

Project Finance and Renewable Energy Alert

Lawsuit Filed to Invalidate Section 1705 of DOE Loan Guarantees

December 12, 2011

On November 28, 2011, Californians for Renewable Energy (CARE) filed a lawsuit in the U.S. District Court for the District of Columbia against the U.S. Department of Energy (DOE); Steven Chu in his capacity as secretary of DOE; the United States Department of the Treasury; Timothy F. Geithner in his capacity as Treasury secretary; and the Federal Financing Bank. The lawsuit is styled as a Complaint for Declaratory Relief, and Mandamus Relief Under the Administrative Procedures Act, The Energy Policy Act of 2005 and the American Recovery and Reinvestment Act of 2009 (the Complaint). The Complaint attacks all of the loan guarantees issued under Section 1705 of the Energy Policy Act (the 1705 Guarantees).¹

Section 1705 was added to Title XVII of the Energy Policy Act (the Act) by the American Recovery and Reinvestment Act of 2009 (ARRA). Prior to ARRA, Title XVII authorized DOE to issue loan guarantees for innovative clean energy technology financings, as described in Section 1703 of the Act (the 1703 Guarantees). The addition of Section 1705 to the Act expanded DOE's authority to award loan guarantees to projects including renewable energy systems, electric

¹ The CARE complaint specifically refers to the following projects—

- (1) Solyndra
- (2) AES Energy Storage, LLC
- (3) Beacon Power
- (4) Kahuku Wind Power, LLC
- (5) Nevada Geothermal Power Company, Inc.
- (6) Caithness Shepherds Flat
- (7) Abound Solar
- (8) Abengoa Solar, Inc. (Solana)
- (9) U.S. Geothermal, Inc.
- (10) LS Power Associates
- (11) Abengoa Bioenergy Biomass of Kansas, LLC
- (12) NRG Solar, LLC (Agua Caliente)
- (13) Record Hill Wind
- (14) SoloPower Technology
- (15) 1366 Technologies, Inc.
- (16) Abengoa Solar, Inc. (Mojave Solar)
- (17) Cogentrix of Alamosa, LLC
- (18) First Solar, Inc. (Antelope)
- (19) First Solar, Inc. (Desert Sunlight)
- (20) Granite Reliable
- (21) Mesquite Solar I, LLC (Sempra Mesquite)
- (22) Ormat Nevada, Inc.
- (23) POET, LLC
- (24) Prologis (Project Amp)
- (25) Solar Reserve, LLC (Crescent Dunes)
- (26) SunPower Corporation, Systems (California Valley Solar Ranch).
- (27) BrightSource Energy, Inc.



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power transmission systems and leading-edge biofuels projects that commenced construction prior to September 30, 2011.

In 2007, Congress included a provision in the law funding the DOE and other federal departments and agencies requiring DOE to issue final regulations governing the award and administration of loan guarantees under Title XVII within six months after enactment of the law and prohibiting DOE from making any loan guarantees before it issued the regulations. DOE issued final rules for the award of guarantees in 2007 and later modified the rules in December of 2009 to reflect its experience with the loan guarantee program. DOE did not amend the rules to reference the Section 1705 program explicitly; however, in soliciting applications for the section 1703 and 1705 programs in 2009, DOE put applicants on notice that 1705-eligible projects would be required to comply with the final rules for the Section 1703 program.

The Complaint contends that the award of 1705 Guarantees was procedurally defective. Specifically, CARE argues that the 2007 enabling legislation required, as a precondition to the issuance of 1703 Guarantees and 1705 Guarantees, a separate rulemaking for innovative and conventional energy technology projects, although the Complaint offers no basis for this distinction. Because the December 2009 final rule refers only to Section 1703 and not Section 1705, CARE suggests that no rulemaking for the award of 1705 Guarantees was created, and, therefore, none of the 1705 Guarantees was properly issued.

The relief requested in the Complaint includes—

- determination that the loan guaranties issued under the 1705 Program are invalid
- a directive to DOE to promulgate regulations before issuing any loan guarantees
- determination that reliance on the 1703 Program regulations was improper
- determination that the issuance of the 1705 Program loan guaranties was arbitrary, capricious, an abuse of process and otherwise illegal.

While the Complaint is limited to federal actors, and none of the program borrowers or other participants have been named in the Complaint, over 6.5 GWs of clean energy projects are potentially at risk. The invalidation of the loan guarantees could result in events of default under Section 1705 project financings. There are defenses to the complaint, and DOE is likely to oppose it vigorously. Still, given the stakes, participants in Section 1705 financings should evaluate the Complaint and determine how best to manage the risks it presents.

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