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*Comment Received From: Neil Serr
Submitted On: 9/14/2026
Docket Number: 24-OPT-05*

Voters rights

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, State Preemption, and Constitutional Takings 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 effectively override voter-protected agricultural land-use restrictions under Solano County Measure T, and whether doing so raises constitutional takings concerns that have not been adequately addressed in the Staff Assessment/Draft EIR.

The Corby project is not simply a disagreement over ordinary county zoning. The proposed project would place a large industrial battery facility on land designated and used for agriculture, including prime agricultural resources. The Commission's own Opt-In program recognizes that its certification authority can supersede local permits and ordinances. But the existence of that statutory authority does not eliminate the obligation to determine precisely what local law is being displaced, whether the Legislature clearly intended to displace a voter-enacted initiative, and whether the resulting governmental action raises constitutional property-rights concerns.

1. Measure T is not merely an ordinary zoning ordinance

Measure T was adopted by the voters of Solano County and is a foundational component of the County's land-use planning system. It protects agricultural land and limits the ability of local government to redesignate protected agricultural land without voter approval.

That distinction matters.

The question before the Commission is not simply whether a CEC certificate can replace a county building permit or zoning approval. The more fundamental question is whether Public Resources Code section 25545.1 gives an administrative agency the authority to effectively nullify a land-use protection adopted directly by the electorate.

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 recognized that state preemption of a voter-enacted local initiative requires a sufficiently clear legislative basis. See also *City of Morgan Hill v. Bushey*, 5 Cal.5th 1068 (2018).

Accordingly, the Commission should not assume that the phrase "supersede any applicable statute, ordinance, or regulation" in Public Resources Code section 25545.1 automatically resolves the separate question presented by a voter-enacted land-use initiative.

The Commission should make an express legal determination concerning:

1. Which specific 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 any voter-protected Measure T provision;
4. Whether the Legislature clearly expressed an intent in Public Resources Code section 25545.1 to preempt voter-enacted land-use initiatives;
5. Whether the CEC has authority to make such a determination administratively; and
6. Whether any such determination is subject to judicial review and, if so, on what legal basis.

A generalized statement that the CEC certificate supersedes local zoning does not answer these questions.

2. The Commission should distinguish local zoning preemption from displacement of a voter-protected land-use right

There is a substantial difference between overriding an ordinary county zoning regulation and authorizing development that the voters specifically sought to prevent on protected agricultural land.

If the County Board of Supervisors could not lawfully authorize the proposed industrial use without complying with Measure T, the Commission should explain precisely how an administrative certification process can accomplish the same result without implicating the voters' reserved legislative authority.

The issue is especially significant because the Corby project is not proposed on land designated for industrial development.

The project would instead use agricultural land for a large industrial energy-storage installation.

The Commission should therefore identify the legal mechanism by which an agricultural designation protected through the electorate's initiative power can remain nominally in place while an industrial facility inconsistent with that designation is nevertheless authorized to occupy the property.

If the answer is that section 25545.1 simply makes the local restriction irrelevant, the Commission should expressly state that conclusion and identify the statutory language and legislative history supporting it.

That conclusion should not be buried within a generalized discussion of local zoning.

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

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

The concern is more fundamental.

Eminent domain normally involves the government taking private property for a public use and paying constitutionally required compensation. A regulatory taking, by contrast, can arise when governmental restrictions or actions go so far that they effectively appropriate or destroy protected property interests without formal title transfer.

The Supreme Court has recognized that regulatory takings must be evaluated under the constitutional protections of the Fifth Amendment, 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 relevant concern here is unusual because the governmental action is potentially moving in the opposite direction from a conventional taking:

The property owner may voluntarily lease or otherwise make the property available to the developer, while the State simultaneously uses its statutory authority to eliminate the local community's ability to enforce its voter-approved land-use protections.

That raises an important question:

When the State uses its regulatory authority to remove a locally protected limitation on the industrial use of private agricultural property, what consideration has the Commission given to the property interests of the surrounding landowners, agricultural operators, and the public's legally protected interest in preservation of agricultural land?

The Commission should not assume that the absence of a physical condemnation means that no constitutional property-rights issue exists.

At a minimum, the administrative record should address whether the Commission's action constitutes merely permissible land-use regulation and preemption, or whether the cumulative effect of the State's action could implicate federal or state constitutional takings principles.

4. Prime agricultural land should not be treated as interchangeable with industrial land

The Corby proposal presents an additional concern because the proposed site is agricultural land.

The permanent conversion of prime agricultural resources is materially different from placing the same facility on land already designated and planned for industrial development.

A conservation easement or agricultural mitigation measure may compensate for some CEQA impacts, but it does not answer the separate legal question of whether the State should authorize an industrial use on land that the electorate specifically sought to preserve.

Mitigation does not transform agricultural land into industrial land.

Nor does mitigation answer whether Measure T continues to have legal force.

The Commission should therefore separately analyze:

- the Measure T restrictions;
- the property's agricultural designation;
- the County's agricultural land-use policies;
- the County's current BESS siting policies;
- the feasibility of industrially designated alternatives;
- the loss of prime agricultural soil;
- the precedent created by allowing a major industrial facility on protected agricultural land; and
- the cumulative consequences if similar projects use the Opt-In process to bypass agricultural protections throughout California.

5. The availability of industrially designated alternatives makes the issue even more significant

The record indicates that Lambie Industrial Park is an alternative location with industrial/manufacturing land-use designations.

If an industrial-scale BESS can reasonably be located on land already designated for industrial development, the Commission should explain why it is necessary to use protected agricultural land instead.

The State should not use preemption authority merely because it makes a preferred private project easier to permit.

The existence of state-level energy policy does not automatically establish that every particular site is necessary.

If the State possesses the extraordinary authority to override local land-use restrictions, that authority should be exercised with particular care when the proposed site is prime agricultural land and an industrially designated alternative exists.

6. The Commission should not allow the Opt-In process to become a substitute for voter approval

Measure T represents an exercise of democratic land-use authority by the people of Solano County.

If the CEC determines that state law nevertheless overrides Measure T, the Commission should clearly explain why the Legislature intended to give an administrative agency the authority to accomplish indirectly what the County government itself could not accomplish directly.

Otherwise, the practical effect is that a statewide administrative permitting mechanism could become a means of nullifying voter-enacted land-use protections without a vote of the affected electorate.

That is a significant legal and constitutional question.

It deserves a specific finding.

7. Requested action

I respectfully request that the Commission:

1. **Suspend approval of the Corby project until the Measure T issue is fully analyzed.**
2. **Identify every Measure T provision applicable to the proposed site** and explain whether the proposed BESS facility is consistent with each provision.
3. **Provide a specific legal analysis of whether Public Resources Code section 25545.1 preempts Measure T**, rather than treating Measure T as merely another county zoning regulation.
4. **Address the California Constitution's protection of the local initiative power**, including the principles articulated in *DeVita v. County of Napa* and subsequent cases.
5. **Address the federal and California constitutional takings implications** of using state certification authority to eliminate or bypass land-use protections applicable to private agricultural property.
6. **Explain whether approval would constitute a de facto displacement of a voter-protected land-use right**, even though the State does not acquire title to the property.
7. **Analyze the Lambie Industrial Park and other industrially designated sites as alternatives**, particularly where those sites would avoid conversion of prime agricultural land.
8. **Explain why agricultural land must be used for this project if an industrially designated alternative is technically and economically feasible.**
9. **Include these legal questions and the Commission's answers in the final administrative record**, rather than leaving them unresolved in the Staff Assessment.
10. **If the Commission concludes that section 25545.1 unquestionably authorizes it to override Measure T, identify the specific statutory language, legislative history, and controlling judicial authority supporting that conclusion.**

Conclusion

This is not simply a question of whether California needs additional energy storage.

It is a question of **where that infrastructure should be placed, who has the legal authority to decide, and whether the State may use an administrative certification process to bypass land-use protections adopted directly by the voters.**

The CEC's authority under AB 205 may be broad, but broad authority should not be confused with unlimited authority.

If the State can authorize an industrial facility on voter-protected agricultural land merely by issuing a certificate that supersedes local law, then the Commission should candidly acknowledge that its decision represents a displacement of a locally protected land-use right and explain the constitutional basis for doing so.

If the Commission cannot make that showing, the appropriate course is to deny certification at the Corby site and require the project to be evaluated on an appropriately designated industrial site.

At a minimum, the Commission should not approve the Corby project until these questions have been fully analyzed, disclosed, and answered in the administrative record.

Respectfully,