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March 26, 2024

Drew Bohan
Executive Director
California Energy Commission
715 P Street
Sacramento, CA 95814

Re: Shasta County Air Quality Management District Input on the Opt-in Application for Certification of the Fountain Wind Project (23-OPT-01)

Dear Mr. Bohan:

On February 23, 2024, the Shasta County Air Quality Management District ("SCAQMD" or the "District") provided its input on the Opt-in Application for Certification of the Fountain Wind Project (23-OPT-01) (such project, the "Project"). (TN 254693.) The District's submittal was in response to the California Energy Commission's ("CEC" or "Commission") February 9, 2024 Request for Input from Shasta County Air Quality Management District on the Opt-in Application for the Fountain Wind Project (the "Request"). (TN 254394.)

Included as Exhibit C to SCAQMD's submittal is an engineering evaluation for the Project's 107 horsepower propane emergency backup generator. The Authority to Construct/Permit to Operate ("ATC/PTO") evaluation indicates that it sets forth the legal and factual basis for the conditions contained in the proposed ATC for the emergency backup generator. The Project anticipates that the assessment included in Exhibit C is sufficient for the Commission to ensure that appropriate conditions of certification are included in CEC's certification.

In addition to providing its ATC evaluation, the SCAQMD claims that it is a "responsible agency" under the California Environmental Quality Act ("CEQA") and that its permitting authority is not subsumed by the Commission under the opt-in process. As detailed below, the SCAQMD's claims are misplaced. Consistent with the CEC's previous determination (see TN 253603), SCAQMD's otherwise required air quality permit is subsumed in the CEC's certification.

I. SCAQMD is Not a Responsible Agency Under CEQA and Has No Jurisdiction Over the Project

The SCAQMD asserts that it is a "responsible agency" under CEQA for the Project. Commission staff previously considered, and rejected, the SCAQMD's argument in its December 13, 2023 memorandum. (TN 253603). As relayed in that memorandum, a "responsible agency" under CEQA is a "public agency, other than a lead agency, which has responsibility for carrying out or approving a project." Pub. Res. Code § 21069. Here, Public Resources Code section 25545.1(b) specifies that the Commission's issuance of a certificate "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. . . ." The California Legislature granted an unlimited, express exemption to certain agencies, such as the State Water Resources Control Board, Regional Water Quality Control Boards and the California Coastal Commission, from the scope of permitting authority granted to the Commission. Pub. Res. Code § 25545.1(b)(2). By comparison, the California Legislature granted a limited exemption to local air quality management districts only for certain types of manufacturing, production, and assembly projects. Pub. Res. Code § 25545.1(b)(3). The California Legislature's intent is clear: local air quality district authority is subsumed by the Commission's permitting authority except in very limited circumstances. Because the Project is not a manufacturing, production, and assembly project, there is no exemption from the scope of the Commission's permitting authority for SCAQMD. Accordingly, any local air quality permit ordinarily issued by the SCAQMD is subsumed in the Commission's certification if the Project is approved. The SCAQMD does not have permitting authority independent of or separate from that of the Commission with respect to the Project.

Correspondence between Commission staff and contractors working on behalf of the Project (included as Exhibit B to SCAQMD's February 23, 2024 submittal) does not constitute evidence that SCAQMD has jurisdiction over the Project, nor does it constitute an admission that such jurisdiction exists. Instead, the correspondence reflects an iterative process by which Commission staff consider local permitting requirements for inclusion in the conditions of certification, as necessary. Similarly, the submittal of an application for an ATC/PTO does not create SCAQMD jurisdiction when the California Legislature specifically legislated to the contrary. Rather, the application for an ATC/PTO was provided to the SCAQMD with sufficient information to allow the SCAQMD to perform its engineering evaluation and provide recommended conditions for the CEC to consider incorporating into the CEC's certification, if approved.

Furthermore, SCAQMD's Rule 3.28 specifies that the rules applicable to stationary internal combustion engines do not apply to the Project's emergency backup generator because it qualifies as an emergency standby engine. SCAQMD Rule 3.28 § C.2.[1] The SCAQMD, in its engineering evaluation (contained in Exhibit C to its February 23, 2024 submittal), agreed, stating that the "engine will be exempt from permitting." Because the SCAQMD has determined

[1] Only the administrative requirements for exempt engines apply. SCAQMD Rule 3.28 § F.3.

that the engine is exempt from permitting, SCAQMD cannot be a responsible agency because, notwithstanding the requirements of Public Resources Code section 25545.1(b), there is no permit to issue.

II. The CEC's Jurisdiction is Not Prohibited by Federal Law

The SCAQMD asserts that the "Commission cannot subsume SCAQMD's air quality permitting authority into its opt-in permitting process because doing so is prohibited by federal law." In support of its position, the SCAQMD notes that the federal Clean Air Act ("CAA") requires states to adopt state implementation plans ("SIPs") to achieve national ambient air quality standards ("NAAQS"). The SCAQMD argues that subsuming its permitting authority under Public Resources Code section 25545.1(b) violates the structure set forth in California's SIP and, as a result, federal law preempts such action. The SCAQMD further argues that allowing the Commission to provide a certification in lieu of an air permit for the Project's backup emergency generator would lead the United States Environmental Protection Agency ("EPA") to revoke California's authority over its SIP. The SCAQMD is mistaken.

The permit ordinarily to be issued by the local air district, in the absence of CEC jurisdiction, is a creation of State and local law – not federal law. The SCAQMD's argument ignores the position Congress intended States to occupy with respect to attaining air quality standards. Congress has declared that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the *primary responsibility of States and local governments*." 42 U.S.C. § 7401(a)(3) (emphasis supplied). The United States Supreme Court has confirmed that States have the primary role in regulating air pollution. *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975). The Supreme Court explained that:

> The [EPA] is plainly charged by the [Clean Air Act] with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2) [i.e., 42 U.S.C. § 7410(a)(2)], the Agency is required to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choice of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2)…Thus, *so long as the ultimate effect of a State's choice of emission limitations is compliance with national standards for ambient air, the State is at liberty to adopt whatever*

> *mix of emission limitations it deems best suited to its particular situation*.

Id. at 79 (emphasis supplied). Thus, the contents of a SIP – although ultimately approved by the EPA – are determined at the discretion of the State, subject to minimum federal criteria. A SIP is a commitment by the State to achieve the NAAQS. 42 U.S.C. § 7410. However, it is the State that determines how to achieve those air quality standards, e.g., by determining that certain sources are exempt from permitting or that other sources may require a permit. *See* Cal. Health & Saf. Code § 42310 (exempting certain sources from permitting). Further, it is the State that establishes requirements for control programs to achieve no net increase in emissions and it is the State that establishes programs to implement control technology depending on the degree of pollution in relevant districts. *See* Cal. Health & Saf. Code §§ 40918, 40919, 40920, 40920.5.

Each of the foregoing requirements, including the SCAQMD's local rules and permitting program that implement them, are part of State, not federal, law.[2] While the SCAQMD's rules may be included in a SIP that is intended to ensure attainment of the federal NAAQS and, as such, are ultimately blessed by the EPA, the rules do not become federal mandates that convert all local permits associated with state-level air pollution regulations into federal requirements. Neither Congress nor the EPA intended to constrain State legislatures and air districts in such a fashion.[3]

The California Legislature has determined that the Commission is empowered to issue a certification in lieu of State and local permits, including locally issued air permits. Because the Commission will enforce the conditions of certification associated with the emergency generator in its Project certification, if approved, there is no reason to expect that Project certification will lead to the violation of the NAAQS or otherwise imperil California's SIP. Indeed and notably, the SCAQMD's engineering evaluation, itself, supports this conclusion and determines that the Project's emergency generator will have minimal air quality impacts and complies with relevant SCAQMD rules.[4] Accordingly, federal law does not prohibit the Commission from exercising authority over the Project's backup generator and issuing its certification in lieu of any

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[2] Federal law does not require a permit for the Project's emergency backup generator. *See* 40 C.F.R. § 60.4230(c) (specifying that stationary spark ignition internal combustion engines that are "area sources," like the Project's emergency backup generator, are "exempt from the obligation to obtain a permit").

[3] By comparison, States and air districts are far more limited when considering Title V permits for "major sources." A Title V permit is a federal permit. The EPA retains oversight of the Title V program and may object to the issuance of a proposed Title V permit. *See* 40 C.F.R. § 70.8 (providing for permit review by EPA). No Title V permit is required for the Project.

[4] E.g., Exhibit C (SCAQMD ATC/PTO Evaluation) states that "the emissions from the proposed engine are below the District's significant standard. A project that does not result in the generation of emissions beyond the District's significance standards would not result in an increase in the frequency or severity of any existing air quality violations, and thus could be considered to conform to the overall reduction goals of the 2021 Air Quality Attainment Plan and does not conflict with its overall implementation."

SCAQMD permit.[5] Because there is no local air permit associated with the Project, SCAQMD is not a "responsible agency" under CEQA.

Sincerely,

Cox, Castle & Nicholson LLP

Ira J. Klein

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[5] As discussed above, no permit is necessary given that the SCAQMD stated in its engineering evaluation that the Project's backup "engine will be exempt from permitting" based on SCAQMD's Rule 3.28. Rule 3.28 § C.2 specifies that the rules applicable to stationary internal combustion engines do not apply to the Project's emergency backup generator because it qualifies as an emergency standby engine.