

DOCKETED

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Description:	N/A
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Submitter Role:	Applicant Consultant
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To: Leonidas Payne
California Energy Commission

From: Caitlin Barns
Stantec Environmental Services

Project/File: Fountain Wind Project (23-OPT-01)

Date: September 25, 2023

Reference: RE: CONFIDENTIAL Response to Community Benefits Data Request (TN 252320, Docketed September 20, 2023)

DATA REQUEST: Requirements Under Public Resources Code section 25545.10(a).

The application does not contain sufficient detail to meet the requirements of Public Resources Code section 25545.10(a). The applicant has not docketed a response that identifies a plan or strategy with a timeline, to enter into one or more legally binding and enforceable agreements “that benefit, a coalition of one or more community-based organizations ...where there is mutual benefit to the parties to the agreement.” (Pub. Resources Code, § 25545.10, subd. (a).) The applicant did not identify any organization that represents community interests that will benefit from the binding agreement as required under Public Resources Code sections 25545.10(a). For data adequacy, the requirement to execute the agreement within 45 days of the application being deemed complete must include an anticipated timeline for entering into a binding and enforceable agreement with a specific beneficiary in the community. For these reasons, the applicant’s response does not describe an enforceable agreement that will benefit a specific member of the community, but rather an intention to fund a community grants program that may, in the future, create enforceable agreements with community benefits. Intending to enter into future binding agreements with community members does not meet the requirements of Public Resources Code section 25545.10(a). The CEC staff requests that the applicant docket this additional, required information.

APPLICANT RESPONSE

To make it easier to follow each point raised in this first Data Request, the applicant breaks apart the paragraph above and responds as follows:

The Data Request states: “The application does not contain sufficient detail to meet the requirements of Public Resources Code section 25545.10(a).”

Applicant responds: The applicant believes it has already submitted sufficient detail concerning the community benefit proposal but supplements its previous responses with additional confidential information as described more below.

The Data Requests states: “The applicant has not docketed a response that identifies a plan or strategy with a timeline, to enter into one or more legally binding and enforceable agreements “that benefit, a coalition of one or more community-based organizations ...where there is *mutual benefit* to the parties to the agreement.” (Pub. Resources Code, § 25545.10, subd. (a).) [Italics in original data request]”

Applicant responds: With respect to the requirement to provide a “plan or strategy” and “timeline,” the applicant’s response on September 8, 2023 (TN 252187) states that “the applicant expects to execute a legally binding and enforceable endowment agreement by the end of September and will provide a signed version of the agreement shortly after execution.” TN 252187 further states, “the applicant

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anticipates it will be able to provide a copy of the signed agreement no later than 45 days following the CEC's determination that the application is complete."

The information already provided in TN 252187 refers to specific activities leading towards the execution of an agreement as well as a specific timeline for those activities with dates and milestones. The description of these activities constitutes a "plan or strategy" and the dates of expected completion constitute a "timeline." The applicant now estimates that the agreement can be executed within the new few weeks. The applicant has therefore met the "plan or strategy" and "timeline" requirement.


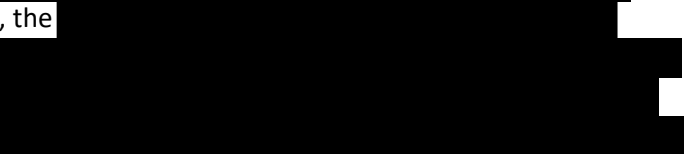
Although not entirely clear, the Data Request also appears to question whether the entity with which the applicant proposes to enter an agreement qualifies as a "community-based organization" pursuant to Public Resources Code section 25545.10(a) either because the organization itself is not "community-based" or fails to "represent community interests" or because the agreement lacks "mutual benefit to the parties."¹


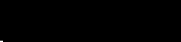


The applicant offers the following explanation:

Public Resources Code section 25545.10(a) calls for the applicant to enter into "one or more legally binding and enforceable agreements with, or that benefit, a coalition of one or more community-based organizations . . . where there is mutual benefit to the parties to the agreement." The section then provides non-exclusive examples of such community-based organizations, including "workforce development training organizations, labor unions, social justice advocates, local governmental entities, California Native American Tribes, or other organizations that represent community interests . . ."

Section 25545.10(a) does not define "community-based organization" or "other organizations that represent community interests," although it provides a non-exclusive list of examples. Given the broad language, it must be concluded the Legislature intended to include any organization that is either based in the community or represents its interests. "Community" appears to be a geographic reference and appears to mean the locality within which the project is proposed, here Shasta County.

Here, the organization with which the applicant is negotiating to enter into a binding legal agreement is the

.² As explained on its website, the 

 With donations from organizations,  individuals and companies like the applicant,  has established  funds that provide financial support to a large variety of local, community-based causes. Examples of the kinds

¹ The data request italicizes the "mutual benefit" language from section 25545.10, but it is not entirely clear why these words are italicized.

² Negotiations are on-going; therefore, the applicant is sharing this information and a draft of the agreement as confidential documents.

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of organizations and grants made were included in TN 252187 and more examples are available on [REDACTED] website. [REDACTED] is run by a Board of Directors who are leaders in [REDACTED] counties and represent a broad range of professions and perspectives. The projects it gives money to through its various funds are located in Shasta, Siskiyou and Tehama counties.

[REDACTED] is community-based, and it is an organization. It is directed by people who live and/or work in the counties in which [REDACTED] operates and represents the interests of the people who live and work in those counties. The members of the Board of Directors of [REDACTED] are local community leaders and are [REDACTED]

[REDACTED] Under a straight-forward interpretation of the words of the statute, [REDACTED] qualifies as either, and indeed, both a “community-based organization and “an organization that represents community interests.” Further, the terms of the funding agreement require the funds to be directed to people and organizations providing services or amenities within the communities of Round Mountain, Montgomery Creek, and Burney, where the project will be developed.

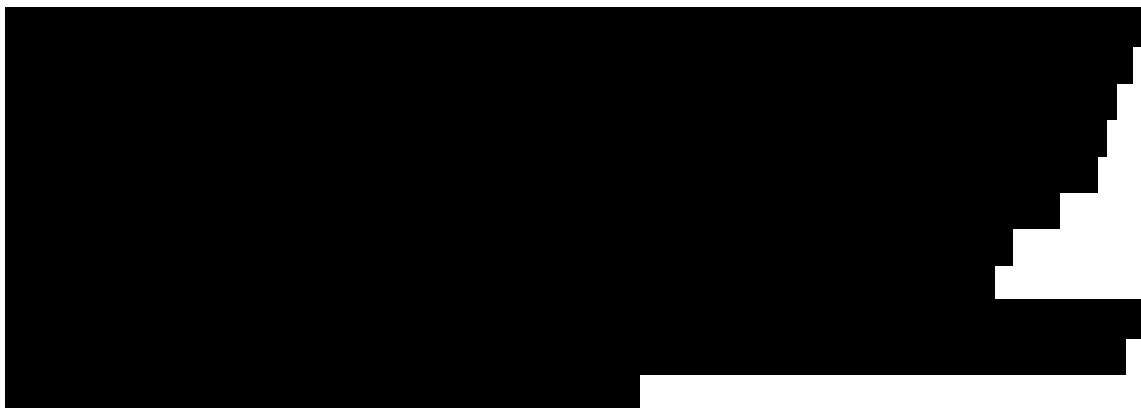
The Data Request also raises the concern that the applicant is not entering into a binding agreement but is only intending in the future to enter into a binding agreement. This concern appears to misunderstand the structure of the proposed agreement. The agreement with [REDACTED] would obligate the applicant to irrevocably transfer [REDACTED] to [REDACTED], which in turn would be required to distribute the funds for purposes consistent with Public Resources Code section 25545.10. [REDACTED]

[REDACTED] of the agreement explains the purpose of the agreement as follows and also directs that [REDACTED] of the funds be distributed to or for the benefit of the [REDACTED]:

[REDACTED]

³ In this case, cash would be donated.

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The agreement with [REDACTED] is not an unenforceable intention to offer financial support for community benefits at some later date. It is an immediate, enforceable commitment to create a fund from which community organizations in the immediate area of the project, and specifically [REDACTED], can apply for and obtain grants for projects designed by them and for them.

The agreement is also for the “mutual benefit to the parties to the agreement.” The benefit to the applicant is that the agreement helps it meet its qualifications under section 25545.10 of the CEC’s opt-in program. The benefit to [REDACTED] is that it helps meet [REDACTED] mission of providing charitable funding to community-based organizations in Shasta County. The reasons the applicant selected [REDACTED] as the entity to hold and distribute of the funds are (1) [REDACTED] expertise in managing funds donated for purposes of providing community benefits and (2) [REDACTED] unique knowledge of the needs of people and organizations in Shasta County.

The Data Request says: For data adequacy, the requirement to execute the agreement within 45 days of the application being deemed complete must include an anticipated timeline for entering into a binding and enforceable agreement with a specific beneficiary in the community. For these reasons, the applicant’s response does not describe an enforceable agreement that will benefit a specific member of the community, but rather an intention to fund a community grants program that may, in the future, create enforceable agreements with community benefits. Intending to enter into future binding agreements with community members does not meet the requirements of Public Resources Code section 25545.10(a).

Applicant Response: 20 CCR section 1878(c) provides that, no later than 45 days after an application is deemed complete, or a later date set forth by the executive director, “the applicant shall provide information updating or supplementing the information in the application to support the findings required by Public Resources Code sections 25545.9 and 25545.10.” This provision does not require the applicant submit an executed community benefits agreement with 45 days after the application is deemed complete (or a later date set forth by the executive director), but rather requires the applicant to provide updated or supplemental information regarding its community benefits proposal. Regardless, the applicant anticipates that it be able to execute the agreement within 45 days of the determination of application completeness.

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Second, the Data Request suggests that the agreement fails to meet the requirements of section 25545.10 because it must be “with a specific beneficiary in the community” or “benefit a specific member of the community.” Section 25545.10 does not in fact contain these requirements or this language. As discussed above, subdivision(a) requires that the agreement be with a “community-based organization” or “other organization that represent community interests.” [REDACTED] qualifies as both. Subdivision (b) indicates that the “topic” and “term” of a community benefit agreement can vary but expressly calls out “contributions to a nonprofit or community-based organization that awards grants to organizations delivering community-based services and amenities” as an arrangement that qualifies. Contrary to the position taken in the Data Request, the statute does not require the agreement to specifically identify the organizations to which grants will be made and does not require the agreement to specifically identify the specific “community-based services” or “amenities” to be carried out by the grantees. No provision of the statute requires the agreement to benefit “a specific member of the community.” Nonetheless, the draft agreement contemplates that [REDACTED] of the funds would be distributed to or for the benefit of [REDACTED].

The Data Request characterizes the applicant’s plan as merely “an intention to fund a community grants program that may, in the future, create enforceable agreements with community benefits.” This is not correct. Upon execution, the agreement will create a (1) legally binding; (2) enforceable; (3) irrevocable obligation to provide [REDACTED], which in turn are required to be distributed by [REDACTED] for purposes consistent with section 25545.10 (a) and (b) and as set forth in the agreement. As stated in the agreement, these purposes include but would not be limited to programs benefitting [REDACTED], workforce development, tourism and economic development, job quality and job training, funding for specific community improvements or amenities such as park or playground equipment, urban greening, enhanced safety crossings, paving roads and bike paths, wildfire mitigation and fire safety, and annual contributions to community-based organizations delivering services and amenities in Shasta County. Accordingly, the applicant has not simply provided its “intention to fund a community grants program that may, in the future, create enforceable agreements with community benefits,” as suggested by CEC staff. Rather, the applicant is in the process of finalizing an *enforceable* agreement with a community-based organization that will establish *mandatory* obligations on both parties to fund community benefit projects initiated by local individuals and groups. Accordingly, the proposed community benefits agreement complies with Public Resources Code section 25545.10(a).

DATA REQUEST: Requirements Under Public Resources Code section 25545.10(b).

Public Resources Code section 25545.10(b) sets forth supplemental terms that may be included in the benefits agreement. Providing one of these optional additional features is not an alternative method to satisfy the requirements of subdivision (a). It states, “The topics and specific terms in the community benefits agreement may also include, ...funding for or providing specific community improvements... and annual contributions to a nonprofit or community-based organization that awards grants to organizations delivering community-based services and amenities.” (Pub. Resources Code, § 25545.10, subd. (b).) Contributing to a grant-awarding entity does not in itself satisfy subdivision (a). Further, in its docketed response the applicant did not identify the foundation that may be tasked with distributing

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future grants. If such an entity will be included in the terms of the agreement, the CEC staff requests that the applicant docket this information.

APPLICANT RESPONSE

Public Resources Code section 25545.10(a) requires the applicant to enter into one or more legally binding and enforceable agreements with, or that benefit, a coalition of one or more *community-based organizations*, such as workforce development and training organizations, labor unions, social justice advocates, local governmental entities, California Native American tribes, *or other organizations that represent community interests*. We have established above that [REDACTED] qualifies as a “community-based organization” *and* as an “organization representing community interests.” Subdivision (a) further recognizes that an applicant may satisfy this requirement through various mechanisms, providing that the “topics and specific terms in the community benefits agreements *may vary and may include* workforce development, job quality, and job access provisions.”

Subdivision (b) provides alternative mechanisms to satisfy the requirements of section 25545.10. Under subdivision (b), “the topics and specific terms in the community benefits agreement *may also include, but not be limited to*, funding for or providing specific community improvements or amenities ... and annual contributions to a nonprofit or community-based organization that awards grants to organizations delivering community-based services and amenities.” Similarly, subdivision (c) provides that “the topics and specific terms in agreements with California Native American tribes *may include, but not be limited to*” various cultural preservation and management programs.

Accordingly, to satisfy Public Resources Code section 25545.10, the applicant is not required to enter into one or more agreements that individually satisfy subdivisions (a), (b), and (c). Rather, each subdivision provides a non-exhaustive list of options that *on their own* meet the overall requirement of Public Resources Code section 25545.10 to enter into one or more legally binding and enforceable agreements with, or that benefit, a coalition of one or more community-based organizations.⁴ Indeed, subdivision (a) recognizes that the topics of an agreement “may vary” and “may” include workforce-related benefits. Subdivision (a) does not require that the agreement address workforce benefits. Subdivision (b) similarly indicates that the topics of an agreement “may also include,” i.e., *may in the alternative* include, annual contributions to a nonprofit or community-based organization that awards grants. Finally, subdivision (c) addresses the topics which may be included in agreements with California Native American tribes, but it does not mandate that an applicant enter into such an agreement.

The applicant’s proposed agreement satisfies the requirements of Public Resources Code section 25545.10. The agreement is with an “organization that represents community interests.” (subd. (a).) The agreement includes terms that would require that organization to “award grants to organizations delivering community-based services and amenities.” (subd. (b).) Further, the agreement authorizes [REDACTED] to issue grants for workforce development, tourism and economic development, job quality and job training, funding for specific community improvements or amenities such as park or playground

⁴ Regardless, the agreement proposed by the applicant meets (a), (b) and (c) of section 25545.10.

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equipment, urban greening, enhanced safety crossings, paving roads and bike paths, wildfire mitigation and fire safety, and for the benefit of [REDACTED]—all of which are recognized options under subdivisions (a), (b), and (c). Thus, the applicant’s agreement satisfies the requirements of Public Resources Code section 25545.10 and authorizes award grants for various purposes which are explicitly recognized by that provision as benefitting the local community.

DATA REQUEST: Requirements Under Title 20, California Code of Regulations, sections 1877(g) and 1878(c).

The applicant’s response amounts to a plan to reach an agreement with a funding institution that the applicant has not identified in the docket, to receive an undisclosed amount of money from the applicant, to award grants to unidentified future community projects. While the use of an intermediary institution to manage funds for community benefits could be a condition of such an agreement (Pub. Resources Code, § 25545.10, subd. (b)), the information provided by applicant does not constitute a plan or strategy with a timeline, to “benefit, a coalition of one or more community-based organizations...where there is mutual benefit to the parties of the agreement.” (Pub. Resources Code, § 25545.10, subd. (a).) Sufficient foundational information demonstrating applicant’s ability to enter into one or more such agreements is required before the CEC can deem the application complete. Thereafter, applicant has 45 days (or more as set forth by the executive director) to supplement the record demonstrating that applicant has obtained “legally binding and enforceable agreement(s) with, or that benefit, a coalition of one or more community-based organizations.” (Title 20, California Code of Regulations, § 1877 subd. (g) and § 1878 subd. (c).)

APPLICANT RESPONSE

As provided above and in the attached draft agreement, the applicant has satisfied the requirements of 20 CCR sections 1877 and 1878 and, upon execution, the requirements of Public Resources Code section 25545.10. The applicant has identified the “organization that represents community interests” that will enter into a community benefits agreement with the applicant ([REDACTED]) that will hold and distribute funds for the purposes of section 25545.10. Further, Public Resources Code section 25545.10 does not separately require the applicant to identify each and every subsequent grant that will be awarded pursuant to the agreement. Rather, the code specifically authorizes the applicant to make “annual contributions to a nonprofit or community-based organization that awards grants to organizations delivering community-based services and amenities.” The fund to be created under this agreement will do that.

Notably, the agreement provides a timing mechanism for applicant to irrevocably transfer funds, including an initial funding commitment and a yearly funding commitment for [REDACTED], as well as a grant cycle describing the process by which [REDACTED] will accept and review award applications and issue grants to applicants. Thus, the agreement further demonstrates how it will benefit the community, in accordance with Public Resources Code section 25545.10.

DATA REQUEST: Purpose of the Opt-in Provisions Related to Community Benefits Agreement(s)

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The applicant's response also fails to meet the purpose of the Opt-in provisions governing community benefits agreements. Community benefits agreements allow for meaningful community involvement in the land development process. These agreements are intended to be negotiated by community groups and stakeholder organizations to address community needs and to deliver economic and social benefits. Community benefit groups represent the interests of residents who will be impacted by the proposed development. These agreements "ensure that measurable, local benefits will be given to a community... and are the direct result of substantial community input." Applicant has not identified through the docket a community member or group who is likely to agree, within 45 days of data adequacy, to receive any held funds for the benefit of the community. This information is needed by CEC staff to ensure that members of the community have the opportunity to shape the project's contributions to the community.

APPLICANT RESPONSE

The applicant respectfully disagrees with CEC staff's view that the agreement does not meet the purposes of the Legislature's opt-in provisions. To the contrary, the applicant will be providing a significant sum of money to *a local organization that represents community interests* and which will award grants to or for the benefit of [REDACTED], support workforce development, tourism and economic development, job quality and job training, funding for specific community improvements or amenities such as park or playground equipment, urban greening, enhanced safety crossings, paving roads and bike paths, wildfire mitigation and fire safety. The arrangement creates significant opportunities for community input into which benefits will be funded through the grant application process. Funds will be directed by [REDACTED] Board of Directors and will be sought from grant applicants who will substantially design how the funds will be applied for the most public good based on a determination by locals about their local needs. [REDACTED] is uniquely positioned to be able to award grants that will benefit the community in which the project is to be developed. Local grant recipients are uniquely positioned to design grant requests that respond to particular local needs. The fund to be created will fund projects only in the Round Mountain, Montgomery Creek, and Burney regions of Shasta County, which are the communities nearest to where the project will be developed. Accordingly, the process established by the agreement itself promotes community involvement.

CEC staff refer to a Department of Energy guidance document on community benefit agreements in a footnote. "Guide to Advancing Opportunities for Community Benefits through Energy Project Development," <https://www.energy.gov/diversity/articles/community-benefit-agreement-cba-resource-guide>. This Guidance document (2017) bears only an indirect relationship to section 25545.10 since that section did not exist at the time the guidance document was written, and the guidance document was written by a federal agency. Nonetheless, to the extent it is relevant, it provides examples of community benefits agreements starting on page 9, including the establishment of an annual "County Economic Trust Fund" for a liquified natural gas project in Maine and a scholarship program for a refinery program in Richmond. The agreement for the Maine LNG project can be found at <https://townofrobbinston.org/agreement2.pdf>. Notably, the agreement contains provisions that are similar to the ones being proposed here in that the funds being created do not identify the specific

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beneficiaries of the fund to be created and instead indicates that “the fund will be administered by a group of Town residents, specifically responsible for the management of the funds” or by a Board of Directors of the fund to be created. (See paragraph 3 on page 3 and paragraph 6 on page 6.)

As for community involvement, once the agreement is executed, the community will be free to review and comment on the agreement, as it can with any other project-related document posted to the CEC’s docket. The community may also comment on the agreement during any of the project’s public hearings. CEC staff’s vision that such agreements must identify specific people, projects, or groups who will receive grants from the community-based organization is not supported by the language of the statute, although in this case the agreement identifies [REDACTED] as a key beneficiary. Nothing in the statute precludes the applicant from setting up a fund to be administered by locally controlled charitable foundation for the benefit of yet to be identified people, projects, and groups in the community. While the applicant could target and dole out funding to specific groups of its choosing in exchange for their support for the project, the applicant has chosen a structure that is less susceptible to a “quid pro quo” exchange and allows [REDACTED] to be chiefly in the driver’s seat. The applicant believes this structure will ultimately result in the most tangible benefits to the community.

Finally, neither Public Resources Code section 25545.10 or 20 CCR sections 1877 or 1878 require the applicant to identify a specific community member or group who is likely to agree to accept grant funds from [REDACTED] within 45 days of the application being deemed complete. Rather, Public Resources Code section 25545.10 requires the applicant to “enter into” an agreement “with” an “organization that represents community interests” *prior to certification*, and further provides that pursuant to such an agreement the applicant may make “annual contributions to a nonprofit or community-based organization that awards grants to organizations delivering community-based services and amenities.” Thus, the agreement satisfies the requirements of section 25545.10. In accordance with 20 CCR section 1877, the applicant also has provided a plan or strategy to enter into that agreement. Further, although not required by 20 CCR section 1878, the applicant anticipates that the agreement will be executed soon, before the 45-day period following application completeness.