STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	Docket No. 08-AFC-13C
The Application for Certification for the Calico Solar Project Amendment	

SIERRA CLUB MOTION TO DISMISS THE PETITION TO AMEND

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I. INTRODUCTION

Sierra Club hereby moves the California Energy Commission ("Commission") to dismiss the Petition to Amend submitted by Calico Solar, LLC (the "Applicant") on grounds that the Commission lacks jurisdiction over the Calico Project. The March 22, 2011, Petition to Amend proposed to modify the Commission's December 1, 2010 decision to certify the Calico Solar Project ("Initial Project") by, *inter alia*, (1) switching to at least 85% solar photovoltaic technology ("PV"), and (2) modifying the construction phasing (together the "Modified Project"). The PV portion of the Modified Project is not a thermal powerplant within the Commission's siting jurisdiction under the Warrant-Alquist Act (Pub. Resources Code § 25500 *et seq.*). The Commission must therefore dismiss the Petition to Amend because it does not have statutory authority to consider a PV electrical generating facility.

II. BACKGROUND AND PROCEDURAL HISTORY

The Applicant originally proposed an 850 MW utility-scale solar thermal project using a wholly new, untested at scale, "SunCatcher" technology. The SunCatcher consists of a pedestal supporting a mirrored dish that focuses sunlight on a Stirling

engine. The focused sunlight heats hydrogen gas, which powers the engine to convert mechanical energy to electricity. The pedestals, which are approximately two-feet in diameter at their base, are driven into the ground to support the 40-foot-high, 38-foot-diameter solar dish. The original application for the Initial Project proposed using 34,000 individual SunCatchers on approximately 8,230 acres. The Applicant later revised the Project footprint to 6,215 acres, and then reduced it a third and final time to 4,613 acres.

The Initial Project would have converted the entire 4,613 acre site into a completely fenced industrial facility with 26,540 individual SunCatcher pedestals that would simultaneously run engines, each producing noise levels similar to a lawnmower of 84 decibels at approximately 50 feet. The Initial Project also would include approximately 500 miles of paved and unpaved roads and a 52 acre main services complex consisting of administrative buildings, maintenance areas, and parking lots. Other industrial operations would include a water treatment complex, water pumping operations, water storage tanks, 50 miles of underground 34.5 kV cable, and 650 miles of 600V cable. The Stirling engines require hydrogen gas to facilitate heat transfer, which the Applicant would produce and distribute using on-site generation facilities. The Applicant would also construct an on-site electricity substation and twelve to fifteen 100-foot high electrical transmission towers. The Commission's final decision approved the 4,613 acre Initial Project on December 1, 2010.

Shortly thereafter, the Applicant's parent company, Tessera Solar, Inc. ("Tessera") announced that it had sold Calico Solar, LLC to K-Road Power. During the public information hearing on April 20, 2011, the Applicant stated that the sale was in large part related to the financial problems experienced by Tessera and its affiliated company Stirling Engine Systems ("SES"), which manufactures SunCatchers. The concerns raised by the Applicant regarding the commercial viability of SunCatchers calls into question whether any SunCatchers will ever be built at the Calico site. The new owner, K-Road Solar, Inc., a subsidiary of K-Road Power, is a company that focuses on

PV power. Although the business entity that constitutes "the Applicant" for purposes of the Petition to Amend remains Calico Solar, LLC, ownership and control of the Modified Project has changed hands. The new owners rejected the Initial Project as designed and decided to switch 85% of the generation to an entirely different technology.

Based on the changed ownership, on March 22, 2011, the Applicant submitted the Petition to Amend its license and substantially alter the Initial Project by, among other changes, replacing 85% of the generating capacity from solar thermal technology (SunCatchers) to PV. (Petition to Amend at p. 1-1.) The Modified Project would also alter the phasing of construction. The Applicant would begin construction on Phase 1 of the Modified Project in 2011, and Phase 1 electrical generation would consist entirely of single-axis tracking PV modules producing up to 275 MW. (Petition to Amend at p. 2-2.) Phase 1 would not include any SunCatchers, nor would it include any hydrogen generation, storage or distribution system for SunCatchers. According to the Petition to Amend, the Applicant does not anticipate even beginning construction of SunCatchers or their related facilities until 2013 at the earliest. (Petition to Amend at p. 4.6-2.) Even then, Phase 2 would include only 100.5 MW of SunCatcher generation and an additional 288 MW of PV generation. This plan to delay construction of SunCatchers by several years, combined with the financial difficulties discussed above facing Tessera Solar and SES, creates a cloud of uncertainty as to whether any SunCatchers will ever be built at the Calico site.

III. LEGAL ARGUMENT

A. The Commission Has No Jurisdiction Over a Solar Photovoltaic Electrical Generating Facility

The Commission's jurisdiction under the Warren-Alquist Act extends only to the construction and modification of thermal powerplants over 50 MW. (Pub. Resources Code § 25500 *et seq.*) The Petition to Amend described an initial facility of 275 MW of

solar PV generation and, several years later, another facility of 288 MW of solar PV generation, and only 100.5 MW of solar thermal generation from SunCatchers. The Commission is precluded from considering the Applicant's request because the Modified Project is currently a PV facility outside the Commission's jurisdiction, but one that **may** contain a thermal component one day.[1]

The Warren-Alquist Act vests in the Commission, "the exclusive power to certify all sites and related facilities in the state…" (Pub. Resources Code § 25500.) The Commission exercises this authority, "in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law…" (*Id.*) and the authority and regulations under the Warren-Aquist Act, "shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law." (*Id.*) This broad and exclusive authority applies to "facilities", which Section 25110 defines as, "any electric transmission line or **thermal powerplant**, or both electric transmission line and **thermal powerplant**, regulated according to the provisions of this division." (emphasis added) The Public Resources Code further defines "thermal powerplant" as follows:

> "Thermal powerplant" means any stationary or floating electrical generating facility using **any source of thermal energy**, with a generating capacity of 50 megawatts or more, and any facilities appurtenant thereto…

(Pub. Resources Code § 25120 (emphasis added).) PV facilities do not use thermal energy, but rather the PV modules convert the sun's energy into direct current (DC) electricity. (Petition to Amend at p. 2-3.) The technology is therefore not a

[1] The Warren-Alquist Act would allow the Commission to consider a different request by the Applicant to modify the Initial Project to construct a reduced acreage project consisting of a 100.5 MW solar thermal powerplant (SunCatchers) to begin construction in 2013.

"thermal powerplant" within the definition of the Section 25120. To the extent any doubt could have existed regarding the possible characterization of PV power as a thermal energy technology, the California Legislature expressly amended the Public Resources Code in 1988 to add the following clarifying language:

> "Thermal powerplant" **does not include any** wind, hydroelectric, **or solar photovoltaic** electrical generating facility.

(Pub. Resources Code § 25120 (as amended by SB 928, Stats.1988, c. 965, § 1, eff. Sept. 19, 1988) (emphasis added).)

The plain meaning of the Legislature's intent could not be more clear: the Commission's siting authority does not extend to solar photovoltaic facilities. California courts have repeatedly rejected attempts by the Commission to expand its authority beyond the clear language of the Warren-Alquist Act. In *Department of Water & Power v. Energy Resources Conservation & Dev. Com.* (1991) 2 Cal.App.4th 206, the Court of Appeal upheld a preemptory writ ordering the Commission to cease its exercise of certification jurisdiction over a generation station repowering project. The Court held that the attempted expansion of the Commission's jurisdiction contravened the clear intentions of the Legislature. *Id.* at 222. Similarly in *Public Utilities Com. v. Energy Resources Conservation & Dev. Com.* (1984) 150 Cal.App.3d 437, the Court held that the plain language of the Warren-Alquist Act limited the Commission's jurisdiction over transmission lines after the point of interconnection. "In ascertaining the intent of the Legislature, the court must first look to the words of the statute." *Id.* at 444. So to in this case, the plain meaning of Section 25120 excludes solar PV facilities from Commission jurisdiction.

The Petition to Amend requested authority from the Commission to approve a project to begin construction this year for PV generation. (See Petition to Amend at p. 1-1.) The proposed phasing of the Modified Project does not even contemplate **any** solar

thermal generation for several years. (Petition to Amend at p. 4.6-2; Staff Issues Identification Report, April 14, 2011, p. 3.) The Applicant did not even propose to begin clearing tortoises in preparation for construction of Phase 2 until 2013 at the earliest. (Petition to Amend at p. 4.6-2.) Even then, Phase 2 would consist of 288 MW of PV and only 100.5 MW of SunCatchers. Given the recent financial troubles of the original owner of Calico Solar, LLC and its affiliated manufacturer of SunCatchers, it remains entirely speculative whether the 100.5 MW of SunCatchers would ever be constructed on the Modified Project site, and therefore it is possible that no solar thermal facilities will ever be built. In short, there is no plausible argument that the Modified Project is a thermal powerplant within the Commission's siting jurisdiction.[2] The Commission therefore has no jurisdiction to grant the Petition to Amend.

Neither is there a plausible argument that the Modified Project falls within the Commission's jurisdiction because the PV facilities are "appurtenant" to the solar thermal facility. (*See* Pub. Resources Code § 25120.) Black's Law Dictionary defines "appurtenant" as "Annexed to a more important thing." (9th ed. 2009.) The Applicant merely plans to co-locate PV facilities with the SunCatchers in Phase 2 to take advantage of common infrastructure.[3] This arrangement does not mean that the PV facilities would be "annexed to a more important facility." The SunCatchers are not more important than the PV modules. To the contrary, the PV modules would constitute the predominant technology onsite, and the Applicant will not even consider constructing SunCatchers until several years after initiating Phase 1. The fact that the two types of generation

[2] At most, the Commission's jurisdiction allows it to consider a different request to amend the Initial Project to authorize construction of the smaller 100.5 MW solar thermal project. However, any such application would be subject to the Commission's start-of-construction deadlines and therefore may be premature at this time. (Pub. Resources Code § 25534; 20 CCR § 1720.3.)

[3] The Petition to Amend asserted that "[b]oth the SunCatchers and the PV technology would be fully integrated components of the power plant" and use common infrastructure and interconnection systems. (Petition to Amend at p. 1-1.)

technologies might ultimately share common infrastructure does not bring the solar PV facility within the Commission's jurisdiction as "facilities appurtenant" to the SunCatchers.

Consistent with the Black's Law Dictionary definition, California courts interpret the term "appurtenant" to mean a subservient facility that is necessary and beneficial to the dominant premises. (*Dubin v. Robert Newhall Chesebrough Trust* (2002) 96 Cal.App.4th 465, 473 (finding that an appurtenant right must be reasonably necessary to the beneficial enjoyment and use of the premises); *Harrison v. Ziegler* (1921) 51 Cal.App. 429, 432 (finding that commonly used facilities were not appurtenant to the premises where "the use of [the facilities] was merely a convenience, but is not necessary to the beneficial use of the property").) In this case, the PV generating technology is not necessary or beneficial to the SunCatchers. The PV modules and the SunCatchers may exist entirely separate from one another, and the operation of one does not depend on the other. Even if the separate technologies some day share common infrastructure and interconnection systems, this does not change the fact that the Applicant proposed to operate two distinct types of electrical generation facilities. The PV modules therefore are not "facilities appurtenant" to a thermal powerplant within the meaning of Public Resources Code section 25120, and the Commission has no jurisdiction over the Modified Project.

B. CEQA Requires the California Department of Fish and Game to Act as Lead Agency and Prepare an Environmental Impact Report

The proposed changes to the Initial Project require a shift in lead agency designation under CEQA. In the absence of Commission jurisdiction to consider the Modified Project, another state or local agency must assume the role of lead agency for purposes of CEQA. Given its previous extensive involvement in the proceeding and the ongoing necessity to revise various permits, CDFG appears to be the most appropriate

agency to assume the Commission's duties as lead agency. As discussed above, the Commission does not have jurisdiction to consider the changes proposed in the Petition to Amend because the PV facilities are outside of the Commission's authority. CEQA nevertheless requires a subsequent EIR because the Applicant proposed substantial changes to the project that will require major revisions of the prior environmental review documents. (CEQA Guidelines § 15162(a)(1).) The Petition to Amend acknowledged these substantial changes by concluding that the Incidental Take Permit and the Lake and Streambed Alteration Agreement must be revised by CDFG to address the Modified Project's changes. (Petition to Amend at p. 4.6-3.)

CDFG participated in the Commission's initial siting proceeding as a responsible agency under CEQA. However, the changed circumstances require CDFG to assume the role of lead agency going forward because (1) substantial changes to the Modified Project require a subsequent EIR, (2) the Commission, as the prior lead agency, granted final approval to the Initial Project, and (3) the statute of limitations for challenging the Commission's final decision under CEQA has expired. (CEQA Guidelines § 15052(a)(2).) Throughout the proceeding for the Initial Project, CDFG demonstrated a clear understanding of the need to fully mitigate environmental impacts, particularly with regard to biological resources. CDFG is therefore well positioned to assume the necessary duties as lead agency under CEQA and ensure that the environmental impacts of the Modified Project are fully analyzed and mitigated.

CDFG appears to be the appropriate lead agency, as opposed to the County of San Bernardino, to prepare a subsequent EIR because the Modified Project would be located entirely on BLM land. It does not appear at this time that the County of San Bernardino would have a major permitting role related to the Modified Project. In contrast, CDFG must issue the Incidental Take Permit and the Lake and Streambed Alteration Agreement for the Modified Project and therefore has the greatest responsibility among state agencies for supervising and approving the Modified Project. (CEQA Guidelines §

15051(b).) In its role as lead agency, CDFG must consider the entire proposed project and prepare an EIR that addresses all of the significant impacts related to construction and development of the Modified Project. (*Nelson v. County of Kern* (2010) 190 Cal. App. 4th 252, 285 (holding that BLM's NEPA review of surface mining operations on federal land did not preclude county, as lead agency, from undertaking CEQA review of entire project).) CDFG must therefore prepare a full EIR that considers environmental impacts that are separate and in addition to impacts related to the Incidental Take Permit and the Lake and Streambed Alteration Agreement.

IV. CONCLUSION

For the foregoing reasons, Sierra Club respectfully requests that the Commission dismiss the Petition to Amend.

Dated: April 20, 2011

Respectfully submitted,

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Docket No. 08-AFC-13C
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DECLARATION OF SERVICE

I, Travis Ritchie, declare that on April 20, 2011, I served by U.S. mail and filed copies of the attached Motion to Dismiss, dated, April 20, 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: **[http://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)

FOR SERVICE TO ALL OTHER PARTIES:

X sent electronically to all email addresses on the Proof of Service list;

___ by personal delivery;

X by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

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

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CALIFORNIA ENERGY COMMISSION
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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.