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*Comment Received From: Neil Serr
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“de facto displacement of voter-enacted local land-use authority”

Additional submitted attachment is included below.

To: California Energy Commission

Re: Corby Battery Energy Storage System Project — Docket No. 24-OPT-05

Subject: Measure T, Prime Agricultural Land, De Facto Displacement of Voter-Enacted Local Land-Use Authority, and Constitutional Property-Rights Concerns

Dear Commissioners and CEC Staff:

I am writing to request that the California Energy Commission fully address a fundamental legal and constitutional issue before approving the proposed Corby Battery Energy Storage System Project: **whether the Commission's use of its Opt-In Certification authority would result in the de facto displacement of voter-enacted local land-use authority under Solano County Measure T, and whether doing so raises constitutional property-rights and takings concerns that have not been adequately addressed in the administrative record.**

This is not simply a dispute over ordinary county zoning.

The proposed Corby project would place a large industrial energy-storage facility on agricultural land, including protected agricultural resources, in an area where local land-use authority has been shaped not only by County government but directly by the voters through Measure T.

The Commission's Opt-In authority may permit it to supersede certain local permits, ordinances, and regulations. However, the existence of state siting authority does not automatically answer the separate and more fundamental question of **whether the Legislature clearly intended to authorize an administrative agency to displace voter-enacted land-use protections**, nor does it eliminate the Commission's responsibility to address the constitutional consequences of doing so.

1. Measure T represents voter-enacted land-use authority

Measure T is not merely an ordinary administrative zoning regulation adopted by County staff or the Board of Supervisors. It represents an exercise of the electorate's reserved legislative authority concerning the preservation and use of agricultural land in Solano County.

That distinction is legally significant.

The question before the Commission is therefore not simply whether a CEC certificate can replace a county permit.

The more fundamental question is:

Can the CEC, through an administrative certification proceeding, authorize an industrial use on land that is subject to voter-enacted restrictions when the County itself could not lawfully authorize that use without complying with Measure T?

If the answer is yes, the practical effect is a **de facto displacement of voter-enacted local land-use authority.**

The Commission should expressly address this issue rather than treating Measure T as interchangeable with an ordinary county zoning ordinance.

California courts have recognized the importance of the electorate's reserved initiative power. In *DeVita v. County of Napa*, 9 Cal.4th 763 (1995), the California Supreme Court addressed state preemption in the context of a voter-enacted local initiative. See also *City of Morgan Hill v. Bushey*, 5 Cal.5th 1068 (2018).

Accordingly, the Commission should make specific findings concerning:

1. Which provisions of Measure T apply to the Corby property;
2. Whether the proposed BESS facility is inconsistent with those provisions;
3. Whether approval of Corby would effectively override, suspend, or nullify voter-enacted Measure T protections;
4. Whether Public Resources Code section 25545.1 clearly authorizes the CEC to displace voter-enacted land-use restrictions;
5. Whether the Legislature clearly expressed an intent to displace the electorate's reserved local legislative authority;
6. Whether the CEC has authority to make that determination administratively; and
7. Whether the Commission's interpretation would effectively establish that the Opt-In process can bypass voter-enacted agricultural land-use protections throughout California.

2. De facto displacement of local land-use authority is a distinct issue from ordinary zoning preemption

The Commission should carefully distinguish between **preemption of local regulation** and **de facto displacement of voter-enacted local land-use authority**.

If Measure T prevents the County from approving the proposed industrial use on the Corby property, but the CEC can authorize precisely that use through a state certification, the practical result is that the electorate's land-use decision becomes legally irrelevant.

That is a profound consequence.

The issue is therefore not resolved merely by stating that state law preempts local zoning.

The Commission should explain:

What specific legal authority allows an administrative agency to accomplish through certification what the County government and the electorate cannot accomplish under Measure T?

If the answer is Public Resources Code section 25545.1, the Commission should identify the precise statutory language and legislative history demonstrating that the Legislature intended to authorize this extraordinary result.

A generalized reference to the CEC's ability to supersede local permits and ordinances is insufficient.

3. The Corby project would industrialize protected agricultural land

The proposed use is particularly significant because the property is agricultural land rather than land already designated for industrial development.

The conversion of agricultural land to a utility-scale industrial battery facility is not equivalent to development on land that the County has already planned and designated for industrial purposes.

The Commission should therefore address whether approving Corby would establish a precedent under which protected agricultural land may be converted to industrial use whenever a developer proceeds through the Opt-In Certification process.

That precedent would substantially diminish the practical effect of local agricultural land-use protections.

The Commission should also evaluate whether the existence of industrially designated alternatives demonstrates that the displacement of Measure T is unnecessary.

4. The Commission should specifically address the property-rights and takings implications

I am not suggesting that the CEC is literally exercising conventional eminent domain by taking title to the Corby property.

The concern is different.

The issue is whether the State is using its regulatory authority to remove legally protected limitations on the use of private property and, at the same time, displace the local electorate's authority over that land.

The Supreme Court has recognized several distinct categories of constitutional takings analysis, including the principles discussed in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

The absence of a formal condemnation does not mean that the Commission should disregard constitutional property-rights considerations.

The unusual circumstance here is that the State could potentially eliminate a significant local limitation on the property's industrial use without acquiring the property itself.

The Commission should therefore address whether its action constitutes:

- ordinary and permissible land-use regulation;
- state preemption of local land-use authority;
- **de facto displacement of voter-enacted local land-use authority;**
- a regulatory taking; or
- some combination of these legal effects requiring additional constitutional analysis.

5. Voluntary participation by the landowner does not resolve the public-law issue

Even if the property owner voluntarily leases or otherwise makes the property available to the project developer, that does not resolve the separate question concerning the public's land-use authority.

A voluntary lease between a landowner and developer cannot itself repeal Measure T.

Nor can private agreement determine whether a state agency has authority to override voter-enacted land-use restrictions.

The Commission should therefore keep these two issues separate:

Private property rights: whether the landowner wishes to lease or develop the property.

Public land-use authority: whether the State may authorize a use that local voters have restricted through Measure T.

The second question remains regardless of the first.

6. The existence of industrial alternatives is highly relevant

The Commission should give serious consideration to locations already designated for industrial or utility uses.

If an industrial-scale BESS can reasonably be located on industrially designated property, the justification for overriding voter-enacted agricultural protections becomes substantially weaker.

The State should not exercise extraordinary preemptive authority simply because doing so makes a particular private project easier to permit.

If the Commission possesses the authority to override local land-use restrictions, that authority should be exercised with particular care when:

- the land is agricultural;
- the land is subject to voter-enacted protections;
- the proposed use is industrial;
- the County has not authorized the use under its normal land-use process; and
- alternative industrially designated locations may exist.

7. The Commission should not allow the Opt-In process to become a mechanism for bypassing the electorate

The fundamental concern is precedent.

If the CEC may approve Corby notwithstanding Measure T, then future developers could potentially use the same process to bypass locally adopted agricultural protections elsewhere.

That would mean that voter-enacted land-use decisions could effectively be overridden without a vote of the affected electorate.

In practical terms, that is a **de facto displacement of voter-enacted local land-use authority**.

The Commission should not treat this consequence as incidental.

It should expressly determine whether the Legislature intended to create such a system.

If so, that conclusion should be stated openly in the administrative record, together with the statutory and constitutional reasoning supporting it.

8. Requested findings and action

I respectfully request that the California Energy Commission:

1. **Suspend approval of the Corby project until the Measure T issue has been fully analyzed.**
2. **Identify every provision of Measure T applicable to the proposed project site** and determine whether the proposed BESS facility conflicts with those provisions.
3. **Provide a specific legal analysis of whether Public Resources Code section 25545.1 preempts Measure T**, rather than treating Measure T simply as another county zoning regulation.
4. **Address whether approval of Corby would constitute a de facto displacement of voter-enacted local land-use authority.**
5. **Address the California Constitution's protection of the local initiative power**, including the principles discussed in *DeVita v. County of Napa* and subsequent cases.
6. **Explain whether the Legislature clearly intended to authorize an administrative agency to override voter-enacted land-use protections** through the Opt-In Certification process.
7. **Address the federal and California constitutional property-rights and takings implications** of using state certification authority to eliminate or bypass local agricultural land-use protections.
8. **Analyze industrially designated alternative sites**, including whether such sites could accommodate the project without overriding Measure T or converting protected agricultural land.
9. **Explain why protected agricultural land must be used for this project** if a technically and economically feasible industrially designated alternative exists.

10. **Include specific findings addressing these issues in the final administrative record,** rather than leaving them unresolved within a generalized discussion of state preemption.

Conclusion

The State's need for additional energy storage does not answer the separate question of **where that infrastructure should be located and who has the legal authority to decide.**

The Corby proceeding presents an important question of governmental authority:

May a state administrative agency use an Opt-In Certification process to authorize an industrial facility on agricultural land where the County and its electorate have adopted voter-enacted restrictions against such development?

If the answer is yes, the Commission should clearly explain the statutory authority for that conclusion, why that authority extends to voter-enacted Measure T, and how the resulting **de facto displacement of voter-enacted local land-use authority** is consistent with California's constitutional protection of the electorate's initiative power.

The Commission should also address the resulting property-rights and takings implications rather than assuming that the absence of a formal condemnation eliminates those concerns.

This is not simply a question of whether AB 205 grants the CEC broad permitting authority.

It is a question of whether that authority extends so far that it can **displace a land-use decision made directly by the voters and convert protected agricultural land into an industrial site without the local electorate's approval.**

That question deserves a clear legal answer before the Commission approves the Corby project.

If the Commission cannot establish that the Legislature clearly authorized such a displacement, and cannot demonstrate that the proposed use is necessary on this agricultural site notwithstanding available industrial alternatives, the appropriate course is to **deny certification for the proposed Corby site and require consideration of an appropriately designated industrial location.**

Respectfully,