

## New Lawsuit Threatens Section 1705 Financings

Adding to the increased congressional and Obama administration scrutiny of US Department of Energy (DOE)-guaranteed loans following the bankruptcies of Solyndra, Inc. and Beacon Power Corp., CALifornians for Renewable Energy (CARE) filed a lawsuit on November 28, 2011 in the United States District Court for the District of Columbia challenging the validity of all loan guarantees issued under Section 1705 of the Energy Policy Act of 2005 (EPAAct)<sup>1</sup>. If successful, the CARE lawsuit threatens the continued viability of billions of dollars of DOE-guaranteed financings for more than 6.5 GWs of clean energy projects<sup>2</sup>. CARE asserts that the award of the Section 1705 guarantees was defective procedurally and should be invalidated.

In 2007 Congress adopted legislation requiring that no loan guarantee be issued under Title XVII of the EPAAct until final regulations were issued establishing the policies and procedures for issuing and administration of the loan guarantees. In the American Recovery and Reinvestment Act of 2009, Congress expanded the federal loan guarantee program under Title XVII of the EPAAct to include renewable energy systems, electric power transmission systems and leading-edge biofuels projects that commenced construction prior to September 30, 2011 (the Section 1705 Program).

CARE argues that the final regulations adopted by the DOE and later modified in December of 2009 only addressed loan guarantees issued for “eligible projects” under Section 1703 of the EPAAct and did not address loan guarantees issued pursuant to the Section 1705 Program. CARE contends that the 2007 enabling legislation required, as a precondition to the issuance of the Section 1703 guarantees and Section 1705 guarantees, a separate rulemaking for innovative and conventional energy technology projects. Because the December 2009 final rule refers only to Section 1703 and not Section 1705, CARE maintains that no rulemaking for the award of the Section 1705 guarantees was undertaken, and, as a result, none of the Section 1705 guarantees was properly issued.

The relief requested by CARE’s complaint includes a determination that the Section 1705 loan guarantees are invalid and that their issuance was arbitrary, capricious, an abuse of process and otherwise illegal.

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<sup>1</sup> *CALifornians For Renewable Energy and Michael E. Boyd, Plaintiffs v. United States Department of Energy; Steven Chu, in the official capacity of Secretary of the United States Department of Energy; United States Department of the Treasury; Timothy F. Geithner, in the official capacity of Secretary of the United States Department of the Treasury; Federal Financing Bank; Defendants*, Case No.: 1:11-cv-02128 in and for the United States District Court for the District of Columbia.

<sup>2</sup> See the chart on page 2 for a list of applicable projects.

This action comes on the heels of an announcement by the White House of its intent to conduct an independent review of the DOE's loan portfolio as well as increased scrutiny by members of Congress and the FBI.

While none of the project sponsors nor any other participants have been named in the CARE lawsuit, the invalidation of the loan guarantees could result in events of default under the Section 1705 project financings with disastrous results. While there exist defenses to the Complaint, and the DOE is likely to oppose it vigorously, we recommend that all project sponsors evaluate the Complaint and consider how best to manage the risk it presents to their specific projects.

#### DOE-Guaranteed Loans Made Pursuant to Section 1705

Sponsor	Amount (\$ millions)	Date	Project	Location
Solyndra, Inc.	\$535.0	Sept 2009	Solar Manufacturing	Fremont, California
AES Corporation	\$17.1	Aug 2010	Battery Storage	Johnson City, New York
Beacon Power Corp.	\$43.0	Aug 2010	Energy Storage	Stephentown, New York
Kahuku Wind Power, LLC	\$117.0	Jul 2010	Wind Generation	Kahuku Oahu, Hawaii
Nevada Geothermal Power Company, Inc.	\$98.5	Sept 2010	Geothermal Generation	Humboldt County, Nevada
Caithness Shepherds Flat	\$1300.0	Oct 2010	Wind Generation	Eastern Oregon
Abound Solar	\$400.0	Dec 2010	Solar Manufacturing	Longmont, Colorado and Tipton, Indiana
Abengoa Solar Inc. (Solana)	\$1446.0	Dec 2010	Solar Generation	Gila Bend, Arizona
US Geothermal, Inc.	\$97.0	Feb 2011	Geothermal Generation	Malheur County, Oregon
LS Power Associates	\$343.0	Feb 2011	Transmission	Las Vegas, Nevada
Abengoa Bioenergy Biomass of Kansas LLC	\$132.4	Aug 2011	Biofuel	Hugoton, Kansas
NRG Solar, LLC (Agua Caliente)	\$976.0	Aug 2011	Solar Generation	Yuma County, Arizona
Record Hill Wind	\$102.0	Aug 2011	Wind Generation	Roxbury, Maine
SoloPower Technology	\$197.0	Aug 2011	Solar Manufacturing	Wilsonville, Oregon
1366 Technologies, Inc.	\$150.0	Sept 2011	Solar Manufacturing	Lexington, Massachusetts

Sponsor	Amount (\$ millions)	Date	Project	Location
Abengoa Solar Inc. (Mojave Solar)	\$1200.0	Sept 2011	Solar Generation	San Bernardino, California
Cogentrix of Alamosa, LLC	\$90.6	Sept 2011	Solar Generation	Alamosa, Colorado
First Solar, Inc. (Antelope)	\$646.0	Sept 2011	Solar Generation	Lancaster, California
First Solar, Inc. (Desert Sunlight)	\$1460.0	Sept 2011	Solar Generation	Riverside County, California
Granite Reliable	\$168.9	Sept 2011	Wind Generation	Coos, New Hampshire
Mesquite Solar I, LLC (Sempra Mesquite)	\$337.0	Sept 2011	Solar Generation	Maricopa County, Arizona
Ormat Nevada, Inc.	\$350.0	Sept 2011	Geothermal	Nevada
Poet, LLC	\$105.0	Sept 2011	Biofuel	Emmitsburg, Iowa
Prologis (Project Amp)	\$1400.0	Sept 2011	Solar Generation	28 states
SolarReserve, LLC (Crescent Dunes)	\$737.0	Sept 2011	Solar Generation	Nye County, Nevada
SunPower Corporation Systems (California Valley Solar Branch)	\$1237.0	Sept 2011	Solar Generation	San Luis Obispo, California

The lawyers at Squire Sanders have decades of experience providing counsel to clients in the Energy industry. Please feel free to contact us if you would like to discuss the possible impact this could have on your business.

#### Contact:

**James Morgan III**  
james.morgan@ssd.com  
+1.305.577.2875

**Laura D. Nemeth**  
laura.nemeth@ssd.com  
+1.216.479.8552

**Paul A. O'Hop**  
paul.ohop@ssd.com  
+1.202.626.6873

**Alejandro Pena-Prieto**  
alejandropenaprieto@ssd.com  
+1.809.289.4923