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The Superagency Solution

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The Superagency Solution

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The Superagency Solution

K.K. DuVivier*

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ABSTRACT

In many parts of the country, hydraulic fracturing has brought energy development onto people’s doorsteps. Efforts by local governments to employ traditional land use mechanisms to study and mitigate some of the impacts of these latest intrusions have erupted into battles over the scope of statewide agencies’ control.

Forgotten in this fray are many renewable energy resources. As a general rule, they are not subject to statewide oversight, and consequently renewable energy providers must navigate the myriad of siting and permitting requirements of local jurisdictions. For several years, scholars have urged more statewide renewable energy siting procedures to level the playing field. California is the national leader in renewable energy deployment, yet its statewide energy commission does not have jurisdiction over the siting of photovoltaic solar or wind energy plants. This article explores when statewide siting is beneficial and when

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it may be contraindicated, making a case for consolidation of all large-scale siting under the purview of California's "superagency," the California Energy Commission.

I. INTRODUCTION

The struggle to determine the most appropriate level of regulation is age-old: should federal law preempt the laws of the states and should state law preempt local control? Local authority prevails for those who believe that democratic governments “deriv[e] their just powers from the consent of the governed,”¹ that “the government closest to the people serves the people best.”²

Hydraulic fracturing, or fracking, has reawakened this tension between state and local control in several states.³ As just one example, in the fall of 2014, Coloradoans faced the prospect of up to a dozen ballot initiatives addressing the power of local governments to restrict fracking operations within their jurisdictions.⁴ Although Colorado's governor convinced proponents to temporarily withdraw their initiative campaigns by creating a task force to consider solutions,⁵ now that the task force has made its recommendations, dissatisfied proponents of local control have renewed their initiative threats.⁶

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Thomas Jefferson embraced this concept from JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Alexander Campbell Fraser ed., Dover Publications 1959) (1690).

2. Greg Overstreet, *Re-Empowering the Native American: A Conservative Proposal to Restore Tribal Sovereignty and Self-Reliance to Federal Indian Policy*, 14 HAMLIN J. PUB. L. & POL'Y 1, 3 (1993) (citing Pub. Papers of Ronald Reagan 96 (Jan. 24, 1983)); see also Thomas Jefferson, First Inaugural Address in Washington, D.C., para. 4 (Mar. 4, 1801), available at <http://www.bartleby.com/124/pres16.html/> (“[Y]ou should understand what I deem the essential principles of our Government, and consequently those which ought to shape its Administration. I will compress them within the narrowest compass they will bear . . .”).

3. See, e.g., John R. Nolon & Steven E. Galvin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 CASE W. RES. L. REV. 995 (2012–2013); Robert H. Freilich, Neil M. Popowitz, *Oil and Gas Fracking: State and Federal Regulation Does not Preempt Needed Local Government Regulation*, 44 URB. LAW. 533 (2012); Sorell E. Negro, *Fracking Wars: Federal, State and Local Conflicts over the Regulation of Natural Gas Activities*, 35 ZONING AND PLANNING LAW REPORT (No. 2 Feb. 2012), available at <http://www.ourenergypolicy.org/wp-content/uploads/2013/07/Fracking-Wars.pdf> (on file with the *McGeorge Law Review*); Michelle L. Kennedy, *Exercise of Local Control over Gas Extraction*, 22 FORDHAM ENVTL. L. REV. 375 (2010–2011).

4. Lynn Bartels, *Big Spenders Energize Fight over Initiatives*, DENVER POST, May 12, 2014, at 1A; see also Mark Jaffe & Aldo Svaldi, *Battles Over Local Control Energized*, DENVER POST, May 1, 2014, at 1A.

5. Maeve Reston, *Deal Will Keep Fracking Battle Off Colorado Ballot*, L.A. TIMES, Aug. 4, 2014, <http://www.latimes.com/nation/politics/politicsnow/la-pn-colorado-deal-fracking-ballot-20140804-story.html#page=1> (on file with the *McGeorge Law Review*); see also Mark Jaffe, *Hickenlooper Compromise Keeps Oil and Gas Measures Off Colorado Ballot*, DENVER POST, Aug. 4, 2014, http://www.denverpost.com/business/ci_26272493/hickenlooper-tries-broker-last-minute-deal-oil-gas-colorado (on file with the *McGeorge Law Review*).

6. *Task Force Proposes Fracking Rules to Colorado Governor*, NPR (Feb. 27, 2015), <http://www.npr.org/2015/02/27/389454418/task-force-proposes-fracking-rules-to-colorado-governor> (on file with the *McGeorge Law Review*); see also Bruce Finley, *Colorado Anti-Fracking Groups Launch Campaign for Statewide Ban*, DENVER POST, Feb. 24, 2015, http://www.denverpost.com/environment/ci_27591553/colorado

These measures reflected the state legislature's failure to resolve escalating turf battles and lawsuits over the authority of the statewide Colorado Oil and Gas Conservation Commission to preempt such local control.⁷

Forgotten in this fray is the fact that renewable energy resources in a majority of states have no comparable statewide agency to facilitate the siting and regulatory processes.⁸ Many have argued that a "one-stop" procedure would help mitigate the risks and delays that jeopardize renewable resources under the current decentralized siting process.⁹ Because California has a statewide energy agency that provides a siting process for most energy generation facilities but not for wind or photovoltaic (PV) solar power,¹⁰ this article will examine the impact of moving to a "superagency"¹¹ solution for these resources in California.

Part II provides an overview of energy siting processes in most states. Part III describes the forces that led to the creation of California's superagency, the Energy Resources Conservation and Development Commission, also called the California Energy Commission (Energy Commission), and the scope of the Energy Commission's jurisdiction. Part IV explains the Energy Commission's siting process and its advantages over the current process required for most renewable projects in California. With compelling arguments for why large-scale renewables should be included under Energy Commission jurisdiction, this

anti-fracking-groups-launch-campaign-statewide-ban (on file with the *McGeorge Law Review*).

7. Bartels, *supra* note 4, at 1A; *see generally* K.K. DuVivier, *Sins of the Father*, 1 TEX. A&M J. REAL PROP. L. 391, 400–09 (2014) (describing the evolution of laws surrounding oil and gas).

8. *See* Ronald H. Rosenberg, *Making Renewable Energy A Reality—Finding Ways to Site Wind Power Facilities*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 635, 672–77 (2008) (describing the varied approaches to wind power facility siting).

9. *See, e.g.*, Brian Troxler, Note, *Stifling the Wind: California Environmental Quality Act and Local Permitting*, 38 COLUM. J. ENVTL. L. 163, 171 (2013) (arguing that a centralized state agency would be preferable to local control); Rosenberg, *supra* note 8, at 679–80 (arguing for a "lead" state agency to oversee wind and energy facility siting); Patricia E. Salkin & Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 HOFSTRA L. REV. 1049, 1065–71, 1076–79, 1092 (2009) (describing local, state, and federal regulation of wind development and resulting challenges to development and arguing for a "federal wind siting policy"); Hannah Wiseman, *Expanding Regional Renewable Governance*, 35 HARV. ENVTL. L. REV. 477, 528–38 (2011) (describing the multiple layers of regulation and property rights that apply to large renewable developments and arguing for regional energy boards).

10. *See* Warren-Alquist State Energy Resources Conservation and Development Act, CAL PUB. RES. CODE § 25120 (West 2007 & Supp. 2014) (indicating that wind, hydroelectric, and solar photovoltaic facilities are not considered thermal power plants for the purposes of the Act). Currently, there are two primary technologies for solar energy generation: solar thermal and solar photovoltaics (PV). PV involves the direct conversion of light into electricity through the photoelectric effect. When PV materials absorb light, they release electrons. The electrons are captured by conductors, creating an electric current. This results in solar PV energy. *See* Gil Knier, *How Do Photovoltaics Work?*, NASA SCIENCE NEWS (last updated Apr. 6, 2011), <http://science.nasa.gov/science-news/science-at-nasa/2002/solarcells/> (on file with the *McGeorge Law Review*).

11. *See Superagency for the Energy Gap*, L.A. TIMES, Sept. 19, 1973, available at http://www.energy.ca.gov/reports/Warren-Alquist_Act/history/1973-74_AB_1575_news.pdf (on file with the *McGeorge Law Review*) (describing the formation of the Energy Resources Conservation and Development Commission in the 1970s).

Article concludes by urging California to shoulder its role-model status by making this change.¹²

II. ENERGY SITING PROCESSES

“[T]he right to use the land and its natural resources” is generally within a state’s police power¹³ and delegated to local governments.¹⁴ This “traditional state-to-local delegation of land use authority” changed in the 1970s.¹⁵ Electric utilities conducted studies in the 1960s that showed “annual industrial growth of seven to eight percent—a rate that would require ‘the doubling of electric generating capacity every ten years.’”¹⁶ Some of these studies also “concluded that nuclear power plants would provide electricity at substantially cheaper rates than coal-fired plants.”¹⁷

Nuclear power was not popular with segments of the public, so “the National Association of Regulatory Utility Commissioners developed a model siting statute”¹⁸ “to speed construction of nuclear power plants.”¹⁹ Several states responded by creating state-level agencies to “streamline challenges to site approvals” and “prevent parochial preference from blocking new power plants.”²⁰

Twenty states now have some mandatory state agency control of energy facility siting: “Arkansas, California, Connecticut, Florida, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New York, Ohio, Oregon, Rhode Island, Vermont, Washington, [and] Wisconsin.”²¹ However, a number of states with statewide agencies regulating some power plant siting do not include renewable energy siting within those

12. Although an argument could be made that smaller energy projects should also be a part of the integrated planning process, this article focuses on facilities comparable to those currently under Energy Commission siting authority which must be at least 50 megawatts (MW). See *infra* notes 82–85 and accompanying text (describing the Energy Commission’s jurisdiction).

13. John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 821 (2006).

14. Daniel R. Mandelker, *Fred Bosselman’s Legacy to Land Use Reform*, 17 J. LAND USE & ENVTL. L. 11, 13 (2001).

15. Uma Outka, *The Renewable Energy Footprint*, 30 STAN. ENVTL. L.J. 241, 257–58 (2011).

16. Paul Rodgers & Charles D. Gray, *State Commission Treatment of Nuclear Plant Cancellation Costs*, 13 HOFSTRA L. REV. 443, 444 n.6 (1985) (quoting Pat Wechsler, *Nuclear Power: Who Foots the Bill?*, DUN’S BUS. MONTH, June 1984, at 70–71) (citing Cook, *Nuclear Follies*, FORBES, Feb. 11, 1985, at 88).

17. *Id.* at 444 n.7 (citing ENERGY INFORMATION ADMIN., U.S. DEP’T OF ENERGY, NUCLEAR PLANT CANCELLATIONS: CAUSES, COSTS, AND CONSEQUENCES 28 (Apr. 1983)).

18. Outka, *supra* note 15, at 257.

19. *Big Energy Bill Signed by Reagan*, UNITED PRESS, May 22, 1974, available at http://www.energy.ca.gov/reports/Warren-Alquist_Act/history/1973-74_AB_1575_news.pdf (on file with the *McGeorge Law Review*).

20. Outka, *supra* note 15, at 258.

21. *Id.* “[M]any of the states with centralized authorities afford one-stop permitting for very large facilities only. North Dakota and Massachusetts, for example, certify energy facilities greater than 100 MW, while New York’s threshold is 80 MW, Florida’s is 75 MW, Ohio’s is 50 MW . . .” *Id.* at 266 n.127.

agencies' jurisdictions.²² Below is a summary of the current status of wind generation siting processes.²³ Fewer statewide agencies address solar PV.²⁴

First, at least ten states²⁵ have statewide siting authority over large-scale²⁶ wind energy generation: Connecticut,²⁷ Maine,²⁸ Massachusetts,²⁹ Minnesota,³⁰ Nevada,³¹ New Hampshire,³² Ohio,³³ Oregon,³⁴ South Dakota,³⁵ and Vermont.³⁶

22. Hannah Wiseman et al., *Formulating a Law of Sustainable Energy: The Renewables Component*, 28 PACE ENVTL. L. REV. 827, 871–72 (2011).

23. It is beyond the scope of this particular Article to cover the full range and current state of all 50 states' utility siting regimes. The text of this Article generally sets out Ronald H. Rosenberg's analysis. *See* Rosenberg, *supra* note 8, at 673–77 (setting forth the various approaches to state siting processes). Alternatively, Hannah Wiseman, Lindsay Grisamer, and E. Nichole Saunders note that there are “three core types of municipal governance approaches to renewable technologies (banning, ignoring, or specifically addressing renewables) [and] four different types of state regimes”: (1) fully centralized, preempting local authority; (2) hybrid regimes with “centralized approval . . . and partial preemption . . . directing municipalities to include minimum requirements”; (3) hybrid regimes with “a centralized siting process[,] but leav[ing] zoning to” locals, some with “optional preemption of local zoning powers”; and (4) regimes “leav[ing] nearly all regulation of renewable development to” local governments. Wiseman et al., *supra* note 22, at 881–82.

24. *See, e.g.*, U.S. Department of Energy's Solar America Cities Program, the U.S. Department of Energy's SunShot Initiative that address some of the challenges solar PV faces. California has made a short-term exception for utility-scale solar PV. *See infra* Part III.B.

25. Rosenberg lists seven: Connecticut, Maine, Massachusetts, Minnesota, Oregon, Vermont, and Virginia. Rosenberg, *supra* note 8, at 676–77. *See infra* note 40 about Virginia.

26. Note from the statutes in the following citations that the size of facilities large enough to warrant statewide siting supervision varies from state to state. *See infra* notes 27–36. In addition to the ten listed here, Brian Troxler lists Rhode Island as “regulating state siting of wind project of forty MW or more.” Troxler, *supra* note 9, 190 n.219. R.I. GEN. LAWS §§ 42-98-1 to -20 (2006 & Supp. 2010) regulates the siting of “major energy facilities,” which are those capable of operating at 40 MW or more, but wind facilities are not specifically mentioned in the siting statute.

27. CONN. GEN. STAT. ANN. §§ 16-50kk (2013) (authorizing the Connecticut Siting Council to adopt regulations for the siting of wind turbines).

28. ME. REV. STAT. ANN. tit. 35-A, §§ 3451–3459 (2010 & Supp. 2013). The act became effective in 2008 and designates the Department of Environmental Protection as the primary siting authority for grid-scale wind energy development in organized areas of the state. *Id.* tit. 35-A, § 3451(8). The Maine Land Use Planning Commission may also designate expedited permitting areas in the State's unorganized and deorganized areas and is the primary siting authority for wind energy developments that are not grid-scale and that are in the unorganized and deorganized areas. *Id.*

29. MASS. GEN. LAWS ANN. ch. 164, §§1, 69H (West 2003) (designating the Energy Facilities Siting Board as the siting authority for energy generating facilities). Section 1 has existed since 1973. *Id.* ch. 164, § 1. In 1997, a definition of “renewable energy,” which included wind, was added to section 1. 1997 Mass. Legis. Serv. ch. 164 (West). In 2008, a definition of “alternative energy development,” which includes wind, was also added to section 1. 2008 Mass. Legis. Serv. ch. 169 (West).

30. MINN. STAT. ANN. §§ 216F.01.2, 216F.04, 216F.07 (West 2010) (requiring all large wind energy conversation systems to obtain a site permit from the Public Utilities Commission and preempting any local authority to issue such permits). Chapter 216F, entitled “Wind Energy Conversion Systems,” was first enacted in 1995, with amendments in 2004, 2007, and 2008. *Id.* § 216F.01–.09. It preempts local regulations and zoning ordinances for wind projects over a certain size with a permit system administered by the Minnesota Public Utilities Commission. *Id.* §§ 216F.04, 216F.07

31. NEV. REV. STAT. ANN. §§ 704.820–900 (West 2014) (requiring the Nevada Public Utilities Commission to site wind facilities greater than seventy MW). Section 704.7811, including wind in the definition of “[r]enewable energy” was added in 2001. *Id.* § 704.7811. The definition was incorporated into section 704.860 defining “[u]tility facility” in 2005 along with provisions for net metering. 2005 Nev. Legis. Serv. ch. 425 (West).

Second, at least five states have a “State/Local Government Hybrid Approach” with respect to wind resources: California, Montana, New Mexico, Washington, and Wisconsin.³⁷ These approaches include technical assistance from the state or shared responsibility through voluntary guidelines, model ordinances, and power siting rules following state models.³⁸

Finally, aside from the fifteen states listed in the previous two categories, most of the rest of the country uses “[l]ocal [g]overnment [c]ontrol [t]hrough [c]onventional [l]and [u]se [c]ontrols and [p]rocedures” to regulate the siting of wind or solar PV generation facilities.³⁹ Some states have recently shifted from

32. N.H. REV. STAT. ANN. §§ 162-H:2 to -H:4 (2014) (providing that the New Hampshire Site Evaluation Committee regulate the siting of wind facilities over thirty MW and allowing smaller facilities to opt in to state regulation to preempt local regulation) A definition of “[r]enewable energy facility” was added to section 162-H:2 in 2007. 2008 N.H. Laws ch. 364. The definition includes facilities “powered by wind energy.” *Id.* § 162-H:2.

33. OHIO REV. CODE ANN. §§ 4906.01-.99 (2014) (regulating the installation of facilities with a capacity of fifty MW or more). Section 4906.13, was amended to define “economically significant wind farm,” in 2008. 2008 Ohio Legis. Serv. Ann. ch. 120 (West). Section 4906.98, also amended in 2008, added “economically significant wind farm” to the permit requirement for “major utility facilities.” *Id.* Section 4906.20, which regulates “[e]conomically significant wind farms,” was added in 2008 and applies to facilities with an aggregate capacity of between five and fifty MW. *Id.* Larger facilities would be subject to the utility-siting provisions applicable to “major utility facilities” in sections 4906.01-.99. OHIO REV. CODE ANN. § 4906.01. *See also id.* § 713.081 (effective June 24, 2008) (giving local governments siting and other regulatory authority over “[s]mall wind farms,” which are facilities that operate at an aggregate capacity of less than five MW.)

34. OR. REV. STAT. ANN. §§ 469.300(11)(J), 469.320, 469.401 (West 2003 & Supp. 2014) (providing for statewide site certification of wind power facilities with a capacity of thirty-five MW or more, with a provision allowing facilities with less capacity to opt in to state certification, after which local governments must issue their permits subject to the conditions contained in the site certificate). The definition of “[e]nergy facility” in section 469.300 was amended in 2001 to include “[a]n electric power generating plant with an average electric generating capacity of 35 megawatts or more if the power is produced from . . . wind energy . . .” Or. Legis. Serv. ch. 134 (2001). Section 469.320 was amended in 2001 to permit facilities generating less than 35 MW from wind to opt in to the site certificate program. *Id.* ch. 683 (2001).

35. S.D. CODIFIED LAWS §§ 49-41B-1 to -38 (2015) (providing for statewide siting of wind projects with 100 MW capacity or more). In 2005, the definition of “[f]acility” was amended to include “wind energy facility,” and a definition of “[w]ind energy facility” was added to the statute. 2005 S.D. Sess. Laws ch. 250. The term was also inserted into other relevant provisions in the siting statute. *Id.*

36. VT. STAT. ANN. tit. 30, § 248 (West 2014) (requiring the Vermont Public Service Board to site all wind energy facilities except those for on-site energy consumption). In 2009, this section was amended to include subsection (o), which provides that a petition for a wind energy generation facility cannot be rejected as incomplete if it does not specify information about the turbines. 2009 Vt. Legis. Serv. ch. 45 (West). This is the only mention of wind in § 248, which suggests that wind-generation facilities were always included in the siting statute. VT. STAT. ANN. tit. 30, § 248. *See also id.* tit. 3 § 2840 (West 2014) (enacted May 27, 2009) (authorizing the siting of wind energy generation facilities on state lands.)

37. Rosenberg, *supra* note 8, at 675–76. Note that WASH. REV. CODE ANN. §§ 80.50.010 to .904 (West 2001 & Supp. 2014) includes a 2007 amendment to § 80.50.020 that added “alternative energy resource” (which includes wind facilities) to the definition of “energy facilities” subject to the statewide siting statute requiring the Energy Facility Site Evaluation Council to site all facilities over 350 MW and allowing renewable facilities to opt into the state process rather than use the local permitting process. 2007 Wash. Legis. Serv. ch. 325 (West); WASH. REV. CODE ANN. §§ 80.50.060.

38. Rosenberg, *supra* note 8, at 675–76.

39. *See id.* at 673 (specifically listing “Oregon, Illinois, Kansas . . . , Texas, Idaho, North Carolina, New Hampshire, Iowa, Utah, Nevada, and Colorado”); Wiseman et al., *supra* note 22, at 871 (“The majority of states

statewide siting to local control.⁴⁰ Thus, these states regulate project siting with zoning and land use control law under traditional local police powers.⁴¹

If a community favors a renewable energy project, then delegation of power at this local level can expedite permitting and siting.⁴² While promoting clean energy generally appears to be a good thing for all involved, both locally and globally, the decision requires a careful balancing of “economic, environmental, and safety concerns.”⁴³ With limited budgets to hire experts, it is likely that “local land use planning officials could be overwhelmed by sophisticated applicants and their consultants, leading to quick project approval with limited analysis and few protective conditions.”⁴⁴

More problematic for energy development companies (and the climate, assuming it benefits from cleaner energy sources) is the possibility that a clean energy project will be challenged or completely blocked at the local level based on emotions rather than facts.⁴⁵ Consequently, the public may benefit from having a statewide agency to make decisions following consistent criteria and with the expertise to consider both local and extra-local benefits.⁴⁶

Finally, the challenges of addressing a panoply of different regulations⁴⁷ and the vagaries of unpredictable and lengthy local processes can create stifling, if not suffocating, risks that drive up costs and make it impossible for renewable energy generation to compete with conventional energy sources for investment

have not preempted local authority over the siting of utility-scale renewable generation”); *id.* at 842 (“The current legal system that governs renewable energy development consists of an incoherent patchwork of statutes, regulations, and common law court decisions geared toward older, nonrenewable technologies.”). *See generally* Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877 (2011) (arguing for local control of renewable energy projects); Uma Outka, *Siting Renewable Energy: Land Use and Regulatory Context*, 37 ECOLOGY L.Q. 1041 (2010) (discussing renewable energy siting law in Florida); Donald Zillman et al., *More Than Tilting At Windmills*, 49 WASHBURN L.J. 1, 10 (2009) (describing the “array of local policies and regulations” that may apply to wind farm siting).

40. *See, for example*, the state of Virginia. In 2008, Rosenberg listed Virginia among the states with a state-controlled siting process. Rosenberg, *supra* note 8, at 676. However, in 2011, V.A. CODE ANN. § 67-103 (West 2014) was enacted, stating that local governments can develop ordinances for the siting of renewable energy facilities generating electricity from wind and that the local ordinances must be consistent with the Commonwealth’s energy policy.

41. Rosenberg, *supra* note 8, at 673.

42. *See* Alexa Burt Engelman, *Against the Wind: Conflict over Wind Energy Siting*, 41 ENVTL. L. REP. 10549, 10561 (2011) (noting that “early and effective engagement of the affected public” may result in less opposition to siting proposals).

43. Troxler, *supra* note 9, at 171.

44. Rosenberg, *supra* note 8, at 675.

45. *See, e.g.*, Engelman, *supra* note 42, at 10556–59 (describing the battle that erupted in Hammond, New York over wind energy development).

46. *See* Outka, *supra* note 15, at 305–06 (arguing that siting decisions must be made in light of “cumulative, not just site-specific, impacts”); Rosenberg, *supra* note 8, at 679 (arguing that a state agency is the most appropriate body to site wind energy facilities because it is in the best position to assess state and regional interests).

47. Troxler, *supra* note 9, at 171–72 (describing the “high transaction costs of navigating through a regulatory maze” of local regulations).

dollars.⁴⁸ Centralized, state-level siting authority could address all of these cost, expertise, efficiency, and environmental concerns.⁴⁹ The following Part III describes California's state-level energy agency, which might serve as a role model for other states.

III. CALIFORNIA'S ENERGY "SUPERAGENCY"

With over 38 million people in 2013, California is by far the most populous state in America.⁵⁰ Texas is a distant second with about 26.4 million.⁵¹ New York and Florida are vying for third place with around 19.6 million each.⁵² By 2050, California is projected to have a population of 50 million.⁵³

In terms of gross domestic product, California is also a global giant.⁵⁴ In 2012, California was "in a virtual tie" with the Russian Federation and Italy, each with an economy of approximately \$2 trillion.⁵⁵ In 2013, California was poised to surpass these two countries to rank as the eighth largest economy in the world.⁵⁶

By almost every measure, California is a national⁵⁷ and world leader⁵⁸ with respect to energy. California is also a leader in terms of renewable energy.⁵⁹

48. See generally *id.* at 177–88 (describing the cost to wind energy developers of complying with CEQA and decentralized siting requirements).

49. See *id.* at 188 (concluding that state-controlled siting "would alleviate the uncertainty surrounding permitting, which would in turn alleviate investment barriers without sacrificing environmental review").

50. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited June 30, 2014) (on file with the *McGeorge Law Review*).

51. *Id.*

52. *Id.*

53. STATE OF CALIFORNIA, GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, CALIFORNIA @ 50 MILLION: CALIFORNIA'S CLIMATE FUTURE 8 (draft, 2013), available at http://opr.ca.gov/docs/EGPR_Review_Draft.pdf [hereinafter CALIFORNIA @ 50 MILLION] (on file with the *McGeorge Law Review*).

54. See *California Posed to Move Up in World Economic Rankings in 2013*, NUMBERS IN THE NEWS (Center for Continuing Study of the California Economy, Palo Alto, Cal.), July 2013, at 1, available at <http://www.csce.com/PDF/Numbers-July-2013-CA-Economy-Rankings-2012.pdf> (on file with the *McGeorge Law Review*) (comparing the largest economies in the world, including California).

55. *Id.*

56. *Id.* Only the following 7 countries were ahead of California: United States (\$15.7 trillion); China (\$8.2 trillion); Japan (\$6 trillion); Germany (\$3.4 trillion); France (\$2.6 trillion); UK (\$2.4 trillion); Brazil (\$2.3 trillion). *Id.*

57. See, e.g., CAL. ENERGY COMM'N, PUB. NO. CEC-100-2013-001-CMF, 2013 INTEGRATED ENERGY POLICY REPORT 1 (2013), available at <http://www.energy.ca.gov/2013publications/CEC-100-2013-001/CEC-100-2013-001-CMF.pdf> [hereinafter 2013 INTEGRATED ENERGY POLICY REPORT] (on file with the *McGeorge Law Review*) ("California continues to lead the nation in designing and implementing innovative policies as strategies to use energy more efficiently, replace fossil fuels with renewable resources, and develop the infrastructure needed to deliver safe, reliable, and affordable energy to consumers and businesses throughout the state"); CAL. ENERGY COMM'N, PUB. NO. CEC-150-2011-002-LCF-REV1, RENEWABLE POWER IN CALIFORNIA: STATUS AND ISSUES 22 (Dec. 2011), available at <http://www.energy.ca.gov/2011publications/CEC-150-2011-002/CEC-150-2011-002-LCF-REV1.pdf> [hereinafter 2011 INTEGRATED ENERGY POLICY REPORT] (on file with the *McGeorge Law Review*) ("In 1980, the Federal Energy Regulatory Commission . . . followed California's lead by adopting the requirement for standard contracts priced at full avoided cost for utility purchases of electricity from qualifying facilities.").

58. See 2013 INTEGRATED ENERGY POLICY REPORT, *supra* note 57, at 35 (describing how California's

According to the National Renewable Energy Laboratory, California is ranked first for installed capacity of solar PV, concentrating solar power, and geothermal, and is second for biomass and hydropower.⁶⁰ In addition, California was number one for installed wind energy capacity in 2000,⁶¹ but it has since languished in comparison to a twentyfold growth nationwide, primarily in more regulatory-friendly states.⁶² Currently, wind power generation is not regulated by the statewide Energy Commission, but an argument can be made that moving it under the auspices of that agency might improve its success.⁶³

The following subparts describe first the creation of the Energy Commission and second the scope of its jurisdiction.

A. *Creation of the California Energy Commission*

The Energy Commission was created in 1974 through the Warren-Alquist Act.⁶⁴ Faced with the prospect of up to 120 new nuclear reactors to meet California's projected energy needs by 2000,⁶⁵ the State Assembly figured out a way to meet the needs of both utility companies and constituents urging

actions influence China and the rest of the world); *id.* at 309 (calling California a “world leader in its efforts to address climate change by reducing greenhouse gas (GHG) emissions”). California’s Low Carbon Fuel Standard, established in 2007, aims to significantly reduce California’s contributions to worldwide Greenhouse Gas emission levels. 2011 INTEGRATED ENERGY POLICY REPORT, *supra* note 57, at 24.

59. See U.S. DEP’T OF ENERGY, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY, 2011 RENEWABLE ENERGY DATA BOOK 31 (2013), available at <http://www.nrel.gov/docs/fy13osti/54909.pdf> (on file with the *McGeorge Law Review*) (ranking California in the top three states for “Renewable Electricity Installed Capacity” in all six energy categories discussed).

60. *Id.*

61. Troxler, *supra* note 9, at 163 (observing that “California led the nation in installed wind energy capacity” in 2000, with over 1,600 MW of the nation’s total installed wind energy capacity of 2,472 megawatts).

62. *Id.* at 164 (“[S]ince 2000, wind capacity in the United States has increased twentyfold to almost 50,000MW, while capacity in California has less than tripled.”). Troxler points out “that wind projects developed in California and New England from 2009 through 2011 were significantly more expensive than comparative projects in other regions,” with a cost in California and New England of \$2,500 per kilowatt in comparison to the national average of \$2,160 per kilowatt. *Id.* at 177.

63. *Id.* at 165, 195 (positing that “[t]he combination of decentralized siting and stringent environmental evaluation shrouds the cost, outcome, and timeline of the permitting process in uncertainty, chilling investment in new [California wind] capacity” and concluding that “California could alleviate these barriers, without necessarily detracting from environmental review, by centralizing permitting authority [for wind] in the California Energy Commission and consolidating its licensing and environmental review process”).

64. 1974 Cal. Stat. 25005.5. Then California Governor, Ronald Reagan, vetoed the first version of the bill in 1973. Larry Pryor, *Reagan Under Fire for Veto of Energy Conservation Bill*, L.A. TIMES, Oct. 4, 1973, available at http://www.energy.ca.gov/reports/Warren-Alquist_Act/history/1973-74_AB_1575_news.pdf (on file with the *McGeorge Law Review*).

65. *Energy Crisis Bill Gets an OK*, S.F. CHRON., Aug. 10, 1973, available at http://www.energy.ca.gov/reports/Warren-Alquist_Act/history/1973-74_AB_1575_news.pdf (on file with the *McGeorge Law Review*). The measure was instigated by a report from the Rand Corporation that “recommended that the state should spend more time trying to conserve energy by increasing efficiency and less on just building new power plants.” *Id.*

conservation and environmental protection.⁶⁶ California legislators placed the authority to regulate the siting of electric power plants in the same agency that was charged with researching energy conservation and new forms of energy.⁶⁷

Because this new agency had the power to look beyond traditional utility-siting authority, the Los Angeles Times called it a “superagency.”⁶⁸ The concept of this superagency structure was alarming to some in the 1970s.⁶⁹ Then California Governor Ronald Reagan vetoed the first version of the bill,⁷⁰ and when he finally signed the legislation, the state energy coordinator resigned warning that the commission was a “dangerous concentration of authority.”⁷¹ Yet reviews of the Energy Commission’s performance have concluded that the process works and is an appropriate balance of speed and oversight,⁷² allowing power plants to be sited in an “expeditious and environmentally considerate manner.”⁷³

B. Current Scope of the Energy Commission’s Jurisdiction

The current version of the Warren-Alquist Act is close to two hundred pages long and incorporates twelve chapters, addressing everything from the Commission’s management to its research programs.⁷⁴ One of the most laudable features of California’s energy regime is the legislative mandate, added to the statute in 2002,⁷⁵ requiring that the Energy Commission prepare an “integrated energy policy report” every two years.⁷⁶ The legislative charge is broad: the Commission must “conduct assessments and forecasts of all aspects of energy industry supply, production, transportation, delivery and distribution, demand, and prices” and “use these assessments and forecasts to develop energy policies

66. See *Superagency for the Energy Gap*, *supra* note 11 (describing the powers of the proposed Energy Resources Conservation and Development Commission, including siting authority for power plants, conservation measures, and research and development of additional sources of energy).

67. *Id.*

68. *Id.*

69. Pryor, *supra* note 64 (describing the opposition of privately-owned utilities to the first version of the Warren-Alquist bill).

70. *Id.*

71. *Big Energy Bill Signed by Reagan*, *supra* note 19 (quoting California State Energy Coordinator Wesley G. Bruer).

72. SUSAN F. TIERNEY & PAUL J. HIBBARD, SITING POWER PLANTS: RECENT EXPERIENCE IN CALIFORNIA AND BEST PRACTICES IN OTHER STATES 4 (2002), available at http://www.issuelab.org/click/download/siting_power_plants_recent_experience_in_california_and_best_practices_in_other_states (on file with the *McGeorge Law Review*).

73. *Power Plant Siting Proceedings FAQs*, CAL. ENERGY COMM’N, http://www.energy.ca.gov/public_adviser/power_plant_siting_faq.html (last visited Nov. 12, 2014) (on file with the *McGeorge Law Review*).

74. Warren-Alquist State Energy Resources Conservation and Development Act, CAL PUB. RES. CODE § 25000–990 (West 2007 & Supp. 2014).

75. 2002 Cal. Stat. 3243.

76. PUB. RES. § 25302(a). The first report was required to be issued in 2003. *Id.* The most recent report was issued in 2013. 2013 INTEGRATED ENERGY POLICY REPORT, *supra* note 57.

that conserve resources, protect the environment, ensure energy reliability, enhance the state's economy, and protect public health and safety.⁷⁷ One of the objectives of the reporting requirement is "to encourage cooperation among the various state agencies with energy responsibilities[,]"⁷⁸ and creating the report requires the Energy Commission to consult and coordinate with at least nine other state agencies that have additional jurisdiction over energy issues.⁷⁹

Despite its coordinating role and broad mandate to "[s]erve as a central repository within the state government" for energy data and recommendations,⁸⁰ the Energy Commission's actual jurisdiction to make decisions is more limited.⁸¹ Since the original enactment of the statute, the Energy Commission's primary jurisdiction is "the exclusive power to certify all sites and related facilities in the state, whether . . . new . . . or a change or addition to an existing facility."⁸²

A further limitation on the Energy Commission's authority is that the definition of "[f]acility" includes only an "electric transmission line or thermal powerplant"⁸³ "using any source of thermal energy, with a generating capacity of 50 megawatts [MW] or more"⁸⁴ The statute explicitly states that "'[t]hermal powerplant' does not include any wind, hydroelectric, or solar photovoltaic electrical generating facility."⁸⁵

As a result of this now seemingly irrational carve out,⁸⁶ the Energy Commission reported that "[m]ore than half of the 9,435 MW of large-scale renewable generation permitted in 2010 fell under the purview of local

77. PUB. RES. § 25301(a).

78. *Id.* § 25300(e).

79. *Id.* §§ 25301(a), 25302(e). These agencies include (1) the Public Utilities Commission; (2) the Office of Ratepayer Advocates; (3) the California Air Resources Board; (4) the Electricity Oversight Board; (5) the Independent System Operator; (6) the Department of Water Resources; (7) the California Consumer Power and Conservation Financing Authority; (8) the Department of Transportation; and (9) the Department of Motor Vehicles. *Id.*

80. *Id.* § 2516.5(d) (The Energy Commission is to "[s]erve as a central repository within the state government for the collection, storage, retrieval, and dissemination of data and information on all forms of energy supply, demand, conservation, public safety, research, and related subjects. The data and information shall be derived from all sources, including, but not be limited to, electric and gas utilities, oil and other energy producing companies, institutions of higher education, private industry, public and private research laboratories, private individuals, and from any other source that the commission determines is necessary to carry out its objectives under this division.").

81. *See id.* § 25216 (describing duties consisting largely of collecting data, making assessments and recommendations, and performing research and development); *id.* § 25410.6 (describing the Energy Commission's role in administering the State Energy Conservation Assistance Account).

82. *Id.* § 25500.

83. *Id.* § 25110 (defining "[f]acility").

84. *Id.* § 25120 (defining "[t]hermal powerplant").

85. *Id.* § 25120. *But cf. infra* note 169 (discussing California Public Utilities Code section 25500.1).

86. At the time the Warren-Alquist Act was passed, utility-scale wind turbines had not yet been developed. *See, e.g., Energy Timelines: Wind*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/kids/energy.cfm?page=tl_wind (last visited Nov. 14, 2014) (on file with the *McGeorge Law Review*) (indicating that the first wind turbine capable of generating over one MW did not begin operating until 1979, and that it was not until the 1980s that some of the first wind turbines were installed in California).

governments” instead of the centralized Energy Commission process.⁸⁷ In comparison to the hundreds, if not thousands, of separate local governmental entities from which renewable energy projects might need to seek approval,⁸⁸ the advantages of the Energy Commission permitting process described in Part IV, help make a compelling argument that large-scale renewable projects should be centralized under the Energy Commission’s jurisdiction.⁸⁹

IV. THE ENERGY COMMISSION’S ENERGY SITING PROCESS

Despite the carve-outs for wind and solar PV mentioned in Part III.B, the Energy Commission’s authority is broad, and its certification process is comprehensive.⁹⁰ It all starts when an applicant files an application for certification of a site.⁹¹ After receiving the application and reviewing it for sufficiency,⁹² the Energy Commission takes the lead role in giving notice of the application to the California Attorney General, relevant federal and state agencies, and the public through newspaper publication.⁹³

Perhaps most significantly, however, the Energy Commission forwards the application to “local governmental agencies having land use and related jurisdiction in the area of the proposed site and related facility[,]” seeking review and comments on “the design of the facility, architectural and aesthetic features of the facility, access to highways, landscaping and grading, public use of lands in the area of the facility, and other appropriate aspects of the design, construction, or operation of the proposed site and related facility.”⁹⁴ This step satisfies the Energy Commission’s responsibility to ensure that a project conforms to applicable federal, state, local, or regional laws, ordinances, regulations, and standards (LORS).⁹⁵ While the Energy Commission certification process coordinates and considers all LORS, the Energy Commission’s

87. 2011 INTEGRATED ENERGY POLICY REPORT, *supra* note 577, at 219.

88. *See id.* (reporting that California has 58 counties, 482 incorporated cities, and 3,400 special districts). While special district approval might not often be required, Ken Alex noted that “local jurisdiction still has a lot of control over where energy facilities are sited.” Ken Alex, Senior Policy Advisor, State of California, Office of Governor & Director, State of California, Governor’s Office of Planning and Research, Remarks at the McGeorge Law Review Symposium: California’s Future and What Does the Environment Look Like? (Apr. 11, 2014).

89. *See Troxler, supra* note 9, at 170 (describing a wind project in Kern County that had to obtain approval from eight local, four state, and three federal agencies).

90. *See generally* CAL. PUB. RES. CODE §§ 25500–43 (West 2007 & Supp. 2014).

91. *Id.* § 25519(a).

92. *See id.* § 25520 (listing the required contents of the application).

93. *Id.* § 25519(g). The Energy Commission may also be required to notify the Public Utilities Commission. *Id.* § 25519(j).

94. *Id.* § 25519(f).

95. *Laws, Ordinances, Regulations and Standards in Siting Cases*, CAL. ENERGY COMM’N, http://www.energy.ca.gov/public_adviser/lors_faqs.html (last visited Nov. 15, 2014) (on file with the *McGeorge Law Review*).

“exclusive power to certify” means the certificate it issues is “in lieu of” and “supersedes” all LORS from other jurisdictions, including the federal government when allowed.⁹⁶

The next phases of the site certification process include discovery and analysis.⁹⁷ The Energy Commission staff gathers data from all sectors and prepares a Preliminary Staff Assessment and then a Formal Staff Assessment for the two commissioners assigned to the application.⁹⁸

The following stage is one that sets the Commission certification process apart: “[f]ormal evidentiary hearings are held . . . to hear the findings and conclusions of the applicant, staff, intervenors, and other agencies through written, oral and documentary testimony in order to make a decision based on evidence.”⁹⁹ In this formal quasi-adjudicatory process, all parties, including approved intervenors, have an opportunity to submit sworn testimony and cross-examine witnesses.¹⁰⁰ Non-party members of the public are also “encouraged to present oral and written comments.”¹⁰¹ The adjudicatory hearings must be scheduled 90 to 240 days after the date the application is filed.¹⁰² To allow for public input, the hearings are held in one of four major cities nearest the proposed site and may also be held in the county in which the site will be located.¹⁰³ The Energy Commission has discretion to determine the number of hearings and how they are to be conducted to “provide a reasonable opportunity for the public and all parties . . . to comment upon the application and the commission staff assessment”¹⁰⁴ In fact, “public adviser[s]” are nominated by the Energy Commission and appointed by the California Governor to educate the public and encourage participation.¹⁰⁵

After the formal adjudicatory hearing or hearings on an application, the Energy Commission must prepare a written decision concerning the application, including “[s]pecific provisions relating to the manner in which the proposed facility is to be designed, sited, and operated in order to protect environmental quality and assure public health and safety”¹⁰⁶ and “[a] discussion of any public benefits from the project including, but not limited to, economic benefits,

96. PUB. RES. § 25500.

97. See *Six Phases of the Power Plant Siting Process*, CAL. ENERGY COMM’N, http://www.energy.ca.gov/public_adviser/six_phases.html (last visited Nov. 15, 2014) (on file with the *McGeorge Law Review*) (listing discovery and analysis phases following the data adequacy phase).

98. *Id.*

99. *Id.*

100. CAL. CODE OF REGS. tit. 20, § 1712(b) (2014).

101. *Six Phases of the Power Plant Siting Process*, *supra* note 97; see also *Power Plant Siting Proceedings FAQs*, *supra* note 73.

102. CAL PUB. RES. CODE § 25521 (West 2007 & Supp. 2014).

103. *Id.*

104. *Id.*

105. *Id.* §§ 25217.1, 25222; CAL. CODE REGS. tit. 20, §§ 2553, 2555.

106. PUB RES. § 25523(a).

environmental benefits, and electricity reliability benefits.”¹⁰⁷ The decision phase starts with the “Presiding Member’s Proposed Decision” upon which one last hearing is held to give the public an opportunity to comment.¹⁰⁸ Ultimately, the full Energy Commission renders a final decision at one of its regular bi-monthly meetings.¹⁰⁹

As discussed below, the Commission process provides three significant advantages for applicants and the public: (A) one-stop shopping; (B) an alternative to the California Environmental Quality Act (CEQA) review requirements;¹¹⁰ and (C) limited judicial review of a Energy Commission certification.

A. *One-Stop Shopping*

In 1974, some proponents of the Warren-Alquist Act argued the legislation was necessary because “it was virtually impossible for power plant builders to secure the permission of the 33 agencies that [had] jurisdiction over location of nuclear power plants in California.”¹¹¹ In contrast, the Energy Commission’s licensing procedure “provide[s] a comprehensive ‘one-stop’ process for permitting thermal power plants larger than 50 MW”¹¹² This one-stop process can provide at least five advantages.

First, all applicants must go through the same well-defined Energy Commission process.¹¹³ Although it might be criticized as “cookie cutter” because it “makes all projects step through a very detailed, lengthy and exhaustive process irrespective of the proposed impacts,”¹¹⁴ the precedents established by the Energy Commission in other cases make the expectations and results fairly predictable.¹¹⁵

107. *Id.* § 25523(h).

108. *Six Phases of the Power Plant Siting Process*, *supra* note 97.

109. *Id.*

110. CEQA is modeled after the federal National Environmental Protection Act (NEPA), and has a similar two-step review process. EXEC. OFFICE OF THE PRESIDENT OF THE U.S. & STATE OF CAL., GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, NEPA AND CEQA: INTEGRATING STATE AND FEDERAL ENVIRONMENTAL REVIEWS 3 (drft. 2013), *available at* http://energy.gov/sites/prod/files/NEPA_CEQA_Draft_Handbook_March_2013_0.pdf [hereinafter NEPA AND CEQA] (on file with the *McGeorge Law Review*). The lead governmental agency conducting the review must make an initial determination if a full report, which in California is called an Environmental Impact Report (EIR) and is comparable to the federal Environmental Impact Statement (EIS), is required. *See id.* 5–8 (describing the comparable processes of review under CEQA and NEPA).

111. *Big Energy Bill Signed by Reagan*, *supra* note 19.

112. 2011 INTEGRATED ENERGY POLICY REPORT, *supra* note 57, at 62.

113. *See* CAL PUB. RES. CODE § 25517 (West 2007 & Supp. 2014) (stating that a certification from the Energy Commission must be obtained prior to constructing any thermal power plant).

114. E-mail from Dana C. Zentz, Vice President, Commercial Dev., Summit Power Group, LLC & Managing Dir. & CEO, NorthLight Power, LLC, to author (May 12, 2014, 5:16 PM) (on file with the *McGeorge Law Review*).

115. *See* TIERNEY & HIBBARD, *supra* note 72, at 28 (indicating that siting procedures are most efficient

Second, placing the decision in the hands of a statewide agency with expertise in various energy generation and conservation concerns and related siting issues can increase the likelihood of “institutional competency to evaluate applications.”¹¹⁶ This can protect the public from local authorities seeking to “race-to-the-bottom” by sacrificing environmental or health values in hopes of spurring economic development.¹¹⁷

Third, the Energy Commission’s process can save an applicant money by avoiding “duplication and regulatory uncertainty.”¹¹⁸ While the LORS requirements still mean an applicant’s lawyers will have to be familiar with the requirements of each federal, state, or local law, ordinance, rule, or standard that applies, legal counsel will not have to spend much face-time with each of the key administrative personnel from several different jurisdictions.¹¹⁹ In addition, the Energy Commission promises “predetermined” flat-fee pricing.¹²⁰ The public also benefit from the efficiency of having a single forum instead of needing to monitor the project on multiple fronts and in multiple venues.¹²¹

Fourth, the use of a statewide agency increases the likelihood of a “more objective . . . review” that “mitigates the risk that decisions will over-emphasize provincial concerns.”¹²² The larger land footprint required to generate power from wind and solar PV sources¹²³ may make it more likely a project would cross more jurisdictional boundaries and potentially raise more provincial concerns.

Fifth, and perhaps most importantly, a statewide agency with exclusive jurisdiction, like the Energy Commission, has the additional advantage of preemptive power.¹²⁴ The Energy Commission’s alternative environmental review process is described in Part IV.B. Although this process does not avoid any of the other agencies that might otherwise be involved in a CEQA review, one benefit is the Energy Commission’s energy focus: the Energy Commission has the ultimate authority to decide whether the project should proceed even if there are impacts,

when prior agency decisions are made available to subsequent applicants, as in New York, California, and Connecticut).

116. Troxler, *supra* note 9, at 189.

117. *See supra* note 44 and accompanying text (describing the risk of lax environmental review in a local siting situation)

118. *Power Plant Siting Proceedings FAQs*, *supra* note 73.

119. *See* TIERNEY & HIBBARD, *supra* note 72, at 7 (indicating that other agencies provide recommendations to the Energy Commission rather than directly to the applicant).

120. Troxler, *supra* note 9, at 194 (“[D]evelopers pay a flat fee of \$255,075, plus \$510 per MW at the time of filing.”).

121. *See* CAL PUB. RES. CODE §§ 25217.1, 25222 (West 2007 & Supp. 2014) (describing the role of the advisers available to the public to assist during the Energy Commission siting process).

122. Troxler, *supra* note 9, at 189.

123. *See* SEAN ONG, ET AL., NAT’L RENEWABLE ENERGY LAB., U.S. DEP’T OF ENERGY, LAND-USE REQUIREMENTS FOR SOLAR POWER PLANTS IN THE UNITED STATES, at iv (2013), available at <http://www.nrel.gov/docs/fy13osti/56290.pdf> (on file with the *McGeorge Law Review*) (observing the “potentially significant land use” associated with solar power plants).

124. *See* PUB RES. § 25500 (stating that Energy Commission siting jurisdiction preempts any other statute, ordinance, or regulation).

whereas other regulatory agencies may not be as interested in promoting the state's energy goals that may override environmental considerations.¹²⁵

Several states have moved to a statewide wind siting model to put wind power generation on a level playing field with other power generation sources that enjoy the benefits of a centralized permit process.¹²⁶ Large-scale wind and solar projects in California that do not have the option of permitting through the Energy Commission process do not have these advantages.

B. *Alternative CEQA Review*

Virtually all energy projects in California, whether permitted under the Energy Commission process or locally, require some sort of approval and therefore are subject to CEQA environmental review requirements.¹²⁷ However, the Warren-Alquist Act allows the Energy Commission to conduct its own environmental review that is then used “in the same manner as . . . an environmental impact report or negative declaration prepared by a lead agency” under the standard CEQA process.¹²⁸

The Energy Commission's environmental review process is arguably more rigorous than a CEQA review by other lead agencies.¹²⁹ A standard CEQA review is comparable to the environmental review process under the National Environmental Policy Act: an agency or governmental body prepares an initial study and if necessary, Environmental Impact Report through an informal information gathering administrative process.¹³⁰ In contrast, the Energy Commission certification process described above requires submission of evidence, cross-examination, and testimony in a formal quasi-judicial adjudicatory setting.¹³¹

125. Telephone conference between author and Michael J. Levy, formerly Chief Counsel, California Energy Commission (June 30, 2014). *See also* e-mail from Michael J. Levy, former Chief Counsel, California Energy Commission, to author (Aug. 25, 2014, 2:21 PM) (on file with the *McGeorge Law Review*).

126. *See supra* Part II (discussing the approaches of various states to energy siting issues).

127. Even though most energy facilities may not be public or publically funded projects, they are private projects that require discretionary approval, so they are subject to CEQA requirements. PUB. RES. § 21080(a); *Friends of Mammoth v. Bd. of Supervisors of Mono Cnty.*, 8 Cal. 3d 247, 259 (1972).

128. PUB. RES. § 25519(c). Consequently the California Secretary for Resources has certified the Energy Commission's process as a CEQA equivalent. CAL. CODE REGS. tit. 14, § 15251(j) (2014) (listing “[t]he power plant site certification program of the State Energy Resources Conservation and Development Commission under Chapter 6 of the Warren-Alquist Act, commencing with Public Resources Code Section 25500”). “Section 21080.5 of the Public Resources Code provides that a regulatory program of a state agency shall be certified by the Secretary for Resources as being exempt from the requirements for preparing EIRs, negative declarations, and initial studies if the Secretary finds that the program meets the criteria contained in that code section. A certified program remains subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible.” *Id.* § 15250.

129. *See* PUB. RES. §§ 25519 (a)(l), 25521 (describing the Energy Commission's environmental review process).

130. *See* NEPA AND CEQA, *supra* note 110.

131. *See supra* Part IV.

Even with the CEQA-equivalent environmental review, in most cases the Energy Commission is required to issue a written decision as to an application “within 18 months of the filing of an application for certification”¹³² A California Bureau of State Audits report showed that the average processing time of applications during the 1990s was a shorter time period—fourteen months.¹³³

The CEQA requirements make permitting time for California projects longer than in other states,¹³⁴ and because wind projects do not benefit from the Energy Commission review process, the additional time to meet CEQA requirements can add significantly more delay.¹³⁵ A 2013 J.D. candidate at Columbia Law School conducted an unpublished survey of the experiences of eight wind farms in Kern and Solano Counties in California from 2008 through 2011.¹³⁶ In this survey, he found that the time between filing a notice of preparation and the final CEQA Environmental Impact Report¹³⁷ ranged from 224 days to 1,508 days.¹³⁸ Thus, in contrast to states in which permitting can be completed in less than a year,¹³⁹ the California wind permitting process averages four years.¹⁴⁰

Furthermore, in contrast to NEPA, which simply lists environmental impacts of a project, the CEQA process requires mitigation measures to address “significant environmental effects” of proposed projects.¹⁴¹ While other lead agencies can issue a “statement of overriding considerations” to allow a project to go forward even if significant environmental effects are unavoidable,¹⁴² the

132. PUB. RES. § 25522(a). If the process to file a notice of intent set out in sections 25501.7 through 25516.6 applies, then the final decision must be within twelve months if an application “[wa]s filed within one year of the commission’s approval of the notice of intent.” *Id.*

133. Troxler, *supra* note 9, at 194.

134. Robert D. Castro, *Developing Wind Projects in California—or Anywhere*, POWER MAG. (Dec. 15, 2007), <http://www.powermag.com/developing-wind-projects-in-california-or-anywhere/> (on file with the *McGeorge Law Review*).

135. See E-mail from Kristen T. Castañón, Partner, Stoel Rives, LLP, to author (May 8, 2014, 5:47 PM) (on file with the *McGeorge Law Review*) (“The CEC [Energy Commission] process is lengthy—18 to 24 months for a new facility, and it can take longer. While this is much longer than a local agency siting process in a state like Oregon, it’s not that much longer than a local siting process (for a large project) in CA, where CEQA compliance is required.”).

136. Troxler, *supra* note 9, at 181 n.144.

137. An Environmental Impact Report (EIR) is comparable to an Environmental Impact Statement (EIS) under NEPA. See, e.g., NEPA AND CEQA, *supra* note 110, at 8.

138. Troxler, *supra* note 9, at 181 n.144.

139. See STOEL RIVES, LLP, THE LAW OF WIND, pt. 2, at 2 (3d ed. 2006), available at http://www.stoel.com/Files/LawOfWind_06.pdf (on file with the *McGeorge Law Review*) (noting that locally cited wind projects take three to six months to work through the permitting process); NAT’L WIND COORDINATING COMM., SITING SUBCOMM., PERMITTING OF WIND ENERGY FACILITIES 10 (rev. 2002), available at <http://www.nationalwind.org/assets/publications/permitting2002.pdf> (on file with the *McGeorge Law Review*) (noting that permitting for a wind project usually takes only twelve months).

140. CTRS. OF EXCELLENCE, ENVIRONMENTAL SCAN: WIND TURBINE TECHNICIANS IN CALIFORNIA 11 (2009), available at http://www.coeccc.net/environmental_scans/wind_scan_sw_09.pdf.

141. CAL. CODE REGS.tit. 14, §15091 (2014).

142. *Id.* § 15093.

Commission alone can include “public convenience and necessity” as a basis for overriding any state law, including CEQA requirements.¹⁴³

C. *Limited Judicial Review*

While not all wind developers in California agree that Energy Commission review would be preferable to local permitting, there does appear to be consensus on the advantage of at least one aspect of the Energy Commission process—limited judicial review.¹⁴⁴ Reconsideration of an Energy Commission decision must occur, if at all, within 30 days after the adoption of a decision or order.¹⁴⁵ Furthermore, judicial review of an Energy Commission decision “on any application for certification of a site and related facility” is limited to a petition for writ of mandate directly to the Supreme Court of California.¹⁴⁶ While a handful of applicants have sought such a writ from the California Supreme Court,¹⁴⁷ that court has never ordered the Energy Commission to overturn a siting decision perhaps because the Energy Commission must only adhere to the rigorous certification process described above in order to meet the narrow procedural review grounds set out in the Warren-Alquist Act.¹⁴⁸ Furthermore, the Act limits review to the certified record without any additional evidence,

143. CAL. PUB. RES. CODE § 25525 (West 2007 & Supp. 2014). While CEQA statements of overriding considerations are common, the public convenience and necessity override of LORS has been used sparingly. *See, e.g., City Officials Disappointed by Power Plant Decision*, CITY OF CARLSBAD (May 31, 2012), <http://news.carlsbadca.gov/news/city-officials-disappointed-by-234625> (on file with the *McGeorge Law Review*) (describing the Energy Commission’s use of the public convenience and necessity override for a power plant to be built in Carlsbad, California); Staff’s Brief on Override Issues, In re Application for Certification for the Eastshore Energy Ctr. in Hayward by Tierra Energy of Texas, No. 06-AFC-6 (Cal. Energy Res. Conservation and Dev. Comm’n Dec. 7, 2007), available at http://www.energy.ca.gov/sitingcases/eastshore/documents/lors_override/ENERGY_COMMISSION_STAFFS_BRIEF_ON_OVERRIDE_2007-12-07_TN-43634.PDF (on file with the *McGeorge Law Review*) (briefing the Energy Commission’s authority to override LORS).

144. *Compare* E-mail from Dana C. Zentz, *supra* note 114 (describing the drawbacks of Energy Commission siting for smaller projects), *with* E-mail from Kristen T. Castañón, *supra* note 135 (“So, in my experience, the true process benefits come from the lack of judicial review of CEC [Energy Commission] decisions, as opposed to a faster processing timeline.”). Castañón amended her earlier email to clarify that the California Supreme Court has granted review, it just “has never reversed a CEC [Energy Commission] siting decision.” E-mail from Kristen T. Castañón, Partner, Stoel Rives, LLP, to author (Sept. 5, 2014, 6:24 PM) (on file with the *McGeorge Law Review*).

145. PUB. RES. § 25530. Reconsideration may be on the Energy Commission’s own motion or upon petition of any party. *Id.*

146. *Id.* § 25531(a), (c).

147. *See, e.g., Santa Teresa Citizens Action Grp v. Cal. Energy Comm’n*, 105 Cal. App. 4th 1441 (2003).

148. PUB. RES. § 25531(b) (“The review shall not be extended further than to determine whether the commission has regularly pursued its authority No new or additional evidence may be introduced upon review and the cause shall be heard on the record of the commission as certified by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority The findings and conclusions of the commission on questions of fact are final and are not subject to review”).

providing that the Energy Commission's "findings and conclusions . . . on questions of fact are final and are not subject to review . . ." ¹⁴⁹

In contrast, one of the biggest uncertainties of current wind siting is whether the project will be subject to protracted litigation.¹⁵⁰ If a local agency's CEQA approval is challenged, the trial portion can take over a year, and the entire process can take up to four years or more with appeals.¹⁵¹ Compare this litigation risk with an Energy Commission project that is "essentially ready to go" immediately after the Energy Commission's licensing decision.¹⁵²

V. CONCLUSION

Arguments against a superagency solution for renewable energy sources come from both developers and the Energy Commission itself. From a developer's perspective, if there is local support for a project, a standardized statewide siting process could create additional hurdles and delays.¹⁵³

The problem with the local approach for large-scale wind and PV projects is that the locations where developers can easily build may be running out.¹⁵⁴ In addition, local agency support does not necessarily shield a project from litigation by other groups opposing a project.¹⁵⁵ Finally, speedy site approval may

149. *Id.*

150. John Watts, *Reconciling Environmental Protection with the Need for Certainty: Significance Thresholds for CEQA*, 22 *ECOLOGY L.Q.* 213, 216–17 (1995). The Cape Wind project in Massachusetts is also a poster child for the problems of litigation opposing a wind project. *See* Cape Wind, Bureau of Ocean Energy Management, <http://www.boem.gov/Renewable-Energy-Program/Studies/Cape-Wind.aspx> (last visited Nov. 16, 2014) (on file with the *McGeorge Law Review*) (describing the progress of the Cape Wind Energy Project proposed in 2001, which is still being litigated thirteen years later).

151. E-mail from Kristen T. Castaños, *supra* note 135.

152. *Id.*

153. Some developers have signaled their desire to avoid Energy Commission review by scaling their projects just below the Commission's 50 MW jurisdictional limit. *See, e.g., Salton Sea & Renewable Energy Facilities*, CAL. STATE SENATE SELECT COMM. ON CAL. ENERGY INDEPENDENCE, <http://caei.senate.ca.gov/sites/caei.senate.ca.gov/files/company%20bios%2010-1-13.pdf> (last visited Nov. 16, 2014) (on file with the *McGeorge Law Review*) (describing Energy Source's 49.9 MW facility). "The caveat to all this is, the length of time a project's permitting takes depends a lot on the local agency, their relative experience with similar projects, and the complexities of the project. There are solar and wind projects that are so well-sited, in jurisdictions with sophisticated staff, with minimal environmental impacts and no opponents, and those can be processed by an experienced local agency relatively quickly (6-9 months). For non-controversial projects with minimal impacts, a developer would probably benefit from a local siting process." E-mail from Kristen T. Castaños, *supra* note 135. *See also* e-mail from Megan Day, Senior Project Planner, Juwi Solar Inc., to author (May 8, 2014, 3:24 PM) (on file with the *McGeorge Law Review*) (agreeing that there may be a role for a statewide agency for larger facilities (wind or solar PV) that may encounter NIMBYism, because they might otherwise not get approval at all; but, that if there is local support, then local permitting is, in fact, more streamlined and efficient than statewide commissions).

154. *See* Salkin & Ostrow, *supra* note 9, at 1068 (indicating that "local opposition to wind turbines . . . is common" and that some areas have gone so far as to enact moratoria on wind turbines).

155. *Cf. supra* Part IV.C (describing the comparative litigation-related benefits of the Energy Commission's siting process).

not be best if environmental review is sacrificed.¹⁵⁶ Because California requires CEQA review for all large-scale renewable projects, the time savings are not significant, and statewide siting would better ensure consistency of protections.¹⁵⁷

From the Energy Commission's perspective, a 2011 report on renewable development suggests renewable energy sources are distinct:

California has 482 incorporated cities and 58 counties with about 3,400 special districts that are "separate local government(s) that delivers [sic] a limited number of public services to a geographically limited area." *Because each jurisdiction has different population sizes, demographics, geography, and renewable resource potential, implementing a one-size-fits-all energy policy for renewable development is impossible and unproductive. . . . Demographic differences such as income and education levels, political leanings, and value placed on renewable energy also play a role, as do geographic differences that affect the type of renewable resource best suited for each jurisdiction.* State government will need to work closely with local jurisdictions to understand these differences and the unique challenges local governments face in pursuing renewable energy policies and practices, and provide assistance in overcoming those challenges.¹⁵⁸

One explanation for this language could be that the Energy Commission was merely commenting on the current decentralized structure of permitting and siting of renewable resources, and not attempting to make any recommendations. Another explanation is that the Energy Commission meant to be addressing only small-scale energy projects,¹⁵⁹ treating them consistently with any other generation source that does not fall into the 50 MW and greater window regulated by the Energy Commission.¹⁶⁰

However, one of the California governor's "[k]ey [a]ctions to [d]ecarbonize" is the goal of "[f]ully integrat[ing] renewable generation sources into the electrical grid without [the] building of additional fossil fuel back-up generating capacity."¹⁶¹ Thus, a "more anticipatory approach"¹⁶² of viewing energy

156. See CAL. PUB. RES. CODE § 21080 (West 2007 & Supp. 2014) (subjecting only projects to be carried out by a public agency or subject to public agency approval to CEQA).

157. E-mail from Kristen T. Castañón, *supra* note 135 (indicating that the local siting process is not dramatically faster than the Energy Commission citing process when CEQA compliance is required).

158. 2011 INTEGRATED ENERGY POLICY REPORT, *supra* note 57, at 219–20 (emphasis added).

159. However, this language appears in the section entitled "Cross-Cutting Issue 2: Local Government Coordination," which does not explicitly refer only to smaller renewable projects. *Id.*

160. See *supra* notes 80–81 and accompanying text (explaining the current siting jurisdiction of the Energy Commission).

161. CALIFORNIA @ 50 MILLION, *supra* note 53, at 16–17.

162. Wiseman et al., *supra* note 22, at 905.

development through a more regional energy-shed¹⁶³ lens, might avoid the “consistent and pervasive neglect of cumulative impacts.”¹⁶⁴

The Energy Commission could play a role in achieving the goal of fully integrating all energy sources, including renewable resources. The Energy Commission could use its authority to make recommendations about how to best regulate California’s diverse energy resources, and it could use its integrated planning process as a vehicle for evaluating and addressing possible improvements.¹⁶⁵

Yet the Energy Commission’s 2013 Integrated Energy Policy Report makes no mention of including solar PV or wind siting within the Energy Commission’s centralized siting jurisdiction.¹⁶⁶ Considering the advantages to placing all large-scale energy projects, not just thermal projects, under the Energy Commission process, why has California not stepped up to its role model status by doing so?

The Energy Commission’s hesitancy to make this recommendation cannot be attributed to a lack of expertise about renewable technologies. The Energy Commission is currently responsible for siting concentrating solar thermal projects, and the agency now has experience with large scale PV because of Senate Bill 226 (SB 226).¹⁶⁷ “Several large-scale solar thermal projects already permitted at the state level [were] switching to PV technologies due to the decreasing cost of PV as compared to solar thermal technologies.”¹⁶⁸ SB 226 granted a short-term expansion of Energy Commission jurisdiction to consider a set group of these projects but has not expanded that jurisdiction to include future solar PV projects.¹⁶⁹ In addition, even though the Energy Commission may not

163. Comparable to the evolution of viewing water regulation through a watershed, as opposed to a jurisdiction-by-jurisdiction lens.

164. Outka *supra* note 15, at 283 (“A reactive regulatory structure [to utility plans] inevitably leads to consistent and pervasive neglect of cumulative impacts.”) While the focus of this article has been on large-scale renewable energy siting, an argument could be made that even small-scale projects have detrimental cumulative impacts. One example is the California ISO “duck curve” model, which suggests problems meeting customer demand if too much solar power from southfacing panels are produced. *See* CAL. INDEP. SYS. OPERATOR, FAST FACTS: WHAT THE DUCK CURVE TELLS US ABOUT MANAGING A GREEN GRID 3 (2013), *available at* http://www.caiso.com/Documents/FlexibleResourcesHelpRenewables_FastFacts.pdf (on file with the *McGeorge Law Review*). One possible solution to this problem might be to integrate the siting of solar panels and orient more to the west “so they capture more late afternoon sunlight, while foregoing greater overall generation.” Jeff St. John, *Retired CPUC Commissioner Takes Aim at CAISO’s Duck Curve*, GREEN TECH GRID (Mar. 24, 2014), <http://www.greentechmedia.com/articles/read/retired-cpuc-commissioner-takes-aim-at-caisos-duck-curve> (on file with the *McGeorge Law Review*).

165. *See supra* notes 80–81 and accompanying text (describing the Energy Commission’s role in collecting data and making recommendations).

166. 2013 INTEGRATED ENERGY POLICY REPORT, *supra* note 57.

167. 2011 INTEGRATED ENERGY POLICY REPORT, *supra* note 57, at 220 (“Senate Bill 226 . . . allows permitted projects larger than 50 MW that switch from solar thermal electric to PV to undergo an Energy Commission license amendment rather than a new permitting and environmental review process conducted by local government.”); *id.* at 44 fig.7 (showing large-scale PV and solar thermal projects permitted in 2010).

168. *Id.* at 220.

169. *See id.* (“Senate Bill 226 . . . allows permitted projects larger than 50 MW that switch from solar thermal electric to PV to undergo an Energy Commission license amendment rather than a new permitting and

have expertise about wind energy generating technologies, it presumably would be in a better position to hire employees with that expertise than would local jurisdictions with more limited budgets.¹⁷⁰

The Energy Commission's hesitancy to recommend centralization of renewable energy siting cannot be attributed to lack of knowledge about the many difficulties renewable energy developers encounter in this area. In a 2011 report, the Energy Commission raised a number of concerns about "[f]ragmented or overlapping licensing authority," noting "[w]hen involved agencies cannot agree on a set of mitigation or licensing conditions, developers have to satisfy more than one set of conditions, submit duplicate information, or face delays while agencies attempt to come to agreement."¹⁷¹

One explanation for the Energy Commission's hesitancy might be a concern that recommending an expansion of its own jurisdiction would seem overreaching. The Energy Commission may also be concerned about treading on a generally popular concept—local control. Both of these concerns seem to be reflected in the way the Energy Commission supported its recommendation for temporarily taking control of the handful of solar PV projects covered by SB 226: "Without SB 226, the addition of these projects, combined with the increased number of PV project applications and the continuing economic downturn, *could have strained local governments' ability to process all the applications.*"¹⁷²

environmental review process conducted by local government.""). It only covers applicants that petitioned the Energy Commission before June 30, 2012 to convert a proposed solar thermal power plant to a PV plant. CAL. PUB. RES. CODE § 25500.1(a) (West 2007 & Supp. 2014). Projects on federal land must also have been certified by the Department of the Interior or Bureau of Land Management before September 1, 2011. *Id.*

170. 2011 INTEGRATED ENERGY POLICY REPORT, *supra* note 57, at 220 ("Local governments may lack the regulatory framework and technical expertise to address the growing number and diversity of renewable energy technologies.").

171. *Id.* at 9. Distributed generation (mostly solar PV) faces even more hurdles:

[T]he wide variation in standards, codes, and fees among local governments make it difficult for developers to meet permit requirements. Land-use requirements for identical systems can vary significantly from jurisdiction to jurisdiction. Fees also vary widely among municipalities and even within municipalities for the same system size, and are often based on project cost rather than staff time needed for permit review, with many municipalities exceeding estimated cost recovery fees. Developers must also get permit approvals from local fire departments, building and electric code officials, and local air districts, leading to duplication and inefficiency in the permit application process. Finally, while distributed generation projects are subject an environmental review under the California Environmental Quality Act and in some cases the National Environmental Protection Act, many local permitting agencies only have thorough environmental screening and review processes in place for traditional development and are ill-prepared to assess environmental impacts associated with renewable distributed generation.

Id.

The 2011 Report disappointingly only notes that it has provided guides to local agencies. *Id.* at 221 (explaining that the 2010 Energy Commission *Energy Aware Facility Siting and Permitting Guide* "provides suggestions for permit process streamlining, including one-stop permit centers, pre-application packages and conferences, simplified permit language, a single point of contact for all local permits, cross training of staff, and the use of program-level EIRs [to satisfy CEQA]").

172. *Id.* at 220 (emphasis added).

As the fracking stories referenced in the introduction to this article illustrate, there is pushback in many parts of the country against statewide control. Despite the concerns over creating a superagency in 1974, the opposition against centralization may be even more pronounced in some areas today.¹⁷³ However, recent legislation that has included large-scale wind facilities within the jurisdiction of statewide siting agencies means that centralization is plausible, at least in some areas.¹⁷⁴

Furthermore, whatever the hesitations, it makes little sense to provide a statewide streamlined siting process for conventional thermal power plants, which have more detrimental impacts on the environment, while making the cleaner renewable energy power plants jump through additional hurdles and costs that prevent investment in these technologies. In conclusion, this article urges the Energy Commission to explore a superagency solution for all large-scale energy projects, including all large-scale renewable energy projects.

173. In fact, much of environmental reform was coming not from local governments but from the federal level during this period.

174. *See, e.g.*, 2011 Cal. Stat. ch. 469.

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