

DOCKET

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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-7

**INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY
OPPOSITION TO PROPOSED COMMISSION ADOPTION ORDER**

December 14, 2010

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INTRODUCTION

The Center for Biological Diversity opposes the adoption of the proposed order approving the Palen Solar Power Project. The Center's opposition is based on many issues raised throughout this process including, but not limited to: the Commission's failure to adequately identify and analyze impacts to the environment from the proposed project; the proposed approval of two different project alternatives rather than a single project; and the lack of prior approval for the proposed project in areas designated for the preservation of wildlife in the California Desert Conservation Area under the adopted land management plans.

I. The Commission Cannot Approve the Proposed Project At This Time Pursuant to the Warren-Alquist Act

A. The Proposed Project is Sited On Lands Designated For Wildlife Protection and Natural Preservation

It is undisputed that the project is 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 proposed project requires a plan amendment before the proposed project can be approved by the Bureau of Land Management ("BLM").

The CDCA was designated by Congress as part of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1781(c). Congress declared 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 the purpose 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). 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 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. FLPMA defines ACECs to include those areas " . . . within the public lands where special management attention is required . . . to protect and prevent irreparable damage to . . . fish and wildlife resources, or other natural systems or processes." 43 U.S.C § 1702(a).

The proposed project would directly impact a DWMA designated for the protection of the desert tortoise and two WHMAs¹ that were adopted in the NECO Plan in 2002.² Unfortunately, it appears from the PMPD and the Errata, that the presiding member may not have understood that these areas—DWMA and WHMAs—were specifically designated for the conservation of wildlife and plants and for the preservation of connectivity across this fragile landscape.

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 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 in the two NECO recovery units identified in the USFWS plan by meeting the criteria for recovery as specified in the plan. NECO at 2-17. The specific objectives 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.

¹ See 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 The PMPD acknowledges that the proposed project is within one WHMA and a DWMA but ignores the other WHMA. PMPD, Land Use 3, pdf 544.

NECO at 2-17. There can be no doubt that the DWMAAs were established as “areas for wildlife protection” as used in the Warren-Alquist Act.

The WHMAAs at issue here were also adopted in the NECO Plan to preserve wildlife and connectivity or habitat continuity. These areas, which are contiguous, were adopted as part of a “Multi-species Conservation Zone.” NECO 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 at 2-52. Further, the NECO plan adopted action items to promote the objectives to “Protect and enhance habitat” (NECO at 2-55), and “Protect connectivity between protected communities” (NECO at 2-58). *See also* NECO ROD at D-1, D-3.

For the first objective, to protect and enhance habitat, the first “action” is to “Designate seventeen multi-species WHMAAs (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 at 2-55.³ For the second objective, to protect connectivity, one of the actions is “The fragmenting affects of projects should be considered in the placement, design, and permitting of new projects.” NECO at 2-58.

³ Appendix H explains that the WHMAAs along with the DWMAAs, and other areas comprise a “conservation zone” and that the “Multi-species WHMAAs address all the special status species as well as the general diversity of species and habitats.” NECO, Appendix H at H-5.

Because the WHMAs at issue were adopted in the NECO plan to fulfill the plan objectives of protecting and enhancing habitat and protecting connectivity it is clear that these areas are both “areas for wildlife protection” within the meaning of the Warren-Alquist Act.

In sum, DWMA and the WHMAs are areas for wildlife protection.

B. The Proposed Project is Sited On Lands That Fall Within the Requirements of Section 25527 of the Public Resources Code.

Pursuant to the Warren-Alquist Act the Commission cannot approve siting of projects in areas designated for wildlife protection and natural preservation unless specific requirements are met and findings are made. These 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 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).

The Center raised this issue in comments on the PMPD and, in response, the Errata to the PMPD 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 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.

Errata at 24. However, the PMPD Errata is mistaken. The Center did not "overlook" the Land Use section of the PMPD regarding the LORS compliance and consistency, rather, the Center disagrees with the analysis and conclusions in the PMPD and in particular disagrees with the implication that the Commission can ignore Section 25527 of the Warren-Alquist Act.

First, as the Center has explained above, and is not disputed, the proposed project is sited on lands include a WHMA, ACEC/DWMA, and designated critical habitat. All of these areas 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 at issue here was specifically

designated in the BLM's land use plan for wildlife protection and fits within the ambit of Section 25527.

Second, 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 such areas “*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 plain language of the statute requires the *approval* of the land management agency to be obtained prior to *approval* by the Commission, not only 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).

Third, the Errata appears to conflate the findings necessary for approval of a project on other lands, with the specific findings necessary to approve a project that is proposed in wildlife protection areas. The PMPD and Errata fail to make the required findings pursuant to the regulations, which specifically requires 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 light of the above, the Commission cannot certify or approve the application at this time.

II. The Commission Can Only Adopt A Single Project

The PMPD suggests that the Commission can approve two different project configurations and can leave the choice to the applicant. This is incorrect. Only the Commission can exercise its own discretionary authority, it cannot give that discretion to a private entity. It is the Commission that must make a determination of the final project approved, if any. Clearly, the Commission must make a single decision, for example, pursuant to the Warren-Alquist Act the Commission approval is for a singular project at a specific site and with a specific design. The statute requires that the written decision must include: “Specific provisions relating to the manner in which *the proposed facility* is to be *designed, sited,* and operated in order to protect environmental quality and assure public health and safety.” Public Utilities Code § 25523. Similarly, CEQA requires that the lead agency itself must make the choice and commit to a definite course of action in approving a specific project. CEQA Guidelines §15352(a) (“Approval’ means the decision by a public agency which *commits the agency to a definite course of action* in regard to a project.” Emphasis added).

While in this case the two alternatives have many similar impacts as the PMPD notes, the PMPD focuses solely on whether the applicant can obtain site control of certain private lands and

fails to address the importance of the fact that the applicant also does not yet have site control over the public lands at issue⁴ for *either* Reconfigured Alternative #2 *or* Reconfigured Alternative #3. In its rush to make a decision, the Commission cannot simply “punt” the decisions on siting and design to the applicant to make at a later time. It is the Commission itself that must make a determination of which project (if any) will be approved at this time. If the Commission is not now prepared to choose which project to approve, it should wait until all of the necessary site information is available and site control is confirmed.

III. Conclusion

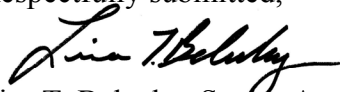
In sum, the Center has shown that the PMPD and the Errata do not provide the information and findings necessary in order for the Commission to approve the proposed project which is located in areas designated for wildlife conservation. The PMPD did not make the required findings regarding approvals by the BLM, as it could not because the BLM process is still ongoing and will likely not be completed for several months. Therefore the proposed project cannot be approved at this time. On this basis (as well as others raised by the Center in our comments on the PMPD), the Commission cannot properly adopt the Proposed Commission Adoption Order.

The PMPD and Errata also fail to provide any legal basis that would allow the Commission to approve two different alternatives and to leave the choice of the specific project up to the applicant to make at a later date. If the Commission is not now prepared to approve a specific project, it should wait until it has sufficient information to do so.

For these reasons, and others, the Center respectfully requests that the Commission deny any project approval at this time.

Dated: December 14, 2010

Respectfully submitted,



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⁴ As detailed above, because the public lands where the project has been proposed to be sited are designated for wildlife conservation, the Commission cannot approve the project on those lands until after approval by the land management agency (BLM).