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12
13 IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
14 FOR THE COUNTY OF ALAMEDA

15 COMMUNITIES FOR A BETTER)
16 ENVIRONMENT and CENTER FOR)
17 BIOLOGICAL DIVERSITY, non-profit)
corporations,)

18 Plaintiffs,)

19 vs.)

20 ENERGY RESOURCES CONSERVATION AND)
21 DEVELOPMENT COMMISSION, CALIFORNIA)
STATE CONTROLLER and DOES I through X,)
22 inclusive,)

23 Defendants.)
24)
25)
26)
27)
28)

) Case No.:

) **VERIFIED COMPLAINT FOR**
) **DECLARATORY AND INJUNCTIVE**
) **RELIEF**

) (Cal. Code of Civil Procedure §§ 1060 and 526a)

1 **INTRODUCTION**

2 1. California’s agencies play a vital role in effectuating the will of the People of the
3 State. They are, in general, created by statute with specific authority. When an agency fails to
4 execute its authority correctly, the California Constitution gives the People the right to secure
5 judicial review in Superior Court.

6 2. Decisions about where to site new natural gas power plants, among the largest new
7 stationary sources of pollution to be constructed in the State, have become exempt from the
8 Constitutional guarantee that allows the people to address flawed agency decision-making. The
9 Energy Resources Conservation and Development Commission, commonly known as the Energy
10 Commission or CEC, is the state agency empowered to make siting decisions concerning all new
11 thermal power plants over fifty megawatts. The CEC is a “one-stop shop” for power plant siting
12 decisions, and in this capacity the agency interprets and implements a wide range of applicable
13 statutes and local ordinances, including many that are usually implemented by agencies with
14 extensive expertise in the subject matter. The only recourse available to those concerned about a
15 flawed CEC decision is a challenge in the California Supreme Court pursuant to Public Resources
16 Code section 25531. While affected parties seeking Supreme Court review file legal briefs and
17 extensive documentation simply to request the Court’s review of a decision, whether or not the
18 Supreme Court accepts review is entirely discretionary. The Court refuses to hear these cases. In
19 fact, there are no reported instances of the Supreme Court accepting review of a power plant siting
20 decision under Public Resources Code section 25531.

21 3. As a result, the Energy Commission essentially acts as its own court of last resort.
22 The risk that a decisionmaker whose decisions are not reviewed will commit errors of fact or law is
23 self-evident, as is the risk to society of power plants being sited improperly because the siting
24 agency acts knowing its decisions will not be reviewed. Moreover, the Energy Commission can
25 interpret many statutes and regulations with relative impunity because the courts are not serving as
26 the necessary check on the Energy Commission’s interpretation of the law and the facts of each case.
27 This unhealthy dynamic, entrusting a state agency with final review of its own actions, disempowers
28 the people who will be affected by those decisions.

1 **PARTIES**

2 9. Plaintiff COMMUNITIES FOR A BETTER ENVIRONMENT (“CBE”) is an
3 environmental justice public-interest organization and a California not-for-profit corporation. CBE
4 has approximately 20,000 members throughout the state of California. CBE's mission is to achieve
5 environmental health and justice for communities of color and working-class communities. CBE
6 strives to accomplish its mission by organizing in traditionally disempowered communities, by
7 facilitating public participation in administrative decision-making processes, and by ensuring
8 implementation of laws that protect public participation, public health and the environment. As part
9 of its effort to bring about environmental justice, CBE has participated in siting proceedings before
10 the CEC. For example, CBE participated in the CEC certification processes for Potrero Unit 7
11 (Docket No. 00-AFC-4); Nueva Azalea (Docket No. 00-AFC-3); Vernon Power Plant aka Southeast
12 Regional Energy Center (Docket No. 00-AFC-3); Sentinel Power Plant (Docket No. 07-AFC-03);
13 and Oakley Generating Station (Docket No. 09-AFC-04). CBE anticipates continuing to participate
14 in CEC power plant siting proceedings as necessary to address its members’ concerns.

15 10. Within the past year, CBE has paid sales tax to the State of California, which tax is in
16 excess of CBE’s annual renewal registration fee of \$75, paid to the State of California to maintain
17 CBE’s status as a nonprofit organization. Additionally, most of CBE’s members are taxpaying
18 residents of California and have within the past year paid income and sales taxes to the State.

19 11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-profit
20 corporation with offices in San Francisco and elsewhere in California and throughout the United
21 States. The Center is actively involved in environmental protection issues throughout California and
22 North America and has approximately 40,000 members. The Center’s mission includes protecting
23 and restoring habitat and populations of imperiled species, and protecting air quality, water quality,
24 and public health. The Center has participated in and continues to participate in CEC power plant
25 certifications since deregulation under section 25531(a). For example, the Center participated as a
26 party in the CEC certification process for the Carlsbad Energy Center Power Project (Docket
27 Number 07-AFC-06) and Palmdale Hybrid Power Project (Docket Number 08-AFC-9) and is
28 currently participating in the CEC certification processes for the Quail Brush Generation Project

1 (Docket Number 11-AFC-03), and the amendment for the Palen Solar Electric Generating System
2 (PSEGS) (Docket Number: 9-AFC-7C). The Center intends to continue to participate in CEC power
3 plant certifications and other proceedings in the future.

4 12. Within the past year, the Center has paid sales tax to the State of California, which tax
5 is in excess of the Center's annual renewal registration fee of \$75, paid to the State of California to
6 maintain the Center's status as a nonprofit organization. Additionally, the Center has California
7 members who are taxpaying residents of California and have within the past year paid income and
8 sales taxes to the State.

9 13. Plaintiffs bring this action on their own behalf and on behalf of their members,
10 employees, and supporters who are residents and taxpayers of the state of California, and who have
11 been and will be adversely affected by the actions of the Energy Commission and the State of
12 California as described in this Complaint.

13 14. Plaintiffs bring this action under Code of Civil Procedure section 1060, as a request
14 for declaratory relief, and additionally under Code of Civil Procedure section 526a, as a request for
15 declaratory and injunctive relief.

16 15. By this action, Plaintiffs seek to protect the constitutional rights of its members,
17 employees, supporters, and the general public. Plaintiffs and their staff and members have a
18 constitutional right to, and a beneficial interest in, judicial review of Energy Commission
19 certifications in the lower courts under a scope of review that assesses whether the decision was
20 supported by the facts. These constitutional rights are essential for Plaintiffs to fulfill their
21 respective missions. The injury to Plaintiffs of being denied these rights can only be remedied
22 through judicial invalidation of the portions of Public Resources Code section 25531 that curtail
23 original jurisdiction in the superior and appellate courts and that unconstitutionally limit the scope of
24 review, as elaborated below.

25 16. Defendant ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
26 COMMISSION ("CEC" or "Energy Commission") is an agency of the state of California located in
27 Sacramento, California. Established in 1974 by the Warren-Alquist State Energy Resources
28 Conservation and Development Act, the Energy Commission is the state's principle energy policy

1 and planning organization. One of its key roles is to act as the exclusive permitting authority for
2 thermal power plants fifty megawatts or larger.

3 17. Defendant CALIFORNIA STATE CONTROLLER is the manager and disbursing officer of
4 the State's funds and is sued in his official capacity.

5 18. The true names and capacities, whether individual, corporate, or otherwise, of
6 fictitiously named Defendants DOES I through X sued herein are unknown to Plaintiffs. Plaintiffs
7 will amend this Complaint for Declaratory and Injunctive Relief to set forth the true names and
8 capacities of said Doe parties when they have been ascertained. Plaintiffs allege that Doe parties I
9 through X are at fault for the constitutional violations alleged herein.

10 **PROCEDURAL HISTORY**

11 19. The Warren-Alquist Act established the Energy Commission in 1974. The Energy
12 Commission is the permitting authority for thermal power plants fifty megawatts or larger, issuing a
13 comprehensive certification of compliance with all state and local land use and environmental laws.
14 When the Legislature established the Energy Commission, new power plants had to obtain both a
15 license from the Energy Commission and a Certificate of Public Convenience and Necessity from
16 the California Public Utilities Commission ("PUC").

17 20. The energy world in California has changed dramatically since the enactment of the
18 Warren-Alquist Act. In the 1990s, the state deregulated the energy industry specifically to change
19 the way power plants are permitted, built, owned and operated. Since deregulation, power plant
20 developers can propose projects and obtain licenses from the Energy Commission — no
21 determination of whether the power plant is needed in the energy system is required.

22 21. The Warren-Alquist Act judicial review requirements have not changed to reflect the
23 deregulated energy world. Instead, legislative amendments have made sections of the judicial
24 review portions of the Act unconstitutional. Currently, the Warren-Alquist Act provides for judicial
25 review of CEC certification of power plant permits in the California Supreme Court under Public
26 Resources Code section 25531, subdivision (a).

27 22. Before deregulation, from 1974 until 2001, the Warren-Alquist Act required that
28 judicial review of a certification proceed in exactly the same way as judicial review of a PUC-issued

1 Certificate of Public Convenience and Necessity. (See Former Pub. Resources Code § 25531, subd.
2 (a), added by Stats. 1974, ch. 276, § 2, p. 532, eff. Jan. 7, 1975, and amended by Stats. 1975, ch.
3 1240, § 63, eff. July 1, 1976; Stats. 1978, ch. 1013, § 22, p. 3124; Stats. 1988, ch. 160, § 153.)

4 23. Until 1996, PUC Certificates of Public Convenience and Necessity were subject to
5 review only in the Supreme Court. (See Former Pub. Util. Code § 1759, subd. (a), added by Stats.
6 1951, ch. 764, § 1759, p. 2091.) Thus, from 1974 until 1996 Energy Commission certifications were
7 also subject to judicial review only in the Supreme Court.

8 24. That pre-deregulation linked review provision was challenged in 1985 in *Cnty. of*
9 *Sonoma v. State Energy Res. Conservation & Dev. Comm'n* (1985) 40 Cal.3d 361, 367 (“*Sonoma*”).
10 There, petitioners argued that former Public Resources Code section 25531, subdivision (a)
11 unconstitutionally infringed on article VI, section 10 of the state Constitution, which provides
12 original, non-exclusive jurisdiction over mandamus proceedings to the superior courts, courts of
13 appeal, and Supreme Court alike. The Supreme Court upheld the Warren-Alquist Act’s linked
14 review provision because article XII, section 5 of the state Constitution allows the Legislature to
15 restrict judicial review of PUC decisions. At that time, all power plants were required to obtain a
16 certificate from the Energy Commission before getting the required Certificate of Public
17 Convenience and Necessity from the PUC. In *Sonoma*, the Court reasoned that because Energy
18 Commission certifications were essentially conditions precedent to every PUC power plant decision,
19 the Constitution allowed review of both certification and the Certificate of Public Convenience and
20 Necessity in the same forum.

21 25. A decade later, in 1996, the Legislature began deregulating California’s energy
22 production and distribution system -- a massive restructuring of the entire regulatory apparatus.
23 Until then, California investor-owned utilities had operated as monopolies, owning and operating
24 both the power plants that generated electricity and the grid that delivered the power to consumers.
25 Deregulation shifted power plant ownership to independent power producers, *i.e.* non-utilities. In
26 most cases, investor-owned utilities now buy power, not power plants.

27 26. Severing the close relationship between the Energy Commission and the PUC
28 regarding licensing power plants was one of the necessary outcomes of deregulation, allowing

1 market participants to own generation resources that would be reviewed for siting and environmental
2 impacts by the CEC, in transactions that are distinct from the generators' contracting with utilities.
3 Utilities would have to seek competitive bids, and present the contracts to the PUC to review the
4 reasonableness of pricing and other factors. Critically, independent power plant developers do not
5 need Certificates of Public Convenience and Necessity or any other approval from the PUC to
6 construct power plants, but instead may proceed based simply on a CEC certification.

7 27. Deregulation also had significant impacts on judicial review. In 1996, the Legislature
8 changed the PUC's judicial review provision to allow review in the Court of Appeals as well as the
9 Supreme Court. The expansion of judicial review was intended specifically to address the Supreme
10 Court's practice of rarely hearing challenges to PUC decisions.

11 28. In 1998, the Legislature extended appellate court review to an even broader scope of
12 PUC actions, explaining that deregulation required more expansive judicial oversight of PUC
13 workings. In the 1998 bill,

14 [t]he Legislature finds and declares that the conversion of the energy, transportation, and
15 telecommunications, and transportation industries from traditional regulated markets to
16 competitive markets necessitates a change in the judicial review of Public Utilities
17 Commission decisions that pertain to those industries. The Legislature finds that the
18 activities of the energy, telecommunications, and transportation industries will require
19 expanded access to the court system at all levels.

20 (Stats. 1998, ch. 886, § 1.5(a).)

21 29. The Legislature also stated that its intent was to "conform judicial review of the
22 Public Utilities Commission decisions that pertain to utility service providers with competitive
23 markets to be consistent with judicial review of the other state agencies." (Stats. 1998, ch. 886, §
24 1.5(b).)

25 30. From 1996 to 2001, the Warren-Alquist Act continued to connect the judicial review
26 provisions of the Energy Commission to the PUC. As a consequence, Energy Commission decisions
27 were also subject to judicial review in the courts of appeal as well as the Supreme Court.

28 31. In 2001, the Legislature expressly delinked review of CEC certifications from PUC
decisions, removing reference to PUC and restricting Energy Commission certification decisions to
review only in the Supreme Court. Public Resources Code section 25531, subdivision (a) now

1 states: “[t]he decisions of the commission on any application of any electric utility for certification
2 of a site and related facility are subject to judicial review by the Supreme Court of California.”

3 32. The Senate Republican Fiscal Office Analysis explained that this change “is a return
4 to the prior practice of review by the Supreme Court, which may mean no review at all.” (Senate
5 Republican Fiscal Office Analysis of April 23, 2001 version of SB 28x (Sher), Senate Republican
6 Fiscal Office Records, California State Archives, Office of the Secretary of State, Sacramento,
7 California.)

8 **FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF:**
9 **VIOLATION OF CALIFORNIA CONSTITUTION ARTICLE 6 SECTION 10**
10 **(By All Plaintiffs Against All Defendants)**

11 33. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
12 the preceding paragraphs.

13 34. Article VI, section 10 of the California Constitution provides in part that “[t]he
14 Supreme Court, courts of appeal, superior courts, and their judges have . . . original jurisdiction in
15 proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. . . .
16 Superior courts have jurisdiction in all other causes.”

17 35. Exceptions to the jurisdictional provisions of article VI can only be created where the
18 Constitution expressly grants authority to the Legislature to define judicial review of the decisions of
19 a specific state agency formed by the Constitution, such as the PUC.

20 36. The Energy Commission is not an agency of constitutional origin — it was
21 established by the Legislature in the Warren-Alquist Act in 1974.

22 37. The Constitution contains no authorization for the Legislature to independently limit
23 article VI section 10 jurisdiction over CEC certifications, as the Legislature did in Public Resources
24 Code section 25531, subdivision (a).

25 38. Public Resources Code section 25531, subdivision (a) no longer falls under the
26 plenary power of the Legislature over the PUC as held in *Cnty. of Sonoma v. State Energy Res.*
27 *Conservation & Dev. Comm’n* (1985) 40 Cal.3d 361 for at least two reasons. First, since *Sonoma*
28 was decided, the plain language of the Energy Commission’s judicial review provision was

1 fundamentally changed and its explicit connection to the PUC deleted. Second, deregulation
2 removed the previous relationship between the two agencies regarding power plant permitting.

3 39. Public Resources Code section 25531, subdivision (a), violates article VI section 10
4 of the California Constitution by restricting review of Energy Commission certification to only the
5 Supreme Court.

6 40. By requiring petitioners to proceed with challenges to Energy Commission
7 certificates in the Supreme Court alone, Public Resources Code section 25531, subdivision (a)
8 dispossesses the superior and appellate courts of their original jurisdiction over these challenges.

9 41. Public Resources Code section 25531, subdivision (a) is in conflict with article VI
10 section 10 of the California Constitution.

11 42. There is a present and actual controversy between Plaintiffs and Defendants as to the
12 constitutionality of Public Resources Code section 25531, subdivision (a).

13 43. Plaintiffs desire a judicial determination of the rights and obligations of the respective
14 parties concerning the allegations in this Complaint. An action for declaratory under California
15 Code of Civil Procedure section 1060 is the proper manner in which to challenge the constitutional
16 validity of a statute.

17 44. Such a declaration and injunction is necessary and appropriate at this time in order
18 that Plaintiffs may have a lawful means of securing judicial review of Energy Commission
19 certifications.

20 **SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF:**
21 **VIOLATION OF SEPARATION OF POWERS**
22 **[ARTICLE III SECTION 3; ARTICLE VI SECTION 1]**
23 **(By All Plaintiffs Against All Defendants)**

24 45. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
the preceding paragraphs.

25 46. Public Resources Code section 25903 provides that should Public Resources Code
26 section 25531, subdivision (a) be held invalid, judicial review of Energy Commission certifications
27 must proceed in superior courts within the parameters set by Public Resources Code section 25531,
28 subdivision (b).

1 47. Public Resources Code section 25531, subdivision (b) provides in part:

2 No new or additional evidence may be introduced upon review and the cause shall be heard
3 on the record of the commission as certified to by it. The review shall not be extended
4 further than to determine whether the commission has regularly pursued its authority,
5 including a determination of whether the order or decision under review violates any right
6 of the petitioner under the United States Constitution or the California Constitution. The
7 findings and conclusions of the commission on questions of fact are final and are not
8 subject to review, except as provided in this article. These questions of fact shall include
9 ultimate facts and the findings and conclusions of the commission.

10 48. Public Resources Code section 25531, subdivision (b) conflicts with the Separation of
11 Powers doctrine embodied in the Constitution.

12 49. Article III, section 3 of the California constitution requires separation of powers
13 among the three branches of government: “The powers of state government are legislative,
14 executive, and judicial. Persons charged with the exercise of one power may not exercise either of
15 the others except as permitted by this Constitution.”

16 50. In Article VI, section 10 of the California Constitution vests judicial power “in the
17 Supreme Court, courts of appeal, and superior courts.”

18 51. These two provisions of the Constitution establish core judicial powers and set limits
19 on the exercise of judicial power by a state agency not created by the Constitution.

20 52. Public Resources Code section 25531, subdivision (b) violates the separation of
21 powers doctrine by infringing on the judicial power to adjudicate cases and controversies. The
22 statute improperly limits the power of the judiciary to assess the factual findings underpinning
23 licensing decision.

24 53. There is a present and actual controversy between Plaintiffs and Defendants as to the
25 constitutionality of Public Resources Code section 25531, subdivision (b).

26 54. Plaintiffs desire a judicial determination of the rights and obligations of the respective
27 parties concerning the allegations in this Complaint. An action for declaratory relief under
28 California Code of Civil Procedure section 1060 is the proper manner in which to challenge the
constitutional validity of a statute.

1 55. Such a declaration is necessary and appropriate at this time in order that
2 Environmental Groups may have a lawful means of securing judicial review of Energy Commission
3 certifications.

4
5 **THIRD CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF:**
6 **PREVENTING ILLEGAL EXPENDITURE OF FUNDS**
7 **[CODE CIV. PROC. § 526A]**
8 **(By All Plaintiffs Against All Defendants)**

9 56. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
10 the preceding paragraphs.

11 57. Defendants have spent and, unless enjoined, will continue to expend taxpayer funds
12 to implement the unconstitutional provisions of Public Resources Code section 25531 subdivisions
13 (a) and (b). Specifically, these funds support the Energy Commission’s activities in ensuring that
14 challenges to its power plant certifications are filed with the California Supreme Court, and the
15 Court expends funds to act on these petitions that should be filed in the Superior Courts.

16 58. Unless Plaintiffs are granted injunctive relief, they will suffer irreparable harm.
17 Plaintiffs lack an adequate remedy at law because monetary damages cannot be ascertained and
18 Plaintiffs cannot be compensated for the violations of their rights caused by Public Resources Code
19 section 25531 subdivisions (a) and (b) complained of herein.

20 59. Under Code of Civil Procedure section 526a, the unconstitutionality of Public
21 Resources Code section 25531 subdivisions (a) and (b) renders illegal any expenditure of public
22 funds related to the implementation of these subdivisions. Plaintiffs seeks declaratory relief to this
23 effect and injunctive relief preventing expenditure of any funds related to Public Resources Code
24 section 25531 subdivisions (a) and (b).

25 **REQUEST FOR RELIEF**

26 Wherefore, Plaintiffs respectfully request relief as follows:

- 27 1. A declaratory judgment that Public Resources Code section 25531(a) is
28 unconstitutional and void on its face;

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VERIFICATION

I, BILL GALLEGOS, hereby declare:

I am the Executive Director of Communities for a Better Environment, a non-profit corporation with offices in Oakland, California and elsewhere in the State. The facts alleged in the above Complaint for Declaratory Relief are true to my personal knowledge and belief.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this verification is executed on this __ day of ____ at Huntington Park, California.

Bill Gallegos, Executive Director
Communities for a Better Environment