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 REPLY BRIEF RE JURISDICTION OF ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION AND THE BASELINE OF ENVIRONMENTAL ANALYSIS REQUIRED BY THE PETITION TO AMEND

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Pursuant to the Committee Scheduling, Briefing, and Procedures Order of May 2, 2011, Calico Solar, LLC (Calico) files this reply brief concerning the Commission's jurisdiction and the baseline for environmental review. This brief also provides a reply to Sierra Club's Motion to Dismiss of May 9, 2011.

Although the specific facts involved are somewhat novel, the central legal issues before the Committee are simple and can be boiled down to:

(1) Does the Commission have exclusive jurisdiction to consider Calico's request to amend the Commission's license to allow for the construction of a 100.5 MW of solar thermal power generating facilities and all related project features?

(2) Must the Commission act as the lead agency in reviewing the amendment that would allow for the construction of a 100.5 MW of solar thermal power generating facility?

(3) Must the Commission consider the whole of the project when conducting its CEQA analysis regardless of the scope of its siting authority?

(4) Is the baseline for the environmental review the approved project?

The law is clear that the answer to each of these questions is irrefutably yes. Therefore, there is no basis for Sierra Club's Motion to Dismiss and this Motion should be rejected.

The question as to whether the Commission has certification authority over the proposed photovoltaic portions of the Modified Project is more complex as it is not specifically addressed in the Warren-Alquist Act. As is discussed in Calico's opening brief and further below, the Warren-Alquist Act does not preclude the Commission's certification of an integrated, hybrid thermal and non-thermal powerplant as claimed by intervenors Sierra Club, BNSF and CURE. A liberal reading of the statute authorizes the Commission to exercise its jurisdiction over hybrid powerplants. Further, exercising such jurisdiction is consistent with and furthers the goals of the Warren-Alquist Act.

I. THE COMMISSION IS THE ONLY AGENCY THAT CAN APPROVE THE 100.5 MW SOLAR THERMAL FACILITY AND ALL RELATED FACILITIES.

In its Petition to Amend, Calico asks the Commission to amend Calico's Approved Project to allow construction of, *inter alia*, a 100.5 MW solar thermal generating facility and related facilities such as a main service complex that includes administrative buildings, maintenance areas, control room and parking lots; roadways; a bridge over the BNSF railroad; transmission lines; water treatment facility; waste water treatment facilities; and an on-site substation. Under the Warren-Alquist Act, Pub. Res. Code §25500, the Commission is the *only* state agency with authority to consider and approve this solar thermal powerplant and related facilities. Therefore, there is no question as to whether the

Commission can authorize the 100.5 solar thermal portion of the Modified Project and all related facilities. Calico is before this Commission not as a matter of choice, but as a matter of necessity.[1]

Sierra Club and BNSF both assert that it is speculative whether SunCatchers will be a part of the Modified Project as proposed in the Petition to Amend and imply that this assertion somehow strips the Commission of its jurisdiction. This is a dramatic and dramatically misleading use of the word "speculative." As stated in the Petition to Amend, Calico is proposing to install 100.5 MW of SunCatcher technology as part of the Modified Project. Stirling Energy Systems has already demonstrated that SunCatcher technology can be commercially deployed. The 1.5 MW Maricopa Solar Plant is currently in commercial operation. The advantages of SunCatcher technology were not affected by the market turbulence that caused Stirling Energy Systems to delay its plans for high volume SunCatcher production. Stirling Energy Systems continues to plan for the large-scale manufacturing of SunCatchers. As Calico recently reported to the BLM:

> Calico has a contractual commitment to Tessera Solar to install SunCatcher technology on Phase 2 of the Calico Solar project, which is expected to begin construction in approximately 2014−15. Stirling Energy Systems (SES), the manufacturer of the SunCatcher technology, reports that it is in discussions with potential strategic investors to support the high volume commercial launch of the SunCatcher, and anticipates that SunCatchers will be commercially available approximately 24 months from the time that a transaction closes. This is consistent with the time frame required for installation on Phase 2 of the Calico Solar project.

[1] Given that Sierra Club views the Commission's procedures under the Warren-Alquist Act to be "chaotic and cumbersome," it is difficult to understand their apparent belief that Calico is somehow attempting to manipulate the Modified Project so that it can be subject to these procedures. (Sierra Club Notice of Protest of May 3, 2011 at 3.)

(Exhibit 1, Letter of May 31, 2011 to Teresa A. Raml, BLM District Manager and Attachment D, May 25, 2011 Letter from Stirling Energy Systems to K Road Power.) Calico remains committed to using SunCatchers technology.[2]

BNSF suggests, without citing anything relevant, that in order for the Commission to consider a Application for Certification or a Petition to Amend, the Commission must make an explicit finding regarding the feasibility of the project's technology. It suggests that this feasibility could be shown through things like a contract for the purchase of the technology to be used at a powerplant prior to the permitting of the powerplant. The Commission's regulations regarding the feasibility of alternatives that BNSF cites contain no such requirement.[3]

II. THE COMMISSION MUST EVALUATE THE ENTIRETY OF THE PETITION TO AMEND AS THE LEAD AGENCY.

Contrary to what Sierra Club suggests, the Commission must act as the lead agency with respect to the evaluation of the Petition to Amend. In its Motion to Dismiss, Sierra Club concedes, as it must, that Calico has proposed to construct a thermal powerplant. (Sierra Club Motion to Dismiss the Petition to Amend at 4, n.1.) The Commission is, therefore, required by the Warren-Alquist Act to act as the lead agency, Pub. Res. Code §

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[2] BNSF assertion that Calico knew as of late September or early October 2010 that SunCatchers would not be commercially available for the proposed Calico Solar Project is not accurate. The insinuation that Calico is not committed to or does not intend to use SunCatchers is blatantly false. As the Commission knows, Calico was sold in late December 2010 and this sale resulted in the need to amend the Approved Project.

[3] The regulations cited by BNSF to support this argument do not speak to the feasibility of the proposed project. For example, 20 Cal. Code Regs. §1741(b)(2) relates to feasible measures needed to ensure compliance with all applicable governmental laws and standards and 20 Cal. Code Regs. §1742(b) addresses the need to consider all feasible mitigation measures. It is not surprising that the regulations do not require consideration of whether a proposed project is feasible given that it is highly unlikely that an applicant would spend the significant resources needed to complete the certification process for an infeasible project.

25519(c), and it is also required by CEQA to evaluate the "whole of the action." 14 Cal. Code Regs. § 15378(a). As CURE notes, the Commission cannot consider the thermal and non-thermal aspects of the project as separate projects, and it cannot be the lead agency and the responsible agency for the same project. 14 Cal. Code Reg. § 15050(a). The Commission therefore must consider the entirety of the Petition to Amend as the lead agency under CEQA. This is true whether or not the Commission has siting authority over the photovoltaic portion of the Modified Project.

Sierra Club's argument that the Department of Fish and Game should be the lead agency is legally unsupportable. While the law is absolutely clear and Sierra Club is wrong, Calico notes that it has never claimed that the Commission should avoid seeking the input of the California Department of Fish and Game as it did in the original siting proceedings.

III. CEQA DOES NOT REQUIRE THE ENVIRONMENTAL REVIEW OF PROJECT AMENDMENTS TO START FROM SCRATCH

Pursuant to Rule 1769(a), the Applicant is seeking to modify an existing approval, not to start from scratch with a new project. 20 Cal. Code Regs. § 1769(a)(1). Therefore, the Commission does not have before it a new project, but rather a modification of a previously approved project. *Temecula Band of Luiseño Mission Indians v. Rancho Cal. Water Dist.*, 43 Cal. App. 4th 425, 437 (1996); *Mani Brothers Real Estate Group v. City of Los Angeles*, 153 Cal. App. 4th 1385, 1401-02 (2007). BNSF makes several exotic arguments that the Commission should consider the Petition to Amend as a new project rather than as a proposal to amend the Approved Project. None of BNSF's arguments have any basis.

BNSF asserts that "the photovoltaic project which is now being proposed as an amendment to the Initial Project was preliminarily analyzed as an alternative to the Initial Project…. Thus, Calico Solar's proposed PV project cannot appropriately be deemed an amendment to the Initial Project." (BNSF Railway Co.'s Brief Regarding Jurisdiction and Baseline, at 14.) BNSF's legal reasoning is conclusory and incorrect. The proposed amendments to the Approved Project were not previously analyzed by the Commission, and if they had been, there would be no need for further CEQA review. The fact that a hypothetical photovoltaic project was excluded from detailed consideration is not at all relevant to determining the level of analysis required for a specific amendment proposal that includes photovoltaic technology. [4]

BNSF argues that the existing site certification for the Approved Project constitutes "hypothetical conditions" that cannot be the baseline. BNSF then proceeds to make inflammatory, incorrect, and highly disputed assertions regarding Calico's alleged non-compliance with the Commission's existing site certification, which BNSF claims somehow affects the type of CEQA review that is now required. BNSF's argument is founded on two errors of law. First, the reason that the existing site certification for the Approved Project constitutes the baseline is simply that the project has *already* been thoroughly reviewed pursuant to CEQA. *San Diego Navy Broadway Complex Coalition v.*

[4] The SA-DEIS raised general concerns about potential grading of land with photovoltaic alternatives, based on the assumption that utility scale solar photovoltaic technology requires ground surface with less than three percent slope. SA-DEIS at B.2-63 to B-2-64. The SA-DEIS concluded that photovoltaic would have "substantial adverse effects similar to those created by the proposed Calico Solar Project," but that the grading required would "result[] in a somewhat more severe effect on biological and cultural resources than the Calico Solar Project." SA-DEIS at B.2-63. Apart from grading, the SA-DEIS noted no other concern regarding photovoltaic technology that would result in greater environmental impacts than the approved project. SA-DEIS at B.2-62 through 64.

City of San Diego, 185 Cal. App. 4th 924, 935 (2010); *Benton v Board of Supervisors*, 226 Cal. App. 3d 1467, 1479 (1991). Because the Approved Project was already reviewed, the baseline for the new environmental review is the Approved Project, which was previously analyzed, and the question that CEQA poses is what remains to be considered as a result of the Petition to Amend. *See Temecula*, 43 Cal. App. 4th at 437 ("When a lead agency is considering whether to prepare an SEIR, it is specifically authorized to limit its consideration of the later project to effects not considered in connection with the earlier project."). This question is answered by Public Resources Code section 21166 and Guideline 15162. *San Diego Navy Broadway Complex Coalition*, 185 Cal. App. 4th at 935. Apparently, BNSF would have the Commission ignore all of the prior environmental review, but this is not an approach that CEQA allows. *Id.* at 928 ("After an initial EIR is certified, CEQA establishes a presumption against additional environmental review.").

Communities for a Better Environment v. SCAQMD, 48 Cal. 4th 310 (2010) is not to the contrary. In *SCAQMD*, ConocoPhillips applied for an entirely new permit and the air district processed the application as a new project. *Id.* at 326. *SCAQMD* did not involve the "modification of a previously analyzed project," which the Supreme Court made clear was dispositive. *Id.* *SCAQMD* and Guideline 15125(a) does not apply in the situation where there is a proposal to modify a previously analyzed project. *Temecula*, 43 Cal. App. 4th at 437. The Petition to Amend is a proposal to modify a previously analyzed project. 20 Cal. Code Regs. § 1769(a)(1).

BNSF's second legal error is its assertion that the presence or absence of Calico's current right to build the Approved Project is somehow determinative of the nature of the environmental review that is now required. Once again, this argument ignores the previous

environmental review and attempts to rewrite CEQA. BNSF's focus on Calico's legal rights as opposed to the scope of what has been reviewed pursuant to CEQA is exactly the type of legal error that the Supreme Court disapproved in *SCAQMD*.

Finally, BNSF makes several assertions about what it believes will be the environmental impacts of the Modified Project. To the extent that BNSF is suggesting that the proposed changes render the Modified Project a new project, BNSF is simply wrong. To the extent that BNSF's argument indirectly suggests that the Commission must analyze the incremental changes in the impacts of the Approved Project, Calico agrees. The Commission will need to evaluate whether the incremental changes of the Modified Project as compared to the Approved Project will result in new significant impacts. The Commission will need to analyze, for example, the incremental impacts to glint and glare of the Modified Project as compared to the Approved Project, and the incremental impacts, if any, of changing the route of the water line.[5] *Temecula*, 43 Cal. App. 4th at 438.

BNSF does not endeavor to explain what new environmental impacts are at issue, let alone explain why "[i]t is clear … that the Commission cannot evaluate solely the incremental difference in environmental impacts...." (BNSF Railway Co.'s Brief Regarding Jurisdiction and Baseline, at 16.) The Committee's task in evaluating what BNSF has claimed about unspecified impacts is unnecessarily complicated by BNSF's

[5] Calico notes that it disagrees with BNSF's characterization of what may be potential new impacts of the Modified Project. For example, BNSF wrongly states that in the Petition to Amend Calico is proposing to "place private at-grade crossing at a BNSF station." The Hector Road crossing to which BNSF refers already exists and BNSF allowed Calico to use that crossing in the past. Further, Calico's use of the Hector Road crossing and open route AF058 has been analyzed and was contemplated in the Commission's Decision, as is depicted in "Project Description Figure 1." Commission Decision, Project Description at 19.

complete refusal to address how CEQA Guideline 15162(a) applies in these proceedings.[6] Rather than addressing the Committee's request for briefing on Guideline 15162, BNSF instead claims that the Commission should start from scratch in reviewing the Modified Project. Nothing supports BNSF's claim.

IV. THE WARREN-ALQUIST ACT ALLOWS THE COMMISSION TO CONSIDER APPROVING PHOTOVOLTAIC TECHNOLOGY THAT IS INTEGRATED WITH A THERMAL POWERPLANT.

All the parties to this proceeding recognize and agree that the Commission does not have siting authority over a photovoltaic powerplant. There is disagreement, however, whether the Commission has jurisdiction over an amendment of a previously approved project that includes an integrated hybrid thermal and non-thermal powerplant located on a single site. The intervenors all mistakenly assert that this question is answered by looking at the definition of thermal powerplant in section 25120. This tautological approach ignores the fact that this definition does not purport to establish the extent of the Commission's authority, and it provides no guidance regarding hybrid sites that have both thermal powerplant and non-thermal generation facilities. The simple fact that a photovoltaic facility is not a "facility" under the Warren-Alquist Act does not mean that the Commission is prohibited from having jurisdiction over a project utilizing some photovoltaic technology.

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[6] The Commission must, of course, consider any changes that result in new and significant environmental impacts. Under Rule 1769(a)(3)(B), it must also consider whether there are LORS issues that were not present in the prior project, but it cannot consider operational issues or generic safety issues affecting BNSF's employees and agents *pursuant to CEQA* that are unrelated to environmental impacts. 20 Cal. Code Regs. 1769(a)(3)(B); *Eureka Citizens for Responsible Government v. City of Eureka*, 147 Cal.App.4th 357, 377 (2007) (safety is "an important issue," but "CEQA studies significant, physical impacts on the environment and [safety for particular persons] is not such an issue...."). In this respect, BNSF's concerns about its employees, agents, and operations fall outside the scope of Guideline 15162(a).

Section 25500 of the Warren-Alquist Act gives the Commission the exclusive power to approve "sites and related facilities" in California. The definition of the term "site" requires that a "thermal powerplant" be present on a "site," but it does not exclude photovoltaic facilities from "sites" within the Commission's jurisdiction. *See* Pub. Res. Code § 25110, 25119. No hidden intent to exclude photovoltaic facilities from sites within the Commission's jurisdiction can be read into a definition that simply requires that a thermal powerplant be present, and reading any such intent into the statute would be inconsistent with the legislative instruction that the statute be construed liberally. *See* Pub. Res. Code. § 25218.5 ("The provisions specifying any power or duty of the commission shall be liberally construed, in order to carry out the objectives of this division.").

Where photovoltaic facilities are combined with a thermal powerplant, the required trigger for the Commission's jurisdiction over the site is present. The Warren-Alquist Act does not support the proposition that the Commission only has partial jurisdiction over hybrid sites that are entirely dedicated to electrical generation. In section 25006, the Legislature expressly stated its intent "to establish and *consolidate* the state's responsibility for energy resources, …, and *for regulating electrical generating and related transmission facilities*." Pub. Res. Code § 25006; *see Public Utilities Commission v. Energy Resources Conservation and Development Commission*, 150 Cal. App. 3d 437, 448 (1984) ("the hearings that led to enactment of the Warren-Alquist Act reflect concern with the ills of fractionalized regulation in the area of energy policy" in the context of the "regulations affecting the siting of powerplants"). Photovoltaic facilities are a type of "electrical generating facilities." Pub. Res. Code § 25006; *see DaFonte v. Up-Right, Inc.*, 2 Cal.4th

593, 601 (1992) ("To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning.").[7]

Intervenors Sierra Club, CURE, and BNSF seem to cite the Court of Appeal's decisions in *Department of Water & Power v. Energy Resources Conservation and Development Commission*, 2 Cal. App. 4th 206 (1991), and *Public Utilities Commission*, 150 Cal. App. 3d 437 (1984), simply because these cases addressed jurisdictional questions. Neither decision, however, addressed the scope of the Commission's jurisdiction over a hybrid thermal and non-thermal powerplant. *Department of Water & Power* addressed the scope of the Commission's "modification jurisdiction" under section 25123. As CURE notes, the Commission's modification jurisdiction is not relevant in these proceedings because there is no "existing facility."[8]

With respect to *Public Utilities Commission*, the intervenors ignore the fact that the decision affirmatively supports Staff's and the Calico's position. In *Public Utilities Commission*, the Court of Appeal considered the scope of the Commission's jurisdiction

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[7] The definition of "facility" in section 25110 cannot be invoked to avoid the ordinary meaning of the term "electrical generating facilities" in section 25006. The use of the word facilities is highly contextual in the Warren-Alquist Act. *See* Pub. Res. Code § 25100 (definitions in the Warren-Alquist Act do not apply if context requires a different meaning). If "electrical generating … facilities" in section 25006 was intended simply be another way of stating "thermal powerplants," then the Legislature would *not* have defined "thermal powerplant" as *a type* of "electrical generating facility" in section 25120. Pub. Res. Code § 25120. Yet, that is precisely what the Legislature did, in keeping with the ordinary meaning of the phrase. A "thermal powerplant" is *a type* of "electrical generating facility" that uses "thermal energy" and that has a "generating capacity of 50 megawatts or more." Pub. Res. Code § 25120. Photovoltaic facilities are another *type* of "electrical generating facility." *See* Pub. Res. Code § 25006. Calico agrees with Staff that the drafters of the Warren-Alquist Act had no reason to contemplate hybrid thermal and non-thermal projects in 1974, but it is equally important that the language of the Act does not support limiting the Commission's jurisdiction over such sites once the Commission's thermal powerplant jurisdiction is triggered.

[8] CURE relies on *Department of Water & Power* for the proposition that the definitions in the Warren-Alquist Act are relevant to the Commission's jurisdiction. This is undisputed, although the interpretation of these definitions is clearly disputed. CURE suggests that *Department of Water & Power* stands for the proposition that a "strict" canon of construction controls rather than the liberal canon of construction required by section 25218.5, but CURE simply reads a holding into *Department of Water & Power* that is not present.

over electric transmission lines. *See* Pub. Res. Code § 25107. The court rejected the contextual "functional test" for jurisdiction over transmission lines in part because it would require "case-by-case determination by the Energy Commission of the extent of its jurisdiction," leading to prolonged ambiguity, "jurisdictional challenges," and "regulatory havoc" that would be "inimical to the salutary policy which informs the Warren-Alquist Act." 150 Cal. App. 3d at 453. This sort of case-by-case determination is exactly what will be required if the Commission lacks jurisdiction over the photovoltaic facilities that are part of integrated hybrid projects. The entirety of the site will be dedicated to electrical power generation and will share all supporting facilities. The Commission, however, will be obligated to determine which supporting facilities are "dedicated and essential to the operation of the thermal powerplant" and which are not. 20 Cal. Code Regs. §1702(n). These contextual determinations will likely be the subject of "jurisdictional challenges" and the fractured jurisdiction over a single electrical generating powerplant will likely create "regulatory havoc." 150 Cal. App. 3d at 453.

As in *Public Utilities Commission*, the fractured jurisdiction that results from this reading of the statue is "inimical" to the goals of the Warren-Alquist Act. *Id*. "[T]he hearings that led to enactment of the Warren-Alquist Act reflect concern with the ills of fractionalized regulation in the area of energy policy," and this concern "focused upon regulations affecting the siting of powerplants and the need for a unified energy policy with respect thereto." 150 Cal. App. 3d at 448. Requiring fractured jurisdiction over hybrid powerplants is not in the public interest as expressed by the Warren-Alquist Act.

In addition to *Department of Water & Power* and *Public Utilities Commission*, Sierra Club's "Notice of Protest" relies upon Attorney General Opinion SO 77-43. Nothing

in that opinion supports Sierra Club's position. 61 Ops. Cal. Atty. Gen. 127, 1978 WL 22741 (1978). The Attorney General's opinion found that geothermal wells are independently regulated by other statutes, that they are similar to oil and gas wells that are outside of the Commission's jurisdiction, and that they therefore do not fall within the scope of "regulating electrical generating and related transmission facilities." *Id.* at *5 (quoting Pub. Res. Code § 25006; underlining in original). The photovoltaic modules proposed in the Petition to Amend are "electrical generating facilities" that can be considered for approval by the Commission when they are combined with a thermal powerplant. They do not fall under any other focused regulatory program, implemented by an agency with the necessary expertise to evaluate them.[9] Accordingly, the facts confronted by the Attorney General were different, but the Attorney General's logic supports Staff's position.

V. CONCLUSION

Calico's Petition to Amend seeks authorization to amend the Approved Project in order to construct a powerplant that will include 100.5 MW of solar thermal electrical generating facility and numerous related facilities that are necessary for the operation of the solar thermal facility. It is clear under the Warren-Alquist Act that the Commission has exclusive jurisdiction to license the solar thermal portion of the Modified Project. It is also clear that the Commission must act as the lead agency in considering the Petition to Amend and the Commission's review must consider incremental changes in environmental impacts

[9] In fact, for a project like the one at issue here, if the Commission does not have siting authority over the photovoltaic portions of the project, no state or local agency with land use expertise will have authority over them because the project is located on federal lands.

that would occur as a result of construction of the entire Modified Project as compared to the Approved Project. This true regardless of the Commission's siting authority over hybrid facilities. Therefore, the Commission has jurisdiction over the Petition to Amend and Sierra Club's Motion to Dismiss should be denied.

Contrary to the Intervenors' assertion, the Warren-Alquist Act does not prohibit the Commission from licensing an integrated powerplant that includes both solar thermal and photovoltaic technology. Under a liberal reading, the Commission does have exclusive jurisdiction over such a hybrid project. Because a liberal reading is consistent with the language of the Act and its legislative history, Calico submits that the Commission has siting authority over the entire Modified Project.

Date: June 3, 2011

Respectfully submitted,

/s/

Ella Foley Gannon
Attorneys for Calico Solar, LLC
Applicant for the Calico Solar
(formerly known as SES Solar One) Project

EXHIBIT 1

Calico Solar

May 31, 2011

Teresa A. Raml, District Manager
Bureau of Land Management
California Desert District
Moreno Valley, CA 92553

Dear Ms. Raml:

I am writing in response to your letter dated April 28, 2011 regarding Application for Amendment Received and Request for Additional Information.

We have provided the executed Cost Reimbursement Agreement and a check for $50,000 under separate cover. We provide our responses to the requests for additional information below.

1. **Provide status update of the fall 2010 plant surveys on the site**.

Fall botanical surveys were completed in September 2010 on the former Phase 1 area, portions of the former Phase 2 area that could be impacted during Phase 1 construction, a 250 foot buffer around the site perimeter and along the site transmission line. The September 2010 survey area encompassed approximately 2,646 acres. These surveys were timed to allow for proper identification of special-status focal species that may not have germinated during previous, spring season survey efforts. Based on meteorological data, field observations of recent flows in the larger desert wash areas onsite, evidence of late season blooming annual species (i.e., white-margined sandmat, *Chamaesyce albomarginata)*, and the concurrent bloom status of nearby focal species reference populations, the site at the time of the surveys had sufficient precipitation for the germination of any late season annual plant species located thereon, including the special-status focal species, Abrams' spurge (*Chamaesyce abramsiaana,* CNPS 2.2) and Parry's spurge (*Chamaescyce parryi,* CNPS 2.3).

No new special-status plant species were detected during the late season 2010 surveys. Additionally, no plant species were collected that may have been ambiguous in comparison to the focal species. A copy of a letter from Dr. Patrick Mock of URS to BLM biologist Chris Otahal, dated November 2, 2010, documenting the results of these surveys is provided as Attachment A to this letter.

Based on the negative results of the Fall 2010 Botanical Surveys, particularly given the favorable weather conditions, it is anticipated that the late season blooming focal rare plant species have a low to moderate chance of occurring on the unsurveyed portions of the site and it would be anticipated that any occurrences would be limited to desert wash areas that experience extensive flood flows during the monsoonal rain season (late July-September period). Late season surveys will be conducted in 2011 on the unsurveyed portion of the site to confirm absence of the focal species.

2. **Provide status update for the completion of spring 2011 desert tortoise surveys on the site**.

Spring 2011 desert tortoise surveys were contemplated in the FEIS and Biological Opinion consistent with Calico's plans in the fall of 2010 to begin construction on Phase 1A in late 2010 and on Phase 1B in early 2011. In connection with the reconfiguration of the Calico project as described in the Application for Amendment, construction has not commenced. Calico currently contemplates conducting desert tortoise surveys in the FWS-approved translocation area(s) in fall 2011, and clearance surveys of Phase 1 of the project site in spring 2012, prior to commencement of construction.

3. **Submit a final Hydrology and Grading Plan**.

As part of the compliance process under the CEC's Conditions of Certification and the amendment process for the CEC's Certification and the BLM's ROWG, Calico is in the process of completing detailed studies of the site's hydrology and developing a revised grading plan. Calico has engaged Tetra Tech to conduct the hydrologic studies and Westwood Engineers to complete the grading plan. We anticipate that these studies will be completed by August 1, 2011. Provided as Attachment B is a letter to Craig Hoffman, Project Manager, California Energy Commission, dated May 25, 2011, which provides a schedule of delivering the hydrologic studies and grading plan. We have also included as Attachment C, a copy of the Tetra Tech's scope of work for the hydrology studies for your information.

4. **Provide an agreement with BNSF railroad for temporary and permanent access across the railroad**.

Prior to October 2010, Calico had access to the northern portion of the site pursuant to an agreement with BNSF. Under that agreement, which expired at the end of September 2010, Calico and its predecessors paid approximately $100,000 to BNSF to improve the Hector Road crossing. That agreement expired of its terms at the end of September 2010. Calico has requested that BNSF continue to allow temporary use of the Hector Road crossing, and for a permanent grade separated crossing (bridge), as contemplated by the FEIS and ROD. However, BNSF has refused to process Calico's applications.

Despite months of negotiations, Calico has not yet obtained a further agreement with BNSF for access to the northern portion of the project site. As a result, Calico filed a request in September 2010 with the California Public Utilities Commission to order BNSF to provide access. Calico is confident that the CPUC will require the requested crossings. However, Calico is unable to provide an agreement with BNSF at this time.

California law gives the CPUC authority over crossings, and the law is clear that BNSF must provide a crossing in this circumstance. Public Utilities Code Section 7537 provides that, "[t]he owner of any lands along or through which any railroad is constructed or maintained, may have such farm or private crossings over the railroad and railroad right of way as are reasonably necessary or convenient for ingress to or egress from such lands , or in order to

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connect such lands with other adjacent lands of the owner." The CPUC has ruled that the BLM ROW grant provides Calico with the requisite ownership interest to invoke Section 7537.[1]

Evidentiary hearings in the CPUC proceeding were held on May 17-19, and we anticipate that the CPUC will issue a final decision on the matter by October 2011. Calico expects to provide evidence of access across the railroad upon completion of the CPUC proceeding (unless negotiations with BNSF conclude positively and sooner).

5. **Provide details on how Calico Solar, LLC plans to operate or mitigate the project in a manner consistent with the values of the lands donated or acquired for conservation purposes**.

Calico's plans with respect to the donated and acquired lands have not changed since the project was approved in October 2010, and remain consistent with the analysis in the ROD. Calico believes that no further analysis of this issue is required in connection with the Application for Amendment.

As stated in the ROD's Determination of NEPA Adequacy, the approved project (called the Modified Agency Preferred Alternative) is more consistent with conservation values than is the Avoidance of Acquired and Donated Lands alternative (called Alternative 3) analyzed in the FEIS:

> "The FEIS analysis demonstrates that the lands lying in the northern area of the proposed project site in the foothills of the Cady Mountains contain relatively much higher biological resource values, in terms of both tortoise habitat and California State jurisdictional waters, than other portions of the site, including the acquired and donated lands parcels. The Modified Agency

[1] Transcript of February 9, 2011 CPUC Hearing:
ALJ HECHT: . . . the issue at hand is this question of jurisdiction and whether the lease is sufficient to provide an interest to go forward with a complaint for a crossing for Calico, the leaseholder. And that's what I want to rule on now.
I do not find the argument that a lease does not convey a sufficient property interest to invoke this section. I do not find that argument persuasive.
I have now, through filings subsequent to the initial complaint, been provided with a copy of what appears to be the lease agreement between the United States Department of the Interior Bureau of Land Management and Calico Solar. That lease grants Calico through I believe the year 2039 -- so that's close to 30 years -- a lease. And it states explicitly that that gives to Calico, Calico receives, and this is a quote from the first page of that lease, quote, receives a right to use and occupy the following described public lands to construct, operate and maintain, and decommission a solar electric generation project.
I interpret that to grant if not ownership of the actual property, ownership of the use of that property, control of that property for the period specified. In granting this right to use the land, I interpret the agreement and the relevant law to provide Calico with the right to take the actions it needs to take to try to carry through the terms of this lease, which is to use that land to develop this property.
I believe that they have that authority. I believe that Calico has the authority to invoke Code Section 7537 in doing that. And on that basis, I find that the commission does have jurisdiction to proceed with this complaint case.

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> Preferred Alternative offers greater overall protection to biological and hydrological resource protection in the project area than does Alternative 3 or the FEIS Agency Preferred Alternative. A total of approximately 96 acres of donated and acquired land would be adversely affected by the Modified Agency Preferred Alternative, compared to 1,180 acres in the Proposed Action. The 96 acres of acquired and donated lands that would still be affected by the Modified Agency Preferred Alternative, however, are located outside the areas of highest biological value."

The issue was further addressed in a State Director's memo dated October 7, 2010. In this memo, the State Director found that: "the donated land contain no resources that are distinct or unique to the donated land and otherwise common to the other public lands in the project boundaries. The applicant has also maintained a dialogue with TWC related to their request to include the donated lands within the authorization area. The applicant has offered to replace the donated lands in their compensation package at a 1:1 ratio and to offset the cost of cleanup of the donated lands the donor expended prior to conveyance to the United States." The State Director recommended acceptance of Calico's offer to compensate for impacts to the donated lands "by replacing the donated lands in an area that is being managed for conservation purposes such as a Desert Wildlife Management area and to ensure that the replacement lands have equally protective status is consistent with our policy of ensuring we preserve the conservation values of the donated lands."

This analysis holds equally true for the Amended Project.

6. **Provide evidence that the SunCatcher technology is a viable and available technology for use on the project site**.

Calico has a contractual commitment to Tessera Solar to install SunCatcher technology on Phase 2 of the Calico Solar project, which is expected to begin construction in approximately 2014-15. Stirling Energy Systems (SES), the manufacturer of the SunCatcher technology, reports that it is in discussions with potential strategic investors to support the high volume commercial launch of the SunCatcher, and anticipates that SunCatchers will be commercially available approximately 24 months from the time that a transaction closes. This is consistent with the time frame required for installation on Phase 2 of the Calico Solar project.

SES states that the model of SunCatcher slated for commercial production is the same model that is currently operating at SES's 1.5 MW Maricopa Solar generating facility near Phoenix, which is producing power for the Salt River Project (SRP), an Arizona utility.

Provided as Attachment D is a letter from SES to William Kriegel describing SES's commitment to making the SunCatchers commercially available and the steps that they are undertaking to that end.

Regards,

Daniel J. O'Shea
On behalf of Calico Solar, LLC

cc: Jim Abbott
Jim Stobaugh
Greg Miller

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A clean energy company

SES

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New York, NY 10017

Cc: Sean Gallagher
Managing Director
Calico Solar LLC
2600 10th Street, Suite 635
Berkeley, CA 94710

May 25, 2011

Dear Mr. Kriegel:

In relation to your request about the availability and viability of the SunCatcher technology for use on the Calico Solar project site, we inform you that:

SunCatcher Viability

SES is committed to the SunCatcher technology and it continues to be one of the more advanced CSP technologies available.

The SunCatcher achieved initial commercial deployment at the 1.5 MW Maricopa Solar Plant in Peoria, Arizona in March 2010. The power output from Maricopa Solar is delivered to Salt River Project (SRP), an Arizona utility. Maricopa Solar has achieved the key milestone of demonstrating the SunCatcher technology in a commercial deployment. The Maricopa Solar Plant remains an operating solar power plant, continuing commercial operations and the delivery of solar power to the grid. It is a key demonstration of the effectiveness and efficiency of the Suncatcher technology. SES has been developing and continues to develop the SunCatchers as they pursue discussions with investors

SunCatcher Availability

SES delayed the high volume commercial deployment of the SunCatcher in response to uncertain capital markets and in order to secure the additional time needed to obtain a strategic investor. SES is currently in discussions with potential investors with technical and financial capabilities to launch high volume production and continue the development of future products. SES' current plans contemplate having SunCatchers commercially available approximately 24 months from the time that a transaction with a strategic investor closes. The model expected to initially be made

commercially available is the model that is deployed at SES' 1.5 MW Maricopa Solar generating facility, where it has demonstrated adequate performance and availability.

We would be in better position to confirm the above once the transaction with the potential investor closes.

Sincerely yours,

Marcelo Figueira

CEO