STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:

The Sierra Club's Motion to Dismiss The Application for Certification for the Calico Solar Power Project Amendment	Docket No. 08-AFC-13C

DEFENDERS OF WILDLIFE'S RESPONSE IN SUPPORT OF SIERRA CLUB'S MOTION TO DISMISS THE PETITION TO AMEND

Respectfully submitted,

June 3, 2011

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I. INTRODUCTION.

Defenders of Wildlife hereby files this response in support of the Sierra Club's motion to dismiss the petition to amend the Calico Solar Power Project (the "CSPP") pending before the California Energy Commission (the "Commission"). The Sierra Club correctly asserts that the Commission lacks jurisdiction over the CSPP as amended. Calico Solar, LLC's ("Calico Solar" or the "Applicant") proposed amendment would change the CSPP from an exclusively solar thermal powerplant to a hybrid powerplant predominately consisting of photovoltaic ("PV") panels. The Applicant argues in other papers filed in this proceeding that the Commission has jurisdiction over the CSPP as amended because the photovoltaic component of the project is merely a facility "related" to a solar-thermal powerplant over which the Commission has exclusive jurisdiction. Calico Solar, LLC Brief Re Jurisdiction of Energy Resources Conservation and Development Commission, Docket No. 08-AFC-13C, § III, May 23, 2011. Neither the facts nor the law support the Applicant's arguments. For the reasons set forth herein,

the Commission does not have authority over PV powerplants and should dismiss the petition to amend the CSPP and decline to exercise jurisdiction over the amended project.

II. BACKGROUND AND PROCEDURAL HISTORY.

On December 1, 2010, the Commission approved the CSPP. Cal. Energy Comm'n Notice of Decision (Revised), Docket No. 08-AFC-13, Dec. 1, 2010 (hereafter, the "Notice of Decision"). In its approved configuration, the project would be located on approximately 4,613 acres of public lands administered by the federal Bureau of Land Management (the "BLM") with a generating capacity of up to 663.5 megawatts ("MW") from a series of Stirling Engines, referred to as SunCatchers.[1] *See id.* SunCatchers are solar thermal devices. *See* Calico Solar, LLC Petition to Amend Calico Solar Project, Docket No. 08-AFC-13C, § 2.2.1, Mar. 18, 2011 (hereafter, the "Petition to Amend"). On March 18, 2011, Calico Solar submitted a petition to amend the CSPP. *See id.* at § 2.1.2. As proposed, the footprint of the project would not change, but the amended project would incorporate PV technology in addition to SunCatchers and be constructed in two phases. *See id.* at §§ 2.1.1, 2.1.2. The first phase would comprise 2,144 acres and involve the installation of PV panels with a generating capacity of up to 275 MW. *See id.* at § 2.1.2. The second phase would comprise 2,469 acres and involve the installation of PV panels with a generating capacity of up to 288 MW and the installation of SunCatchers with a generating capacity of up to 100.5 MW. *Id.* While the total potential generating capacity of the CSPP as amended would remain the same as that of the project as originally approved, approximately 85% of the generating capacity of the amended project would originate from PV panels while only 15% would originate from solar thermal devices.

[1] On October 21, 2010, the federal Bureau of Land Management issued a right-of-way grant to Calico Solar, LLC granting access to 4,607 acres of public lands for the CSPP. *See* U.S. Dep't of Interior, Bureau of Land Mgmt. Right-of-Way Lease/Grant, Serial No. CACA-49537 (Oct. 21, 2010).

III. THE COMMISSION DOES NOT HAVE JURISDICTION OVER THE CSPP AS AMENDED.

A. The CSPP as amended is not a thermal powerplant or a solar thermal powerplant over which the Commission can exercise jurisdiction.

The statutory language of the Warren-Alquist Act (the "Act") establishes that the Commission does not have permitting jurisdiction over PV installations. Under the Act, the Commission has "the exclusive power to certify all sites and related facilities in this state." Cal. Pub. Res. Code § 25500 (2011). By statute, the term "site" is defined as "any location on which a facility is constructed or proposed to be constructed," Cal. Pub. Res. Code § 25119 (2011), and the term "facility" is defined as "any electric transmission line or thermal powerplant, or both electric transmission line and thermal powerplant, regulated according to [the Act]," Cal. Pub. Res. Code § 25110 (2011). "Thermal powerplant" is defined as "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 . . . [and] does not include any wind, hydroelectric, or *solar photovoltaic* electrical generating facility." Cal. Pub. Res. Code § 25120 (2011) (emphasis added). In order for a thermal powerplant to be considered a *solar* thermal powerplant, "75 percent or more of the total energy output [has to be] from solar energy and the use of backup fuels, such as oil, natural gas, and coal, [cannot], in the aggregate, exceed 25 percent of the total energy input of the facility during any calendar year period." Cal. Pub. Res. Code § 25140 (2011).

The Commission does not have the same authority over "site[s] and related facilit[ies] or facilities for which [the Act] do[es] not apply," including PV installations. Cal. Pub. Res. Code § 25542 (2011). California courts have rejected attempts by the Commission to expand its jurisdiction. *See generally Dep't of Water & Power v. Energy Res. Conservation & Dev.*

Comm'n, 2 Cal.App.4th 206 (1991) (denying the Commission jurisdiction over the modification of a thermal power plant where the net increase in generating capacity was less than 50 MW) *and Pub. Util. Comm'n v. Energy Res. Conservation & Dev. Comm'n*, 150 Cal.App.3d 437 (1984) (rejecting the Commission's attempt to regulate power lines beyond the point where power lines from a regulated facility have merged with other power lines).

In addition to the explicit statement that PV powerplants are not thermal power plants, the California legislature provided further evidence of its intent to bar the Commission from regulating PV powerplants in the Desert Renewable Energy Conservation Plan (the "DRECP"). *See* Cal. Fish & Game Code § 2069(f)(2) (2011). Federal and state agencies are developing the DRECP in an effort to identify utility scale renewable energy programs while also identifying areas for conservation and management of desert plant and animal species. *See, e.g.*, California Department of Fish and Game, California Energy Commission, United States Bureau of Land Management & United States Fish and Wildlife Service, Draft Planning Agreement for the Desert Renewable Energy Conservation Plan § 2.1 (Oct. 2009) available at http://www.energy.ca.gov/2009publications/REAT-1000-2009-034/REAT-1000-2009-034.PDF. The DRECP specifically distinguishes between solar thermal power plants under the jurisdiction of the Commission and PV installations under the jurisdiction of another "lead agency."[2] *See* Cal. Fish & Game Code § 2069(f)(2).

The CSPP as amended is neither a thermal powerplant nor solar thermal powerplant within the meanings set forth in the Act. The Act specifically excludes Commission jurisdiction over PV installations, *see* Cal. Pub. Res. Code § 25120, and therefore, the Commission cannot

[2] For purpose of the California Environmental Quality Act, a "lead agency" is the "public agency which has the principal responsibility for carrying out or approving a project which may have significant effect upon the environment." Cal. Pub. Res. Code § 21067. Here, Defenders suggests that the appropriate lead agency for the CSPP as amended is the California Department of Fish and Game which has permitting authority for the project's impacts to desert tortoise and ephemeral streams.

assume jurisdiction over the CSPP as amended where 85% of the project's generating capacity will result from PV panels. The CSPP as amended is a PV installation, a conclusion bolstered by the phased construction schedule for the project. If the Commission accepts jurisdiction over phase 1 of the project, it will exercise permitting authority over a 275 MW PV installation devoid of any solar thermal components. If phase 2 of the project is never ultimately developed, a foreseeable risk, the Commission will have acted in direct contravention of the plain statutory instruction in Cal. Pub. Res. Code § 25120. Finally, it is an incongruous reading of the Act, and would directly contradict the legislature's intent as evidenced in the Act and the DRECP, to suggest that the definition of "solar thermal powerplant," *see* Cal. Pub. Res. Code § 25140, could encompass a project dominated by PV generation where other provisions of the Act have specifically excluded Commission jurisdiction over PV installations. A solar thermal powerplant can be hybridized to include a minority component that uses a different fuel source to generate electricity, but solar thermal power must be the facility's majority energy source. For these reasons, the Commission must decline jurisdiction over the amended project.[3]

B. The CSPP as amended is not an "appurtenant facility" over which the Commission can exercise jurisdiction.

The CSPP as amended is not an "appurtenant facility" over which the Commission can exercise jurisdiction. The Warren-Alquist Act does not define "appurtenant facility." *See generally* Cal. Pub. Res. Code §§ 25100-41 (2011). However, opinions from the California Attorney General, the Act itself, Commission regulations, and California common law indicate that the intended scope of the term is narrow. First, according to the California Attorney General, the term "appurtenant facility" as used in the Act includes "things promoting the ease of

[3] Additionally, accepting jurisdiction over the CSPP as amended could create an avenue for applicants seeking to bring PV projects before the Commission and avoid other forums by simply amending projects to reduce the solar thermal component *after* receiving the Commission's approval.

operations of any thermal power plant," but does not include related operations that could occur elsewhere. 61 Op. Cal. Att'y Gen. 127, 131-32 (1978) (discussing the Commissions lack of authority to regulate the drilling of geothermal wells under the Warren-Alquist Act based on the fact that wells are not appurtenant facilities). Second, in reference to geothermal powerplants, the Act specifically excludes "[e]xploratory, development, and production wells, resource transmission lines, and other related facilities used in connection with a geothermal exploratory project or a geothermal field development project," from consideration as an appurtenant facility. Cal. Pub. Res. Code § 25120. Third, while not specifically referring to appurtenant facilities, the Commission has included "transmission and fuel lines up to the first point of interconnection, water intake and discharge structures and equipment, access roads, storage sites, switchyards, and waste disposal sites" in its definition of related facilities and has declared "the thermal host of a cogeneration facility"[4] to not be a related facility. Cal. Code Regs**.** tit. 20, § 1702(n) (2011). Fourth, in addition to the limited view of appurtency that is found in reference to the Warren-Alquist Act, a limited view is also supported by other areas of California law. For instance, in California property law, to be appurtenant something must be "necessary to the beneficial use of the property" and not "merely a convenience." *Harrison v. Ziegler*, 51 Cal. App. 429, 432 (1921).

Here, even ignoring that it is simply illogical to argue that 85% of a project is merely appurtenant to the other 15% of the project, none of the definitions of appurtenant or related facilities from the Act and elsewhere in California law require this conclusion. *See, e.g.*, 61 Op. Cal. Att'y Gen. 127 (discussing the narrow scope of the term "appurtenant facility"). More specifically, the PV component of the amended project cannot reasonably be characterized as a

[4] A cogeneration facility is "a facility which produces (i) electric energy, and (ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." 16 U.S.C. § 796(18)(A) (*incorporated by reference* in Cal. Pub. Res. Code § 25534(k)).

thing "promoting the ease of operations of any thermal power plant" — it is plainly an operation that could occur elsewhere as a stand-alone installation. As indicated by the lack of solar thermal devices in the first phase of the project. The PV component of the CSPP as amended is not a facility appurtenant to a thermal powerplant, and the Commission does not have permitting jurisdiction over the project for this additional reason.

IV. CONCLUSION.

For the foregoing reasons, Defenders of Wildlife respectfully requests that the Commission dismiss the Petition to Amend and decline to exercise jurisdiction over the CSPP as amended. Alternatively, should the Commission determine that it does have jurisdiction over the solar thermal component of the amended project, Defenders respectfully requests that the Commission decline jurisdiction over the PV component.

Date: June 3rd 2011

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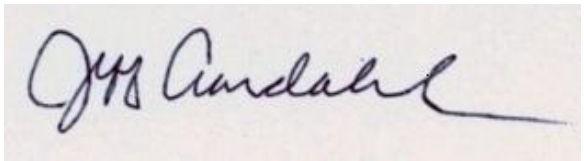

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FOR THE CALICO SOLAR PROJECT AMENDMENT

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

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DECLARATION OF SERVICE

I, Gregory Buppert, declare that on June 3, 2011, I served by U.S. mail and filed copies of the attached Response, 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].

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:

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

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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.

/s Gregory Buppert

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