

DOCKETED

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NextEra Energy Resources Comments on AB205 Emergency Rulemaking

Additional submitted attachment is included below.



September 30, 2022

Submitted as e-Comment

California Energy Commission
Docket Unit, MS-4
Docket No. 22-OIR-01
715 P Street
Sacramento, CA 95814-6400

Re: Emergency Rulemaking for AB205 (Docket 22-OIR-01)

Dear Commissioners, Executive Director and Staff:

On behalf of NextEra Energy Resources, LLC (“NextEra”), we hereby submit the following comments on the California Energy Commission’s (“CEC”) draft Emergency Rulemaking for Assembly Bill 205 (“Draft Regulations”). NextEra appreciates the efforts of the CEC staff in writing the Draft Regulations, as well as its general efforts in implementing AB205. The legislature and Governor acted with clear intent under AB 205 to offer additional expediency and choice in the permitting of renewable energy projects to enable more projects to come online more quickly.¹ In passing AB 205, the legislature and administration recognized the tremendous effort that will be needed in order to bring 35 GW of clean resources online by 2030 to meet state mandates².

NextEra very much appreciates the Draft Regulations as a positive first step in meeting AB 205’s intent and looks forward to working with the CEC to structure a siting program that offers real optionality and expediency for renewable energy developers.

Comments on the Draft Regulations

I. The Draft Regulations should expressly allow for the applicant to prepare the Environmental Impact Report required under the California Environmental Quality Act.

The intent of AB205 is to streamline the permitting timelines for renewable energy and energy storage projects in the State. However, due to the potential use of this statute to address difficulties in local permitting throughout the State, we have concern that CEC Staff and its consultants may have insufficient bandwidth to process such projects on an expedited timeline, i.e., the 150-day period set forth Section 1879(a), particularly when added to the existing scope of projects under the CEC’s jurisdiction. Accordingly, to allow project proponents to front-end and alleviate some of the workload, while ensuring CEC oversight

¹ The Governor’s Office submitted comments to the Senate Budget & Fiscal Review Committee recognizing that AB 205 “Does create opt-in permitting to accelerate bringing clean energy projects online sooner so that the state can rely less on fossil fuel generation sources.” AB205, Third Reading, June 26, 2022

² This is reflected in the California Public Utilities Commission’s Administrative Law Judge’s Ruling dated September 8, 2022 (Ruling IRP, R.20-05-003 ALJ/JF2/lil)

and decision making, we propose, as allowed under California Code of regulations, Title 14, Section 15084(d) that Section 1879(a) be revised to include the following language:

Any Environmental Impact Report required under this provision may be prepared by a consultant retained and directed by the applicant. If the applicant chooses to prepare the Environmental Impact Report, a draft shall be provided to the CEC no less than 120 days from the date the application is deemed complete. Staff shall exercise independent review and analysis of such Environmental Impact Report.

Under this proposed approach, the CEC will review the draft EIR as the Lead Agency and will exercise independent review and analysis. We believe that having the applicant prepare the filing for CEC review will significantly expedite the process while assuring regulatory and legal oversight. This will also make the processing of the EIR more efficient and reduce the need for CEC consultants to start from scratch on the project with required data requests and document preparation

II. The Draft Regulations should direct the CEC to develop guidance regarding substantive compliance for lands under Williamson Act contracts and lands zoned for utility use.

The intent of AB205 is clear. To meet the emerging energy reliability emergency, and the need for a very large number of new clean and reliable energy generation facilities to come online by 2030, renewable energy and energy storage projects are now afforded an expedited permitting process before the CEC. Also, any such certified projects are provided an expedited litigation process as an environmental leadership development project under Public Resources Code section 25545.13. Yet, to benefit from expedited permitting, CEC staff and Commissioners should have guidelines providing a consistent approach to the legal and land use issues challenges facing battery energy storage systems, in particular Williamson Act compatibility and the lack of express county/city zoning for such systems throughout the State.

a. The CEC should establish a rebuttable presumption that battery energy storage systems are compatible uses on lands under Williamson Act contracts.

Williamson Act contracts restrict the type of uses that are permitted on parcels subject to a contract. Types of uses that are permitted under a Williamson Act contract are agricultural and open space uses, or uses that are deemed compatible with agricultural and open space uses. "Compatible use," as defined in the Williamson Act, includes uses determined by the lead agency to be compatible with the agricultural, recreational, or open-space use of land within the preserve and subject to contract (Government Code Section 51201[e]).

Specifically, the Williamson Act provides that uses approved on contracted lands shall be consistent with the following three principles of compatibility:

1. The use will not significantly compromise the long-term productive agricultural capability of the subject contracted parcel or parcels or on other contracted lands in agricultural preserves.
2. The use will not significantly displace or impair current or reasonably foreseeable agricultural operations on the subject contracted parcel or parcels or on other contracted lands in agricultural preserves. Uses that significantly displace agricultural operations on the subject contracted parcel or parcels may be deemed compatible if they relate directly to the production of commercial agricultural products on the subject contracted parcels or parcels or neighboring lands, including activities such as harvesting, processing, or shipping.
3. The use will not result in the significant removal of adjacent contracted land from agricultural or open-space use. In evaluating compatibility, a board or council shall consider the impacts on non-contracted lands in the agricultural preserve or preserves.³

³ Government Code section 51238.1

Local governments throughout California have inconsistent standards regarding whether battery energy storage systems are compatible uses, and often, local government consider energy storage systems as incompatible with lands under Williamson Act. This, in turn, requires cancellation of the Williamson Act contract to allow a battery energy storage project to proceed. NextEra proposes that the CEC adopt guidance and make a finding that establishes a rebuttable presumption that such projects are compatible uses on lands subject to Williamson Act contracts, thereby eliminating the need to further comply with Public Resources Code sections 25523(d)(1) and 25525. This action would expedite and streamline permitting before the CEC.

At minimum, the CEC should make a finding that locating clean energy project on fallowed farmlands that are no longer able to support agriculture is a permissible use compatible with the Williamson Act.

- b. The Draft Regulations should direct that battery energy storage systems are allowable uses in any zone in which solar, wind or utility uses are allowed or permitted uses.**

Local plans and zoning throughout the State have not been updated to meet the pace and demand for energy storage systems. Accordingly, it is commonplace that zoning codes lack language expressly allowing energy storage systems either as a permitted or conditionally permitted use. In turn, local agencies can find that such omissions in their zoning codes means that energy storage systems as not allowed under existing zoning.

However, most local jurisdictions include “utility” uses as a permitted and/or conditionally permitted uses, while other jurisdictions also expressly include wind or solar as permitted and conditionally permitted uses. Given the similarity of energy storage systems to these other uses, we propose that the CEC establish guidance that energy storage systems are allowed under any zoning that permits or conditionally permits utility, wind or solar facilities. We further propose to eliminate the requirement to comply with Public Resources Code sections 25523(d)(1) and 25525 as to whether an energy storage system meets local zoning provisions.

III. Conclusion

We appreciate the opportunity to comment on the Draft Regulations and look forward to working with the CEC to meet the State’s renewable energy and climate change goals. NextEra offers these comments as additional concrete steps that will provide real optionality and expediency and ensure more renewable projects come online more quickly which is necessary to achieve the state’s aggressive mandates.

Sincerely,

Scott Castro

Scott N. Castro
Senior Attorney