

CALifornians for Renewable Energy, Inc. (CARE)

Michael E. Boyd, President of the Board of Directors
821 Lakeknoll Dr.
Sunnyvale, CA 94089

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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of)	
)	
)	DOCKET NO.: 99-AFC-3
)	STATUS REPORT, INTERVENOR'S PROPOSED
Metcalf Energy Center)	SCHEDULING ORDER ON THE STATUS OF
)	PROCEEDINGS FOR CEC SITE LICENSING,
)	AND MOTION TO CHANGE THE ORDER
_____)	OF BUSINESS AT THE STATUS CONFERENCE

CALifornians for Renewable Energy, Inc. (CARE) comments regarding the status of the review of the proposed project are provided below. We feel that the project is flawed by numerous severe unmitigated impacts in addition to a paucity of clear design information and the Application for Certification should be withdrawn by the applicant or rescinded by commission action. Unmitigated impacts include land use, plume visual impacts, emission impacts (especially NOx and particulate matter), water resources, biological resources, cultural resources, and hazardous materials. For this reason CARE has retained legal counsel, John Gabrielli Esq. for the narrow purpose of preparing a motion to rescind (or disapprove) the AFC in this case. Counsel has informed CARE that this motion should be prepared in time for the status conference. Due to CARE's limited financial resources we encourage you to change the order of business as follows.

MOTION BY CARE TO REORDER THE ORDER OF BUSINESS TO CONSIDER AGENDA ITEM 7 OTHER PROCEDURALLY RELEVANT MATTERS AS THE FIRST ORDER OF BUSINESS AT THE MEC JULY 19, 2000 STATUS CONFERENCE.

CARE request that we be given an opportunity at this time for counsel to introduce a motion to rescind (or disapprove) the AFC. We understand that no action will be taken on the motion at this meeting, but the introduction of this motion should be taken into consideration in the Committee's subsequent scheduling order. CARE will require 15 minutes to present the motion.

The continuance of effort on the part of all agencies and parties is costly and non-productive. CARE is a non-profit corporation, which depends on contributions from the public to fund its activities. This places an undue burden on CARE as an intervenor and the public in general in these proceedings

Our comments are provided in the event that the preferred approach is not taken. We request 25 minutes to present our comments at the conference.

1.0 - The necessity of further discovery

Further discovery is required if the application is to proceed. As noted by staff, outstanding major issues should be resolved prior to issuance of the FSA, otherwise disputed issues must be litigated at the evidentiary hearings. There are many unresolved issues, so that it is impossible to foresee how the project could be approved as currently designed. The public and the parties to the proceedings should not be made to solve all failings of the applicant through the hearing process. A discussion of the some but not all of the unresolved issues are listed below. CARE provides recommendations to CARE for additional work related to assessing the impacts and mitigation effectiveness of Calpine-Bechtel's proposed Metcalf Energy Center from Dr. Smallwood PhD to define the current status from experts CARE has retained and to identify additional experts required for additional discovery, and their associated costs and

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hours. This estimate as provided identifies the need for in excess of 1,000 hours of additional discovery time for experts. This estimate provide a fair estimate of what it will cost to represent the public's interest and rights in this matter on an equal basis with the applicant. Due to the projected costs in excess of \$120,000 CARE will require three months time devoted to fund raising to collect necessary funds to provide the public a level playing field with the applicant.

2.0 -The status and anticipated timing of any further federal actions:

CARE requests that the evidentiary hearing on the MEC be completed within 15 days of the issuance FDOC by the BAAQMD. The issuance of the EPA PSD air permit has been delegated by EPA to BAAQMD to take place concurrent with the issuance of the FDOC. The thirty-day period in which appeals may be filed on the PSD permit with the EPA Environmental Appeals Board begins with the issuance of the PDOC. The CEC evidentiary hearings need to be completed at least two weeks prior to the thirty-day deadline in order to provide the public an opportunity to appeal to EPA based on the record.

3.0 -The issuance of a Final PDOC by the BAAQMD

CARE, STCAG, and CVRP have all responded to the PDOC with comments that include a lack of a top down BACT analysis that does not conform to EPA standards. The FDOC should not be released until a hearing at the BAAQMD on the adequacy of their BACT analysis takes place. CARE and CVRP also noted serious miscalculations in the level of toxic releases from the turbines. Correction of these errors could delay the release of the FDOC, and requires a revised PDOC as has occurred in other cases, rather than a FDOC as the next step in the BAAQMD process.

4.0 - The necessity of reissuing the PSA

A revised PSA is required for meaningful participation by the public. Sufficient information exists in the current PSA to disqualify the project. However we are concerned that iterations and design changes will be allowed by the CEC, as the FSA is prepared. The public and other parties to the proceedings prior to release of the FSA if they occur must review these changes. There were numerous inadequacies in the air quality analysis, health risk assessments, biological and cultural resources impact analysis, and water which were identified by CVRP, CARE, and other interveners as well as other agencies and interested parties. These deficiencies are of sufficient number and magnitude to require review by the parties prior to issuance of the FSA.

In *STAFF'S OPPOSITION TO CVRP'S MOTION FOR AN ORDER DIRECTING STAFF TO PREPARE A SUPPLEMENTAL PRELIMINARY STAFF ASSESSMENT* it states,

“CVRP acknowledges that the Commission’s siting process is exempt from CEQA with respect to issuance of an EIR, but then contradicts itself by arguing that a supplemental PSA is required because “under CEQA, a supplemental EIR is mandated when substantial changes to the project will require major revisions to the previous EIR because the involvement of new significant environmental effects.” (CVRP Motion, p. 6.) The fact remains that staff is exempt from issuing a draft EIR and an EIR. Furthermore, CVRP is incorrect in its comparison of the PSA to an EIR. The PSA is a preliminary assessment by staff, subject to change based on comments from agencies, parties and the public. The PSA is not an “EIR equivalent” document, nor has it ever been intended to be used as such. Thus, staff is not required under CEQA to issue a supplemental PSA. Furthermore, the PSA includes analysis of any project changes referred to by CVRP.”

We object to this, as laypersons, as it is contrary to what our understanding is of the role that agency staff must play in a certified regulatory program plan analysis. It is our understanding that there is no “exemption” from CEQA, as the certified regulatory program is merely a substitute for the CEQA process and must contain all of its essential elements. We will retain legal counsel to look into this issue as soon as we have raised sufficient funds to do so, in addition to all the other legal matters being raised. Be warned, if we are correct about our understanding of CEQA and you do not fix this defect it will be raised in any subsequent litigation.

The PSA is in general a document, which serves the public well. It provides a single source of analysis by the staff, and is laid out in logical format. We are extremely dissatisfied with the data that has been presented by the applicant. We are confronted by a dazzling display of revisions and supplements some subset of which defines the proposed

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project. At this stage in the process the public can have absolutely no hope of reviewing the project since the project definition is completely nebulous. We request that a single defining document be produced which defines the project for review.

In the event that a revised assessment is made by the staff. We request that a single full PSA be issued for review rather than separate sections.

5.0 - The timing of necessary actions by the City of San Jose;

The city planning department needs to have sufficient data for review during hearings in August to consider the Amendment to the General Plan. The current PSA with identified serious unmitigated impacts provides sufficient information for a negative determination by the City.

6.0 - The scheduling of future prehearing (i.e. those occurring in advance of evidentiary hearings) events including the Prehearing Conference and issuance of the Final Staff Assessment.

Multiple major design changes by the applicant have slipped the schedule well beyond the twelve month mandated and event beyond the more typical 14-month timeline. Based on the necessary and reasonable review process we propose the following sequence and durations. These events cannot occur in parallel since each item is dependent on the previous results. The specific dates must be determined by controlling agencies. The total minimum remaining duration is 8-1/2 months.

CARE's Proposed scheduling order

30 days for BACT hearings by BAAQMD, new PDOC issued
30 days from submittal of new data by the applicant to the issuance of a second PSA.
30 days of workshops and PSA comments.
30 days to FSA
15 days to issuance of BAAQMD FDOC
30 days to rebuttal testimony submission deadline
15 days evidentiary hearings
30 days to PMPD
30 day comment period
15 days to issue Errata
15 days Commission Considers PMPD and Errata.

DATED: July 11, 2000

respectfully submitted,



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Exhibit 1

Recommendations to CARE for additional work related to assessing the impacts and mitigation effectiveness of Calpine-Bechtel's proposed Metcalf Energy Center

K. Shawn Smallwood, Ph.D.

I was asked by Californians for Renewable Energy (CARE) to provide recommendations for work that remains to be completed to properly assess the impacts and mitigation effectiveness of the proposed MEC. In so doing, I am summarizing the needs of our team of present experts, as well as my own needs. Of course, this is an utterly impossible task to perform, but I will do my best, good-faith effort to provide sound, realistic estimates suited for the present purposes.

Air Resources

CARE has retained an expert on air resources, and he has provided some input on the project. The fact that the Bay Checkerspot Butterfly is considered as an "umbrella species" of serpentine-based ecosystems (Stuart Weiss, Conservation Biology 13:1-12), coupled with the identification of Nox, ozone, and particulate matter as threats to the Red Legged Frog (Draft Red-legged Frog Recovery Plan: page 41), I have decided that our air resources assessment likely needs additional work. Dr. Kya-tha Paw-U informed me that a thorough assessment of the air impacts will require a meso-scale air analysis, which includes the effects of the surrounding hills on air flows. This task will require approximately 100 hours, but I feel compelled by the resources at stake (the serpentine soils of the surrounding hillsides and their associated special status species) to recommend that CARE retain Dr. Paw-U to perform this work. It will cost CARE \$11,500.

As with all the tasks described in this report, this is a very preliminary, rough estimate, which is likely to increase on virtually a daily basis, as changes are made and new information is provided.

Water Resources

With recent documents submitted by the applicant, it has become apparent to me that the groundwater will be utilized by MEC, thereby possibly threatening the continued existence of the springs on Tulare Hill. These springs may depend partly on the saturation of lower-elevation groundwater tables, which may force water to run from the springs. Taking water from the lower-elevation groundwater table may kill the springs on Tulare Hill. These recently submitted documents also made it apparent to me that the MEC will increase the salinity of the waters in the local area. The salinity of the recycled water will increase by 3% (PSA page 402) and the discharge will include 780 mg/L of sodium (PSA page 403). The stack effluent will bear salts, which will deposit in the local environment and run-off into the local streams. According to the Draft Red-legged Frog Recovery Plan, 100% of Red-legged Frog eggs die when exposed to salinity levels of >4.5 parts per thousand, and 100% of larvae die when exposed to salinity levels of >7 parts per thousand. It is absolutely essential to determine the levels of salinity that will be realized in the local streams due to the effluent of the MEC. It is especially important to accurately predict the increased salinity levels because Red-legged frogs have been nearly completely extirpated from nearby streams to the west of the proposed MEC site. Increasing salinity in local streams to toxic levels would constitute a significant cumulative impact, which has not yet been addressed by the applicant or the CEC.

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I feel compelled to recommend to CARE that they retain an expert on water resources. I estimate that this expert will require at least 80 hours and \$9,200 to properly assess the impacts of the MEC.

(As with all other tasks addressed in this report, the estimates I am providing are not only rough and subject to immediate change, but they are also short-term estimates.)

Human Health Risks

In responding to the MEC PSA (set 7), the applicant estimated that 100% of the particulate matter in the MEC airborne effluent would be PM 2.5. This fine particulate matter may pose increased risk to human health because it can be inhaled more deeply into the lungs. Furthermore, this set 7 response of the applicant acknowledges that the air effluent will include formaldehyde, acetaldehyde, and acrolein. We are, of course, already aware of the VOCs, ozone, NOx, and SOx that are projected to be deposited into the air by MEC. Considering all these increased levels of air contaminants together, and considering that some of them are carcinogenic, I feel compelled to recommend that CARE retain an expert on human health risk assessment. I know of several who could provide such risk assessments, and I estimate that it will take them about 100 hours to properly estimate the risk factors. This work will likely cost CARE \$25,000.

Process

We decided to retain an expert on process because we are concerned with the process currently being implemented for the applicant's request for certification of the Metcalf Energy Center. Our decision to retain an expert on the process being used by the CEC was influenced by a significant number of factors, including the two patterns described below.

First, the environmental documents related to this application for site certification span a year's time, thereby rendering our assessments of the project's impacts and mitigation effectiveness as too disjointed to be coherent and meaningful. As new documents keep appearing from the applicant, we feel that we are commenting on moving targets, where the targets are the description of the environmental setting, the impacts assessments, and the mitigation plan. Most troublesome is the fact that the applicant still has not disclosed its mitigation and monitoring plan, referred to as the Biological Resources Mitigation Implementation and Monitoring Plan (BRMIMP). I am concerned that the applicant is purposefully delaying the issuance of this BRMIMP, knowing full well that our funding is limited and could be exhausted by the time the applicant releases this critically important document at the last minute. The CEC's PSA was severely constrained by not having this document from the applicant. Our assessment of the MEC siting is also severely constrained by not having access to this document. It is unfair of the CEC to allow the applicant to submit its environmental documents in piecemeal fashion. Therefore, we intend to retain an expert on process.

Second, the public workshops were conducted in a manner that stifled public participation, rather than encouraged it. The recent public workshops were advertised to occur from 0900 hours to 1700 hours during each day. Our archaeologist arrived at 1230 hours on the day the Workshops addressed her issues. She arrived prepared to ask important questions and to provide important comments. However, she arrived to find the CEC wrapping up the Workshop already. She was not allowed to participate on the grounds that she was late. Similarly, I arrived at the Workshop on Biological Resources at 1015 hours, only 1.25 hours after the meeting was scheduled to start (the meeting actually started at 0930 hours because the CEC staff were late). Three days prior to the Workshop I called Steve DeYoung of Bechtel and I requested an MEC site visit during the afternoon of the Biological Resources Workshop. Steve told me that the Workshop was scheduled through 1700 hours, so he would be unavailable to accompany me to the MEC site. Thus, I was assured that the Workshop would last until 1700 hours and that I would have ample time to discuss the issues with which I was concerned. When I arrived at the Workshop, I was told that I was late, and that I, as the last speaker of the Workshop, had to make my comments and questions quickly. I felt rushed by the Workshop chair, Paul Richens, and I did not get the opportunity to carefully discuss the issues with which I was concerned. The Workshop was wrapped up by 1130 hours. This type of public participation favors the project applicant, and discourages the public from participating. Therefore, I feel compelled to recommend that CARE retain an expert on the process being implemented by the CEC.

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I estimate that our expert on process will require at least 120 hours to review minutes of meetings, to interview attendees of past meetings related to this site certification process, and to attend future hearings related to MEC. The total cost of this work will be at least \$24,000.

Biological Resources

As I had stated in my comments on the PSA, I have a lot of work that needs to be completed before I can provide a proper assessment of the environmental setting, the project's impacts, and the suitability of the mitigation and monitoring plan. For example, according to Stuart Weiss (Conservation Biology 13:1-12), the Bay Checkerspot Butterfly exhibits a metapopulation structure, but the applicant's response to my PSA comments represent the opinion of Weiss that the Bay Checkerspot Butterflies on Tulare Hill contribute little to the viability of the larger metapopulation. I want to satisfy myself that this conclusion is well founded, so I recommend to CARE that they retain an experts on metapopulations, metapopulation modeling, and population genetics. I have worked with two metapopulation experts, one of whom has a Ph.D. in genetics and the other a Ph.D. in mathematical ecology. These two experts should be available to us and could assess the impact to the metapopulation of Bay Checkerspot Butterfly should the habitat on Tulare Hill degrade to the point where the Butterfly can no longer occur there.

To assist with this effort, I recommend to CARE that they retain an expert on serpentine soils and an expert on butterflies. I already have approached an expert on serpentine soils. He has a Ph.D. in ecology and works on serpentine grassland communities throughout California. I also know of several Ph.D. level ecologists who specialize on butterfly species. This entire effort will require approximately 350 hours, and will cost CARE about \$40,250.

As I indicated above, I have become aware of the projected increase in salinity levels of discharged water from the MEC. This increase in salinity poses a threat to the Red-legged Frog, and will need to be addressed. Besides retaining an expert on water resources, I recommend to CARE that they retain me to assess the possible impacts of increased salinity in the environment on Red-legged Frog population viability. To properly address the possible impacts of increased salinity, I recommend that CARE also retain a population geneticist, with whom I've worked in the past. This effort will cost CARE approximately \$18,400 for 160 hours of work.

After reviewing the response of the applicant to my comments on the PSA (set 7), I realize that a detailed reply will be needed to further clarify my points that the applicant does not understand the scientifically defined term, *adaptive management*, nor has the applicant fully disclosed the environmental setting, adequately assessed the cumulative impacts and adequately described a mitigation and monitoring plan. I recommend to CARE that they retain me to spend approximately 30 hours to reply to the applicant's set 7 responses. I estimate that this work will cost CARE \$3,450.

The applicant's set 7 response to my comments on the PSA prompted me to examine their map of ground squirrel burrows at the MEC site (Draft Riparian Corridor biotic Assessment for the Metcalf Energy Center, October 1, 1999). I found that their map of ground squirrel burrows did not represent the distribution of ground squirrel burrows that I observed at the site this past spring. It appears that the ground squirrels have expanded onto the upland areas during the 6 months intervening the applicant's map production and my site visits. This spread of squirrels may help make my point that the environmental conditions and the constituent biological species are cyclic, and that the environmental setting described by the applicant is inadequate by not considering this inherent cyclic nature of conditions. I recommend that CARE retain me to map the ground squirrel burrows at MEC, which will require about 12 hours, and I recommend that CARE retain me to search the published literature for evidence of population cycles among the biological species that occur at the MEC site. This latter effort will require at least 80 hours. The total cost will be about \$10,580.

Cultural Resources

Our cultural resources expert estimates that she still needs 80 hours to produce a final CEQA-level report on the project proposal, and she needs her field crew at the site to survey for one day (~ \$1,000). Test-pitting will cost \$2,000. She also wants to meet with the applicant and the CEC staff for 4 hours (\$200) and needs 8 hours for a site record search

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(\$400). In summary, our cultural resources expert will need 164 hours of additional work, which will cost CARE at least \$7,600.

Overall Estimate of Costs

In my opinion, the costs I projected above for the work products that I recommend to CARE will be minimum. The total hours, as projected above, will be 1244, and the total cost will be \$149,980.

Shawn Smallwood
July 11, 2000