

CBR Energy Solutions Comments on Draft DOER BESS Model Bylaws

Submitted to the Massachusetts Department of Energy Resources (DOER)

Re: Model BESS Bylaw

Submitted by: Chris Rodstrom, Principal Consultant, CBR Energy Solutions

Date: November 14, 2025

Introduction and Overall Position

A major concern with BESS zoning in Massachusetts today is that municipalities are increasingly using zoning—setbacks, Special Permits, overlay districts, and vague “design standards”—to block projects they simply do not want. This is inconsistent with M.G.L. c. 40A, §3 (“the Dover Amendment”), the 2022 Tracer Lane decision, the 2024 Kearsarge Walpole decision, and the 2025 Duxbury Energy Storage decision confirming that even standalone BESS is protected. Creating an increasingly risky and difficult environment for BESS project developers and utilities will lead to fewer projects and some developers choosing to invest in other states, and abandon the Massachusetts market altogether.

DOER must state plainly that municipalities cannot use zoning as a backdoor prohibition, nor can they impose conditions or processes that make development infeasible.

Table of Uses Must Not Enable De Facto Prohibitions

Even with the model table of uses, many municipalities may attempt to force all BESS into extremely limited districts or overlays. The educational notes hint at this legal risk, but DOER needs to say explicitly that:

- Overlay districts cannot cover a tiny fraction of land area.
- Restricting primary-use BESS solely to industrial districts is legally indefensible.
- Zoning cannot be drafted to confine storage to parcels already owned by utilities.

Without strong, direct language, towns will read this model bylaw as permission to continue creating zoning maps that functionally exclude BESS.

Setbacks Have Become a Primary Tool of Indirect Prohibition — DOER Should Cap Them

Municipalities have begun using excessive setbacks (200–400 ft) as a tool to block BESS where they are not outright permitted to ban them. These distances have no basis in NFPA 855, UL standards, or any credible safety analysis.

DOER should state clearly that:

- Setbacks beyond 50–75 feet generally lack a valid health or safety justification.
- Setbacks larger than this are likely to be interpreted as unreasonable regulation prohibited by M.G.L. c. 40A §3.
- Setbacks must be tied to documented, objective safety requirements—not generalized fears of “battery technology.”

The model bylaw’s optional setback language may unintentionally encourage towns to adopt unreasonably large buffers unless DOER adds explicit boundaries.

Special Permit Requirements Can Be Abused — DOER Should Narrow Their Use

Towns routinely assign BESS to Special Permit review specifically because it allows boards to kill projects through delays, vague “public interest” language, or denial for reasons unrelated to zoning.

DOER should strongly advise:

- Special Permits should be used sparingly, not as the default.
- A Special Permit cannot be used to deny a project that meets all objective criteria.
- Special Permit criteria must be based exclusively on zoning—not political preference, anecdotal concerns, or abutter opposition.
- Any deviation from the model bylaw that expands the use of Special Permits risks violating the Dover Amendment.

Without firm guardrails, municipalities will continue using Special Permits as an indirect ban.

Site Plan Review Conditions Must Not Create Hidden Barriers

SPR is intended to regulate—not prohibit—as emphasized by *Prudential* and other case law. Yet many towns use SPR to impose delays or costly “conditions” that function as denial.

DOER should explicitly state that:

- SPR conditions must be objectively tied to land-use impacts (e.g., drainage, access).
- SPR cannot be used to require off-site improvements unrelated to the project.
- SPR cannot require excessive studies (e.g., multi-season wildlife surveys, 12-month noise monitoring) that are not required under state regulations.
- SPR cannot be used to force “zero visual impact,” which courts have repeatedly rejected.

Emergency Response Plans Must Be Scalable — Not a Backdoor Burden

Some municipalities will interpret the ERP section as a mandate to demand extremely expensive and unnecessary measures—full-scale drills, unrealistic training requirements, or hazmat commitments that local fire departments do not even want.

DOER should clarify that:

- ERP requirements must remain proportional to system size and risk.
- Municipalities cannot require fire departments to act as de facto consultants.
- DRILLS must be *optional*, not mandatory, unless required by state fire code.
- ERP reviews cannot be used to indefinitely delay approval.

This is a commonly exploited delay tactic, so stronger guardrails are needed.

Environmental Mitigation Fees Must Not Be Used to Deter Projects

Some towns are may attempt to impose 2:1 or 4:1 habitat mitigation ratios, despite AGO guidance invalidating ratios above 1:1. Others may use excessive “mitigation fees” as a revenue tool to discourage development, and may in fact may projects cost prohibitive.

DOER must clearly state:

- Municipalities may not impose mitigation ratios exceeding AGO-approved standards.
- Mitigation fees must follow only the DOER formulas in 225 CMR 29.07.

- Municipalities cannot independently invent new formulas or additional fees.

Left vague, this section will be misused as a financial deterrent against storage.

Decommissioning Requirements Should Not Be Used to Inflate Costs

A 125% surety with 5-year updates is appropriate, but some municipalities may try to:

- Require annual updates
- Require cash-only payments
- Require large escrow deposits held locally
- Require financial instruments unavailable to developers

DOER should make clear that:

- Surety must be flexible, not punitive.
- Municipalities cannot require more than what DOER sets forth.
- Decommissioning requirements cannot be used to discourage development.

Clear Warning to Municipalities: Exclusionary Zoning Will Be Overturned

The educational notes are very good, but DOER should be more explicit:

- Any municipal bylaw that restricts BESS to a fraction of land area is likely unlawful.
- Any conditions not necessary to protect health, safety, or welfare violate the Dover Amendment.
- Municipalities risk AG disapproval, Land Court litigation, and invalidation of local bylaws.

DOER should consider adding a final warning that: “BESS zoning must meaningfully enable development. Any bylaw that functions as a prohibition, either directly or indirectly, is inconsistent with state law and risks legal challenge.”