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STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:

Application for Certification
For the Palen Solar Power Project
Palen Solar I, LLC

Docket No. 09-AFC-7

ENERGY COMMISSION STAFF'S RESPONSE TO INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY'S PETITION FOR RECONSIDERATION

On December 15, 2010, the California Energy Commission (Commission) adopted a Commission Decision certifying the Palen Solar Power Project (PSPP). On January 14, 2011, Center for Biological Diversity (CBD) filed a petition for reconsideration of this decision (Petition). CBD argues that Public Resources Code section 25527 prohibited the Commission from certifying PSPP before the Bureau of Land Management (BLM) issued its Record of Decision on the project proposal. As discussed below, section 25527 did not act as a bar to the Commission's adoption of PSPP on December 15, 2010 and CBD's petition should, therefore, be rejected.

I. CBD Fails To Set Forth An Error Of Fact Or Law

Pursuant to California Code of Regulations, title 20, section 1720, a petition for reconsideration must either set forth "new evidence that could not have been provided during the evidentiary hearings" or "an error in fact or change or error of law". The petition must also fully explain "why the matters set forth could not have been considered during evidentiary hearings, and their effects upon a substantive element of the decision." (Cal. Code Regs., tit. 20, §1720(a).)

CBD first raised their argument regarding section 25527 in comments on the PMPD on November 29, 2010, and provided oral argument on the matter at the PSPP Presiding Member's Proposed Decision (PMPD) conference on December 2, 2010. The Committee was not persuaded by CBD's arguments and proposed that the PSPP be adopted by the full Commission. CBD reiterated their arguments in writing on December 14, 2010, and again in person at the December 15, 2010, adoption hearing, where their arguments again proved unpersuasive. CBD raises these same arguments one final time in their petition for reconsideration.

The purpose of the Petition for Reconsideration process is not to allow parties another chance to re-argue matters raised and dismissed in the original proceeding – it is intended to address new issues that had not already been considered and rejected by the Committee or the full Commission. Thus, CBD is required to explain why these matters were not, and could not have been, considered previously. CBD's entire petition, however, is just a reiteration of arguments they made at the adoption hearing. CBD cites to no new or changed facts, no new evidence, and no new error of law. The only new comment in the petition is a brief statement of CBD's disagreement with how the issue was framed in the Commission Decision; the comment, however, provides nothing new in support of CBD's argument that section 25527 prohibited the certification of PSPP on December 15, 2010. Thus, the petition should be rejected.

However, even if one looks past this obvious failure, staff believes that CBD's arguments lack merit, and that section 25527 does not apply to the certification of PSPP because none of the lands on which PSPP will be located fall under that section's prohibition. Specifically, it appears that the Legislature intended section 25527(a) to apply to state, regional, county, and city lands in existence on January 7, 1975. In other words, it does not appear that section 25527(a) is intended to apply to the lands that CBD claims that it is applicable to.

II. Public Resources Code Section 25527 Did Not Prohibit The Certification Of PSPP On December 15, 2010.

PSPP will be sited on 5,200 acres of land approximately 0.5 mile north of U.S. Interstate-10 and approximately 10 miles east of Desert Center, in an unincorporated area of eastern Riverside County, California. (Ex. 301, Revised Staff Assessment, Part II, p. A-4). Most of the land is public land administered by the Bureau of Land Management (BLM). Approximately 3,873 acres of the 5,200 acre site would ultimately be disturbed by project construction (an additional 137 acres would be disturbed by construction of the transmission line). (Ex. 301, p. C-2.14).

The Federal Land Policy and Management of 1976 established the California Desert Conservation Area (CDCA), a 25 million-acre expanse covering most of southeastern California, almost a quarter of the state. (43 U.S.C. §1781(c).) BLM manages 12.1 million acres of land within the CDCA, including most of the land on which PSPP will be located, which is within an area designated under the CDCA Plan of 1980. Specifically, the project site is located within the Northern and Eastern Colorado Desert Coordinated Management Plan (NECO) area, a region that includes most of the California portion of the Sonoran Desert ecosystem. (Ex. 301, pp. C.2-15; A-4) This land is designated as Multiple-Use Class L (Limited Use) and the plan states that solar power facilities may be allowed after NEPA requirements are met. (Ex. 301, p. A-4.)

The project is located within two areas designated in the NECO as wildlife habitat management areas (WHMA); Palen-Ford WHMA and Desert Wildlife Management Area (DWMA) Connectivity WHMA. Management emphasis for the Palen-Ford WHMA is on the management of the dunes and playas within the Palen-Ford dune system. Management emphasis for the DWMA Connectivity WHMA is on the geographic connectivity for desert tortoise for the conservation areas east of Desert Center (i.e., connectivity between the Chuckwalla DWMA and the wilderness area north of I-10). The Palen McCoy Wilderness is approximately 3 miles to the northeast of the project, the Chuckwalla DWMA is located approximately 2 miles to the south, and the Palen Dry Lake Area of Critical Environmental Concern (ACEC) borders the project site to the east. (Ex. 301, p. C.2-16.) Approximately 1 mile of the transmission line will traverse into the Chuckwalla DWMA en route to the Red Bluff substation. (Ex. 53, Palen Solar I, LLC's Data Responses to Reconfigured Alternatives 2 & 3 – Biological Resources, Palen Solar Power Project Biological Resources Data Package Addendum, p. 1.)

According to the 1994 Desert Tortoise Recovery Plan, the project is located within the Eastern Colorado Recovery Unit. On February 8, 1994, the U.S. Fish and Wildlife Service published a final rule in the *Federal Register* (59 Fed. Reg. 5820 (1994).) designating 6.4 million acres of critical habitat for the Mojave population of the desert tortoise. In California, this designation totals 4,754,000 acres in Imperial, Kern, Los Angeles, Riverside, and San Bernardino counties. (Fish and Wildlife Service, Desert Tortoise (Mojave population) Recovery Plan (1994), p. H1). Approximately 201 acres of the southwestern corner of the project overlaps the northern boundary of the Chuckwalla Desert Tortoise Critical Habitat Area. (Ex. 301, p. C.2-71.)

The Warren-Alquist Act prohibits the Commission from approving "as a site for a facility" designated "areas for wildlife protection" unless the Commission makes certain findings and obtains "the approval of any public agency having ownership or control of such lands". (Pub. Resources Code, §25527.) CBD posits that PSPP is so sited and, thus, the Commission must have obtained, prior to certification, approval from the public agency having ownership of such lands, the Bureau of Land Management (BLM). (Petition, p. 1.)

As discussed further below, staff does not believe it is necessary to parse whether WHMAs, DWMAs, or Critical Habitat constitute "areas for wildlife protection" under section 25527. Instead, staff posits that there are two qualifiers in subsection 25527(a) that make it inapplicable to PSPP; additionally, the last paragraph of section 25527 is intended to guide the Commission's consideration of lands identified therein and not prohibit their use outright.

A. Public Resources Code Subsection 25527(a) Applies Only To Areas Of Wildlife Protection In Existence As Of January 7, 1975.

The provision upon which CBD relies reads as follows:

> The following areas of the state shall not be approved as a site for a facility, unless the commission finds that such use is not inconsistent with the primary uses of such lands and that there will be no substantial adverse environmental effects and the approval of any public agency having ownership or control of such lands is obtained:
>
> (a) State, regional, county and city parks; wilderness, scenic or natural reserves; areas for wildlife protection, recreation, historic preservation; or natural preservation areas in existence on the effective date of this division.
> (b) Estuaries in an essentially natural and undeveloped state.
>
> In considering applications for certification, the commission shall give the greatest consideration to the need for protecting areas of critical environmental concern, including, but not limited to, unique and irreplaceable scientific, scenic, and educational wildlife habitats; unique historical, archaeological, and cultural sites; lands of hazardous concern; and areas under consideration by the state or the United States for wilderness, or wildlife and game reserves.

(Pub. Resources Code, §25527 [emphasis added].) Subsection (a) contains a list of land designations subject to prohibition if the requirements in the preceding paragraph are not or cannot be met. The entire division became operative, or effective, on January 7, 1975. Upon a plain reading, the qualifying phrase at the end of subsection (a), "in existence on the effective date of this division", appears to apply to the entire list of land designations preceding it. Standard rules of grammar recommend the use of semicolons to separate a series of parallel dependent clauses if they contain internal commas. (The Gregg Reference Manual, Ninth edition, 2001, p. 39.)Thus, the authors likely used semicolons in this subsection to aid the reading of the paragraph and not to prevent the qualifier from applying to all items preceding it.

Indeed, where the authors did wish to prevent other terms from applying and **treat a land** designation separately, they placed it in another subsection, (b), that does not include the timing limitation. In fact, this appears to be the only explanation for the presence subsection (b) altogether. If all the clauses in subsection (a) were intended to be read independently, then the land described in (b) could have just as easily been thrown into (a). The authors must have had a reason for separating this provision, and the reason must be that the qualifying phrases included in this paragraph were not intended to apply to (b). Reading it otherwise would make the existence of subsection (b) superfluous and unnecessary, which according to the rules of proper statutory construction should be avoided.

This interpretation is also supported by the organization of other Warren-Alquist Act provisions. Where the authors have elsewhere wished to create a list of items with the intention that each item be self-contained, they have created a list with each item as its own subsection, clearly distinct from the others, so that there is no confusion. (Pub. Resources Code, §§ 25005.5, 25534, 25602.) The only purpose for not doing so with subsection 25527(a) must be that the authors did not intend each item to be self-contained, but intended each item to be qualified by the language at the beginning of the subsection and at the end.

The three designations currently attached to the project site and the transmission line (critical habitat, wildlife habitat management area, and designated wildlife management area) all were made after January 7, 1975. The WHMA and DWMA designations appear to have been formally made on December 19, 2002 with adoption and implementation of the NECO plan. Even if the designations precede the NECO plan, they could not have been made any earlier than 1980, when BLM's CDCA Plan was adopted. The critical habitat designation was made on February 8, 1994 with adoption of a final rule by the U.S. Fish and Wildlife Service, which designated 6.4 million acres of critical habitat for the Mojave population of the desert tortoise. (59 Fed. Reg. 5820 (1994).) Since all of these land designations occurred after January 7, 1975, the prohibition of section 25527 does not apply.

B. The Legislative History Of Section Subsection 25527 Indicates That It Was Intended To Protect State And Local Lands Subject To The Energy Commission's Preemptive Licensing Authority.

In addition to the qualifier at the end of subsection (a) discussed above, subsection 25527(a) contains another qualifier at the beginning:

> (a) State, regional, county and city parks; wilderness, scenic or natural reserves; areas for wildlife protection, recreation, historic preservation; or natural preservation areas in existence on the effective date of this division.

(Pub. Resources Code., §25527 [emphasis added].) As discussed above, subsection (a) contains a list of land designations subject to prohibition if the requirements in the preceding paragraph are not or cannot be met. Before the land designations are listed, however, the subsection begins with a listing of jurisdictions, conspicuously leaving out "Federal". Again upon a plain reading of the language, this provision should be interpreted as intending the beginning clause "state, regional, county and city" to qualify all following land designations, thereby excluding any Federal land from the prohibition. As discussed above, the semicolons appear to serve the purpose of keeping the list orderly due to the presence of multiple commas. They do not appear to be intended to prevent application of the beginning qualifier to the rest of the list.

This interpretation also appears to be supported by legislative history. The first iteration of this provision was a complete prohibition of the use of these types of land:

> The following areas of the State of California shall be excluded from consideration whenever a site is considered for a thermal powerplant:
> (a) State, regional, county and city parks; wilderness, scenic or natural reserves; areas for wildlife protection, recreation, historic preservation; or natural preservation areas in existence on the effective date of this division.

(Bill No. AB 1575 (1973-1974 Reg. Sess.) as amended in Assembly, August 6, 1973.) In a memo from his staff on March 26, 1974, to Charles Warren, coauthor of the legislation, section 25527 is discussed in the context of the utilities' wish to allow some development on these lands if such use would not disturb the character of the areas. (Staff Memorandum to Charles Warren (1973-1974 Reg. Sess.) March 26, 1974, p. 12, Assemblyman Charles Warren's Files, AB 1575.) The memo discusses this request and states, "because the commission does have ultimate pre-emptive power, it may be wise to require the involvement and acquiescence of relevant agencies protecting these areas prior to authorizing the intrusion." (Id.) This statement implies that the provisions surrounding implementation of section 25527 revolve around concern over the pre-emptive power of the Commission, power the Commission can exert only over non-federal lands. Thus, logically, the prohibition contained in section 25527 should not apply to federal land because there is no risk of the Commission certifying a project impacting federal land without the federal agency in charge of those lands being able to stop the project. Therefore, the qualifier "state, regional, county and city" could and should most logically be read to apply to all of the lands listed in subsection (a).

The order in which the provisions of section 25527 were drafted also explains why the qualifier "state, regional, county and city" is not contained earlier in the provision (i.e. to qualify the clause "the approval of any public agency having ownership or control of such lands is obtained."). Subsection (a) was written before the bulk of the first paragraph; when first written the obvious place for the qualifier was at the beginning of subsection (a). (Bill No. AB 1575 (1973-1974 Reg. Sess.) as amended in Assembly, August 6, 1973.) When the first paragraph was expanded on, it is easy to understand that the authors would not want to disturb already acceptable language and move the qualifier from subsection (a) to the first paragraph. Therefore, the requirement to obtain the "approval of any public agency having ownership or control of such lands" can be presumed as intended to be interpreted in light of subsection (a); those agencies in control of non-federal lands had to be consulted.

One could argue that the "state, regional, county and city" was only intended to qualify "parks", but there is no apparent reason why National Parks should be excluded from the prohibition if all other federal lands were intended to be

included. Thus, the most logical reading is that the entire subsection was only intended to apply to state, regional, county and city lands because of the concern that otherwise the Commission's preemptive authority would allow it to approve projects on state and local lands without the approval of the agency in charge of those lands.

C. The Commission Is Directed To Give The Greatest Consideration To Protecting Areas Of Critical Environmental Concern, But Is Not Prohibited From Approving Such Lands As Sites For A Facility.

In several areas of their petition CBD refers to DWMAs as Areas of Critical Environmental Concern (ACECs) and cites to the last paragraph of section 25527, which states:

> In considering applications for certification, the commission shall give the greatest consideration to the need for protecting areas of critical environmental concern, including, but not limited to, unique and irreplaceable scientific, scenic, and educational wildlife habitats; unique historical, archaeological, and cultural sites; lands of hazardous concern; and areas under consideration by the state or the United States for wilderness, or wildlife and game reserves.

(Pub. Resources Code, §25527.) Though not explicitly stated, CBD appears to imply that this provision also prohibits the Commission from approving facilities on such sites unless the steps required in the first paragraph of section 25527 are taken (i.e. finding that the use is not inconsistent with the primary uses of such lands, finding that there will be no substantial adverse environmental effects, and obtaining the approval of any public agency having ownership or control of such lands). Based on a plain reading of the provision and legislative history, however, it is clear that this provision means what it says: the Commission should give "greatest consideration" to these lands, but no prohibition attaches. Therefore, staff does not believe the Commission needs to determine whether any of the land designations on which PSPP will be sited constitute "areas of critical environmental concern."

Section 25527 begins with a paragraph stating that the Commission may not approve a facility located on the following listed areas of the state unless three requirements are met. After this opening paragraph, subsections (a) and (b) are presented with a list of the aforementioned areas. It is apparent that this listing is intended to conclude the list of areas to which the initial prohibition applies. After this list, a new paragraph is presented containing an additional list of areas to which the Commission should give "greatest consideration." Hence, the last paragraph is intended to be separate from the first, with no carryover of the prohibition, or the requisite actions, from the first to the second. This interpretation is supported by legislative history. Analysis of this provision by the electric utilities in a memo Edwin Meese, III, Executive Assistant to the Governor at the time, stated that "[t]he second paragraph provides that "greatest consideration", rather than prohibition, is required for certain other classes of

lands." (Memorandum to Mr. Edwin Meese, III, (1973-1974 Reg. Sess.) March 22, 1974, Assemblyman Charles Warren's Files, AB 1575.) A memo authored by the staff of Charles Warren summarizing the Utilities' March 22, 1974 memo expresses acceptance with the utilities' proposed approach and suggests a few additional changes but does not remark on the utilities' statement that the latter paragraph does not serve as a prohibition. (Staff Memorandum to Charles Warren (1973-1974 Reg. Sess.) March 26, 1974, Assemblyman Charles Warren's Files, AB 1575.) If the utilities' statement was not correct, the staff would have surely remarked upon it and perhaps suggested a change to ensure the statutory language was clear. The fact that they did not do so evinces that they agreed with the interpretation. Therefore, even if any of the lands on which PSPP will be sited constitute "areas of critical environmental concern," it would not alter the Commission's ability to have certified PSPP on December 15, 2010.

III. Conclusion

CBD's petition raises no new issues, as required by the Commission's regulations. However, CBD's arguments also fail on substantive merits for three reasons. First, the land subject to the license had no designation for wildlife protection in 1975, when the statute was enacted, and the prohibition is, thus, inapplicable. Second, upon a plain reading of the statutory language, and when considered in the context of relevant legislative history, staff does not believe that section 25527 was ever intended to apply to federal lands; there is a qualifier at the beginning of the list stating as much and, logically there is no need for federal lands to have been included as such lands have never been subject to the preemptive effect of the Commission's licensing jurisdiction, as federal approvals are required. And third, the second paragraph of section 25527 does not act has a prohibition of certifying facilities on lands listed therein. For all of these reasons, staff recommends that the petition be rejected.

DATED: February 3, 2011

Respectfully submitted,

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APPLICATION FOR CERTIFICATION FOR THE *PALEN SOLAR POWER PLANT PROJECT*

Docket No. 09-AFC-7

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(Revised 8/27/10)

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DECLARATION OF SERVICE

I, **Rhea Moyer**, declare that on, **February 3, 2011**, I served and filed copies of the attached **Energy Commission Staff's Response to Intervenor Center for Biological Diversity Petition for Reconsideration**, dated **February 3, 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/palmdale/index.html]. The document has 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*)

FOR SERVICE TO ALL OTHER PARTIES:

__X__ sent electronically to all email addresses on the Proof of Service list;

____ by personal delivery;

__X__ by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

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FOR FILING WITH THE ENERGY COMMISSION:

__X__ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (***preferred method***);

OR

____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-9
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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.

Rhea Moyer

Rhea Moyer