



August 23, 2011

Via Electronic Mail

Commissioner Karen Douglas
Chairman Robert B. Weisenmiller
Kourtney Vacarro, Hearing Officer
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

RE: Calico Solar Project Issues Statement (08-AFC-13C)

To the Siting Committee:

In anticipation of the upcoming Calico status meeting scheduled for August 24, 2011, Sierra Club provides the following issues statement.

Lead Agency Determination

The Energy Commission must follow the requirements of CEQA Guidelines § 15050 *et seq.* with respect to the designation of the appropriate lead agency.

What Type of Document Should the Commission Produce?

If the Energy Commission elects to act as lead agency for purposes of the PV portion of the project, Sierra Club recommends that it prepare two separate sets of documents: (1) a PMPD and Final Decision covering the SunCatcher component; and (2) draft and final EIRs that cover the PV component and the whole of the project. Staff requested Committee guidance on whether it should separately prepare documents for the PV component of the project that is outside of the Commission's certification jurisdiction, and the SunCatcher component that is within the Commission's certification jurisdiction. The Applicant asserted that the Commission should ignore the distinction between the portions of the Calico project that are or are not within its certification jurisdiction and instead treat the entire project as if it were part of the Commission's certified regulatory program.

Sierra Club strongly objects to the Applicant's suggestion to ignore the requirements of CEQA by preparing a single document under the Commission's certified regulatory program. As the Sierra Club explained in detail in its July 13, 2011 letter to

the Commission regarding CEQA review of the Calico project, the lead agency must comply with the normal procedural requirements of CEQA when it prepares the draft EIR for the PV component of the project. This process requires, among other things, that the lead agency circulate a draft EIR for public comment, and then respond to those public comments. If public comment results in significant new information in the EIR, then the lead agency must disclose and analyze that information and then recirculate the EIR for further public comment. If the Energy Commission acts as lead agency, it must, at a minimum, follow these fundamental principles of CEQA with respect to the PV component of the project. It may not rely on its certified regulatory program to avoid any of these CEQA procedures because the PV component does not fall within the certification jurisdiction of the Commission.

Two separate documents are necessary for review of this project. The documents would be as follows: (1) the PMPD and Final Decision applicable to the SunCatcher component of the project that incorporates all of the information developed through hearings and other aspects of the certified regulatory program; and (2) a draft EIR document applicable to the entire project that incorporates in an appendix the Final Decision prepared by the Energy Commission as well as any other relevant permits or information from responsible agencies, including but not limited to the incidental take statement to be prepared by the Department of Fish and Game.

Preparing a single document as the Applicant suggests could create irreconcilable procedural conflicts between CEQA and the Energy Commission's certified regulatory program. For example, § 1751 of the Energy Commission Rules of Practice and Procedure states that the PMPD must be based **exclusively** upon the hearing record and evidentiary record of the proceeding. Although the rules provide for public comment on the PMPD (§ 1749), they do not require the Commission to respond to such comments, nor do they specify that the presiding member may base any part of a revised PMPD on public comments that are not part of the evidentiary record (§ 1753). If a public comment raises new information that was not previously included in the record, the certified regulatory program prohibits the presiding member from basing the PMPD on such information. This process directly conflicts with CEQA Guidelines § 15088 and § 15088.5, which expressly require the lead agency to evaluate public comments and, where necessary, add new information to the draft EIR and recirculate. It is more efficient and simple for the Energy Commission to prepare two separate documents: one that follows the certified regulatory program and another that follows the typical CEQA process.

Judicial Review

The Applicant asserted in its status memo that preparing a single document under the certified regulatory program, "assures maximum defensibility of the document and would avoid having judicial review situated in different venues." Sierra Club interprets this statement to mean that the Applicant wants a single document prepared under the Commission's certified regulatory program because it believes that Public Resources Code § 25531 would render such a document immune from judicial review in the Superior Courts and the Courts of Appeal. The Applicant is incorrect. Section 25531 would not prevent Superior Court review of such a document. However, the Applicant's recommendation to draft a single document under the certified regulatory program would

create unnecessary legal ambiguity for the Energy Commission's environmental review of the Calico project.

Sierra Club acknowledges that a Final Decision made by the Energy Commission pursuant to its certification authority to site a thermal powerplant facility may only be reviewed by the Supreme Court of California. However, such legal immunity does not extend to a CEQA decision on the PV component of the Calico project because – as this Committee clearly recognized – PV facilities do not fall within the certification jurisdiction of the Energy Commission. The Supreme Court recently issued an order clarifying that Public Resources Code § 25531 applies only to Energy Commission decisions that are made pursuant to its certification authority as applied to thermal powerplants and related facilities. (*Voices of the Wetlands v. State Water Resources Control Board* (2011) __ P.3d __, 11 Cal. Daily Op. Serv. 10365 (“Read together with subdivision (a), [Public Resources Code § 25531] subdivision (c) simply confirms that no other court may review directly a **certification decision** of the commission ...”) (emphasis in original).) By advocating for a single document, the Applicant is attempting to conflate the separate authorities of the Energy Commission in this matter – i.e. the authority under CEQA to review the PV component and the whole of the project, and the authority under the Warren-Alquist Act to certify the thermal powerplant – and thereby impede the public from seeking judicial review of a final EIR in Superior Court. While the extent of judicial review is ultimately a question for the courts to decide, the Energy Commission would enhance the legal defensibility of its environmental review by clearly delineating in two separate documents the aspects of the project that fall under its certification jurisdiction and those aspects that are limited to its authority under CEQA.

In summary, if the Energy Commission acts as lead agency, it should prepare two separate documents: (1) a PMPD and Final Decision covering the SunCatcher component; and (2) a draft EIR and final EIR that covers the PV component and the whole of the project.

Dated: August 23, 2011

Respectfully submitted,

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