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RURAL COUNTY REPRESENTATIVES OF CALIFORNIA

September 30, 2022

California Energy Commission
Docket Unit
Docket No. 22-OIR-01
715 P Street
Sacramento, CA 95814

RE: Comments on 22-OIR-01 Emergency Rulemaking for AB 205, Opt-In Provisions

Dear Commissioners:

On behalf of the Rural County Representatives of California (RCRC), I am writing to provide comments on and suggest amendments to your Draft Emergency Regulations for Assembly Bill 205's opt-in permitting provisions. RCRC is an association of thirty-nine rural California counties, and the RCRC Board of Directors is comprised of elected supervisors from each member county.

AB 205 (Chapter 61, Statues of 2022) establishes an opt-in permitting process at the California Energy Commission (Commission or CEC) for renewable energy, transmission, energy storage, and manufacturing projects. This is an alternative to the traditional local permitting process. We appreciate the opportunity to provide comments and suggest amendments to the AB 205 Opt-In Permitting draft regulations to help protect the environment, mitigate impacts on host communities, and preserve the commitments made by project developers.

We appreciate your inclusion of local governments in pre-filing consultations with the project applicant, but suggest several other vital changes to the regulations, as follows:

- Expand the scope of permits applicants must disclose in the application.
- Ensure local review and verification of the project's purported economic benefits.
- Authorize Commission staff to request additional information of the applicant.
- Ensure information requested by responsible, trustee, and local agencies are requested of the applicant.
- Ensure the legitimacy of community-based organizations and that agreements are enforceable.
- Provide notices of meetings, workshops, and hearings to local governments and tribes.

- Modify the highly deferential and constraining post-certification project approval process to ensure environmental protection, mitigate impacts on host communities, and preserve commitments made by project proponents.

I. Section 1876.5 - Counties support inclusion of local governments in pre-filing consultation.

We appreciate inclusion of local governments in the pre-filing consultation meetings with project applicants. Local governments have long held authority to site and regulate the types of facilities included in AB 205 and have striven to balance project development with the needs and expectations of local communities. Many AB 205 projects will be very large, could conflict with local plans, and impose significant impacts on surrounding communities. Extensive engagement with local governments during the opt-in permitting process will help protect the environment and host communities while expediting permit processing and reducing the risk of future conflicts. This engagement should ***begin with***, but not be limited to, the pre-filing consultation,

II. Section 1877(d) – Disclosure of what permits the applicant has sought should be expanded.

Section 1877(d) requires the applicant to identify and discuss whether it has submitted (or will submit) any ***state or federal*** permit applications to other state agencies with authority over the project. While this information is helpful, it is too narrow in scope to fully inform the Commission's decisions. This requirement leaves out vital information about any permit applications previously, concurrently, or anticipated to be submitted to local governments in relation to the project.

Given the potentially unfamiliar territory of permitting several types of AB 205 projects, information on previous, current, and planned local permits will help the Commission gain a better understanding of what actions and permits are necessary at the different levels of government for successful project delivery.

In some cases, the AB 205 project or related applications may have already been submitted for approval and rejected by the local government. This information, and the reason for any previous rejection, is vital to fully inform the Commission about the benefits and consequences of the project and its impact on the host community.

To address these concerns, we suggest the following changes to Section 1877(d):

> (d) The opt-in application shall identify and discuss whether the applicant has submitted any ***local,*** state or federal permit applications ***and the status of those applications***, for permits required prior to any construction, to other relevant ***local or*** state agencies with authority over the project. For any required permit that has not yet been submitted to the relevant ***local or*** state agency, the opt-in application shall include a plan for submitting the application and any discussions that have occurred with the relevant ***local or*** state agency with authority over the project.

III. Sections 1877(f) and 1879(a)(7) – Information about the project's net positive economic benefit should be reviewed and verified by local governments.

Section 1877(f) commendably requires the application to include preliminary information identifying the overall net positive economic benefit to the local government that would have had permitting authority over the site and facility. Additionally, Section 1879(a)(7) requires the project's environmental impact report to include information on the overall net economic impact to the local government. It should be noted that Section 1879(a)(7) is couched in terms of "impact" and departs from Public Resources Code Section 25545.9, which requires the Commission to find that the project will have an overall net ***positive*** economic benefit to the local government that would have had permitting authority.

Unfortunately, it is not clear how well that information will be vetted, which leads to a significant risk of the applicant overinflating expected benefits and minimizing the potential impacts to the host community. We strongly encourage the Commission to ensure that this assessment is vetted and verified before it is relied upon in its decision-making process. The impacted local government should be given the opportunity to review and comment upon the economic benefit assessment. The applicant should be required to disclose, incorporate suggested modifications, and respond to any comments received from impacted local governments on the economic assessment in the draft environmental impact report. We suggest the following changes to accomplish this:

> Section 1877(f) The opt-in application shall contain preliminary information identifying the overall net positive economic benefit to the local government that would have had permitting authority over the site and related facility of the construction and operation of the facility, consistent with Public Resources Code section 25545.9. ***The applicant shall provide this preliminary information to the relevant local governments for review before the pre-filing consultation meeting required pursuant to Section 1876.5. The applicant shall submit its final economic impact draft analysis to the relevant local governments for review and comment upon its completion.***
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> Section 1879(a)(7) The overall net economic impact to the local government that would have had permitting authority over the site and related facility. Such discussion may include consideration of employment growth, housing development, infrastructure and environmental improvements, assistance to public schools and education, assistance to public safety agencies and departments, property taxes and sales and use tax revenues. ***The economic impact section shall disclose any comments received from impacted local governments, respond to those comments, summarize suggested modifications made by those entities, and indicate whether those changes were incorporated into the analysis, or why they were not.***

IV. Section 1878(a) –Authorization to request additional information from the applicant must be clarified.

Section 1878(a) allows the "*commission"* to request additional information from the applicant as reasonably necessary to prepare the environmental impact report for the application and to make a decision on the application. This provision must be modified to clarify

that it is the ***executive director*** who may make the request of the applicant. Requiring additional requests for information to come from the Commission itself will create unnecessary delays. Given that Section 1878(b) allows the ***executive director*** to file a statement that the application is complete, this drafting will be viewed as precluding the executive director from requesting the information himself/herself. Instead, Section 1878(a)'s drafting will unfortunately be viewed as imposing additional administrative hurdles that will delay or discourage the Commission and its staff from seeking valuable information to help it prepare environmental documents and make its decision.

> (a)***(1)*** The ~~**commission**~~ ***executive director*** may request additional information from the applicant as set forth in Public Resources Code section 25545.4.

V. Section 1878(a) – To improve the quality of decision making, address community concerns, and reduce the risk of future litigation, the CEC should seek additional information from the applicant as suggested by trustee agencies, responsible agencies, and relevant local governments.

Incorporation of requests, daylighting, and mitigation of potential impacts will help reduce community concerns and the risk of potential future litigation.

The executive director should require project applicants to provide any additional information requested by trustee agencies and responsible agencies, as their input will be vital in preparation of the Commission's environmental impact report and influence the Commission's ultimate decision. Similarly, the executive director should also require applicants to submit additional information requested by the relevant local government that would have otherwise had authority over the project. Incorporation of these requests will help improve the commission's decisions and the quality of the project's environmental impact report.

Local governments have tremendous experience issuing the types of permits contemplated in this opt-in program, know the communities that will be impacted, and have worked with project proponents and impacted communities to balance competing interests. Allowing the executive director to require applicants to submit additional information as requested by local governments will help the Commission draw on local experience and insights to make informed decisions. Based on their previous experiences and knowledge of the host community, local governments may be able to raise important questions about the project and its impacts that may not otherwise be immediately apparent to Commission staff. With this additional information, the Commission, local governments, and other stakeholders will be better able to provide feedback on the project and recommend mitigation measures that will improve acceptance of the project in the host community, reduce the risk of future litigation, and ultimately improve the project's defensibility (if challenged).

We also encourage the commission to create a local consultation process, comparable to that set forth in proposed Section 1878.5, to fully flesh out and address impacts of the project on the host community.

To address these concerns, we suggest adding subparagraph (a)(2) as follows:

(a)***(2) The executive director shall request additional information as required by trustee agencies and responsible agencies to inform preparation of the environmental impact report. The commission shall also request additional information requested by the relevant local government to determine a project's impacts and benefits to the host community.***

VI. Section 1879 (a)(8) – The Commission should establish standards to ensure legitimacy of community-based organizations with whom project applicants enter into legally binding and enforceable agreements.

Section 1879(a)(8) requires the application to include any legally binding and enforceable agreements with community-based organizations (CBO), as required under Public Resources Code Section 25545.10. Both provisions identify CBOs to include workforce development and training organizations, labor unions, social justice advocates, and local government entities.

Unfortunately, there are no clear standards for the CEC to determine whether the identified CBO is legitimate, whether it was newly-created to merely "check the box", or has inappropriately close ties with the project applicant.

To ensure that these agreements are with legitimate CBOs and that the promised benefits are real and durable, we urge the CEC to develop some standards and expectations for those CBOs and to ensure that the binding agreements are enforceable by more than just the two signatories to the agreement.

VII. Section 1880 – Notice of meetings, workshops, and hearings must also be provided to all local governments in whose jurisdiction the site is located.

Section 1880 requires notices of meetings, workshops, hearings, and public events to be done pursuant to 20 CCR 1209, which establishes the normal procedures for noticing hearings at least ten days before the event through electronic delivery to persons on the Commissions listservs and proceeding lists. Section 1880 needs to be modified considering the local and individualized nature of AB 205 opt-in projects.

Utilizing the 20 CCR 1209 notification pathway presumes that the impacted local governments and tribes will subscribe to listservs that may be created for individual project applicants. This is an unrealistic expectation and will not serve the state's broader purpose of making sure these long-term projects are done right and are well-received in the host communities.

We strongly suggest modifying Section 1880 to require notices to be provided to all impacted tribes and local governments in whose jurisdiction the site is located, as follows:

(a) Noticing of meetings, workshops, hearings and similar public events shall be done as set forth in section 1209 ***and shall also be provided to impacted California Native American tribes and local governments in whose jurisdiction the site is located, as determined in consultation with the Local Area Formation Committee where the project is located***.

VIII. Section 1882 – Framework for CEC approval of post-certification project changes needs major overhaul to protect the environment, mitigate impacts on the host community, and preserve commitments made by project proponents.

A. CEC must preserve its discretion to approve, modify, or reject post-certification project changes.

As currently drafted, Section 1882(a) constrains the Commission and compels it to approve significant changes that will have a long-term impact unless those modifications meet an unacceptably high threshold of triggering preparation of a subsequent or supplemental environmental impact report.

Rather than compel approval of post-certification project changes unless they meet that high bar, Section 1883(a) should preserve the Commission's authority by replacing "shall" with "may." Given the potential significance of those changes (especially under the proposed standard), decisions should be made by the Commission itself rather than by staff. It is inappropriate for Commission staff to have no choice but to approve post-certification modifications over the objections of the host community and residents who will be impacted. This especially compelling where those concerns relate to modifications that will have a significant impact on the community, but which do not rise to the level of necessitating preparation of a subsequent or supplemental environmental impact report.

These two changes, included in "Section *D*" below, will ensure that the *Commission* makes a responsible, informed *decision* after considering the impact those changes will have on the host community over the long-term.

B. Preparation of a subsequent or supplemental environmental impact report is an inappropriately threshold for ministerial approval of post-certification project changes.

Whether changes to an approved project will "require the preparation of a subsequent or supplemental environmental impact report" is a wholly inappropriate standard for ministerial approval of such changes.

CEQA caselaw allows substantial changes to industrial-type facilities (like those eligible for the opt-in permitting process) without preparation of a subsequent or supplemental environmental impact report. In one case, changes to a planned medical research center and laboratory complex did not trigger preparation of a subsequent or supplemental environmental impact report despite increasing the project in size from 308,000 square feet to 415,000 square feet and changing the composition of the buildings from one-story to a mix of one- and two-story buildings. (*Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538.) In another, modifications to an airport facility did not require preparation of a subsequent or supplemental environmental impact report despite changes to the size and location of air cargo facilities, replacement of planned air cargo facilities with 44 acres of general aviation facilities, and modifications to taxiways to provide better access for corporate jets. (*Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788.) In another case, the court

determined that project changes to remove an entire 25,000 square foot pier did not require preparation of a subsequent or supplemental environmental impact report. (*Save San Francisco Bay Assn. v. San Francisco Bay Conservation etc. Com*. (1992) 10 Cal.App.4th 908.) Finally, one court determined that project changes resulting in 10% variances for required standards did not trigger preparation of a subsequent or supplemental environmental impact report. (*Molano v. City of Glendale*, 2009 Cal. App. Unpub. LEXIS 1414.)

These concerns are compounded by the fact that CEQA caselaw holds that even if a proposed project change actually ***does*** cause new or more severe significant effects, a subsequent or supplemental environmental impact report still is not required if adopted mitigation measures will reduce the impact to a level of insignificance. (See, e.g., *River Valley Preservation Project v. Metropolitan Transit Development Bd*. (1995) 37 Cal.App.4th 154, 168.) In other words, even if truly major project changes are proposed, the project will still not meet the regulation's threshold for Commission review as long as the applicant also includes mitigation measures. Incorporation of mitigation measures will trigger the regulation's mandatory requirement that the changes "shall be approved" by commission staff – even if the adequacy of those mitigation measures is disputed by the host community and stakeholders. Merely disputing the adequacy of those mitigation measures will not prompt Commission review under Section 1882(e) because those bringing an objection must still make a showing that the change requires preparation of a subsequent or supplemental environmental impact report. It is still staff that determines whether such a showing has been made to elevate the matter for review by the Commission. Given this standard, ***we fear that the Commission itself will never hear or weigh in on disputes raised by the impacted host communities and residents***. ***We fear the proposed process for approval of post-certification project changes plainly opens the door to substantial project alterations without significant Commission review***.

Even more troubling in this context, CEQA standards for whether a subsequent or supplemental environmental impact report is (or is not) required address only impacts to the physical environment. The requirements for the opt-in permitting process are not so narrow. Commission approval of an eligible facility under this opt-in permitting process requires consideration of much more, including local economic benefits, support for community-based organizations, assistance to public services and infrastructure, etc. We are deeply concerned that the draft regulations could allow project modifications that greatly affect these other aspects – thereby avoiding environmental review – and yet the Commission ***staff*** would be ***left with no choice*** but to approve the changes without any further review by the Commission or determination of whether the letter and intent of AB 205 were still being met.

Equally troubling, the draft regulations provide no discretion to staff or the Commission to require modifications. The threshold for approval of project changes must take into account the full range of criteria and conditions upon which the project was approved in the first place.

C. *Summary and notice of post-certification project changes should be provided to Native American tribes and local governments.*

Section 1882(c) requires Commission staff to provide a summary of the proposed modifications and its review process to property owners of parcels within 500' of project linear and 1000' of the project site. This notification process is too narrow in scope and should be expanded to include impacted Native American tribes and local governments in whose jurisdiction the site is located.

As can be seen, the resulting post-certification project changes could have wide-ranging and significant impacts on the host community. Those modifications are not merely limited to impacts on the environment and could undermine the projected net economic benefits to the local government and agreements with community-based organizations. Given their scope, and the fact that they could undermine many of the benefits and mitigation measures incorporated to address local concerns, the Commission's summary and procedures ***must*** also be provided to impacted tribes and local governments. This is even more compelling because these modifications come after local governments and tribes have already weighed in during the project approval process. Without direct notification, tribes and local governments may be left unaware of the modifications and the opportunity to provide feedback and inform the Commission's decision.

D. *Section 1882 must be modified to provide for a more meaningful notice, review, and approval of post-approval project modifications by the Commission itself.*

To address the serious concerns outlined in this Section, we strongly suggest modifying Section 1882 as follows:

> (a) Upon project certification, any change to the design, operation or performance requirements of the project ~~**shall**~~ ***may*** be approved by ~~**staff**~~ ***the commission, with or without modification,*** if ~~**staff**~~ ***the commission*** finds ***that*** the ~~**proposed**~~ project***, as proposed to be*** change***d, continues to meet the criteria and requirements for approval identified in Section 1881*** ~~**does not require the preparation of a subsequent or supplemental environmental impact report as set forth in Title 14, California Code of Regulations sections 15162 and 15163**~~.
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> (b) A project owner seeking a change to the design, operation or performance shall file a petition containing the payment required under Public Resources Code section 25806(e) and a complete description of the proposed change and ***an explanation of how the project continues to meet the criteria and requirements for approval identified in Section 1881*** ~~**whether any of the conditions requiring a subsequent or supplemental environmental impact report set forth in Title 14, California Code of Regulations sections 15162 and 15163 are met**~~. The petition shall also include a list of current assessor's parcel numbers and owners' names and addresses for all parcels within 500 feet of any affected project linears and 1000 feet of the project site.
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> (c) Within 30 days of receiving a completed petition and the applicable fee, staff shall file a summary describing the content of the petition and shall include a description of the commission's procedures concerning review and consideration of the petition. As soon as

practicable after filing the summary, staff shall provide a copy to ***all of the following with instructions on how to receive future filings:***
(1) The California Native American tribe(s) described in Public Resources Code section 25545.7.4, subdivision (b).
(2) The local government(s) described in Section 1876.5.
(3) Eeach property owner described in subdivision (b)~~ with instructions on how to receive future filings.~~

(d) ***No sooner than 30 days and no later than 60 days after the filing of staff's statement, staff shall file an assessment of the petition, which shall include consideration of whether the project, as proposed to be changed, continues to meet the criteria and requirements for approval identified in Section 1881, and a recommendation by the executive director on whether the commission should approve, modify, or disapprove the proposed change. If staff determines that the proposed change will require further review under the California Environmental Quality Act, the assessment and recommendation shall be filed upon completion of such review, but not later than 150 days after the filing of staff's statement.*** ~~If staff finds a subsequent or supplemental environmental impact report is not required, staff shall file a statement to that effect and approve the project change. Any person may file an objection to a staff's approval of the project change within 14 days of the filing of staff's statement. Any such objection must make a showing supported by facts that the change requires the preparation of a subsequent or supplemental environmental impact report as set forth in Title 14, California Code of Regulations sections 15162 and 15163. Speculation, argument, conjecture, and unsupported conclusions or opinions are not sufficient to support an objection to staff approval.~~

(f) After consideration of the petition, staff's assessment of the proposed change, and the executive director's recommendation at a public meeting held under section 1101, and any public comment received at the public meeting, the commission shall issue a written decision on the petition, which may be in the form of an order incorporating the staff assessment and executive director's recommendation. Any decision to approve the proposed change shall be consistent with Public Resources Code sections 25545.8, 25545.9 and 25545.10. ~~If staff finds a subsequent or supplemental environmental impact report is required, or if a person files an objection that complies with subdivision (d), the subsequent or supplemental environmental impact report and the petition shall be submitted to the commission for consideration at a publicly noticed meeting. The commission shall issue an order approving, rejecting, or modifying the petition.~~

IX. Conclusion

For the above reasons, we strongly encourage the Commission to modify the draft opt-in permitting regulations as set forth above.

As local governments are committed to improving energy reliability and resiliency and related manufacturing, we hope there will be little need for the Commission's opt-in permitting process. Regardless, we look forward to close collaboration with the Commission on applications submitted through this AB 205 opt-in permitting process and believe that the

proposed modifications outlined above will strengthen the state's framework, enhance environmental and community protections, and improve the final project.

If you should have any questions, please do not hesitate to contact me at jkennedy@rcrcnet.org.

Sincerely,

JOHN KENNEDY
Policy Advocate