

DOCKETED

Docket Number:	23-OPT-01
Project Title:	Fountain Wind Project
TN #:	254155
Document Title:	Response to the County of Shasta's Request for Investigation into Fountain Wind LLC regarding Fountain Wind Project
Description:	N/A
Filer:	Ngoc Tran
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	1/26/2024 10:57:01 AM
Docketed Date:	1/26/2024



**CALIFORNIA
ENERGY COMMISSION**



January 26, 2024

Ryan M. F. Baron
BEST BEST & KRIEGER LLP
18101 Von Karman Avenue, Suite 1000
Irvine, California 92612
Ryan.baron@bbklaw.com

Response to the County of Shasta's Request for Investigation into Fountain Wind LLC Regarding Fountain Wind Project

Dear Ryan M.F. Barron:

On January 4, 2024, (TN 253801) the California Energy Commission (CEC) received Shasta County's Request for Investigation filed under California Code of Regulations, title 20, section 1231, concerning Fountain Wind LLC and the Fountain Wind Project. In January 2023, Fountain Wind LLC submitted an application to the CEC for the Fountain Wind Project for certification pursuant to Chapter 6.2 of Division 15 of Public Resources Code (Opt-In Certification program). This response is only regarding Shasta County's Request for Investigation. It is not a decision on Fountain Wind LLC's application under the Opt-In Program or a determination on the merits of Shasta County's concerns with the Fountain Wind Project.

The CEC's Request for Investigation process provides a formal means to notify the CEC of a potential violation of a requirement under the CEC's jurisdiction. Pursuant to California Code of Regulations, title 20, section 1231, any person, including a public entity, may present a request for investigation by filing a document containing the following items:

- (a) the name, address, email and telephone number of the person filing the request;
- (b) identifying information such as the name, address, email and telephone number of the person or entity allegedly violating the statute, regulation, order, program, or decision;

- (c) a statement of the facts upon which the request is based and any evidence and witness statements demonstrating the existence of those facts;
- (d) a statement indicating the statute, regulation, order, program, or decision that has been violated;
- (e) the names and addresses of any other individuals, entities, or organizations that are or are likely to have been affected by the violations; and
- (f) a statement indicating if the person or entity requesting the investigation has attempted to resolve the issue with the person or entity alleged to have committed the violation.

Although the request for investigation contains a deficiency,¹ the CEC is not prevented from analyzing the merits of the request or its substantive allegations. Shasta County alleges Fountain Wind LLC's application for the Opt-in Certification program violated California Code of Regulations, title 20, sections 1707 and 1876; 1716(c); and 1877(g).

After review by staff and consultation with the chief counsel, for the reasons set forth below, I have made the following determinations. Regarding the alleged violations of California Code of Regulations, title 20, sections 1707 and 1876, Shasta County is correct that the application is missing the required verification. However, because staff has taken action to resolve this issue, I have determined that the matter is already being corrected under California Code of Regulations, title 20 section 1232(a)(8). Regarding the alleged violations of California Code of Regulations, title 20, sections 1716(c) and 1877(g), I have determined under California Code of Regulations, title 20, section 1232(a)(1), that there has been no violation of a statute, regulation, order, program or decision adopted, administered or enforced by the CEC.

1) Alleged Violation of 20 C.C.R sections 1707 and 1876. California Code of Regulations, title 20, sections 1707 and 1806 require an application for the Opt-in Certification program be verified as to the truth of the information contained in the application. Shasta County claims there is a violation of these sections due to the applicant failing to submit the required verification. Staff previously reviewed the

¹ Subdivision (f) requires a statement indicating if Shasta County has attempted to resolve the matter with Fountain Wind, but the documentation contains no information regarding any efforts by Shasta County to resolve the allegations that the community benefits agreement with the Northeastern California Building & Construction Trades Council is non-compliant with the law. Shasta County's recitation of its objections to the Community Foundation of the North State-related plan do not indicate whether any effort was made to resolve the alleged defects with the filed community benefits agreement that is part of the application. As well, Shasta County does not indicate if it has attempted to resolve with the applicant the need for the application to be verified.

application for the required verification and identified this non-compliance. On January 5, 2024, staff issued a data request to Fountain Wind LLC to submit a verification of all the information in the application consistent with California Code of Regulations, title 20, sections 1707 and 1876. The CEC filed its request in the project's docket (23-OPT-01). Because there is an active data request on this issue and time for the applicant to correct the missing verification, I consider the resolution of this issue to be in process. For this reason, no additional action will be taken at this time.

2) Alleged Violation of 20 C.C.R section 1716(c). California Code of Regulations, title 20, section 1716(c) is not applicable to the Opt-in Certification program. Section 1716(c) is a CEC regulation that implements section 25519(b) of Chapter 6 of Division 15 of the Public Resources Code. Chapter 6 governs Applications for Certification of thermal power plants. The Opt-in Certification program, established in Chapter 6.2 of Division 15 of Public Resources Code, is a separate program with different requirements. While the Opt-in Certification program incorporates by reference certain parts of Chapter 6 of Division 15 of the Resources Code,² there is no incorporation of 25519(b), which is the authority for section 1716(c).

The process for obtaining information from the applicant under the Opt-in Certification program is set forth in Public Resources Code sections 25545.2 and 25545.4 and California Code of Regulations, title 20, sections 1877 and 1878. If Shasta County believes the applicant has information pertinent to staff's development of the staff assessment and environmental impact report that has not already been provided, Public Resources Code section 25545.4(d) provides "[t]he executive director may request additional information from the applicant to address comments by public agencies on the scope and content of the information that is required to be included in an environmental impact report for certification."

Staff previously implemented this provision by issuing data requests on January 5, 2024, that were derived from comments received by the California Department of Fish and Wildlife, California Department of Transportation, and in response to action taken by the Burney Water District. Staff can similarly issue data requests based on comments provided by Shasta County, and I encourage Shasta County to reach out directly to the staff project manager to discuss.

² Pub. Resources Code, § 25545.8.

3) Alleged Violation of 20 CCR section 1877(g). California Code of Regulations, title 20, section 1877(g) requires the application to contain the applicant's plan or strategy, including a timeline for execution, to obtain the legally binding community benefits agreement (CBA) required by Public Resources Code section 25545.10. Shasta County's request identifies three documents filed by the applicant and argues the documents do not satisfy section 1877(g) and thus, the applicant has violated section 1877(g). The three filings include the 2021 CBA proposal (2021 Proposal) submitted to Shasta County in Fountain Wind LLC's application to construct the project; the draft agreement with the Community Foundation of the North State from 2023 (Foundation Agreement); and an executed agreement with the Northeastern California Building & Construction Trades Council (Trades Council Agreement) dated December 13, 2023).

The 2021 Proposal: Because later CBAs superseded the 2021 Proposal, discussion of this CBA is not relevant to a determination of compliance with section 1877(g).

The Foundation Agreement: When the applicant filed the Foundation Agreement plan it met the requirements of section 1877(g) in that it reflected the applicant's plan or strategy for an agreement with a community organization (the Foundation) that funds local community programs and projects. Although the applicant did not provide an executed agreement, this is not required for the initial application under section 1877(g). Ultimately, the Foundation and applicant did not execute the agreement, so any deficiencies with the Foundation Agreement are now moot.

Trades Council Agreement: Unlike the Foundation Agreement plan, the applicant executed the Trades Council Agreement on December 13, 2023, and filed the agreement in the docket on December 14, 2023. The Trades Council Agreement meets the requirements of section 1877(g) ("The Opt-in application shall include the applicant's plan or strategy, including a timeline for execution, to obtain legally binding and enforceable agreement(s) with, or that benefit, a coalition of one or more community-based organizations prior to project certification, consistent with Public Resources Code section 25545.10.") and 1878(c) ("No later than 45 days after an application is deemed complete, or a later date set forth by the executive director, the applicant shall provide information updating or supplementing the information in the application to support the findings required by Public Resources Code sections 25545.9 and 25545.10"). The executed agreement with the Trades Council supports the findings the CEC must make regarding satisfying Public Resources Code section 25545.10, and thus meets the requirements of the regulations.

Shasta County in its request and supplemental comments, both filed on January 4, 2024, argues that the Trades Council Agreement does not meet the requirement of Public Resources Code section 25545.10(a). Shasta County disputes whether the Trades Council is a community benefits organization and alleges that the applicant's filing of a non-compliant agreement is a false or misleading statement regarding its community benefits obligations. Shasta County also questions the amounts of funds being offered and whether the Trades Council and its activities benefits the local community.

Public Resources Code section 25545.10(a) contains the salient language regarding a CBA for purposes of a project under the Opt-in Certification program. A CBA must be "with, or . . . benefit, a coalition of one or more community-based organizations, such as workforce development and training organizations, labor unions . . . or other organizations that represent community interests . . ." As a coalition of labor unions, the Trades Council qualifies as a community-based organization.³ Further, the topics of the CBA "may include workforce development, job quality, and job access provisions . . ." Thus, the submitted CBA is consistent with Public Resources Code section 25545.10 given the Trades Council is a non-profit coalition of labor organizations that seeks to benefit some subset of the community through employment and labor benefits.

Public Resources Code section 25545.10 requires the CBA include "mutual benefit to the parties to the agreement."⁴ Shasta County, in its Request for Investigation, questions the adequacy of the agreement because of its limited benefits. The nature and extent of the benefits of the entire project are relevant to the CEC's decision whether to approve the project despite its inconsistency with local laws as required under Public Resource Code section 25525. CEC staff welcomes any information Shasta County has on how any executed CBA will impact the local community at large. For the forgoing

³ In its supplemental filing on January 5, 2023 (TN 253813), Shasta County provided tax returns for the Trades Council. These documents verify that the Trades Council consists of members who are trade unions which is reasonably interpreted to be a "coalition of . . . labor unions" and meets the statutory definition of who may be a party to or benefit from an agreement with the applicant. The fact that the Trades Council engages in lobbying in furtherance of its members' interests does not disqualify the Trades Council as an acceptable community-based organization under Public Resources Code section 24454.10.

⁴ The agreement filed by the applicant indicates mutual benefit to the parties, stating "WHEREAS, there is mutual benefit to the Parties to this Agreement, as the Union receives significant funding to further its workforce training and development purposes, and Developer satisfies the requirements of Public Resources Code section 25545.10 in furtherance of developing a renewable wind energy project in accordance with the State of California's renewable energy goals under Assembly Bill 32, Senate Bill 100, and other related legislation and Executive Orders." (TN #253611)

Ryan Baron
January 26, 2024
Page 6

reasons, however, no violation of California Code of Regulations, title 20, section 1877(g) occurred.

In conclusion, since CEC has issued a data request for the applicant to correct the missing verification, and Shasta County's Request for Investigation does not otherwise demonstrate any violation of a statute, regulation, order, program, or decision enforced by the CEC, no further action will be taken.

Sincerely,

A handwritten signature in black ink, appearing to read 'Drew Bohan', with a stylized flourish at the end.

Drew Bohan
Executive Director