Katten
Katten Muchin Rosenman LLP

2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
310.788.4400 tel
310.788.4471 fax

CYNTHIA L. BURCH

DOCKET
08-AFC-13
DATE SEP 03 2010
RECD. SEP 03 2010

September 3, 2010

Via E-Mail and FedEx

Mr. Jim Stobaugh
National Project Manager
Bureau of Land Management
1340 Financial Blvd
Reno, NV 89502

BLM Director (210)
Attention: Brenda Williams
1620 L Street, NW., Suite 1075
Washington, DC 20036

Re: Comments on Final Environmental Impact Statement and Protests to Proposed Grant of Right-of Way to Calico Solar LLC under the FLPMA and to Amendment of the California Desert Conservation Area Plan

Dear Mr. Stobaugh and Ms. Williams:

BNSF Railway ("BNSF") appreciates the opportunity to comment on the Final Environmental Impact Statement and Proposed Amendment to the California Desert Conservation Area Plan ("FEIS") for the Calico Solar (formerly SES Solar One) Project ("Project") proposed by Calico Solar, LLC ("Calico Solar") released August 6, 2010. The proposed Project would require the Bureau of Land Management ("BLM") to issue a right-of-way ("ROW") over public lands in compliance with the Federal Land Policy and Management Act of 1976 ("FLPMA"). Issuance of the ROW would require an amendment of the California Desert Conservation Area Plan ("CDCA"). This letter serves both as BNSF's comments on the FEIS and BNSF's protest of the proposed right-of-way under the FLPMA and the CDCA amendment.

1. Brief Procedural Background

Calico Solar first filed its Application for Certification before the California Energy Commission ("CEC") on December 22, 2008. On March 30, 2010, consistent with the Memorandum of Understanding between BLM and the CEC (the "MOU"),[1] the BLM and CEC issued the Staff Assessment and Draft Environmental Impact Statement ("SA/DEIS"). By doing so, BLM

[1] Attached as Appendix B to the FEIS.

confirmed its obligation to comply with the procedural and substantive requirements of the National Environmental Policy Act ("NEPA"). The CEC confirmed its corollary obligation to comply with the California Environmental Quality Act ("CEQA"). The MOU sets forth BLM's and the CEC's respective duties and responsibilities in relation to preparing the SA/DEIS and acknowledges that "[t]he assessments provided by the Parties must be sufficient to meet all federal and state requirements for NEPA and CEQA." [MOU at p. 4]

On May 5, 2010, the CEC issued a Notice of Availability, Staff Assessment and Draft Environmental Impact Statement for the Proposed Calico Solar Project ("Notice of Availability"). The Notice of Availability stated that "[t]he Energy Commission and the BLM have been jointly conducting the state and federal environmental review for the Calico Solar Project and recently released a joint SA/DEIS; however, the two agencies have now determined that it is necessary to produce separate, but coordinated, final environmental reviews and decision documents." [Notice of Availability at p. 1.]

The Transportation and Safety section of the SA/DEIS referenced access roads and a grade-separation bridge on BNSF's Right-of-Way ("RoW"), but there was no environmental study relating to the impacts of those proposed Project features. [See SA/DEIS at C.11-6 and C.11-7.] The Transportation and Safety section of the SA/DEIS noted that glare and glint impacts had not been analyzed and the CEC Staff was in the process of obtaining additional information. [See SA/DEIS at C.11-15.] On July 1, 2010, BNSF provided written comments on the SA/DEIS to the CEC and BLM.[2] A Supplemental Staff Assessment (the "SSA") was issued on July 21, 2010. The Transportation and Safety section was blank with the exception of two figures giving general depictions of the Project and various temporary and permanent roadways, noting that it "will be filed subsequently." [See SSA at C.11-1.]

On July 29, 2010, BNSF provided written comments on the SSA to the CEC and BLM.[3] That same day, BNSF filed a Petition to Intervene. BNSF was granted intervenor status on August 3, 2010. On August 4-6, 2010, the CEC held evidentiary hearings in Barstow in furtherance of the CEC's responsibility to complete a CEQA-equivalent review process in relation to the certification decision-making process. On August 9, 2010, the CEC Staff issued Supplemental Staff Assessment Part II ("SSA Part II"), which contained a narrative Transportation and Safety section with proposed Conditions of Certification. The SSA Part II contained a Glare & Glint Study at Appendix A, which was prepared by Staff because Staff determined that Applicant had not prepared a sufficient Glare & Glint study.[4] On August 18, 2010, the CEC held an evidentiary

[2] Attached hereto as Exhibit "A."

[3] Attached hereto as Exhibit "B."

[4] Testimony of Staff expert Alan Lindsley ("Lindsley"), 8/18/2010 TR at 29:3-6.

hearing in Sacramento, during which the CEC heard testimony and reviewed evidence regarding Transportation and Safety issues, including access roads and other proposed structures on the RoW and glare and glint.

During the August 18th hearing, Calico Solar presented no testimony regarding Glare & Glint, but did offer Exhibit 105, which is the Imperial Valley study that the Staff had already determined was insufficient.[5] During the August 18th hearing, Staff confirmed Calico Solar had not conducted any of the requisite environmental studies and analyses regarding access to and proposed structures within the BNSF RoW.[6]

The FEIS was issued on August 6, 2010, before any of the CEC hearings relating to Traffic and Transportation. Section 4.15 of the FEIS deals with Traffic and Transportation. That section specifically notes that "[t]his section was developed from Section C.11 Transportation and Traffic in the SA/DEIS." [FEIS at Section 4.15.] The FEIS, however, does not properly analyze the impacts of glare and glint previously identified in the SA/DEIS. The FEIS does reference the temporary access roads proposed by Calico Solar within the BNSF RoW. This reference, however, is a brief comment in the mitigation measures section that it will be an "all-weather road designed to allow for fire-truck and emergency vehicle access." [See FEIS, at Section 4.15.4.] There is no reference to any environmental study or analysis performed relating to the impacts of those proposed Project features.

---

[5] At the conclusion of the final evidentiary hearing on August 25-26, 2010, the CEC properly excluded Exhibit 105 from the Record.

[6] Testimony of CEC Staff Member Marie McLean ("McLean"), 8/18/2010 TR at 239:7-18.

> MR. LAMB: Okay. Ms. Bellows had testified just a little while ago about doing proper studies, analyses for the impacts of the roadways that had been studied and analyzed around the project.
>
> Do you recall that?
>
> MS. McLEAN: Yes.
>
> MR. LAMB: There have been no studies, no analyses, no environmental review of any roadways within the right of way, correct?
>
> MS. McLEAN: I don't – I'm not sure.
>
> MR. LAMB: Well, are you aware of any, ma'am?
>
> MS. McLEAN: Right at the moment, no.

The FEIS does not address the comments previously submitted by BNSF on July 1 and 29, 2010. Nor does it address the concerns expressed by BNSF in its Post-Hearing Brief. Consistent with the May 5th Notice of Availability, the FEIS does not incorporate by reference or otherwise adopt the study, analysis and concomitant findings of the CEC in relation to the CEC's supplemental staff assessments.[7]

2. Brief Factual Background Relating To BNSF[8]

BNSF is one of the two Class 1 railroads operating in California. As noted in the FEIS, BNSF provides long-haul freight service throughout the U.S. over a 32,000-mile route. Its double-track transcontinental mainline, traversed by as many as 80 trains per day, carries interstate commerce from the Ports of Los Angeles and Long Beach to U.S. Midwestern, Southwestern and Eastern markets. The Project proposes to place 34,000 SunCatchers, a 5,000-foot transmission line, substation, and maintenance facilities, along both sides of approximately five miles of BNSF's mainline. The mainline section where the Project proposes to emplace 34,000 SunCatchers has two at-grade crossings, a significant curve, changes elevations, requires engineers to adjust speed through curves and elevation changes, and has six signals that serve as critical safety features on which engineers rely to ensure that they do not collide with other trains moving through the section.[9]

3. Comments And Protests

Given the importance of this transcontinental rail corridor, it is essential that safety along BNSF's mainline be maintained. Accordingly, BNSF has significant concerns the construction and operation of the Project not adversely impact BNSF operations or otherwise impose unacceptable safety risks to BNSF personnel and operations.

NEPA requires BLM to prepare the FEIS in such a manner that it may "serve as an action-forcing device to ensure that the policies and goals defined in NEPA are infused into the ongoing programs and actions of the federal government." As such, the FEIS is more than simply a disclosure document, it is to "be used by federal officials in conjunction with other relevant [information] to plan actions and make decisions." 20 C.F.R. 1502.1

---

[7] The FEIS does note that it "may consider" these materials. [See, e.g., FEIS Section 4.15.4.]

[8] BNSF incorporates herein the evidentiary record of exhibits, filings, and testimony introduced during the CEC evidentiary hearing process. For the BLM's convenience, BNSDF attaches hereto the BNSF exhibits offered and admitted during the CEC proceeding, the BNSF Post-Hearing Brief, and Extracts from relevant testimony.

[9] See Intervenor BNSF's Post-Hearing Brief and Exhibits 1200-1206.

BLM cannot abdicate its NEPA responsibilities. *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972) (Federal Power Commission cannot allow applicant to take the lead in preparing environmental impact study). While coordination with other federal and state agencies is encouraged, and tasks can certainly be apportioned to other agencies, as lead agency BLM must independently evaluate all information submitted and be responsible for its accuracy. 40 C.F.R. 1506.5(c) (lead agency responsible for scope, contents and legal adequacy of EIS); s*ee also, Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975) *reh'g denied*, 422 U.S. 1049 (1975) (requiring Housing and Urban Development to independently review, analyze, and judge all information submitted as part of the environmental impact study by the local government applicant agency).

Here, with the decision to forego further joint preparation of environmental reviews as set forth in the May 5, 2010 Notice of Availability, BLM must prepare a comprehensive FEIS that fully and completely assesses Traffic and Transportation issues related to the Project. In particular, the issues raised by the SA/DEIS must be fully evaluated and assessed, to include corresponding mitigation measures, if necessary and appropriate. The FEIS fails to meet BLM's requirements under NEPA. There is no environmental analysis whatsoever of the impact of utilizing temporary "all-weather" access roads within the BNSF RoW. Nor is there any analysis of the glare and glint issues identified in the SA/DEIS.

Moreover, under FLPMA, a right-of-way issued by the BLM must contain terms and conditions that "protect Federal . . . economic interests . . . [and] protect the other lawful users of the lands adjacent to or traversed by such right-of-way." 43.U.S.C. §1765(b). As a major transcontinental transportation corridor responsible for the shipment of a significant portion of the goods to and from the west coast, the federal government has an important economic interest in ensuring that rail traffic is not interrupted. This issue has been raised repeatedly by BNSF and it has not been addressed by the FEIS. Additionally, the FEIS fails to analyze or address how the proposed Project will protect BNSF's lawful use of its RoW. Moreover, the FPLMA makes it clear that it does not grant the Secretary the right to terminate, restrict, or impede the rights of a holder of a pre-FLPMA right-of-way. 43 U.S.C. §1769; s*ee also, City and County of Denver, by and Through Bd. Of Water Com'rs v. Bergland*, 695 F.2d 465 10th Cir. 1082) (US Forest Service cannot impede City's planned water project inasmuch as it is an authorized use of a pre-FLPMA right-of-way through national forest lands). Here, the Record[10] clearly reflects that the glare and glint resulting from the proposed SunCatchers will have a material adverse impact on train operations and safety on the BNSF RoW.

---

[10] BLM has participated in all evidentiary hearings held by the CEC and has received all documents filed in this action as an interested agency to the CEC proceeding.

Both the FLPMA and the CDCA require that lands adjacent to the proposed Project right-of-way be protected. Such protection cannot be accomplished without "full and fair discussion of significant environmental impacts" (40 C.F.R. 1502.1) and a discussion of the "means to mitigate adverse environmental impacts" (*Id.*) as required by NEPA, 42 U.S.C. 4321 *et seq.*). Moreover, BNSF does not believe that a determination can be made that the proposed CDCA amendment is in accordance with applicable laws and regulations and will provide for the immediate and future management, use, development, and protection of the public lands within the CDCA, as required by Chapter 7 of the CDCA.[11]

A. Traffic and Transportation – Glint and Glare[12]

1. The FEIS fails to adequately describe the impacts of glint and glare from the Project on BNSF's rail line.

The FEIS fails to provide a "full and fair discussion of significant environmental impacts" as required by NEPA with regard to the Project's impacts relating to glint and glare. 40 C.F.R. 1502.1. Without such a discussion, the BLM District Manager, Desert District is not able to determine the environmental impact of the proposed CDCA amendment as required by Chapter 7 of the CDCA. The FEIS analysis regarding Traffic and Transportation finds that a project may have an adverse impact if, among other things it would alter rail traffic or conflict with existing policies, plans, or programs. FEIS 4-319 – 4-320. As has been addressed in BNSF's

[11] BNSF notes that, throughout the evidentiary hearings, CEC Staff and Commissioners commented on the tight time frames under which they were working because Calico Solar had temporal restrictions in relation to anticipated funding through the American Recovery and Reinvestment Act of 2009 ("ARRA"). Indeed, US Fish & Game's Ashleigh Blackford even commented that "we have not had enough time with the ARRA finding deadlines to, you know, pursue gathering that information." 8/25/2010 TR at 120:14-16. While BNSF is sympathetic to Calico Solar's funding issues, ARRA does not serve as a waiver to the procedural and substantive requirements of NEPA or the FLPMA.

[12] The FEIS fails to address or respond adequately to other critical BNSF concerns that were raised in the CEC evidentiary hearings. Those concerns resulted in a number of Conditions of Certification proposed by BNSF and agreed to by Calico Solar. [See Exhibit 1209.] BNSF expressly reserves those issues as set forth in Exhibits 1207-1209, its Post-Hearing Brief, and the Record in this matter. Accordingly, the Conditions of Certification introduced during the CEC evidentiary hearing and set forth in Exhibit 1209 should be incorporated into the FEIS as mitigation measures. BNSF focuses its comments and protests in this submission on issues raised in relation to Traffic and Transportation that were not adequately addressed by the FEIS and were not he subject of adequate Conditions of Certification during the CEC evidentiary hearing.

submissions to the BLM on the joint Staff Assessment/Draft Environmental Impact Statement ("SA/DEIS"), the portion of the BNSF mainline along which the Project is proposed to be built is curved. An essential signal for rail traffic is located in the vicinity near Hector Road. Signals are critical safety features. Calico Solar proposes to locate the nearest SunCatchers as close as 223' from the right of way, on both sides of the transcontinental mainline track for approximately five miles. Daytime glint and glare from the 34,000 SunCatcher mirrors and associated structures, in particular when the mirrors are in offset tracking position, may significantly impact BNSF engineers' ability to see the signal. The situation would be exacerbated by the site elevations which Calico Solar has proposed. Experts for both the Staff and BNSF uniformly agree that a comprehensive study has not been done and needs to be done before any SunCatcher is put into place.

Both FRA regulations and the BNSF General Code of Operating Rules ("GCOR"),[13] BNSF's federally-regulated operating procedures, require BNSF to maintain visual contact with signals. The illuminated background created by the SunCatcher field could interfere with this contact, because it could result in an engineer perceiving the signal to be dark or to be displaying a white light. Both of these circumstances, under GCOR Section 9.4, require the engineer immediately to stop the train. This often requires an emergency application of the brakes, risking derailment of the train, collision with another train, and other catastrophic events. When a train has been stopped through emergency application of the brakes, GCOR Section 6.23 requires the engineer to inspect all cars, units, equipment and track pursuant to BNSF special instructions and rules. This can cause significant delays to rail operations with ramifications reaching from the Ports of Los Angeles and Long Beach to Chicago and beyond. Thus, glint and glare are critical safety and operational issues.

The FEIS addresses glint and glare as relates to potential impacts on wildlife (FEIS pp. 4-40 – 4-41), and as relates to possible visual or scenic impacts with an emphasis on changes in aesthetic values. FEIS pp. 4-349. The FEIS acknowledges the visual impacts to rail where it states: "From [the BNSF Railroad], the Proposed Action would create a strong degree of contrast. The magnitude of change from this viewpoint would be very high, and the Proposed Action would dominate the landscape." FEIS 4-345. The FEIS, however, does not address the potential for glint and glare to adversely affect the safety of rail operations and personnel on BNSF property adjacent to the proposed right-of-way for the Project.

[13] Exhibit 1210.

2. The FEIS fails to discuss potential mitigation measures for the glint and glare impacts of the Project.

Without an adequate discussion of glint and glare impacts, the discussion of the "means to mitigate adverse environmental impacts" required by NEPA (40 C.F.R. 1502.1) is impossible. The discussion of mitigation measures for Traffic and Transportation defers discussion of mitigation measures until the issuance of the Record of Decision, and states: "When developing the Record of Decision for the proposed Calico Solar Project and CDCA Plan Amendment, the BLM may consider the SA/DEIS Conditions of Certification, additional Conditions of Certification from the Supplemental SA, and other mitigation measures developed by the BLM and other regulatory agencies." FEIS 4-334. As a result, with the exception of the below, BNSF is unable to provide meaningful comments on possible mitigation measures at this time

In response to BNSF's comments on the SA/DEIS regarding glint and glare, the BLM stated: "The Proponent will work closely with BNSF to ensure that BNSF's safety concerns are addressed and appropriate measures taken to ensure the safety of BNSF trains and personnel and Calico Solar personnel." FEIS G-119. However, the FEIS does not propose to condition the issuance of the proposed right-of-way or the approval of the CDCA amendment upon Calico Solar cooperating as described, nor does it propose any mitigation measures to address these adverse environmental impacts. BNSF therefore requests that the following be incorporated into the Project as Mitigation Measure TRANS-1:

TRANS 1 – Prevention of Glare and Glint from SunCatchers to BNSF Train Crews and Motorists on Hector Road; Route 66; Interstate 40

The purpose of this condition of certification in the CEC AFC proceeding and as a mitigation measure in the FEIS is to prevent adverse visual impacts from glint and glare on rail operations and other modes of transportation. This mitigation measure is divided into two sections. Section One concerns the performance of a study to analyze the impact of glint and glare from the SunCatchers and the corresponding impact, if any, on a railroad engineer's ability to see and respond to signals, and additional mitigation measures, if recommended by the study. Section Two concerns general location, operating, reporting procedures, and mitigation measures pertaining to the SunCatcher mirrors.

I. Glare/Glint Study and Implementation of Additional Mitigation Measures, if Necessary

Prior to the first SunCatcher disc being mounted on a pedestal, a site-specific Glare/Glint study shall be performed at applicant's expense to address the Glare/Glint issues relating to BNSF's rail operations raised by BNSF with respect

to the potential impact of the proposed SunCatchers on BNSF rail operations. The site specific study shall commence immediately upon BNSF's selection of the experts to perform the study. If an impact to BNSF rail operations is identified, the Glare/Glint study will suggest mitigation measures to address any such impact. The recommended mitigation measures shall be reviewed by BNSF to determine whether the mitigation measures will ensure that the engineer can accurately see and respond to signals and they are consistent with BNSF guidelines and FRA regulations. If BNSF agrees on the proposed mitigation measures identified in the study, said mitigation measures shall be implemented by applicant at applicant's expense. Immediately after the installation of the first SunCatcher mirrors near the BNSF Railway right-of-way but before operation of the mirrors, the applicant will work with BNSF Railway to ensure that the operation of the SunCatcher mirrors will not interfere with the railroad engineers' ability to accurately see and respond to appropriate signal lights. Moreover, Calico Solar must warrant and represent that Calico Solar's proposed Project will not interfere with BNSF's critical rail operations and that Calico Solar will immediately eliminate any interference if it occurs.

II. General Location, Operating, and Reporting Procedures

A. Subject to the results of the study performed under Section I, and resulting mitigation required thereunder, if any, the project owner shall accomplish the following:

1. Modify the offset tracking procedure to use a 25-degree offset instead of the proposed 10-degree offset.

2. Ensure the morning stow position-to-offset position transitions occur at least 30 minutes before sunrise and end in the 25 % offset tracking position.

3. Ensure that the "Night Stow" should occur 30 minutes after sunset to avoid any intrusive light effects.

4. Ensure that the minimum distance from any SunCatcher reflector assembly to the BNSF right-of-way (RoW) or any public roadway shall be a minimum of 223 feet to reduce the possibility of temporary flash blindness or any other adverse visual impact identified by the study performed under Section I. In addition, during the normal tracking and offset tracking positions, the project operator shall adhere to the following procedures and specifications.

B. The Applicant, in consultation with and subject to the approval of BNSF, shall develop and implement an emergency glare and glint response program that includes all of the following:

a. Monitoring plan that requires (1) the use of video surveillance trucks (or other equipment recommended by the experts as a result of the study performed under Section I) to identify and document intrusive light conditions, covering all hours of operation on a weekly basis for five years; and (2) monitoring of the status of individual SunCatchers during all hours of operation to immediately identify any units with the potential to create glare within the BNSF Railway right-of-way; or on I-40,, Route 66, or Hector Road.

b. Procedures that allow motorists and train operators, including AMTRAK and BNSF, to report to the project owner, as well as to the FRA, Caltrans, California Highway Patrol (CHP), and the County of San Bernardino, in the case of complaints from motorists, any problems with glint or glare resulting from the operation or malfunction of SunCatchers. The procedures for public reporting of glare and glint problems shall be developed in consultation with the FRA, California Department of Transportation (Caltrans) District 8 office, California Highway Patrol (CHP), and San Bernardino County. These procedures shall include a toll-free number for reporting problems as well as a process for written notification to the project owner and to California Department of Transportation (Caltrans, District 8) and San Bernardino County, in the case of complaints from motorists; or to AMTRAK or BNSF Railway, or both, in the case of complaints from train operator or passengers.

c. Upon receipt of a complaint, procedures for the immediate (1) stowing and/or repositioning of all units to avoid reported glare and glint within the BNSF Railway right-of-way or on I-40, Route 66, or Hector Road; and (2) investigation and resolution of complaints received from train operators or motorists or both as well as any incidences of intrusive light conditions identified by the video surveillance or other equipment specified by the experts as a result of the study in Section I. The expert performing the study under Section I shall be consulted to determine the source of the interference with an engineer's ability to see and respond to a signal and whether the interference has been eliminated. Within 48 hours, the expert will conduct and initial investigation and confer with representatives from the applicant, BNSF and CPM regarding resolution of the reported issue.

d. Process for evaluating intrusive light conditions identified by the video surveillance (or other equipment recommended by the experts as a result of the study performed under Section I) and determining, in consultation with the experts, what operational or other changes may be warranted to reduce or eliminate the identified intrusion.

e. Procedures for documenting instances when units with the potential to create glare and glint are identified, or when train operators or motorists complain of glare or glint, and the actions taken in response to those instances or complaints.

f. Periodic reports to the Project CPM detailing instances of SunCatcher malfunction, public complaints about glare or glint, or video-detected problems (or other equipment recommended by the experts as a result of the study performed under Section I) that are covered by the emergency glare response program.

3. The FEIS list of Applicable Laws, Regulations, Plans and Policies relating to Traffic and Transportation is incomplete.

FEIS Table 3-33, Traffic and Transportation Laws, Regulations, Plans and Policies, fails to include a number of applicable laws, regulations plans and policies relating to rail. As described above, BNSF is required to operate in a manner consistent with FRA regulations and GCOR.[14] BNSF is also subject to statutory requirements relating to train signals, including but not limited to the Rail Safety Improvement Act of 2008, which reserves to the FRA the sole and exclusive right, among other things, to control and regulate:

---

[14] Railroads are required to file their operating rules and any amendments thereto with the FRA. The operating rules are intended to ensure safety in railroad operations (GCOR Section 1.1), and railroads are required to periodically monitor compliance with their operating rules. 49 C.F.R. 217.9. Railroads must periodically instruct their employees on the meaning and application of the operating rules (49 C.F.R. Part 217.11), and must have a program to monitor the conduct of their certified locomotive engineers and their compliance with "provisions of the railroad's operating rules that require response to signals that display less than a 'clear' aspect..." 49 C.F.R. Part 240.303(d)(1)(i). A railroad is required to revoke the certificate of an engineer who fails to meet the qualification requirements of Part 240, which may be established by an engineer's failure to control a train in accordance with a signal. 49 C.F.R. Part 240.307. A railroad's failure to comply with the provisions of these regulations subject the railroad to civil penalties.

a. "[P]erformance standards for processor-based signal and train control systems" [49 U.S.C. §20171(7)];

b. "[The] qualification of new or novel technology at highway-rail grade crossings" [49 U.S.C. §20171(7)];

c. The duties and responsibilities, to include specifically limiting the duty hours, of railway signal employees [49 U.S.C. § 21104]; and

d. Federally funded capital projects designed to, among other things, "mitigat[e] environmental impacts [and implement] communication and signalization improvements." [49 U.S.C. §24401(2)].

Based on the evidence received at the CEC evidentiary hearings, which are incorporated herein by reference,[15] the issuance of the proposed right-of-way to Calico Solar and the approval of the CDCA amendment may adversely affect BNSF's ability to operate consistent with these laws, regulations and standards. Moreover, an approval of the CDCA amendment would require the BLM Desert District Manager to make a threshold determination that the proposed CDCA amendment is in accordance with applicable laws and regulations. CDCA Chapter 7. Because the FEIS does not include all applicable laws, regulations, plans and policies, that threshold determination cannot be made.

Table 3-33 must therefore be augmented with the following:

Law Regulation, Plan or Policy	**Description**
Federal: CFR; Title 49, Transportation, Part 209 to Part 244, Federal Railroad Administration.	Federal regulations concerning rail safety.
Federal: Federal Railroad Safety Act of 1970 (FRSA)	FRSA granted the Federal Railroad Administration rulemaking authority over all areas of railroad safety.

[15] See Extracts of relevant testimony, attached hereto.

Rail Safety Improvement Act of 2008 (RSIA)	RSIA reserves to the FRA the sole and exclusive right, among other things, to control and regulate rail signals and crossings and related technology.
BNSF General Code of Operating Rules	Federally-regulated rules governing operation of railroads, with a focus on safety.

B. Traffic and Transportation – Access

As noted above, the FEIS states that the analysis regarding Traffic and Transportation finds that a project may have an adverse impact if, among other things it would alter rail traffic or conflict with existing policies, plans, or programs. FEIS 4-319 – 4-320. However, the FEIS does not address potential impacts to rail from any access roads and at-grade and above-grade crossings proposed to be constructed over the BNSF right-of-way, nor does it propose any mitigation for impacts to rail other than those associated with the temporary access road.[16] BNSF is concerned that any proposed access roads and at-grade and above-grade crossings be constructed in conformance with applicable railroad laws, regulations, plans and policies, including those listed above, and that they be constructed using materials which meet with approval from the proper regulatory authority. These access roads and at-grade and above-grade crossings, subject to BNSF's voluntary agreement to allow them, must be conditioned on measures which ensure the safety of railroad operations.

To address these concerns, BNSF requests that a proper environmental study be conducted of the potential impact of the proposed access roads and at-grade and above-grade crossings within the

[16] The FEIS includes the following mitigation measure relating to the temporary access road:

> Temporary Access Road. The temporary access road would be an all-weather road designed to allow for fire-truck and emergency vehicle access during all weather and soil conditions. The Applicant shall prepare a safety plan for ensuring that all state and federal safety requirements for railroad crossings are followed, including those required by the CPUC and the Federal Railroad Administration (FRA).

FEIS Section 4.15.4.

BNSF RoW and that the following mitigation measure be incorporated into the FEIS:

TRANS-2 Construction of All-Weather Roads and Bridge.

If an easement is granted and the applicant begins construction, the applicant shall construct an all-weather road according to (1) California State Fire Marshall specifications as outlined in *California Fire Code* Section 902.2.1 et seq. These roads shall be treated with Soiltac or its equivalent, subject to obtaining proper authority from BLM and the Regional Water Quality Control Board.

In addition, the applicant shall coordinate its activities with BNSF Railway. Those activities include working with the California Public Utilities Commission to ensure compliance with provisions of the *California Public Utilities Code* Sections 1201- 1220.

During construction of both the temporary and permanent road, temporary crossing of BNSF tracks, and permanent crossing of BNSF tracks, the applicant shall prepare and coordinate with BNSF Railway; California Public Utilities Commission; and Federal Railroad Administration a safety plan for ensuring that all state and federal safety requirements for railroad crossings are followed.

That plan shall be reviewed and coordinated with BNSF Railway and appropriate regulatory agencies to ensure compliance with all state and federal requirements and approved by those agencies.

4. Conclusion

For all the foregoing reasons, BNSF respectfully requests that the BLM supplement the FEIS to include: (1) a comprehensive glare/glint study that will address the impact of 34,000 SunCatchers on BNSF rail operations and safety; and (2) a proper environmental analysis of the potential impact of the proposed access roads and at-grade and above-grade crossings within the BNSF RoW. BNSF further requests that the Conditions of Certification set forth in Exhibit 1209 and as set forth hereinabove in TRANS 1 and TRANS 2 be incorporated into the FEIS and adopted by the BLM. Finally, BNSF protests the issuance of the proposed right-of-way to Calico Solar under the FLPMA and approval of the CDCA amendment proposed as part of the Calico Solar Project, as set forth hereinabove.

Respectfully submitted,

Cynthia Lea Burch

Cynthia Burch
For BNSF Railway

Table of Attachments

Tab	Description
1	Exhibit 1200 – Prepared Direct Testimony of Dennis Skeels
2	Exhibit 1201 – Prepared Direct Testimony of Edward Phillips
3	Exhibit 1202 – Prepared Direct testimony of Thomas Schmidt
4	Exhibit 1203 – Prepared Direct Testimony of Joseph Schnell
5	Exhibit 1204 – Prepared Direct Testimony of Dennis Skeels
6	Exhibit 1205 – Prepared Direct Testimony of David Krauss, Ph. D.
7	Exhibit 1206 – Prepared Direct Testimony of Edward Phillips
8	Exhibit 1207 – BNSF Comment Letter to BLM dated July 1, 2010
9	Exhibit 1208 – BNSF Comment Letter to BLM dated July 29, 2010
10	Exhibit 1209 – Conditions of Certification
11	Exhibit 1210 – BNSF General Code of Operating Rules
12	BNSF's Post-Hearing Brief
13	Extracts of Relevant Testimony, CEC Evidentiary Hearing of August 5, 2010
14	Extracts of Relevant Testimony, CEC Evidentiary Hearing of August 18, 2010

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION	**Docket No. 08-AFC-13**
For the CALICO SOLAR *(Formerly SES Solar One)*	**PROOF OF SERVICE** *(Revised 8/9/10)*

APPLICANT
Felicia Bellows
Vice President of Development
& Project Manager
Tessera Solar
4800 North Scottsdale Road,
#5500
Scottsdale, AZ 85251
felicia.bellows@tesserasolar.com

CONSULTANT
Angela Leiba
AFC Project Manager
URS Corporation
1615 Murray Canyon Rd.,
#1000
San Diego, CA 92108
angela_leiba@URSCorp.com

APPLICANT'S COUNSEL
Allan J. Thompson
Attorney at Law
21 C Orinda Way #314
Orinda, CA 94563
allanori@comcast.net

Ella Foley Gannon, Partner
Bingham McCutchen, LLP
Three Embarcadero Center
San Francisco, CA 94111
ella.gannon@bingham.com

INTERESTED AGENCIES
California ISO
e-recipient@caiso.com

Jim Stobaugh
BLM – Nevada State Office
P.O. Box 12000
Reno, NV 89520
jim_stobaugh@blm.gov

Rich Rotte, Project Manager
Bureau of Land Management
Barstow Field Office
2601 Barstow Road
Barstow, CA 92311
richard_rotte@blm.gov

Becky Jones
California Department of
Fish & Game
36431 41st Street East
Palmdale, CA 93552
dfgpalm@adelphia.net

INTERVENORS
County of San Bernardino
Ruth E. Stringer,
County Counsel
Bart W. Brizzee,
Deputy County Counsel
385 N. Arrowhead Avenue,
4th Floor
San Bernardino, CA 92415-
bbrizzee@cc.sbcounty.gov

California Unions for Reliable
Energy (CURE)
c/o: Loulena A. Miles,
Marc D. Joseph
Adams Broadwell Joseph
& Cardozo
601 Gateway Boulevard, Ste. 1000
South San Francisco, CA 94080
lmiles@adamsbroadwell.com

Defenders of Wildlife
Joshua Basofin
1303 J Street, Suite 270
Sacramento, California 95814
e-mail service preferred
jbasofin@defenders.org

Society for the Conservation of
Bighorn Sheep
Bob Burke & Gary Thomas
P.O. Box 1407
Yermo, CA 92398
cameracoordinator@sheepsociety.com

Basin and Range Watch
Laura Cunningham &
Kevin Emmerich
P.O. Box 70
Beatty, NV 89003
atomictoadranch@netzero.net

*indicates change

INTERVENORS CONT.

Patrick C. Jackson
600 N. Darwood Avenue
San Dimas, CA 91773
e-mail service preferred
ochsjack@earthlink.net

Gloria D. Smith, Senior Attorney
***Travis Ritchie**
Sierra Club
85 Second Street, Second floor
San Francisco, CA 94105
gloria.smith@sierraclub.org
travis.ritchie@sierraclub.org

Newberry Community
Service District
Wayne W. Weierbach
P.O. Box 206
Newberry Springs, CA 92365
newberryCSD@gmail.com

Cynthia Lea Burch
Steven A. Lamb
Anne Alexander
Katten Muchin Rosenman LLP
2029 Century Park East,
Ste. 2700
Los Angeles, CA 90067-3012
Cynthia.burch@kattenlaw.com
Steven.lamb@kattenlaw.com
Anne.alexander@kattenlaw.com

ENERGY COMMISSION

ANTHONY EGGERT
Commissioner and Presiding Member
aeggert@energy.state.ca.us

JEFFREY D. BYRON
Commissioner and Associate Member
jbyron@energy.state.ca.us

Paul Kramer
Hearing Officer
pkramer@energy.state.ca.us

Lorraine White, Adviser to
Commissioner Eggert
e-mail service preferred
lwhite@energy.state.ca.us

Kristy Chew, Adviser to
Commissioner Byron
e-mail service preferred
kchew@energy.state.ca.us

Caryn Holmes
Staff Counsel
cholmes@energy.state.ca.us

Steve Adams
Co-Staff Counsel
sadams@energy.state.ca.us

Christopher Meyer
Project Manager
cmeyer@energy.state.ca.us

Jennifer Jennings
Public Adviser
e-mail service preferred
publicadviser@energy.state.ca.us

*indicates change

DECLARATION OF SERVICE

I, Harriet Vletas, declare that on September 3, 2010, I served and filed copies of the attached Comments on Final Environmental Impact Statement and Protests to Proposed Grant of Right-of-Way to Calico Solar LLC under the FLPMA and to Amendment of the California Desert Conservation Area Plan, dated September 3, 2010. 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/solarone]**.

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;

____ 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."

AND

FOR FILING WITH THE ENERGY COMMISSION:

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

OR

____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-13
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

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.

Harriet Vletas

Harriet Vletas

*indicates change