

STATE OF CALIFORNIA

**Energy Resources Conservation and
Development Commission**

In the Matter of:

The Application for Certification for the
Calico Solar Project Amendment

Docket No. 08-AFC-13C

**CALICO SOLAR, LLC'S BRIEF ON THE BASELINE OF ENVIRONMENTAL
CONDITIONS AND THE ENVIRONMENTAL ANALYSIS REQUIRED BY THE
PETITION TO AMEND**

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Pursuant to the Committee Scheduling, Briefing, and Procedures Order¹ of May 2, 2011, Calico Solar, LLC (Calico) files its brief addressing the nature of the environmental review that the Commission must undertake in light of the Petition to Amend the Calico Solar Project.

I. BACKGROUND

On December 1, 2010, the Commission approved Calico's application for certification and licensed construction of the Calico Solar Project in San Bernardino County (Approved Project). The Approved Project has a generating capacity of 663.5 megawatts (MW) produced by thermal SunCatchers and includes ancillary facilities such as a main services complex, a substation, a well and water line, and roadways. After the certification, two intervenors challenged the Approved Project and the Commission's environmental

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

review of the Approved Project in the California Supreme Court. The California Supreme Court denied both petitions for review on April 13, 2011.

On March 22, 2011, Calico Solar submitted to the Commission a Petition to Amend the Approved Project that proposes the addition of new technology and a change in phasing (Modified Project). As proposed, the Modified Project would generate 100.5 MW of power using SunCatchers and the remaining 563 MW using single-axis tracker photovoltaic (PV) technology. Additionally, the phasing of the Modified Project would be inverted such that Phase 1 would be developed primarily south of the railroad, necessitating the relocation of the main services complex, the on-site substation, and the waterline. The Modified Project does not change the overall footprint or boundaries of the Approved Project. Given that the overall acreage of the Modified Project and the intensity of development within that acreage remains the same, many of the impacts identified for the Approved Project are unchanged or reduced under the Modified Project.

II. THE BASELINE FOR REVIEWING AND EVALUATING THE PROPOSED AMENDMENT IS THE APPROVED PROJECT

When an agency is evaluating a proposed change to an approved project that has already been reviewed under CEQA, the focus of the agency's environmental analysis is limited to the potential for the proposed *changes* to result in new or potentially more severe environmental impacts. See *Temecula Band of Luiseño Mission Indians v Rancho Cal. Water Dist.*, 43 Cal. App. 4th 425, 437 (1996); *Benton v Board of Supervisors*, 226 Cal. App. 3d 1467, 1477 (1991). In light of the previous environmental review, the "baseline" against which the project's potential impacts are evaluated becomes the previously approved project, and environmental review is constrained to "comparing what [is] already approved to what [is] being proposed." *Benton*, 226 Cal. App. 3d at 1476. It does not

matter in these circumstances whether or not the project that is being amended has been constructed. *Benton*, 226 Cal. App. 3d at 1477.

In *Benton*, the leading case on this issue, a county adopted a negative declaration in connection with land use approvals for a winery. The applicant then applied for a new permit and sought to change the winery's location. Because the county viewed the application for the new permit as an amendment to the existing permit and the county had conducted CEQA review on the existing permit, the Court of Appeal found that it was appropriate for the county to review only the incremental effects of the proposed changes rather than repeating the analysis of the overall impacts of the winery. 226 Cal. App. 3d at 1475-1482. Similarly, in *Temecula*, a water district sought to reroute an approved pipeline that was a component of a larger project. Because the "new project" was "a modification of an earlier one" and the project had already been evaluated pursuant to CEQA, it was appropriate to consider "only the incremental effects of the new project." 43 Cal. App. 4th at 438. In sum, as both of the authoritative treatises on CEQA conclude, where there is an amendment of a project that has already undergone CEQA review, "the baseline for purposes of CEQA is adjusted such that the originally approved project is assumed to exist." Remy, Thomas, Moose, & Manley, *Guide to the California Environmental Quality Act*, at 207 (11th ed. 2006); Kostka & Zischke, *Practice Under the California Environmental Quality Act* § 12.23 (2011) (quoting same).

This is exactly the case here. In certifying the Approved Project, the Commission relied upon the environmental review included in the Staff's Assessments, the Presiding Members' Proposed Decision and the Decision documents as required under CEQA and the Warren-Alquist Act. Pub. Res. Code §§ 21080.5(a), 25519(c); 20 Cal. Code. Regs.

§ 1742.5. The Commission's Decision and environmental review were upheld by the California Supreme Court. In light of this previous environmental review, the baseline for the Modified Project is the Approved Project. The task before the Commission is to evaluate the incremental environmental impacts specific to the proposed changes to the Approved Project, not the Modified Project as a whole.

III. THE COMMISSION SHOULD EVALUATE ONLY PROJECT CHANGES, CHANGED CIRCUMSTANCES AND NEW INFORMATION, NOT THE ENTIRETY OF ITS PRIOR DECISION

Once CEQA review on a project is completed, a lead agency should conduct no further environmental review in the absence of project changes, changed circumstances, or new information that could not have been previously available. Pub. Resources Code § 21166; 14 Cal. Code Reg. § 15162. Under CEQA, project changes, changed circumstances, or new information require additional review *only* if they relate to new potentially significant environmental impacts not previously analyzed, a substantial increase in the level of impact previously analyzed, or if the new information relates to mitigation measures or alternatives not previously analyzed or deemed feasible which could reduce one or more significant impact of the project. *Id.* The statute and the regulations are phrased in prohibitory language: an agency *shall not* require supplemental or subsequent environmental review unless the project changes, changed circumstances or new information exceptions exist. *Id.* The intent behind the statute and the implementing regulations is to avoid repeating the CEQA process once environmental review has been completed. *See San Diego Navy Broadway Complex Coalition v. City of San Diego*, 185 Cal. App. 4th 924, 928 (2010) (“After an initial EIR is certified, CEQA establishes a presumption against additional environmental review.”); *see also Fund for Env't Defense v*

County of Orange, 204 Cal. App. 3d 1538, 1544 (1988); *Long Beach Sav. & Loan Ass'n v Long Beach Redev. Agency*, 188 Cal. App. 3d 249, 265 (1986); *Bowman v City of Petaluma*, 185 Cal. App. 3d 1065, 1073 (1986).

A. The Commission Needs to Evaluate Whether Proposed Project Changes Will Result in Increased Severity of Significant Environmental Impacts.

The proposed amendment involves some substantial changes to the Approved Project and therefore, the Commission must determine whether any of the changes would result in new or more severe environmental impacts as compared to the baseline of the Approved Project. For effects that are the same or less than those associated with the Approved Project, the Commission does not need to conduct substantial analysis or consider whether additional mitigation measures are necessary. *See, e.g., A Local And Regional Monitor (ALARM) v. City of Los Angeles*, 12 Cal. App. 4th 1773, 1800 (1993); *Fund for Env't'l Defense v County of Orange*, 204 Cal. App. 3d at 1552. It will only need to document its conclusion that the project changes do not result in any new or more severe impacts. Because the size and location of the Modified Project is the same as the Approved Project, no new resources will be impacted.

To determine whether the severity of any impacts previously studied in connection with the Approved Project will increase as a result of the Modified Project, the Commission will need to review the information included in Calico's Petition to Amend, information included in the Staff's Assessment to be prepared by the Commission Staff, and any information submitted by intervenors that specifically relates to the proposed incremental changes to the Approved Project. This information must be compared to the analysis included in the Commission's CEQA documents for the Approved Project. Based on this comparison, the Commission will then decide whether the incremental changes result in

increased impacts on a resource by resource basis. For example, when evaluating whether the proposed amendment will increase potentially significant air quality impacts, the Commission will need to evaluate whether the proposed changes would increase the emissions of any criteria pollutant or greenhouse gas during construction or operation of the Approved Project. If emissions of criteria pollutants and greenhouse gases do not increase, the Commission should conclude that the severity of impacts will not increase and no further review of this impact is required. *See* Calico Solar Petition to Amend § 4.2.

Similarly, for most biological resource impacts, the Commission's previous environmental analysis assumed that all biological resources included within the 4,613 acre site would be impacted. *See* Commission Decision, December 1, 2010, Biological Resources at 43, 45, 48-49. The mitigation required by the Commission was based on this conservative determination. Because of the nature of the changes proposed in the Petition to Amend, and because the size and location of the Approved Project's site will not change, these impacts cannot increase and, therefore, no additional analysis should be required. *See* Calico Solar Petition to Amend §4.6.

Based on its analysis completed as part of the Petition to Amend, Calico Solar anticipates that the Commission will conclude that the proposed changes do not result in any new or more severe impacts than those studied under the Approved Project. *See id.* §§ 4.3 (Geological Resources and Hazards); 4.4 (Soils); 4.5 (Water Resources); 4.7 (Cultural Resources and Native American Values); 4.8 (Paleontological Resources); 4.9 (Land Use); 4.10 (Socioeconomics); 4.11 (Traffic and Transportation); 4.12 (Noise and Vibration); 4.13 (Visual Resources); 4.14 (Waste Management); 4.15 (Hazardous Material Management); 4.16 (Public Health and Safety); 4.17 (Worker Safety and Fire Protection); 4.18 (Facility

Design); 4.19 (Power Plant Efficiency); 4.20 (Power Plant Reliability); 4.21 (Transmission System Engineering); 4.22 (Transmission Line Safety and Nuisance); and 4.23 (Cumulative Scenario).

B. There Are No Substantial Changes in the Circumstances Under Which the Approved Project Will Be Undertaken.

Under the Approved Project, 663.5 MW of solar power would be generated on the Project site. Apart from the proposed changes described above, there are no changes in circumstances related to how the Approved Project will be undertaken. Therefore, the Commission does not need to evaluate the whether changed circumstances could result in new or more severe significant environmental impacts.

C. The Commission Needs to Evaluate Whether New Information Developed During Compliance Meets the Approved Project's Performance Standards.

The Commission needs to evaluate whether there is any new information, that “could not have been known” when the Commission licensed the Approved Project, which indicates that there are new potentially significant environmental impacts not previously identified or significant impacts that would increase in severity. 14 Cal. Code Regs § 15162. Staff anticipates that there are three areas where new information, not previously available to the Commission, will be developed prior to consideration of the Modified Project: (1) the Grading and Drainage Plans; (2) the Glint and Glare Study; and (3) the Desert Tortoise Translocation Plan. Staff's Issues Identification Report, April 14, 2011. Each of these studies/plans were contemplated in the Decision licensing the Approved Project and the Decision included performance standards that these studies and plans must meet. As part of the compliance measures required for the Approved Project, Calico is currently developing these studies and plans. The Commission will need to review these

studies and plans to determine whether they meet the required performance standards. If they do, no further analysis should be required.

IV. CONCLUSION

The Commission's review and evaluation of the Modified Project is limited under CEQA to the incremental environmental impacts specific to the proposed changes. The Commission should therefore compare the impacts of the Modified Project to the baseline of the Approved Project and should only evaluate project changes or new information that result in new or more severe impacts. The Commission need not and should not re-open its Decision licensing the Approved Project and its related environmental review, both of which were upheld by the California Supreme Court.

Date: May 23, 2011

Respectfully submitted,



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DECLARATION OF SERVICE

I, Margaret Pavao, declare that on May 23, 2011, I served by U.S. mail and filed copies of the attached Brief on the Baseline of Environmental Conditions and the Environmental Analysis Required by the Petition to Amend, dated, May 23, 2011. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:

[www.energy.ca.gov/sitingcases/calicosolar/compliance/index.html].

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

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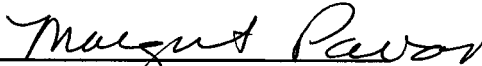
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding


Margaret Pavao
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**FOR THE CALICO SOLAR PROJECT
AMENDMENT**

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

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