| DOCKETED | |
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| **Docket Number:** | 23-OPT-01 |
| **Project Title:** | Fountain Wind Project |
| **TN #:** | 252245 |
| **Document Title:** | Margaret Osa Comments - Steven Johnson - Fountain Wind Project Opt In 23-01 |
| **Description:** | N/A |
| **Filer:** | System |
| **Organization:** | Margaret Osa |
| **Submitter Role:** | Public |
| **Submission Date:** | 9/14/2023 10:11:37 AM |
| **Docketed Date:** | 9/14/2023 |

*Comment Received From: Margaret Osa*
*Submitted On: 9/14/2023*
*Docket Number: 23-OPT-01*

## Steven Johnson - Fountain Wind Project Opt In 23-01

*Additional submitted attachment is included below.*

September 14, 2023

Leonidas Payne, Project Manager
California Energy Commission
Environmental Office, 715 P Street, MS-15
Sacramento, CA 95814
Leonidas.Payne@energy.ca.gov

Re: Fountain Wind Project (23-OPT-01)

Dear Mr. Payne,

This letter is respectfully submitted in support of the legal arguments made by Shasta County and most recently San Bernardino County as to why the California Energy Commission lacks jurisdiction to consider or process the currently incomplete application for the Fountain Wind project. This letter further offers several additional and independent legal reasons why the California Energy Commission should not deem the application complete and should immediately dismiss or deny the application as a matter of law.

As an initial matter, I am an attorney, real estate broker, and rancher who resides in Shasta County. I serve on the Board of Directors of the Shasta County Fire Safe Council, and I chair the committee of that organization charged with the development of a strategic plan to reduce catastrophic wildfire risks in Shasta County. I practiced law for over 30 years with the national and international law firm of Gibson, Dunn & Cruther, and I have litigated cases concerning wind energy projects in several areas of California, including Tehachapi and Altamont Pass. My ranch is located in Montgomery Creek, close to the proposed Fountain Wind project, and my ranch was partially burned in

the Fountain Fire in 1992. That fire burned the historical founder's homestead cabin on my ranch that had stood for nearly 100 years. On that site today is a mobile home provided to the prior owner by FEMA when it responded to the Fountain Fire disaster in 1992.

As you may know, CalFire, or other responsible fire fighting agency in charge of the response to a wildfire, often names wildfires after a location or local feature of a particular fire. The Fountain Fire was named after a water fountain that existed at the time next to Highway 299 near the towns of Montgomery Creek and Round Mountain. People used the water fountain to fill their radiators as they climbed up the highway traveling east toward Hatchet summit. The Fountain Fire was named after this water fountain because the fire was sparked nearby, and quickly became catastrophic because there were very high winds, and the area was heavily forested. The Fountain Fire burned hundreds of homes and other structures, mostly in the first 24 hours, and grew quickly to burn over 60,000 acres—at the time, one of the largest catastrophic wildfires in California history. The "fountain" by the highway after which the fire was named, was later moved to a stop further up the highway, where an informational poster board reminder was erected to describe the devastating fire to motorists and tourists who traveled through the devastated area, and as a lesson for future generations of the dangers of wildfire and the tragedy of the Fountain Fire. While the natural forest that had been there was nearly completely destroyed in 1992, the area was soon replanted by a timber company, the predecessor of the timber company that has leased the land now to Connectgen for the Fountain Wind project. Tens of thousands of acres were replanted after the 1992 Fountain Fire, mostly with hundreds of thousands of Ponderosa Pines, planted so close together that today, 30 years later, the trees are 40 or 50 feet tall, and in most places have grown so close together that you can't walk

between them. This new even-age artificial forest or tree plantation as it is sometimes called, is more dangerous, in terms of wildfire risk, than the natural forest it replaced, as the trees are not naturally spaced apart from each other with some open areas as before but are densely packed for maximum timber production and carbon sequestration. The current artificial forest is now a solid mass of one of the most flammable species of pine in the world and stretches for as far as the eye can see on both sides of the highway. This is the proposed site now for the Fountain Wind project, where turbine pads would be carved out of the surrounding forest--possibly the most dangerous site, from a wildfire perspective, ever proposed for a wind farm. The project site is rated by CalFire as the highest fire risk severity zone or area in the entire State of California. It was the site of a catastrophic wildfire once before in 1992 that burned much of the nearby towns of Montgomery Creek and Round Mountain to the ground, including hundreds of homes.

As far as we know, this is the only proposed wind turbine project in the world that was named after a catastrophic wildfire on the same site. "Fountain Wind" was named after the "Fountain Fire." And today, the site presents a greater risk of catastrophic wildfire than it did when it burned before in 1992, because it is now covered with densely packed, highly flammable Ponderosa Pines that comprise a giant timber plantation, and the trees are dozens of feet tall and still growing, and their branches are in most places intertwined with each other. Below them are ladder fuels, and any wildfire there will quickly spread through the canopy to comprise a catastrophic fire of tens of thousands, and more likely will grow to hundreds of thousands of acres, if the fire, whether sparked my lighting, downed power lines, or the turbines themselves, cannot be quickly contained by air tankers.

The CEC, like the Shasta County Planning Commission and Board of Supervisors before it, has received testimony and evidence from aerial firefighters, stating in no uncertain terms, that aerial tankers need to drop retardant from a height of 150 or 200 feet above the ground to be effective. The proposed wind turbines would be over 600 feet tall. It is therefore an uncontested fact that the turbines would make an area of tens of thousands of acres essentially a no-fly zone for air tankers and helicopters in the case of a wildfire in or near the Fountain Wind turbines. The turbines themselves are proposed to be spread over an area of several thousand acres, but because these large air tanker jets need a large area before a drop to get down to a low enough elevation to be effective, and room after a drop to rise back to a higher elevation, the reality is that a much larger area than just the turbine field will become unable to be accessed by the large air tankers in a wildfire situation. Add to that the high winds and smoke that almost always accompany a catastrophic wildfire (and this is an area of high winds, which is why they want to build wind turbines there) and you have a catastrophe in the making. It is not a question of if, it is only a matter of when. Shasta county has experienced several catastrophic fires, just in the last five years, and this very site was already the site of a catastrophic fire in 1992. The Fountain Wind project, if allowed to be built, would present thousands of additional potential ignition sources, including thousands of truck trips through the forest, miles of additional power lines and electrical infrastructure, and then the turbines themselves, and wind turbines have and do catch on fire. Indeed, another project related to the developer behind the Fountain Wind project—a project in the State of Washington had one of its turbines catch on fire and started a wildfire in Washington State (the Juniper Fire) while the Fountain Wind permit application was pending

in Shasta County, just a few years ago (this would be an interesting subject for an information request by the CEC to Fountain Wind).

The aerial firefighters have testified before the CEC, as they did in the proceedings in Shasta County, that the very existence of the wind turbines would make the local communities indefensible to wildfire. To be more blunt, people are going to die. The paramount issue here is public safety, not environmental harm, though a catastrophic wildfire that was either caused by the project, or which, even if sparked by lightning, could not be contained quickly due to the no-fly zone created by the existence of the turbines, would also present catastrophic environmental harm too. And of course, the fire would release far more carbon into the atmosphere, accelerating climate change, than the project could have ever hoped to offset. And, as noted, when the catastrophe occurs, it is highly likely that many innocent men, women, and children will be burned alive.

This is not hyperbole. In the Camp Fire, in Paradise, not that far away, over 80 people died, most burned alive because they could not get out in time. In the Carr fire in Shasta County, eight people died, including a fireman, utility worker, and other innocents. In the recent Zogg fire in Shasta County, four people, including women and children who could not get out in time, were burned alive. PG&E paid Shasta County an over $50 million settlement for that fire alone just a few months ago, as reported in the *Record Searchlight*. The claims against PG&E for other electrical-caused wildfires in its recent bankruptcy were in excess of $50 billion. And of course, most recently, in Maui, Hawaii, another catastrophic wildfire caused by a downed electrical line burned the town of Lahaina to the ground, killing hundreds of people. They are still searching for and trying to count all the burned bodies there.

So when the experts here, the aerial firefighters who fly the air tankers out of Redding, and have fought hundreds of fires from the air in their careers, testify that the turbines will make the local communities indefensible to wildfire, and you already know that a catastrophic fire on the same site 30 years ago burned those same communities to the ground, you need to understand that what this means is that innocent people are very likely going to die if this project is built and the inevitable fire happens, and it can't be contained quickly from the air, because the turbine field impedes or completely prevents aerial attack on any fire in that area.

Why is that legally significant on the issue of jurisdiction, and the additional reasons why this application should be denied or dismissed before it is ever deemed complete? Because these very issues have already been thoroughly vetted and decided against the project by Shasta County after five years of proceedings that legally cannot and need not be duplicated again now at the CEC.

First, as presented in the letter briefs by Shasta County and San Bernardino County, AB 205 allows an applicant to choose to go through the permitting process either at the local agency, in this case Shasta County, or to "opt in" and proceed instead, to apply for a permit from the CEC—but not both, and certainly not in serial fashion, to be denied in one forum, and then present the same project for approval in the other forum. The arguments why AB 205 itself precludes the applicant from applying to the CEC after seeking a permit from Shasta County, and being denied, are aptly stated in the briefs submitted by Shasta and San Bernardino counties, and warrant dismissal or denial by the CEC for the reasons stated in those briefs alone.

But there are also several separate, and independent reasons why such immediate dismissal/denial is warranted.

In addition to lack of jurisdiction, the present (incomplete) application to the CEC is barred by collateral estoppel and res judicata. Connectgen went through a complete administrative proceeding seeking a permit for the same project in Shasta County, including a complete CEQA review—a CEQA review that it now proposes to duplicate before the CEC. Connectgen "actually litigated" (as required for collateral estoppel) the same issues in the Shasta County proceeding that it seeks to re-litigate now, and those very same issues were previously decided against it, so it is just trying now a "do over' in another forum. Its attempt to do so should be barred by collateral estoppel.

When the permit was denied by the Shasta County Planning Commission, Connectgen filed a formal appeal of that decision to the Shasta County Board of Supervisors, and prosecuted that appeal to a final decision by the Board of Supervisors, who, after de novo review and a public hearing, also denied the permit application and refused to certify the EIR because, among other things, its discussion of wildfire risk and impacts was woefully inadequate (if not false and misleading on the issue of aerial firefighting as shown by the testimony of the aerial firefighters in the public hearings in Shasta County, and who also recently made the same points in a letter to the CEC). The decision to deny the permit by the Shasta County Board of Supervisors is now final, and was never challenged in court by Connectgen. It therefore has the same effect as a final judgment for purposes of collateral estoppel and res judicata. Shasta County was at the time the "lead agency" under CEQA with exclusive jurisdiction over the matter, as AB 205 had not been passed by the time of the final conclusion of those proceedings.

Even if a court were to determine for some reason that the CEC has jurisdiction to consider these issues under AB 205 again now (ignoring the plain language of that statute), the present application would still be barred by collateral estoppel and res judicata, as Connectgen is

simply seeking to re-litigate the very same issues that it previously litigated in the proceedings in Shasta County, which decisions were never challenged in court, any such challenge being time-barred now, and therefore such decisions became and still are final.

So first, the present application is barred for lack of jurisdiction under AB 205.

Second, it is barred by collateral estoppel and/or res judicata.

And third, the present application is also barred by CEQA.

The application is barred by CEQA because the applicant went through a full CEQA review in Shasta County, and when the permit application was denied by the lead agency with exclusive jurisdiction over the Project for CEQA purposes, Connectgen's remedy was to present any CEQA challenge in court under the provisions of CEQA applicable to such challenges, but Connectgen failed to do so, and any such challenge now would be time-barred under CEQA. Since the statute of limitations has now run on any CEQA challenge, the adverse decision by the Shasta County Board of Supervisors is now final for CEQA purposes. The present application before the CEC may be seen in this light as nothing more than a disguised and time-barred CEQA challenge, or put another way, an attempt at a "do over" under CEQA, after the statute of limitations has already run. The same policy reasons that preclude a party from re-litigating in a second forum issues that were decided against it in the first forum, which apply to court proceedings, apply here too (such as judicial economy). Indeed, the application to the CEC itself was simply a series of cut and paste excerpts from the prior EIR cobbled together into an application to the CEC with citations or quotes from the prior studies and CEQA materials that were part of the CEQA process in Shasta County that resulted in a final denial of the Project. CEQA itself does not permit a second duplicative CEQA process such as

this, and AB 205 did not amend CEQA  Put another way, there is no provision of AB 205 that says that a project that was denied by a local agency after a full CEQA review, can be re-litigated or processed a second time before the CEC in the hopes of a different result, and CEQA certainly does not allow this either.

Indeed, AB 205 contains provisions and time periods for CEQA challenges to decisions of the CEC as lead agency under CEQA, including an expedited timetable and expedited preparation of the administrative record for such a court challenge, making clear that the remedy for an applicant after a denial by the lead agency is a court challenge, not to go and try again in front of another agency.  The same court challenge process (absent AB 205's expedited timetable for such a challenge) applied to any challenge by Connectgen to the CEQA review by Shasta County when it was lead agency with exclusive jurisdiction for CEQA purposes, and the adverse decision by Shasta County under CEQA (and otherwise) is now final and cannot be challenged outside of a court proceeding by seeking a permit instead from a different agency.

Fourth, and perhaps most important, the present application is legally barred, and should be immediately dismissed or denied because the CEC cannot make the findings that would be required to be made under AB 205 to approve the permit in the face of the current zoning laws in Shasta County that now include a complete ban on industrial wind turbine projects in all of the unincorporated areas of Shasta County, including the proposed project site, as a matter of law.

Under AB 205, in the face of Shasta County's zoning code, even if the CEC had jurisdiction to proceed, which it does not, and even if the proceedings before the CEC were not barred by collateral estoppel, res judicata, and CEQA, which they are, the CEC still cannot make the

findings under AB 205 required to overcome the ban in Shasta County's zoning code as a matter of law, and therefore should not proceed for all of the following reasons.

With respect to "economic benefit" the CEC cannot make such a finding as a matter of law because Shasta County has already decided that the project would be "detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of the proposed use" (emphasis added). Specific findings were made by the Planning Commission and Board of Supervisors after years of taking evidence and completing a full CEQA review, and after receiving hundreds of letters and receiving oral and written testimony from dozens of experts and the public, including a petition against the project signed by over 2000 residents of the area where the project would be located. Specific findings were made again by the Board of Supervisors and embodied in the current Shasta County Zoning Code to the effect that large wind energy systems, such as Fountain Wind, would be detrimental to the health, safety and welfare of residents of the County for, among other things, wildfire risk and impediments to aerial firefighting, harm to biological resources, aesthetics, and harm to cultural resources including lands held sacred to Native Americans. These findings are supported by substantial and exhaustive evidence, and are formally expressed by the Planning Commission and Board of Supervisors in the formal resolutions of those bodies denying the permit application for the Fountain Wind project, and in formal findings in the resolution supporting the adoption of the current zoning code banning such projects, and expressed as legislative findings in the zoning code itself. Primary among these reasons, and backed by a plethora of evidence submitted to Shasta county officials in the Fountain Wind permit application proceedings, was the extreme wildfire danger and risks posed by the project, both that the project

itself could cause a catastrophic wildfire, and that the existence of the turbines would preclude aerial firefighting efforts to contain a fire even if caused naturally. All of this was and is in the administrative record of the Shasta County proceedings, and the CEC should request a full copy from Shasta County of the administrative record of those proceedings, which we have otherwise asked Shasta County to prepare and submit to the CEC.

There is also a plethora of evidence of the devastating economic impacts to the County that would be caused by a catastrophic fire in such a high fire risk area, including the Fountain Fire 30 years ago on this very site that burned 64,000 acres, 309 homes, and numerous barns, outbuildings, shops, equipment, and businesses. Evidence of the staggering costs of such fires to the County is beyond dispute and is not a close question. Claims by Shasta County against PG&E for the Zogg fire were recently settled for over $50 million in damages to the County, as reported by the *Record Searchlight*. Claims against PG&E from wildfires caused by electrical lines and similar incidents in PG&E's recent bankruptcy totaled some 50 billions of dollars, which is a matter of public record in PG&E's bankruptcy. It is simply not a close question whether the project is a net "economic benefit" to local government. It is not. In fact, if built it will likely cause billions of dollars of damages to the County if and when a catastrophic fire happens again in that same footprint, and will certainly reduce property values, tourism, and tax revenues in the meantime, by making that entire area an unsafe place to live. Homeowners are already finding their homes to be uninsurable due to extreme wildfire risk in that area. A catastrophic fire caused by the project, or a fire which becomes catastrophic because the existence of the turbines impedes aerial firefighting efforts to safely contain the fire, and the attendant loss of entire communities and innocent people being burned alive as a result, makes it abundantly clear that the CEC

could never make such a finding of "economic benefit" here, and therefore cannot make such a finding as a matter of law.

The same is true for any required finding of public "convenience" under AB 205. While that term in AB 205 is not defined and has not yet been construed by the courts, even if it were generously construed by the courts, which is not likely, where, as here, the paramount issue is public safety, and where, as here, the project would make the surrounding area unsafe to live in, this alone, much less the additional mountain of evidence that led to the ban in Shasta County, precludes any finding of public "convenience," regardless of how it's defined. Indeed, specific factual findings have been made in Shasta County, multiple times, by the Planning Commission, by the Board of Supervisors, and in the zoning code itself, that this project would be detrimental to the health safety and welfare of the citizens of Shasta County, for multiple reasons, including catastrophic wildfire risk, harm to wildlife, aesthetics, and harm to cultural resources including land held as sacred to Native Americans, among other things. And there are specific findings, backed by all of the evidence, expressly stating that such projects are banned to protect the public "convenience" too, which is just the opposite of what the CEC would have to find under AB 205 to approve the project in the face of the ban. Shasta County's zoning Ordinance includes Legislative Findings in Section 17.88.335 pertaining to Large Wind Energy Systems, adopted under applicable provisions of the California Constitution, that such projects pose numerous adverse impacts, particularly with respect to wildfire, aerial firefighting, aesthetics, biological resources, and historical, cultural, and tribal resources, and goes on to find that most of the unincorporated areas of Shasta County is designated as High or Very High Fire Hazard Severity Zones, that Large Wind Energy Systems are "incompatible" in the High and Very High Fire Hazard Severity Zones, and that the zoning

code amendments banning such Large Wind Energy Systems are adopted "to protect the public health, safety and welfare or residents from the adverse impacts of large wind energy systems," and further that the zoning code prohibition of large wind energy systems is enacted "in furtherance of the public necessity, health, safety, convenience, and general welfare" (Shasta County Code section 17.88.335, emphasis added). Five years of public proceedings, and thousands of pages of letters, testimony, and other evidence in the administrative record in Shasta County, some of which is also now before the CEC, support these findings unequivocally. Thus, the CEC can never make the required findings under AB 205 to approve this project or any similar project in Shasta County in the face of the current ban in Shasta County's zoning code, as a matter of law.

It remains undisputed that the project is proposed to be located in the highest fire danger zone in the entire State of California, and that the turbines themselves would preclude the single most effective means of containing any fire that may erupt in that area, which is aerial firefighting by means of air tankers. This cannot be mitigated.

Several undisputed facts compel this conclusion, and therefore there is no reason for the CEC to go through a second, duplicative CEQA review. Nothing can change the fact that the project is located in the Very High Fire Severity Zone, the highest wildfire risk zone in the State of California. Nothing can change the fact that the turbines will be over 600 feet tall, and air tankers need to drop retardant from 150 to 200 feet above the ground to be effective. Given turbines spread over thousands of acres of densely packed timber with high winds and smoke, air tankers won't be allowed to fly in that area at all in a wildfire situation. Nothing can change the fact that the project will create thousands of additional potential ignition sources that could spark a wildfire, or that all such potential sources of ignition cannot be

eliminated through any mitigation plan. No matter what mitigation is proposed, the project will still pose several thousand possible ignition sources that could spark a wildfire, including the turbines themselves and the additional power lines and electrical infrastructure that define the project itself. Nothing can change the fact that another catastrophic wildfire in the project area would be economically devastating to the County and the local residents, some of whom would likely be burned alive. This is simply not a close question, and based on these undisputed facts, the CEC can never make the findings required by AB 205 to overcome the opposite findings already made by Shasta County and the current ban in its zoning code.

The "mitigation" proposed by the applicant in the Shasta County proceedings is the same as proposed by the applicant to the CEC—to provide CalFire with the GPS locations of the turbines. It appears that the CEC has already seen through this and understands that this is not "mitigation" at all, in any sense of the word. The purpose of providing turbine locations to CalFire is so that CalFire does not send air tankers to fight a fire in or near the turbines, and so that air tankers or helicopters don't hit the turbines among all the high winds and smoke of a wildfire. In other words, to create a no-fly zone. That is not mitigation, it is an admission that air tankers and helicopters should avoid that area if there is a wildfire there. That is the problem itself, not "mitigation" of the problem. The very existence of the turbines in the highest fire danger zone in the state, where there has already been a catastrophic fire just 30 years ago, and likely will be again, is the problem and it cannot be mitigated. Thus, the findings that the CEC would be required to make under AB 205 to overcome the Shasta County zoning ban, and the previous denials of the project by Shasta County as lead agency under CEQA, cannot be made as a matter of law.

Accordingly, and for all of the foregoing reasons, the currently incomplete application by Connectgen should never be deemed complete and should be dismissed or formally denied in its entirety, forthwith, as a matter of law.

Respectfully submitted,

Steven J. Johnson