

# ***Californians for Renewable Energy, Inc.(CARE)***

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<b>DOCKET 99-AFC-3</b>
Date: Sep. 28, 00
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## **STATE OF CALIFORNIA**

Energy Resources Conservation  
and Development Commission

In the Matter of:

) Docket No. 99-AFC-3

Application for Certification for the  
Metcalf Energy Center [Calpine  
Corporation and Bechtel Enterprises, Inc.]

)  
) **Addendum to Motion for**  
) **for a Workshop on Public**  
) **Participation on the MEC**

### **Motion for reconsideration or in the alternative another motion to conduct the workshop previously requested on public participation**

More thoughts on the need for a "workshop" or other device to give everyone a chance to address the serious CEQA public participation problems we began pointing out in prior comments and our prior request. Please make sure this gets into the CEC administrative record on the MEC project, along with all prior comments and communications we have previously submitted in regard to that project. We will undoubtedly be relying on this documentation in any subsequently litigation to enforce CEQA and other environmental and land use laws.

The CEC process may increase the opportunities for members of the public to "speak out" on a project. But speaking out is not the only, nor even the most important, component of the vital CEQA public participation requirement. We've been informed and believe it's well established under CEQA law that mere comments by members of the public are virtually meaningless unless they constitute the kind of "substantial evidence" necessary to show the EIR process being carried out, or some aspect of that process, is inadequate. Or to require that additional mitigation measures or alternatives be adopted, etc. This is particularly true in regard to the technical, scientific matters that permeate the entire CEC project approval process. In regard to these matters, only the comments and opinions of duly qualified experts--based on their comprehensive review of pertinent, objective, quantifiable, scientific and objective data and information--suffices. In order for the public to adequately participate in the administrative process as envisioned and required by CEQA, the public must be given a fair and reasonable opportunity to develop and deal with such substantial evidence. In addition, the expert testimony and assistance must come from a truly "independent" source, meaning a source not directly connected with or obliged to the applicant or the reviewing agency and potential respondent in CEQA enforcement litigation. The idea reflected in your ruling that CEC staff can

somehow perform such an independent function is preposterous. CEC staff is directly under the control of and accountable to the agency. In addition, we believe the main purpose of the CEC under the Warren-Alquist Act (the Act) is directly opposite to and at odds with the basic purpose and values embodied in CEQA. The Act is primarily interested in getting new powerplants licensed and sited, and only secondarily in environmental protection. CEQA, on the other hand, is primarily concerned with protecting the environment.

Of course, the best method of assuring that the public is given access to the substantial evidence necessary to adequately participate in the CEC/CEQA review process is to provide funding for that purpose as part of the process (the funding could come directly from the project applicant whose application seeking to reap billions of dollars in corporate profits triggers the review process). This may not be possible at the present time, but in terms of creating and implementing a fair and adequate public participation process it is certainly worth discussing. The discussion can also encompass other funding methods, or other procedures capable of attaining the same basic public participation goals. The CEC's apparent failure to understand this, and to recognize it must be explored further, is very discouraging, to say the least.

Even if public funding isn't presently required or available, in recognition of the significance of providing access to independent experts in order to adequately participate in the CEC/CEQA process, other matters pertaining to and aimed at dealing with this vital issue and serious problem must be explored. If reasonably feasible, measures to mitigate the effect of this inherent inequality in the ability to access substantial evidence must be adopted. That's what CEQA requires. And this is all we're asking. We strongly believe our threshold workshop request must be granted--rather than summarily rejected--in order to comply with CEQA.

We strongly believe the claim made in the Ruling summarily rejecting our public participation workshop request that CEC procedures actually enhance public participation is hollow and inherently fraudulent in nature. It is hard to believe that the CEC has not been aware--until now at least--of the harsh reality that being allowed to merely "speak out" on issues--while also being required to comply with a host of restrictions associated with a formal litigation process--is virtually meaningless when it comes to effectively participate in not only the CEQA review process, but also the accompanying democratic decision making/political process, which is the role public participation must play under CEQA.

Another specific public participation problem that should be addressed--and would be addressed if a workshop on the issue is allowed--is that accommodations must be made to take into account the time and trouble a citizens group such as CARE must come up with and expend to get access to the substantial evidence and other tools needed

to fully and effectively participate in this ongoing review process, as strongly required by CEQA.

In this regard, please keep in mind that as far as CARE is concerned these problems aren't merely hypothetical. They are real CARE has already obtained and is in the process of obtaining private donations used to retain and pay for the continuing services of some though not all the most critical experts. And CARE has already encountered major problems, one of which is being given enough time to obtain the funding and the experts' services from private donations. Although we realize the CEC is vitally interested in expediting the siting process, we feel some accommodation should be made to deal with CARE's funding problems and funding mechanism. At the very least, we strongly believe this should be discussed and possible solutions should be explored.

In addition, as our biological resources expert, Dr. Shawn Smallwood, previously advised you, the "piecemealing" of information required and requested from the applicant by staff makes the review process way more complicated, confusing and expensive than under a typical CEQA review/EIR process. As Dr. Smallwood points out, the present process forces our experts to continuously monitor and continuously work on the project, which drastically increases the costs, among other things. This is something the CEC can control. At the very least, it is something that should be discussed. Under CEQA, this problem either doesn't occur or is greatly mitigated by the draft and final EIR procedures. Under CEQA, the project applicant isn't allowed to dribble-in pertinent information at its leisure, which is then followed by a review process subject to strict time limitations and other requirements imposed by the CEC administrative litigation process. CEQA requires all pertinent information to be provided and incorporated into a draft EIR, which is then circulated for public review and comment. This means citizens groups and other members of the public strapped for money to hire expensive experts on an ongoing basis can actually wait until the draft EIR is published and circulated before even hiring experts or start the meter running for their services. And, when the experts are retained or instructed to proceed after circulation of a draft EIR, they have a finite, essentially final set of data and conclusions to work with. Not so for the present CEC process. Therefore, you can see how and why we're a bit cynical about the Resolution's claim that the CEC procedures actually enhance public participation. From our standpoint, the CEC process does the exact opposite.

The fact we're given so many chances to "speak out" is simply meaningless. Speak out on what? Without experts to interpret and comment on the technical, scientific information, data and conclusions, our comments don't constitute substantial evidence and can be blatantly ignored, in the same manner the Resolution summarily and completely rejects our public participation workshop request.

The anti-public participation effects of the CEC process presently followed, and the problems associated with those effects, aren't limited to those just described. They

include, without being limited to, the heavy burden placed on the public of having to become "parties" in the civil litigation sense to administrative litigation in order to fully and effectively participate in the CEC/CEQA review process. This is an extremely heavy, and typically expensive burden. For one thing, it requires retaining and paying for specialized legal counsel on an ongoing basis. Few if any citizens groups we are aware of can afford such costs. CARE certainly can't.

Being forced to participate in a civil litigation process also entails additional burdens directly affecting CARE's right to public participation as required by CEQA. For example, in attempting to recruit new members and donors, or new project opponents, CARE has frequently been hampered by the obligations and risks imposed by the CEC civil litigation process. Things like being required to disclose information through a discovery process, and being compelled to do so within strict time limitations subject to penalties for failure to comply, simply aren't conducive to encouraging public participation. And, of course, neither is the fact that the litigation is against such heavyweight corporate powers as Calpine and Bechtel, not to mention heavyweight public agencies such as the CEC. Indeed, from where we sit it's very much like throwing an ant (CARE) into the ring (the CEC litigation process) to do battle with a couple of elephants (Calpine and Bechtel). This isn't exactly a level playing field and though sympathetic to our environmental concerns, many potential donors, members and project opponents see no point in what clearly appears to be a futile effort.

Well, this is all we have time for now. But we will continue our efforts to persuade you to reconsider and grant our public participation workshop request. In so doing, we do not feel bound by CEC regulations, restrictions and limitations because we are exercising our right to public participation under CEQA, which allows and imposes a duty to respond to public comments through and including the last minute prior to final approval of the project.

Although in a good faith attempt to comply with CEC rules CARE became a party and intervener in the CEC civil litigation process, neither CARE nor any of its individual members have ever waived any of their rights under CEQA.

A handwritten signature in cursive script that reads "Michael E. Boyd".

Michael E. Boyd – President, CARE 9-28-00