

DOCKETED

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TN #:	256732
Document Title:	Engie Response to SJC Letter of 051024
Description:	Engie Response to SJC Letter of 051024
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June 6, 2024

VIA DOCKET UNIT E-FILING SYSTEM

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

RE: Compass Energy Storage, LLC's Response to Letter from the City of San Juan Capistrano

Dear Mr. Bohan:

This letter briefly responds to the May 10, 2024, letter submitted by the City of San Juan Capistrano regarding the Compass Energy Storage Project, submitted pursuant to the California Energy Commission's opt-in program (Docket #24-OPT-02). The City's letter misconstrues the historical record, as described below.

I. THE CEC HAS JURISDICTION OVER THE COMPASS PROJECT'S APPLICATION

The City misconstrues the factual record when it claims that it "denied, or effectively denied" the Compass Project. On November 1, 2022, the City Council voted not to initiate a Comprehensive Development Plan ("CDP") on the approximately 161-acre Saddleback Church Rancho Capistrano property as requested by the Saddleback Church. At that time, no action to approve the Compass Project was before the City Council, nor had the City performed environmental review on the Project pursuant to the California Environmental Quality Act ("CEQA").

To deny the Project, the City Council would have had to initiate the CDP process, approve that CDP, along with a CEQA certification, to allow the battery storage use within the Church's property, and then accept and consider a conditional use permit ("CUP") application for the specific project, and its CEQA document, and then take a final action, none of which occurred.

It is also worth noting that the City's decision not to initiate the CDP at that time in no way foreclosed a request to do so in the future, as was recognized by the City Councilmembers at the November 1, 2022, hearing. Mayor Pro Tem Hart encouraged the Saddleback Church and Compass to come back with a project that did not present a "bad visual," and Mayor Reeve

confirmed that a City Council vote to deny initiation of a CDP would have the same effect as a continuance and that Saddleback Church was in no way barred from resubmitting a new proposal whenever it was “ready to go.”¹

This understanding is further confirmed by the fact that on February 15, 2024, Compass Energy Storage withdrew its pending CUP application with the City, in collaboration with City staff, due to Compass’ decision to file an opt-in application with the CEC. Had the City processed the CUP application, deemed it complete, and then denied the CUP, then no such action would have been necessary.

Finally, Compass Energy Storage LLC agrees with, and incorporates by reference, the letters submitted in the CEC’s 23-OPT-01 docket by A. Mudge, Cox Castle & Nicholson on Aug. 21, 2023, on behalf of Fountain Wind LLC, and A. Graf, Adams Broadwell Joseph & Cardozo on Aug. 25, 2023, on behalf of California Unions for Reliable Energy, which both comprehensively analyze and explain the CEC’s far-reaching jurisdiction over opt-in applications. (See Attachment A.)

II. THE COMPASS PROJECT’S COMMUNITY BENEFITS STRATEGY

The City objects to the Compass Project’s community benefits strategy included in its CEC application based on its alleged lack of specificity, citing 20 Cal. Code Regs. Section 1877(g). The Compass Project’s community benefits strategy provides sufficient specificity at this stage in the application process and, as stated in its application, Compass will provide more information about its community benefits agreements as the application process proceeds. The community development strategy has provided a schedule for compliance within the review period, and is consistent with other projects currently under consideration by the CEC during the Opt-in review process.

The City also alleges that the City has had “no meaningful” conversations with Compass regarding how the Project can provide community benefits in partnership with the City. This statement is wholly inconsistent with the numerous meetings and correspondence between the Compass project and the City of San Juan Capistrano and misconstrues the record.

When Compass informed the City of its intent to file an opt-in application, a subcommittee of two City Councilmembers was formed to discuss issues related to the Compass Project. Compass has met with the subcommittee and City staff multiple times to discuss what community benefits the Project may be able to provide in partnership with the City.

The following are examples of substantive, meaningful communications between the City and Compass regarding the project after the City Council declined to initiate a CDP for the Church property in November of 2022:

¹ (See https://sjc.granicus.com/player/clip/2628?view_id=3&redirect=true, at 2:08 to 2:13.)

- 1/5/2023 Meeting with City Manager, Planning Director and other City officials regarding the potential of Compass' submittal of an application to the CEC, the applicable regulations and opportunities for collaboration and cooperation with the City (in person).
- 1/6/23 Follow up correspondence with the City providing reference documents and responses to questions from the City regarding CEC processes and City's role (email).
- 2/27/23 Pre-application meeting with Compass, CEC, City of San Juan Capistrano and other interested agencies on the project, application requirements and Q&A from participants on the project (virtual).
- 10/30/23 Phone conversation with City Manager and Compass community relations consultant providing updated information on project application status (phone).
- 1/4/24 Updated correspondence from Compass to City describing project actions and status over prior months while CEC application being prepared, and request for meeting to discuss design and next steps (email).
- 1/23/14 Meeting with City Staff and City Council Ad Hoc Committee (Campbell and Bourne) to discuss status of CEC application, share of revised project design, visual simulations and request to identify community benefits for SJC as part of project (in person).
- 2/12/24 Meeting with City Staff and Ad Hoc Council subcommittee to continue community benefits discussion (in person).

Compass intends to continue its efforts to work with the City and with other local organizations to develop a meaningful community benefits package that invests in the community.

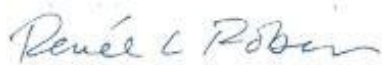
III. INTERIM ORDINANCE

On April 2, 2024, the City adopted an interim ordinance prohibiting battery energy storage system ("BESS") facilities ("moratorium"). On May 7, 2024, the City extended the interim ordinance for an additional ten months and fifteen days. The interim ordinance states that it is designed to provide the City time to study BESS technology and update its Zoning Code accordingly. The City specifically references the Compass project as a basis of the moratorium, even though the Compass project was not a pending matter before the City at that time. The moratorium references potential safety concerns related to the Compass project, but at no time did the City confer with Compass on the project technology or safety measures associated with the project.

Compass stands ready to assist the City in its information-gathering process related to battery

energy storage to better understand the issues raised in the moratorium. In addition, the rigorous CEQA process associated with the CEC process will allow the City to fully engage and ensure its concerns are fully addressed. We will continue in our outreach to the City on these matters and urge the CEC to engage with the City as well.

Sincerely,

A handwritten signature in blue ink that reads "Renée L. Robin". The signature is written in a cursive style.

Renée L. Robin, J.D.
Director, Permitting & Planning
Engie North America

Attachments

Cc: Justin Amirault, Engie North America
Paul McMillan, Engie North America
Ryan Waterman, Brownstein Hyatt Farber Schreck, LLP
Eric Knight, California Energy Commission
Renée Longman, California Energy Commission

Attachment A

DOCKETED

Docket Number:	23-OPT-01
Project Title:	Fountain Wind Project
TN #:	251700
Document Title:	Response to Shasta County Jurisdictional Claims
Description:	N/A
Filer:	Caitlin Barns
Organization:	Stantec Consulting Services, Inc.
Submitter Role:	Applicant Consultant
Submission Date:	8/21/2023 1:14:21 PM
Docketed Date:	8/21/2023

August 21, 2023

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

Re: Fountain Wind AB 205 Application (23-OPT-01)

Dear Mr. Bohan:

On behalf of the Applicant, this letter responds to Shasta County's "Opposition to Commission Jurisdiction under AB 205 and Objection to Fountain Wind LLC Request for Application Completion Determination," docketed on August 14, 2023.¹ Shasta County's position is not supported. Under AB 205, the California Energy Commission (CEC) has jurisdiction over all eligible renewable energy facilities for which opt-in applications have been filed in accordance with Warren Alquist Act, regardless of whether a local agency has denied a permit for these facilities. Contrary to the County's position, 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.

A. Shasta County claims that the California Energy Commission lacks jurisdiction over otherwise eligible projects if they were denied a permit by a local agency.

Shasta County is mistaken. The language of AB 205 does not support this position.

1. The language of AB 205 imposes no restrictions on the pre-application circumstances under which the CEC may consider certification of an eligible renewable energy facility, such as whether a permit for the facility was denied by a local agency.
2. Public Resources Code section 25545.1(a) offers guidance on the scope of the CEC's jurisdiction. Section 25545.1(a) says that "[a] person proposing an eligible facility [defined in section 25545(b)] may file an application for certification with the commission in accordance with this chapter." None of the eligibility criteria or certification procedures in the chapter refer to the facility's permitting history or the

¹ Shasta County's opposition is styled as a motion. The opt-in procedure under AB 205 is not an "adjudicative proceeding" within the meaning of the CEC's regulations and thus the opt-in process does not call for the filing of motions. Nor is Shasta County a "party" to the proceeding. The Applicant nonetheless submits this written response for the record.

results of that history. If the Legislature had intended to preclude facilities denied at the local level from eligibility, that would have been an obvious carve-out. No such carve-out exists.

Indeed, AB 205 confers exclusive jurisdiction on the CEC merely “upon receipt” of an application for an eligible facility. Section 25545.1(a) states: “upon receipt of the application, the commission shall have the 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 does not say “upon receipt of the application and demonstration that a permit for such facility has not been denied by a local agency, the commission shall have the exclusive power to certify the site . . .”² Again, had that result been intended, section 24445.1 would have been an obvious place to make this clear.

3. Under section 25545.1(b), CEC authority is “in lieu of any permit . . . required by any . . . local agency . . . and shall supersede any applicable statute, ordinance or regulation of any . . . local agency. . .” Shasta County argues that the use of the term “in lieu” means that an applicant may file with the CEC “in lieu” of the County but if an applicant chooses to file with the County, it cannot thereafter file with the CEC. However, section 25545.1(b) merely says that *CEC authority* is “in lieu” of any permit required by any local agency; it does not say that an applicant that has applied to a local agency is barred from invoking CEC’s exclusive authority.³
4. Although it admits that the language in support of its interpretation is “ambiguous,” Shasta County also posits that the statute’s use of the permissive term “may” in describing whether an applicant “may file” an application with the CEC instead of pursuing local permits means that once the choice to pursue approval at the local level, that choice is irrevocable. ⁴ This interpretation is unfounded. There is nothing in the Legislature’s use of the term “may” in relation to the verb “file” that supports the County’s binary interpretation of how the opt-in process operates. ⁵

² 20 CCR section 1877 indicates that an opt-in application should describe whether the Applicant has “submitted any local, state, or federal permit applications.” If the denial of such a permit were a bar, this would have been yet another good place to request this information.

³ When the Applicant first sought approval of the project in 2016, AB 205 and the opt-in program did not exist. Nor did it exist in 2021 when the County denied the permit. By seeking local permitting approval in 2016, Fountain Wind cannot have been precluded from opting into a permitting program that had not yet been enacted.

⁵ To the contrary, AB 205’s implementing regulations evince jurisdictional flexibility rather than rigidity on this point. For example, an applicant may withdraw its CEC application “at any time after acceptance” and may even change its mind by re-filing a new opt-in application after having withdrawn the first application. See 20 CCR 1877.5(a) and (c). This kind of flexibility does not support Shasta County’s view that once an applicant chooses the local forum and the local forum says “no,” the Applicant has reached the end of the line but for a judicial challenge to the denial.

5. Shasta County's argument also ignores the language about the CEC's "superseding" authority. To "supersede" means "to annul, make void, or repeal by taking the place of." (Black's Law Dictionary, 11ed. 2019.) When a local agency's permitting authority is "superseded," any exercise of that authority, including the exercise of that authority in the past, is made void. Under AB 205, Shasta County's denial of a conditional use permit for the Fountain Wind Project in 2021 is "superseded." A voided denial cannot be a jurisdictional bar to the CEC's ability to certify the Fountain Wind Project should it choose to do so.
6. In its analysis of the bill, the Senate Rules Committee observed that AB 205 "create(s) opt-in permitting to accelerate bringing clean energy projects online sooner so that the state can rely less on fossil fuel generation sources." (Senate Rules Committee Analysis of AB 205, June 26, 2022.) If the Legislature had intended for local agencies to be able to thwart this important state-wide goal by denying permits to these facilities at the local level and thus precluding later certification by the CEC, surely the Legislature would have made this explicit.

B. No Case Law Supports Shasta County's Position.

No case law supports the County's interpretation of the CEC's jurisdiction and Shasta County cites none. However, helpful guidance exists to the contrary. In 1975, the California Attorney General's office opined in 58 Ops. Cal. Atty. Gen 729 that the then newly enacted Warren Alquist Act preempts local authority over power plants and that county governments have no power to prohibit such plants:

"The provisions of the Warren-Alquist Act indicate that the state has preempted the field of the evaluation, regulation and approval of thermal power plant sites and facilities. A county government therefore would have no power to regulate or prohibit the construction of Nuclear A if the plant should fall under the jurisdiction of the Energy Commission. However, the Energy Act does require the Energy Commission to solicit extensive comments and recommendations from local governments concerning power plant site and facility proposals, and to give such comments major consideration in evaluating such proposals."

The Attorney General discusses several public utility cases as well as general preemption principles, concluding that "the Energy Act does indeed contain specific language evidencing a legislative intent that the state should wholly occupy the field of thermal power plant site and facility approval" (citing to section 25500). Further,

"[E]ven if there were no specific statement of legislative intent to occupy the entire field, the exhaustive process of site and facility evaluation, the solicitation of extensive comments and information from applicants, members of the public and interested governmental agencies on a regional and state-wide basis, the full

consideration required in public hearings, reports, forecasts, etc., and the power granted the Commission to certify thermal power plants in spite of noncompliance with otherwise applicable local, regional or state standards, ordinances or laws upon appropriate findings of public convenience and necessity (§ 25525), all evidence an unmistakable intent on the part of the Legislature to bring all state-wide factors necessary for the full consideration and approval of thermal power plant sites and facilities to the attention of the Commission.”

“It must, therefore, be concluded that the subject matter of thermal power plant site and facility approval "has been so fully and completely covered by [the Energy Act] as to clearly indicate that it has become exclusively a matter of state concern." See In re Hubbard, supra at 128. Stanislaus County therefore would have no authority to regulate or prohibit the construction of Nuclear A if it should be subjected to the approval authority of the Energy Commission.”

While this Attorney General opinion concerned preemption over a thermal nuclear power plant, the same principles apply to the CEC’s role over eligible renewable energy power plants under AB 205 once a developer has opted in to the CEC certification process.

C. Shasta County claims that the CEC must “evaluate its jurisdiction” before it can proceed to determine that the application is complete.

Shasta County is mistaken.

1. Nothing in AB 205 or its implementing regulations calls for the CEC to “evaluate its jurisdiction” via a formal Business Meeting of the Commission or through any other means before determining an application to be complete.
2. CEC staff has preliminarily determined that the facilities proposed as part of the Fountain Wind Project meet AB 205’s eligibility requirements.
3. Shasta County makes no claims that the Project fails to meet those eligibility requirements.

D. Shasta County argues that AB 205 is improper because it was adopted as one of the Governor’s trailer bills.

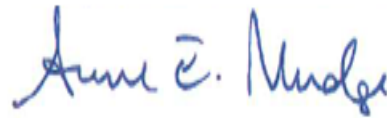
Shasta County cites no authority for this novel proposition, and we are aware of none. The origin of a bill is irrelevant when passed by the legislature and signed by the Governor.

E. Shasta County could have raised these jurisdictional arguments months ago.

Shasta County has been aware of the Applicant's intent to opt-in to the CEC's certification program for months. Shasta County representatives were invited to and attended the pre-application meeting in November 2022. Its objections could have been raised at that time but were not. This objection by a non-party to this proceeding is not only improper procedurally but appears to be an attempt to delay the timely consideration of this application. The opposition should not delay a finding of completeness of the application.

Sincerely,

Cox, Castle & Nicholson LLP



Anne E. Mudge

DOCKETED	
Docket Number:	23-OPT-01
Project Title:	Fountain Wind Project
TN #:	251924
Document Title:	CURE Response to Shasta County Opp to Commission Jurisdiction Under AB 205
Description:	N/A
Filer:	Alisha Pember
Organization:	California Unions for Reliable Energy
Submitter Role:	Public
Submission Date:	8/25/2023 2:03:48 PM
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ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

agraf@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO

Of Counsel

MARC D. JOSEPH
DANIEL L. CARDOZO

August 25, 2023

Submitted via Docket No. 23-OPT-01

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

Re: Response of California Unions for Reliable Energy to County of Shasta's Opposition to Commission Jurisdiction Under AB 205

Dear Mr. Bohan:

We write on behalf of California Unions for Reliable Energy ("CURE") to respond to the County of Shasta's Opposition to Commission Jurisdiction Under AB 205 and Objection to Fountain Wind LLC Request for Application Completion Determination.¹ Assembly Bill ("AB") 205 allows any person to file an application for certification of an eligible nonfossil-fueled powerplant. Once an application is filed, the California Energy Commission ("Energy Commission") obtains exclusive jurisdiction over the site and related facility, and any certification issued by the Energy Commission supersedes the County's authority.

Shasta County claims the Energy Commission lacks jurisdiction to consider the Fountain Wind application because a permit for the project was previously denied by the County. The County contends that AB 205 does not allow an applicant to circumvent a previous denial by a local government with land use authority. However, the County's interpretation of AB 205 is contrary to the statute's plain language, inconsistent with the bill's legislative history and statutory scheme, and unsupported by caselaw. Therefore, the Energy Commission should reject Shasta County's request to review the Commission's jurisdiction over the Fountain Wind Project ("Project").

¹ County of Shasta, Opposition to Commission Jurisdiction Under AB 205 and Objection to Fountain Wind, LLC Request for Application Completion Determination (Aug. 11, 2023) (TN # 251601) (hereinafter "County Opposition"), *available at* <https://efiling.energy.ca.gov/GetDocument.aspx?tn=251601&DocumentContentId=86490>.

A. THE ENERGY COMMISSION OBTAINED EXCLUSIVE POWER TO CERTIFY THE FOUNTAIN WIND PROJECT WHEN IT RECEIVED THE APPLICATION

The Commission’s jurisdiction over the Fountain Wind application is clear from the plain text of the statute. Section 25545.1(a) states:²

A person proposing an eligible facility may file an application no later than June 30, 2029, for certification with the commission to certify a site and related facility in accordance with this chapter, including a person who has an application for certification or small powerplant exemption filed with the commission pursuant to Chapter 6 (commencing with Section 25500) pending as of the effective date of this section. Upon receipt of the application, the commission shall have the 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. This section does not modify the Public Utilities Commission’s jurisdiction, including the issuance of a certificate of public convenience and necessity under Chapter 5 (commencing with Section 1001) of Part 1 of Division 1 of the Public Utilities Code for a facility that is proposed by a utility regulated by the Public Utilities Commission.

Subdivision (a) allows a person to file an opt-in application if it proposes an eligible facility and does so before June 30, 2029. “Facility” is defined in Section 25545(b) and includes “terrestrial wind electrical generating powerplant with a generating capacity of 50 megawatts or more and any facilities appurtenant thereto.”³ Once the Commission receives an opt-in application, it obtains “exclusive power to certify the site and related facility” with one exception. If an eligible facility is proposed by a utility regulated by the California Public Utilities Commission (“CPUC”), the Commission does not possess exclusive jurisdiction.

Nothing in subdivision (a) prohibits a person from filing an opt-in application. While subdivision (a) provides an example of who may file an opt-in application, the use of “including” does not ordinarily introduce an exhaustive list.⁴ Moreover, subdivision (a) expressly states that the Commission’s jurisdiction extends to an application that proposes a new site and related facility.

² All statutory references are to the Public Resources Code unless indicated otherwise.

³ Pub. Resources Code § 25545(b)(1).

⁴ Antonin Scalia & Bryan Garner, *Reading Law* (2012) p. 132.

If the Legislature intended to limit the Commission’s jurisdiction over an eligible facility that had been previously denied by a local agency, it could have done so. The only limitation placed on the Commission’s jurisdiction is when the application concerns an eligible facility proposed by a CPUC-regulated utility. In that instance, the CPUC retains jurisdiction to issue a certificate of public convenience and necessity. Therefore, opt-in applications are not limited to a person who previously filed an application for certification or small powerplant exemption, and the CPUC maintains jurisdiction over an eligible project proposed a CPUC-regulated utility.

Energy Commission staff confirmed that the Commission received the application for the Fountain Wind Project on January 11, 2023.⁵ Shasta County does not dispute that the Fountain Wind Project qualifies as an eligible project under Section 25545(b). Therefore, pursuant to Section 25545.1(a), on January 11, 2023, the Commission obtained exclusive power to certify the Project.

B. ENERGY COMMISSION CERTIFICATION OF THE FOUNTAIN WIND PROJECT OVERRIDES SHASTA COUNTY AUTHORITY

Section 25545.1(b)(1) provides that Energy Commission certification of an eligible project is “in lieu of any permit, certificate, or other 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 “supersede[s] any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.”⁶ Subsection (b)(1) is modified by subsections (b)(2) and (b)(3), which identify circumstances where Commission certification “does not supersede” an agency’s authority.

For example, Energy Commission certification does not override the authority of the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, the State Water Resources Control Board, or other applicable regional water quality control boards.⁷ It also does not

⁵ Memorandum to Docket Unit from Leonidas Payne, Project Manager, California Energy Commission re: Fountain Wind Project Application (23-OPT-1) (Jan. 13, 2023) (TN # 248411), *available at* <https://efiling.energy.ca.gov/GetDocument.aspx?tn=248411&DocumentContentId=82844>.

⁶ Pub. Resources Code § 25545.1(b)(1).

⁷ Pub. Resources Code § 25545.1(b)(2).

replace the authority of the State Lands Commission to require leases and receive lease revenues, if applicable.⁸ Finally, for certain eligible manufacturing facilities, certification does not supersede the authority of local air quality management districts or the Department of Toxic Substances Control.⁹

Subdivision (b) does not contain an exception for a local land use agency. Once the Energy Commission certifies the Project, the certification is in lieu of any permit, certificate, or similar document required by the County, and supersedes any applicable County statute, ordinance, or regulation to the extent permitted by federal law. Therefore, Shasta County does not retain permitting authority over the Project.

C. LEGISLATIVE HISTORY AND CONTEXT CONFIRM ENERGY COMMISSION JURISDICTION AND CERTIFICATION AUTHORITY

In enacting the Warren-Alquist Act, the Legislature found that “prevention of delays and interruptions in the orderly provision of electrical energy, protection of environmental values, and conservation of energy resources require expanded authority and technical capability within state government.”¹⁰ The legislative background and context of AB 205 confirm the plain meaning of the statutory text is consistent with the Warren-Alquist Act.

The Legislative Counsel’s Digest for AB 205, which is “a primary indication of legislative intent,”¹¹ reiterates 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 is consistent with the purpose of the Warren-Alquist Act which is to prevent delays “in the orderly provision of electrical energy, protection of environmental values, and conservation of energy resources...”¹²

⁸ Pub. Resources Code § 25545.1(b)(2).

⁹ Pub. Resources Code § 25545.1(b)(3).

¹⁰ Pub. Resources Code § 25005.

¹¹ *Souvannarath v. Hadden* (2002) 95 Cal.App.4th 1115, 1126 n.9.

¹² Pub. Resources Code § 25005.

August 25, 2023

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Other legislative materials confirm that the certification process supplants local authority. For example, the Senate Committee on Budget and Fiscal Review states:

The bill allows the CEC consolidated permit to **replace** all local, state, and federal permits, except for leases issued by the State Lands Commission and permits issued by the Coastal Commission, San Francisco Bay Conservation and Development Commission, the State Water Resources Control Board, or regional water quality control boards. For manufacturing facilities, the CEC permits do not replace permits issued by the local air boards o[r] the Department of Toxic Substances Control.¹³

Similar interpretations of the AB 205 were expressed in the Assembly Floor Analysis and Senate Floor Analysis.¹⁴ In fact, the County acknowledges that AB 205 “took permitting power away from local governments and placed it into the hands of the commission” when it included the provision for certifying new types of renewable energy facilities.¹⁵

The Senate Floor Analysis also includes comments from the Governor’s office which specify the purpose of the new certification process. It states that the energy provisions of the Budget Act and AB 205 “create opt-in permitting to accelerate bringing clean energy projects online sooner so that the state can rely less on fossil fuel generation sources.”¹⁶ Given the state’s compelling interest in getting renewable energy projects online quickly, it follows that the new certification process would be designed in a manner that overrides local decisionmaking.¹⁷

Other provisions of AB 205 support this reasoning. For example, Section 25545.1(c) states: “The Legislature finds and declares that this section addresses a matter of statewide concern rather than a municipal affair as that term is used in

¹³ Senate Committee on Budget and Fiscal Review of AB 205 (June 26, 2022) p. 3 (emphasis added), available at

https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB205#.

¹⁴ Assembly Floor Analysis of AB 205 (June 28, 2022) p. 1, available at

https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB205#; Senate Rules Committee, Office of Senate Floor Analyses of AB 205 (June 29, 2022) p. 2 (hereinafter “Senate Floor Analysis”), available at

https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB205#.

¹⁵ County Opposition at p. 8.

¹⁶ Senate Floor Analysis at p. 5.

¹⁷ Pub. Resources Code §§ 25519(f), 25545.8(b).

Section 5 of Article XI of the California Constitution. Therefore, this section applies to all cities, including charter cities.” While not applicable to the County, this section demonstrates the Legislature’s intent to remove decisionmaking entirely from local control (except for local air districts when the project is a manufacturing facility).

Moreover, AB 205 requires the participation of local governmental agencies with land use authority over eligible projects during the certification process.¹⁸ Specifically, Section 25545.8(b) makes certain provisions of the Energy Commission’s thermal powerplant certification process applicable to the new certification process. Among those are Section 25519(f), which states:

Upon receipt of an application, the commission shall forward the application to local government agencies having land use and related jurisdiction in the area of the proposed site and related facility. Those local agencies shall review the application and submit comments on, among other things, the design of the facility, architectural and aesthetic features of the facility, access highways, landscaping and grading, public use of lands in the area of the facility, and other appropriate aspects of design, construction, operation of the proposed site and related facility.

While the plain language of AB 205 is clear standing alone, the legislative history and statutory scheme underscores that the Energy Commission retains jurisdiction over the certification process and any certification issued by the Commission supersedes the County’s authority over eligible projects.

D. NO CASELAW SUPPORT SHASTA COUNTY’S INTERPRETATION OF ENERGY COMMISSION JURISDICTION OVER FOUNTAIN WIND

CURE reiterates the Applicant’s emphasis that Shasta County provides no caselaw to support its interpretation of AB 205.¹⁹ CURE also concurs that the California Attorney General’s opinion addressing the Energy Commission’s jurisdiction over thermal powerplants provides helpful guidance given that the new

¹⁸ Pub. Resources Code § 25545.8(b).

¹⁹ Letter to Drew Bohan, Executive Director, California Energy Commission from Anne E. Mudge, Cox, Castle & Nicholson LLP re: Fountain Wind AB 205 Application (23-OPT-01) pp. 3-4 (TN# 251700) (hereinafter “Applicant Response”), *available at* <https://efiling.energy.ca.gov/GetDocument.aspx?tn=251700&DocumentContentId=86688>.

certification process is modeled after that existing process, and even relies directly on some of its requirements.²⁰

E. COMMISSION JURISDICTION OVER FOUNTAIN WIND WOULD NOT LEAD TO ABSURD LEGAL OR POLICY RESULTS

Shasta County argues it is inappropriate to use the new certification process to review projects previously denied at the local level because it would lead to absurd policy and legal results. This is incorrect. Given the need to quickly bring new renewable energy projects online to meet California's energy needs and goals, the state's interests and concerns diverge significantly from those of local agencies. The Energy Commission may find that, after review of the project, public convenience and necessity require that the facility be constructed.

The County is free to reiterate its disapproval of the proposed Project. In fact, the new certification process requires local agency participation, and the Legislature intended for the Energy Commission to give great weight to the comments, opinions, ordinances and standards of local governments.²¹ However, if the Commission "determines that the facility is required for public convenience and necessity and that there are no more prudent and feasible means of achieving the public convenience and necessity,"²² the certification overrides the objections of the county government.²³

Even though Shasta County previously denied the Fountian Wind Project, compelling statewide interests (such as meeting California's energy needs and goals) may override the County's local concerns, which will be determined based on the record of the proceeding and in accordance with the procedures established by AB 205.

F. SHASTA COUNTY SHOULD HAVE RAISED ITS CONCERNS MONTHS AGO

CURE reiterates the Applicant's concerns regarding the timing of Shasta County's opposition.²⁴ The Energy Commission received the application in January

²⁰ See e.g., Pub. Resources Code § 25545.8.

²¹ See 58 Ops.Cal.Atty.Gen. 729, 745 (citing similar participation requirements and opportunities in thermal powerplant certification proceedings).

²² Pub. Resources Code §§ 25525, 25545.8(b).

²³ See 58 Ops.Cal.Atty.Gen. 729, 746.

²⁴ Applicant Response at pp. 4-5.

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2023, and pursuant to Section 25519(f), was required to forward the application to the Shasta County upon receipt. Yet, Shasta County waited over 8 months to raise its concerns with the Commission's jurisdiction. The Commission need not evaluate jurisdiction given the plain language of AB 205.

Sincerely,



Andrew J. Graf

AJG:acp