

Memorandum

To: Docket 22-OIR-01

Date: October 6, 2022

From: Jared Babula, Senior Attorney
Chief Counsel's Office
California Energy Commission

Subject: California Environmental Quality Act Compliance

At the October 12, 2022 California Energy Commission (CEC) Business Meeting, CEC staff will propose that the CEC adopt a proposed resolution adopting emergency regulations to implement a new siting program authorized by Assembly Bill (AB) 205 (ch. 61, stats. 2022), which, among other things, added Chapter 6.2 to Division 15 of the Public Resources Code.

I. Adoption of the Regulations is Not a Project.

For purposes of complying with the California Environmental Quality Act ("CEQA," Pub. Resources Code, § 21000 et seq.), staff recommends the CEC find that the adoption of the proposed emergency regulations is not a project under CEQA. The proposed emergency regulations implement a new optional program (opt-in) that authorizes the CEC to accept applications seeking certification of certain types of non-fossil-fueled energy generating facilities, energy storage facilities, and related facilities. The emergency regulations set forth the process for submitting opt-in applications, reviewing applications, performing outreach, and considering whether to issue or deny a certification.

California Code of Regulations, title 14, section 15060 states, in part, that a lead agency must first determine whether an activity is subject to CEQA and that an activity is not subject to CEQA if the activity is not a project as defined in section 15378. CEQA Guidelines section 15378 states that an activity is a project if it has the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.

In the case of this rulemaking, the proposed emergency regulations set forth a process for submitting and reviewing an opt-in application. The action to establish procedural requirements in emergency regulations does not result in any direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment but implements an administrative process. Therefore, the adoption of the emergency regulations is not a project and is not subject to CEQA.

II. Even if Adoption of the Regulations Were a Project, the Class 6 Exemption and the Common Sense Exemption Would Apply.

The adoption of the opt-in emergency regulations is also exempt from CEQA as a categorical exemption under the Class 6 Information Collection exemption. (Pub. Resources Code, §

15061(b)(2); Cal. Code Regs., tit. 14, §15306.) Pursuant to section 15306, activities that involve data collection, research, experimental management, and resource evaluation activities that do not result in a serious or major disturbance to an environmental resource, have been determined not to have a significant effect on the environment and are therefore exempt from CEQA. In this case, part of the opt-in regulations relate to the contents of an application and environmental review which cover the data collection and resource evaluation of the Class 6 exemption.

Furthermore, none of the exceptions to exemptions listed in CEQA Guidelines section 15300.2 apply here, and there is no reasonable possibility that the approval will have a significant effect on the environment due to unusual circumstances. For these reasons, the adoption of the opt-in emergency regulations is exempt from CEQA.

Adoption of the regulations would also be exempt from CEQA under the common sense exemption. (Cal. Code Regs., tit. 14, § 15061(b)(3).) CEQA only applies to projects that have the potential for causing a significant effect on the environment. A significant effect on the environment is defined as a substantial, or a potentially substantial, adverse change in the environment, and does not include an economic change by itself or beneficial changes to the environment. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382.) Because the action concerns the adoption of regulations covering the process and procedures for the opt-in program and it does not provide for any physical changes to the environment, it can be seen with certainty that there is no possibility that the adoption of the opt-in emergency regulations may have a significant effect on the environment.

III. Conclusion.

As shown, adoption of the opt-in emergency regulations is not a project under CEQA and thus CEQA does not apply. Even if the adoption is a project and CEQA does apply to the agency action, consistent with the Class 6 exemption in section 15306 of the CEQA Guidelines, the adoption is exempt from CEQA as information gathering and resource evaluation. Additionally, adoption of the regulations is consistent with the common sense exemption under section 15061(b)(3) of the CEQA Guidelines. For these reasons, the adoption of the opt-in emergency regulations by the CEC would be exempt from CEQA, and a Notice of Exemption may be filed with the Office of Planning and Research.

STATE OF CALIFORNIA
CALIFORNIA ENERGY COMMISSION
ADOPTION OF EMERGENCY RULEMAKING ACTION
Docket No. 22-OIR-01

Certification of Nonfossil-Fueled Powerplants,
Energy Storage Facilities, and Related Facilities
Chapter 6.2 of Division 15 of the Public Resources Code

NOTICE OF PROPOSED EMERGENCY ACTION

Government Code section 11346.1(a)(2) requires that at least five working days prior to submission of a proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency action to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

The California Energy Commission (CEC) intends to submit this proposed emergency rulemaking action for OAL review on **October 13, 2022**. Upon submission, OAL will have 10 calendar days within which to review and decide on the proposed emergency rulemaking action. If approved, OAL will file the regulations with the Secretary of State, and the regulations will become effective. Under Public Resources Code section 25545.12, these emergency regulations remain in effect until amended by the commission.

The submitted emergency action, including the specific language of the proposed emergency regulations, will appear on the list of “Emergency Regulations Under Review” on OAL’s website at

https://oal.ca.gov/emergency_regulations/emergency_regulations_under_review/

and is included with this notice.

Comments must be submitted in writing to **both** CEC and OAL.

For CEC:

Comments should be e-filed in the 2022 Emergency Rulemaking Docket at [22-OIR-01](https://www.energy.ca.gov/proceedings/energy-commission-proceedings/emergency-rulemaking-assembly-bill-205-opt-certification), <https://www.energy.ca.gov/proceedings/energy-commission-proceedings/emergency-rulemaking-assembly-bill-205-opt-certification>.

For e-filing questions, contact docket@energy.ca.gov.

In the alternative, written comments may also be submitted by email. Include Docket Number 22-OIR-01 in the subject line and email to docket@energy.ca.gov.

A paper copy may be sent to:

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

and

For OAL:

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
Fax: (916) 323-6826
Email: staff@oal.ca.gov

FINDING OF EMERGENCY

In June 2022, the Legislature enacted, and the Governor signed Assembly Bill (AB) 205 (Ch. 61, Statute of 2022), which, among other things, added Chapter 6.2 to Division 15 of the Public Resources Code. Chapter 6.2 creates a new path for certain eligible facilities to optionally apply to the CEC’s exclusive licensing jurisdiction and allows the CEC to process the applications under a more streamlined and expedited certification process. The new process is efficient, prioritizes reliability, maximizes public input, applies rigorous environmental review, and includes provisions to ensure that local governments, workers, California Native American tribes, and communities reap the benefits of renewable and zero-carbon resource development in the state. The new program supports an acceleration in the state’s transition to clean energy to reduce greenhouse gas emissions that are driving climate change. Simultaneously, the new program will help maintain energy reliability by supporting the licensing of energy storage projects and facilities that can help increase energy storage in the state.

Public Resources Code section 25545.12 authorizes the CEC to adopt emergency regulations to implement a new optional (opt-in) certification program for non-fossil fueled power plants, energy storage facilities, and related facilities. Section 25545.12 specifically states:

“The adoption of these regulations shall be considered by the Office of Administrative Law as an emergency, and necessary for the immediate preservation of the public peace, health, safety, and general welfare. Notwithstanding any other of law, the emergency regulations adopted to implement this chapter shall remain in effect until amended by the commission.”

Therefore, these regulations are deemed an emergency by statute, and the CEC has express statutory authority to seek approval of these regulations by implementing Chapter 6.2 of Division 15 of the Public Resources Code through OAL’s emergency rulemaking procedures.

DOCUMENTS RELIED UPON

The CEC did not rely on any documents in adopting these emergency regulations.

AUTHORITY

Public Resources Code sections 25213, 25218(e), and 25545.12.

REFERENCE

Public Resources Code sections 21183, 21183.6, 25526, 25527, 25545, 25545.1, 25545.2, 25545.3.3, 25545.3.5, 25545.4, 25545.6, 25545.7, 25545.7.2, 25545.7.4, 25545.7.6, 25545.8, 25545.9, 25545.10, 25545.11, 25545.13, 25806, and 30413, 66645. Fish and Game Code sections 1602 and 2081.

INFORMATIVE DIGEST

Prior to the June 30, 2022, signing of AB 205, the CEC’s powerplant licensing jurisdiction was limited to thermal powerplants 50 MW or larger. To accelerate the state’s transition to renewable energy and to maintain electrical system reliability under this transition and during extreme climate-change-driven events, AB 205, as modified by AB 209 (ch. 251, stats. 2022) expands the types of facilities that can be certified by the CEC to include a variety of non-fossil- and non-nuclear-fueled generation and energy storage facilities, transmission from these facilities to the first point of interconnection, and facilities that manufacture or assemble clean energy or storage technologies or their components. AB 205 adds Chapter 6.2 commencing with section 25545 to Division 15 of the Public Resources Code, which authorizes the CEC to accept applications for these additional facilities and provides a new, streamlined process for their review and approval by the CEC. Specifically, Chapter 6.2 provides for the following types of facilities to be eligible to “opt-in” to the CEC’s new certification process:

- A solar photovoltaic or terrestrial wind electrical generating power plant with a generating capacity of 50 megawatts (MW) or more and any appurtenant facilities.
- An energy storage system as defined in Section 2835 of the Public Utilities Code that can store 200 megawatt-hours (MWh) or more of electrical energy.
- A stationary electrical generating powerplant using any source of thermal energy, with a generating capacity of 50 MW or more, excluding any powerplant that burns, uses, or relies on fossil or nuclear fuels.
- An electric transmission line carrying electric power from one of the above types of facilities to the first point of interconnection.
- A discretionary project for which the applicant certifies that a capital investment of at least \$250 million will be made over a period of five years, and for the manufacture, production, or assembly of an energy storage system or component manufacturing, wind system or component manufacturing, solar photovoltaic energy system or component manufacturing, or of specialized products, components, or systems that are integral to renewable energy or energy storage technologies.

AB 205 further provides that the issuance of a certificate by the CEC for an eligible facility is in lieu of any permit, certificate, or similar document required by any state, local, or regional agency, or federal agency to the extent permitted by federal law that may otherwise be required for the facility. AB 205 carves out some exceptions to this “in-lieu” permitting authority.

To implement a streamlined process to receive, review, and make a decision on an opt-in application under the expedited timelines set forth in Chapter 6.2 of Division 15 of the Public Resources Code, the CEC proposes to adopt emergency regulations to ensure that opt-in applications of eligible non-fossil-fueled facilities, energy storage facilities, and related facilities are reviewed in a timely and consistent manner in support of the state’s comprehensive accelerated efforts to address climate change and grid reliability. Further, the regulations will benefit the state’s grid reliability and greenhouse gas emission goals by deploying the CEC’s in-lieu permitting authority and expertise to review and certify eligible “opt-in” facilities in a manner that ensures transparent public process and robust environmental protection.

The CEC’s expanded authority through AB 205 is one portion of a systematic effort by the state to stabilize the grid as extreme heat events, wildfires, and drought present unprecedented and multifactorial challenges, and to accelerate the state’s transition to a clean energy system to reduce the state’s contribution to the greenhouse gas emissions driving these climate-change-induced effects.

Existing law and regulations directly related to the proposed action include:

- Public Resources Code sections 25545-25545.13, establishing the new opt-in certification program for eligible facilities.
- Public Resources Code section 25806, providing for payment of fees for facilities that “opt-in” to the CEC’s jurisdiction.
- Public Resources Code section 25520, containing the application requirements.
- Public Resources Code sections 25523(a), (d), (e), (g), and (h); 25519(f), (g), (j), and (k); 25525, 25527, and 25538, related to noticing requirements and findings the CEC makes for applications for certification.
- Public Resources Code sections 25532-25534.2, related to post-certification requirements.
- Public Resources Code sections 21000 and following, the California Environmental Quality Act, which applies to the CEC’s determinations under the new opt-in certification program.
- Public Utilities Code section 2835, defining energy storage systems.
- Labor Code, Division 2, Part 7, Chapter 1, providing criteria related to public work projects.
- Public Contract Code, Division 2, Part 1, Chapter 2.9, providing workforce and labor definitions and terms.
- Unemployment Insurance Code section 14005, providing training provisions.
- California Code of Regulations, title 20, sections 1101-1105, providing for CEC business meetings, at which the CEC will decide whether to approve or deny an application under this new opt-in certification program.
- California Code of Regulations, title 20, division 2, chapter 5, Appendix B, containing information requirements for applications for certification submitted under the CEC’s ordinary power plant licensing process.
- California Code of Regulations, title 14, Division 6, Chapter 3, containing the CEQA Guidelines applicable to the CEC’s determinations under the new opt-in certification program.

The proposed regulations are not inconsistent or incompatible with existing regulations. Pursuant to Chapter 6.2 commencing with section 25545 to Division 15 of the Public Resources Code, these regulations implement a new opt-in certification program specifically for eligible non-fossil-fueled facilities, energy storage facilities, and related facilities that apply to the CEC for certification. Therefore, no existing regulations apply to this new opt-in certification program.

DOCUMENTS INCORPORATED BY REFERENCE

None.

OTHER MATTERS PRESCRIBED BY STATUTE

The CEC has determined that the proposed emergency rulemaking is not a “project” subject to CEQA because the proposed rulemaking relates to the process for submitting and reviewing an opt-in application, and so does not result in any direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. Therefore, the activity is not subject to CEQA.

LOCAL MANDATE DETERMINATION

The CEC has determined that the proposed changes do not impose a mandate on local agencies or school districts.

ESTIMATE OF COST OR SAVINGS

The CEC does not anticipate any costs to state agencies as a result of this emergency rulemaking action. The proposed emergency regulations set forth the process for the filing of an application seeking approval to construct and operate a powerplant, storage facility, or certain type of manufacturing facility as well as the evaluation and certification of the facility. The expansion of the CEC’s authority to review non-thermal powerplants and the cost to the agency associated with this additional responsibility are the result of statutory changes and not these emergency regulations.

The proposed regulations will not result in any reimbursable costs to local government agencies, school districts, nondiscretionary costs or savings to local government agencies, or costs or savings in federal funding to the state.

NECESSITY

The following description of facts demonstrates the need for the proposed regulations to effectuate the provisions of Chapter 6.2 of Division 15 of the Public Resources Code being implemented, interpreted, or made specific and to address the demonstrated

emergency. The emergency regulations support and effectuate the purpose of addressing climate change and grid reliability by expediting the certification of renewable energy and energy storage facilities, and facilities that manufacture these systems and components.

California Code of Regulations, Title 20, Article 4.1 Certification of Nonfossil-Fueled Powerplants, Energy Storage Facilities, and Related Facilities

§ 1875. Scope. This section is necessary to orient a potential applicant as to which certification program this Article of Title 20 is implementing. The CEC has Articles addressing geothermal, small powerplant exemptions and other special cases. By clearly identifying the scope, those interested can quickly locate the relevant regulations.

§ 1876. Filing of Opt-in Application. This section is necessary to delineate the name of an application for review and certification of a facility that falls within new Chapter 6.2 of Division 15 of the Public Resources Code. By having a specific name, “Opt-in Application,” it is clear to CEC staff, the public, and other agencies, what the application pertains to. For consistency with how documents are submitted to the CEC and to utilize the existing electronic docking system it is necessary to include reference to the filing process set forth in title 20, sections 1208 and 1208.1. To ensure that the application contents can be relied on to support CEC analysis of the project, it is necessary to include reference to the existing process for authorizing and verifying applications as set forth in title 20, section 1707.

§ 1876.5. Pre-filing Consultation. Given the expedited nature of the new certification program, it is necessary to require applicants to meet with CEC staff at least 30 days before submitting an opt-in application to ensure that the application contains information that staff will accept as responsive and sufficient to prepare a staff assessment of the project. In addition to provide for early engagement, the CEC must invite local governments that would have authority over the project but for the CEC’s exclusive jurisdiction to the pre-filing consultation. State and federal agencies may also be invited.

§ 1877. Contents of Opt-in Application. Public Resources Code section 25545.2 specifically directs the CEC to determine the form and content of an application and requires the application to include all the information required by Section 25520. Section 25520 in turn requires certain specific application requirements as well as any other information that the commission by regulation may require. It is thus necessary to identify the information that must be included in the application so the CEC can effectively and timely act on the application and reach a decision. To leverage the CEC’s existing information categories used in the evaluation of thermal powerplants, the proposed emergency regulation requires applications contain the information identified

in California Code of Regulations, title 20, Appendix B (which is found after section 2012). In addition to Appendix B, it is necessary to require additional data categories because the Public Resources Code sections 25545(b), 25545.3.3, 25545.3.5, 25545.9, and 25545.10 require either specific information to be in the application or for the CEC to make certain findings that necessitate the applicant providing such information. It is also necessary to require additional information for purposes of issuing any necessary incidental take authorizations or lake and streambed alteration authorizations under the Fish and Game Code, as the CEC has in-lieu permitting authority for these authorizations. This information requirement was developed in consultation with the California Department of Fish & Wildlife.

§ 1877.5. Withdrawal of Opt-in Application. This section is necessary to ensure transparency and clarity when an applicant is voluntarily withdrawing an application from consideration. Having a defined process to withdraw will eliminate wasted time and resources by the CEC working on applications the applicant is no longer interested in pursuing. This is especially important given the expedited timelines set forth in the Public Resources Code governing the opt-in certification program. Clearly communicating an application is being withdrawn and the proceeding closed will inform the public the project is no longer active allowing stakeholders to focus on other pending applications. The language parallels the project withdrawal provisions of section 1709.8. To address the scenario of an applicant wanting to reinstitute an application, language is necessary to set forth a process to ensure the public is notified and staff has adequate time and funding to evaluate the application. In this case the applicant must refile so evaluation process can restart.

If an applicant has a withdrawn project which meets the definition of Public Resources Code section 25545(b)(3), language is necessary to clarify that a refile of the project may be done as an opt-in project following these regulations or filed under the CEC's existing powerplant certification program under California Code of Regulations, title 20, section 1709.

§ 1878. Commission Review of Opt-in Application. This provision is necessary to set forth the process for CEC staff to review the application and obtain additional information to perform the required environmental review, respond to comments from public agencies or tribes, and address other statutory requirements. Where appropriate, the emergency regulatory language cites to the Public Resources Code provisions where specific requirements are identified. The statutory period to reach a decision on an opt-in application is 270 days from receipt of a complete application. To mark that date and to inform the public of when the timeline begins, it is necessary to have emergency regulations directing the executive director to file a statement when the application is complete. To accommodate the potential that not all the information the CEC will need to reach a decision on an application will be available at the time the applicant submits an application, and to recognize not all information is needed by CEC

staff at the beginning, it is necessary to identify the categories of data that can be provided after the application is submitted and the extended timeline for submission. These categories related to non-environmental topics required to be covered under Public Resources Code sections 25545.9 and 25545.10 and based on the nature of the topic, staff has identified 45 days after the application is deemed complete as an appropriate amount time that would still provide staff adequate time to incorporate the information into its assessment.

§ 1878.5. Tribal Consultation. This section is necessary to clarify the importance of tribal consultation, which is not only required under the California Environmental Quality Act (CEQA) but also provided for specifically under the opt-in certification program's specific statutory requirements. The emergency regulations reference the requirements in Public Resources Code section 25545.7.4 and provide clarity that the CEC may initiate engagement with tribes earlier to ensure meaningful process and information exchange.

§ 1879. Staff Assessment and Executive Director's Recommendation. This provision is necessary to describe the document staff is required to file under the opt-in program, the content of the document, and the timeline. The emergency regulations implement the statute by naming the CEC's analysis of the opt-in application as the "Staff Assessment" defining the Staff Assessment as containing the required environmental impact report and a separate section addressing specific requirements unique to the opt-in certification program that are required by the statutory provisions establishing the opt-in program and that are separate from or additional to the information required to be included in an environmental impact report. Where appropriate, the emergency regulations cite to the specific provisions of the Public Resources Code sections of the opt-in program for clarity. Because there are procedural requirements specific to CEQA and that do not apply to the additional statutory findings related to the opt-in program, it is necessary to separate out the portion of the staff assessment of the application that complies with CEQA and the portion that is specific to the opt-in certification program.

Because, with some exceptions, the Public Resources Code requires a decision on the application within 270 days of the filing of a complete application, the emergency regulations provide for 150 days to file a draft staff assessment. 150 days was determined by staff to be appropriate amount of time to ensure compliance with the requirements of the CEQA and to address specific categories of information required by the statutory provisions of the opt-in certification program while providing enough time to include the 60-day public comment period required by statute (Public Resources Code, § 25545.7.6(b)), the issuance of a final environmental impact report, and a 30-day period between the final environmental impact report and CEC consideration at a business meeting. Because the 60-day public comment period is longer than the standard 45-day time provided in CEQA, it is necessary for clarity for the public and staff to also include the 60-day period in the emergency regulatory language. Finally, it is necessary in the emergency regulations to include direction on the filing by the

executive director of a recommendation on the application which is required by Public Resources Code section 25545.6.

§ 1880. Public Outreach. This section is necessary to provide structure for implementing the multiple public events required by Public Resources Code sections 25545.7.2. and 25545.7.6. For simplicity the process for noticing a public event is the existing process set forth in title 20, section 1209. To maximize public participation and to reduce agency and public travel costs, regulatory language is necessary to require, to the extent feasible, that venues for public events have remote access capabilities. Because some projects may be in remote areas making it challenging to obtain internet connections, some flexibility regarding remote access is necessary. The expectation is that most venues for public events near the project site will have access to the internet.

§ 1880.5. Record of Proceedings and Request for Modification. This section is necessary to implement Public Resources Code section 25545.13 which designates opt-in projects as an Environmental Leadership Development Project if certain requirements are met. Such designation allows for the project to be subject to expedited judicial review. The proposed emergency provision sets forth the process for the CEC to prepare and certify the record of proceedings, which must be done within five days of the certification of environmental impact report and project in order for an otherwise eligible project to be deemed an Environmental Leadership Development Project. Subsection (a) utilizes the CEC's existing docketing system as the repository of records comprising the record of proceedings and clarifies that the CEC's certification shall be based on the record of proceedings and on any public comments made at the public meeting to consider the opt-in application. The number of days identified in this section are necessary to ensure that there is time for the public to assess the completeness of the record while also providing time to ensure any request to modify the proceeding's record is properly noticed on the agenda of the public meeting in which the opt-in application is being considered.

Subsection (b) sets forth necessary language to ensure clarity as to when the record of proceedings is complete and the process for communicating that information. Subsection (c) provides for a process and timeline allowing any person who commented on staff's assessment of the opt-in application to request the record of proceedings be modified and what information is necessary in the request for the CEC to act on it.

Subsections (d) and (e) are necessary to provide a two-step process to address the request. The executive director can simply modify the record of proceedings by adding or removing records to comport with the request. Such action would render the request withdrawn. If the executive director does not make the requested changes, the CEC, at the meeting in which the opt-in application is to be considered, will also consider the request to modify the record of proceedings before certification of the environmental impact report and opt-in project. This joint consideration is necessary to implement the

statutory requirement for the CEC to certify the record within 5 days of certification of the project.

§ 1881. Commission Certification of the Environmental Impact Report and Certification to Construct and Operate the Facility. This section is necessary to articulate the process for final consideration of the environmental impact report and project certifications. For clarity the section identifies three specific provisions of the Public Resources Code that must be complied with before a project can be certified.

§ 1882. Post Certification Project Changes. This section is necessary because the CEC has continuing jurisdiction over certified opt-in projects and regulatory language setting forth the process for projects to implement changes to design, operation or performance provides a clear process for the project owner as well as the public. The emergency regulations balance public transparency with the efficient processing of any minor facility changes having minimal impacts on the environment. The emergency rulemaking language is based off the amendment process in effect for existing certified thermal powerplants set forth in section 1769 and includes components needed for review of a project change such as the statutory filing fee, a description of the change, staff analysis and process for approval. Some differences exist between the two processes because the CEC's process for existing certified thermal powerplants in section 1769 is part of the CEC's certified regulatory program whereas the opt-in certification program is not a certified regulatory program and is therefore subject to CEQA. The proposed regulatory language also requires information on how the project as changed would continue to comply with requirements unique to the opt-in program such as certain labor requirements, benefits to local governments and community benefits.

Article 4.1 Certification of Nonfossil-Fueled Powerplants, Energy Storage Facilities, and Related Facilities

§ 1875. Scope.

This Article implements Chapter 6.2 of Division 15 of the Public Resources Code related to certification of nonfossil-fueled powerplants, energy storage facilities, and related facilities, as defined in section 25545(b) of the Public Resources Code.

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 25545, and 25545.1, Public Resources Code.

§ 1876. Filing of Opt-in Application.

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.

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 25545, 25545.1, 25545.2 and 25545.4, Public Resources Code.

§ 1876.5. Pre-filing Consultation.

(a) At least 30 days before submitting an opt-in application under this Article, the applicant shall meet with staff to discuss information requirements for the opt-in application.

(b) Staff shall invite the local government(s) that would have had permitting authority over the site and related facility of the construction and operation of the facility but for Chapter 6.2 of Division 15 of the Public Resources Code, and may invite other relevant state and federal agencies, to participate in the meeting(s) held pursuant to subdivision (a).

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 25545, 25545.1, 25545.2 and 25545.4, Public Resources Code.

§ 1877. Contents of Opt-in Application.

(a) The opt-in application shall contain all the information specified by Appendix B and meet the general requirements set forth in section 1704(a). For categories of information contained in Appendix B not relevant to the project, the application shall include a discussion explaining why a category does not apply. If the applicant is

seeking incidental take authorization as described in California Fish and Game Code section 2081(b), the application shall include the information required in California Code of Regulations, title 14, section 783.2(a)(1)-(a)(10). If the applicant is seeking lake and streambed alteration authorization under Fish and Game Code Section 1602, the application shall include the information required in California Fish and Game Code sections 1602(a)(1)(A)-(F).

(b) The opt-in application shall contain an explanation of how the facility meets one or more of the definitions of “facility” in Public Resources Code section 25545(b). If the opt-in application is seeking certification for a discretionary project pursuant to Public Resources Code section 25545(b)(4), the application shall contain a detailed description of how the facility meets the criteria specified in section 25545(b)(4) including, as applicable, what the facility would manufacture, produce, or assemble, and how the facility’s products or services would be used in the manufacture, production, or assembly of (1) energy storage systems or component manufacturing, (2) wind systems or component manufacturing, (3) solar photovoltaic energy systems or component manufacturing, or (4) specialized products, components, or systems that are integral to renewable energy or energy storage technologies.

(c) The opt-in application shall contain all certifications required by Public Resources Code sections 25545.3.3 and 25545.3.5. The executive director may request, and the applicant shall provide, documentation verifying any certification in the opt-in application. Unless confidential information is requested by the executive director, all supporting documentation shall be filed as a public record.

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

(e) The opt-in application shall identify whether the project is on a prohibited site as identified in Public Resources Code section 25527 or on a site designated by the California Coastal Commission under Public Resources Code section 30413(b) or on a site designated by the San Francisco Bay Conservation and Development Commission under Public Resources Code section 66645(b). For projects on such a site, the opt-in application shall include documentation of the approval of the public agency having ownership or control of the land.

(f) The opt-in application shall contain preliminary information demonstrating 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. Staff shall provide the submitted information to the local government for review and comment.

(g) The opt-in application shall include the applicant's plan or strategy, including a timeline for execution, to 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.

(h) The opt-in application shall include a discussion of whether the project meets the requirements of Public Resources Code sections 21183 and 21183.6.

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 21183, 21183.6, 25527, 25545, 25545.1, 25545.2, 25545.3.3, 25545.3.5, 25545.7, 25545.9, 25545.10, 30413, and 66645, Public Resources Code; Sections 2081(b) and 1602(a), Fish and Game Code.

§ 1877.5. Withdrawal of Opt-in Application.

(a) Any time after acceptance, the applicant may withdraw the opt-in application by filing a written notice of withdrawal. The notice of withdrawal must be authorized and verified in the same manner as the original opt-in application, as provided in Section 1707.

(b) Upon receipt of a properly executed withdrawal, the executive director shall immediately file a statement that the application has been withdrawn and closing the docket. The documents of the proceeding shall continue to be maintained by the Docket Unit.

(c) If the applicant decides to request that the commission review and approve the project after filing a notice of withdrawal, the applicant must file a new opt-in application under section 1876, except that an applicant for facilities described in section 25545(b)(3) of the Public Resources Code must either file a new opt-in application under section 1876 or a new notice or application under section 1709.

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 25545, 25545.1, and 25545.2, Public Resources Code.

§ 1878. Commission Review of Opt-in Application.

(a) The executive director may request additional information from the applicant as set forth in Public Resources Code section 25545.4, including additional information to address comments by public agencies and California Native American tribal governments.

(b) Consistent with Public Resources Code section 25545.4, the executive director shall file a statement when the application is complete.

(c) No later than 45 days after an application is deemed complete, or a later date set forth by the executive director, the applicant shall provide information updating or

supplementing the information in the application to support the findings required by Public Resources Code sections 25545.9 and 25545.10.

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 25545, 25545.4, 25545.9, and 25545.10, Public Resources Code.

§ 1878.5. Tribal Consultation.

(a) In addition to formal tribal consultation required in the California Environmental Quality Act, the commission shall follow the additional requirements governing tribal engagement, related to opt-in applications, as set forth in Public Resources Code section 25545.7.4.

(b) The commission may initiate tribal engagement earlier than required under Public Resources Code section 25545.7.4 to ensure meaningful process and information exchange.

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 25545, 25545.7.2, and 25545.7.4, Public Resources Code.

§ 1879. Staff Assessment and Executive Director's Recommendation.

(a) Within 150 days from the date the application is deemed complete, or as soon thereafter as is practicable, staff shall file a Staff Assessment of the opt-in application that consists of a draft environmental impact report following the requirements of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) and the CEQA Guidelines (Cal. Code of Regs., tit. 14, Chapter 3) and includes consideration on whether the project satisfies the conditions in Chapter 6.5 (commencing with Section 21178) of Division 13, including Sections 21183 and 21183.6 of the Public Resources Code, and a separate section addressing the following:

(1) The extent to which the applicant has complied with the recommended minimum standards of efficiency adopted under Public Resources Code section 25402(d).

(2) The conformity of the facility with public safety standards and the applicable air and water quality standards, and with other applicable local, regional, state, and federal standards, ordinances, or laws and a statement of efforts made to correct or eliminate any noncompliance.

(3) The potential for restoring the site as necessary to protect the environment if the commission denies approval of the application.

(4) The public benefits from the project including, but not limited to, economic benefits, environmental benefits, and electricity reliability benefits.

(5) Identification of public agencies that received notice of the opt-in application.

(6) Identification of whether the site is located at a prohibited area as identified in Public Resources Code sections 25526 and 25527 and any proposed findings relevant to that location.

(7) The overall net positive economic benefit to the local government that would have had permitting authority over the site and related facility. Economic benefits may include but are not limited to 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.

(8) Any legally binding and enforceable agreements by the applicant with, or that benefit, a coalition of one or more community-based organizations, such as workforce development and training organizations, labor unions, social justice advocates, local governmental entities, California Native American tribes, or other organizations that represent community interests, where there is mutual benefit to the parties to the agreement.

(b) After conclusion of at least a 60-day public comment period on the Staff Assessment of the opt-in application, including the draft environmental impact report, staff shall publish an updated Staff Assessment of the opt-in application that consists of a final environmental impact report following the requirements of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) and the CEQA Guidelines (Cal. Code of Regs, tit. 14, Chapter 3), and any updates or changes to the sections of the Staff Assessment addressing section 1879, subdivisions (a)(1)-(a)(8). The updated Staff Assessment, including the final environmental impact report, shall be filed no sooner than 30 days before the commission's consideration at a public meeting.

(c) Concurrent with the publication of the updated Staff Assessment the executive director shall file a recommendation on whether the commission shall certify the environmental impact report and issue a certificate for construction and operation of the facility.

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 25526, 25545.1, 25545.6, 25545.8, 25545.9, 25545.10, and 25545.13, Public Resources Code.

§ 1880. Public Outreach.

(a) Noticing of meetings, workshops, hearings, and similar public events shall be done as set forth in section 1209.

(b) The timing and number of public events shall be consistent with Public Resources Code section 25545.7.2.

(c) For purposes of conducting a meeting, informational workshop, or scoping workshop as close as practicable to the proposed site consistent with Public Resources Code sections 25545.7.2 and 25545.7.6, the commission or applicant shall, to the extent feasible, secure a space with adequate technological capacity to support remote participation that is near the project site.

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 25545, 25545.7.2 and 25545.7.6, Public Resources Code.

Section 1880.5. Record of Proceedings and Request for Modification.

(a) To prepare and certify a record of the proceeding concurrently with the review of the opt-in application, as set forth in Public Resources Code section 25545.13, the project's docket will be the record of proceedings and contain the materials required in subdivision (e) of Public Resources Code section 21167.6. The commission's certification of the environmental impact report and project shall be based on this record and on any public comments made at the public meeting to consider the application.

(b) Within five days after the executive director issues the recommendation set forth in section 1879(c), staff shall file a statement that the record of proceedings is complete.

(c) Within seven days after staff files the statement set forth in subsection (b), any person who commented on the Staff Assessment of the opt-in application may request that the commission modify the record of the proceeding. Such a request shall be filed into the project's docket and contain information detailing the records to be added or removed, reason for such action, and laws and policies supporting such action. A request to modify the record of the proceeding shall not delay or prohibit the commission from certifying the record of the proceeding pursuant to Public Resources Code section 25545.13.

(d) The executive director may review the request and take actions to conform the docket with the request by adding or removing the requested records and notifying the requester. Comporting with the request shall cause the request to be considered withdrawn.

(e) A request to modify the record of proceeding not acted upon by the executive director shall be considered by the commission at the public meeting in which the opt-in application is on the agenda for consideration. The executive director shall file a statement before the public meeting explaining the reasons for not acting on a request.

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 25545, 25545.8, 25545.9, 25545.10, and 25545.13, Public Resources Code.

§ 1881. Commission Certification of the Environmental Impact Report and Certification to Construct and Operate the Facility.

After consideration of the updated Staff Assessment of the opt-in application, the executive director's recommendation, the requirements of Public Resources sections 25545.8, 25545.9 and 25545.10, and public and public agency comment, the commission shall determine whether to certify the environmental impact report and issue a certification to construct and operate the facility. The commission may take action including, without limitation, voting to issue the certification, deny the application, or require additional information or analysis. If the commission votes to require additional information or analysis, the commission shall issue an order that specifies the required information and establishes a schedule for subsequent actions.

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 25545, 25545.4, 25545.8, 25545.9, and 25545.10, Public Resources Code.

§ 1882. Post Certification Project Changes.

(a) Upon project certification, any change to the design, operation or performance requirements of the project shall be approved by staff if staff finds the proposed project change 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. In the alternative, staff may submit a proposed change that would otherwise qualify for staff approval to the commission for consideration at a public meeting held under section 1101.

(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 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 discussion of how the project as changed would continue to comply with the requirements of Public Resources Code sections 25545.3.3, 25545.3.5, 25545.9 and 25545.10, and 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.

(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 each property owner described in subdivision (b) with instructions on how to receive future filings.

(d) 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.

(e) 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 public meeting held under section 1101. The commission shall issue an order approving, rejecting, or modifying the petition.

Note: Authority cited: Sections 25213, 25218(e), and 25545.12, Public Resources Code. Reference: Sections 25545, 25545.3.3, 25545.3.5, 25545.9, 25545.10, 25545.11, and 25806 Public Resources Code.

STATE OF CALIFORNIA
STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF:

**Emergency Rulemaking to
Implement Opt-in Program**

Docket No. 22-OIR-01

**[PROPOSED] RESOLUTION
ADOPTING EMERGENCY
REGULATIONS**

WHEREAS, on June 30, 2022, the Legislature enacted, and the Governor signed Assembly Bill (AB) 205 (ch. 61, stats. 2022), which, among other things, added Chapter 6.2 to Division 15 of the Public Resources Code; and

WHEREAS, to expedite the State's transition to clean energy projects and maintain energy reliability in the face of climate change, Public Resources Code section 25545.12 authorizes the CEC to adopt regulations to implement a new optional permitting program (opt-in) for non-fossil fueled power plants, energy storage facilities, and related facilities; and

WHEREAS, Section 25545.12 states that the adoption of these regulations shall be considered by the Office of Administrative Law (OAL) as an emergency, and necessary for the immediate preservation of the public peace, health, safety, and general welfare. Notwithstanding any other area of law, the emergency regulations adopted to implement this chapter shall remain in effect until amended by the commission; and

WHEREAS, on September 9, 2022, the CEC mailed a Notice of a Webinar to the subscription service, including to a representative number of small business enterprises or their representatives that are likely to be affected by the proposed action, and posted it on the CEC's website to present the proposed emergency regulations and take public comments on the regulatory language and opt-in program; and

WHEREAS, on September 19, 2022, the CEC held the webinar, and accepted written public comment until September 30, 2022; and

WHEREAS, on September 30, 2022, in the proceeding's docket and business meeting webpage, the CEC provided notice that it designated October 12, 2022, as the date for the business meeting to consider adoption of the proposed emergency regulations; and

WHEREAS, on October 6, 2022, at least five working days prior to submission of the proposed emergency action to OAL, the CEC provided notice of the proposed action, which included the proposed emergency regulations, to every person who has filed a request for notice of regulatory action with the agency; and

WHEREAS, on October 12, 2022, the CEC considered the proposed emergency regulations at its business meeting and adopted the proposed emergency regulations as published on October 6, 2022.

THEREFORE, THE CALIFORNIA ENERGY COMMISSION FINDS:

With regard to the California Environmental Quality Act (CEQA):

- The CEC has considered the application of CEQA to the proposed emergency regulations and concluded that adoption of the proposed emergency regulations is not a project under CEQA (Cal. Code Regs., tit. 14, § 15378(a)) because the regulations will not result in a physical change to the environment or reasonably foreseeable indirect physical change to the environment. In the alternative, adoption is exempt from the CEQA as a categorical exemption under the Class 6 Information Collection exemption (Pub. Resources Code, § 15061(b)(2); Cal. Code Regs., tit. 14, §15306) and adoption of the regulations would also be exempt from CEQA under the common sense exemption. (Cal. Code Regs., tit. 14, § 15061(b)(3).); and

With regard to the Administrative Procedure Act:

- The proposed regulations are deemed an emergency by statute, and the CEC has express statutory authority to seek approval of these regulations implementing Chapter 6.2 of Division 15 of the Public Resources Code through OAL's emergency rulemaking procedures; and
- The proposed emergency regulations will impose no direct costs or savings, or direct or indirect requirements or mandates, on state agencies, local agencies, or school districts, including but not limited to costs that are required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code; and
- The proposed emergency regulations will result in no costs or savings in federal funding to the State of California; and
- The proposed emergency regulations will result in no nondiscretionary costs or savings to any state agencies, local agencies, or school districts; and
- None of the comments received at the business meeting on October 12, 2022, and nothing else in the record, justified any changes to the proposed emergency regulations.

THEREFORE, BE IT RESOLVED that, based on the entire record before it, the CEC finds that adoption of the proposed emergency regulations is not a project under CEQA (Cal. Code Regs., tit. 14, § 15378(a)) because the regulations will not result in a direct physical change to the environment or reasonably foreseeable indirect physical change to the environment. The adoption of the propose emergency regulations is also exempt from CEQA as a categorical exemption under the Class 6 Information Collection exemption (Pub. Resources Code, § 15061(b)(2); Cal. Code Regs., tit. 14, §15306) and adoption of the regulations would also be exempt from CEQA under the common sense exemption. (Cal. Code Regs., tit. 14, § 15061(b)(3).); and

FURTHER BE IT RESOLVED that, after considering all comments received and based on the entire record of this proceeding, the CEC hereby adopts emergency regulations implementing the opt-in program. The CEC takes this action under the authority of sections 25213, 25218(e) and 25545.12 of the Public Resources Code, which authorize the CEC to adopt emergency regulations, as reasonable and necessary, to implement the opt-in program; and

FURTHER BE IT RESOLVED that documents and other materials that constitute the rulemaking record can be found at the CEC, 715 P Street, Sacramento, California, 95814 in the custody of the Docket Unit and online in Docket Number 22-OIR-01, at <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=22-OIR-01> and posted on the CEC's website; and

FURTHER BE IT RESOLVED that, the CEC delegates the authority and directs CEC staff to take, on behalf of the CEC, all actions reasonably necessary to have the proposed emergency regulations go into effect, including but not limited to making any appropriate non-substantive changes to the regulations; preparing all appropriate documents; compiling and submitting the rulemaking file to the Office of Administrative Law (OAL); making any changes to the rulemaking file required by OAL; and filing a notice of exemption with the Office of Planning and Research.

CERTIFICATION

The undersigned Secretariat to the CEC does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the CEC held on October 12, 2022.

AYE:

NAY:

ABSENT:

ABSTAIN:

Dated:

Liza Lopez
Secretariat