

LEGISLATIVE COUNSEL

Eric E. Boyer-Vine

LEGISLATIVE COUNSEL

Frey A. DeLanté  
Daniel A. Weitzman

LEGISLATIVE COUNSEL

David B. Judson  
Michael J. Kerger  
Robert G. Miller  
John T. Stadtbaker

Eric Ayala  
Edward Ned Cohen  
Kevin D. Greas  
John T. Harrington  
Christian M. Johnston  
Michael R. Kelly  
Samuel I. Loner  
Mark S. Louie  
James A. Marsala  
William K. Stark  
William T. Thom  
Michael H. Upton  
Richard B. Weisberg

LEGISLATIVE COUNSEL

Andy Anne Alanis  
Denny C. Alley  
Julius Amilla  
Robert A. Baxter  
Jonathan M. Buraster  
Debra J. Buxton  
Kendy M. Cardillo  
Gregorio E. Caspio  
Jennifer Chu  
Christina Cutrer  
John E. Dale  
William D. Damsam, Jr.  
Christopher Dawson  
Jonathan J. deVito  
Nancy B. Dozier  
Christina M. Ferns  
Aaron R. Fisher  
Zandra Zidich Gibbons  
Lisa C. Goldkuhl  
Kristen A. Goodwin-Alexander  
Alejandra A. Grantham  
Maria Hilakos Hanke  
Julius S. Heir  
Thomas R. Heuer  
Russell H. Holder  
Kathana G. Jaffe  
Therese R. Jones  
Christina Hart Jorgensen  
Jonathan Ann Joseph  
Michael J. Kanitz  
Thomas J. Kerbs  
Cecelaine R. Kinney  
Debra B. Krottinger  
Erik Lange  
Christina M. Launey  
Theresa A. Lee  
Liana G. Lim  
Tara A. Macias  
Ariana Marin  
Anthony P. Marquez  
Francisco A. Martin  
Daniel M. Marucita  
William E. Moddelmog  
Debra R. Mohr  
Bel Munoz  
Michelle E. O'Connor-Ratchiff  
Gerardo Parrida  
Christine N. Parnos  
Robert A. Pratt  
Stephanie Ramirez Ridgeway  
Annicia Gates Rhodes  
Beth A. Salamon  
Michael B. Salerno  
Manda H. Saxton  
Jessica L. Steele  
Ellen Sward  
Mark Franklin Terry  
Bradley N. Webb  
Lisa M. Wright  
Rick G. Zorman

OFFICE OF LEGISLATIVE COUNSEL

State Capitol, Suite 3021  
Sacramento, California 95814

TELEPHONE (916) 341-8000  
FACSIMILE (916) 341-8020  
INTERNET www.legislativecounsel.ca.gov  
EMAIL administration@legislativecounsel.ca.gov



August 2, 2004

Honorable Patricia C. Bates  
4116 State Capitol

**CALIFORNIA ENERGY COMMISSION: CALIFORNIA COASTAL COMMISSION:  
CERTIFICATION OF SITE AND RELATED POWER FACILITIES - #12178**

Dear Ms. Bates:

You have asked several questions with respect to the certification of a site and related power facilities under Section 25540.6 of the Public Resources Code.<sup>1</sup> The first question is whether, on an application for certification pursuant to Section 25540.6, the California Coastal Commission is required to submit a report pursuant to subdivision (d) of Section 30413 of the Public Resources Code.

Generally, and with certain exceptions, the Warren-Alquist State Energy Resources Conservation and Development Act (Div. 15 (commencing with Sec. 25000); hereafter the Energy Act) requires every person proposing the construction of a thermal powerplant and related facility to obtain certification of the site and related facility from the California Energy Resources Conservation and Development Commission (hereafter the Energy Commission; see Secs. 25110 and 25120, and Sec. 25500).

By way of background, under the Energy Act the procedures for certification of a site and related power facilities are contained in Chapter 6 (commencing with Section 25500) of Division 15, and generally require the filing of a notice of intention (hereafter NOI) to submit an application for certification of a site and related facility (Sec. 25502), followed by the filing of an application for certification (hereafter AFC) of a site and related facility (Sec. 25519). For five specified types of projects, however, the requirement of a NOI is eliminated and the only procedure required is an application for certification of a site and related facility (Sec. 25540.6; hereafter the AFC-only procedure). The NOI proceeding primarily determines the suitability of the proposed sites to accommodate the facility and to meet the demand for electrical energy

<sup>1</sup> All section references are to the Public Resources Code, unless otherwise indicated.



and capacity (Sec. 25502), whereas the AFC proceeding considers whether a particular site and related facility are suitable for certification (Sec. 25519).

In the NOI proceeding, the Energy Commission is required to prepare and make public a summary and hearing order on the NOI (Secs. 25502 and 25510). Following the summary and hearing order on the NOI, the Energy Commission is required to commence adjudicatory hearings culminating in the final report of the commission which is, in turn, subject to a hearing or hearings (Secs. 25513 and 25515). If the NOI is approved by the Energy Commission, the AFC proceeding is commenced upon the filing of an application for certification of a site and related facility (Secs. 25516 and 25519). The Energy Commission is required to hold hearings and issue a written decision on the AFC, stating its findings (Sec. 25523). The Energy Commission's decision is subject to reconsideration (Sec. 25530), and judicial review by the Supreme Court of California (Sec. 25531).

The power of the Energy Commission to certify sites and related power facilities is declared to be "exclusive," and a certificate issued by the Energy Commission in accordance with the power facility and site certification program prescribed by Chapter 6 (commencing with Section 25500) is in lieu of any permit, certificate, or similar document required by a state, local, or regional agency for use of the site and related facilities, and supersedes any applicable statute, ordinance, or regulation of any state, local, or regional agency (Sec. 25500; *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 879).

The California Coastal Act of 1976 (Div. 20 (commencing with Sec. 30000; hereafter the California Coastal Act) establishes the California Coastal Commission (Secs. 30105 and 30300; hereafter the Coastal Commission) with specified jurisdiction over prescribed areas along the state's coastline designated as the coastal zone (Art. 3 (commencing with Sec. 30330), Ch. 4, Div. 20; Secs. 30103 and 30103.5). The Coastal Commission participates in proceedings with respect to the certification of a site and related power facility to be located in the coastal zone (Sec. 30413).

Section 30413 reads as follows:

"30413. (a) In addition to the provisions set forth in subdivision (f) of Section 30241, and in Sections 25302, 25500, 25507, 25508, 25510, 25514, 25516.1, 25523, and 25526, the provisions of this section shall apply to the commission and the State Energy Resources Conservation and Development Commission with respect to matters within the statutory responsibility of the latter.

"(b) The commission shall, prior to January 1, 1978, and after one or more public hearings, designate those specific locations within the coastal zone where the location of a facility as defined in Section 25110 would prevent the achievement of the objectives of this division; provided, however, that specific locations that are presently used for such facilities and reasonable expansion thereof shall not be so designated. Each such designation shall include a description of the boundaries of those locations, the objectives of this division which would be so affected, and detailed findings concerning the significant

adverse impacts that would result from development of a facility in the designated area. The commission shall consider the conclusions, if any, reached by the State Energy Resources Conservation and Development Commission in its most recently promulgated comprehensive report issued pursuant to Section 25309. The commission shall transmit a copy of its report prepared pursuant to this subdivision to the State Energy Resources Conservation and Development Commission.

“(c) The commission, after it completes its initial designations in 1978, shall, prior to January 1, 1980, and once every two years thereafter until January 1, 1990, revise and update the designations specified in subdivision (b). After January 1, 1990, the commission shall revise and update those designations not less than once every five years. Those revisions shall be effective on January 1, 1980, or on January 1 of the year following adoption of the revisions. The provisions of subdivision (b) shall not apply to any sites and related facilities specified in any notice of intention to file an application for certification filed with the State Energy Resources Conservation and Development Commission pursuant to Section 25502 prior to designation of additional locations made by the commission pursuant to this subdivision.

“(d) Whenever the State Energy Resources Conservation and Development Commission exercises its siting authority and undertakes proceedings pursuant to the provisions of Chapter 6 (commencing with Section 25500) of Division 15 with respect to any thermal powerplant or transmission line to be located, in whole or in part, within the coastal zone, the commission shall participate in those proceedings and shall receive from the State Energy Resources Conservation and Development Commission any notice of intention to file an application for certification of a site and related facilities within the coastal zone. The commission shall analyze each notice of intention and shall, prior to completion of the preliminary report required by Section 25510, forward to the State Energy Resources Conservation and Development Commission a written report on the suitability of the proposed site and related facilities specified in that notice. The commission's report shall contain a consideration of, and findings regarding, all of the following:

“(1) The compatibility of the proposed site and related facilities with the goal of protecting coastal resources.

“(2) The degree to which the proposed site and related facilities would conflict with other existing or planned coastal-dependent land uses at or near the site.

“(3) The potential adverse effects that the proposed site and related facilities would have on aesthetic values.

“(4) The potential adverse environmental effects on fish and wildlife and their habitats.

“(5) The conformance of the proposed site and related facilities with certified local coastal programs in those jurisdictions which would be affected by any such development.

“(6) The degree to which the proposed site and related facilities could reasonably be modified so as to mitigate potential adverse effects on coastal resources, minimize conflict with existing or planned coastal-dependent uses at or near the site, and promote the policies of this division.

“(7) Such other matters as the commission deems appropriate and necessary to carry out this division.

“(e) The commission may, at its discretion, participate fully in other proceedings conducted by the State Energy Resources Conservation and Development Commission pursuant to its powerplant siting authority. In the event the commission participates in any public hearings held by the State Energy Resources Conservation and Development Commission, it shall be afforded full opportunity to present evidence and examine and cross-examine witnesses.

“(f) The State Energy Resources Conservation and Development Commission shall forward a copy of all reports it distributes pursuant to Sections 25302 and 25306 to the commission and the commission shall, with respect to any report that relates to the coastal zone or coastal zone resources, comment on those reports, and shall in its comments include a discussion of the desirability of particular areas within the coastal zone as designated in such reports for potential powerplant development. The commission may propose alternate areas for powerplant development within the coastal zone and shall provide detailed findings to support the suggested alternatives.” (Emphasis added.)

To ascertain the meaning of a statute, we begin with the language in which the statute is framed (*Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438; *Visalia School Dist. v. Workers' Comp. Appeals Bd.* (1995) 40 Cal.App.4th 1211, 1220). When the language of a statute is clear, its plain meaning should be followed (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 38).

With respect to a NOI proceeding, subdivision (d) of Section 30413 requires the Coastal Commission to analyze each NOI proposing a site and related facilities to be located within the coastal zone, and to prepare a written report for the Energy Commission on the suitability of the proposed site and related facilities that considers specified matters and makes certain findings. Subdivision (d) of Section 30413 requires the Coastal Commission to submit this report to the Energy Commission prior to the Energy Commission preparing and making public a summary and hearing order on the NOI pursuant to Section 25510.

Section 25540.6 establishes the AFC-only procedure for certification in certain circumstances, and reads as follows:

“25540.6. (a) Notwithstanding any other provision of law, no notice of intention is required, and the commission shall issue its final decision on the

application, as specified in Section 25523, within 12 months after the filing of the application for certification of the powerplant and related facility or facilities, or at any later time as is mutually agreed by the commission and the applicant, for any of the following:

“(1) A thermal powerplant which will employ cogeneration technology, a thermal powerplant that will employ natural gas-fired technology, or a solar thermal powerplant.

“(2) A modification of an existing facility.

“(3) A thermal powerplant which it is only technologically or economically feasible to site at or near the energy source.

“(4) A thermal powerplant with a generating capacity of up to 100 megawatts.

“(5) A thermal powerplant designed to develop or demonstrate technologies which have not previously been built or operated on a commercial scale. Such a research, development, or commercial demonstration project may include, but is not limited to, the use of renewable or alternative fuels, improvements in energy conversion efficiency, or the use of advanced pollution control systems. Such a facility may not exceed 300 megawatts unless the commission, by regulation, authorizes a greater capacity. Section 25524 does not apply to such a powerplant and related facility or facilities.

“(b) Projects exempted from the notice of intention requirement pursuant to paragraph (1), (4), or (5) of subdivision (a) shall include, in the application for certification, a discussion of the applicant's site selection criteria, any alternative sites that the applicant considered for the project, and the reasons why the applicant chose the proposed site. That discussion shall not be required for cogeneration projects at existing industrial sites. The commission may also accept an application for a noncogeneration project at an existing industrial site without requiring a discussion of site alternatives if the commission finds that the project has a strong relationship to the existing industrial site and that it is therefore reasonable not to analyze alternative sites for the project.” (Emphasis added.)

Because Section 25540.6 eliminates the requirement for a NOI in an AFC-only procedure, the Coastal Commission is not required to submit in that procedure the report required in a NOI proceeding under subdivision (d) of Section 30413. The intent of the Legislature in enacting Section 25540.6 was to establish an expedited certification procedure for specified types of facilities by removing the NOI requirement and shortening the AFC process to 12 months (Assembly Rules Committee, Office of Assembly Floor Analyses, 3rd reading analysis of Senate Bill No. 1805 (1977-78 Regular Session), as amended August 22, 1978).

In addition, the failure of the Legislature to change the law in a particular respect when the subject is generally before it, while changes in other aspects of that subject are made, is indicative of an intent to leave the law as it stands in the aspects not amended (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 596). In that regard, when Section

25540.6 was enacted in 1978 (Stats. 1978, c. 1010), the Legislature also amended Section 30413 (Stats. 1978, c. 1013), but did not amend Section 30413 to require in a proceeding under Section 25540.6 that the Coastal Commission submit the report required by subdivision (d) of Section 30413.

Accordingly, we conclude that in an AFC-only proceeding conducted pursuant to Section 25540.6 of the Public Resources Code, the California Coastal Commission is not required to submit the report that is required by subdivision (d) of Section 30413 of the Public Resources Code in a NOI proceeding.

You have also asked whether, in an AFC-only proceeding conducted pursuant to Section 25540.6 of the Public Resources Code, the California Coastal Commission in its review and comment under subdivision (d) of Section 25519 of the Public Resources Code is prohibited from submitting the information it would submit in a report required by subdivision (d) of Section 30413.

With respect to an AFC-only proceeding, subdivision (d) of Section 25519 requires the Energy Commission to transmit a copy of the AFC to the Coastal Commission for its review and comments, if the site and related facility are proposed to be located in the coastal zone, and the Coastal Commission may participate in the proceeding on the AFC as an interested party (see Sec. 25508 and subd. (e), Sec. 30413). Nothing in those provisions or in any other statutory provision prohibits the Coastal Commission from submitting to the Energy Commission, in its review and comments in an AFC-only proceeding, information similar to that contained in the report that the Coastal Commission is required, pursuant to subdivision (d) of Section 30413, to submit in a NOI proceeding. Moreover, the AFC-only procedure established by Section 25540.6 specifically requires three of the five types of projects exempted from the NOI requirement to include in the AFC a discussion of the applicant's site selection criteria, any alternative sites that the applicant considered for the project, and the reasons why the applicant chose the proposed site (subd. (b), Sec. 25540.6). These items are similar to the *considerations regarding alternative proposed sites that the Coastal Commission is required to address in its report required by subdivision (d) of Section 30413 in a NOI proceeding.*

Accordingly, we conclude that, in an AFC-only proceeding conducted pursuant to Section 25540.6 of the Public Resources Code, the California Coastal Commission in its review and comment under subdivision (d) of Section 25519 of the Public Resources Code is not prohibited from submitting the information it would submit in a report under subdivision (d) of Section 30413.

Finally, you have asked whether, on an application for certification made pursuant to Section 25540.6 of the Public Resources Code, the California Energy Commission is required by subdivision (b) of Section 25523 to include in its decision specific provisions to meet any comments the California Coastal Commission submits in its review and comments submitted to the Energy Commission pursuant to subdivision (d) of Section 25519 of the Public Resources Code.

The Energy Commission is required to prepare a written decision after the public hearing on an AFC that includes several items (Sec. 25523). Section 25523 specifically requires the Energy Commission, in the case of a site to be located in the coastal zone, to include in that

decision specific provisions to meet the objectives of the California Coastal Act, as may be specified in the report submitted by the Coastal Commission pursuant to subdivision (d) of Section 30413, unless the Energy Commission specifically finds that the adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provisions proposed in the report would not be feasible (subd. (b), Sec. 25523).

However, the requirement that the Energy Commission include, in its decision on an AFC, specific provisions to meet the objectives of the California Coastal Act as may be specified in the report that the Coastal Commission is required to submit under subdivision (d) of Section 30413, does not apply in the instance of an AFC-only procedure established by Section 25540.6. The report made by the Coastal Commission pursuant to subdivision (d) of Section 30413 is submitted only in response to a NOI, and the AFC-only procedure does not include a NOI proceeding (see discussion above). Therefore, we conclude that the statutory requirement that the Energy Commission include such specific provisions in its decision on an AFC, unless they would result in greater adverse effect on the environment or would not be feasible, is inapplicable in an AFC-only procedure established under Section 25540.6.

Accordingly, we conclude that on an application for certification made pursuant to Section 25540.6 of the Public Resources Code, the California Energy Commission is not required by subdivision (b) of Section 25523 to include in its decision specific provisions to meet any comments the California Coastal Commission submits in its review and comments to the Energy Commission pursuant to subdivision (d) of Section 25519 of the Public Resources Code.

Very truly yours,

Diane F. Boyer-Vine  
Legislative Counsel

*Maria H. Hilakos Hanke by MC*

By  
Maria Hilakos Hanke  
Deputy Legislative Counsel

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