

**DOCKETED**

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<b>Project Title:</b>	Fountain Wind Project
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Submitted On: 9/12/2023  
Docket Number: 23-OPT-01*

**23-OPT-01**

*Additional submitted attachment is included below.*



## Land Use Services Department

**Mark Wardlaw**  
Director

**Jevin Kaye**  
Assistant Director

September 1, 2023

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

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

Dear Mr. Bohan:

Please allow this letter to serve as San Bernardino County's ("County") comments in support of the County of Shasta's "Opposition to Commission Jurisdiction under AB 205 and Objection to Fountain Wind LLC Request for Application Completion Determination," ("Opposition") docketed on August 14, 2023. As outlined in the Opposition, the California Energy Commission ("CEC") lacks jurisdiction to consider an application for an eligible energy facility ("Energy Project") pursuant to Assembly Bill ("AB") 205 when the same or similar Energy Project has previously been considered and denied by the applicable state, local, regional, or federal agency (collectively "Local Agency") having permitting authority. To interpret the provisions otherwise would create absurd results, invite manipulation, and directly conflict with the intent and processes of AB 205.

AB 205 creates concurrent jurisdiction for the applicable Local Agency or the CEC to review and consider an application for an Energy Project. The selection of the permitting authority is at the option of the applicant; not the Local Agency or the CEC.<sup>1</sup> Once an applicant opts-in and selects the CEC as the desired permitting authority, AB 205 then provides the CEC with the exclusive jurisdiction for certifying or denying the Energy Project application in lieu of any permit, certificate, or similar document required by the Local Agency.<sup>2</sup> Given that the selection of the permitting authority is at the option of the applicant and that the Local Agency is subject to the determination by the CEC, the same principles should be true when an applicant initially selects the Local Agency as the permitting authority and a decision is rendered on the merits of the application.

In those circumstances in which a Local Agency has already considered and denied an Energy Project, interpreting AB 205 as providing the CEC continued jurisdiction would create absurd results and directly conflict with AB 205's review and decision-making processes. For example, applications submitted pursuant to AB 205 require the CEC to consult with the Local Agency having land use jurisdiction in the area of the proposed Energy Project.<sup>3</sup> The purpose of consultation is to solicit comments on, among other things, aspects of the design, construction,

<sup>1</sup> Public Resources Code § 25545.1, subd. (a).

<sup>2</sup> Public Resources Code § 25545.1, subd. (b).

<sup>3</sup> Public Resources Code § 25545.8, subd. (b).

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SUBJECT  
DATE  
PAGE 2 of 3

or operation of the proposed site and related facility.<sup>4</sup> Engaging in this consultation process for a previously denied Energy Project would be wasteful by consuming the time and resources of both the CEC and the Local Agency in order to re-evaluate matters already decided.

Another example of inconsistent and absurd results include those circumstances in which the CEC must make a finding of public convenience and necessity before certifying an Energy Project.<sup>5</sup> When an Energy Project is determined to be in conflict with a Local Agency's standards, ordinances, or laws, AB 205 authorizes the CEC to certify the Energy Project only if the facility is required for public convenience and necessity.<sup>6</sup> A finding of public convenience and necessity takes into consideration factors that include, but are not limited to, impacts of the Energy Project on the environment, consumer benefits, and electric system reliability. A Local Agency's review and consideration of an Energy Project often includes overlapping evaluations such that the CEC's continued jurisdiction over an Energy Project previously denied by a Local Agency invites manipulation and an applicant's attempt at inconsistent results that is contrary to the intent of the in lieu permitting process authorized by AB 205.

Most importantly, prior to certifying an Energy Project, AB 205 requires the CEC to make a finding that the construction or operation of the facility will have an overall net positive economic benefit to the local government that would have had permitting authority over the site and related facility.<sup>7</sup> This finding requirement rings hollow if the CEC were able to conclude, over the previous determination of the Local Agency, that the Energy Project has a net positive economic benefit on the local government when the elected and/or appointed members of that same government have already determined, directly or indirectly, that no said benefit exist. Therefore, pursuant to AB 205's own processes the continued jurisdiction of the CEC under these circumstances would create absurd results.

For the reasons discussed above and for the reasons outlined in the County of Shasta's Opposition, the CEC lacks jurisdiction under the unique circumstances of this case. Concluding the CEC lacks jurisdiction would prevent wasted effort and expense, avoid manipulation, encouraging reliance on local administrative proceedings, and foster repose through finality of decisions. Thank you for your consideration.

Very Truly Yours,



Mark Wardlaw  
Director  
Land Use Services Department  
San Bernardino County, CA

cc: Luther Snoke, Interim County Chief Executive Officer  
Tom Bunton, County Counsel

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<sup>4</sup> Public Resources Code § 25519, subd. (f).

<sup>5</sup> Public Resources Code § 25545.8, subd. (b).

<sup>6</sup> Public Resources Code § 25525.

<sup>7</sup> Public Resources Code § 25545.9.

SUBJECT  
DATE  
PAGE 3 of 3