

## DOCKETED

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**STATE OF CALIFORNIA**

**Energy Resources Conservation  
and Development Commission**

In the Matter of:

NEXTERRA BLYTHE SOLAR ENERGY  
CENTER, LLC'S REVISED PETITION TO  
AMEND - CONVERSION TO PV BLYTHE  
SOLAR POWER PROJECT

DOCKET NO. 09-AFC-6C

**INTERVENOR LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL UNION NO. 1184's  
COMMENTS ON PRESIDING MEMBER'S PROPOSED DECISION**

January 10, 2014

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On behalf of Laborers' International Union of  
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Pursuant to the December 13, 2013 Notice of Availability of Presiding Member's Proposed Decision, Supplemental Environmental Review Documentation, Committee Recommendations and Notice of Full Commission Hearing and 20 California Code of Regulations ("CCR") § 1749(b), Intervenor Laborers' International Union of North America, Local Union No. 1184 ("LIUNA") submits the following comment on the Proposed Decision. LIUNA continues to stand by its earlier comments and testimony regarding the inadequacies of the Energy Commission's analysis of air pollution and biological resource impacts of the revised Blythe Solar Project. In addition, however, LIUNA brings to the attention of the Energy Commission the following important issue regarding the constitutionality of Public Resources Code § 25531, the Warren-Alquist State Energy Resources Conservation and Development Act's ("Warren-Alquist Act") judicial review provision. Although LIUNA understands that the Energy Commission is not in a position to alter its enabling legislation, LIUNA submits these comments in order to exhaust this important issue in the context of a certification decision by the Energy Commission.

As the Commission is well aware, Public Resources Code § 25531(a) provides for exclusive judicial review of the Energy Commission's site certification decisions by way of petition to the Supreme Court of California. Pub. Res. Code § 25531(a). See *also* Pub. Res. Code §§ 25901; 25500.1; Proposed Decision, p. 3. Section 25531(a) is unconstitutional because it infringes upon the constitutionally-prescribed jurisdiction of the California Superior Courts and Court of Appeal and, thus, improperly restricts LIUNA's and other interested parties' access to the constitutionally prescribed judicial review venues. By restricting judicial review to petitioning the Supreme Court, Section 25531 in effect largely precludes the vast majority of challenges to the Energy Commission's certification decisions from obtaining any judicial review on the merits.

Article VI, section 10 of the California Constitution provides that:

The Supreme Court, courts of appeal, superior courts, and their judges ... have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction. Superior courts have original jurisdiction in all other causes.

Cal. Const., Art. VI § 10. The Legislature may only alter this Constitutional directive where the Constitution itself empowers the Legislature with authority to establish a different judicial review scheme for a particular agency or department. Where an agency has not been established pursuant to a Constitutional provision that also grants the Legislature plenary authority to prescribe the available judicial review of that agency's decisions notwithstanding other Constitutional provisions, the Legislature may not alter Article VI, Section 10's judicial review provision.

The Energy Commission was not established by way of the Constitution. The Commission was instead created solely by the Legislature with the enactment of the Warren-Alquist Act. Because there is no provision in the California Constitution authorizing the Legislature to alter Article VI, Section 10's judicial review jurisdiction as they apply to the Energy Commission's decisions, the Legislature's enactment of Pub. Res. Code § 25531(a) is unconstitutional.

In the past, the constitutionality of Public Resources Code § 25531(a)'s judicial review scheme under Article VI, Section 10 has been upheld where it was inextricably linked to the decisionmaking and judicial review process of the Public Utilities Commission ("PUC"). See *County of Sonoma v. State Energy Resources Conservation etc. Com.* (1985) 40 Cal.3d 361, 368. Unlike the Energy Commission, the PUC has been established under a constitutional enabling act with full power conferred on the Legislature to enact legislation defining the PUC's powers and procedures even contrary to any other provisions of the Constitution provided such provisions are consistent with the enabling provision. Cal. Const., Art. XII. This includes plenary authority for the Legislature to establish the judicial review process for PUC decisions:

The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, ... to establish the manner and scope of review of commission action in a court of record....

Cal. Const., Art. XII § 5. In 1985, the only reason the Supreme Court upheld the constitutionality of Section 25531(a) in regard to the Energy Commission's certification decisions occurring at the time was because, under the then existing statute, the certification decisions were "a statutory prerequisite to approval by the PUC of thermoelectric power projects to be constructed by public utilities." *County of Sonoma*, 40 Cal.3d at 368. As a result, the Court reasoned that, because the Legislature had the power to designate the Supreme Court as the sole court to review the PUC's decision, that power extended to the prerequisite certification decision in order to preserve the expedited PUC review process. *Id.*

The Supreme Court's 1985 rationale has been rendered moot by the Legislature's subsequent legislation deregulating the energy industry, including in 2001 the decoupling of the PUC's approvals and the Energy Commission's certification decisions. Senate Bill No. 28 (May 22, 2001). The Energy Commission's certification decisions are no longer a prerequisite to any decisions by the PUC. Hence, the linkage and timing concerns described by the Supreme Court in the *County of Sonoma* ruling, as well as the extent of the Legislature's authority over the PUC under Article XII, Section 5 of the California Constitution, no longer have any bearing on a Constitutional analysis of Section 25531(a). The Energy Commission was not created via the California Constitution. As a result, there is no Constitutional provision granting the Legislature any authority to alter the judicial review provisions of Article VI, Section 10 of the California Constitution as they apply to Energy Commission decisions. At the time of the 1985 *County of Sonoma* decision, the integrated approval processes of the Energy Commission and PUC may have justified the constitutionality of Section 25531(a). As a

stand-alone review provision of the Energy Commission's certification decisions, however, Justice Mosk's dissenting views now hold full sway:

It cannot be denied that in section 25531 the Legislature has with deliberation purported to restrict and curtail the jurisdiction vested in the superior courts of this state by the Constitution. But what the Legislature has thus attempted to do is beyond its power. "And upon this but one thing can be said. If there be not in the constitution itself warrant and power to the legislature to do this thing, its effort must be declared illegal." [citation omitted.] There is no such power in the Constitution. [citation omitted.]

*County of Sonoma*, 40 Cal.3d at 375 (J. Mosk, dissenting).

LIUNA requests that the Energy Commission hold off on approving the Presiding Officer's Proposed Decision in order to provide the Commission, its staff, and the parties additional opportunity to respond to LIUNA's challenge to the constitutionality of Section 25531(a). Thank you for this opportunity to comment on the Proposed Decision.

Dated: January 10, 2014

Respectfully Submitted,

LOZEAU|DRURY LLP

Original signed by \_\_\_\_\_  
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Attorneys for Laborers International Union of  
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**DECLARATION OF SERVICE**

I, Michael R. Lozeau, declare that on January 10, 2014, I served and filed copies of **INTERVENOR LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 1184's COMMENTS ON PRESIDING MEMBER'S PROPOSED DECISION** dated January 10, 2014. The most recent Proof of Service List, which was copied from the web page for this project at <http://www.energy.ca.gov>, is attached to this Declaration.

For service to all other parties and filing with the Docket Unit at the Energy Commission, I successfully uploaded the document to the Energy Commission's filing system and I personally delivered the document or deposited it in the US mail with first class postage to those persons for whom a physical mailing address but no mail address is shown on the attached Proof of Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am over the age of 18 years.

Dated: January 10, 2014

  
Michael R. Lozeau



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Docket: 09-AFC-06C

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