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Comments RE Emergency Rulemaking Amending the Opt-In Regulations

Additional submitted attachment is included below.

ALENE TABER
LAW

November 10, 2026

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RE: Docket #: 26-OIR-04 - Project Title: Emergency Rulemaking Amending the Opt-In Regulations

Dear Mr. Boersma:

These comments are submitted in response to the California Energy Commission's ("CEC") proposal to modify its Opt-In Certification Program Regulations, Title 20, California Code of Regulations, sections 1875-1882 and Appendix B for battery energy storage systems ("BESS").

1. The Statute Does Not Provide for a CEC Emergency Proceeding and CEC Should Instead Proceed by the Regular Rulemaking Process

In its Updated Notice of Remote-Only Opt-In Certification Program Rulemaking Workshop, CEC states that the purpose of the rulemaking is to update existing regulations to implement Senate Bills 254 and 283 and clarify aspects of the existing regulations. CEC proposes to adopt the regulations as emergency regulations pursuant to Public Resources Code, section 25545.12. As explained below, Public Resources Code, section 25545.12 does not qualify CEC's rulemaking as an "emergency" and the processing of the rulemaking as an "emergency" is prejudicial to the public process as it unnecessarily shortens the time and reduces the opportunity for meaningful public input.

Public Resources Code, section 25545.12 states: "Regulations adopted to implement this chapter, or any amendment to those regulations, shall be adopted by the commission in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The adoption of these regulations shall be considered by the Office of Administrative Law as an emergency." The statute does not designate CEC's action on the proposed regulations as an "emergency." The statute only designated the proceeding conducted by the Office of Administrative Law ("OAL") as an "emergency". Further, the purported basis for the amended regulations, Senate Bills 254 and 283, were Chaptered more than a year ago in September and October 2025. An emergency cannot be self-created by CEC's own delay or failure to act in a

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timely manner. CEC and the public have relied on the existing regulations for more than a year without these modifications, and as such, CEC cannot claim an immediate crisis requires stripping the public of its right to participate. CEC needs to comply with the regular rulemaking process by publishing the notice of proposed action in the California Regulatory Notice Register and provide the statutorily required public review timeframes and documents including notice of proposed action, initial statement of reasons, etc. (Gov't Code § 11346.5.)

2. <u>CEC Staff Needs to Conduct an Un-Biased Assessment of Whether There is Sufficient Evidence to Support a Finding that the Project will have a Net Positive Economic Benefit to the Local Government Permitting Authority</u>

CEC proposes to modify Section 1879(a)(7) by removing the requirement that the Staff Assessment of the Opt-In Application address the "overall net positive economic benefit to the local government that would have had permitting authority over the site and related facility." In its place, CEC proposes to instead confirm that "evidence has not been filed sufficient to overcome the rebuttable presumption that construction or operation of the facility will have an overall net positive economic benefit to the local government that would have had permitting authority over the site and related facility." This proposed language contravenes and is inconsistent with the requirements of Public Resources Code, section 25545.9(a). CEC also proposes to remove the requirement in Section 1877(f) that applicants provide information demonstrating the overall net positive impact to the local government.

Public Resources Code, section 25545.9(a) prohibits CEC from approving a project unless it "finds that the construction or operation of the facility will have an overall net positive economic benefit to the local government that would have had permitting authority over the site and related facility." The statute identifies examples of economic benefits. Public Resources Code, section 25545.9(b) provides for a "rebuttable presumption that the construction or operation of the facility will have an overall net positive economic benefit to the local government that would have had permitting authority over the site and related facility." CEC is proposing to treat the presumption as a foregone conclusion that every project has a net positive economic benefit to local government. This approach contradicts the statutory requirement and well-established law regarding the effect of a rebuttable presumption.

A rebuttable presumption does not relieve the parties of submitting evidence; it reallocates an evidentiary burden. A presumption is an assumption of fact the law requires to be drawn from other established facts, and "[a] presumption is not evidence." (Evid. Code § 600.) A presumption is not self-executing: the party invoking it must first prove the predicate facts by a preponderance before the presumption arises. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652-53.) "[A] presumption affecting the burden of producing evidence does not arise until the foundational facts are established." (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 644.) If contrary evidence is presented to the CEC, the presumption drops out because it is rebuttable and the issue is decided instead on the evidence in the record. (Evid. Code § 604.)

In order for the CEC to accurately assess whether a proposed BESS provides a net positive economic benefit to a local government, CEC needs to evaluate direct and indirect economic costs

to the local government in addition to the benefits. These costs could include additional fire inspections and plan reviews, development of emergency action plans, extended fire and rescue operations and higher than normal incident costs from BESS fires, specialized training and equipment needs, containment and runoff clean up caused by the massive volumes of water, temporary community evacuations (e.g., surrounding hundreds or thousands of residents) and highway or road closures, straining municipal police, transit, and shelter resources, construction of secondary emergency evaluation routes, upgrades to emergency notification systems, on-going monitoring and compliance enforcement, land use constraints that reduce the opportunity for other development and associated decrease in property tax revenues, loss of agricultural production, etc.

Therefore, the proposed amendments should not eliminate the requirement that the Staff Assessment of the Opt-In Application address the "overall net positive economic benefit to the local government that would have had permitting authority over the site and related facility" or the requirement to provide the information as part of the application. Rather, CEC should expand its regulations to ensure its analysis provides for an unbiased assessment of true costs and benefits of BESS.

3. The Community Benefits Agreement Provision Should Be Revised to Ensure that the Benefits are Above and Beyond Regulatory Requirements and CEQA Mitigation Measures

CEC proposes to add Section 1879.5 that would provide "minimum" standards for community benefit agreements. There is no statutory basis for this. The regulation must be in the scope of the enabling statute. (Gov't Code § 11342.1.) There is also no evidence to support the notion that the minimum funding amounts provide any benefit to the community. This should be a community specific assessment. As there is no automatic provision for ensuring the amount increases to match inflation, the value of the benefit will quickly decrease. Finally, while CEC proposes specific monetary amounts as a minimum, the reality is that when a statute specifies a minimum requirement, it initially functions as a regulatory floor that inevitably hardens into an operational ceiling. This is because exceeding a statutory minimum is considered an unnecessary compliance cost and there are diminishing returns to project proponents from incremental increases above the minimum.

CEC should revise Section 1879.5 to specify that the benefit is an amenity or program that improves the quality of life which is completely different and above and beyond statutory/regulatory mandates and CEQA mitigation. A community benefit provides a net positive bonus while a regulation is a requirement and mitigation fixes a harm. If an action is already legally required by a statute, a regulation, or a CEQA mitigation, allowing the action to also double as a benefit defeats the purpose of the statutory requirement that the community be provided a benefit.

4. All Documents That CEC Relies Upon or Comprise the Administrative Record Must Be Readily Available to the Public

CEC proposes to amend Section 1880.5 so that documents that are "incompatible with the docketing system" or copyrighted are not readily available to the public. The exclusion of these

documents from timely public access will prejudicially and negatively affect the public's ability to provide comments on the projects. This amounts to secret evidence and violates the foundational principles of due process, administrative law, and democratic accountability.

A core tenet of constitutional due process is that an affected party must have notice and a meaningful opportunity to be heard. If the government bases its decision on secret evidence, the public cannot: test its veracity; cross-examine witnesses; point out fatal flaws, factual errors, or biases in the record; formulate and present counter-evidence; or verify that government acted impartially. It is also doubtful that secret evidence would be properly part of any administrative record, and as such, not available to support a government decision or finding of fact or law.

At the public workshop, CEC stated that the proposed amendments to Section 1880.5(b) regarding copyright documents is required by CEQA. This is not accurate. CEQA does not state that the lead agency may exclude copyright documents from the publicly available documents. CEQA states that "it is the policy of the state that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (Pub. Res. Code, § 21005.) Public Resources section 21186(g) states that the agency may elect to not make copyright documents readily accessible in electronic format, but if they decide not to make the documents available, then the agency "shall make an index of these documents available in an electronic format no later than the date of the release of the draft environmental impact report, or within five days if the document is received or relied on by the lead agency after the release of the draft environmental impact report. The index must specify the libraries or lead agency offices in which hardcopies of the copyrighted materials are available for public review." As the Opt-In Program is of state-wide importance and members of the public throughout California are reviewing and commenting on BESS projects throughout the State, the copyright documents must be readily available to the public at convenient locations throughout California.

At the public workshop, CEC staff also suggested that the public could go to its offices in Sacramento to review any omitted documents. This is not an adequate substitute. Not everyone has the time and resources to travel to Sacramento to review documents that are required to be publicly available. The Op-In program is statewide, and as such, documents need to be readily available to the public throughout the State. The solution to this problem is straightforward: either (1) CEC provide an alternative electronic method for the public to timely access documents that are not compatible with the docketing system or are copyrighted; or (2) CEC agrees that it will not consider any evidence that cannot be made readily available to the public.

Further, the regulation should be amended to make it clear that all documents including Material Safety Data Sheet ("MSDS"), Safety Data Sheets, UL 9540A Test Reports, modeling assumptions, and modeling outputs, etc. are not confidential nor constitute trade secrets. These documents are essential to understanding the potential impacts caused by the projects.

5. CEC May Not Automatically Certify a BESS When the Required Fire Inspection Has Not Occurred or the BESS has Failed the Fire Inspection.

Proposed Section 1881.5 is inconsistent with Public Resources Code, section 25545.16. Public Resources Code, section 25545.16(a) provides that CEC "shall not certify an energy storage system…unless, within 90 days of the project applicant providing notice of completion of installation to the authority that has jurisdiction over fire suppression, but before commencing operations or use of the batteries, the energy storage system is inspected by the authority that has jurisdiction over fire suppression where the system is located." The statute does not require CEC to certify a BESS when the required inspection does not occur. Rather that is a discretionary decision which in accordance with Public Resources Code, section 25545.16(c) "shall" be included in the "findings regarding compliance with the requirements of this section in a decision to certify an energy storage system pursuant to Section 25545.1." As such, should the CEC decide to allow a BESS to start operation without the authority that has jurisdiction over fire suppression completing the required fire inspection it will need to explain and justify such decision to the public ***before*** deciding to certify the BESS.

Further, CEC does not have statutory authority to override or veto the California Fire Code, State Fire Marshal, or recommendations and requirements made by the authority that has jurisdiction over fire suppression. Fire safety is by law supposed to be an integral part of the Opt-In process starting with early consultation that must address facility design and emergency response plans. Fire safety is also evaluated under CEQA (i.e., Very High Fire Hazard Severity Zone, hazards, emergency response, etc.) CEC should be guided by safety, transparency, and coordination with State and local fire authorities. A BESS that fails a fire inspection should not be permitted to operate or be certified. As such, Proposed Section 1881.5(d) should be modified to add the following: The CPM will not authorize commencement of testing, operation or certification of a battery energy storage system if it fails the inspection. Proposed Section 1881.5(e) should be modified as follows: "The CPM shall consider any inspection results before approving system testing or operations. Any design or equipment changes or modifications recommended by the State Fire Marshal or jurisdiction over fire suppression shall be required by the Commission ~~CPM approval~~ to be fully implemented before certification.

6. CEC Cannot Use this Rulemaking to Establish Standards of Significance Under CEQA

CEC proposes as part of Appendix B, to establish an acute hazard index (HI) of 1.0 as a threshold of significance under CEQA. (See page 19.) CEQA Guidelines section 15064.7 requires that any thresholds of significance "must be adopted by ordinance, resolution, rule, or regulation, and developed through a public review process and be supported by substantial evidence." The adoption of a CEQA threshold of significance does not quality as an "emergency" under Public Resources Code, section 25545.12, and must instead be considered and adopted as part of the regular CEC rulemaking process. CEC has provided no evidence, let alone substantial evidence, to support establishing an acute hazard index at this level.

7. <u>An Initial Statement of Reason is Required</u>

CEC is required to provide an initial statement of reasons for proposing the amendment of a regulation. (Gov. Code, § 11346.2(b)(1).) As this is a major regulation, the standardized regulatory impact analysis required by subdivision (c) of Section 11346.3 is also required. (Gov. Code, § 11346.2(b)(2)(B).) This includes addressing the "benefits of the regulations, including, but not limited to, benefits to the health, safety, and welfare of California residents, worker safety, and the state's environment and quality of life, among any other benefits identified by the agency." (Gov. Code, § 11346.3(c)(1)(F).) CEC is also required to provide a "description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives." (Gov. Code, § 11346.2(b)(4)(A).) CEC must provide an opportunity for public review and comment on the initial statement of reason before considering the proposed regulations.

Sincerely,



Alene Taber