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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 OPPOSITION TO COMMISSION JURISDICTION UNDER AB 205 AND OBJECTION TO FOUNTAIN WIND LLC REQUEST FOR APPLICATION COMPLETION DETERMINATION

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COUNTY OF SHASTA

August 11, 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
OPPOSITION TO COMMISSION JURISDICTION UNDER AB 205 AND OBJECTION TO FOUNTAIN WIND LLC REQUEST FOR APPLICATION COMPLETION DETERMINATION

I. INTRODUCTION

The County of Shasta ("County") submits this opposition to Fountain Wind LLC's ("Applicant") opt-in application filed with the California Energy Commission ("Commission"), Docket No. 23-OPT-01, with a receipt date of January 11, 2023, seeking approval and certification of the Fountain Wind Project ("Application").

The Commission lacks jurisdiction to consider the Application under Assembly Bill ("AB 205") because the Fountain Wind Project was previously denied twice by the County after exhaustive California Environmental Quality Act ("CEQA") review, by both the County Planning Commission and Board of Supervisors. The Legislature did not intend to allow an applicant to use the Commission process to circumvent the previous denial of approval of an AB 205 project by a local government with land use authority. Rather, the Legislature intended to allow an applicant to opt-in to the Commission certification process "in lieu of," or instead of, the traditional local government discretionary approval process. Furthermore, it is questionable whether AB 205 was properly enacted when the bill proceeded through a budget trailer bill

process as urgency legislation and whether the adoption process and application of AB 205 to the Project usurped local discretionary authority. For these reasons, and because there is nothing contained in the current record of this proceeding indicating that the Commission has evaluated its jurisdiction with respect to the Application, the County objects to the Applicant's August 3, 2023 request for a Commission determination that the Application is complete.

The County hereby requests the Commission (1) formally review its jurisdiction under AB 205, (2) hold a duly-noticed Business Meeting to discuss its jurisdiction over the Application prior to allowing the Applicant or Commission staff to proceed further in the proceeding, (3) decide this issue at the Business Meeting and ultimately find that the Commission does not have jurisdiction and deny or reject the Application, and (4) direct the Executive Director to delay issuing a notice of completion until this issue is finally decided. Due to the urgency of this matter, the County reserves all rights to supplement its opposition and request additional remedies.

II. BACKGROUND: SHASTA COUNTY's PRIOR REVIEW AND DENIAL OF THE FOUNTAIN WIND PROJECT

Before applying for an "opt-in" certification with the Commission on January 11, 2023, the Applicant filed an application for a conditional use permit, among other approvals, with the Shasta County Department of Resource Management Planning Division to build the Fountain Wind project ("Project") in November of 2016.[1] Pursuant to Shasta County Code § 17.92.020, any use permit application submitted to the County must be reviewed by County planning staff for compliance with CEQA. The County Planning Commission "may approve, conditionally approve or deny approval of the application by resolution," and cannot approve the permit unless

[1] Planning Permit Master Application, https://www.shastacounty.gov/sites/default/files/fileattachments/planning/page/3357/application-form.pdf (last accessed August 9, 2023).

it finds that the use would not "be detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of the proposed use or be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the county[.]"[2]

What followed after the initial County application was a five-year process of public meetings and hearings, environmental review, submittal of amended applications, and significant opposition from local tribes and community members, which ultimately led the Planning Commission to deny the application in June 2021, and on appeal, the Shasta County Board of Supervisors to also deny the application in October 2021.

Members of the Pit River Tribe, whose tribal trust and ancestral lands encompass the Project site, were opposed to the Project because it would irrevocably alter mountain ridges that are sacred to the Tribe and where the Tribe would traditionally hold ceremonies and gather food. Tribal members also expressed concerns about wildfire risks.

Members of the public expressed concerns involving increased wildfire risk, increased construction traffic, rock blasting impacts on wildlife, light and noise pollution, the diminishment of the aesthetic value of the mountain ridges, and more. A 2,000+ page Final Environmental Impact Report ("EIR") was prepared, which responded to each public comment that fell within the scope of CEQA, analyzed each CEQA-related impact, and included extensive consultations with and review by several state agencies with jurisdiction over the subject matter of the Project.[3]

[2] Shasta County Code § 17.92.020(F).
[3] Fountain Wind Project Final Environmental Impact Report, https://www.shastacounty.gov/sites/default/files/fileattachments/planning/page/3362/web-fwp-feir-vol-1-2021.04.pdf.

On June 22, 2021, after a duly noticed public hearing on the Final EIR and Project, the County Planning Commission unanimously denied the application for the permit, noting that it had received testimony "regarding the following detrimental impacts of the proposed project: impacts to aesthetics; potential increased fire danger; impediments to firefighting efforts; damage to wildlife; damage to natural resources; and damage to cultural and tribal resources."[4] In denying the permit, the County further found that these impacts would be detrimental and injurious to the general welfare of people in the County and to County property.

Pursuant to Shasta County Code § 17.92.030, Fountain Wind LLC then appealed the Planning Commission's decision to the Shasta County Board of Supervisors, and amended its project application by, among other things, proposing to shrink the Project to 48 wind turbines rather than 72. In accordance with Shasta County Code § 17.92.030, the Board of Supervisors could "reverse or affirm, wholly or partly, or . . . modify the order, requirement, decision, determination or condition appealed," and the "action of the board shall be final." On October 26, 2021, the Shasta County Board of Supervisors voted to uphold the planning commission's decision and deny the permit.

Between January 3 to January 11, 2023, Fountain Wind LLC re-filed the Project for approval with the Commission under AB 205. Tribal members (again) expressed frustration that this new attempt ignored "a local decision that was based on years of legally required environmental studies, public meetings, and consultations with the Pit River Tribe," and opined that the Commission should not consider the Project given the fact that it had been denied after

[4] See Shasta County Resolution No. 2021-010: A Resolution of the Shasta County Planning Commission Denying Use Permit 16-007 (Fountain Wind, LLC), https://www.shastacounty.gov/sites/default/files/fileattachments/planning/page/3363/fw-denial-resolution.pdf (last visited August 9, 2023).

an incredibly extensive review and subsequent appeal.[5] The Project Application has been undergoing review as part of the Commission's "opt-in" Application for Certification ("AFC") process and hundreds of deficiencies have been noted with data requests issued by the Commission. Based on discussions with Commission staff, there has been no public analysis or determination of the Commission's jurisdiction over the Project, nor any analysis that considers that the Project was previously denied by the County.

III. ASSEMBLY BILL 205

A. Text of AB 205

AB 205 was signed into law by the Governor on June 30, 2022, giving the Commission extended siting authority over certain renewable energy facilities, including any "solar photovoltaic or terrestrial wind electrical generating power plant with a generating capacity of 50 megawatts or more and any facilities appurtenant thereto." AB 205 added Chapter 6.2 to Division 15 of the Public Resources Code, which Chapter governs the Commission and its certification of nonfossil-fueled powerplants, energy storage, and related facilities. AB 205 permits an applicant proposing to build a qualifying energy facility to file an application with the Commission on or before June 30, 2029, and that, "[u]pon 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[.]"[6] AB 205 further provides 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,

[5] Back from the Dead: Shasta County Fountain Wind Project Could Be Approved Under New California Bill Designed To Fast Track Renewable Energy, https://shastascout.org/back-from-the-dead-state-could-approve-shasta-county-fountain-wind-project-under-new-bill-designed-to-fast-track-californias-renewable-energy/.
[6] Pub. Res. Code § 25545.1.

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."[7]

After the filing of an application with the Commission, the Commission must review the application as the Lead Agency pursuant to CEQA and make a final determination on the application within 270 days of the Commission's notice of completion.[8] In making a final determination, the Commission is required, among other determinations, to take into account the traditional ecological knowledge of tribes, hold extensive public outreach, and refrain from certifying an application unless the applicant has "entered into one or more legally binding and enforceable agreements with, or that benefit, a coalition of one or more community-based organizations."[9] The Commission must also find that the project has a net positive economic benefit.

B. History of Enactment of AB 205

AB 205 was enacted as a part of the 2022 state budget as a "budget trailer bill." Budget trailer bills are meant to supplement the main budget act by enacting corresponding changes in the State code. In the past several years, however, so-called budget trailer bills have begun to include more sweeping and impactful policy changes that are only loosely connected to the budget, thereby circumventing the typical legislative process and drawing critiques as undemocratic. Since budget trailer bills are negotiated behind closed doors, there is typically "no documented legislative history or intent available," and a court must rely on "the language of the bill itself" when interpreting legislative intent.[10]

[7] *Id*. (emphasis added).
[8] Pub. Res. Code §§ 25545.4 and 25545.7.
[9] *Id*. at § 25545.10.
[10] *California Hosp. Ass'n v. Maxwell-Jolly*, 776 F. Supp. 2d 1129, 1138 (E.D. Cal. 2011).

AB 205 was introduced in the Assembly on January 8, 2021 with the generic placeholder language: "It is the intent of the Legislature to enact statutory changes relating to the Budget Act of 2021." On June 26, 2022, in the Senate Committee on Budget and Fiscal Review, the "opt-in" provision of the bill was proposed to "[a]llow specified clean energy projects to seek consolidated permitting at the Commission by June 30, 2029, if they adhere to specified labor standards[.]" On June 29, 2022, the bill was introduced for a third reading at the Senate Rules Committee with the same language that was introduced on June 26, and on the same day, the full language of the now-enacted bill was introduced. The bill was signed into law by the Governor on June 30, 2022. *Only four days passed between the public proposal of any substantive language in AB 205 and its enactment*.

There has been increased criticism in recent years of the state's use of budget trailer bills. When budget trailer bills are introduced, they contain generic placeholder language and then "stay like that for months while closed door negotiations take place between the Legislature, Governor's staff, and select stakeholders."[11] Budget trailer bills require only a simple majority to be enacted rather than a two-thirds vote, they take effect as soon as they are signed by the Governor, and they are negotiated behind closed doors rather than in legislative session. Therefore, state policymakers have used them ever more frequently to enact policy changes that would otherwise face strong opposition if introduced through a normal legislative procedure.[12]

[11] The Curious Case of Budget Trailer Bills, https://www.counties.org/county-voice/curious-case-budget-trailer-bills.

[12] *See California Senate takes rare stand against misuse of budget 'trailer bills'*, Cal Matters, https://calmatters.org/commentary/2023/06/california-misuse-budget-trailer-bills/ (last visited July 26, 2023) ("California governors and legislators routinely misuse so-called budget 'trailer bills' to enact sweeping policy changes without the transparent processes that they deserve. . . . it ha[s] become common practice for governors and legislative leaders to put sweeping policy changes into trailer bills to make their passage easier."); see also Concerns mount on Newsom administration's use of budget process to fast track proposed laws, KRCA 3, https://www.kcra.com/article/california-gavin-newsom-criticism-fast-trackbills/44203421 (last visited Jul 26, 2023) (quoting Assemblyman Vince Fong, R-Bakersfield: "We are watching a broken budget process. We are now seeing budget trailer bills that are making significant policy decisions without any public input. They're being drafted behind closed doors, presented to the Legislature, presented to the public in very little time.").

Multiple city and county governments protested the inclusion of the opt-in provision for certifying new types of renewable energy facilities that was included in AB 205, given that it took permitting power away from local governments and placed it into the hands of the Commission. The League of California Cities voiced opposition to AB 205's "usurpation of local permitting authority," and the Rural County Representatives of California criticized the bill as being "overly broad, usurp[ing] local control, [and] exclud[ing] local governments from meaningful involvement in major development projects within their jurisdictions," among other things.[13] Had the bill undergone the traditional legislative process and the County been afforded time to review AB 205, the County would have participated in the process and formally opposed AB 205.

IV. THE COMMISSION LACKS JURISDICTION TO CERTIFY THE PROJECT

The Commission lacks jurisdiction over the Application because the Legislature in enacting AB 205 intended that an applicant choose either the local permitting or Commission certification pathway. The Legislature did not intend for an applicant to be able to go through the same or similar approval process twice and have a "second bite at the apple."[14] Therefore, Fountain Wind LLC is precluded from obtaining Project approval in a new forum and the Commission has no jurisdiction or other authority to further review or act on the Application other than to dismiss it. The only remedy that was available to Fountain Wind LLC at the time of the County's denial and thereafter was to petition the state court for a writ of mandate, which action is now time-barred by the applicable statute of limitations. Any other interpretation of AB 205 would create significant statewide legal and policy issues where local agency denials,

[13] *See Legislators, Newsom negotiating behind closed doors over energy deal*, Cal Matters, https://calmatters.org/environment/2022/06/energy-deal-budget-talks/ (last visited August 9, 2023).
[14] Both the application before the County Board of Supervisors and the application currently before the Commission propose the construction of 48 wind turbines in the exact same location.

and court decisions upholding those denials, could be dusted off and resurrected. This interpretation is also inconsistent with how other opt-in or in lieu laws and programs work. In addition, based on the Applicant's position here, it is questionable whether AB 205 was properly enacted when it proceeded through a budget trailer bill process as urgency legislation and the bill itself usurps local discretionary authority.

A. Statutory Interpretation of AB 205 Is That the Commission Cannot Review and Certify a Project that Has Undergone Local Permitting Review and Denial

The statutory language and legislative history of AB 205 demonstrate that, in enacting the bill, the Legislature intended to allow applicants seeking permits for eligible renewable energy projects to "opt-in" to the Commission certification process, thereby "opting out" of any other local permitting process, but did not intend to allow an applicant to pursue both avenues. This is further supported by the plain meaning and deliberate use of the words "in lieu of" in the statutory language and "opt-in" in the legislative description of the bill.

California courts review questions of statutory construction "independently."[15] The courts:

> look first to the words of a statute, "because they generally provide the most reliable indicator of legislative intent." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871, 39 Cal.Rptr.2d 824, 891 P.2d 804.) We give the words their usual and ordinary meaning (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299), while construing them in light of the statute as a whole and the statute's purpose (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, 253 Cal.Rptr. 1, 763 P.2d 852). . . . "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." (*People v. Snook* (1997) 16 Cal.4th 1210, 1215, 69 Cal.Rptr.2d 615, 947 P.2d 808.) "Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." (*Murphy v. Kenneth Cole Productions, Inc*. (2007) 40 Cal.4th 1094, 1103, 56 Cal.Rptr.3d 880, 155 P.3d 284.)

[15] *Pineda v. Williams-Sonoma Stores, Inc*., 51 Cal. 4th 524, 529 (2011).

Id. at 529–30.

In this case, the language of AB 205 provides that an applicant seeking a permit for an eligible renewable energy facility "*may* file an application . . . for certification with the [Commission] to certify a site and related facility in accordance with this chapter," and that "the issuance of a certificate by the commission for a site and related facility pursuant to this chapter 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[.]"[16]

The language indicating that an applicant "may file" an application with the Commission is permissive rather than mandatory, and is specifically worded as such so that an applicant can choose between the new Commission certification process offered by AB 205 or an analogous local permitting process. Similarly, the language providing that the Commission's certification of an eligible facility is to be "*in lieu of* any permit, certificate, or similar document required by any state, local, or regional agency" indicates that an applicant may choose to file an application with the Commission rather than the local agency.[17] In addition, the Commission adopted emergency regulations after AB's 205's enactment approving its application procedures as "Opt-in Regulations."

To the extent that AB 205's text is ambiguous, this interpretation of the "either-or" option is supported by the earlier version of AB 205 that was introduced in the Senate Committee on Budget and Fiscal Review on June 26, 2022, which read: "**Opt-in Permitting.** Allows specified

[16] Pub. Res. § 25545.1 (emphasis added).
[17] *See* Pub. Res. Code § 71022(a)(3) (indicating that an applicant for a permit may use a "consolidated permit application form that is authorized by subdivision (e) or (f) of Section 15399.56 of the Government Code *in lieu of* the separate application forms for each component environmental permit that would be provided by the consolidated permit agency and the participating permit agencies." (emphasis added)).

clean energy projects to seek consolidated permitting at the Commission by June 30, 2029, if they adhere to specified labor standards[.]" The "opt-in" language clarifies that applicants were allowed to "opt-in" to the Commission process, thereby opting out of the traditional local process, but only if the applicant adhered to the aforementioned labor standards.

To be clear, Merriam Webster defines "in lieu of" as "in the place of : instead of." Merriam Webster further defines "opt-in" as "to choose to do or be involved in something."[18] Other plain meanings of "opt-in" include "to make a choice; choose." Nothing in the statutory language or legislative history indicates that an applicant would be allowed to file in both venues, or that an applicant should be able to go through the process twice. Thus, the Legislature was clear that selecting the particular approval process for AB 205 applications was disjunctive or, in other words, mutually exclusive. The Fountain Wind Project does not get two bites at the apple.

B. The Applicant Did Not Challenge the Shasta County Board of Supervisors' Denial of the Project.

The County went through an exhaustive review of the Project at both the Planning Commission and on appeal with the Shasta County Board of Supervisors. A 2,000+ page Final EIR was prepared which responded to each public comment that fell within the scope of CEQA, analyzed each CEQA-related impact, and included extensive consultations with and review by several state agencies with jurisdiction over the subject matter of the Project. The Final EIR concluded that the Project would have a large number of significant and unavoidable impacts to the environment, both on the project and cumulative levels - impacts that cannot be fully mitigated. These include significant impacts to scenic vistas, to air quality with regard to increased emissions of particulate matter in excess of state standards, to raptors due to collisions

[18] Merriam-Webster.com, https://www.merriam-webster.com (last accessed August 9, 2023).

with wind turbines, as well as mortality and injury to bats and special status species and impacts to Tribal Cultural Resources throughout the Project site. After this extensive review, the Project was denied.

Fountain Wind LLC had adequate legal remedy to challenge the Shasta County Planning Commission's decision, and it did pursue that remedy when it appealed the denial to the Shasta County Board of Supervisors. The Board of Supervisors, however, also denied a conditional use permit for the Project and did not certify the Final EIR, acknowledging, among other things, that the Planning Commission decision was the result of an extensive five-year CEQA-compliant analysis during which all public comments and perspectives were carefully considered. Pursuant to Shasta County Code § 17.92.030, any "action of the [Board of Supervisors] shall be final," and Fountain Wind LLC's remaining remedy at law was to challenge the Board of Supervisors' decision under Code of Civil Procedure sections 1094.5 or 1085, as applicable, by filing a petition for a writ of mandate with the superior court seeking review of the County's decision and action.[19] The Applicant did not do so, and it is now time-barred from filing a court challenge under the applicable statute of limitations. Instead, as is evident from a review of the Application filed in Commission docket 23-OPT-01, the Applicant recycled the same EIR and other analyses, such as its purported economic benefits analysis, and re-filed it with the Commission. Therefore, in terms of the environmental impacts of this project, the Applicant is in fact asking the Commission to make findings of overriding consideration that the merits of the Project warrant its approval despite its multiple significant and unavoidable environmental impacts, findings that, after extensive environmental review and public as to this exact Project

[19] *See Mills v. Cnty. of Trinity*, 98 Cal. App. 3d 859, 861 (Ct. App. 1979); *see also Knoff v. City etc. of San Francisco*, 1 Cal. App. 3d 184, 190 (Ct. App. 1969).

and based on no new evidence, the local government agency with land use authority concluded that it could not make.

C. Commission Jurisdiction Over the Application Would Lead to Absurd Policy and Inconsistent Legal Results in State and Local Government Opt-In and In Lieu Laws and Programs

AB 205 is not a legal mechanism to "resurrect" projects that were properly denied at the local level and for which EIRs were fully reviewed and considered and were not certified. If the Project had been litigated and the County's denial of the project upheld in state court, AB 205 would not provide a forum at the Commission to circumvent a court decision, and certainly, the Legislature did not intend that this be the case. Otherwise, it would have specified this in the legislative history of the bill or in the bill itself as it does when it seeks to overturn specific local government actions or prior judicial decisions. Instead, it gave project proponents a choice between two options. Allowing the Commission proceeding to move forward to a certification decision would lead to conflicting and absurd policy and legal results where projects that have denied at the local level or whose environmental documents were not certified or found to be legally inadequate could be pulled off the shelf and re-submitted to the Commission. Certainly, the Commission is not intending that this be the case; however, there is no current record before the Commission indicating that the Commission has analyzed or even considered whether it has jurisdiction over the Project in the first place or that it desires to create a process where prior projects can be re-packed and resurrected.

In addition, an "opt-in" system in which projects could go through one process, be denied, and pivot to another process is entirely inconsistent with how state and local government opt-in processes work. There is a litany of opt-in programs throughout the state, such as the Quimby Act, whereby a developer selects one state or local government pathway over another

and is then bound by the option the developer opted-into. The very definition of "opt-in" and how such programs are carried out is to make a choice between one option or the other.

V. RELIEF SOUGHT

The County requests that the Commission dismiss the Application on the grounds that it lacks jurisdiction to approve the Project under AB 205 in addition to the other reasons provided herein. More specifically, the County hereby requests the Commission (1) formally review its jurisdiction under AB 205 if it has not previously done so (and provide such analysis publicly), (2) hold a duly-noticed Business Meeting to discuss its jurisdiction over the Application prior to allowing the Applicant or Commission staff to proceed any further in this process, (3) decide this issue at the Business Meeting and ultimately find that the Commission does not have jurisdiction and dismiss the Application, and (4) direct the Executive Director to delay issuing a notice of completion until this issue is decided in a final action of the Commission.

CONCLUSION

The County submits this opposition and objection and hereby requests that the Executive Director not issue a notice of completion on the Application pending further review of the issues raised herein, and that the Commission ultimately dismiss the Application on jurisdictional and other legal and policy grounds. The County appreciates the Commission's attention to this request.

Dated: August 11, 2023

Respectfully submitted,

By: 

Ryan M. F. Baron