

**DOCKET**

**08-AFC-13**

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**Docket No. 08-AFC-13**

Mr. Anthony Eggert  
Commissioner and Presiding Member  
Calico Solar AFC Committee

RE: Calico Solar Power Project – Public Comments in response to the Presiding Member’s Proposed Decision under Docket No. 08-AFC-13

The California Energy Commission’s (CEC) preliminary approval of the Calico Solar power project should be rescinded in favor of a reduced layout, further study, and a final decision should be issued only after the Federal government conducts a proper programmatic Environmental Impact Statement (EIS) for its altered policy toward review and approval of utility-scale solar projects on Bureau of Land Management (BLM) land. A copy of these comments will be provided to the BLM Barstow field office. The following comments regarding the CEC’s proposed approval of the Calico Solar power project center on 3 core concerns:

**Site Layout:** The project layout approved in the Presiding Member’s Proposed Decision (PMPD) impedes upon higher quality desert tortoise habitat contrary to the stated intent of the CEC to avoid this habitat in a revised layout. The CEC should not approve “scenario 5.5,” and the final layout should not impede upon the higher quality desert tortoise habitat during any phase of the project.

**Impacts of Noise on Wildlife:** The CEC staff assessment and BLM EIS did not consider or assess the potential impact of the Calico Solar projects noise levels on birds. A study published in Current Biology found that noise levels from the operation of natural gas wells in New Mexico drove away certain bird species. The high noise levels of SunCatcher operation are likely to have a similar effect in the vicinity of the Calico Solar project that has not yet been assessed. The EIS and CEC assessments only considered the effects of noise on desert tortoise.

**Failure of Federal Government to Fulfill NEPA Obligations:** The Calico Solar power project (project) benefitted from a larger Federal program to promote, site, and fund non-hydropower renewable energy projects on Federal land under the Energy Policy Act of 2005 and the Department of Interior Secretarial Order number 3285. The Department of the Interior, recognizing the potential for cumulative impacts of a series of connected actions that would result from this policy change, originally initiated a Programmatic Environmental Impact Statement that has not yet been completed. The Federal government instead chose to take action on a smaller scale in the State of California—foregoing NEPA obligations originally identified in the larger Programmatic EIS—and committed itself to a series of Federal actions that would otherwise be interdependent parts of the Programmatic EIS. The Department of Interior has ignored the Programmatic EIS in favor of a segmented approach that expedited projects on a case-by-case basis in the California Desert District. California became party to this Federal action according

to a Memorandum of Understanding (MOU) signed by Secretary of the Interior Ken Salazar and Governor Arnold Schwarzenegger, which seeks to ensure the Federal and state permitting of renewable energy projects by December 1, 2010, pursuant to the Order and Act identified above. If the project benefited from a segmented Federal action absent proper NEPA review, the application for certification would not be in compliance with the law.

### **Site Layout:**

The CEC recognized on September 3, 2010 that the original layout of the Calico Solar power project could not be approved since it would result in impacts on high quality desert tortoise and bighorn sheep habitat that would be lost due to the construction *and operation* of the project. (Please see "Committee Order Directing Further Review of Reduced Footprint Alternatives and Notice of Committee Conference, Docket Log number 58275) The CEC welcomed a revised layout that excluded this higher quality habitat located north of the Phase 1 boundary, and generally recognized as habitat requiring 5:1 mitigation according to agency recommendations.

Despite this recognition, the CEC PMPD approves Tessera Solar LLC's (applicant) "scenario 5.5", which includes 369 acres of the highest quality habitat (requiring 5:1 mitigation). The direct impacts of scenario 5.5 could harass or harm an estimated 22 desert tortoises according to US Fish and Wildlife Service (USFWS) calculations. Scenario 6, which was discarded by the CEC's PMPD, would have only harassed or harmed four desert tortoises according to the same USFWS calculations. The indirect impacts of the project operation and construction will extend even further into this high quality habitat.

The PMPD's Override Findings justify this take of endangered species listed under CESA, as well as the Endangered Species Act, because of overriding economic benefits and progress toward renewable energy goals. However, the CEC failed to conduct an alternative assessment of scenario 6, and how such economic and benefits would differ for a slightly smaller project. According to the applicant, scenario 6 would produce only 60MW less than scenario 5.5. The difference in economic impacts is likely negligible, but the difference in benefits for the less destructive scenario 6 were not disclosed in revised CEC assessments.

USFWS estimates made it clear to CEC that an additional 18 desert tortoises could be lost under scenario 5.5, when compared to scenario 6. The override findings failed to justify this substantially higher take of endangered species, when scenario 6 could have overriding benefits similar to those used to justify scenario 5.5.

The CEC's PMPD in favor of scenario 5.5 should be rescinded and the final decision should not permit construction or operation of the project in the higher quality habitat, in accordance with the CEC's original intent.

### **Impacts of Noise on Wildlife:**

The CEC staff assessments and BLM EIS considered the impact of increased noise levels from the construction and operation of the project on desert tortoises, but failed to thoroughly assess the potential impact of higher noise levels on birds. Special status birds deemed present in the vicinity of the project include Golden Eagle, Western burrowing owl, LeConte's Thrasher, Prairie Falcon, Loggerhead shrike, and Bendire's thrasher.

According to a study conducted by Clinton Francis, Catherine P. Ortega, and Alexander Cruz published in *Current Biology* (Current Biology, 19, 1-5, August 25, 2009), the operation of natural gas wells in New Mexico had an adverse impact on some bird species and altered interaction among nearby species. Given that the project operation will generate noise from 63-70 dBA, and an increase of noise by 20 dBA reaching further into high quality habitat north of the project boundary, according to the BLM EIS, the project could have significant impacts on special status birds.

The CEC and BLM should consider this impact before a final decision is granted for the Calico Solar power project, and the project's layout should be altered appropriately in order to reduce the impact of noise, or mitigation requirements should be included to compensate for the additional habitat loss.

### **Failure of Federal Government to Fulfill NEPA Obligations:**

The Federal government prematurely supplemented and altered policy within the Department of the Interior—originally intended for review under the Solar Energy Development Programmatic EIS (Programmatic EIS)—that benefitted the Calico Solar power project. By establishing the “Fast -Track” permitting list, the joint MOU with the State of California signed in October 2009, and the Desert Renewable Energy Conservation Plan (DRECP), the Department of the Interior began to segment its responsibilities identified in the Programmatic EIS to facilitate expedited approval of solar power projects in the California Desert District without NEPA review of its modified policies. The result could be several renewable energy projects being permitted through these Federal actions in California and a mitigation strategy adopted through the DRECP.

The Programmatic EIS was originally established to assess the impact of the Federal government's program to meet objectives laid out in the Energy Policy Act of 2005 and seconded by the Secretary's Order. According to the Programmatic EIS website (<http://solareis.anl.gov/eis/why/index.cfm>), Federal agencies determined that:

*“...the establishment of specific agency-wide solar energy programs and additional related policy constitute major Federal actions as defined by the NEPA and, thus, they*

*have decided to jointly prepare a programmatic environmental impact statement (PEIS)."*

*"Fast-Track"*

The Calico Solar power project is listed by the BLM as a recognized "Fast-Track" project, according to the BLM's website, and as recognized during CEC evidentiary hearings. Cooperation between the Department of the Interior (DOI) and California Energy Commission to facilitate the permitting process of "fast-track" projects was codified in an MOU signed by Governor Schwarzenegger on October 12, 2009. This MOU was an extension of the efforts begun by Secretary of the Interior Ken Salazar in his Secretarial Order number 3285 (Secretary's Order), which was in turn pursuant to section 211 of the Energy Policy Act of 2005.

The Secretary's Order and the Secretary's joint MOU with the State of California in order to expedite renewable energy projects resulted in the "Fast-Track" list guiding BLM's activities.

According to the Secretary's Order, which was part of the rationale for establishing the Programmatic EIS:

*"Policy. Encouraging the production, development, and delivery of renewable energy is one of the Department's highest priorities. Agencies within the Department will work collaboratively with each other, and with other Federal agencies, departments, states, local communities, and private landowners to encourage the timeline and responsible development of renewable energy and associated transmission while protecting and enhancing the Nation's water, wildlife, and other natural resources."*

Resulting from the Secretary's Order and the joint MOU, the BLM's "Fast-Track" list constitutes a change in Department of the Interior policy pursuant to policy objectives intended to be covered under the Programmatic EIS.

*Solar Energy Study Zones:*

Another aspect of the Programmatic EIS was the proposed establishment of "solar energy study zones" in which solar energy projects could be encouraged under proposed Federal management strategies also under review in the Programmatic EIS. The Calico Solar power project would be constructed and operated at least partially within the Pisgah solar energy study zone identified in the Programmatic EIS, according to maps available on the Programmatic EIS website.

Exemplifying the Federal government's segmentation of action initially identified under the Programmatic EIS, the joint MOU signed by the Secretary of the Interior and the Governor specifically ordered Federal and State agencies to:

*"Place a high priority on processing applications for solar development in any*

*areas ultimately identified as solar energy zones through the Solar Energy Programmatic Environmental Impact Statement (Solar PEIS) and renewable energy zones identified in the DRECP and in the Renewable Energy Transmission Initiative (RETI)."*

The premature Federal action to prioritize development in the solar energy study zones before the completion of the Programmatic EIS appears to constitute segmentation of the government's NEPA requirements.

*Mitigation Strategies:*

The Programmatic EIS had broader objectives for actions that have been prematurely incorporated in the BLM's review of the Calico Solar power project.

According to a BLM press release:

*"The joint PEIS will also evaluate a number of alternative management strategies to determine which presents the best management approach for the agencies to adopt in terms of mitigating potential impacts and facilitating solar energy development while carrying out their respective missions. The measures adopted as a result of this PEIS will provide consistency and certainty for solar energy development and will help expedite environmental analysis for site-specific projects in the future."*

According to the Programmatic EIS website:

*"The **proposed action in this PEIS** is for the Agencies to develop and implement agency-specific programs that would facilitate environmentally responsible utility-scale solar energy development **by establishing environmental policies and mitigation strategies related to solar energy development** in six western states (Arizona, California, Colorado, New Mexico, Nevada, and Utah)."*

*"**Through this PEIS, the BLM is considering whether** to establish a Bureau-wide solar energy development program **to supplement or replace the existing policy, and to amend land use plans in the six-state study area to adopt the new program.**"*

The Federal government and the State of California recognized the cumulative impacts that the Federal action of a streamlined permitting process ("Fast-Track") will have on California's deserts, and are cooperating to implement a mitigation strategy under the "Desert Renewable Energy Conservation Plan (DRECP). This Plan appears to mirror the proposed actions in the Programmatic EIS, which would modify existing BLM policies and develop a mitigation strategy to address impacts of renewable energy projects.

**As a result of the Agency specific "fast-track" list, the establishment of the Federal-State DRECP, and the Secretary's joint MOU with the State of**

**California, BLM's existing policy was in fact modified absent the PEIS intended to address such Federal action.**

The State of California and the BLM proceeded with the approval of various solar power projects identified by Federal agencies pursuant to the Energy Policy Act of 2005, the Secretary's Order and the joint MOU for "fast-track" approval without finishing a Programmatic EIS.

Even though a Programmatic EIS would not exclude the need for a site-specific NEPA review for the Calico Solar project, the Calico Solar project benefitted from the Federal actions that have not yet been properly reviewed under NEPA. The Federal actions constitute a program intended to affect multiple renewable energy projects on a scale smaller than the initial Programmatic EIS, in that they address projects only in California. **The Federal actions, however, are interdependent parts of the larger Federal action to organize and promote increased renewable energy development on public land under the Secretary's Order that initially necessitated a programmatic EIS.**

It appears that the Federal government's need to meet NEPA requirements resulting from these major Federal actions has not been met. Instead, the Federal government appears to have abandoned the requirement for a Programmatic EIS in favor of a case-by-case NEPA process that is designed to facilitate expedited approval of multiple projects. The Federal government's modified approach to these projects remains pursuant to the same Federal policy (Energy Policy Act of 2005, and Secretary's Order) that necessitated the abandoned Programmatic EIS.

The CEC should consult with the Department of the Interior to consider whether or not the project is in compliance with the law before final approval. Further CEC review of other solar projects on the "fast-track" list should be delayed pending the completion of the Programmatic EIS or similar NEPA review of the "Fast-Track" list, the MOU, and the Secretary's Order as it affects California Desert District.

Sincerely,

Shaun Gonzales