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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	DOCKET NO. 09-AFC-7C

INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY'S OPPPOSITION TO PETITION FOR EXTENSION OF DEADLINE FOR COMMENCEMENT OF CONSTRUCTION

August 18, 2015

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INTRODUCTION

The Center for Biological Diversity ("Center") timely files this Opposition and incorporates by reference herein all of the Center's earlier briefing, exhibits and other submissions in this proceeding. The Committee deny the Petition for Extension of Deadline to Commence Construction.

I. Legal Standard

Permits issued by the Commission expire by their own terms after 5 years if construction has not begun. The regulations state:

> Unless a shorter deadline is established pursuant to Section 25534, the deadline for commencement of construction shall be five years after the effective date of the decision. Prior to the deadline, the applicant may request, and the commission may order, an extension of the deadline for good cause.

20 C.C.R §1720.3. "Good cause" is not defined in the regulations.

In a recent staff analysis for a petition for extension of time for the Victorville Hybrid project Staff looked at 3 factors in considering whether good cause existed: 1) diligence; 2) whether factors outside of the applicant's control prevented construction; and 3) and a comparison of the amount of time and resources that would have to be spent in processing any required amendments to the project if extension is granted as opposed to the amount of time and resources that would be spent in processing a new AFC if the extension were denied. TN# 70630 (May 6, 2013); Docket No. 07-AFC-1C (Victorville 2).

II. Applicant Has Not Met Its Burden to Show Good Cause Exists To Grant an Extension

While the factors listed above are addressed by the applicant in the pending petition, the applicant has failed to show "good cause" for the requested extension. First, the applicant and former owners showed no diligence in pursuing construction—indeed they have consistently stated that they have no intention of constructing the permitted project. Second, outside factors have not been the source of delay; rather, the applicant and former owners themselves have repeatedly taken steps that have delayed the process, from failing to obtain needed BLM approvals to withdrawing prior amendment proposals. Third, an amendment would take more time and resources to process than a new application given the prior piecemeal and confused environmental review. Therefore, the Commission should ***deny*** the petition and process any proposed new project at this site as a new AFC.

A. Neither the Applicant Nor any of the Former Owners of the Permit Have Been Diligent in Pursuing Construction or Needed BLM Approvals.

Neither the current applicant (Abengoa) nor the prior owners of the permit have been diligent in seeking to construct the permitted project. The initial applicant, Solar Millennium, informed BLM it was considering converting the project to PV in September 2011, shortly after the permit was issued. After that company entered bankruptcy, the permit was eventually transferred to a joint venture of Brightsource and Abengoa after a payment of $10M as part of the bankruptcy proceedings. At that time, the owners also stated they had no intention of building the permitted project but would seek an amendment. After proceeding with the amendment process up through a Revised PMPD, the partnership (including Abengoa, the current "owner"), voluntarily withdrew the application for an amendment. At no time did any of the former owners or the current owner diligently take the steps needed to pursue construction of the permitted project nor did they have any intent to do so.

The applicant's claims that it and prior owners have been diligent in pursuing construction are unsupported. For example, the Petition refers to the Revised PMPD (TN # 203061) issued for the prior proposed amendment (Pet. At 3). However, the applicant completely fails to acknowledge that **the applicant itself voluntarily withdrew the petition for amendment** (TN # 203116) – cutting short that process—and terminating the proceeding (TN # 203124 [Order Terminating Proceeding]). The delay in construction of the permitted solar trough project has always been applicant's and prior owners' choice.

The applicant and prior owners never completed the BLM process to obtain a right-of-way grant for the use of public lands where the project is sited although the right-of-way grant and a notice to proceed are necessary before the project can be constructed. Indeed, the original applicant, Solar Millennium, informed the BLM as early as September 1, 2011, that they were considering changing from solar trough to PV technology which delayed the issuance of a BLM ROW grant for the project permitted by the Commission. Solar Millennium later became insolvent and filed for bankruptcy in April, 2012.

Further, testimony at a Commission hearing on the earlier proposed amendment, stated that the current applicant has access to solar tough technology with storage. (TN # 202871, Transcript of July 30, 2014 hearing at 122 ["Abengoa, a partner in the Palen Solar Holdings Partnership is the owner of Solana and, therefore, there is access to that technology."].) At that time, the applicant (which was a

joint venture including the current applicant) also stated that the currently permitted project for solar tough was "infeasible." (*Id*. at 121 ["it's always been our position that the solar trough, as originally licensed, was not a feasible alternative for us"]). The applicant and former owners have made it quite clear for the past four years that they did not intend to build the solar trough project as permitted.

Because the applicant has no intention of constructing the project and former owners have likewise had no intention of constructing the project since the permit was issued the Commission cannot find that the applicant was diligent in pursuing construction. Moreover, because the applicant and prior owners have themselves called the permitted project infeasible, the Commission cannot find that it is in the public interest to extend the permit term. The Commission should therefore ***reject*** the petition to extend the permit term based on the applicant's lack of diligence in pursuing construction and because an extension of time for construction of an infeasible project is not in the public interest.

B. There are No "Outside Factors" that Delayed Construction; Applicant Has No Intention of Building the Permitted Project

There are no outside factors delaying construction, since the permit was issued, the applicant never intended to build the permitted project as explained above. Because the initial owner did not diligently pursue obtaining all needed permits from BLM in 2011, the time spend in the bankruptcy proceedings in 2012 is not relevant to the analysis. In addition, in 2014, the applicant itself withdrew the amendment request before a decision was made in order to consider changing technology once again (to potentially include storage). (*See* Pet. at 4.) The time that the applicant and former owners spent on the amendment process was not a factor outside their control. Indeed, the timing of the amendment petition and withdrawal were completely within the applicant's control.

Because no outside factors caused the owners to delay construction, the Commission should ***reject*** the petition to extend the permit.

C. Extending the Permit Term Will Not Save Time and Resources Because Prior CEQA Analysis is Outdated and Piecemeal

Extending the permit term will not save time or resources. The earlier environmental assessments and evaluations of the solar trough project are more than 4 years old and significant new information and changed circumstances would require entirely new assessments in many areas including impacts to: habitat connectivity for desert tortoise and other species; Mojave fringe-toed

lizard and sand habitats; water resources; and cultural resources. The additional environmental review conducted for the proposal to permit two power towers did not fully address much of the new information or changed circumstances and this information is likewise missing from the Revised PMPD. The anticipated request to amend the project to a power tower with storage would require additional environmental assessment of impacts to: avian species; water resources; and cultural resources never examined for the original permit for the solar trough project or the earlier amendment proceeding.

Most importantly, the earlier staff assessments and evaluations and the Revised PMPD for the prior amendment process were done on a piecemeal basis, making it nearly impossible for the public or intervenors to review and understand what was actually analyzed. As such, the review did not meet the most basic CEQA requirement to inform the public and decision makers which applies to the Commission's review just as it does to an Environmental Impact Report ("EIR"). As the Supreme Court succinctly put it:

> The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. "[I]nformation 'scattered here and there in EIR appendices,' or a report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis.'"

(*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442 (quoting *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239, quoting *Santa Clarita Organization for Planning and the Environment vs. County of Los Angeles* (2003) 106 Cal.App.4th 715,722–723.); *see also Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 717-718 [holding that an unclear and misleading EIR was insufficient as an informational document].) Repeating this process in another major amendment will run the risk of even greater confusion and again failing to adequately inform the public and decision makers.

Moreover, the practice the staff undertook in the prior amendment process of only providing analysis that compared the new proposal to the permitted project (which the applicant had no intention of constructing), significantly truncated the review by utilizing an illusory baseline in violation of CEQA. (*Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310, 322 ["An approach using hypothetical allowable conditions as the baseline

results in "illusory" comparisons that "can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts," a result at direct odds with CEQA's intent."]; *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 357-58 [where baseline was inaccurate "comparisons utilized in the EIRs can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts which would result."].)

If the applicant or staff believe that some of the earlier environmental information or analysis in the Revised PMPD and other documents remains relevant and accurate, that information can be incorporated into a review of a new application. Ultimately, utilizing a new application for the new project would save time and resources of the Commission, Commission Staff, intervenors, and members of the public by providing a coherent analysis of any new proposal based on current information and a proper baseline as required by CEQA. It would also alleviate confusion and thereby enhance public participation.

Because extending the permit and processing the extensive proposed project changes an amendment rather than as a new application will not save time or resources and would undermine public participation, the Commission should ***deny*** the petition to extend the permit term.

II. An Extension Is Not in the Public Interest

Extending the permit term for a project the owner has no intention of building is not in the public interest. Allowing a permit for an infeasible and unwanted project to be extended simply to give an applicant a "head start" on permitting an entirely different project as an amendment rather than as a new proposal, would undermine the power plant siting process in the Warren-Alquist Act and the Commission regulations and undermine public confidence in the Commission process. Such a result is not in the public interest. Moreover, experience shows that the confused and piecemeal environmental review undertaken for the prior amendment proposal failed to meet the most basic requirements of CEQA to provide information to the public and decision makers regarding the significant impacts of a proposed project-- a result that does not serve the public interest.

Because the applicant has clearly stated it has no intention of constructing the solar trough project permitted by the Commission and intends to seek approval for an entirely different project, that new proposal should be processed as a new application and not given a "head start" by extending the

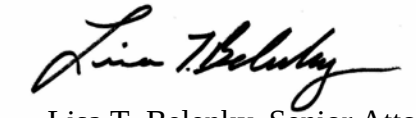
current permit term. The Commission should **deny** the petition to extend the permit term because it is not in the public interest.

CONCLUSION

In light of the above, and the previous documents submitted in this matter, the Center urges the Commission to ***deny*** the Petition for Extension of Deadline to Commence Construction.

Dated: August 18, 2015

Respectfully submitted,



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