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Docket Number:	22-OIR-01
Project Title:	Emergency Rulemaking for AB205, Opt-In Provisions
TN #:	246315
Document Title:	Hydrostor Comments - on Webinar on Emergency Rulemaking for Assembly Bill 205 Opt-In Certification Provisions
Description:	N/A
Filer:	System
Organization:	Hydrostor
Submitter Role:	Public
Submission Date:	9/30/2022 4:48:37 PM
Docketed Date:	9/30/2022

*Comment Received From: Hydrostor
Submitted On: 9/30/2022
Docket Number: 22-OIR-01*

on Webinar on Emergency Rulemaking for Assembly Bill 205 Opt-In Certification Provisions

Additional submitted attachment is included below.

September 30, 2022

Eric Knight
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**RE: COMMENTS OF HYDROSTOR ON THE WEBINAR ON EMERGENCY
RULEMAKING FOR ASSEMBLY BILL 205 OPTIN-IN CERTIFICATION PROVISIONS
(DOCKET NUMBER 22-OIR-01)**

Dear Mr. Knight,

Hydrostor thanks you for the opportunity to provide written comments on the California Energy Commission's Draft Emergency Regulations/Rulemaking for Assembly Bill 205, Opt-in Certification Provisions.

We participated in the Webinar on Emergency Rulemaking for Assembly Bill 205 Opt-In Certification Provisions on September 19, 2022 and are concerned the practical implementation of the rules will disproportionately disadvantage existing applicants and potentially confuse their stakeholders that are actively participating in the public engagement process. Furthermore, we believe there are important clarifications on streamlining that would allow for a more holistic link between State expectations on Commercial Operation Dates for electrical reliability requirements (through the California Public Utility Commission), and the reasonable expectation of efficiency associated with the permitting process. We believe these issues are readily addressable through amendments described herein.

Recommendations for AB 205 Regulations

We are requesting the regulations include the following elements to mitigate aforementioned risks:

1. Inclusion of a "pipelining" or "grandfathering" provision that any applications for projects under CEC jurisdiction filed prior to new rules taking effect should be protected in terms of processing timelines; specifically, opt-in applications should not supersede or leapfrog the queue of existing

applications. This should extend to agencies that are included in the Commission's licensing process such as the Department of Toxics and Substance Control, California Department of Fish and Wildlife, State Water Resources Control Board, and any other applicable regulatory authorities for which permits are obtained through the CEC as lead agency.

Pipelining language in the DRAFT CEC Regulations to protect existing applications for certification could read as an Amendment to Section 1876 as follows:

§ 1876. Filing of Opt-in Application.

(a) Applications filed under this article shall be known as "opt-in" applications. All opt-in applications shall be filed following the requirements set forth in sections 1208 and 1208.1. All opt-in applications shall be authorized and verified as set forth in section 1707.

(b) Notwithstanding the provisions implementing Chapter 6.2 of the Public Resources Code, the executive director shall ensure that applications currently pending before the Commission pursuant to the requirements of Chapter 6 (commencing with Section 25500) are not delayed or otherwise disadvantaged due to processing applications pursuant to this Article 4.1.

2. Inclusion of a "switchover" provision that allows discretionary projects under CEC jurisdiction for which applications have been filed prior to new rules taking effect to switch to the opt-in process without penalty of fees, timing, and administrative burden. Said another way, eligible project applicants, CEC staff, and stakeholders should not be punished for being in an existing process via requirements to submit new applications and filing fees subject to new review timelines. The regulations should allow existing applicants to simply amend their applications with the necessary information to be consistent with opt-in requirements (such as labor status and local benefits) and join the opt-in process where they are. This switchover provision would reduce the administrative burden on staff and applicants and reduce confusion among stakeholders who have been actively participating in public engagement efforts for existing projects.

Moreover, AB 205 was not intended to disadvantage projects already in the permitting process upon enactment of the Legislation. In fact, Section 25545.1(a) expressly defines an "eligible facility" as one that, among other things, "...has an application for certification or small powerplant exemption

filed with the commission pursuant to Chapter 6 (commencing with Section 25500) pending as of the effective date of this section.”

Application fees paid by existing projects pending as of the effective date of AB 205 have been deposited in a special fund, the Energy Facility License and Compliance Fund in the State Treasury, as required by Section 25806(d). Moneys in this special State Treasury fund are available to the Commission upon appropriation by the Legislature.

The Application fees paid by projects already in the Commission’s permitting pipeline at the time of enactment of AB 205 remain available to the Commission to be applied to the Commission’s review of the opt in project’s Application. Payment of a second fee of nearly \$650,000 for a long duration storage facility would serve only to place existing Application projects at a serious competitive disadvantage, with no corresponding benefits, contrary to AB 205’s intent to afford existing projects the opportunity to opt into the AB 205 process.

A second application fee serves only to stifle the potential to expedite important projects before the Commission at the time of enactment of AB 205. A second application fee serves no legitimate State interest and is expressly authorized by AB 205. Assessment of a second application fee is contrary to the intent to allow projects to opt in. The revised Regulations should be amended as recommend by these comments to ensure no such competitive disadvantage is borne by projects with pending Applications.

Switchover language in the DRAFT CEC Regulations to allow opt in without prejudice or penalty could read as a new Section 1876.1 as follows:

§ 1876.1 Opt-in Application for Pending Applications.

(a) Project before the Commission pursuant to the provisions of Chapter 6 (commencing with Section 25500) that elect to opt into the process established by Chapter 6.2 of the Public Resources Code shall opt in by filing a notice with the executive director of their intent to opt into the review process established by Chapter 6.2 of the Public Resources Code.

(b) Projects that opt in pursuant to subdivision (a) of this section shall be processed consistent with the requirements of Chapter 6.2 of the Public Resources Code.

(c) Existing applications for projects that opt into the Chapter 6.2 of the Public Resources Code shall continue to be reviewed and processed by

the Commission using the funds already deposited by in the Energy Facility License and Compliance Fund created in the State Treasury by Section 25806 of the Public Resources Code for review of the application, and no new or additional processing fees shall be required or collected for expediting the Commission's review of projects electing to proceed under Chapter 6.2 of the Public Resources Code.

3. Alternatively, to point (2), if the CEC is unable to allow a simple switch in processes, then the regulations should allow for existing AFC applicants to follow a streamlined timeline consistent with the opt-in process so they can realize schedule benefits in their existing process. In this situation, there is an opportunity to use the available \$140 million in Long Duration Energy Storage (LDES) funding in AB 205 to supplement staff and consulting resources as needed to conduct expedited review. LDES money was appropriated by the Legislature to help facilitate the successful deployment of commercial-ready LDES projects of first impression on the grid. Use of LDES funds to augment the staffing needs to expedite AFC project applications consistent with the opt-in process would meet the legislative intent of getting these projects online. AB 205 authorized the CEC under Public Resources Code section 25643 (b) to deploy monies to assist in the creation of financial incentives to aid in the deployment of LDES:

Award Long-Duration Energy Storage Program moneys for technical assistance, including, but not limited to, providing outreach to eligible industries, identifying promising technologies, assessing market conditions needed to accelerate commercial traction of the technology, assisting with technical review of proposals and deliverables, identifying opportunities that provide significant benefits to the electrical grid, and performing benefits analysis. The commission may contract for, or through interagency agreement obtain, technical, scientific, and administrative services and expertise from one or more entities to support the Long-Duration Energy Storage Program. (emphasis added)

4. The Regulations should include of an “oversight” provision exercisable at the option of the proponent that enables the assignment of a Committee or Commissioner to adjudicate potential disputes in the environmental review and documentation process for eligible projects, the timeline for which is included in the 270 days of judicial review. This maintains the streamlining intent of the statute and regulation, without bypassing an appeal pathway should it be required.

Oversight language in the DRAFT CEC Regulations could read as a new (d) to Section 1878 (Commission Review of Opt-in Application) and amendment to Section 1881 as follows:

(d) Within 30 days of the executive director's determination made pursuant to subdivision (c) of this section, a committee of two Commissioners shall be assigned pursuant to Section 1204 of Title 20 to oversee applications processed pursuant to Chapter 6.2 of the Public Resources Code.

“After consideration of the final environmental impact report, staff’s assessment of the opt-in application, the executive director’s recommendation at a public meeting held under section 1101, and any public comment received at the public meeting, the ~~commission~~ committee assigned pursuant to section 1878(d) shall issue a written decision on the certification of the environmental impact report and the application to construct and operate the facility, ~~which may be in the form of an order incorporating the staff assessment and executive director’s recommendation.~~ Any decision to approve the facility shall be consistent with Public Resources Code sections 25545.8, 25545.9 and 25545.10.

5. Inclusion of further limitations on CEC staff environmental documentation preparation time and more defined timelines on when the draft Environmental Impact Report would be released, which would accelerate schedules and incentivize applicants to opt-in without sacrificing CEQA public review. Refer to point (3) for LDES funding options.

Link of Permitting to Parallel Regulatory Requirements for Commercial Operation Date (COD)

Based on recent changes to rules via the California Public Utilities Commission (CPUC), supply chain and global delivery challenges are putting increased pressure on developers of Long Duration Energy Storage (LDES) projects and other Long Lead Time (LLT) projects being sought through CPUC procurement orders in the Integrated Resource Plan Mid-Term Reliability decision¹. While we recognize the importance of diligent environmental review through CEC permitting processes, proponents are increasingly facing disconnects between CPUC COD expectations and permitting timelines that would enable this.

¹ CPUC D.21-06-035 Decision Requiring Procurement to address Mid-Term Reliability June 24, 2021 <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M389/K603/389603637.PDF>

We therefore request greater coordination between the CEC and CPUC that allow for unanticipated delays to permitting to be reflected without penalty for up to a 1-year grace period through CPUC procurement orders. This is reflective of the criticality of these LDES and LLT projects to emergency and electrical system reliability in California and would ensure these are made a priority and streamlined to address the grid transition challenges we face collectively. Ideally this would also be reflected through AB 205 regulations and/or CPUC clarification through their parallel reliability processes.

We look forward to reviewing the notice of proposed emergency action on October 6, 2022. We are available to discuss in the interim as well.

Respectfully submitted,

/s/ Jon Norman

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