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BEFORE THE CALIFORNIA ENERGY COMMISSION

In the Matter of: Fountain Wind Project Opt-In Application for Certification	Docket No. 23-OPT-01

COUNTY OF SHASTA RESPONSE TO AB 205 JURISDICTIONAL COMMENTS

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September 29, 2023

BEFORE THE CALIFORNIA ENERGY COMMISSION

In the Matter of: Fountain Wind Project Opt-In Application for Certification.	Docket No. 23-OPT-01

COUNTY OF SHASTA
RESPONSE TO AB 205
JURISDICTIONAL COMMENTS

The County of Shasta ("County") hereby submits the foregoing supplemental comments into the administrative record in connection with its August 14, 2023, opposition to the California Energy Commission's ("Commission") AB 205 authority over the Fountain Wind Project ("Project") and the County's objections to the August 3, 2023, request by Fountain Wind LLC ("Applicant") to deem the application complete. The County submits these supplemental comments in anticipation that the Commission will review and act on them accordingly. The County also clarifies its opposition and objection based on comments filed by the Applicant, the Concerned Unions for Reliable Energy ("CURE"), and the County of San Bernardino, among others.

The County appreciates that Commission staff in a memorandum submitted September 11, 2023, acknowledged party comments that have been filed on the jurisdictional issue raised by the County and that staff will also fully consider such comments. The County reiterates its objection that the Commission does not have jurisdiction over the Project for the reasons discussed in detail in the County's August 14, 2023, opposition comments. Namely, both the plain language and legislative history indicate that AB 205 was not intended to confer jurisdictional authority over a project that was reviewed in its entirety under the local agency's discretionary review authority

and the California Environmental Quality Act ("CEQA") and was subsequently denied by the local agency. For this and other reasons, the County objects to Applicant's request for a Commission completion determination. In responding to the comments that have been raised in the docket to-date, the County offers additional reasons and supplemental analysis why the Commission does not have jurisdiction or other authority over the application or project.

I. The County Did Not Delay Its Opposition to Commission Jurisdiction and Is Not Estopped from Doing So

Before addressing substantive comments regarding the Commission's authority under AB 205, it is important to correct certain procedural issues raised in comments. The Applicant and CURE claim that the County should have raised its Commission jurisdictional opposition sooner. To begin, opposition to an agency's jurisdiction can generally be raised at any time. The Commission either has jurisdiction over the Project or it does not. There is no theory of law or other argument, and the Applicant and CURE present none, that dictates when a jurisdictional challenge should be raised. There is nothing barring a jurisdictional challenge at this stage of the proceeding and no theory of estoppel applies.[1] In fact, the County raised jurisdictional comments at an appropriate time in the proceeding and such timing was not unreasonable.

As a matter of law, the Commission either has jurisdiction over the Project or it does not.[2] Jurisdiction over any proceeding is conferred by the California constitution or by statute.[3] In this case, AB 205 is the Applicant's basis to claim jurisdiction by the Commission. Among other things, AB 205 provides that an applicant for an eligible facility can opt-in to the Commission's

[1] As raised in the County's *Request for Reimbursement and Itemized Budget*, dated August 14, 2023 (TN251628), the County's attendance at a pre-application meeting, other Commission staff meetings, and participation in Docket No. 23-OPT-01 does not constitute a waiver of its right to challenge or enforce any and all rights and remedies with respect to the Commission's jurisdiction over the Project or the legality or application of AB 205. The County reserves all such rights.

[2] *New Amsterdam Cas. Co. v. Industrial Acc. Comm'n of Cal.* (1924) 66 Cal.App. 86, 89 ("It is apparent that the commission either had or that it had not jurisdiction.").

[3] *Harrington v. Superior Court*, (1924) 194 Cal.185, 188.

certification process for certain renewable energy projects "*in lieu of*" obtaining approval from the local agency with "land use and other related jurisdiction over the proposed site and related facility." There is no indication in either the plain language or the history of AB 205 that the Legislature ever intended that Commission jurisdiction extend to a facility or project that has been previously reviewed (and denied) by a local agency due to the opt-in nature of the legislation. Even if the Commission accepts receipt of an application and begins to review it, such jurisdiction cannot be given, enlarged or waived by any party or stakeholder in the proceeding or by the Commission itself.[4] Basically, as a creature created by the State, the Commission cannot assert its jurisdiction independently from the Constitution or enabling statute.[5] The courts have been abundantly clear that a lack of jurisdiction by an agency "in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties."[6] And when an agency lacks jurisdiction in a "fundamental sense, an ensuring judgment is void, and 'thus vulnerable to direct or collateral attack at any time.'"[7] The notion that an agency has jurisdiction or it does not is a common precept of federal[8] and state administrative law. In this case, the Commission does not have jurisdiction over the Project due to the County's prior review (and denial) of the Project, among other reasons. Therefore, the County is not prevented from raising jurisdictional opposition in this proceeding at the time that it did prior to the application being deemed complete (or rejected, or further deemed incomplete as

[4] *Id*.
[5] *Wilson v. Southern California Edison Co.* (2005) 234 Cal.App.4th 123.
[6] *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660.
[7] *Id.* at 661 (quoting *Barquis v. Merchants Collection Assn*. (1972) 7 Cal.3d 94, 119); see also *Mt. Holyoke Home, LP v. Ca. Coastal Com.*, 167 Cal.App.4th 830 (2008), citing *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660. California case law on jurisdiction began with analyzing the jurisdiction of courts over subject matter, which analysis has been subsequently applied and extended to agency jurisdictional cases. *Mt. Holyoke Home*, fn. 6. "Although our discussion of jurisdiction is in the context of a trial court's jurisdiction over an action, the principles are equally applicable to an administrative agency's jurisdiction. (See *NBS Imaging Systems, Inc. v. State Bd. of Control* (1997) 60 Cal.App.4th 328, 335 ["`court's review of the administrative decision extends "to the questions whether the [administrative agency] has proceeded without, or in excess of jurisdiction . . ."""].).
[8] See, e.g., *General Atomics v. U.S. Nuclear Regulatory Com'n* (1996) 75 F.3d 536, 541.

was the case on August 31 and September 20, 2023), and it is not required to raise it at a particular time.[9]

While the County attended a pre-application meeting in November 16, 2022, it was not required, or was requested, to note objections to the Project and never waived its ability to challenge the Commission's jurisdiction over the Project. The County in fact has raised issues with the Commission's jurisdiction previously in at least one Commission staff meeting where it questioned the basis for the Commission's authority based on the plain reading and legislative intent of AB 205. When the Applicant requested its completion determination on August 3, 2023[10], and the County received notice that Commission staff was moving forward with recommending the application be deemed complete, it filed its formal opposition, and did so in a timely manner. While Commission staff has acknowledged receipt of the application confirming a January 11, 2023, filing date and issued deficiency notices, the full Commission or Commission staff has not otherwise acted on the application in any other way. The County would consider a notice of completion issued by and under the authority of the Commission Executive Director to be the first complete action by the Commission in recognizing that the Project is an eligible facility under the Commission's AB 205 jurisdiction and that the Commission is proceeding forward with the 270-day certification review.

Any delay in this proceeding has been brought on solely by the Applicant in submitting a grossly deficient application. Between January 3, 2023, to January 11, 2023, when the application documents were being uploaded to the docket, the Applicant essentially submitted the same documents and information to the Commission (or in some cases, snippets of those documents) as it did to the County at the time the Fountain Wind Project went through the County's full

[9] *Wilson v. Southern California Edison Co.* (2005) 234 Cal.App.4th 123.
[10] Fountain Wind LLC, *Fountain Application Completion Letter*, TN251479 (Aug. 3, 2023).

environmental review and permitting process pursuant to CEQA and its zoning ordinance. Most of the Project documentation submitted as part of the application here reflect dates that show that they were part of the County's environmental review and permitting process and never subsequently updated. The Applicant made no other changes to the so-called "application" and did not conform to or meet the AB 205 or Commission Exhibit B application requirements for opt-in applications.[11] These and many other deficiencies in the application led Commission staff to initially issue a 243-page deficiency notice along with a lengthy addendum and data request.[12] Indeed, it appears that the deficiency letter was substantially more extensive than any deficiency letter issued in any recent Commission siting docket. The filing of a substantially incomplete application by the Applicant is what has led to any delay in the further processing of the application. Not surprisingly, application incompleteness has been raised in several comments filed in the docket,[13] and an additional deficiency notice, dated August 31, 2023, and data request, dated September 20, 2023, have been issued by Commission staff regarding the lack of a community benefits agreement plan and incomplete information on the mitigation of wildfire risk. As of the date of this comment submittal, *nearly 270 days after the application was received by the Commission*, the application is still deemed deficient.[14]

The Applicant further states that the Commission does not need to address its jurisdiction more formally in a Commission Business Meeting or otherwise and that the plain language of AB 205 provides such jurisdiction. One of the primary issues, however, is whether the Commission has examined its jurisdiction *at all* or just assumed that the agency had jurisdiction. In a meeting

[11] Pub. Res. Code § 25520; 20 C.C.R. § 1877; 20 C.C.R. Div 2 Ch. 5 App. B (Information Requirements for an Application).
[12] Commission Staff, *Determination of Incomplete Application and Request for Information for the Fountain Wind Project* (23-OPT-01) (Feb. 10, 2023) (TN248742); Commission Staff, *Alternatives, Land Use, and Socioeconomics Data Requests inadvertently left out of deficiency letter for Fountain Wind application* (Feb. 13, 2023) (TN248759).
[13] Save Our Rural Town, *Comments by Save Our Rural Town*, TN251380 (July 31, 2023).
[14] Commission Staff, *Staff Response to Applicant Request for Determination of Completeness, Including Wildfire Data Requests*, TN252072 (Aug. 31, 2023).

with Commission staff on June 2, 2023, the County specifically inquired whether the Commission had done any legal analysis as to its jurisdiction over the Project in light of the County's prior review and denial. Commission staff indicated that an analysis had *not* been done. Since that meeting, there is nothing in the existing administrative record, the Applicant's crosswalk matrix, or Commission application deficiency notices regarding the Commission's jurisdiction *vis-à-vis* the County's prior review and denial of the Project. No analysis has been done, or if it has, an analysis has not been made public. Therefore, the County can only conclude that if anything, the Commission has made merely a bald presumption of jurisdiction, and that continued review of the application for completeness is being done under that presumption.

II. The County Can Properly File Comments Throughout the Fountain Wind Project Proceeding

As an additional procedural matter, the County is entitled to file comments now and throughout the Project proceeding. The Applicant states that the County's opposition is "styled as a motion," and suggests that the opposition and objection is somehow improper in that Docket 23-OPT-01 is not an adjudicatory proceeding. In stating this, the Applicant suggests that the County, and other interested persons, are precluded from filing any comments on the application at this stage of the proceeding or that any comment drafted in the form of a motion or resembling formal opposition to the Commission's jurisdiction or the existing review of the application and its submittals is barred. The Commission has not adopted any formal rules or orders in place that prescribe the timing of comment submittals. The County, and any interested person, can file comments at any time. This is also the opinion that has been provided to the County by Commission staff. Furthermore, under AB 205 and existing Commission regulations, the County is required to be notified of the application and it is required by law to review and comment on the application due to the County's underlying discretionary authority as the local agency. The County is also, unquestionably, an agency that has relevant information for the Commission. The County

has discretion to evaluate and determine the timing and scope of submissions it wishes to submit to the docket. It would be unreasonable to demand or expect that the County comment on matters which the Commission has declared incomplete or for which the County may otherwise wish to reserve argument before the Commission.

III. The Commission Has Maintained a Precedent of Evaluating Its Jurisdiction and Should Do So in this Proceeding

The Applicant desires that the Commission move forward with the application notwithstanding the County's jurisdictional claims on the grounds that (1) there is no need to evaluate jurisdiction in a Business Meeting, (2) staff has preliminarily determined that the Project meets AB 205 eligibility requirements, and (3) the County has not raised a claim that the Project fails eligibility requirements. None of these objections are valid.

First, there is significant precedent wherein the Commission has addressed its jurisdiction through formal orders, and sometimes after written, publicly available opinions have been issued by its general counsel. This has been the case with petitions filed with the agency requesting that the agency assert jurisdiction over a project, as well as in proceedings where its jurisdiction has been questioned.[15] Accordingly, the County appropriately requests that the Commission follow its prior precedent and practice, pause its review of the application for completeness, and act on the County's request for a jurisdictional determination. Certainly, an agency must find that it has jurisdiction prior to taking action on a matter.[16] If the Commission had denied a project under its

[15] See *e.g.,* In re San Francisco Bay Chapter of the Serra Club v. GWF Powers Systems, Inc., *General Counsel's Opinion on the CEC's Jurisdiction Over GWF's Five Proposed Powerplants in Contra Costa County*, Docket No. 88-C&I-2 (June 20, 1988); In re Jurisdictional Investigation of the Los Angeles Department of Water and Power's Harbor Generating Station Repowering Plant, Order No. 90-0725-01, Docket No. 89-C&I-3 (July 25, 1990); In re Applied Energy, Inc.'s Four Energy Powerplants, Order No. 88-0713-01, Docket No. 88-C&I-4 (July 13, 1988).

[16] Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280. "As respects right to prohibition, a tribunal generally has jurisdiction to determine its own jurisdiction, but once a tribunal, judicial or administrative, has made such determination of issue and has acted to assume jurisdiction of the cause, the rule no longer has any meaning, since jurisdiction to determine has been fully exercised by determination in favor of jurisdiction over cause and the question is no longer of jurisdiction to determine but of jurisdiction to act, and jurisdiction to act is always a subject of inquiry by a higher court."

AB 205 authority potentially finding that there was no net positive economic benefit and that environmental impacts were significant and could not be mitigated or overridden, and such project was re-submitted to the local agency with underlying land use authority, the Commission and other parties to the first action would at a minimum (1) call into question (and even oppose) the second and duplicative review of a denied project, or (2) contend that the Commission's prior review under the plain language of Public Resources Code Section 25545.1 preempted further review by the County. The local agency in that case would then as a matter of proper policy proceed to determine its jurisdictional authority and do so through a public process with public comment.

Second, even if staff at the Commission has determined Project eligibility under Public Resources Code Section 25545 and, therefore, arguably determined jurisdiction as part of a technical review on whether an application is complete or not, Commission staff does not, itself, have the authority to determine the legal jurisdiction of the Commission. This determination can only be made by the full Commission itself. Therefore, a technical determination in a completeness review is insufficient to establish the jurisdictional issue being raised by the County, and as a legal matter, can only be done by the Commission.

Third, the County has raised a claim that the Project fails to meet eligibility requirements by virtue that the plain meaning and legislative history of AB 205 (*i.e.*, Public Resources Code Sections 25545 and 25545.1) do not support Commission jurisdiction over a project previously reviewed and denied, and for the supplemental reasons and analysis provided herein.

IV. AB 205 Is in Conflict with the California Constitution as it Is a Violation of Separation of Powers for the Statute to be Applied to a Project Previously Reviewed and Denied by the County

Before turning to the substantive comments raised by the Applicant and CURE regarding the legislative intent of AB 205, the County offers supplemental reasons why the Commission cannot move forward with its review of the Project and must reject the Project. If AB 205 is

intended to apply to a project that has been previously reviewed and denied by the local agency with discretionary authority over the site and related facility, and such statute of limitations has passed on the local agency's denial, then AB 205, as with any law purporting to effectively modify a final adjudicatory action and applicable statute of limitations, or nullify or extend the administrative remedies period, is void and in violation of the constitutional separation of powers found in the California Constitution.

The California Constitution divides power equally among three branches of state government, which is comprised of the legislature, executive branch, and courts.[17] Although there is a certain overlap and interdependence among the three branches of government, each is constitutionally vested with certain core or essential functions that the others cannot perform.[18] Protection of these functions is guarded by the separation of powers doctrine and is embodied in the California Constitution that states that one branch of state government may not exercise the powers belonging to another branch.[19] The purpose of separation of powers is to prevent both the concentration of power in a single branch of government and overreaching by one branch against another.[20] Administrative and local agencies, depending on how they are formed and what powers they are given, are comprised of the three branches of government and are bound by the same separation of powers limitations in exercising their powers.

A core function of the legislative branch is to make statutory law, which includes weighing competing interests and determining social policy. A core function of the judiciary is to resolve specific cases and controversies between parties. As part of that function, the courts interpret and apply existing laws, such as exhaustion of administrative remedies, decision finality and statutes

[17] Cal. Const., art. IV, § 1; art. V, § 1; and art. VI, § 1.
[18] *People v. Bunn* (2002) 27 Cal.4th 1, 14, 16 (*Bunn*).
[19] Cal. Const., art. III, § 3; *Bunn*, pp. 14, 16; *Mandel v. Myers* (1981) 29 Cal.3d 531, 539 (*Mandel*).
[20] *Bunn*, p. 16.

of limitation.[21] Separation of powers principles compel the courts to carry out the legislative purpose of statutes and limit the courts' ability to rewrite statutes where drafting or constitutional problems appear. Those same principles also constrain legislative influence over judicial proceedings. When cases become final for separation of powers purposes, the Legislature may not change or interpret a statute or otherwise bind a court to an after-the-fact declaration of legislative intent. While the Legislature may amend a statute or otherwise change the law in a given area, it applies the changed law to pending and future cases. The amended statute or change in law may not re-adjudicate or otherwise disregard agency decisions or judgments that are already final.[22] .

In *People v. Bunn*,[23] the California Supreme Court held that if a complaint is dismissed because the statute of limitations has run, and the Legislature later changes the law to allow such action after the time for appeal has expired, the Legislature's attempt to revive the action violates the separation of powers doctrine. Such law is deemed to be "retroactive legislation," which "prescribes what the law was at an earlier time, when the act whose effect is controlled by the legislation occurred . . ."[24] The *Bunn* court based its state constitutional rule on a prior decision by the U.S. Supreme Court that also addressed the issue of Congress retroactively changing a prior judicial decision. "When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made in a particular case.'"[25] Such legislation is a "clear violation of the separation-of-powers principle . . ." Once a judgment becomes final, "Congress may not declare that the law applicable to that very case was something other than what the courts said it was."[26] In that circumstance, use of the later

[21] *Id.* pp. 14–15.
[22] *Id.* at pp. 16–17 (citing to Mandel, p. 547).
[23] (2002) 27 Cal.4th 29, 115 (*King*).
[24] Plaut, 514 U.S. at p. 225.
[25] *Id.*
[26] (Id. at p. 227, 115 S.Ct. 1447 original italics.).

law constitutes an impermissible retroactive attack on a judgment constitutionally subject to reopening only under the earlier law."[27]

In the present matter, the Project was reviewed and denied by the County, and the denial for purposes of the statute of limitations was effective October 26, 2021. Because the County's underlying action involved issuance of a use permit, the County's review is considered as quasi-adjudicatory.[28] Under the relevant statute of limitations contained in Code of Civil Procedure Section 1094.6(b), the Applicant had 90 days to file a writ of mandate in California superior court. The Applicant did not pursue its only remedy at law, and as such, the County's decision was final and is considered a final adjudication.[29] Should the Commission then seek to apply jurisdiction over the Project, it would, in effect, be interpreting and applying AB 205 in an unconstitutional manner because it is nullifying the final adjudicated decision of the County and nullifying and/or extending the applicable statute of limitations that applies to the County's determination on the Project. The Applicant then has an end-run around the time-bar prescribed by Code of Civil Procedure Section 1094.6. Furthermore, the Applicant filed its application for the same, unchanged Project and for an identical certification (*i.e.*, permit) *albeit* in a different venue, and as the courts have held, there are no new material facts or circumstances that would rescue the prior Project.[30] Therefore, Commission AB 205 jurisdiction would constitute retroactive legislation that

[27] (Id. at p. 26, 115 Cal.Rptr.2d 192, 37 P.3d 380.)

[28] *Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 57 Cal.App.4th 997; *Petrovich Development Company, LLC v. City of Sacramento* (2020) 48 Cal.App.5th 963. "In contrast, quasi-judicial decisions (also called adjudicative or administrative decisions) involve individual applications that are being considered for approval. Examples include granting a conditional use permit or a tentative map application. Here, broad policies are being applied to a specific parcel or project. The procedural requirements are more stringent because the local agency is acting more like a court: there is a hearing, evidence is taken, and the decisionmaker is vested with discretion to determine the facts and make findings." *Save Savita Because Sudberry Won't v. City of San Diego*

[29] The County's denial was both a final decision as a local agency and a final adjudication with the County acting in a quasi-adjudicatory fashion in reviewing the issuance of a conditional use permit. In other words, the County was exercising its judicial powers in acting on a permit application, and AB 205 would disturb the final decision of the County as an adjudicatory (judicial branch) body.

[30] As has been previously demonstrated by the County, nothing has changed about the Project and the same Project the County reviewed has been re-submitted and re-packaged to the Commission, to which the courts have held that "When the original judgments against appellants in this action were entered, *there were no new facts or alternate statutes of limitations available to rescue their claims*. Instead, to paraphrase *Plaut*, this case involves judgments that

would reverse the County's Project determination. The Commission then is disregarding the final decision and statute of limitations and allowing the matter to be re-adjudicated.[31]

Even more troubling is the scenario in which the Applicant, in 2021, timely filed a writ of mandate within the 90-day statute of limitations and litigated the County's denial in the courts, and the courts upheld the County's decision. Under that scenario, the theory that the Commission jurisdiction under Public Resources Code Sections 25545 and 25545.1 attaches at the time the agency receives the application[32] would effectively render a court's final decision null and void, or in effect extends the statute of limitations to correspond to the Commission's review and decision process. In other words, a court's final adjudication on the Project would be meaningless because the Commission thereby resurrect the Applicant's claims in direct opposition to a court order. This result is the inevitable, logical extension of applying Commission AB 205 jurisdiction to the Project. In its most basic sense, any application of AB 205 that permits the retroactive reconsideration of a previously denied project is a violation of constitutional separation of powers.

Commission jurisdiction over the Project would also be in conflict with the doctrine of exhaustion of administrative remedies by creating, in effect, an appeal of the County's review to the Commission with the Commission exercising its own quasi-adjudicatory authority of the application for certification.[33] This also violates separation of powers. Prior to resorting to the

the Legislature subjected to a reopening device that did not exist when those judgments were pronounced. Once final, 'a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.' When taken as a whole, this passage defines finality for separation of powers purposes as the point at which the last court within a judicial system rules on a case. Once that occurs, a legislative body may not revive that very judgment by amending the statute of limitations." *Perez v. Roe* (2006) 146 Cal. App. 4th 171 (emphasis added).

[31] "Only those judgments that represent the last word from the entire judicial system are final under Plaut. Because the judicial branch consists of a hierarchy of courts—from district courts and appellate courts to the Supreme Court itself—a judgment has no conclusive effect for separation of powers purposes until the time for appeal has passed, or an appeal has been pursued and the review process is completed." Id. at 179.

[32] Applicant Comments, pg. 2; CURE Comments, pg. 2.

[33] *Sommerfield v. Helmick* (1997) 57 Cal.App.4th 315, 320 ("The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function."); 2 Cal.Jur.3d, Administrative Law (3d ed. 2011) Administrative Adjudication, § 367 (administrative agency's adjudicatory powers are "quasi-judicial").)

courts, the Applicant was required to exhaust all administrative remedies with the County.[34] Under the doctrine, an administrative remedy is exhausted only upon "termination of all available, nonduplicative administrative review procedures."[35] The primary reason for the requirement to exhaust all remedies are concerns for "favoring administrative autonomy" and judicial efficiency "i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary."[36] In this case, the Applicant has exhausted its remedies with the County, and subsequently with the courts, and any review by the Commission would result in administrative compulsion and regulatory inefficiency by nullifying the finality of the County's decision and extending additional administrative remedies through the Commission. Moreover, it requires the County, per the requirement under AB 205, to, again, review and submit comments on the Project, forces the public to do so, and re-litigates the EIR.

Comments have been submitted to the Project docket stating that AB 205 was intended to promote the State's renewable energy and carbon-free goals by providing an expedited means to develop large, utility-scale projects.[37] The Applicant has also (incorrectly) suggested that the Legislature enacted AB 205 as a response to local agency project denials and moratoria.[38] Whatever the ultimate goal of AB 205 is and how laudable it may be, the courts have held that the consequences of violating separation of powers far outweigh any "good intentions" by the Legislature or the legislative body in enacting policy.

> "Allowing the Legislature to assume such power simply because a judgment on statute of limitations grounds was not on the merits

[34] *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292; see *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1148.
[35] *California Correctional Peace Officers Assn. v. State Personnel Bd.*, p. 1151; see also *Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 933 (exhaustion requires agency decision of "entire controversy"); *People v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 124 (administrative process must "run its course"]; *Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 432 (exhaustion requires "a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings").
[36] *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391; see also *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501.
[37] CURE Comments, pg. 4.
[38] Applicant Comments, pg. 1.

> could have far reaching consequences. Although the Legislature was guided by understandable intentions in this case—recognizing the need for an extended and revived limitations period due to the delayed discovery of harm that is inherent in childhood sexual abuse—the separation of powers doctrine 'is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, such as the legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.' (*Plaut*, supra, 514 U.S. at p. 228, 115 S.Ct. 1447 original italics.) *While it might seem a far-fetched notion, if the Legislature has the power to undo the class of judgments covered by section 340.1, subdivision (c), then it would also be free to revive any cause of action, no matter how old, that had been dismissed under a previously existing statute of limitations. The constitution does not permit such an extension of legislative power.*"[39]

Therefore, in reviewing the legality of AB 205 and its jurisdiction thereunder, the Commission should not focus on the purported goals the bill serves or what the Commission's mission or charge is under the Warren Alquist Act, but on the constitutional bedrock of the separation of powers. In doing so, the Commission should reject the application accordingly.

V. The Plain Language of AB 205 Does Not Support Commission Jurisdiction Over the Fountain Wind Project

Comments filed by the Applicant and CURE supporting the Commission's jurisdiction look narrowly, and somewhat singularly, at the definition of "facility" set forth in Public Resources Code Section 25545 and at the process for submitting an application under Public Resources Code Section 25545.1. Although Commission staff has determined in its completion review that the Project is a "facility" contemplated by AB 205, any project eligibility determination only addresses the technical aspects of the Project and the 50 MW threshold that a "terrestrial wind electrical generating powerplant" has to meet to qualify as a "facility" under Public Resources Code Section 25545(b)(1); such a determination does not address the legal issue of jurisdiction over a project

[39] *Perez v. Roe* (2006) 146 Cal. App. 4th 171, 189 (emphasis added).

that was previously reviewed and denied. There is nothing addressing that issue in the opt-in application requirements. Furthermore, the Applicant has not submitted the record disclosing the County's review and denial of the Project as part of any analysis of other governmental approvals required by 20 C.C.R. Section 1877.

The Applicant and CURE also raise several arguments as to why the plain language of Public Resources Code Section 25545.1 provides for Commission jurisdiction over the Project: They assert that (1) under Public Resources Code Section 25545.1(a) Commission jurisdiction is conferred immediately upon receiving an application for an opt-in project, and that exclusive power is provided to certify the site with respect to a new or existing facility; and (2) certification is in- lieu of the requirement for any local permit and supersedes any ordinance, regulation or prior County denial; and (3) the opt-in program did not exist prior to 2017 when the application was first submitted to the County or in 2021 when the County reviewed and denied the Project, and the Applicant cannot be denied the ability to opt-in to a program that did not exist; and (4) the Legislature would have carved out a local government's prior review and denial if it intended such an exception.

These arguments are flawed as they seek to apply the statute retroactively in a manner that is inconsistent with prior case law and misstate the effect of the Commission's certification authority under Section 25545.1 and its preemption powers. Public Resources Code Section 25545.1(a) states that upon receiving an application for an eligible facility, the Commission shall have exclusive power to "certify the site and related facility, whether the application proposes a *new* site and related facility or a change or addition to an *existing* facility." Section 25545.1(b) goes on to provide that "the *issuance* of a certificate by the commission for a site and related facility . . . 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 the 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."

Section 25545.1 applies on a prospective basis, and cannot be interpreted or applied retroactively to the Project or to the County's prior review and denial of the Project. As the courts have held, "legislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention."[40] In accordance with Civil Code Section 3[41] and other court precedent, "in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application."[42] Section 25545.1 applies to new and existing sites. In this case, however, the Project is neither a new nor an existing site, but a Project that was proposed and denied and is now barred from further review by the Commission. And while Commission's jurisdiction may apply, on a going-forward basis, to an application for a "new" project not previously proposed, the statute does not confer power on the Commission retroactively to review the same project that existed prior to the enactment of AB 205. The Applicant and CURE contend that the Legislature would have carved out local agency jurisdiction had it intended that the Commission not have jurisdiction over such projects, but that argument is flawed, as it is just the opposite. Had the Legislature intended for AB 205 to apply to Projects like the Fountain Wind Project, it would have expressly stated that in a clear manner. "[A] statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive

[40] See, *e.g.*, *Fox v. Alexis* (1985) 38 Cal.3d 621, 637; *White v. Western Title Co.*, 40 Cal.3d 870, 884; *Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590; *Baker v. Sudo* (1987) 194 Cal.App.3d 936, 943; *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1156; *Glavinich v. Commonwealth Land Title Ins. Co.* (1984)163 Cal.App.3d 263, 272.
[41] "No part of it is retroactive, unless expressly so declared."
[42] *Myers v. Philip Morris Companies, Inc.*(2002) 28 Cal. 4th 828, 844–45; *Evangelatos v. Superior Ct.*, (1988) 44 Cal. 3d 1188, 1208–09.

application."[43] There are several examples where the Legislature has done so.[44] There is no clear and unavoidable expression of retroactive intent, however, in either the plain language of the statute or in the legislative history.

While Section 25545.1(a) states that the Commission has exclusive certification authority upon receipt of an application, it is a different issue altogether of whether the agency can determine the matter at all and exercise its certification authority. For example, if a court or adjudicatory body has determined that a prior project denial was validly taken, then the agency could review the application for jurisdiction and the effect of the prior action but it could not override the court or adjudicatory body.

The Applicant and CURE also mischaracterize what AB 205 states with respect to the Commission's preemption authority and when it applies. They go to the extreme: claiming that upon the filing of an application, the County's prior review and denial process is void. "*Under AB 205, Shasta County's denial of a conditional use permit for the Fountain Wind Project in 2021 is 'superseded*.'"[45] While the Commission has authority to review an application for a jurisdiction determination,[46] it is only with the issuance of a certificate, however, that the Commission can preempt any "permit, certificate, or similar document" required by a local agency. And, it is only with the issuance of a certificate that the Commission's power supersedes the local agency authority (on a prospective basis). Furthermore, the application has been deemed incomplete and has been and continues to be deficient in several material respects, including a community benefits plan and the adequate mitigation of wildfire risk. The Commission, and no agency for that matter, has preemptive authority over local agency authority based on an incomplete and deficient application. Here, the application is being reviewed for completeness, which is arguably more

[43] *Id*.
[44] See, *e.g.*, Fin. Code § 4058.5; In re Marriage of Buol, 39 Cal. 3d 751, 756
[45] Applicant Comments, pg. 3.
[46] *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.

authority than the Commission has prior to a jurisdictional determination, and is currently incomplete and deficient. No certificate has been issued, and the Commission has no authority to invalidate the County's review and denial of the Project in arrears or otherwise assert any other authority over the Project.[47] In fact, the Applicant recognized in its Application Executive Summary that preemption occurs at certificate issuance.[48] If the Legislature had intended for the Commission to have power over prior Projects or assert preemption retroactively, the Legislature is required by law and the courts to clearly and unavoidably express that intent. The Legislature has not done so.

Even assuming that the plain language of AB 205 supports Commission jurisdiction over the Project, as has been previously raised by the County, and now by San Bernardino County, a literal interpretation of Section 25545 and 25545.1 that preemptive jurisdiction over the Project is conferred only on the Project being 50 MW or greater and an application being received would result in absurd consequences that the Legislature did not intend. As the courts have held, if statutory language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.[49] As San Bernardino County points out, Commission jurisdiction over the previously reviewed and denied Project would be wasteful by duplicating review and consuming the resources of the various state and local agencies to re-evaluate matters already decided. A second review would invite manipulation leading to overlapping evaluations, inconsistent results, and forum shopping. Findings by the prior agency would be "hollow" on such determinations as net positive economic benefit. And, as previously discussed by the County, final decisions that are now barred by the

[47] Analogously, the U.S. Supreme Court has held that an agency cannot apply rules retroactively without Congress expressly granting that authority. *Bowen v Georgetown University Hospital* (1988) 488 U.S. 204.
[48] Application, Executive Summary, pp. 16-17, fn 1(Jan. 4, 2023) ("Indicates that permit would be superseded by CEC approval of the project under the opt-in program").
[49] *Smith v. LoanMe, Inc.* (2021) 11 Cal5th 183, 190.

statute of limitations or even a final decision of a court (even the Supreme Court) would be overridden with exhaustion of administrative remedies extended or rendered meaningless. Finally, the entire concept of opt-in is absurd if a project can avail itself of local review and then during such review or thereafter turn around and choose (again) to be subject to another approval process. There is absolutely no precedent or analogous federal or state law scheme of an "opt-in" permitting system or a similar system of preemption where an applicant remove itself from the review of one agency and trigger another agency's jurisdiction by filing a (deficient) application because such a parallel system would result in absurd and nonsensical consequences.

VI. The Legislative History of AB 205 Does Not Support Commission Jurisdiction Over the Fountain Wind Project

The Applicant incorrectly states that "the legislative history shows the Legislature enacted AB 205 to counteract a recent spate of permit denials, moratoria and zoning amendments by local agencies preventing the development of renewable energy facilities."[50] The legislative history and the news reporting on AB 205 say *absolutely nothing* to the effect the bill was enacted to address local government review of non-fossil-fueled power-plants and energy storage facilities.[51] This statement by Applicant merely serves as a red-herring to support its purely political/lobbying position that the Project was somehow improperly denied, and to paint the County and other local governments as being in opposition to renewable energy. The Project was extensively reviewed by the County with an administrative record that exceeded 2,000 pages, and was denied based on its environmental impacts. To the contrary, the County is in the process of reviewing other renewable energy projects under its local authority. It has only determined that "large wind energy

[50] Applicant Comments, pg. 1.
[51] This instead appears to be a re-statement by the law firm representing the Applicant made at the time AB 205 was enacted and is not reflected in the legislative history. https://www.coxcastle.com/publication-california-opens-new-permitting-pathway-for-renewable-energy-projects.

systems" in the unincorporated area are prohibited due to the significant high fire risks and thus environmental impacts of such projects.

Setting aside the Applicant's lobbying, the legislative history of AB 205 *onl*y addresses the streamlining of the CEC's existing (thermal) certification process, shortening such certification review period to 270 days. If the Legislature intended to address prior local government actions in the manner characterized by the Applicant, it would have stated this concern in the legislative history or attempted to completely preempt all local government review as the Legislature did in the Warren Alquist Act for review of certain thermal projects for which the Commission has exclusive authority. In fact, there is little legislative history for AB 205 due to that it was inappropriately enacted through the budget trailer process previously discussed in the County's August 23, 2023, comments. But it is beyond dispute that prior iterations of AB 205 note the "opt-in" purpose of the legislation for a person to select one path or the other.[52]

CURE notes that the Legislative Counsel's Digest supports its plain language interpretation of Commission jurisdiction that the bill "would authorize a person proposing to construct those [eligible] facilities, no later than June 30, 2029, to file an application for certification with the Energy Commission" and "would, except as provided, specify that the issuance of the certification is in lieu of any permit, certificate, or similar document required by a state, local, or regional agency, or federal agency, to the extent permitted by federal law, for those facilities." This statement by Legislative Counsel, though (and other legislative statements cited by CURE), is nothing more than a verbatim restatement of the existing language of Section 25545.1, and does not provide any information regarding the intent of the Legislature other than that Commission certification is to be a consolidated approval process (prospectively). Contrary to CURE's

[52] As stated in the County's prior comments, the law is replete with examples of "opt-in" where the person is provided the choice to pick one option to the foregoing of the other. See, *e.g.,* Ins. Code § 38.6; Civil Code § 1798.120; Wel. & Inst. Code § 14045.19.

assertion that this language is consistent with 1) the Warren Alquist Act's purpose to prevent delays in the provision of energy, and 2) the California Attorney General's Opinion on Commission preemption of thermal power plants,[53] the legislative history of AB 205 says nothing about these purposes or draws any comparison to the Warren Alquist Act. In fact, the Legislature specifically kept local government review intact by allowing an "opt-in" application and not expressly preempting local agencies. There is absolutely no support in the legislative history that the Legislature intended for AB 205 to apply to a previously reviewed and denied project or that the legislation was to be applied retroactively.

VII. Conclusion

For all the foregoing arguments and authorities, and the arguments and authorities presented in comments opposing the Commission's jurisdiction, the County of Shasta respectfully requests that the Commission hold a Business Meeting and reject the application.

Dated: September 29, 2023

Respectfully submitted,

By: _____
Ryan M. F. Baron

[53] The California Attorney General's Opinion cited by CURE is a 1975 opinion issued at the time the Warren Alquist Act as enacted. The opinion discusses the Commission's *exclusive* preemption authority over nuclear power plants. While it analyzes the same language where the Commission maintains preemption authority upon the issuance of a certification, it does not discuss and is not illustrative as to the intent of AB 205, particularly as to retroactivity or if jurisdiction attaches at the time an application is received.