required carbon footprint reduction. The CEC's plan to address such requirements "as these regulations become more fully developed and implemented" is nothing more than an impermissible deferral of feasible mitigation requirements that could be implemented now. (*See, e.g., Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309 [agency impermissibly "evade[s] its responsibility to engage in comprehensive environmental review" when it approves project with mitigation measures which simply call for future studies since, until results of such studies are obtained, there is no evidence that problem can actually be mitigated]; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1606, n.4 ["the City cannot rely upon post approval mitigation measures adopted during the subsequent design review process"]; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 884 ["[t]here cannot be meaningful scrutiny of a mitigated negative declaration when the mitigation measures are not set forth at the time of project approval"].)

California is extremely vulnerable to the impacts of global warming and is also responsible for a significant portion of the U.S. and global emissions of greenhouse gases. (PA 147) The significant risks climate change poses to California as well as the considerable benefits the state could realize if it addresses these risks prompted Governor Schwarzenegger

to issue Executive Order S-3-05 on June 1, 2005. The Executive Order called for specific emissions reductions and a periodic update on the state of climate change science and its potential impacts on sensitive sectors, including water supply, public health, coastal areas, agriculture and forestry. The Executive Order established the following GHG emissions targets: by 2010, reduce GHG emissions to 2000 levels; by 2020, reduce GHG emissions to 1990 levels; and by 2050, reduce GHG emissions to 80 percent below 1990 levels. (PA 147) In addition to these targeted reductions, the California Global Warming Solutions Act of 2006 (AB 32), places a cap on California's greenhouse gas emissions from utilities, oil refineries, and other major global warming polluters, and thus brings the state closer to meeting these targets. (PA 147)

In response to Executive Order S-3-05, the California Environmental Protection Agency ("CalEPA") formed a Climate Action Team with members from various state agencies and commissions. The Team has issued a series of reports, including a March 2006 Climate Action Team Report to Governor Schwarzenegger and the Legislature. This and other reports issued by CalEPA, the CEC, the Department of Water Resources and other California agencies should be used when preparing environmental documents under CEQA or CEQA like processes.

Under CEQA, emissions associated with a proposed project must be analyzed for their cumulative impact, no matter how small total emissions may be. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 721 ["The EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have upon air quality"].) The greenhouse gas emissions of each component and phase of the Project must be calculated. For example, the construction phase would include, but not be limited to: (1) the greenhouse gas emissions of construction vehicles and

machinery; (2) the greenhouse gas emissions from manufacturing and transporting the Project's building materials; (3) the greenhouse gas emissions of the Project's planning and design. The operation phase would include but not be limited to: (1) the greenhouse gas emission from the operation of the power plant and (2) the greenhouse gas emissions from the vehicle trips generated by the Project.

Here, the Staff Assessment and Final Decision quantify the Orange Grove Project's cumulative contribution and include some mitigation measures for those impacts. (PA 150) Both documents fail to fully analyze the Orange Grove Project's GHG emissions. The Staff Assessment and the Final Decision must fully disclose the Orange Grove Project's GHG emissions, and then avoid, minimize, and mitigate them to the maximum extent feasible. The analysis cannot begin and end with only a cursory discussion of the issue.

## **2. Water Supply**

The Orange Grove Project proposes to use both potable water and recycled water for plant industrial uses. (PA 152) While the Orange Grove Project is located within the boundaries of the Rainbow Municipal Water District, the nearest potable water distribution line is several miles from the main project site. (PA 152) Consequently, water supplies for project operations will be provided by the Fallbrook Public Utilities District (FPUD) and will be trucked to the site from pickup locations in Fallbrook. (PA 152) When complete the Project will use up to 62 acre feet of potable water per year (PA 153), enough to serve 124 households for a year.

The Project's reliance on potable and recycled water raises three substantial issues. First, at a time when the State is facing a severe drought, and many local agricultural operations are being denied irrigation water, the Orange Grove Project is proposing to use enough water to serve 124 households for a year for industrial processes that are not absolutely

necessary. Second, because the project site is located several miles from the Orange Grove Project site, the water will need to be delivered to the site by truck, generating up to four truck trips to and from the site every hour. Lastly, the Final Decision does not adequately define the level to which the recycled water that will be used at the Orange Grove Project will be treated.

With regard to the first issue, the CEC has allowed the Orange Grove Project to proceed despite the fact that it will waste enough water to serve 124 households for a year on an industrial process that could be served entirely with recycled water. (See PA 157-159 [discussing a contingency plan that would require the power plant to use recycled water exclusively if the potable supply becomes unavailable].) The Final Decision notes state water policy strongly discourages the use of potable water for power plant cooling. (PA 156) The CEC nonetheless has allowed Orange Grove to use potable water for this and other industrial purposes. (See PA 157-159)

The CEC is required identify and require mitigation measures to eliminate all significant environmental impacts associated with a project. (Pub. Resources Code §§ 21080.5; 25523(d)(1); 14 Cal. Code Regs. § 15251(j).) At a minimum, the CEC needed to mitigate for the water use impacts associated with the project. To accomplish this it should have required the Orange Grove Project to use recycled water for all industrial processes rather than the potable water that is currently planned for the project.

With regard to the second issue, there can be no question that driving water to the Orange Grove Project site in large diesel trucks during the hours of operation represents a tremendous waste of resources. The CEC's failure to analyze the impacts associated with this flawed aspect of the project is discussed in the Greenhouse Gas discussion, above, and the Traffic and Land Use sections below. However, it is worth noting here that

this type of project has never been approved by the CEC before (PA 163), and if allowed to proceed, it will have wide ranging impacts that have not been fully analyzed by the CEC.

Lastly, the Orange Grove Project will rely on recycled water to support some of its industrial processes. Throughout the Staff Assessment, and the Final Decision, the CEC refers to the level of treatment that the recycled water that the project will use as "tertiary-treated recycled water." (See e.g. PA 155) This is a term of art that is not defined in the California Water Code, or California Department of Public Health regulations governing the use of recycled water. By failing to specify the level of treatment the recycled water will receive the CEC has both left open the possibility that Orange Grove Energy will attempt to use poorly treated water to satisfy the project's needs, and created a substantial amount of confusion about a major aspect of the project. In fact Intervenor Archie McPhee submitted numerous comments on precisely this issue. (PA 74-77)

As with an EIR, the Staff Assessment and the Final Decision are information documents that serve a dual purpose: providing a basis for the CEC's decision, and informing the public about a proposed project's impacts. (*Laurel Heights Improvement Association v. Regents of Univ. Cal.* (1988) 47 Cal.3d 376, 392 ["[t]he EIR is also intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action . . . Because the EIR must be certified or rejected by public officials, it is a document of accountability"].) An environmental document that is misleading, or imprecise fails as an informational document. (*See id.*) For that reason, the Staff Assessment and Final Decision must be revised to properly define what type of recycled water will be used for the Orange Grove Project.

### 3. Traffic

The CEC failed to adequately analyze the traffic impacts associated with the Orange Grove project. The lack of an adequate analysis caused the Staff Assessment and the Final Decision to fail as informational documents, and rendered the CEC's reliance on them when it made its decision on the Orange Grove Project an abuse of discretion.

First, the CEC failed to adequately analyze the unique nature of SR-76, a major thoroughfare for project service. SR-76 is a winding, two lane highway with high numbers of accidents. It contains slopes, curves, steep grades, hazards unique to a rural setting, is prone to high winds and is narrow in places. (PA 95) Bicycle travel is allowed for the entire length of SR-76 and there are no bike lanes near the project area. (PA 160) The Orange Grove Project proposes using large, unwieldy 6,500-gallon water trucks to deliver water to the project site at a rate of two per hour when the plant is operational. The Final Decision downplays the impacts that this level of traffic will have on SR-76, to the extent that it is ignored. The Final Decision further does not discuss the dangerous nature of SR-76 other than to state "that SR 76 has a higher rate of traffic accidents than the statewide average and the Energy Commission has no precedent for allowing water delivery by truck." (PA 162) This cursory analysis fails to provide the information necessary for the CEC or the public to make an informed decision on the Orange Grove Project.

The CEC additionally failed to adequately analyze the impacts that construction would have on traffic flow in the project vicinity. The Final Decision concludes that construction traffic will not degrade existing conditions on I-15 or SR-76 to levels that are below Caltrans and San Diego County acceptable standards or below the No Project level of service. (PA 162) The CEC therefore determined that if the project did not proceed, precisely the same number of cars, trucks, and heavy machinery

would travel to and from the Orange Grove Project site. This defies logic. The Staff Assessment and the Final Decision both state that during construction, the number of worker trips to and from the project site would be range from 56 and 84 round trips per day. (PA 161) The CEC nevertheless determined that the project would not increase traffic flow to and from the project site on SR-76, and I-15. The project site is located on SR-76.

This internal inconsistency demonstrates the substandard traffic analysis the CEC included in the Staff Assessment and the Final Decision. Because both documents fail to adequately analyze the Orange Grove Project's traffic impacts, the CEC abused its discretion when relying on them to approve the Orange Grove Project.

#### **4. Land Use**

CEC Regulations prohibit the CEC from approving a power plant siting application that violates local laws, rules, or regulations. (20 Cal Code Regs §§ 1752, 1755.) Nevertheless, the CEC has approved the Orange Grove Project despite the fact that it violates the San Diego County Zoning Ordinance.

The Project is within the service area of the Rainbow Municipal Water District ("RMWD"). Because the site is in a remote area, several miles from the closest RMWD water main, Orange Grove Energy will truck water to the Orange Grove Project site when the power plant is operating. (PA 152) Two trucks will deliver potable and tertiary recycled water to the proposed power plant once an hour when it is operational. (PA 152) RMWD regulations prohibit the permanent use of water on a parcel other than where the water is purchased. Because the water trucking is proposed on a permanent basis, the plan violates RWMD rules and regulations regarding the sale of water within its service area. To sidestep this problem, Orange Grove Energy entered into a purchase agreement with a

neighboring water district. Because the Orange Grove Project site is not within this district's service area, the use of water from this district violates applicable local water district regulations. (PA 90)

The Project site is zoned for agricultural use. The Staff Assessment determined that the Project is nonetheless consistent with San Diego County's zoning ordinances. This determination is based on the San Diego County Zoning Ordinance which allows major utility projects in areas zoned for agriculture if a Major Use Permit is issued for the project, and a letter from the San Diego County Department of Planning and Land Use recognizing this, and stating that the Proposed Project would be "compatible" with the Project site's agricultural zoning. (PA 62) This conclusion is erroneous because a Major Use Permit would not be available in this case.

Pursuant to Section 7358 of the San Diego County Zoning Ordinance, the San Diego County Board of Supervisors cannot issue a Major Use Permit without making certain findings. Among other things, the Board of Supervisors must find that "the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to . . . *the availability of public facilities, services and utilities.*" (San Diego County Zoning Ordinance § 7358 [emphasis added].)

The Orange Grove Project site is beyond the service area of any water district or potable water purveyor. As a result, the cooling water necessitated by the Orange Grove Project will be trucked to the Project site on an hourly basis. Because utility services are not available, the County of San Diego, and now the CEC cannot make the findings necessary for a Major Use Permit. The Project is therefore in violation of the San Diego County Zoning Ordinance.

**B. The CEC refused to provide Petitioner with the due process required by law.**

The Warren-Alquist State Energy Resources Conservation and Development Act (Public Resources Code, § 25500 et seq.) requires that notice of the filing of a thermal power plant application be made to a wide range of federal, state and local government agencies, and perhaps more importantly, the public. (*See, e.g.*, Pub. Resources Code, § 25519) The plain language of the statute indicates the Legislature's intent that the CEC should broadly construe its notice obligations. Nevertheless, the CEC failed to notify Petitioner of the Orange Grove Project proceedings, and denied Petitioner's request to intervene in the proceedings when Petitioner became aware that the CEC was considering the project.

**1. The CEC Failed to provide Petitioner with Notice of the Proceedings, then Refused to allow Petitioner to intervene.**

By failing to notify Petitioner of the Orange Grove Project proceedings, then denying Petitioner the right to intervene in those proceedings, the CEC failed to "regularly pursue its authority" under the Warren-Alquist State Energy Resources Conservation and Development Act. Moreover, the CEC's actions denied Petitioner and its partners their right to procedural due process as guaranteed by the California and United States Constitutions.

Orange Grove Energy filed its application for the Orange Grove Project on June 20, 2008. (PA 2) As part of its application, Orange Grove Energy filed a list of assessors parcel numbers along with the owner names and addresses for all properties within 5000 feet of the transmission line component of the Orange Grove Project. Also listed were the assessors parcel numbers, owner names, and addresses, for all properties within the 1000 feet of the proposed power plant site. (20 Cal. Code Regs. Chapter 5, Exhibit B.) (PA 20-41) Although other lenders with an interest in

property near to the project site (including Countrywide Home Loans) were included on the service list, Petitioner's name was omitted. (PA 20-41) Following submission of Orange Grove Energy's application, CEC staff was required to notify those persons or entities listed on the service list of the proposed project proceedings. Because Petitioner was not listed on the service list, it was never provided with notice of the proceedings. (PA 49)

When Petitioner became aware of the December 19, 2008, evidentiary hearing on the Orange Grove Project AFC, Petitioner took immediate steps to enter the proceedings as an intervening party, and retained counsel to review and comment on the Commission staff's analysis of the Orange Grove Project, and file a Petition for Intervention in the proceedings. Petitioner's Petition was filed three business days later, on December 16, 2008. (PA 79) Petitioner's comments on the Commission staff's analysis of the project was filed the following day, on December 18, 2008. (PA 83-98) At the evidentiary hearing on December 19, 2008, the CEC denied Petitioner's Petition for Intervention on the grounds that pursuant to CEC Regulations, it should have been filed before December 1, 2008. (PA 102-107)

The CEC's failure to provide notice to Petitioner constitutes prejudicial error, as it deprived Petitioner, its partners, and the CEC of the benefit of Petitioner's full participation in the power plant siting process.

**2. The CEC was required to provide Petitioner with notice of the Orange Grove Project Proceedings**

CEC regulations require an applicant seeking certification of a power plant siting to provide a listing of property owners and APNs that are in close proximity of a proposed project site. (20 Cal. Code Regs. Chapter 5, Exhibit B.) CEC Regulations further require the CEC to hold one or more informational presentations and site visits in the county or counties where the project will be located, and to mail notice of these presentations

to all owners of land adjacent to the proposed site within 45 days of acceptance of a power plant siting application. (20 Cal Code Regs § 1709.7.)

In addition to the above notice requirements, as soon as practicable, and no later than ten days after an application for certification is determined to be complete by CEC staff, the CEC is required to:

1. Publish of a summary of the application in a newspaper of general circulation in each county where a transmission corridor zone is proposed;
2. Notify all property owners who are within or adjacent to a proposed transmission corridor zone;
3. Publish the application on the commission internet web site; and
4. Notify members of the public, including landowners notified under subsection (2), that the application is available on the commission's web site.

(20 Cal Code Regs § 2324(a).)

Notice pursuant to this requirement must, among other things, include a summary of the application, and a brief description of the Commission's review process, including the role of the assigned committee. (20 Cal Code Regs § 2324(a).)

Petitioner was never given notice of the Orange Grove Project AFC proceedings. Moreover, Petitioner was not informed about any of informational presentations held by the CEC on the Orange Grove Project, and was not given notice of the proceedings in a newspaper or by any means directing Petitioner to the CEC website, as required by CEC regulations. (20 Cal Code Regs § 2324(a).) As a result of this failure to "regularly pursue its authority," Petitioner did not receive notice of the Orange Grove Project proceedings until after December 11, 2008. This

was ten (10) days after the deadline for obtaining Intervenor status in the project approval proceedings. When Petitioner requested to be named an Intervenor, the CEC denied Petitioner's request.

The CEC's failure to provide notice to Petitioner violated Petitioner's due process rights. Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest. (See e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601, 605-606; *Goss v. Lopez* (1975) 419 U.S. 565, 572-576; *Board of Regents v. Roth* (1972) 408 U.S. 564, 576-577; *Boddie v. Connecticut* (1971) 401 U.S. 371, 379; *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337, 339; *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 206-207; *Beaudreau v. Superior Court* (1975) 14 Cal.3d 448, 458; *Randone v. Appellate Department* (1971) 5 Cal.3d 536, 541.)

Determination of the appropriate form of procedural due process requires evaluation of all the circumstances and accommodation of competing interests, in which an individual's right to fairness must be respected. (*Rogal v. American Broadcasting Companies, Inc.* (3<sup>rd</sup> Cir., 1996) 74 F.3d 40, 24.) Essential to this analysis is whether the petitioner lost life, liberty, or property; and, if so, was the petitioner provided with the minimum measure of procedural protection warranted under the circumstances? (*Brown v. Hot, Sexy and Safer Productions, Inc.*, (1st Cir. 1995) 68 F.3d 525 [cert. denied by, 116 S. Ct. 1044, 134 L. Ed. 2d 191 (U.S. 1996)]; *Mallette v. Arlington County Employees' Supplemental Retirement System II*, (4th Cir. 1996) 91 F.3d 630; *Farthing v. City of Shawnee, Kansas* (10th Cir. 1994) 39 F.3d 1131.)

In the land use approval setting, this Court has held that "whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the

affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs.” (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 616.) The case involved a subdivision approval in Ventura County. The County approved a property owner’s tentative map without giving direct notice to adjoining property owners. Although the County provided general notice of the proceedings, and an opportunity to be heard through the CEQA process. The Court held that this was insufficient. While declining to describe a specific formula a specific detailing the nature, content, and timing of the requisite notice, the Court held further that land use decisions that those persons affected by quasi-adjudicatory land use decisions are “constitutionally entitled to notice and an opportunity to be heard prior to the rendition of final decisions.” (*Id.*, at 617.)

Petitioner has a substantial interest in property adjoining the Orange Grove Project site. That interest will be severely compromised if the Orange Grove Project is constructed. By failing to notify Petitioner of the Orange Grove Project proceedings, and denying Petitioner the opportunity to participate in the proceedings as an intervening party, the CEC failed to “regularly pursue its authority” and denied Petitioner its right to procedural due process under the California and United States Constitutions.

## V. CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the Court grant Petitioner’s Petition for Writ of Mandate.

Respectfully submitted,

Dated: May 8, 2009

BEST BEST & KRIEGER LLP

By:



Cindy Day-Wilson (Bar No. 135045)

Melissa Woo (Bar No. 192056)

G. Andre Monette (Bar No. 248245)

Attorneys for Petitioner

DFI Funding, Inc.

**CERTIFICATE OF WORD COUNT**  
**PURSUANT TO RULE 8.204(c)(1)**

Pursuant to California Rule of Court 8.204(c)(1), counsel for Petitioners hereby certifies that the number of words contained in this **PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF, REQUEST FOR STAY; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS (CEQA)**, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 9,240 words as calculated using the word count feature of the computer program used to prepare the brief.

  
\_\_\_\_\_  
San Barajas

PROOF OF SERVICE BY HAND

I declare as follows:

1. I am over the age of 18 and not a party to the within cause. I am employed by Best Best & Krieger LLP in the County of San Diego, State of California. My business address is 655 West Broadway, San Diego, CA 92101.

2. On May 8, 2009, I served a true copy of the attached documents entitled

**PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS and PETITIONER'S APPENDIX**

in addressed, sealed envelopes, clearly labeled to identify the persons being served at the addresses shown below and causing the envelope to be personally delivered to the offices of the addressee.

**CALIFORNIA ENERGY COMMISSION**  
1516 Ninth Street, MS-15  
Sacramento, CA 95814-5512

**ORANGE GROVE ENERGY, L.P.**  
California Service Company which will do business in California as CSC –  
Lawyers Incorporating Service  
2730 Gateway Oaks Drive, Suite 100  
Sacramento, CA 95833

**J-Power USA Development Co., LTD.**  
California Service Company which will do business in California as CSC –  
Lawyers Incorporating Service  
2730 Gateway Oaks Drive, Suite 100  
Sacramento, CA 95833

Case No: \_\_\_\_\_

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

---

DFI Funding, Inc.,

Petitioner

v.

California Energy Commission,

Respondent

and

Orange Grove Energy, L.P. and J-Power USA Development Co., LTD,

Real Parties In Interest.

---

**PETITIONER'S APPENDIX**

**VOL. I OF I**

**PA 1 – PA 163**

---

BEST BEST & KRIEGER LLP  
Cyndy Day-Wilson (Bar No. 135045)  
Melissa Woo (Bar No. 192056)  
Andre Monette (Bar No. 248245)  
655 West Broadway, 15th Floor  
San Diego, CA 92101  
Phone: (619) 525-1300  
Fax: (619) 233-6118

**CHRONOLOGICAL INDEX**

<b>VOL.</b>	<b>TAB</b>	<b>PAGE</b>	<b>DATE</b>	<b>DOCUMENT</b>
I	1.	PA 1	6/16/08	ORANGE GROVE PROJECT APPLICATION FOR CERTIFICATION
I	2.	PA 43	6/26/08	NOTICE OF INFORMATIONAL HEARING ISSUES IDENTIFIED AND SCHEDULING CONFERENCE AND COMMITTEE SCHEDULING ORDER
I	3.	PA 49	7/08	NOTICE OF RECEIPT OF APPLICATION FOR CERTIFICATION
I	4.	PA 54	11/6/08	STAFF ASSESSMENT OF THE ORANGE GROVE PROJECT
I	5.	PA 64	11/6/08	NOTICE OF PREHEARING CONFERENCE AND NOTICE OF EVIDENTIARY HEARING
I	6.	PA 71	11/20/08	NOTICE OF STAFF ASSESSMENT WORKSHOP FOR ORANGE GROVE PROJECT
I	7.	PA 74	11/27/08	ARCHIE McPHEE COMMENT LETTER
I	8.	PA 79	12/16/08	DFI FUNDING PETITION FOR INTERVENTION
I	9.	PA 83	12/18/08	DFI FUNDING COMMENT LETTER
I	10.	PA 102	12/19/08	TRANSCRIPT OF EVIDENTIARY HEARING
I	11.	PA 109	12/31/08	DFI FUNDING'S APPEAL OF DENIAL OF PETITION FOR INTERVENTION
I	12.	PA 112	1/8/09	PROCEDURAL ORDER ON DFI FUNDING, INC.'S APPEAL OF DENIAL OF PETITION FOR INTERVENTION
I	13.	PA 116	1/28/09	DOCKET re ORDER DENYING DFI FUNDING, INC.'S APPEAL OF DENIAL OF PETITION FOR INTERVENTION

**CHRONOLOGICAL INDEX**

<b>VOL.</b>	<b>TAB</b>	<b>PAGE</b>	<b>DATE</b>	<b>DOCUMENT</b>
I	14.	PA 119	4/14/09	FINAL COMMISSION DECISION ON THE ORANGE GROVE ENERGY POWER PLANT PROJECT APPLICATION FOR CERTIFICATION

**ALPHABETICAL INDEX**

<b>VOL.</b>	<b>TAB</b>	<b>PAGE</b>	<b>DATE</b>	<b>DOCUMENT</b>
I	7.	PA 74	11/27/08	ARCHIE McPHEE COMMENT LETTER
I	9.	PA 83	12/18/08	DFI FUNDING COMMENT LETTER
I	8.	PA 79	12/16/08	DFI FUNDING PETITION FOR INTERVENTION
I	11.	PA 109	12/31/08	DFI FUNDING'S APPEAL OF DENIAL OF PETITION FOR INTERVENTION
I	13.	PA 116	1/28/09	DOCKET re ORDER DENYING DFI FUNDING, INC.'S APPEAL OF DENIAL OF PETITION FOR INTERVENTION
I	14.	PA 119	4/14/09	FINAL COMMISSION DECISION ON THE ORANGE GROVE ENERGY POWER PLANT PROJECT APPLICATION FOR CERTIFICATION
I	2.	PA 43	6/26/08	NOTICE OF INFORMATIONAL HEARING ISSUES IDENTIFIED AND SCHEDULING CONFERENCE AND COMMITTEE SCHEDULING ORDER
I	5.	PA 64	11/6/08	NOTICE OF PREHEARING CONFERENCE AND NOTICE OF EVIDENTIARY HEARING
I	3.	PA 49	7/08	NOTICE OF RECEIPT OF APPLICATION FOR CERTIFICATION

I	6.	PA 71	11/20/08	NOTICE OF STAFF ASSESSMENT WORKSHOP FOR ORANGE GROVE PROJECT
I	1.	PA 1	6/16/08	ORANGE GROVE PROJECT APPLICATION FOR CERTIFICATION
I	12.	PA 112	1/8/09	PROCEDURAL ORDER ON DFI FUNDING, INC.'S APPEAL OF DENIAL OF PETITION FOR INTERVENTION
I	4.	PA 54	11/6/08	STAFF ASSESSMENT OF THE ORANGE GROVE PROJECT
I	10.	PA 102	12/19/08	TRANSCRIPT OF EVIDENTIARY HEARING



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA  
1516 NINTH STREET, SACRAMENTO, CA 95814  
1-800-822-6228 – WWW.ENERGY.CA.GOV**

**APPLICATION FOR CERTIFICATION  
ORANGE GROVE POWER  
PLANT PROJECT**

**DOCKET No. 08-AFC -4  
PROOF OF SERVICE  
(Revised 2/17/09)**

**APPLICANT**

Stephen Thome  
J-Power USA Development  
1900 East Golf Road,  
Ste. 1030  
Schaumburg, IL 60173  
[sthome@jpowerusa.com](mailto:sthome@jpowerusa.com)

Mike Dubois  
J-Power USA Development  
1900 East Golf Road,  
Ste. 1030  
Schaumburg, IL 60173  
[mdubois@jpowerusa.com](mailto:mdubois@jpowerusa.com)

**APPLICANT'S CONSULTANT**

Joe Stenger, PG. REA  
TRC  
2666 Rodman Drive  
Los Osos CA 93402  
[jstenger@trcsolutions.com](mailto:jstenger@trcsolutions.com)

**COUNSEL FOR APPLICANT**

Jane Luckhardt  
Downey Brand, LLP  
621 Capitol Mall, 18<sup>th</sup> Floor  
Sacramento, CA 95814  
[jluckhardt@downeybrand.com](mailto:jluckhardt@downeybrand.com)

Wayne Song  
Morgan, Lewis  
& Bockius LLP  
300 S Grand Avenue,  
22<sup>nd</sup> Floor  
Los Angeles, CA 90071  
[wsong@morganlewis.com](mailto:wsong@morganlewis.com)

**INTERESTED AGENCIES**

California ISO  
[e-recipient@caiso.com](mailto:e-recipient@caiso.com)

Steve Taylor  
San Diego Gas & Electric  
8306 Century Park Court  
San Diego, CA 92123  
[srtaylor@semprautilities.com](mailto:srtaylor@semprautilities.com)

**INTERVENORS**

Anthony J. Arand  
219 Rancho Bonito  
Fallbrook, CA 92028  
[tony@envirepel.com](mailto:tony@envirepel.com)

Alliance for a Cleaner Tomorrow  
(ACT)  
c/o Arthur S. Moreau,  
Klinedinst, PC  
501 West Broadway,  
Ste. 600  
San Diego, CA 92101  
[amoreau@klinedinstlaw.com](mailto:amoreau@klinedinstlaw.com)

Archie D. McPhee  
40482 Gavilan  
Mountain Road  
Fallbrook, CA 92028  
[archied1@earthlink.net](mailto:archied1@earthlink.net)

**ENERGY COMMISSION**

JAMES D. BOYD  
Vice Chairman and  
Presiding Member  
[jboyd@energy.state.ca.us](mailto:jboyd@energy.state.ca.us)

ARTHUR ROSENFELD  
Commissioner and Associate  
Member  
[pflint@energy.state.ca.us](mailto:pflint@energy.state.ca.us)

Kenneth Celli  
Hearing Officer  
[kcelli@energy.state.ca.us](mailto:kcelli@energy.state.ca.us)

Felicia Miller  
Project Manager  
[fmiller@energy.state.ca.us](mailto:fmiller@energy.state.ca.us)

Jared Babula  
Staff Counsel  
[jbabula@energy.state.ca.us](mailto:jbabula@energy.state.ca.us)

Public Adviser's Office  
[publicadviser@energy.state.ca.us](mailto:publicadviser@energy.state.ca.us)

**DECLARATION OF SERVICE**

I, April Albright, declare that on May 12, 2009, I served and filed copies of the attached DFI Funding, Inc's Petition for Writ of Mandate Filed with the Supreme Court of California. 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/orangegrovepeaker](http://www.energy.ca.gov/sitingcases/orangegrovepeaker)]**. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, 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 or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

**AND**

**FOR FILING WITH THE ENERGY COMMISSION:**

- sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

**OR**

- depositing in the mail an original and 12 paper copies, as follows:

**CALIFORNIA ENERGY COMMISSION**

Attn: Docket No. 08-AFC-4  
1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512

[docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)

I declare under penalty of perjury that the foregoing is true and correct.

Original signed by \_\_\_\_\_  
**April Albright**