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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]

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[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 severral 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

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