AMENDED IN SENATE FEBRUARY 18, 2010

AMENDED IN SENATE FEBRUARY 17, 2010

CALIFORNIA LEGISLATURE—2009–10 EIGHTH EXTRAORDINARY SESSION

SENATE BILL No. 34

Introduced by Senator Padilla

February 5, 2010

An act to add Sections 2069 and 2099 to the Fish and Game Code, to amend Sections 11430.30, 11430.70, and 11430.80 of the Government Code, and to add Section 25524 to the Public Resources Code, relating to energy, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

SB 34, as amended, Padilla. Energy: solar thermal powerplant: siting: California Endangered Species Act: mitigation measures.

(1) Existing law vests exclusive power to certify a thermal powerplant with the State Energy Resources Conservation and Development Commission (Energy Commission). Existing law requires a person to obtain a certification from the commission prior to commencing the construction of a thermal powerplant.

This bill would require the Energy Commission to establish a process for certain applicants for certification of a solar thermal powerplant that allows the applicant to elect to pay additional fees to be used by the Energy Commission to contract with 3rd parties to assist Energy Commission staff in performing the analysis otherwise performed by staff in determining whether or not to issue a certification. The Energy Commission would retain discretion as to when this option will be offered to qualified applicants.

(2) The California Endangered Species Act (CESA) requires the Fish and Game Commission to establish a list of endangered species and a list of threatened species and requires the Department of Fish and Game to recommend, and the commission to adopt, criteria for determining if a species is endangered or threatened. CESA states that state agencies should not approve projects, as defined, that would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of the species if there are reasonable and prudent alternatives available consistent with conserving the species or its habitat that would prevent jeopardy. *CESA further declares that in the event specific economic, social, or other conditions make infeasible these alternatives, individual projects may be approved if appropriate mitigation and enhancement measures are provided.*

This bill would require the department, in consultation with the Energy Commission, to develop and implement an interim strategy for mitigation measures pursuant to CESA for the construction of certain solar thermal powerplants. *The bill would condition this requirement upon a developer or owner of a proposed solar thermal powerplant agreeing to reimburse the department and the Energy Commission for all state costs associated with the development and implementation of the interim strategy.* The bill would establish the Renewable Energy Resources Development Mitigation Trust ~~Account~~ *Fund* as a continuously appropriated ~~account within the Fish and Game Preservation Fund~~ *fund in the State Treasury* to serve, and be managed, as an optional, voluntary method for developers or owners of solar thermal powerplant projects, as defined, to deposit fees sufficient to complete mitigation and enhancement measures pursuant to the interim strategy adopted by the department and thereby meet their requirements pursuant to CESA. The bill would require that the ~~account~~ *fund* be managed by the California Wildlife Foundation or the National Fish and Wildlife Foundation as determined, and subject to oversight, by the department and would prohibit any expenditure from being made from the ~~account~~ *fund* except as authorized by the department.

(3) Existing law, the Administrative Procedure Act, provides for the conduct of administrative adjudication proceedings of state agencies. Existing law generally prohibits during a pending proceeding, communication, regarding any issue in the proceeding, with the presiding officer from an employee or representative of the agency

without notice and opportunity for all parties to participate, except as specified.

This bill would except from this general prohibition specified communications relating to determinations of applications for site certification that are before the Energy Commission and are made by certain employees of the commission for the purpose of enabling the presiding officer to effectively manage the proceeding.

(4) Existing law generally requires the Department of Personnel Administration to establish and adjust salary ranges for each class of position in the state civil service subject to any constitutional merit limits. Existing law requires the salary range to be based on the principle that like salaries shall be paid for comparable duties and responsibilities. Existing law prohibits the department from making any adjustments that require expenditures in excess of existing appropriations that may be used for salary increase purposes.

This bill would approve the recruitment and retention differentials of the Department of Personnel Administration for specified employees in State Bargaining Units 1 and 10 employed by the Energy Commission covered by the October 29, 2009, letter from the Director of the Department of Personnel Administration to the Chairperson of the Joint Legislative Budget Committee.

The bill would specify that those differentials that require the expenditure of funds would not take effect unless funds for these provisions are specifically appropriated by the Legislature or already exist within available appropriations. The bill would authorize either party to reopen negotiations on all or part of the addendum if the Legislature does not approve or fully fund any addendum included in this measure.

(5) The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. The Governor issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on January 8, 2010.

This bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on January 8, 2010, pursuant to the California Constitution.

Vote: majority. Appropriation: yes. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 2069 is added to the Fish and Game Code, to read:

2069. (a) For purposes of this section, the following terms have the following meanings:

(1) “Desert Renewable Energy Conservation Plan” means the completed conservation plan for portions of the Mojave and Colorado Desert regions adopted pursuant to the Natural Community Conservation Planning Act (Chapter 10 (commencing with Section 2800)), in response to Executive Order S-14-08 issued November 17, 2008.

(2) “Eligible renewable energy resource” has the same meaning as in the California Renewables Portfolio Standard Program (Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code).

(3) “Energy Commission” means the State Energy Resources Conservation and Development Commission.

(b) (1) ~~The~~ *If the developer or owner of a proposed solar thermal powerplant has agreed to reimburse the department and the Energy Commission for all state costs, the* department, in consultation with the Energy Commission, shall develop and implement an interim strategy for mitigation measures pursuant to this chapter for the construction of solar thermal powerplants that meet each of the following requirements:

(A) The Energy Commission has determined that the application for certification was complete by February 1, 2010.

(B) The solar thermal powerplant is proposed to be constructed in the Mojave or Colorado Desert regions.

(C) The developer or owner of the proposed solar thermal powerplant has applied for, and will receive, funding under the federal American Recovery and Reinvestment Act of 2009 (Public Law 111-5) if construction begins by December 31, 2010. For purposes of this subparagraph, “funding” means a loan guarantee made pursuant to Section 406 of the act (42 U.S.C. Sec. 16516) and a grant for specified energy property in lieu of a tax credit provided pursuant to Section 1603 of Division B of the act, which division is titled the American Recovery and Reinvestment Tax Act of 2009.

(2) The interim strategy for mitigation measures pursuant to this chapter shall include the following:

(A) A description of specific mitigation areas and specific actions on public or private land within the planning area that are to be implemented, including a focus on habitat preservation, while also including enhancement or restoration actions that will do all of the following:

(i) Contribute to the conservation of each candidate species, threatened species, or endangered species for which a permit is issued.

(ii) Adopt a regional planning perspective that provides a foundation for, or that will complement, any conservation strategy to be developed for the Desert Renewable Energy Conservation Plan.

(iii) Implement mitigation actions within a reasonable period of time relative to the impact to the affected candidate species, threatened species, or endangered species, including, where feasible, advanced mitigation.

(B) A cost estimate for each action, whether on public or private land, using total cost accounting, including, as applicable, land acquisition costs, restoration costs, the amount of a nonwasting endowment account for land management costs by the department or other management entity, and administrative costs.

(C) A preliminary estimate of the time required to implement each action.

SEC. 2. Section 2099 is added to the Fish and Game Code, to read:

2099. (a) For purposes of this section, "solar thermal powerplant project" means a project to build a solar thermal powerplant that meets the requirements of paragraph (1) of subdivision (b) of Section 2069.

(b) (1) The Renewable Energy Resources Development Mitigation Trust ~~Account is hereby established in the Fish and Game Preservation Fund~~ *Fund is hereby established in the State Treasury*. All moneys received for purposes of mitigation and enhancement measures pursuant to Section 2069 shall be deposited in the ~~account~~ *fund* and may only be used consistent with the purposes and restrictions of that section and any contractual agreement between the department and the developer or owner of a solar thermal powerplant project.

(2) The ~~account~~ *fund* shall serve, and be managed, as an optional, voluntary method for developers or owners of solar thermal powerplant projects to deposit fees sufficient to complete mitigation and enhancement measures and thereby meet their requirements pursuant to this chapter. The ~~account~~ *fund* shall be managed by the California Wildlife Foundation or the National Fish and Wildlife Foundation as determined, and subject to oversight, by the department. Notwithstanding Section 13340 of the Government Code, the money in the ~~account~~ *fund* is hereby continuously appropriated to the department, without regard to fiscal years, for the purposes enumerated in this section and Section 2069. An expenditure shall not be made from the ~~account~~ *fund* except as authorized by the department.

(3) All funds in the ~~account~~ *fund* shall be wholly derived from the solar thermal powerplant projects that use the interim mitigation strategy developed and implemented by the department pursuant to Section 2069. A solar thermal powerplant project developer or owner electing to participate shall deposit funds into the ~~account~~ *fund,* in an amount that reflects the estimate by the department and the commission of specific habitat and wildlife costs attributable to the project that meets the fully mitigated standard of this chapter. The amount of funding required by a solar thermal powerplant project developer or owner to meet the fully mitigated standard through the deposits to the ~~account~~ *fund* shall be calculated on a per acre basis that reflects the full cost per-acre of providing compensatory mitigation, including land acquisition costs, initial habitat improvement funds, and long-term management endowment funds.

(c) The department shall provide regular updates on its Internet Web site relative to implementation and monitoring of all approved interim mitigation actions and of all expenditures from the ~~account~~ *fund* and the relationship of the expenditures to the impacts of certificated solar thermal powerplant projects.

SEC. 3. Section 11430.30 of the Government Code is amended to read:

11430.30. A communication otherwise prohibited by Section 11430.10 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

(a) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record.

(b) The communication is for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor.

(c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative proceeding that is nonprosecutorial in character:

(1) The advice involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.

(d) The communication is made to the presiding officer by an employee of the Siting, Transmission, and Environmental Protection Division of the State Energy Resources Conservation and Development Commission, if the communication is made for the purpose of enabling the presiding officer to effectively manage a proceeding regarding an application for site certification pursuant to Chapter 6 (commencing with Section 25500) of Division 1 of the Public Resources Code.

SEC. 4. Section 11430.70 of the Government Code is amended to read:

11430.70. (a) Subject to subdivisions (b) and (c), the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized ratemaking proceeding if the content of the communication is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

(c) An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized determination of an application for site certification pursuant to Chapter 6 (commencing with Section 25500) of Division 15 of the Public Resources Code, that is before the State Energy Resources Conservation and Development Commission, if the communication is made by an employee of the Siting, Transmission, and Environmental Protection Division of the commission and is made for the purpose of enabling the presiding officer to effectively manage the proceeding.

SEC. 5. Section 11430.80 of the Government Code is amended to read:

11430.80. (a) There shall be no communication, direct or indirect, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or where the presiding officer does not issue a decision in the proceeding.

(c) This section does not apply to the determination of an application for site certification pursuant to Chapter 6 (commencing with Section 25500) of Division 15 of the Public Resources Code, that is before the State Energy Resources Conservation and Development Commission where the communication is between the presiding officer and a commissioner and the communication is made for the purpose of enabling the presiding officer to effectively manage the proceeding.

SEC. 6. Section 25524 is added to the Public Resources Code, to read:

25524. (a) “Qualified applicant” means an applicant for certification of a solar thermal powerplant that meets each of the following requirements:

(1) The commission has determined that the application for certification was completed by February 1, 2010.

(2) The solar thermal powerplant is proposed to be constructed in the Mojave or Colorado Desert regions.

(3) The developer or owner of the proposed solar thermal powerplant has applied for, and will receive, funding under the federal American Recovery and Reinvestment Act of 2009 (Public Law 111-5) if construction begins by December 31, 2010. For purposes of this paragraph, "funding" includes a loan guarantee made pursuant to Section 406 of the act (42 U.S.C. Sec. 16516) and a grant for specified energy property in lieu of a tax credit provided pursuant to Section 1603 of Division B of the act, which division is titled the American Recovery and Reinvestment Tax Act of 2009.

(b) The commission shall establish a process to allow a qualified applicant to elect to pay additional fees to be used by the commission to contract with a third party, or more than one third-party, to assist commission staff in performing the analysis otherwise performed by commission staff in determining whether or not to issue a certification. The commission shall retain discretion as to when this option will be offered to a qualified applicant.

(c) The amount of the fees charged by the commission pursuant to this section shall be conditioned upon the qualified applicant agreeing to that amount and electing to proceed with the retention of the third party or parties pursuant to subdivision (b).

(d) All fees paid by a qualified applicant shall be used exclusively for analysis of that applicant's application for certification.

SEC. 7. (a) The Legislature finds and declares that the purpose of this section is to approve recruitment and retention differentials for specified employees in State Bargaining Units 1 and 10 that require the expenditure of funds, consistent with the state employer's memoranda of understanding with those bargaining units and the Joint Legislative Budget Committee's determination that those differentials require legislative approval.

(b) The recruitment and retention differentials specified in subdivision (c) that are consistent with the memoranda of understanding with State Bargaining Units 1 and 10 that require the expenditure of funds are hereby approved for the purposes of Section 3517.63 of the Government Code.

(c) The recruitment and retention differentials for certain members of State Bargaining Units 1 and 10 employed at the State Energy Resources Conservation and Development Commission that were described in the attachment to the letter, dated October 29, 2009, from the Director of the Department of Personnel Administration to the Chairperson of the Joint Legislative Budget Committee shall be approved.

(d) The recruitment and retention differentials approved by subdivisions (b) and (c) and that require the expenditure of funds shall not take effect unless funds for these provisions are specifically appropriated by the Legislature or already exist within available appropriations. If the Legislature does not approve or fully fund any addendum included in this section, either party may reopen negotiations on all or part of the addendum.

SEC. 8. This act addresses the fiscal emergency declared by the Governor by proclamation on January 8, 2010, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution.

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