



455 Capitol Mall Suite 350
Sacramento CA 95814
Tel· 916.441.6575
Fax· 916.441.6553

DOCKET	
09-AFC-9	
DATE	<u>Jun 17 2011</u>
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June 17, 2011

California Energy Commission
Docket Unit
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: **MOTION FOR ORDER AFFIRMING APPLICATION OF JURISDICTIONAL WAIVER RIDGECREST SOLAR POWER PROJECT DOCKET NO. (09-AFC-9)**

Enclosed for filing with the California Energy Commission is the original of **MOTION FOR ORDER AFFIRMING APPLICATION OF JURISDICTIONAL WAIVER**, for the Ridgecrest Solar Power Project (09-AFC-9).

Sincerely,

Marie Mills

Scott A. Galati
David L. Wiseman
GALATIBLEK LLP
455 Capitol Mall
Suite 350
Sacramento, CA 95814
(916) 441-6575

STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

**RIDEGCREST SOLAR POWER
PROJECT**

DOCKET NO: 09-AFC-9

**MOTION FOR ORDER AFFIRMING
APPLICATION OF JURISDICTIONAL
WAIVER**

INTRODUCTION

Solar Trust of America (STA, formerly Solar Millennium, LLC) wishes to inform the Committee that it is exploring redesign of the Ridgecrest Solar Power Project (RSPP) to reduce the potential impacts identified in the Staff Assessment/Draft Environmental Impact Statement (SA/DEIS). The redesign is intended to reduce the overall project footprint by reducing the generation output and utilizing photovoltaic technology (PV). Reduction of the footprint would include no development on the north side of Brown Road and no encroachment into the primary wash area. Such a redesign would avoid impacts to the Desert Tortoise habitat located north of Brown Road and would also avoid restriction of the connectivity corridor identified by Staff for the Mohave Ground Squirrel (MGS). Additional benefits of a smaller PV project would be reduction in grading, reduction in water requirements, smaller visual effects, and less lighting. STA is also considering other sites within the Ridgecrest area and is working with the Bureau of Land Management to identify appropriate sites. Additionally, STA is participating in the Desert Renewable Energy Conservation Planning Process as it pertains to the Ridgecrest area.

STA requests that the Committee issue a Revised Scheduling Order suspending the current Application For Certification (AFC) Proceeding to allow the redesign and the DRECP Process to further enlighten the viability of the sites in and around the City of Ridgecrest including the current site. Additionally, STA request the Committee issue an Order affirming the application of a Jurisdictional Waiver authorized by the Warren-Alquist

Act¹. Specifically the Warren Alquist Act allows an applicant to voluntarily elect to file an AFC to the Commission for a proposed facility that would otherwise be excluded or exempted from the exclusive siting jurisdiction of the Commission. This brief offers an analysis supported by legal authority for this proposition. This jurisdictional waiver is different than the issues raised in the Calico AFC Proceeding because the waiver specifically allows an applicant for an energy facility to elect to obtain its state entitlements from the Commission whether or not the solar PV components are appurtenant or related to the solar thermal components of the project.

I. PUBLIC RESOURCES CODE SECTION 25502.3 ALLOWS AN APPLICANT TO VOLUNTARILY WAIVE THAT ITS FACILITY IS OTHERWISE EXCLUDED OR EXEMPTED FROM THE EXCLUSIVE SITING JURISDICTION PROVISIONS OF THE WARREN ALQUIST ACT.

Public Resource Code (PRC) Section 25502.3 states:

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)**

At first glance, the plain meaning of this language allows any person who is not required to file with the Commission to waive its right to file with other agencies and instead file with the Commission. As further analysis demonstrates, this plain meaning approach is the only interpretation that provides this provision with any legal effect.

PRC Section 25510 defines a “facility” as follows.

“Facility” means any electric transmission line or **thermal powerplant**, or both electric transmission line and **thermal powerplant**, regulated according to the provisions of this division. **(emphasis added)**

PRC Section 255120 defines a “thermal powerplant” as follows.

“Thermal powerplant” means 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

¹ Public Resources Code Section 25000 et seq

appurtenant thereto. Exploratory, development and production wells, resource transmission lines, and other related facilities used in connection with a geothermal exploratory project or a geothermal field development project are not appurtenant facilities for the purposes of this division.

“Thermal powerplant” **does not include** any wind, hydroelectric, or **solar photovoltaic electrical generating facility. (emphasis added)**

Inserting the definitions of “facility” and “thermal powerplant” into PRC Section 25502.3 yields the following.

Except as provided in Section 25501.7, any person proposing to construct a[n] **electric transmission line or 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,** 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. **(definitions inserted)**

Inserting the definitions as shown above without further analysis renders PRC Section 25502.3 without any legal effect. There are **no projects** that meet the definitions of “facility” and “thermal powerplant” that are currently excluded from Commission mandatory jurisdiction. Every project that meets the definitions shown above are already within the Commission’s **mandatory** exclusive jurisdiction and therefore such a waiver cannot be used. In other words, if the definitions were relied upon instead of the plain meaning of the words, the section would hold that **any person who must file with the Commission may voluntarily elect to file with the Commission.** Such a reading renders PRC Section 25502.3 meaningless as such projects cannot “elect” to waive any exclusion to file an AFC at the Commission, because they “must” file an AFC at the Commission. Moreover, interpreting the statute this way is inconsistent with well established legal principles for statutory interpretation.

The first rule of statutory construction is that the plain and commonsense meaning of the statutory language controls². Any interpretation must, if possible, give effect and significance to every word and phrase of a statute³. "When two statutes touch upon a common subject," they must be construed "in reference to each other, so as to “harmonize the two in such a way that no part of either becomes surplusage”⁴. It must be presumed that the Legislature intended "every word, phrase and provision ... in a statute ... to have meaning and to perform a useful function."⁵ “Courts are required to give statutes a

² *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.

³ *Steinberg v. Amplica, Inc.* (1986) 42 Cal.3d 1198, 1205.

⁴ *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778-779.

⁵ *Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 233.

reasonable and commonsense interpretation which will result in wise policy rather than mischief or absurdity”.⁶ Additionally, the courts have held that they must presume that the statute has purpose and may not attempt to reconcile inconsistencies by repealing a portion of statute by implication.⁷

The only way to give this waiver section meaning – to avoid “repealing it by implication” and to avoid “absurd results” – would be to apply it to those facilities that are **not** subject to the Commission’s **mandatory** exclusive jurisdiction and **thus actually have the option to waive certain siting jurisdiction rights**. Using the definitions of “facility” and “thermal powerplant,” the following types of projects are **specifically** excluded from Commission mandatory exclusive jurisdiction:

1. any stationary or floating electrical generating facility using **any source of thermal energy** with a **generating capacity of less than 50 megawatts** or more, and any facilities appurtenant thereto;
2. any wind generating facility;
3. any hydroelectric generating facility;
4. any **solar photovoltaic electrical generating facility**.

The logical conclusion is that the Warren Alquist Act allows an applicant to voluntarily elect to file for a License at the Commission for a proposed facility that would otherwise be excluded from the exclusive siting jurisdiction of the Commission.

One could attempt to argue that such an interpretation could be read too broadly to include non-electricity facilities. However, this interpretation should be rejected as inconsistent with the purpose and intent of the Warren Alquist Act. PRC Section 25006 states:

It the policy of the state and the intent of the Legislature to establish and consolidate the state’s responsibility 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. (**emphasis added**)

“Energy” is defined in PRC Section 25109 as:

“Energy” means any work or heat that is, or may be produced from any fuel or source whatsoever.

Therefore, the Warren Alquist Act does not grant the Commission any permitting authority over any site or facility, such as a shopping center or a golf course, that is not related to

⁶ *USA v. Gibson* (1992) 6 Cal.App.4th 577, 582.

⁷ *Flores v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 171, Page 477. See also *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298 and *In re White* (1969) 1 Cal.3d 207.

the production of energy and the Commission cannot read the exclusion too broadly to permit non energy producing facilities or sites.

Lastly, this "plain meaning" interpretation is consistent with the legal opinion from Office of Legislative Counsel dated May 13, 1974 in which it was asked specifically about whether local governments regulating authority was superseded by the Warren Alquist Act. In response to that inquiry, the Office of Legislative Counsel opined,

However, we observe that 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 the constructing of such facility** (Section 25501.7, **25502.3**). Therefore, any person proposing to construct a facility on an excluded or exempted site, including the site referred to in subdivision (e) of Section 25501.5, could waive the exclusion of such site and related facility from the power facility and site certification provisions, and, in that case, the commission, as discussed generally in Analysis No. 1, would have the exclusive power to certify such site and facility. **(emphasis added).**

II. STA HEREBY NOTIFIES THE COMMISSION THAT IT IS ELECTING TO SUBMIT TO THE COMMISSION'S EXCLUSIVE JURISDICTION FOR AN ENERGY FACILITY UTILIZING PHOTOVOLTAIC TECHNOLOGY.

STA requests the Commission use this Motion and the existing RSPP AFC as the official documents memorializing its waiver of exclusion from the Commission's siting authority for the RSPP site. Therefore, STA requests an order affirming its Jurisdictional Waiver and a Revised Scheduling Order that suspends proceedings of the RSPP for up to 12 months with the requirement that STA submit quarterly Status Reports to inform the Committee of its redesign progress.

The undersigned declare under penalty of perjury that they have the authority to make this request on behalf of STA for the RSPP.

Dated: June 17, 2011



David L. Wiseman, Counsel to STA



Scott A. Galati, Counsel to STA



**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**

**APPLICATION FOR CERTIFICATION
For the *RIDGECREST SOLAR POWER
PROJECT***

**Docket No. 09-AFC-9
PROOF OF SERVICE
(Revised 6/14/2011)**

APPLICANT

Solar Millennium, LLC
Billy Owens,
Director of Project Development
*1111 Broadway, 5th Floor
Oakland, CA 94607
owens@solarmillennium.com

Alice Harron,
Senior Director of
Project Development
*1111 Broadway, 5th Floor
Oakland, CA 94607
harron@solarmillennium.com

AECOM
Elizabeth Copley, Project Manager
2101 Webster Street, Suite 1900
Oakland, CA 94612
elizabeth.copley@aecom.com

Galati/Blek, LLP
Scott Galati,
Marie Mills
455 Capitol Mall, Suite 350
Sacramento, CA 95814
sgalati@gb-llp.com
mmills@gb-llp.com

Paul, Hastings, Janofsky & Walker,
LLP
Peter Weiner, Matthew Sanders
55 2nd Street, Suite 2400-3441
San Francisco, CA 94105
peterweiner@paulhastings.com
matthewsanders@paulhastings.com

Solar Millennium, LLC
Jim Migliore, Associate
Environmental Management
1111 Broadway, 5th Floor
Oakland, CA 94607
E-mail preferred
migliore@solarmillennium.com

INTERVENORS

Desert Tortoise Council
Sidney Silliman
1225 Adriana Way
Upland, CA 91784
gssilliman@csupomona.edu

California Unions for Reliable
Energy (CURE)
Tanya A. Gulesserian,
Elizabeth Klebaner,
Marc D. Joseph
Adams, Broadwell, Joseph
& Cardozo
601 Gateway Boulevard,
Suite 1000
South San Francisco, CA 94080
tgulesserian@adamsbroadwell.com
eklebaner@adamsbroadwell.com

Basin and Range Watch
Laura Cunningham,
Kevin Emmerich
P.O. Box 70
Beatty, NV 89003
bluerockiguana@hughes.net

Western Watersheds Project
Michael J. Connor, Ph.D.,
California Director
P.O. Box 2364
Reseda, CA 91337-2364
mjconnor@westernwatersheds.org

Kerncrest Audubon Society
Terri Middlemiss, Dan Burnett
P.O. Box 984
Ridgecrest, CA 93556
catbird4@earthlink.net
imdandburnett@verizon.net

Center for Biological Diversity
Ileene Anderson, Public Lands
Desert Director
PMB 447
8033 Sunset Boulevard
Los Angeles, CA 90046
ianderson@biologicaldiversity.org

INTERESTED AGENCIES

California ISO
E-mail Preferred
e-recipient@caiso.com

U.S. Department of the Interior,
Bureau of Land Management
Janet Eubanks, Project Manager,
California Desert District
22835 Calle San Juan de los Lagos
Moreno Valley, California 92553
janet_eubanks@ca.blm.gov

INTERESTED AGENCIES (Cont.)

Naval Air Warfare Center Weapons Division
Scott O'Neil, Executive Director
1 Administration Circle
China Lake, CA 93555-6100
E-mail preferred
scott.oneil@navy.mil

Naval Air Warfare Center Weapons Division
Scott O'Neil, Executive Director
575 "I" Avenue, Suite 1
Point Mugu, CA 93042-5049
E-mail preferred
scott.oneil@navy.mil

*Naval Air Weapons Station, China Lake
CAPT Jeffrey Dodson, Commanding Officer
1 Administration Circle, Stop 1003
China Lake, CA 93555-6100
E-mail preferred
jeffrey.dodson@navy.mil

*Tim Fox
Community Plans & Liaison Officer
429 E Bowen Rd, Stop 4003
China Lake, CA 93555-6100
E-mail preferred
timothy.h.fox@navy.mil

ENERGY COMMISSION

JAMES D. BOYD
Vice Chair and Presiding Member
jboyd@energy.state.ca.us

Kourtney Vaccaro
Hearing Officer
kvaccaro@energy.state.ca.us

Tim Olson
Adviser to Commissioner Boyd
tolson@energy.state.ca.us

Eric Solorio
Project Manager
esolorio@energy.state.ca.us

Jared Babula
Staff Counsel
jbabula@energy.state.ca.us

Jennifer Jennings
Public Adviser
E-mail preferred
publicadviser@energy.state.ca.us

DECLARATION OF SERVICE

I, Marie Mills, declare that on June 17, 2011, I served and filed copies of the attached **MOTION FOR ORDER AFFIRMING APPLICATION OF JURISDICTIONAL WAIVER**, dated June 17, 2011. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[http://www.energy.ca.gov/sitingcases/ridgecrest_solar].**

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

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OR

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CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 09-AFC-9
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

docket@energy.state.ca.us

I declare under penalty of perjury 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.



Marie Mills