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Comment Received From: Margaret-Ann Schott
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Docket Number: 26-OPT-02

Seahawk BESS Fire Risk

Dear CEC Staff,
Below are my comments regarding
Docket Number: 26-OIR-04
Project Title: Emergency Rulemaking Amending the Opt-In Regulations

The proposed emergency amendments extend beyond fire safety and include changes to application content, site control, suspension and termination procedures, agency participation, and Commission review.

I request that the CEC establish why each substantive amendment is appropriate for emergency adoption rather than treating the entire regulatory package as equally urgent.

1) I request a bifurcation of issues into two separate tracks: one relating to compliance with SB 254 and SB 283 and secondly, the discretionary changes that have been proposed by staff.

The first track should address narrowly defined, time-sensitive requirements necessary to implement applicable legislation and protect public safety. The second should address substantive procedural changes affecting property rights, local government authority, application review, public participation, and project certification.

The proposed amendments combine provisions addressing battery fire safety with provisions that may substantially change the rights and responsibilities of applicants, property owners, public agencies, and affected communities.

These subjects warrant different levels of review.

Emergency rulemaking should not be used to avoid meaningful public examination of substantive changes that are not themselves necessary to address an immediate emergency.

Requested bifurcation

Track One â€” Narrowly Tailored Emergency Safety Regulations

This track should address provisions demonstrated to be immediately necessary, including:

Mandatory fire authority consultation and inspection.

Minimum requirements for battery fire and hazardous-materials assessments.
Emergency-response planning and interagency coordination.
Safety requirements that must be satisfied before battery testing or operation.
Other requirements for which the CEC identifies a specific statutory deadline or legally supportable emergency necessity.

The CEC should explain why each provision must be adopted through emergency procedures and why ordinary rulemaking would be inadequate.

Track Two â€” Standard Rulemaking with Full Public Review

This track should include:

Evidence required to establish property ownership, leases, easements, and site control.
Application completeness and supporting documentation.
Suspension, withdrawal, and early termination procedures.
Changes to local government review and reimbursement.
Public participation, comment periods, and agency responses.
Changes to environmental-review procedures.
Applicability to pending applications and existing certifications.
Other administrative provisions not demonstrated to require immediate emergency adoption.

Reason for bifurcation

Combining these provisions in one emergency package creates the risk that important changes will be adopted without sufficient time to evaluate their legal and practical consequences.

Property owners should not be required to discover and disprove unsupported claims of site control. Local agencies should have adequate opportunity to evaluate effects on emergency services, public roads, and surrounding communities. The public should be able to review proposed regulatory changes with a clear understanding of their consequences.

Requested action

I request that the CEC:

Publish a provision-by-provision explanation identifying the statutory authority and emergency necessity for each amendment.
Separate immediately necessary safety requirements from broader procedural amendments.
Conduct the second track through ordinary notice-and-comment rulemaking, including public workshops and written responses to substantive comments.
Publish a comparison of existing and proposed regulatory language.

Identify which requirements will apply to applications already filed, applications deemed complete, and previously certified projects.
Preserve all existing legally applicable protections while the second rulemaking proceeds.

Bifurcation would allow genuinely urgent safety protections to proceed without unnecessarily limiting public review of other consequent

I suggest the CEC adopt the following timeline for a bifurcated process

Days 0â€“15 â€” Separate and justify the amendments

Publish two rulemaking packages, the legal justification for each emergency provision, and a clear comparison with existing regulations.

Days 15â€–30 â€” Emergency safety track

Provide targeted consultation with fire authorities, emergency managers, and affected agencies; address comments and proceed with qualifying emergency provisions.

Days 15â€–60 â€” Standard rulemaking preparation

Hold public workshops on site control, local authority, application completeness, and public participation. Publish revised proposed language and supporting analysis.

Days 60â€–105 â€” Formal public comment

Provide at least the applicable statutory notice period, ordinarily 45 days for a California APA regular rulemaking, subject to the governing requirements.

Days 105â€–135 â€” Evaluate and revise

Review comments, prepare responses, and provide additional comment opportunities for sufficiently substantial revisions.

Days 135â€–165 â€” Adoption and implementation

Complete required legal review, publish final regulations, and establish transition rules for pending projects.

This will promote transparency and public participation, including those disadvantaged populations who may need to seek assistance with language and technology barriers.

2) I request that Staff provide an explanation in plain English a stated reason for the change, and potential benefits and disadvantages of each change. I request that all documentation be prepared pursuant to the standard of clarity provided in Government

Code Section 11349 and the plain English requirements of Government Code Sections 11342.580 and 11346.2(a)(1). I request that all proposed regulations be written to be easily understood by the parties that will use them, including the fire response agencies and the general public.

3) I request that Staff clearly identify who may be affected by the changes, including residents, property owners, counties, developers and public agencies.

4) I request that Staff clearly identify whether projects with incomplete applications would be affected by proposed rulemaking changes

.5) I request that Staff clearly identify whether projects with complete applications and in review process would be affected by proposed rulemaking changes

1876.5. Pre-filing Consultation.
6) I request that any and all California Native American tribes, whether or not they have gained federal recognition or not, be included in the pre-filing consultation meetings.

1877. Contents of Opt-in Application

7) I request that the strikeout language be retained in order to ensure a timeline of benefit delivery and enforcement of any agreements.
f) The opt-in application shall include the applicant's plan or strategy, including a timeline for execution, to comply with obtain legally binding and enforceable agreement(s) with, or that benefit, a coalition of one or more community-based organizations prior to project certification, consistent with Public Resources Code section 25545.10 and section 1879.5 of these regulations.

8) re: subsection (h), I strongly oppose allowing developers to simply submit an affidavit as evidence that all property agreements are in order. Please strike the following language:
Absent evidence to the contrary, an affirmation by the applicant of
such rights and a description of those rights, shall be adequate evidence.

In my opinion, this creates a potential evidentiary presumption in favor of the applicant without requiring the applicant to produce the underlying legal instruments.

9) re: subsection (h)(1) on federal lands, I request that this language be added:
"Applicant must submit evidence of any and all federal agency response to applicants' efforts to obtain right-of-way access."

10) Please clarify whether or not new PRC 25545.19 consultations are required for new project owners when the project is sold or transferred prior to having a complete application.

11) Please require that "water supply, secondary access and all-weather access, realistic evacuation routes, SCADA operation and chain of command emergency notification, history of failures of any and all battery technology from chosen supplier and other related equipment, real-time infrared sensors of all facility areas, 24/7 off-gassing monitoring and notification systems. HF monitoring in real time with data delivered directly to local fire and haz mat teams, realistic worst-case thermal runaway plume modelling, and additional specialized equipment and training necessary" be included in addition to mandatory discussion of the energy storage system design, input on mitigating potential fire and life safety concerns, and input on the content of emergency action plans required by Section 761.3 of the Public Utilities Code. Additionally, I request that applicants are required to provide any and all materials presented in the conference with fire staff be made available to the fire staff 10 days in advance of the meeting. Local fire officials have complained that BESS developers provided an overwhelming amount of technical information at a fast-paced discussion and refused to provide fire official any of the presentation materials to review before or after the meeting.

11a) The proposed Â§ 1877(h) provides:

"Absent evidence to the contrary, an affirmation by the applicant of such rights and a description of those rights, shall be adequate evidence."

The problem is not simply that the applicant may affirm its rights. It is that the provision would make the affirmation adequate unless contrary evidence exists, while Appendix B(a)(4)(i) requires written proof of sufficient real property rights.

The CEC should require the developer to substantiate site control rather than effectively requiring other property owners to challenge it.
PROPOSED SUBSTITUTE REGULATORY TEXT â€” SECTION 1877(h)

Replace proposed Section 1877(h) with:

"(h) The opt-in application shall include documentary evidence demonstrating that the applicant possesses sufficient, legally valid, binding, and enforceable real property rights to access, construct, operate, maintain, inspect, and decommission the proposed facility, including all ancillary facilities, transmission interconnections, utility corridors, and primary and secondary emergency-access routes.

"(1) Documentary evidence shall include, as applicable, recorded deeds, executed leases, options or agreements conferring present enforceable rights, easements, licenses, rights-of-way, access agreements, and other instruments necessary to establish the applicant's legal authority to undertake the proposed activities.

"(2) The applicant shall identify each affected parcel by assessor's parcel number, identify the record owner or owners, and provide a parcel-specific description of the rights claimed, the duration of those rights, any material conditions precedent, and any

limitations affecting construction, operation, emergency access, or decommissioning.

"(3) Where an instrument requires authorization by multiple property owners, trustees, governmental entities, or other parties with a legally recognized interest, the applicant shall provide documentation establishing that all authorizations legally required for the claimed rights have been obtained.

"(4) A statement, declaration, attestation, or affirmation by the applicant, standing alone, shall not constitute sufficient evidence of site control.

"(5) Any proposed project component or emergency-access route dependent upon an agreement that has not been executed, an option that does not confer present necessary rights, or an unresolved third-party authorization shall be specifically identified. Such a component or route shall not be represented as legally secured.

"(6) The applicant shall disclose any known pending litigation, recorded claim, written objection, or other material dispute concerning the validity, scope, or enforceability of the property rights necessary for the proposed facility. The Commission shall provide affected parties an opportunity to submit relevant documentation and shall evaluate material disputes within the scope of its certification authority.

"(7) Before finding an application complete, the Commission shall determine whether the submitted documentation establishes sufficient site control for the proposed project and for meaningful evaluation of all required project components and alternatives.

"(8) Before certification, the Commission shall make a written finding, supported by substantial evidence in the administrative record, that the applicant has demonstrated the legal authority necessary to construct, operate, maintain, and decommission the project as certified.

"(9) The Commission's review of site-control evidence shall not adjudicate title or extinguish private property rights, and certification shall not independently confer an easement, right of entry, or other real property interest.
"(10) A material change in ownership, access rights, lease terms, easements, or other site-control instruments affecting project feasibility or public safety shall be promptly disclosed to the Commission and evaluated before the affected activity proceeds."

CONFORMING AMENDMENT â€” APPENDIX B(a)(4)(i)

Replace the proposed Appendix B site-control provision with:

"(i) A parcel-specific site-control report containing the documentary evidence required by Section 1877(h), together with a map identifying the boundaries of all property interests and rights-of-way necessary for the proposed project.

"The report shall distinguish between existing enforceable rights, conditional rights,

pending agreements, and rights not yet obtained. It shall separately identify all primary and secondary emergency-access routes and the legal instruments authorizing their use.

"Confidential personal information may be protected in accordance with applicable law, provided that confidentiality shall not relieve the applicant of its obligation to furnish the Commission with sufficient evidence to verify site control."

1877(i)

The proposed regulations should distinguish between the fire department responsible for responding to a battery incident and the larger network of agencies responsible for managing its consequences.

A major BESS incident may require road closures, evacuations, hazardous-materials response, ambulance transport, hospital preparedness, air monitoring, water protection, and animal evacuation. These responsibilities extend beyond the fire department.

The proposed Â§ 1877(i) requires documentation of consultation with the fire suppression authority, including participants, topics discussed, and how the project would address those matters.

That is a useful starting point, but documentation of a meeting is not documentation of emergency preparedness.
Proposed replacement for Â§ 1877(i)
PROPOSED SUBSTITUTE REGULATORY TEXT â€” SECTION 1877(i)
PROPOSED SUBSTITUTE REGULATORY TEXT â€” SECTION 1877(i)

Replace proposed Section 1877(i) with:

"(i) For an energy storage system, the opt-in application shall include a site-specific Emergency Response Coordination and Capability Assessment documenting consultation and coordination with the authority having jurisdiction over fire suppression and all other public agencies and emergency service providers reasonably expected to have responsibility for responding to or managing a reasonably foreseeable emergency at the facility.

"(1) The applicant shall identify and consult, as applicable, with:

"(A) The fire department having primary response responsibility, neighboring mutual-aid fire agencies, and specialized hazardous-materials response teams;

"(B) The county sheriff, local police departments, California Highway Patrol, and other law enforcement agencies responsible for evacuations, traffic control, site security, or emergency access;

"(C) The county office of emergency services or emergency management, relevant city emergency management offices, and other agencies responsible for emergency coordination and public warning;

"(D) Emergency medical services authorities, ambulance providers, emergency medical transport agencies, receiving hospitals, emergency departments, and other medical facilities reasonably expected to receive persons exposed to smoke, hazardous substances, or injuries resulting from a facility incident;

"(E) The California Department of Transportation, local public works and transportation departments, and other roadway authorities responsible for roads potentially affected by emergency access, evacuation, or closures;

"(F) Public health agencies, environmental health departments, air quality management agencies, water agencies, and other agencies responsible for hazardous exposure, environmental monitoring, contamination, or public health advisories;

"(G) Agencies responsible for schools, evacuation centers, emergency shelters, animal shelters, livestock evacuation, and other facilities or populations that may be affected by a facility emergency.

"(2) The assessment shall document the dates of consultation, names and titles of participating representatives, information provided, concerns identified, and the applicant's proposed resolution of each material concern.

"(3) The assessment shall evaluate credible emergency scenarios, including thermal runaway, fire propagation, explosion or deflagration, toxic gas release, hazardous smoke dispersion, contaminated runoff, loss of communications or power, and simultaneous emergencies affecting regional response resources.

"(4) The assessment shall identify available emergency personnel, equipment, specialized training, hazardous-materials capabilities, emergency medical resources, firefighting water supplies, access routes, evacuation routes, and mutual-aid arrangements.

"(5) The applicant shall prepare a written interagency emergency response plan addressing incident command, notification procedures, agency responsibilities, protective actions, evacuation and shelter-in-place decisions, traffic management, medical response, public communication, environmental monitoring, contaminated runoff management, and recovery procedures.

"(6) The applicant shall provide each consulted agency a reasonable opportunity to review and comment on the draft assessment and emergency response plan. Written comments, recommendations, objections, and agency responses shall be included in the application record.

"(7) A failure of an agency to respond shall not constitute concurrence, approval, or a determination that emergency-response capabilities are adequate. The applicant shall document its consultation efforts and the Commission shall independently evaluate any unresolved material emergency-response issue.

"(8) The Commission shall not certify the facility without determining, based on substantial evidence, that reasonably foreseeable emergency-response needs have been adequately evaluated and that necessary protective measures, resources, and enforceable mitigation requirements have been identified.

"(9) The Emergency Response Coordination and Capability Assessment and emergency response plan shall be updated before initial operation and whenever a material change in battery technology, facility design, emergency access, or identified emergency-response capability could affect public safety.

"(10) Nonconfidential portions of the assessment, agency comments, and emergency response plan shall be made publicly available with sufficient opportunity for review and comment before certification. Sensitive security information may be protected as authorized by law."
REQUIRED SUPPORTING DOCUMENTATION

The applicant shall provide a coordination matrix identifying each responsible agency, its role, the date of consultation, concerns raised, actions required, outstanding deficiencies, and the status of agency review.

The applicant shall also identify the funding, equipment, training, and continuing support necessary to implement the emergency response plan, including any enforceable commitments to provide such resources.

1877.5 Withdrawal, Suspension and Early Termination of Opt-In Applications
12) 1877.5 introduces procedures for suspension and early termination of applications, including circumstances involving site control, grid connection, and project feasibility. These provisions warrant review and clarification of their effect on public notice, administrative accountability, and pending applications.

12a) re: (b) I support the addition of "upon resolution of all outstanding issues," to ensure protection of public entity reimbursement for any and all expert review expenditures.

13) I support the language in (d) however, please add that " the applicant must state the reason for suspension of the proceeding."
(d) At any time after filing the application, the applicant can request the proceeding be suspended by filing a written request to the executive director stating the request for suspension, the estimated length of time needed for the suspension, and an

acknowledgment that the commission will cease all work on the application during the suspension.

14) re: (d)(1), I support this language but request that there be additional language added to require the executive director to notify the AHJ of the suspension, and notice of the suspension will be posted on the Project Docket for public transparency.

15) re: (d) (2): I support this language in full but request that nay decisions be publicly posted on the docket for transparency.

16) re: (d) (3): I support this language in full but clarify whether any new rulemaking changes would apply to the project once out of suspension, and to post any new project timelines on the project docket for public transparency.

17) re: (e)(1) subsections listed for cause of early termination by staff, I support all causes listed, and request adding the lack of adequate water supply to effectively handle a worst-case thermal runaway event without depleting area water resources or endangering supply for other fire events, inadequate stormwater and concurrent thermal runaway cooling water management plan that would prevent contamination of local streams, lakes and groundwater resources, overwhelming public resistance by local residents, especially disadvantaged communities.

18) Proof of site control â€" Â§ 1877(h): Require actual legal documentation rather than accepting a developer's affirmation unless someone produces contrary evidence.

19) Fire authority and coordinated emergency response â€" Â§Â§ 1877(i) and 1881.5: Require documented coordination among fire agencies, sheriffs, law enforcement, emergency medical services, hospitals, Caltrans, emergency management offices, and other responsible agencies before certification and operation.
20) T he proposed rules address two different stages of fire safety review: consultation during the application process under Â§ 1877(i), and inspection before testing or operation under Â§ 1881.5. Both need strengthening. Consultation alone is not proof that emergency services can adequately respond to a major battery incident.

21) The proposed Â§ 1877(h) also creates a direct tension with Appendix B(a)(4)(i), which calls for written proof of site control. That inconsistency must be resolved in favor of documented legal rights.

1878. Commission Review of Opt-In Application.
22) Section 1878.1 addresses local agency participation and reimbursement. Local agencies possess information concerning roads, emergency access, land use, infrastructure, and public safety that may not be available to the applicant or Commission staff. The rulemaking should encourage necessary technical review by local agencies but not shift unreasonable costs to local governments.

Section 1881.5 creates an alternative to a completed fire authority inspection when 90

days have elapsed. Passage of time is not equivalent to a finding that a battery facility is safe to test or operate.

Proposed replacement for Â§ 1881.5

This provision requires particular legal attention. TN 272980 proposes a 90-day alternative to completed inspection. Before finalizing the substitution, the CEC should reconcile the text with Public Resources Code Â§ 25545.19 and any other statute governing inspection deadlines. A regulation cannot simply eliminate an alternative expressly mandated by statute.

The following language is therefore proposed to the fullest extent authorized by governing law, with a separate safeguard if the 90-day alternative must remain.
PROPOSED SUBSTITUTE REGULATORY TEXT â€” SECTION 1881.5

Approval to Test or Operate a Battery Energy Storage System

"(a) Before authorizing initial battery system testing, commissioning involving energized battery equipment, or commercial operation, the Compliance Project Manager (CPM) shall determine that all applicable fire safety, emergency access, and emergency response conditions of certification have been satisfied.

"(b) The project owner shall provide the authority having jurisdiction over fire suppression with written notice that the facility is ready for inspection, together with the final approved facility plans, equipment specifications, hazard mitigation analysis, emergency response plan, and documentation of required safety-system testing.

"(c) The project owner shall provide the CPM with:

"(1) The completed inspection report of the authority having jurisdiction over fire suppression, when such inspection has been performed;

"(2) Documentation of the correction of all identified conditions that materially affect fire or life safety;

"(3) Verification of the installation and functional testing of required fire detection, gas detection, emergency shutdown, ventilation, communications, and other applicable protective systems;

"(4) Documentation demonstrating that all required primary and secondary emergency-access routes are legally secured, constructed, unobstructed, and available for emergency use;

"(5) The final Emergency Response Coordination and Capability Assessment required by Section 1877(i), including agency comments and the status of identified corrective measures;

"(6) Documentation of required training, emergency notification procedures, and emergency-response exercises;

"(7) Documentation identifying the final battery manufacturer, model, chemistry, configuration, and applicable testing and certification records.

"(d) The CPM shall consider all inspection results, material agency objections, and identified safety deficiencies before authorizing testing or operation.

"(e) If the fire suppression authority has not completed an inspection within the period specified by applicable statute, the CPM shall document the reasons for the delay, the project owner's efforts to arrange the inspection, and any known unresolved safety concerns.

"(f) Where applicable law permits authorization without a completed inspection after a specified period, expiration of that period shall not independently establish compliance with applicable safety requirements or satisfaction of conditions of certification. Before granting authorization, the CPM shall make written, evidence-supported findings addressing compliance with all remaining legally applicable prerequisites and unresolved safety deficiencies.

"(g) Where authorized by law, the CPM may require an independent inspection by a qualified fire protection professional or other competent authority as additional evidence of compliance. Such inspection shall not be represented as an inspection by the authority having jurisdiction over fire suppression.

"(h) The CPM shall not authorize operation where an unresolved deficiency violates an applicable mandatory safety requirement or condition of certification.

"(i) Inspection reports, corrective-action documentation, and the CPM's written findings shall be docketed and made publicly available, subject to applicable confidentiality and security requirements.

"(j) Material changes in battery equipment, chemistry, configuration, fire protection systems, or emergency-access arrangements shall be reviewed for their effect on safety compliance and shall require additional inspection or verification when necessary before the affected equipment is placed into service."

ADDITIONAL REQUESTED STATUTORY PROTECTION

If the CEC determines that existing law requires authorization to remain possible after 90 days without a completed fire authority inspection, the Commission should identify that statutory requirement and seek legislation eliminating the inspection bypass.

The requested statutory amendment should require a completed inspection by the responsible fire authority before battery testing or operation, with a mechanism for an

independent qualified inspection if the authority cannot act within a reasonable period.

A lack of inspection resources should be addressed through funding, technical assistance, and inspection capacityâ€”not by presuming safety from the passage of time.

At all times, non-flammable non-lithium battery energy technology should be incentivized to provide long duration energy storage without sacrificing public health and safety, and to eliminate emergency responder safety risks in responding to thermal runaway events.

Sincerely,

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