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December 9, 2011

Energy Resources Conservation
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1516 Ninth Street
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Re: Application for Certification for the Ridgecrest Solar Power Project
Docket No. 09-AFC-9

Letter in Opposition to Hearing Adviser's [Proposed] Commission Decision Affirming that Warren-Alquist Act Section 25502.3 Applies to Photovoltaic Electrical Generating Facilities (Business Meeting, December 14, 2011)

Dear Commissioners:

The South Coast Air Quality Management District (AQMD) staff submits the following comments in opposition to the Hearing Adviser's Proposed Decision in this matter on the issue of the applicability of Public Resources Code §25502.3 to photovoltaic electrical generating facilities. (Unless otherwise specified all section references are to the Public Resources Code.) In particular, the AQMD is concerned that the reasoning of the proposed decision could be extended to apply to new thermal powerplants of less than 50 megawatts (or existing powerplants with an increase of less than 50 MWs), which are also outside of the Commission's jurisdiction. The District retains full permitting authority for such powerplants and is often the CEQA lead agency as well. As the agency primarily responsible for air pollution control within the South Coast Air Basin, and portions of Salton Sea and Mojave Desert Air Basins, the AQMD must oppose any decision which has the potential for creating an opportunity for litigation concerning jurisdiction of the air districts, as might occur in this case. The AQMD is confident that a court would uphold its right and responsibility to issue federally required air permits for such projects. *Voices of the Wetlands v. State Water Resources Control Board,* 52 Cal. 4th 499, 523 (2011). Nevertheless, the Proposed Decision creates the potential for confusion and litigation which should be avoided. As explained below, basic principles of California law counsel against allowing a project to "opt-in" to this Commission's jurisdiction.

Background

The Commission is the siting authority for "all sites and related facilities in the state." §25500. The term "facility" is defined as "any electric transmission line or thermal powerplant, or an electric transmission line and thermal powerplant, regulated according to the provisions of this division." In turn, the term "thermal powerplant" is defined in section 25120 as "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...." In 1988, this statute was amended to include the following language: "'Thermal powerplant' does not include any wind, hydroelectric, or solar photovoltaic electrical generating facility." This amendment was declaratory of existing laws, since such projects already were not "thermal powerplants."

In this matter, STA Development, LLC, (Applicant) has filed a Motion for Order Affirming Application of Jurisdictional Waiver. The Applicant argues that a photovoltaic solar powerplant may voluntarily submit to the jurisdiction of the Commission pursuant to Section 25502.3, which 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." The Applicant argues that this section allows any facility to submit to the Commission's jurisdiction even though it was outside the Commission's jurisdiction in the first place because it is not a thermal powerplant with a generating capacity of 50 megawatts or more.

The Commission Staff contends that the waiver section applies only to projects that would have been within the Commission's basic jurisdiction, because they were thermal powerplants of 50 MW or more, but were "excluded" by the provisions of existing and former statutes. Those statutes were intended to provide "grandfathering" so that the lengthy Commission process would not result in a three-year hiatus on new power plants resulting from the enactment of the Warren-Alquist Act. Without the exclusion, plants already "in the pipeline" would have had to start over at the beginning of the Commission process. The AQMD concurs with the Commission Staff arguments and will not repeat them here.

However, we wish to provide an additional perspective on the issue. It is our position that the Commission should not interpret §25502.3 to allow applicants to confer jurisdiction on this Commission, and at the same time deprive cities and counties of their jurisdiction, because the statute does not unmistakably require such a result. In the case of "grandfathered" plants, the issue of conferring jurisdiction on the Commission does not arise, because they clearly would have been within the Commission's general grant of jurisdiction had the legislature not excluded them specifically. We concur with the views of the California State Association of Counties in this regard as well. We also

concur with the Center for Biological Diversity's arguments concerning the need for clear and express language in order to find preemption. Section 25502.3 does not clearly and expressly allow a project applicant to seek the cover of preemption of city and county authority.

The Waiver Provision Does Not Apply to Projects that Are Not Within the Commission's Jurisdiction

As explained by Commission Staff, projects that are not within the Commission's jurisdiction in the first place, such as solar photovoltaic power plants, or thermal powerplants of less than 50 megawatts, should not be allowed to confer jurisdiction on this Commission merely at their own election. Such a proposition would potentially impact local agency jurisdiction in a significant way, and would create an opportunity for "forum-shopping" by the applicants. We urge the Commission to consider the legal principle set forth in Civil Code §3513, which has been ingrained in California law since 1872: "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Thus, our Supreme Court has held that teachers may not waive the protections of the Education Code that are part of the public policy of this state. *Covino v. Governing Board,* 76 Cal. App. 3d 314,322 (1977).

The Supreme Court has held that a person may waive a right that exists primarily for his benefit, even if there is incidental public benefit, but only if the waiver does not "contravene any other public policy reasons motivating the enactment of the statutes." *Cowan v. Superior Court,* 14 Cal. 4th 367, 372 (1996) See also *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1049 (1997): "The pertinent inquiry, therefore, is not whether the law has any public benefit, but whether that benefit is merely incidental to the legislation's primary purpose." In this case, the law defining this Commission's jurisdiction has a public purpose that is not "merely incidental" and thus cannot be waived.

In this case, Applicant assumes that the law limiting the Commission's jurisdiction and not including plants such as the proposed photovoltaic plant is a law intended solely for the benefit of the applicant; i.e., the applicant is therefore not subject to the Commission's lengthy processes. But we believe that the jurisdictional division of authority between the Commission and local agencies also reflects an important public purpose: recognizing the important role of local and regional agencies in our system of government. To be sure, the Warren-Alquist Act recognizes the benefits of the Commission's process, but in our view, the Legislature determined that those benefits were outweighed by the benefits of maintaining local authority for those projects that were outside the Commission's jurisdiction in the first place. Only those projects that were within the Commission's jurisdiction, but excluded in order to avoid unduly delaying their construction, should be allowed to "waive" their exclusion and voluntarily submit to the Commission process.

Indeed, the Legislature may have determined that only the larger thermal powerplants raised the issues that would make their siting a subject of "statewide concern" so as to supersede local authority. (*See Orange County Air Pollution Control Dist. v. Public Util. Com.* 4 Cal. 3d 945, 950-951(1971).) We note that the courts have preserved and protected local jurisdiction when the 50 megawatt requirement was at issue. *Department of Water and Power v. Energy Resources Conservation and Development Commission*, 2 Cal. App. 4th 206 (1991).

Moreover, the courts have already established that the benefits of conferring Commission jurisdiction (and thus limiting local ability to decide the fate of a project) do not always justify extending the Commission's jurisdiction. Thus, the Court of Appeal rejected the Commission's assertion that jurisdiction should be broadly construed because to do otherwise would "lead to piecemeal regulation by a variety of local, regional, and statewide agencies, and would enable local jurisdictions to obstruct and delay powerplant transmission line sitings." *Public Util. Com. V. Energy Resources Conservation and Development Com.*, 150 Cal. App. 3d 437, 451-52 (1984) Despite this concern, the court held that the Commission's expansive "flexible" reading of its authority was unjustified. Significantly, in that case the Court expressed serious concerns that the Energy Commission's interpretation of its authority over transmission lines would lead to "uncertainty and confusion" because the "functional" test advocated by the Commission would lead to "a case-by-case determination by the Energy Commission of the extent of its jurisdiction. ...The attendant delay, expense, and uncertainty might well create regulatory havoc." *Pub. Util. Com.,* 150 Cal. App. 3d at 453.

Similarly in this case, an applicant for a solar photovoltaic plant or a thermal powerplant of less than 50 megawatts may proceed down the path of seeking local approvals in the normal course, only to suddenly elect Energy Commission siting processes instead, once confronted with a proposed condition not to its liking. Litigation over which agency has jurisdiction would likely ensue. In sum, the Legislature has drawn a line establishing the limits of the Commission's jurisdiction, and absent an unmistakable indication of legislative intent, the statute should not be interpreted to allow an Applicant to unilaterally decide which agency shall have jurisdiction, because the law defining the Commission's jurisdiction is part of the public policy of this state and cannot be "waived" by the applicant. *Covino,* 76 Cal. App. 3d at 322.

Indeed, the Applicant's position runs afoul of the basic principle that "the act of a litigant cannot confer subject matter jurisdiction on the court." *Cowan v. Superior Court,* 14 Cal. 4th 367, 373. It is an equally well-established principle that "administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute." *Ferdig v. State Personnel Board*, 71 Cal. 2d 96, 103 (1969). Applicant's interpretation would allow this Commission's jurisdiction to depend, not on

constitution or statute, but on the unilateral act of a private party-the applicant seeking to avoid local decision-making.

Such an interpretation may well constitute an improper delegation of legislative power to a private party. *Bock v City Council*, 109 Cal. App. 3d 52, 57 (1980); *Kugler v. Yocum*, 69 Cal. 2d 371 (1968). The weighty constitutional issues raised by Applicant's interpretation should be avoided by adopting the logical and persuasive interpretation of Commission Staff. The "opt-in" provisions apply only to projects that were within the Commission's basic jurisdiction in the first place, but were given a legislative exclusion in order to avoid unnecessary delay to the siting process.

Conclusion

For the reasons stated in the foregoing, AQMD staff respectfully urges this Commission to deny the Applicant's motion.

Respectfully submitted,

Barbara Baird

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APPLICATION FOR CERTIFICATION
For the *RIDGECREST SOLAR POWER PROJECT*

Docket No. 09-AFC-9
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(Revised 12/05/2011)

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DECLARATION OF SERVICE

I, Vanessa M. Rodriguez, declare that on December 9, 2011, I served and filed copies of the attached **Letter in Opposition to Hearing Adviser's [Proposed] Commission Decision Affirming that Warren-Alquist Act Section 25502.3 Applies to Photovoltaic Electrical Generating Facilities (Business Meeting, December 14, 2011) dated December 9, 2011**. The original documents, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulation, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[www.energy.ca.gov/sitingcases/solar_millennium_ridgecrest/index.html]**.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

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_X_ Served electronically to all e-mail addresses on the Proof of Service list;

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_____ by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

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1516 Ninth Street, MS-4
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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

_____ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

Vanessa M Rodriguez

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