

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

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.<sup>1</sup> 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").

---

<sup>1</sup> 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:<sup>2</sup>

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.”<sup>3</sup> 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.<sup>4</sup> Moreover, subdivision (a) expressly states that the Commission’s jurisdiction extends to an application that proposes a new site and related facility.

---

<sup>2</sup> All statutory references are to the Public Resources Code unless indicated otherwise.

<sup>3</sup> Pub. Resources Code § 25545(b)(1).

<sup>4</sup> 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.<sup>5</sup> 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.”<sup>6</sup> 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.<sup>7</sup> It also does not

---

<sup>5</sup> 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>.

<sup>6</sup> Pub. Resources Code § 25545.1(b)(1).

<sup>7</sup> Pub. Resources Code § 25545.1(b)(2).

replace the authority of the State Lands Commission to require leases and receive lease revenues, if applicable.<sup>8</sup> 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.<sup>9</sup>

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.”<sup>10</sup> 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,”<sup>11</sup> 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...”<sup>12</sup>

---

<sup>8</sup> Pub. Resources Code § 25545.1(b)(2).

<sup>9</sup> Pub. Resources Code § 25545.1(b)(3).

<sup>10</sup> Pub. Resources Code § 25005.

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

<sup>12</sup> Pub. Resources Code § 25005.

August 25, 2023

Page 5

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.<sup>13</sup>

Similar interpretations of the AB 205 were expressed in the Assembly Floor Analysis and Senate Floor Analysis.<sup>14</sup> 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.<sup>15</sup>

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.”<sup>16</sup> 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.<sup>17</sup>

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

---

<sup>13</sup> 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#](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB205#).

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

[https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=202120220AB205#](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#](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB205#).

<sup>15</sup> County Opposition at p. 8.

<sup>16</sup> Senate Floor Analysis at p. 5.

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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

---

<sup>18</sup> Pub. Resources Code § 25545.8(b).

<sup>19</sup> 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.<sup>20</sup>

#### **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.<sup>21</sup> 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,"<sup>22</sup> the certification overrides the objections of the county government.<sup>23</sup>

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.<sup>24</sup> The Energy Commission received the application in January

---

<sup>20</sup> See e.g., Pub. Resources Code § 25545.8.

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

<sup>22</sup> Pub. Resources Code §§ 25525, 25545.8(b).

<sup>23</sup> See 58 Ops.Cal.Atty.Gen. 729, 746.

<sup>24</sup> Applicant Response at pp. 4-5.



August 25, 2023  
Page 8

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