[PROPOSED ORDER]

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

Application for Certification for the )
Palen Solar Power Project ) Docket No. 09-AFC-7
_______________________________ )

# [PROPOSED] ORDER DENYING PETITION FOR RECONSIDERATION OF ADOPTION OF COMMISSION ORDER NO. 10-1215-19

***After having reviewed the Petition for Reconsideration and responses, the Chief Counsel's Office of the Energy Commission has prepared this draft Order, denying the Center for Biological Diversity's Petition for Reconsideration, for the Commission's consideration at the hearing on February 14, 2011.***

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09-AFC-7
DATE FEB 10 2011
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February 14, 2011

## I. INTRODUCTION

On December 15, 2010, the Energy Commission approved the Application for Certification ("AFC") for the Palen Solar Power Project. (Docket No. 09-AFC-7, Order No. 10-1215-19 (Dec. 15, 2010) ("Decision"). On January 14, 2011, Intervenor Center for Biological Diversity ("Petitioner") filed a Petition for Reconsideration of the Energy Commission's Adoption Order ("Petition"). On January 28, 2011, we invited comments and responses to the Petition. On February 14, 2011, we heard arguments on the Petition. In this Order, we deny the Petition.

The Warren-Alquist Act and the Commission's regulations allow any party in a power facility proceeding to file a petition for reconsideration of a decision or order. (Pub. Resources Code, § 25530[1]; Cal. Code Regs., tit. 20, § 1720, subd. (a).) A petition for reconsideration must specifically either (1) set forth new evidence that despite the diligence of the petitioner could not have been produced during evidentiary hearings on the case; or (2) demonstrate that the decision being

[1] Unless otherwise indicated, all statutory citations are to the Public Resources Code.

challenged contains an error in fact or law, or that there has been a change in applicable law. (Cal. Code Regs., tit. 20, § 1720, subd. (a).) The petition must also fully explain why the matters could not have been considered during the evidentiary hearings, and their effects upon a substantive element of the decision. (*Ibid.*)

The Commission must grant or deny a petition for reconsideration within 30 days of its filing. (*Id.,* § 1720, subd. (b).) If the Commission does not grant the petition, the original determination stands. If the Commission grants the petition, that does not mean that the original decision is changed; rather, it simply means that the Commission then holds a subsequent hearing (which may include the taking of evidence), within 90 days, to consider whether to change the original determination. (*Id.,* § 1720, subds. (b)-(c).)

Petitioner properly intervened in the AFC proceeding (Committee Order Granting Petition to Intervene dated July 2, 2010); therefore it is a party with standing to file a petition for reconsideration.

The Petition "asks the Commission to cure errors of fact and law in adoption of the Commission Order and Decision." (Petition, p. 1.) However, the Petition does not explain why the issues it raises could not have been considered during the evidentiary hearings or how these issues affect a *substantive* element of the decision. Thus, the Petition has not met the requirements of section 1720, subdivision (a), of our regulations and should be denied. Nonetheless, we turn to the merits of the Petition to explain why section 25527 did not apply to this Project and how the Commission nonetheless substantively complied with the statute in response to the concerns Petitioner raised in its comments on the Presiding Member's Proposed Decision.

## II. THE MERITS OF THE PETITION

The Petition asserts that the Energy Commission was required under section 25527 of the Public Resources Code and section 1729 of its own regulations to wait for the Bureau of Land Management ("BLM") to issue a Record of Decision approving a right-of-way application and amendment to the California Desert Conservation Act ("CDCA") Plan before the Energy Commission approved the Palen Solar Power Project ("Project").

We address this single contention here.

A. Legal and factual background

Section 25527 of the Public Resources Code states:

> 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 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, archeological, 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.

(§ 25527 [emphasis added].)

Section 25527 is consistent with the general purpose of the Warren-Alquist Act: to consider "state, regional, and local plans for land use, urban expansion, transportation systems, environmental protection, and economic development" in "planning for future electrical generating and related transmission facilities" so as to "ensure that a reliable supply of electrical energy is maintained." (See §§ 25001 ["Legislative finding; essential nature of electrical energy"], 25003 ["Legislative finding; consideration of state, regional and local plan"].)

The Energy Commission implements section 25527 in its notice of intent ("NOI") proceedings through section 1729 of title 20 of the California Code of Regulations, and in its AFC proceedings through section 1752 of title 20 of the

California Code of Regulations. (*See* Cal. Code Regs., tit. 20, § 1701 [explaining that Article 1 (§§ 1701-1720.6) of Chapter 5 of the regulations applies to *all* NOI and AFC proceedings, Article 2 (§§ 1721-1731) applies only to NOI proceedings, and Article 3 (§§ 1741-1770) applies only to AFC proceedings].)

Solar Millennium, LLC filed an AFC with the Energy Commission on August 24, 2009, for the Palen Solar Power Project. Since the application was to site and construct a solar thermal power plant, this proceeding is expressly exempt from the NOI process. (§ 25540.6, subd. (a)(1).) After two days of evidentiary hearings and several staff workshops, the Commission approved the AFC at a Commission Business Meeting on December 15, 2010. (Order No. 10-1215-19, at p. 2 (Dec. 15, 2010).) The Commission's approval is "subject to the timely performance of the Conditions of Certification and Compliance Verifications enumerated in the" Commission Decision. (*Ibid*.) These conditions include significant measures for protecting and conserving the quality of the surrounding environment, such as BIO-8, which provides specific measures to limit and minimize disturbance and impacts, and BIO-20, which requires acquisition of habitat compensation lands to mitigate impacts to the Mojave Fringe-Toed Lizard. (Decision, Biological Resources, pp. 66, 118; see generally, Decision, Biological Resources, pp. 58-144 [Conditions of Certification for Biological Resources].)

Relevant to the Petition, Condition of Certification LAND-1 requires the applicant, prior to the commencement of construction of the Project, to obtain the Bureau of Land Management's ("BLM") approval of its right-of-way application and amendment to the CDCA Plan, as the bulk of the Project will be built on federal land managed by BLM. (Decision, Land Use, p. 17.)

B. Section 1729 does not apply in an AFC proceeding.

The Petition argues that section 25527 requires the Commission to find that BLM approval occurred prior to the Commission's approval of the Project pursuant to section 1729 of our regulations. Section 1729 states that "the applicant shall demonstrate prior to the conclusion of [evidentiary] hearings . . . that the approval of any public agency having ownership or control of such lands has been obtained." (Cal. Code Regs., tit. 20, § 1729, subd. (b)(4).) However, section 1729 applies only to NOI proceedings; it does not apply to this AFC proceeding. Therefore *the applicant* was not required to demonstrate "prior to the conclusion of hearings . . . that the approval of any public agency having ownership or control of [the] lands has been obtained." (Cal. Code Regs., tit. 20, §1729, subd. (b)(4).)

Nevertheless, in an AFC proceeding, prior approval would be required pursuant to sections 1752, subdivision (f), and 1755, subdivision (b), if those subdivisions were applicable. Those subdivisions implement section 25527. Therefore, whether or not such approvals are required for this Project depends upon the applicability of section 25527.

C. Section 25527 does not require the Commission to find that approval is obtained from *federal* agencies like BLM.

The Petition correctly states that the Project is sited primarily on federal public lands managed by BLM. (Petition, p. 2.) However, the Petition incorrectly asserts that the Commission must find that BLM approval occurred before the Commission could approve the Project. (Petition, p. 7.)

Section 25527 requires that the approval of the public agency having ownership or control of two categories of "areas of the *state*" be obtained in an AFC proceeding: "(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, and (b) Estuaries in an essentially natural and undeveloped state." The statutory language specifically refers to state, regional, county and city lands – reference to federal lands is nowhere to be found in subdivisions (a) or (b). In fact, the only place in section 25527 that refers to lands of the United States is in the final paragraph, which applies a different standard of review, calling for the Commission to give the "greatest consideration" to protecting areas of critical environmental concern, including "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*." (§ 25527 [emphasis added].) Petitioner does not contend, and there is nothing in the record before us to suggest, that the project site is under consideration by the United States for wilderness or wildlife and game reserves. Therefore, this suggests to us that section 25527 has no applicability in this case.

The legislative history of section 25527 confirms this interpretation. When originally proposed as a part of Assembly Bill 1575, section 25527 entirely prohibited the Commission from siting a facility on the listed categories of lands. (Senate Public Utilities and Corporations Committee, Bill Files, AB1575, "As Amended in Assembly August 6, 1973."). As a result of subsequent criticism that such a blanket prohibition was too restrictive, the public utilities proposed, and the legislature ultimately adopted, an amendment to the bill that would allow some

development on the listed areas by requiring the Commission to make the three findings that are part of the statute today. (*See* Assemblyman Charles Warren Files, AB1575, Memorandum to Mr. Edwin Meese, III, Executive Assistant to the Governor, from Pacific Gas & Electric (Mar. 22, 1974); Assemblyman Charles Warren Files, AB1575, Summary of Memo 3/22/74 from California Private Utilities to Edwin Meese to Charles Warren from Staff, March 26, 1974.)

Specifically, the drafters expressed concern that "because the commission does have ultimate preemptive power, it may be wise to require the involvement and acquiescence of relevant agencies protecting these areas prior to authorizing the intrusion [of the facility]." (Assemblyman Charles Warren Files, AB1575, Summary of Memo 3/22/74 from California Private Utilities to Edwin Meese to Charles Warren from Staff, March 26, 1974; see also § 25500 ["The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law."].) To address this concern, the bill required the Commission to find, in addition to consistency with the primary use of such lands and no substantial adverse environmental effects, that the approval of public agencies is obtained when approving sites in the listed areas. (Assemblyman Charles Warren Files, AB1575, Conceptual Amendments to Accommodate Utility Concerns, March 28, 1974, Sec. VIII.) This formed the basis for the language of section 25527 as it exists today. (Stats. 1974, ch. 276, § 2 (Jan. 7, 1975).)

While the Energy Commission's site certification process preempts state and local agency laws, ordinances, regulations and standards (LORS), federal agencies like BLM are not subject to such preemption unless permitted by federal law. (Compare Pub. Resources Code, § 25500 (certificate preempts state, local, and regional agencies, and federal agencies to the extent permitted by federal law), with U.S. Const Art. IV, § 3, cl. 2 (Congress has complete power over federal territory and property); 43 U.S.C. §§ 1701, 1761 (Federal Land Policy and Management Act of 1976, which governs right-of-way applications to BLM); see also Decision, Land Use, p. 15 (BLM approval a necessary prerequisite to construction).) Here, federal law does not allow preemption – on the contrary, federal law preempts state law in this situation:

> If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state

> regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, either expressly or impliedly, as where the two laws conflict. A state agency cannot dictate the use of federal lands in conflict with the laws and regulations of the federal government.

(*Carden v. Kelly* (D. Wyo. 2001) 175 F.Supp.2d 1318, 1323.)

Here, the Federal Land Policy & Management Act, which governs BLM's administration of the federal public lands in the Project, does not occupy the field of power plant licensing, as it only governs how federal public lands may be used, for example, by allowing BLM to authorize particular uses through a right-of-way grant. (43 U.S.C. §§ 1701, 1761.) However, to the extent that the Commission's actions conflict with federal law, such as by authorizing construction where the federal government prohibits it, the federal law preempts the Commission's certification. (See, e.g., *National Audubon Society v. Davis* (N.D. Cal. 2000) 144 F. Supp. 2d 1160, 1180-1181 (State of California cannot regulate the use of traps on federal land because the federal government has exclusive authority to manage wildlife on federal land); *Wyoming v. United States* (D. Wyo. 1999) 61 F. Supp. 2d 1209, 1221 (state cannot compel federal government to allow state personnel to enter federal land for the purpose of administering a vaccination program where federal government has exclusive authority to manage wildlife on federal lands). Thus, while the Commission can condition its approval on compliance with various environmental protections (see *California Coastal Com'n v. Granite Rock Co.* (1987) 480 U.S. 572, 584 [state can condition a permit in compliance with state environmental policy so long as it is not in direct conflict with federal regulations]), it cannot itself authorize the construction of a power plant on federal lands without federal consent. The latter type of authorization would directly conflict with the Federal Land Policy & Management Act and the federal Constitution, which states that Congress, not the state, has authority over federal property, in this case delegated to BLM.

This means that the applicant must obtain BLM approval before it can construct, regardless of the Commission's approval or its Conditions of Certification. If BLM does not approve the Project, the Commission's certification is preempted and the Project cannot proceed. Thus, the concern that section 25527 addresses – that public agencies in charge of the protected lands would be preempted against their will – is not present in this case. Prior BLM approval is

not required here because the BLM can preempt the Commission's approval at any time. Indeed, BLM's failure to approve the project necessarily preempts the Commission's certification in and of itself. Accordingly, no federal interest required section 25527's protections for vindication. Moreover, the Petitioner's interpretation could well run counter to federal land use planning prerogatives—it is not for the State of California to establish the order in which the United States government must issue entitlements. A federal land agency would be well within its rights to withhold the grant of its entitlement until it actually sees what the state intends to authorize on federal land. Nothing in the Warren-Alquist Act suggests a legislative intent to limit federal prerogative in such a manner.

Although we conclude that section 25527 does not apply in this case, we briefly address petitioner's remaining contention below.

D. The Project is not sited in an "area for wildlife protection."

In order to make its argument viable, the Petition must argue that the Project is sited in an "area for wildlife protection." The Petition accurately states that the Project "is sited largely on federal public lands managed by the Bureau of Land Management …within the California Desert Conservation Area ("CDCA")." (Petition, p. 2; see also Decision, Land Use, pp. 6-7.) The Petition further alleges that the Project "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")." (*Ibid.*) However, even assuming that these types of lands are all impacted by the Project, the Petition fails to persuade us that even if they were "areas of the state," these types of lands would be "areas for wildlife protection."

BLM has designated the Project land as "Multiple-Use Class M" under the CDCA Plan. (Decision, Land Use, p. 3.) The "Class M" land use category "may allow electrical generation plants in accordance with federal, state, and local laws subject to approval of a CDCA Plan amendment by the BLM," and is also intended "to conserve desert resources" and "to mitigate damage to those resources that permitted uses may cause." (Decision, Land Use, p. 3; see also BLM, CDCA Plan (1980 with amendments through 1999), p. 13.) In other words, these lands may be used for energy development subject to a right-of-way application and corresponding CDCA Plan amendment approved by BLM. (CDCA Plan, p. 15.) Thus, the Class M lands on which the Project is sited are not areas for wildlife

protection. Rather, they are multiple use areas, on which this type of project has been expressly authorized.

Therefore, we conclude that, were the lands "areas of the state," the Project site is nevertheless not an "area for wildlife protection."

E. Even though section 25527 does not apply in this proceeding, the Energy Commission substantively complied with its requirements.

The Petition contends that because the Energy Commission did not wait for BLM to approve the Project *first*, the Energy Commission's approval is invalid. Although we have found that section 25527 was inapplicable in this proceeding, we take the opportunity to note that the Energy Commission's certification of the project facility in fact achieves the substantive purpose of this section.

The Energy Commission's decision, including the Conditions of Certification and Compliance Verifications, prevents construction of the Project facility until the applicant obtains BLM's approval. There is no benefit to be achieved from waiting until BLM issues its decision, as there are no issues of public participation and due process – BLM's decision is made independently of the Energy Commission's AFC proceeding.

Condition of Certification LAND-1 states:

> Prior to the start of construction, the Applicant shall provide to the Compliance Project Manager (CPM) documentation of the U.S. Bureau of Land Management (BLM) Right-of-Way grant and the 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, p. 17). This means that the applicant must obtain BLM approval before beginning construction, which is effectively the same as if the Commission had waited for BLM approval before approving the Project. If BLM denies the right-of-way application, then the Project will not proceed on BLM land. If BLM grants the right-of-way application, then the Project may only proceed pursuant to the Conditions of Certification that the Commission approved and any additional conditions imposed by BLM. This demonstrates that, consistent with our statutory construction of section 25527, the order of approvals makes no

difference to the State of California. In the absence of a contrary showing, we reject Petitioner's contention.

## III. CONCLUSION

Because the Petitioner did not explain why the matters it set forth could not have been considered during the evidentiary hearings and has failed to establish an error in fact or law, the Petition is DENIED.

February 14, 2011

| ___________________________ | ___________________________ |
|---|---|
| ROBERT B. WEISENMILLER<br>Chair | JAMES D. BOYD<br>Vice Chair |
| ___________________________ | ___________________________ |
| JEFFREY D. BYRON<br>Commissioner | KAREN DOUGLAS<br>Commissioner |

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA**
**1516 NINTH STREET, SACRAMENTO, CA 95814**
**1-800-822-6228 – WWW.ENERGY.CA.GOV**

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

**Docket No. 09-AFC-7**

***PROOF OF SERVICE***
**(Revised 8/27/10)**

**APPLICANT**
Alice Harron
Senior Director of Project Development
***1111 Broadway, 5th Floor**
**Oakland, CA 94607**
harron@solarmillenium.com

***Michael Cressner, Project Development & Permitting**
**Solar Millennium, LLC**
**1111 Broadway, 5th Floor**
**Oakland, CA 94709**
**cressner@solarmillennium.com**

Arrie Bachrach
AECOM Project Manager
1220 Avenida Acaso
Camarillo, CA 93012
arrie.bachrach@aecom.com

Ram Ambatipudi
Chevron Energy Solutions
150 E. Colorado Blvd., Ste. 360
Pasadena, CA 91105
rambatipudi@chevron.com

**Co-COUNSEL**
Scott Galati, Esq.
Marie Mills
Galati/Blek, LLP
455 Capitol Mall, Suite 350
Sacramento, CA 95814
sgalati@gb-llp.com
**mmills@gb-llp.com**

**Co-COUNSEL**
Peter Weiner, Matthew Sanders
Paul, Hastings, Janofsky & Walker LLP
55 2nd Street, Suite 2400-3441
San Francisco, CA 94105
peterweiner@paulhastings.com
matthewsanders@paulhastings.com

**INTERVENORS**
California Unions for Reliable Energy (CURE)
c/o Tanya A. Gulesserian,
Marc D. Joseph
Jason W. Holder
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard,
Suite 1000
South San Francisco, CA 94080
tgulesserian@adamsbroadwell.com
jholder@adamsbroadwell.com*

Michael E. Boyd, President
Californians for Renewable Energy (CARE)
5439 Soquel Drive
Soquel, CA 95073-2659
michaelboyd@sbcglobal.net

Alfredo Figueroa
Californians for Renewable Energy (CARE)
424 North Carlton
Blythe, CA 92225
lacunadeaztlan@aol.com

Basin and Range Watch
Kevin Emmerich
Laura Cunningham
P.O. Box 153
Baker, CA 92309
atomictoadranch@netzero.net

Lisa T. Belenky, Senior Attorney
Center for Biological Diversity
351 California St., Suite 600
San Francisco, CA 94104
lbelenky@biologicaldiversity.org
Ileene Anderson
Public Lands Desert Director
Center for Biological Diversity
PMB 447, 8033 Sunset Boulevard
Los Angeles, CA 90046
ianderson@biologicaldiversity.org

**INTERESTED AGENCIES**
California ISO
e-recipient@caiso.com

Holly L. Roberts, Project Manager
Bureau of Land Management
Palm Springs-South Coast Field Office
1201 Bird Center Drive
Palm Springs, CA 92262
CAPSSolarBlythe@blm.gov

**ENERGY COMMISSION**
ROBERT WEISENMILLER
Commissioner and Presiding Member
rweisenm@energy.state.ca.us

KAREN DOUGLAS
Chairman and Associate Member
kldougla@energy.state.ca.us

Raoul Renaud
Hearing Officer
rrenaud@energy.state.ca.us

Alan Solomon
Siting Project Manager
asolomon@energy.state.ca.us

Lisa DeCarlo
Staff Counsel
ldecarlo@energy.state.ca.us

Jennifer Jennings
Public Adviser's Office
*e-mail service preferred*
publicadviser@energy.state.ca.us

*indicates change

<u>DECLARATION OF SERVICE</u>

I, Lynn Tien-Tran, declare that on **February 10, 2011**, I served and filed copies of the attached, **[PROPOSED] ORDER DENYING PETITION FOR RECONSIDERATION OF ADOPTION OF COMMISSION ORDER NO. 10-1215-19**, dated February 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]**

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*)**

<u>FOR SERVICE TO ALL OTHER PARTIES</u>:

_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."

***AND***

<u>FOR FILING WITH THE ENERGY COMMISSION</u>:

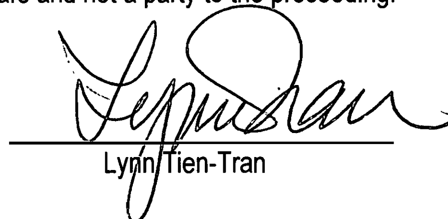
_x___ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (***preferred method***);

***OR***

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

**CALIFORNIA ENERGY COMMISSION**
Attn: Docket No. <u>09-AFC-7</u>
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
<u>docket@energy.state.ca.us</u>

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.



Lynn Tien-Tran

*indicates change