BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

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APPLICATION FOR CERTIFICATION FOR THE
RIDGECREST SOLAR POWER PROJECT

DOCKET NO. 09-AFC-9

Attached for full Commission consideration is the Hearing Adviser's recommendation for disposition of Solar Trust of America's *Motion for Order Affirming Application of Jurisdictional Waiver.* The recommendation is submitted as *a [Proposed] Commission Decision Affirming that Warren-Alquist Act Section 25502.3 Applies to Photovoltaic Electrical Generating Facilities*.

Dated: December 5, 2011, at Sacramento, California.

Original Signed By:
Kourtney Vaccaro
Hearing Adviser
Ridgecrest Solar Power Project

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APPLICATION FOR CERTIFICATION FOR THE *RIDGECREST SOLAR POWER PROJECT*

DOCKET NO. 09-AFC-9

[PROPOSED] COMMISSION DECISION AFFIRMING THAT WARREN-ALQUIST ACT SECTION 25502.3 APPLIES TO PHOTOVOLTAIC ELECTRICAL GENERATING FACILITIES

Introduction

Solar Trust of America (STA) filed a motion asking the Energy Commission to find that Section 25502.3 of the Warren-Alquist Act allows a photovoltaic electrical generating facility to voluntarily submit to the Commission's exclusive certification jurisdiction.[1] Section 25502.3 provides:

> Except as provided in Section 25501.7, any person proposing to construct *a facility excluded from the provisions of this chapter* may waive such exclusion by submitting to the commission a notice of intention to file an application for certification, and any and all of the provisions of this chapter shall apply to the construction of such facility.[2] (Emphasis added.)

STA contends that a photovoltaic electrical generating facility is a facility excluded from the provisions of the Act's Chapter 6 relating to power facility and site certification.

This is a question of first impression that pertains exclusively to statutory construction.[3] STA, interested agencies and persons[4], and Commission Staff briefed the legal issues.

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[1] All statutory references are to the Public Resources Code unless otherwise noted.

[2] Section 25501.7 states: "Any person proposing to construct a facility or a site to which Section 25501 applies may waive the exclusion of such site and related facility from the provisions of this chapter by submitting to the commission a notice to that effect on or after July 1, 1976, and any and all of the provisions of this chapter shall apply to the construction of such facility."

[3] In July 2011, the Commission committee assigned to the Calico Solar Project Amendment proceeding (08-AFC-13C) issued a ruling disclaiming Commission jurisdiction over the photovoltaic component of the

All but STA argue that the motion must be denied. As discussed below, we agree with STA that the scope of Section 25502.3 includes a photovoltaic electrical generating facility. We issue this opinion under our inherent authority to interpret our enabling statutes. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.)

Key Definitions

The Act defines terms pertinent to this decision as follows:

- A "site" is any location on which a facility is constructed or is proposed to be constructed. (§ 25119.)
- A "facility" is any transmission line or thermal powerplant, or both electric transmission line and thermal powerplant, regulated according to the provisions of the Act. (§ 25110.)
- A "thermal powerplant" is any stationary or floating electrical generating facility using any source of thermal energy, with a generating capacity of 50 megawatts or more, and any facilities appurtenant thereto. (§ 25120.)

Discussion

The Warren-Alquist Act vests the Energy Commission with exclusive certification jurisdiction over "all sites and related facilities in the state, whether a new site and related facility, or a change or addition to an existing facility." (Pub. Res. Code, § 25500.) Under the Act, "[n]o construction of any facility or modification of any existing facility shall be commenced without first obtaining certification for any such site and related facility by the commission, as prescribed [therein]." (*Ibid.*) In other words, someone proposing such construction or modification must submit to the Commission's exclusive certification jurisdiction. A related corollary is that someone proposing construction or modification of something other than a "site" or "facility" is excluded from the Commission's certification process.

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proposed project. The applicant sought Commission jurisdiction under Commission Regulations section 1769, which pertains to amendments or changes to projects previously certified by the Commission. Neither the applicant nor the committee discussed the possible application of Section 25502.3.

[4] Briefs were submitted by Sierra Club, Center for Biological Diversity, Kerncrest Audubon Society, Desert Tortoise Council, Western Watersheds Project, Imperial County, Kings County, Riverside County, San Luis Obispo County, and the California State Association of Counties. Public comments in opposition to the motion were submitted by The Solar Alliance, Don and Judie Decker and Penelope LePome. Dr. Geoff Lindsay filed supportive comments.

However, Section 25502.3 allows any person proposing to construct *a* facility excluded from the provisions of the Act's Chapter 6 relating to power facility and site certification to waive such exclusion by submitting to the commission a notice of intention to file an application for certification, and any and all of the provisions of this chapter shall apply to the construction of such facility.

The legal briefs collectively identify ambiguity in Section 25502.3 but offer conflicting rationale to resolve it. We have therefore undertaken an independent analysis guided by the briefs and applicable decisional law. Guided by the canons of statutory construction, we attempt to determine the lawmakers' intended scope for Section 25502.3. (*People v. Massie* (1998) 19 Cal.4th 550, 569.) Like courts, we begin with the plain or specially defined meaning of the statutory language but recognize that the meaning of a statute may not be determined from a single word or sentence; instead, the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) Thus, literal construction should not prevail if it is contrary to the legislative intent apparent in the statute or leads to an absurd result. Like courts, we look to the wider historical circumstances of a statute's enactment and underlying public policy as appropriate. (*Absher v. AutoZone, Inc*. (2008) 164 Cal.App.4th 332, 340.) And, we presume that the Legislature, when enacting a statute, is aware of existing related laws and intended to maintain a consistent body of rules. (*Stone Street Capital, LLC v. California State Lottery Com*. (2008) 165 Cal.App.4th 109.)

Looking first to the words of Section 25502.3, we note that it neither describes nor defines "a facility excluded from [the Act's Chapter 6 relating to power facility and site certification]." However, by replacing the word facility with its statutory definition in Section 25110, the phrase changes to: "any electric transmission line or thermal powerplant, or both, electrical transmission line and thermal powerplant, regulated according to the provisions of this division, excluded from this chapter." (See § 25100 [providing that "[u]nless the context otherwise requires, the definitions in this chapter govern the construction of this division."].) The Act identifies at least three kinds of facilities that satisfy these criteria:

- Any related facility for which the Public Utilities Commission has issued a certificate of public convenience and necessity or which any municipal entity has approved before January 7, 1975. (§ 25501.) [5]

[5] We are not aware of any such sites or related facilities that could satisfy these criteria.

- Commission-exempted thermal powerplants with a generating capacity of up to 100 megawatts and modifications to existing generating facilities that do not add capacity in excess of 100 megawatts. (§ 25541.)
- Geothermal powerplants and related facilities governed by county operating under Commission-delegated authority. (§ 25540.5.)

As shown, Section 25502.3 has meaning when we apply the statutory definition of facility. We recognize, however, that the Legislature did not always intend for facility to be given its statutory meaning. The definition of thermal powerplant illustrates the Legislature's inconsistent and circular use of this term.

A thermal powerplant is "any stationary or floating electrical generating *facility* using any source of thermal energy, with a generating capacity of 50 megawatts or more, and any *facilities* appurtenant thereto." (§ 25120, emphasis added.) Section 25120 has meaning only when "facility" and "facilities," as used therein, have plain or commonsense meaning. The California Attorney General reached this same conclusion over 30 years ago in construing the meaning of the phrase "facilities appurtenant thereto." The Attorney General observed:

> *The definitions used in the Act are of limited utility because of circulatory contained in them*. A thermal power plant is defined in section 25120 as any electrical generating facility using any source of thermal energy with a capacity of 50 megawatts or more and any facilities appurtenant thereto. A facility is defined in section 25110 as an electric transmission line or thermal power plant. Webster's New International Dictionary, 2d Ed. defines the noun 'facility' as '[a] thing that promotes the ease of any action, operation, transaction, or course of conduct.' According to this same dictionary, 'appurtenant' is an adjective meaning 'annexed or pertaining to some more important thing.' Because the phase 'facilities appurtenant thereto' is used in connection with all thermal power plants and not just with geothermal power plants, it appears as if the Legislature was referring to those things promoting the ease of operations of any thermal plant. Such things would include access roads, outbuildings, parking lots and service and storage areas. (61 Ops. Cal. Atty. Gen 127 (1978), p. 3, underline original, italics added.)

Notwithstanding the inconsistent use of "facility" within the definition of thermal powerplant, in 1988 the Legislature added the following sentence to definition of thermal powerplant and perpetuated this inconsistency: " 'Thermal powerplant' does not include

any wind, hydroelectric, or solar photovoltaic electrical generating *facility*." (§ 25120, emphasis added.)

In addition to perpetuating the Act's circular use of facility, the 1988 modification to Section 25120 created a new issue. In other words, by making it plain that wind, hydroelectric, and photovoltaic electrical generating facilities are not thermal powerplants, the Legislature affirmed their exclusion from the power facility and siting provisions of the Act's Chapter 6. Presuming, as we must, that the Legislature's use of "facility" was deliberate, the 1988 amendment arguably signaled that Section 25502.3 might also apply to wind, hydroelectric, and photovoltaic electrical generating facilities. Even if the 1988 amendment did not have this effect, nothing in the legislative history materials submitted by parties and independently obtained by Commission Staff compels the conclusion that Section 25502.3 refers only to statutorily defined facilities. [6] Indeed, we know of no extrinsic aide that explains Section 25502.3's purpose and scope. Instead, looking to the Legislature's policy objectives in vesting the Energy Commission with powerplant siting jurisdiction, we note the following legislative pronouncement:

> It is the policy of the state and the intent of the Legislature to establish and consolidate the state's responsibility [in the Energy Commission] for energy resources, for encouraging, developing and coordinating research and development into energy supply and demand problems, *and for regulating electrical generating and related transmission facilities*.
> (§ 25006, emphasis added.)

Consistent with this policy statement, the Legislature made the Commission the mandatory one-stop shop for statutorily defined sites and facilities and states that

> [t]he issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.

And, through opt-in statutes such as Sections 25001.7 and 25502.3, the Legislature gave the Commission authority to serve as the one-stop shop for certain facilities otherwise excluded from its jurisdiction. "Any and all of the provisions of [the Act's

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[6] The materials are exhibits to briefs filed by STA, Commission Staff and also found at http://www.energy.ca.gov/reports/Warren-Iquist_Act/history.html .

Chapter 6 relating to power facility and site certification] apply to the construction of such facility," apply to these sections. Notably, above-discussed Section 25500 is a provision of Chapter 6.

Even assuming that the Legislature did not initially envision the Energy Commission's role in implementing statewide siting policy as encompassing nonthermal powerplants, the Legislature's October 2011 passage of Senate Bill 226 (SB 226) makes it plain that the Legislature now has such vision. SB 226, vests the Energy Commission with exclusive certification jurisdiction over specified photovoltaic electrical generating powerplants by amending Chapter 6 of the Warren Alquist Act to include Section 25500, which provides in pertinent part:

> (a) The owner of a proposed solar thermal powerplants (sic) for which an application for certification was filed with the Commission after August 15, 2007, and certified by the commission and, of a project on federal land, for which a record of decision was issued by the Department of the Interior or the Bureau of Land Management before September 1, 2011, *may petition the commission not later than June 30, 2012, to review an amendment to the facility's certificate to convert the facility, in whole or in part, from solar thermal technology to photovoltaic technology, without the need to file an entirely new application for certification or notice of intent pursuant to Section 25502* … .
>
> (c) For a facility specified in subdivision (a), this chapter shall continue to apply, notwithstanding that the facility or part of the facility *would otherwise be excluded pursuant to Section 25120.* (Emphasis added.)

SB 226, like Section 25502.3, is an "opt-in statute." If the owner of a specified solar thermal powerplant already has Commission certification, it may submit to the Commission's exclusive certification jurisdiction to convert all or a portion of the powerplant to photovoltaic technology. The owner would exercise this option by filing project amendment documents in accordance with pre-existing Commission Regulation section 1769. Under Section 1769, after a final Commission certification decision becomes effective, the project owner must file "with the [C]ommission a petition for any modifications it proposes to the project design, operation, or performance requirements." (§ 1769, subd. (a)(1).)

Significantly, nothing in the language of SB 226 indicates a Legislative assumption or determination that the Commission would have no jurisdiction over photovoltaic electrical generating projects but for Section 25500.1. SB 226 merely affirms that the

owner of a photovoltaic powerplant does not require Commission certification and allows the owner to initiate Commission review under a streamlined process without an application for certification or notice of intent that might otherwise be required.

As shown by the foregoing discussion, even if Section 25502.3 might once have been reasonably construed as pertaining exclusively to a statutorily defined facility, several factors preclude continuation of that construction. Thus, "a facility excluded from the provisions of this chapter" as that phrase is used by Section 25502.3, includes statutorily defined facilities and also to wind, hydroelectric, and photovoltaic electrical generating facilities.[7]

Several counties contend that this construction impermissibly violates their constitutionally-vested land use authority and police power.[8] They essentially argue that the Commission may not certify photovoltaic powerplants other than those contemplated by SB 226, because the Legislature has not expressed an unequivocal intent for the Commission to do so in Section 25502.3 or otherwise. (Citing *Valley Vista Services, Inc. v. City of Monterey Park* (2004) 118 Cal.App.4th 881, 886-887.)

As discussed above, we resolved Section 25502.3's ambiguity in a manner that makes it applicable to wind, hydroelectric, and photovoltaic electrical generating facilities. By its express language, Section 25502.3 preempts local certification authority by asserting that all of the Act's power facility and site certification provisions will apply if one of these otherwise excluded facilities submits to Commission jurisdiction.[9] Section 25502.3 provides:

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[7] Included among Sierra Club's arguments that Section 25502.3 must be construed to refer to a statutorily defined facility, is the contention that a broader view of facility will allow the developer of *any* project, including a hotel or something else unrelated to electricity generation, to submit to the Commission's certification jurisdiction. This line of reasoning suggests by implication that a photovoltaic electrical generating facility of any size could also avail itself of Section 25502.3. None of the hypotheticals posed by Sierra Club are presently before the Commission. Even so, we note that Warren-Alquist Act unambiguously establishes Commission jurisdiction over facilities greater than 50 megawatts. (§25120.) This decision does not change 50 megawatt threshold.

We also note that Section 25502.3 mandates notice of intent proceedings, which are more rigorous than the already exacting application for certification proceedings. For instance, under the notice of intent process, must generally find that there are at least two acceptable alternative sites and related facilities as a prerequisite to certification. (§25516.)

[8] Counties may make and enforce within their limits all local, police, sanitary and other ordinances and laws not in conflict with general laws. (Cal. Const. art XI, § 7.)

[9] In a 1973 opinion discussing the preemptive effect of Section 25502.3, the Office of Legislative Counsel noted:

> Except as provided in Section 25501.7, any person proposing to construct a facility excluded from the provisions of this chapter may waive such exclusion by submitting to the commission a notice of intention to file an application for certification, and *any and all of the provisions of this chapter shall apply to the construction of such facility.* (Emphasis added.)

And, Section 25500 (a provision of Chapter 6) makes it plain that Commission's certification jurisdiction occupies the entire field to which it applies by stating:

> The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.

Thus, we are persuaded the Legislature asserted its intention for the Commission to have exclusive certification jurisdiction over facilities encompassed by Sections 25502.3.

Conclusion

For the foregoing reasons, we affirm that Section 25502.3 includes photovoltaic electric generating facilities.

> … any person proposing to construct a facility which is excluded or exempted may waive, as prescribed, the exclusion or exemption of such site and related facility from the power facility and site certification provisions; and, if so, any and all of such provisions would apply to construction of such facility (Secs. 25501.7, 25502.3). Therefore, any person proposing to construct a facility on an excluded or exempted site, …, could waive the exclusion of such site and related facility from the power facility and site certification provisions, and, in that case, the commission, … , would have the exclusive power to certify such site and facility.

(OLC letter to Hon. Raymond Gonzales (May 13, 1973), pp. 6-7, emphasis added.)