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8 and Michael E. Boyd

9
10 UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF COLUMBIA

12 CALIFORNIANS FOR RENEWABLE)
13 ENERGY and MICHAEL E. BOYD,)

14 Plaintiffs,)

15 vs.)

16 UNITED STATES DEPARTMENT OF)
17 ENERGY; STEVEN CHU, in the official)
18 capacity of Secretary of the United States)
19 Department of Energy; UNITED STATES)
20 DEPARTMENT OF THE TREASURY;)
21 TIMOTHY F. GEITHNER, in the official)
22 capacity of Secretary of the United States)
23 Department of the Treasury; FEDERAL)
24 FINANCING BANK;)

25 Defendants.)

CASE NO.

**COMPLAINT FOR DECLARATORY,
INJUNCTIVE, AND MANDAMUS
RELIEF UNDER THE
ADMINISTRATIVE PROCEDURES
ACT, THE ENERGY POLICY ACT OF
2005, AND THE AMERICAN
RECOVERY AND REINVESTMENT
ACT OF 2009**

Case: 1:11-cv-02128
Assigned To : Boasberg, James E.
Assign. Date : 11/28/2011
Description: Admn. Agency Review

26 Plaintiffs CALIFORNIANS FOR RENEWABLE ENERGY and MICHAEL E. BOYD
27 allege as follows:

28 **PARTIES**

1. Plaintiff Californians for Renewable Energy ("CARE") is a non-profit organization formed to promote public education concerning the responsible development of renewable energy. Since its inception, CARE has been an advocate for environmentally- and community-sensitive energy projects that are commercially viable without inappropriate subsidies. CARE has participated and continues to actively participate in a multitude of

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1 proceedings regarding renewable and non-renewable energy projects. CARE has members who
2 reside, recreate, or otherwise utilize the areas in or near a number of the sites for renewable-
3 energy projects that have received loan guarantees from the United States of America. All of
4 CARE's members will be impacted by the greenhouse gas ("GHG") emission impacts of the
5 projects and by the false assurances of substantial GHG reductions that the loan-guaranteed
6 projects represent. These projects would not be viable without the issuance of the loan
7 guarantees. CARE's members suffer from the environmental consequences of the projects,
8 higher utility rates of the projects, and the consequences of delayed GHG reductions when the
9 projects on which this country is betting to achieve substantial immediate reductions turn out
10 not to be viable even with the loan guarantees. Participation by CARE's members is not
11 required to maintain this action.

12 2. Plaintiff Michael E. Boyd is a natural person who is concerned about responsible
13 development of renewable energy. He is the President of and a member of CARE, a California
14 ratepayer, a federal taxpayer, and an active participant to the extent feasible in energy
15 proceedings, and he will suffer the environmental impacts of the solar energy projects in
16 Southern California.

17 3. The United States Department of Energy ("DOE"), the United States Department
18 of the Treasury, and the Federal Financing Bank are agencies or instrumentalities of the United
19 States.

20 4. The following Defendants are being sued in their official capacities: Steven Chu,
21 in the official capacity of Secretary of the United States Department of Energy; and Timothy
22 F. Geithner, in the official capacity of Secretary of the United States Department of the
23 Treasury.

24 **BACKGROUND INFORMATION**

25 5. On or around April 18, 2005, H.R. 6 ("Energy Policy Act of 2005" or "EPAAct")
26 was introduced. EPAAct was originally referred to the Committee on Energy and Commerce, and
27 then it was then referred to the Subcommittee on Energy and Air Quality (among other
28 committees). EPAAct passed the House of Representatives in April 2005, passed the Senate in

1 June 2005, and was signed by President George W. Bush in August 2005. EAct became
2 Public Law 109-58 on or about August 8, 2005.

3 6. Title XVII of the EAct established the “Incentives for Innovative Technologies”
4 program. Section 1703 (42 U.S.C. § 15513) defined eligible projects for loan guarantees under
5 Title XVII.

6 7. The Congressional Bill Summary & Status for the EAct described Title XVII
7 as directing the Secretary of Energy to make guarantees for certain projects that: (1) avoid,
8 reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and (2)
9 employ new or significantly improved technologies as compared to commercial technologies
10 in service in the United States at the time the guarantee is issued.

11 8. On August 14, 2006, DOE filed a notice of “Guidelines for Proposals Submitted
12 in Response to the First Solicitation” for “Loan Guarantees for Projects That Employ Innovative
13 Technologies” under Title XVII of the EAct.

14 9. In February 2007, Congress passed Public Law 110-5, which added Section 16515
15 to Title 42 of the United States Code. This statutory provision specifies that no loan guarantees
16 may be awarded under Title XVII of the EAct until final regulations are issued that include:
17 (1) programmatic, technical, and financial factors the Secretary will use to select projects for
18 loan guarantees; (2) policies and procedures for selecting and monitoring lenders and loan
19 performance; and (3) any other policies, procedures, or information necessary to implement title
20 XVII of the EAct.

21 10. On May 16, 2007 (72 Fed. Reg. 27471), DOE issued a Notice of Proposed
22 Rulemaking and Opportunity for Comment for the adoption of 10 C.F.R. part 609 (§§ 609.1-
23 609.18). These regulations were intended to address loan guarantees for “Eligible Projects,”
24 which was defined to mean new and innovative technology that was not a commercial
25 technology and otherwise met the requirements of 42 U.S.C. § 15513 (Section 1703). (*See* 10
26 C.F.R. §§ 609.1 & 609.2).

27 11. After having received comments from 47 interested parties, on October 23, 2007,
28 DOE published the notice of Final Rule for “Loan Guarantees for Projects That Employ
Innovative Technologies,” which would be codified at 10 C.F.R. part 609 (“Final Section 1703

1 Rule”). (See 72 Fed. Reg. 60116). The Federal Register notice for the Final Rule indicated that
2 “DOE believes that commercial use of these technologies will help sustain and promote
3 economic growth, produce a more stable and secure energy supply and economy for the United
4 States, and improve the environment.”

5 12. In February 2009, Congress passed the American Recovery and Reinvestment Act
6 of 2009, which established Section 1705 (42 U.S.C. § 15516) of the loan guarantee program and
7 appropriated \$6 billion for the program.

8 13. On December 4, 2009, the Final Section 1703 Rule was amended. 74 Fed. Reg.
9 63544. As amended, the Regulations apply only to loans under Section 1703. (See 10 C.F.R.
10 609.1(a).) The Federal Register noted that: “The two principal goals of Title XVII are to
11 encourage commercial use in the United States of new or significantly improved energy-related
12 technologies and to achieve substantial environmental benefits.”

13 14. On July 29, 2009, DOE issued a loan guarantee solicitation announcement
14 (reference no. DE-FOA-0000132) for “Electric Power Transmission Infrastructure Investment
15 Projects.”

16 15. On July 29, 2009, DOE issued a loan guarantee solicitation announcement
17 (reference no. DE-FOA-0000140) for “Federal Loan Guarantees for Projects that Employ
18 Innovative Energy Efficiency, Renewable Energy, and Advanced Transmission and Distribution
19 Technologies.” The solicitation indicates that eligible projects under Section 1705 will be
20 required to comply with the final regulations codified at 10 C.F.R. part 609 (*i.e.*, the Final
21 Section 1703 Rule).

22 16. On October 7, 2009, DOE issued a loan guarantee solicitation announcement
23 (reference no. DE-FOA-0000166) for “Federal Loan Guarantees for Commercial Technology
24 Renewable Energy Generation Projects under the Financial Institution Partnership Program.”

25 17. Ultimately, Congress transferred approximately \$3.6 billion of the funding
26 originally appropriated for Section 1705 loan guarantees to other programs, leaving DOE with
27 approximately \$2.4 billion for the Section 1705 program.

28

1 18. For the projects considered for a loan guarantee on federal land, DOE entered into
2 a Memorandum of Understanding with the Bureau of Land Management for the environmental-
3 review process.

4 19. In March 2011, the DOE Office of Inspector General issued an audit report for
5 the DOE's Loan Guarantee Program for Clean Energy Technologies. The audit focused on
6 whether DOE had implemented effective safeguards to manage the Government's risk of loss
7 and to identify opportunities to improve loan processing activities. The audit found that the
8 "Loan Guarantee Program could not always readily demonstrate, through systematically
9 organized records, including contemporaneous notes, how it resolved or mitigated relevant risks
10 prior to granting loan guarantees."

11 20. CARE has been concerned about the loan-guarantee process and has submitted
12 requests under the Freedom of Information Act for documents relating to loan-guarantee
13 applications and those guarantees that have been issued under the EAct. The response has
14 been sparse.

15 21. Plaintiffs understand that Congress has similarly had difficulty obtaining
16 information about the decision-making process for loan guarantees under the EAct.

17 22. The White House recently ordered an independent analysis of the Section 1703
18 and Section 1705 loan-guarantee programs.

19 **Solyndra**

20 23. Solyndra first applied for a DOE loan application in December 2006 in response
21 to an August 2006 solicitation.

22 24. In September 2009, DOE closed a \$535 million loan guarantee under Section
23 1705 for Solyndra, Inc., for a solar manufacturing project in Fremont, California. Solyndra used
24 a unique cylindrical design for the panels based on a Copper Indium Gallium Selenide
25 technology.

26 25. Solyndra began to face financial difficulties. On February 23, 2011, the parties
27 to the loan guarantee signed an agreement to restructure the guarantee.

28 26. Solyndra filed for bankruptcy under Title 11 of the United States Code on
September 6, 2011, in the United States Bankruptcy Court for the District of Delaware.

1 27. Congressional hearings have been held to investigate the Solyndra deal and
2 investigations continue.

3 **AES Corporation**

4 28. In August 2010, AES Energy Storage, LLC, secured a \$17.1 million loan
5 guarantee from DOE under Section 1705 for a battery storage project in Johnson City, New
6 York.

7 **Beacon Power**

8 29. In August 2010, DOE closed a \$43 million loan guarantee under Section 1705 for
9 Beacon Power for an energy storage project in Stephentown, New York.

10 30. Beacon Power has declared bankruptcy.

11 **Kahuku Wind Power, LLC**

12 31. In July 2010, DOE closed a \$117 million loan guarantee under Section 1705 for
13 Kahuku Wind Power, LLC, for a 30-megawatt wind-generation project in Kahuku Oahu,
14 Hawaii.

15 **Nevada Geothermal Power Company, Inc.**

16 32. In September 2010, DOE closed a \$98.5 million loan guarantee under Section
17 1705 for a 36-megawatt geothermal project in Humboldt County, Nevada.

18 **Caithness Shepherds Flat**

19 33. In October 2010, DOE closed a \$1.3 billion loan guarantee for Caithness
20 Shepherds Flat for a wind-generation project in eastern Oregon.

21 **Abound Solar**

22 34. In December 2010, Abound Solar secured a \$400 million loan guarantee under
23 Section 1705 for a solar manufacturing project in Longmont, Colorado, and in Tipton,
24 Indianapolis.

25 **Abengoa Solar, Inc. (Solana)**

26 35. In December 2010, Abengoa Solar, Inc. (Solana), secured a \$1.446 billion loan
27 guarantee under Section 1705 for a solar-generation project in Gila Bend, Arizona.

28 36. The Solana project is using concentrating solar technology.

1 **US Geothermal, Inc.**

2 37. In February 2011, DOE closed a \$97 million loan guarantee under Section 1705
3 for U.S. Geothermal, Inc., for a geothermal project in Malheur County, Oregon.

4 **LS Power Associates**

5 38. In February 2011, DOE closed a \$343 million loan guarantee under Section 1705
6 for LS Power Associates (ONLine--formerly known as SWIP-S) for a transmission project in
7 Las Vegas, Nevada.

8 **Abengoa Bioenergy Biomass of Kansas, LLC**

9 39. In August 2011, DOE closed a loan guarantee with Abengoa Bioenergy Biomass
10 of Kansas, LLC, under Section 1705 in the amount of \$132.4 million for a biofuel project in
11 Hugotown, Kansas.

12 **Agua Caliente**

13 40. In August 2011, DOE closed a \$967 million loan guarantee under Section 1705
14 for NRG Solar, LLC (Agua Caliente), for a solar-generation project in Yuma County, Arizona.

15 **Record Hill Wind**

16 41. In August 2011, DOE closed a \$102 million loan guarantee under Section 1705
17 for a wind-generation project in Roxbury, Maine.

18 **SoloPower**

19 42. In August 2011, DOE closed a \$197 million loan guarantee under Section 1705
20 for SoloPower Technology for a solar manufacturing project in Wilsonville, Oregon.

21 **1366 Technologies, Inc.**

22 43. In September 2011, DOE completed a loan guarantee for \$150 million to 1366
23 Technologies, Inc., for a solar manufacturing project in Lexington, Massachusetts.

24 **Abengoa Solar, Inc. (Mojave Solar)**

25 44. In September 2011, Abengoa Solar, Inc. (Mojave Solar), secured a \$1.2 billion
26 loan guarantee from DOE under Section 1705 for a solar-generation project in San Bernardino,
27 California.

1 **Cogentrix of Alamosa, LLC**

2 45. In September 2011, DOE closed a \$90.6 million loan guarantee with Cogentrix
3 of Alamosa, LLC, for a solar generation project in Alamosa, Colorado.

4 **First Solar, Inc. (Antelope)**

5 46. In September 2011, DOE closed a \$646 million loan guarantee under Section
6 1705 with First Solar, Inc., for the Antelope Valley Solar Ranch solar-generation project located
7 in Lancaster, California.

8 **First Solar, Inc. (Desert Sunlight)**

9 47. In September 2011, DOE closed a \$1.46 billion loan guarantee under Section
10 1705 with First Solar, Inc., for a solar-generation project in Riverside County, California. This
11 project is on federal land managed by the Bureau of Land Management.

12 **Granite Reliable**

13 48. In September 2011, DOE closed a \$168.9 million loan guarantee under Section
14 1705 with Granite Reliable for a wind-generation project in Coos, New Hampshire.

15 **Mesquite Solar 1, LLC (Sempra Mesquite)**

16 49. In September 2011, DOE closed a \$337 million loan guarantee under Section
17 1705 for a solar-generation project in Maricopa County, Arizona.

18 **Ormat Nevada, Inc.**

19 50. In September 2011, DOE closed a \$350 million loan guarantee under Section
20 1705 for Ormat Nevada, Inc., for a geothermal project in Nevada.

21 **POET, LLC**

22 51. In September 2011, DOE closed a \$105 million loan guarantee under Section
23 1705 for POET, LLC, for a biofuel project in Emmetsburg, Iowa.

24 **Prologis (Project Amp)**

25 52. In September 2011, DOE closed a \$1.4 billion loan guarantee under Section 1705
26 to Prologis (Project Amp) for a solar-generation project in 28 states.

1 71. Prior to promulgating a new regulation, repealing or suspending an existing
2 regulation, or substantially modifying a new regulation, a federal agency must publish a notice
3 of proposed rule-making in the Federal Register unless the rule is merely interpretative, a
4 general statement of policy or a rule of agency organization, procedure, or practice; or the
5 agency, for good cause, finds the notice and public procedure thereon are impracticable,
6 unnecessary, or contrary to the public interest.

7 72. Defendants did not publish a notice of proposed rule-making in the Federal
8 Register for the intent to rely on the regulations codified in part 609 of Title 10 of the Code of
9 Federal Regulations for Section 1705 loan guarantees.

10 73. The regulations codified in part 609 of Title 10 of the Code of Federal
11 Regulations are not simply interpretive, are not a general statement of policy, and are not a rule
12 of agency organization, procedure, or practice.

13 74. Defendants did not find that the notice and public procedure is impracticable,
14 unnecessary, or contrary to the public interest with regard to the application of the regulations
15 codified in part 609 of Title 10 of the Code of Federal Regulations to Section 1705 loan
16 guarantees. Furthermore, there is no evidence to support a finding of good cause.

17 **FOURTH CLAIM:**
18 **5 U.S.C. § 706--Arbitrary and Capricious Conduct**
(Against All Defendants)

19 75. Paragraphs 1 through 74 are fully incorporated into this paragraph.

20 76. Defendants have not complied with all requirements of the EPAct (as amended)
21 or with the regulations codified in part 609 of Title 10 of the Code of Federal Regulations
22 (assuming that they apply to Section 1705 loan guarantees).

23 77. For example, and without limitation, Defendants guaranteed loans for projects that
24 do not meet the “eligible project” definition under 10 C.F.R. § 609.2.

25 78. Defendants’ actions were arbitrary, capricious, an abuse of discretion, or
26 otherwise not in accordance with law, in excess of statutory jurisdiction, authority, or
27 limitations, without observance of procedure required by law, and unsupported by substantial
28 evidence or facts.

PRAYER FOR RELIEF

FOR ALL THESE REASONS, Plaintiffs respectfully pray for the following relief against Defendants (and any and all other parties who may oppose Plaintiffs in this proceeding):

A. A judgment or other final order determining or declaring that the loan guarantees issued under Section 1705 of the Energy Policy Act of 2005 are invalid;

B. A judgment or other final order ordering Defendants to promulgate regulations covering Section 1705 loan guarantees under the Energy Policy Act of 2005 prior to issuing any loan guarantees under that section;

C. A judgment or other final order determining or declaring that the decision to rely on Section 1703 regulations for Section 1705 loan guarantees is invalid because it was promulgated without the legally required notice of proposed rule-making, because it took effect without the legally required prior notice, or both;

D. A judgment or other final order determining or declaring that the Section 1705 loan guarantees are invalid because their approval was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law;

E. All legal fees and other expenses incurred in connection with this proceeding, including but not limited to reasonable attorney fees as authorized by law; and

F. Any and all further relief that this Court may deem appropriate.

Date: November 23, 2011.

Respectfully submitted,

BRIGGS LAW CORPORATION

By:


Cory J. Briggs

Attorneys for Plaintiffs CALifornians for Renewable Energy and Michael E. Boyd