

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
CALICO SOLAR PROJECT) Docket No. 08-AFC-013C
AMENDMENT) **STAFF'S REPLY BRIEF**

I. INTRODUCTION

The Committee for the Calico Solar Amendment (Committee), as part of its May 2, 2011 Scheduling, Briefing, and Procedures Order, set a briefing schedule for several legal issues that included a deadline of June 3, 2011 for the filing of reply briefs. This is the California Energy Commission (Energy Commission) Staff's reply brief responding to briefs filed by other parties on May 23, 2011. Staff does not address all the issues originally scheduled for briefing in this document, but instead focuses on three issues, including a factual error, that it believes warrant further clarification or response. In matters not specifically addressed here, Staff continues to rely on the arguments that it submitted in Staff's Response to Committee Briefing Order filed May 23, 2011.

II. ANALYSIS

- A. The Petition to Amend is properly categorized as a project amendment rather than a new project under CEQA, and environmental review is properly governed by CEQA Guidelines section 15162.**

Intervener BNSF Railway Co. ("BNSF") argues in its Brief Regarding Jurisdiction and Baseline ("BNSF Brief") that the Petition to Amend must be treated as a new project under the California Environmental Quality Act, Public Resources Code section 21000 et seq. ("CEQA"), necessitating a completely new analysis of all environmental impacts

under CEQA.(BNSF Brief at pp. 12-17.) BNSF stands alone in arguing that the Petition to Amend is a new project that requires analysis anew of all environmental impacts. Despite their divergent views on other issues, the other parties that briefed the issue of CEQA baseline appear to all agree that environmental review of the Petition to Amend should be governed by CEQA Guidelines section 15162, which provides for a subsequent EIR (Environmental Impact Report) that examines certain incremental impacts from project revisions when an environmental document has already been certified.¹

BNSF's arguments as to why the Petition to Amend must be handled as a new project are not convincing. First, it argues that the Supreme Court's decision in *Communities For A Better Environment v. South Coast Air Quality District* (2010) 48 Cal.4th 310 ("*CEB*") prevents an agency from using hypothetical conditions that assume existing permits are fully utilized as a baseline for CEQA Analysis. (BNSF Brief at pp. 12-13.) But this argument overlooks the fact that the *CEB* opinion interprets the proper baseline for determining significance of impacts from a new project rather than the amendment of a project that was already reviewed under CEQA. In *CEB*, the Court quickly rejected an argument that the project was in fact a modification of an existing project by noting that neither the refinery operator that applied for a new permit nor the

¹ See Sierra Club Motion to Dismiss the Petition to Amend at p. 8 (arguing that the Department of Fish and Game should assume the role of lead agency and prepare a subsequent EIR pursuant to CEQA Guidelines, § 15162); Opening Brief of California Unions for Reliable Energy Regarding California Energy Commission Jurisdiction and Baseline for Environmental Review for Calico Solar Project Amendment at pp. 9-12; Calico Solar, LLC's Brief on the Baseline of Environmental Conditions and the Environmental Analysis Required by the Petition to Amend at pp. 2-8; and Staff's Response to Committee Briefing Order at pp. 8-10 (arguing that CEQA Guidelines, § 15162 should guide Staff and Commission analysis of the amendment because CEQA's substantive requirements apply to reviews conducted pursuant to a certified regulatory program).

air district had issued the new permit treated the new equipment and refining processes that were being approved as a project modification. (*CEB* at p. 326.) With the Petition to Amend, Calico Solar, LLC specifically seeks an amendment to revise an approved project in a manner that may result in environmental impacts that are in many respects similar or identical to impacts previously analyzed. This is precisely the situation addressed by Public Resources Code section 21166 and CEQA Guidelines section 15162 that require the preparation of a subsequent EIR or its equivalent.

BNSF also argues that because the use of photovoltaic technology was included as a project alternative in the analysis for the approved project, it is by definition a different project than the approved project. (BNSF Brief at p. 14.) Even if the photovoltaic alternative discussed previously were identical to the amended project proposed by Calico Solar, LLC, its inclusion in the alternatives analysis would not force the Energy Commission to treat the Petition to Amend as a new project for CEQA purposes. Courts have upheld the use of subsequent EIRs and subsequent negative declarations for amendments that involved moving approved projects to entirely different locations (*see Benton v. Board of Supervisors* (1991) 226 Cal.App. 3d 1467; *Temecula Band of Luiseno Mission Indians v. Rancho Cal. Water Dist.* (1996) 43 Cal.App.4th 425). Construction of a proposed project at a different location is a well-recognized project alternative for purposes of CEQA alternatives analysis. (CEQA Guidelines, § 15126.6, subdiv. (a); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566.) Therefore, the fact that a project amendment was studied or could have been studied as an alternative to the original project does not mean that the approving agency must regard it as an entirely new project under CEQA, or that use of a subsequent EIR is prohibited.

B. New information and plans developed on drainage, grading, and glint and glare impacts should be analyzed as part of the amendment review process rather than handled as compliance matters under the Final Decision from December 1, 2010.

At Staff's request, Calico Solar, LLC is preparing studies and plans related to drainage and grading and glint and glare impacts associated with the project as revised by the Petition to Amend. (Daniel J. O'Shea letter to Craig Hoffman dated May 25, 2011.) The project owner describes these plans and studies, along with revisions to the approved Desert Tortoise Translocation Plan, as compliance measures for the approved project, which Calico Solar, LLC says requires only that the Energy Commission determine whether the plans and studies meet the performance standards in the Final Decision. (Calico Solar, LLC's Brief on the Baseline of Environmental Conditions and the Environmental Analysis Required by the Petition to Amend dated May 23, 2011 ("Calico Baseline Brief") at pp. 7-8.)

Staff disagrees with this characterization of the drainage and grading plans and glint and glare studies. The studies and planning that are underway in these fields are analyzing impacts of the project as described in the Petition to Amend, and not the approved project. Therefore, Staff believes the Energy Commission will need to evaluate information that is developed from those studies and plans as it assesses the revised project pursuant to its site certification authority in the Warren-Alquist Act, Public Resources Code section 25000 et seq., and CEQA, and not limit its review to a determination whether the new plans and studies are consistent with the performance standards established for the original project. For CEQA purposes, the Energy Commission's evaluation of new information will focus primarily on whether the proposed revisions to the project will create "new significant environmental effects or a

substantial increase in the severity of previously identified significant effects” and whether there is new information indicating, inter alia, that the project will have significant effects not discussed in the previous environmental document, or that significant effects previously examined will be substantially more severe than previously shown.² (CEQA Guidelines, § 15162(a); *Benton, supra*, at pp. 1482-1483.)

Staff believes Calico Solar, LLC’s argument may have merit when it comes to expected revisions to the Desert Tortoise Translocation Plan. As described in Staff’s previous brief, changes in the project’s Desert Tortoise Translocation Plan do not appear to be related to the Petition to Amend, based on information currently available to Staff. If proposed project changes do not increase or decrease the need to disease test, capture, or move tortoises, revisions to the Desert Tortoise Translocation Plan may not as a matter of law require further analysis as part of this amendment proceeding.

Finally, Staff cannot agree at this point in the proceeding with Calico Solar, LLC’s statement that because the overall footprint of the project is unchanged, project impacts to biological resources “cannot increase and, therefore, no additional analysis should be required.” (Calico Baseline Brief at p. 6.) As described more fully in Staff’s previous brief, Staff will need to receive responses to all of its data requests and additional time to evaluate the proposed project changes before it can say whether the Petition to Amend will introduce additional or more severe impacts that require fuller analysis.

² The summary provided here is not a complete list of the criteria that must be evaluated as part of a subsequent EIR or the trigger for when new information creates an obligation to conduct further analysis. The summary represents those criteria that Staff believes are most likely to be a factor as it analyzes the Petition to Amend.

C. The Petition to Amend mischaracterizes the Final Decision as requiring the applicant to obtain two permits from the Department of Fish and Game.

Intervener Sierra Club states in its Motion to Dismiss the Petition to Amend (“Motion”) that the Petition to Amend concluded “the Incidental Take Permit and the Lake and Streambed Alteration Agreement must be revised by CDFG [the Department of Fish and Game] to address the Modified Project’s changes.” (Motion at p. 8 (quoting the Petition to Amend at p. 4.6-3).) While the Motion accurately describes a statement in the Petition to Amend regarding the need to amend the two CDFG permits, the Petition to Amend errs in describing the Commission’s Final Decision as requiring Calico Solar, LLC to obtain the permits. Consistent with the Energy Commission’s exclusive jurisdiction in Public Resources Code section 25500 to certify sites for thermal power plants, the Final Decision incorporated mitigation measures to ensure that substantive requirements of the CDFG regulatory programs were met in lieu of the project owner obtaining CDFG permits. (See, e.g., Final Decision at p. Biological Resources-58.) Simply put, there are no existing or required CDFG permits at this time to amend.

If the Committee determines that the Energy Commission has authority to license the entire amended project, the Commission’s decision on the Petition to Amend would take the place of CDFG permits under Public Resources Code section 25500, just as the Final Decision did last year. If the Committee concludes that it cannot approve the photovoltaic component of the revised project under the Warren-Alquist Act, Calico Solar, LLC would need both an Incidental Take Permit and a Lake or Streambed



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**FOR THE CALICO SOLAR PROJECT
AMENDMENT**

**Docket No. 08-AFC-13C
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(Revised 5/25/2011)**

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DECLARATION OF SERVICE

I, Chester Hong, declare that on June 3, 2011, I served by U.S. mail and filed copies of the attached **Staff's Reply Brief**, dated June 3, 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].

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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.

/s/