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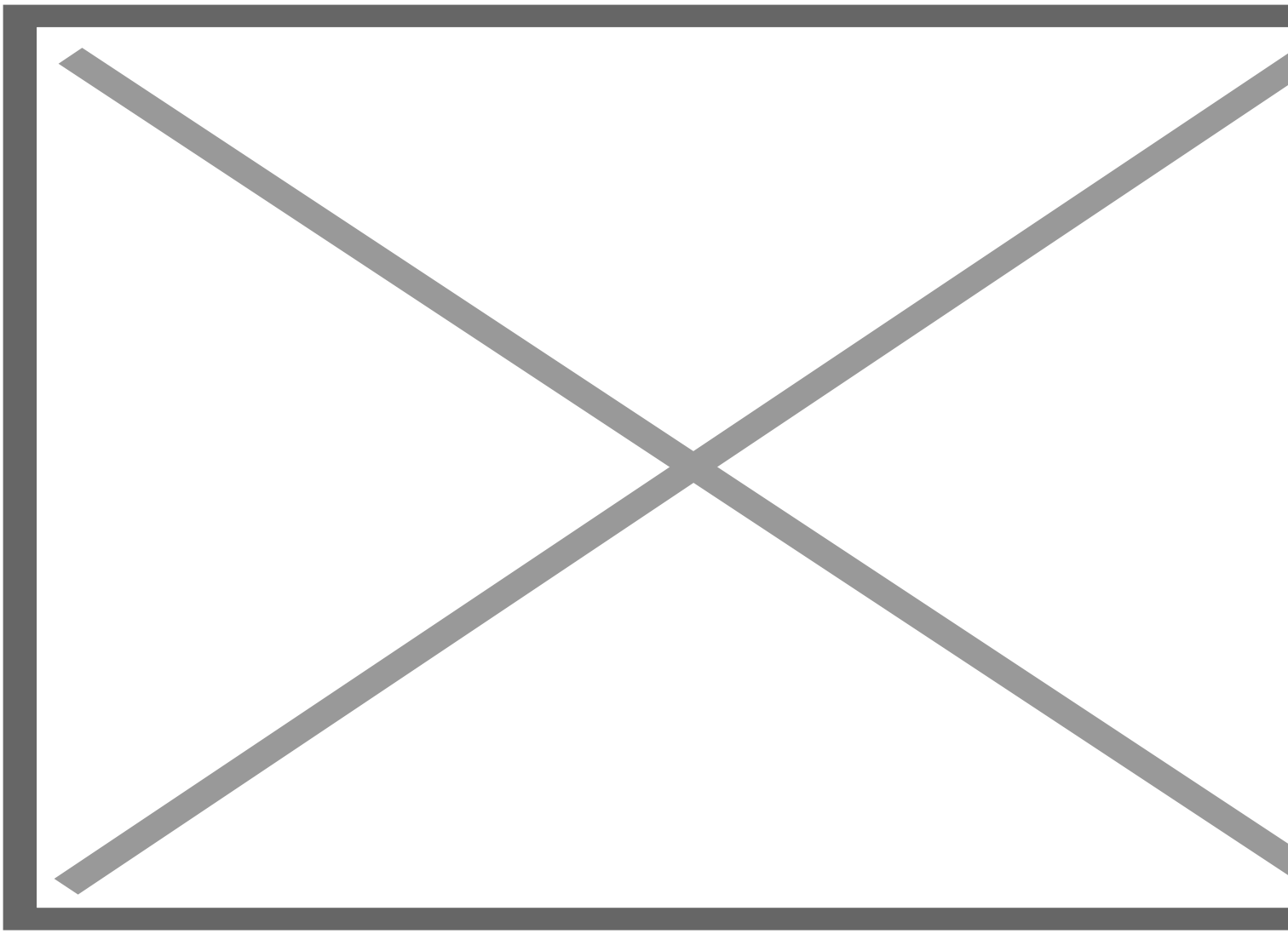
Power Plant Licensing Case May Open Door to Expanded Judicial Review of Licensing Decisions



In *Communities for a Better Environment v. State Energy Resources Conservation and Development Commission*, 19 Cal. App. 5th 725 (2017), the First District Court of Appeal reversed the trial court's conclusion that a challenge to the constitutionality of California's process for judicial review of decisions of the State Energy Resources Conservation and Development Commission (Energy Commission) was not ripe. The practical effect of this decision may be to increase the difficulty in permitting and financing large, non-renewable power plants in California. The Energy Commission has exclusive authority to license thermal power plants over 50 megawatts, "in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law." Under Section 25531 of the Public Resources Code, decisions of the Energy Commission are reviewable only by the Supreme Court of California, and the Commission's factual findings "are final and are not subject to review." Review by the Supreme Court is discretionary and, in practice, the high court has summarily denied every challenge to an Energy Commission

power plant licensing decision since energy deregulation in California in the 1990s. The trial court dismissed the case on ripeness grounds, concluding that no actual controversy existed between the environmental groups and the Energy Commission that could be adjudicated in the context of a specific factual dispute. On appeal, defendants argued that the trial court's determination was correct because the groups were seeking a purely advisory opinion on the constitutionality of a statute, unmoored to any concrete factual dispute regarding an actual Energy Commission decision. The appellate court disagreed, finding that the dispute was sufficiently concrete for adjudication. Prior decisions had found cases to be unripe when "a factual context was necessary" to resolve the legal issue. But here, no factual context was necessary "or even useful," according to the court, because the constitutionality of Section 25531 would be implicated in every future judicial review of an Energy Commission power plant licensing decision. The court also determined that ripeness should not operate to bar adjudication of the dispute before it because the consequences would be lingering uncertainty in the law despite the widespread public interest in the answer to a particular legal question. Although the effect of this decision is merely to send the case back to the trial court for further adjudication, the court's concern that the failure to address the constitutionality of Section 25531 would result in a "lingering uncertainty" suggests that the court found some merit to the environmental groups' arguments. Without legislative intervention, the decision portends a more uncertain future for the development of large thermal power plants in California. Smaller power plant projects (under 50 megawatts) regulated by other state and local government agencies experience significant delay and increased risks from a complicated approval and permitting process. Larger plants licensed by the Energy Commission may soon confront the same challenges. The decision may have limited impact, however, as recent forecasts produced by the Public Utilities Commission show no appetite for new natural gas plants.

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