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Before the Energy Resources Conservation and Development
Commission of the State of California
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APPLICATION FOR CERTIFICATION FOR THE:

PUENTE POWER PROJECT

Docket No. 15-AFC-01

**COMMITTEE ORDER PARTIALLY GRANTING INTERVENORS' JOINT MOTION TO
MODIFY COMMITTEE'S MARCH 10, 2017 ORDERS FOR ADDITIONAL EVIDENCE
AND BRIEFING FOLLOWING EVIDENTIARY HEARINGS**

This Order addresses Intervenors'¹ Joint Motion to Modify Committee Orders (Joint Motion).² The Joint Motion requests that the California Energy Commission (Energy Commission) Committee³ modify its March 10, 2017 *Committee Orders for Additional Evidence and Briefing Following Evidentiary Hearings* (March 10 Orders).⁴ Specifically, the motion seeks orders to:

- (1) supplement its Order regarding Biological Resources surveys to require surveys for the additional special status wildlife and plants listed above [and in outfall area];
- (2) adjust the timing of the surveys to be based on the most biologically and scientifically appropriate time;
- (3) allow Intervenors' testifying biologists access to the Project site; and,
- (4) postpone briefing on Land Use and LORS until the development and submission of the additional, related evidence is completed.⁵

For the reasons set forth below, the Committee **PARTIALLY GRANTS** the Joint Motion.

Background

Following the completion of four days of Evidentiary Hearings on February 7-10, 2017, and its initial review of the evidence, the Committee issued the March 10 Orders. Those Orders required NRG Oxnard Energy Center, LLC (Applicant) to provide the results

¹ Environmental Defense Center (EDC), Sierra Club, Environmental Coalition of Ventura County (EC), City of Oxnard, California Environmental Justice Alliance, Fighting for Informed Environmentally Responsible Clean Energy, and the Center for Biological Diversity (CBD)

² TN 216641, filed March 21, 2017.

³ The Committee assigned to conduct proceedings on the Application for Certification (AFC) for the Puente Power Project consists of Commissioner Janea Scott, Presiding Member, and Commissioner Karen Douglas, Associate Member. The Energy Commission made this Committee assignment at its June 10, 2015 Business Meeting.

⁴ TN 216505.

⁵ Joint Motion, TN 216641, p. 5.

from focused biological surveys of the proposed project site by July 31, 2017.⁶ Prior to commencing surveys, the Applicant was required to prepare a draft survey methodology for public and party comment. The Applicant filed the draft methodology on March 27, 2017.⁷

The parties subsequently filed comments on the draft methodology.⁸ The Applicant then filed responses to the comments and a final survey methodology.⁹

Request to Include Additional Special Status Wildlife and Plant Species and Outfall Area in Survey

The Applicant's survey methodology included all of the Committee-ordered species and adopted many of the requests made in the Joint Motion, specifically adding surveys for the following seven special status wildlife species and two special status plant species: western snowy plover (*Charadrius nivosus nivosus*), California least tern (*Sterna antillarum browni*), least Bell's vireo (*Vireo bellii pusillus*), burrowing owl (*Athene cunicularia*), white-tailed kite (*Elanus leucurus*), northern harrier (*Circus cyaneus*), California black rail (*Laterallus jamaicensis coturniculus*), salt marsh birds beak (*Chloropyron maritimum ssp. Maritimum*), and Orcutt's pincushion (*Chaenactis glabruiscula orcuttiana*). The methodology also clarified that the surveys will include the entire project site including areas potentially affected by removal of the existing outfall structure.¹⁰

With the Applicant's agreement to conduct surveys regarding the requested additional species, the Joint Motion's request is **GRANTED** to the extent that those surveys are included in the Applicant's final survey methodology.

Request to Adjust Timing of Surveys

The Joint Motion requests that the July 31, 2017 survey end date provided in the March 10 Orders be replaced with a date based upon the feedback and recommendations from parties, public, and expert agencies on the proposed survey design appropriate for each species. Intervenors recommend that the earliest biologically appropriate time to conduct these surveys be ordered.¹¹

In its Biological Resources Survey Methodology, the Applicant asserts that April and May are biologically appropriate and scientifically recommended time periods for surveying for the species in the March 10 Orders and the Joint Motion.¹² No comments

⁶ TN 216505.

⁷ TN 216716.

⁸ TNs 216886 (Commission Staff), 216901 (California Department of Fish and Wildlife), 216908 (California Coastal Commission), 216914 (Environmental Defense Center, Sierra Club Los Padres Chapter, Ventura County Environmental Coalition, and Center for Biological Diversity)

⁹ TN 216937.

¹⁰ TN 216716 (Draft Survey Methodology); TN 216937 (Final Survey Methodology).

¹¹ TN 216937 (Responses to Comments p. 2 [stating that, "survey periods are biologically appropriate and scientifically recommended."]); see also TN 215273, pp. 3-4.

¹² TN 216716, p. 16.

received questioned the survey methodologies except those proposed for burrowing owls, a species requested in the Joint Motion and agreed to by Applicant. For example, the California Department of Fish and Wildlife (CDFW) recommends:

...even if no previously used owl burrows are located for burrowing owl in April during this focused survey period, protocol wintering surveys based on the CDFW 2012 Staff Report on Burrowing Owls referenced in the Methods should be conducted based on the likelihood of burrowing owls using the Project site in the winter. Burrowing owls could appear in winter months at any time at the project site, including in future years. Wintering owls have been documented in past years immediately north of the proposed Project area, and on the North Shore at Mandalay Bay project site, also nearby.¹³

Energy Commission staff's (Staff) comments on the Applicant's Biological Resources Survey Methodology recommended, among other things, that:

Staff believes the currently proposed methodology, in conjunction with applicant's previously performed survey work, would yield substantive information as to the presence or absence of burrowing owls. However, should the Committee desire agency-approved protocol-level surveys to be conducted for the burrowing owl during the breeding season, then the applicant's proposed survey timing would need to be extended to accommodate a final survey after June 15, 2017.¹⁴

The Applicant's response to comments states:

With respect to burrowing owls, the CEC Comments suggested that the Committee might want to consider that an additional survey for burrowing owls be conducted after June 15, 2017. Applicant agrees to conduct an additional burrowing owl survey after June 15, 2017. This will delay submission of the Final Survey Report until June 23, 2017. In addition, CDFW Comments and CCC Comments recommend that burrowing owl surveys be conducted during the winter months. Applicant cannot agree to delaying the CEC proceedings for the extended period of time that would be required to conduct surveys during the winter, which would be at least six months beyond the outside window identified in the Committee Order for conducting additional surveys (July 31, 2017). However, Applicant notes that it previously conducted reconnaissance surveys during March 2015, November 2015 and October 2016, during which no burrowing owls or signs of burrowing owls were observed. Furthermore, proposed Conditions of Certification BIO-8 and BIO-10

¹³ TN 216901, p. 1.

¹⁴ TN 216886, p. 2.

require preconstruction surveys to determine if any breeding birds are present, as well as monitoring throughout demolition and construction.¹⁵

Based upon the already admitted evidence, the evidence to be developed from the biological resources surveys the Applicant has committed to perform, and the requirements of Conditions of Certification BIO-8 and BIO-10 applicable to the project if it is approved, the Committee does not find it necessary to extend the survey period beyond June 23, 2017 as the Applicant proposed in its survey methodology. The efficacy of the available surveys and other information may be discussed during the evidentiary hearings and briefing. Regarding this request, the Joint Motion is **DENIED**.

Project Site Access for Intervenors' Biologists

The Joint Motion requests the Committee order the Applicant to allow Intervenors' biologists to visit and study the project site, including attending the site visits with staff from the California Coastal Commission and CDFW. In support of the request, Intervenors point to Mr. Hunt's and Ms. Anderson's credentials, the fact that their lack of access was noted at the previous hearings, and the opportunity to improve transparency.

The Applicant objects to this request, arguing that such access is not necessary to conduct the biological resources surveys and secure the desired information, or to ensure the adequacy and integrity of the surveys.

In light of the substantive participation of biologists from three state agencies and the opportunity granted to the parties to comment on the survey methodologies, the Committee does not find it necessary to order the Applicant to allow the Intervenors' biologists access to the site and will not compel the applicant to provide that access. This request is therefore **DENIED**.

Postponing Land Use Topic Briefing

The Joint Motion requests the postponement of post-hearing briefs on Land Use issues until after submission of additional evidence relating to biological resources and coastal flooding. No party objected to that request. This request is **GRANTED**.¹⁶

Conclusion

The Joint Motion is **GRANTED** to the extent described above and in all remaining respects is **DENIED**.

¹⁵ TN 216937, PDF pp. 4 – 5.

¹⁶ The Hearing Officer informed the parties that the request was granted on April 5, 2017. TN 216817.

Dated: May 19, 2017, at Sacramento, California.

Original signed by

JANE A. SCOTT
Commissioner and Presiding Member
Puente Power Project AFC Committee

Original signed by

KAREN DOUGLAS
Commissioner and Associate Member
Puente Power Project AFC Committee