STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:

APPLICATION FOR CERTIFICATION FOR THE PALEN SOLAR POWER PROJECT

DOCKET NO. 09-AFC-7

INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY PETITION FOR RECONSIDERATION OF ADOPTION OF COMMISSION ORDER NO. 10-1215-19

January 14, 2011

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INTRODUCTION

Pursuant to Public Resources Code Section 25530 (Warren-Alquist Act § 25530) and 20 California Code of Regulations Section 1720 (Rules of Practice and Procedure § 1720), the Center for Biological Diversity petitions for reconsideration of the Commission's adoption of Order No. 10-1215-19 on December 15, 2010 ("Order"), and the Decision approving a license for the Palen Solar Power Project. This petition for reconsideration asks the Commission to cure errors of fact and law in adoption of the Commission Order and Decision.

In short, because the Commission approved a project sited in areas designated for wildlife protection on federal public lands before approval by the federal land management agency had been obtained, the Commission erred as a matter of fact and law by adopting the Order and violated the plain language of the Warren-Alquist Act Section 25527 and the implementing regulations. Therefore, the Order and Decision should be withdrawn.

I. The Commission Approval is Invalid Because it is Based on Mistakes of Fact and Law Regarding the Status of the Lands on Which the Project is Sited and the Controlling Statutory and Regulatory Requirements.

A. Pursuant to Section 25527 of the Public Resources Code, the Commission Could Not Approve the Project Before Approval of the Land Management Agency Was Obtained.

Pursuant to Section 25527 of the Warren-Alquist Act the Commission cannot approve siting of projects in areas designated for wildlife protection unless specific requirements are met and findings are made. The requirements in the regulations expressly include a finding that the proposed project is not inconsistent with the primary uses of such lands and a showing of *prior* approval by the appropriate land management agency.

Pursuant to the statute:

> "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.
> . . .
> 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."

Public Resources Code § 25527 (emphasis added). Similarly, the Commission's implementing regulations state that:

> (a) The commission shall not find acceptable any site and related facility to which the provisions of Sections 25526 or 25527 of the Public Resources Code apply unless the finding required by the applicable section has been made.
>
> (b) The applicant shall be required to comply with the following requirements of Sections 25526 and 25527 at the application stage:
> . . .
> (4) For a site in any area covered by this section, the applicant shall demonstrate *prior to the conclusion of hearings* held under Section 1748 *that the approval of any public agency having ownership or control of such lands has been obtained*."

20 CCR § 1729(b)(4). Nonapprovable Sites or Non-Certifiable Sites (emphasis added).

B. The Proposed Project is Sited On Lands Designated For Wildlife Protection Within the Meaning of Public Resources Section 25527.

It is undisputed that the project is sited largely on federal public lands managed by the Bureau of Land Management ("BLM") within the California Desert Conservation Area ("CDCA"), and will directly, indirectly and cumulatively impact lands within the CDCA including lands within two designated Wildlife Habitat Management Areas ("WHMAs"), designated critical habitat, and a designated desert wildlife management area ("DWMA") which is a type of Area of Critical Environmental Concern ("ACEC"). It is also undisputed that under the CDCA plan as amended by the Northern and Eastern Colorado Desert Coordinated Management plan amendment ("NECO"), the project requires a plan amendment before the proposed project can be approved by the land management agency, the BLM.

The CDCA was designated by Congress in 1976 as part of the Federal Land Policy and Management Act ("FLPMA), 43 U.S.C. § 1781(c). Congress recognized in FLPMA that:

> the California desert environment is a total ecosystem that is extremely fragile, easily scarred, and slowly healed.

43 U.S.C. § 1781(a)(2). In light of the threats to the unique and fragile resources of the CDCA, Congress determined that special management was needed for this area and among the purposes of designating this area was "to provide for the immediate and future protection and administration of the public lands in the California desert within the framework of a program of multiple use and sustained yield, and the maintenance of environmental quality." 43 U.S.C. § 1781(b).

As part of FLPMA, Congress expressly required the development of a land management plan for the CDCA by a date certain (43 U.S.C. § 1781(d)), and the FLPMA planning criteria state that in developing land use plans the agency shall "give priority to designation and protection of areas of critical environmental concern" (43 U.S.C. §1712(c)(3)). FLPMA defines Areas of Critical Environmental Concern ("ACECs") to mean

> areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes, or to protect life and safety from natural hazards.

43 U.S.C § 1702(a). The CDCA Plan was first adopted by BLM in 1980. As part of the CDCA Plan, the BLM adopted an initial set of ACECs and, through plan amendments, additional ACECs have been adopted since that time.

The Palen project site directly and indirectly impacts two Wildlife Habitat Management Areas (WHMAs") designated in the NECO Plan amendment – "the Palen-Ford WHMA, and the DWMA Continuity WHMA (which provides connectivity between the Chuckwalla DWMA/ACEC south of I-10 and the Palen-Ford WHMA north of I-10 in the immediate Project vicinity)." [1] The Palen project gen-tie line and the associated Red Bluff substation will also directly impact the Chuckwalla Desert Wildlife Management Area ("DWMA") (which is a type of ACEC) designated for the protection of the desert tortoise by BLM in the CDCA Plan as amended in the NECO Plan amendment in 2002.[2]

The DWMAs were adopted as areas for the conservation (that is—both survival and recovery) of the desert tortoise.

> Proposed Desert Wildlife Management Areas (DWMAs) address the recovery of the desert tortoise. These are stand-alone areas which cover much of the designated critical habitat for the desert tortoise. As such they may and do overlap some existing restricted areas. On BLM and CMAGR lands DWMAs are designated areas of critical environmental concern (ACEC). Some additional use restrictions are proposed, but emphasis is placed on minimizing disturbance and maximizing mitigation, compensation, and restoration from authorized allowable uses.

NECO Plan at 2-2. For the desert tortoise, the NECO Plan states: "The overall goal of the desert tortoise conservation strategy in the planning area is to recover populations of the desert tortoise

[1] *See* Decision, Biological Resources page 51 (pdf pages 324). *See also* Exh. 640 at 5 (I. Anderson Testimony explaining that RSA ignored WHMA for connectivity); Exh. 647 (map 2-21 from NECO plan); 10-27-2010 Transcript at 91 (BLM staff confirming that the WHMA for connectivity was adopted in the NECO Plan amendment.)

[2] Decision, Biological Resources page 37 (pdf pages 310).

in the two NECO recovery units identified in the USFWS plan by meeting the criteria for recovery as specified in the plan." NECO Plan at 2-17. The specific objectives for desert tortoise survival and recovery are tied to the designation of the DWMAs:

> The objectives are to
>
> > a. Establish desert wildlife management areas (DWMAs) where viable desert tortoise populations can be maintained.
> > b. Implement management actions within DWMAs to address conflicts with the goal.
> > c. Acquire sufficient habitat within the DWMAs to ensure that management actions are effective in the DWMAs as a unit.
> > d. Reduce tortoise direct mortality resulting from interspecific (e.g., raven predation) and intraspecific (e.g., disease) conflicts that likely result from human-induced changes in ecosystem processes.
> > e. Mitigate effects on tortoise populations and habitat outside DWMAs to provide connectivity between DWMAs.

NECO Plan at 2-17. There can be no doubt that the DWMAs were established as "areas for wildlife protection" within the meaning of Section 25527 of the Warren-Alquist Act.

The WHMAs at issue here were also adopted in the NECO Plan to preserve wildlife and connectivity or habitat continuity. These two areas, which are contiguous on and adjacent to the Palen site, were adopted as part of a "Multi-species Conservation Zone." NECO Plan at 2-2. The NECO Plan goals and objectives for "Other Special Status Animal and Plant Species, Natural Communities, and Ecological Processes" are very specific and focus on conservation:

> Goals for special status animal and plant species, natural communities, and ecological processes are as follows:
>
> > • Plants and Animals. Maintain the naturally occurring distribution of 28 special status animal species and 30 special status plant species in the planning area. For bats, the term "naturally occurring" includes those populations that might occupy man-made mine shafts and adits.
> > • Natural Communities. Maintain proper functioning condition in all natural communities with special emphasis on communities that a) are present in small quantity, b) have a high species richness, and c) support many special status species.
> > • Ecological Processes. Maintain naturally occurring interrelationships among various biotic and abiotic elements of the environment.
>
> The objectives are to
>
> > a. protect and enhance habitat
> > b. protect connectivity between protected communities

NECO Plan at 2-52. Further, the NECO Plan adopted action items to promote the objectives to "Protect and enhance habitat" (NECO Plan at 2-55), and "Protect connectivity between protected communities" (NECO Plan at 2-58). *See also* NECO Plan ROD at D-1, D-3.

> For the first objective, to protect and enhance habitat, the first "action" is to
>
> Designate seventeen multi-species WHMAs (totaling 555,523 acres) such that approximately 80 percent of the distribution of all special status species and all natural community types would be included in the Multi-species Conservation Zone (Map 2-21 Appendix A). See Appendix H for a description of the process used to define the WHMA and the concept of conservation zones.

NECO Plan at 2-55.[3] For the second objective, to protect connectivity, one of the actions states that: "The fragmenting affects of projects should be considered in the placement, design, and permitting of new projects." NECO Plan at 2-58.

Because the WHMAs affected by the Palen project siting were adopted in the NECO Plan to fulfill the plan objectives of protecting and enhancing habitat and protecting connectivity it is clear that these WHMAs are both "areas for wildlife protection" within the meaning of Section 25527 of the Warren-Alquist Act.

In sum, it is clear that the Palen project directly and indirectly impacts a DWMA and two WHMAs that are areas for wildlife protection within the meaning of Section 25527. The Commission erred by failing to acknowledge that the lands at issue were subject to the requirements of Section 24427.

C. Because the Palen Project is Sited On Lands That Fall Within the Requirements of Section 25527 of the Public Resources Code, the Commission Erred as a Matter of Fact and Law By Approving the Project Application Before Approval of the Land Management Agency Was Obtained.

The Center raised this issue in comments on the PMPD, filed a detailed Opposition to the Adoption Order, and addressed these issues at the hearing on December 15, 2010. In addressing these issues the Response to Comments in the Decision states:

> In its comments on the PMPD submitted November 29, 2010, intervenor CBD asserts that the project site is within lands protected under various federal, state and local laws, and that we have failed to find both that the project, as mitigated, will not adversely impact those lands and that the approval of the agency having jurisdiction over such lands has been obtained. In making the first assertion CBD apparently has overlooked our discussions in this Land Use section concerning

[3] Appendix H explains that the WHMAs along with the DWMAs, and other areas comprise a "conservation zone" and that the "Multi-species WHMAs address all the special status species as well as the general diversity of species and habitats." NECO Plan, Appendix H at H-5.

> the project's LORS compliance and consistency with applicable land use plans, policies and regulations.
>
> As for the matter of approval of the agency having jurisdiction over the site, it is undisputed and a matter of public record that the applicant has applied for a Right-of-Way grant from the BLM. Obviously, the applicant's ability to construct the project is dependent upon the receipt of such grant. Whether BLM makes its determination before, simultaneously with, or after the issuance of this Decision is of no consequence. Section 1752(f) of our regulations requires a finding that the approval of the agency having jurisdiction has been obtained in order to ensure that we do not allow construction of a project without approval of the other agency. With the BLM approval process running concurrently with ours, there is no danger of that happening. Applicant cannot construct the project without BLM's right of way grant. If BLM grants the right of way, approval of the other agency has been obtained and the project may be constructed. If BLM denies the right of way grant, the project may not be constructed despite our approval.
>
> We are adding language to Condition of Certification LAND-1, to require that the applicant submit to the Construction Project Manager, prior to the start of construction, documentation of the Right-of-Way grant as well as a copy of the U.S. Bureau of Land Management (BLM) approved project-specific amendment to the California Desert Conservation Area Plan (CDCA) permitting the construction/operation of the proposed Palen Solar Power Project.

Decision, Land Use page 15 (pdf page 563). These statements in the Decision are incorrect as a matter of fact and law. The Center did not "overlook" the Land Use section of the Proposed Decision (and the final Decision) regarding the LORS compliance and consistency, rather, the Center disagrees with the analysis and conclusions in the Proposed and Final Decisions and hereby seeks reconsideration of the Order and Decision regarding the application of Section 25527 of the Warren-Alquist Act.

Most importantly, as the Center has explained above, and is not disputed, the Palen Project is largely sited on federal public lands and will directly and indirectly affect two WHMAs, and a DWMA, as well as designated critical habitat. The Center has shown that the DWMA and WHMAs fall within the ambit of Section 25527 of the Warren-Alquist Act which applies to "areas for wildlife protection." Each of the special designation areas was specifically designated in the BLM's land use plan for wildlife protection and fits within the ambit of Section 25527.

The statutory requirements are also clear and undisputed. Section 25527 of the Warren-Alquist Act requires approval by the land management agency *prior* to the Commission decision – not simply before construction begins. Proposed projects in areas for wildlife protection "*shall not be approved* as a site for a facility, *unless . . . the approval of any public agency having ownership or control of such lands is obtained.*" Public Resources Code § 25527 (emphasis added). The adoption of additional language in Condition of Certification LAND-1 cannot and does not cure the Commission's failure to comply with the statute. The plain language of the

statute requires the *approval* of the land management agency to be obtained prior to *approval* by the Commission, not simply prior to construction. The Commission's own regulations confirm this is the plain meaning of the statute and expressly require that "the applicant shall demonstrate *prior to the conclusion of hearings* held under Section 1748 that the *approval* of any public agency having ownership or control of such lands has been obtained." 20 CCR § 1729(b)(4) (emphasis added).

The Order and Decision are invalid because the Commission failed to make the required findings pursuant to the regulations, which specifically require that for projects sited in areas for wildlife protection "Findings and conclusions on whether the facility will be consistent with the primary land use of the area; whether the facility, after consideration of feasible mitigation measures, will avoid any substantial adverse environmental effects; *and whether the approval of the public agency having ownership or control of the land has been obtained*." 20 CCR § 1752(f)(3) (emphasis added). The use of the past tense makes it clear, again, that the approval of the land management agency must precede the approval of the Commission in such cases.

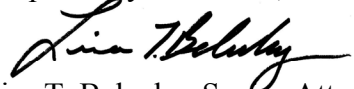
In sum, the Center has shown that the Commission erred in adopting the Order approving a project sited in areas designated for wildlife conservation without prior approval of the land management agency. Because the BLM process is still ongoing and will likely not be completed for several months, the Commission did not, as it could not, make the findings necessary for the Commission for such approval.

II. Conclusion

In light of the above, the Commission's Order and Decision to approve the application for the Palen Solar Power Project absent any prior approval of the Bureau of Land Management, the public agency with management control over the public lands on which the project is proposed to be sited, was in error. The Center respectfully requests that the Commission reconsider its adoption of the Order and Decision and asks the Commission to withdraw the Order and Decision to correct these clear errors of fact and law.

Dated: January 14, 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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Pursuant to 20 CCR § 1720(a) this Petition for Reconsideration of Adoption of Commission Order No. 10-1215-19 is also being filed with the Chief Counsel of the Commission, via email and U.S. Mail at:

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DECLARATION OF SERVICE

I, Lisa Belenky, declare that on Jan. 14, 2011 ~~2010~~, I served and filed copies of the attached Petition for Reconsideration, dated Jan. 14, 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/solar_millennium_palen]
And Copied with the Chief Counsel
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)

FOR SERVICE TO ALL OTHER PARTIES:

✓ sent electronically to all email addresses on the Proof of Service list; + to the Chief Counsel

____ by personal delivery;

✓ 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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✓ 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
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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.

Lisa T Belenky