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California Energy Commission
Docket Unit, MS-4
Docket No. 26-OIR-04
715 P Street
Sacramento, California 95814

Submitted Electronically

Re: Docket No. 26-OIR-04 – American Clean Power – California Comments on the Emergency Rulemaking Amending the Opt-In Certification Program Regulations

American Clean Power – California ("ACP-California")[1] appreciates the opportunity to comment on the California Energy Commission's ("CEC" or "Commission") September 29, 2026 proposed emergency regulations for the Opt-In Certification Program and the November 2, 2026 workshop. ACP-California represents companies in the utility-scale wind, solar, geothermal, energy storage, and independent transmission industries, including many members with substantial existing and planned investments in California that are undergoing or have recently completed review through the Opt-In Certification process.

Our comments recommend proceeding with the rulemaking through a two-track approach. In track 1, we recommend the CEC move forward with the proposed regulations that implement the statutory requirements of SB 254 and SB 283. In track 2, we recommend the CEC afford additional time to consider the broader set of updates proposed by staff and other reforms proposed by stakeholders to fulfill the intent of the Opt-In Certification Program. We also offer recommendations to address certain requirements under the Administrative Procedure Act ("APA") and resolve statutory inconsistencies at issue in the September 29, 2026 proposed emergency regulations. ACP-California's recommendations are summarized as follows:

1. *Rulemaking Procedure:* The CEC should create two tracks for the rulemaking, as noted above, to ensure stakeholders have sufficient time to review and consider the proposed updates that go beyond what is required to implement the recent statutory requirements.

[1] The American Clean Power Association ("ACP") is the voice of companies from across the clean power sector that provide cost-effective solutions to the climate crisis while creating jobs, spurring massive investment in the American economy, and driving high-tech innovation across the United States. ACP's mission is to transform the U.S. power grid to a low-cost, reliable, and renewable power system. ACP-California is a state project of ACP, representing companies who develop, own, and operate utility-scale solar, storage, geothermal, land-based wind, offshore wind, and transmission assets to power a clean and renewable economy for California and the West.

2. *Supported Provisions:* ACP-California supports the amendments that implement SB 254 and SB 283, including the flexibility to prepare a mitigated negative declaration or negative declaration, the rebuttable presumption of net economic benefit, and the real property rights standard in Section 1877(h). We also support the restructured local agency reimbursement process and the new process for approving changes in ownership, with the refinements noted below.

3. *Applicability:* The CEC should clarify that the regulations, as amended, would apply to applications submitted after the effective date of the amendments. The rulemaking package sent to the Office of Administrative Law ("OAL") should make clear that applications that are currently pending are subject to the version of the regulation in place as of the application date, or, at a minimum, will not be subject to amended regulations affecting steps of the Opt-In Certification process that are already complete (e.g., the completeness determination).

4. *Early Termination:* The early termination provision in Section 1877.5(e) should be removed because it is overly broad and inconsistent with the APA's requirements for authority and clarity. If the CEC nonetheless moves forward with a narrowly tailored early termination provision, it should provide notice and a cure period before the termination takes effect.

5. *Community Benefit Agreements ("CBA"):* The rulemaking record should acknowledge that requirements for CBAs need to be balanced with affordability considerations for ratepayers. The CBA language should provide discretion for developers to enter into agreements that ensure funds are actually used in the communities where projects are located, including through community foundations as envisioned in SB 254. The proposed funding levels should operate as a safe harbor rather than a fixed minimum, and the storage metric and disclosure requirements should be refined.

6. *Battery Energy Storage System ("BESS") Requirements:* The regulations should not require a high degree of technology specificity at the application phase, and the CEC should not require "worst-case" dispersion modeling for all criteria pollutants and toxic air contaminants. Instead, the CEC should rely on empirical data gathered from physical, large-scale fire tests of actual equipment. Setbacks to sensitive receptors should be measured from the actual location of a sensitive receptor, which may be materially different than the property boundary.

7. *Site Control:* The regulations should clarify that projects on state or federal lands may not be able to provide proof of "current" site control. A submitted application for a right-of-way, encroachment permit, or other application should satisfy the application requirement, consistent with proposed Section 1877(h).

8. *Confidentiality:* The regulations should clarify that the CEC's normal confidentiality application process applies to the Opt-In Certification Program.

DISCUSSION

1. Rulemaking Procedure

The proposed regulations go well beyond the scope required to implement Senate Bills ("SB") 283 and SB 254. ACP-California recommends bifurcating the rulemaking to address statutory requirements first. A second track should be dedicated to the remaining updates proposed by staff and other reforms that fulfill the legislative intent of the Opt-In Certification Program. Based on applicants' experiences to date, we believe broader reforms are necessary to meet the Legislature's direction for an optimized and streamlined environmental review process. We welcome the opportunity to work with CEC staff on broader reforms to improve the Opt-In Certification process.

2. Provisions ACP-California Supports

ACP-California supports the proposed amendments that implement SB 254 and SB 283 and urges the CEC to adopt them in the first track of this rulemaking. In particular, ACP-California supports the following provisions:

- *Environmental document flexibility.* Replacing references to an "environmental impact report" with "environmental document" in Sections 1879, 1880.5, 1881, and 1882 conforms the regulations to SB 254, which authorizes the CEC to certify an environmental impact report, mitigated negative declaration, or negative declaration for an opt-in project.[2] Matching the environmental document to the scale of a project's impacts is consistent with the Legislature's direction for a streamlined review process.
- *Net economic benefit presumption.* Deleting the requirement to submit preliminary economic benefit information (Section 1877(f)) and revising Section 1879(a)(7) to reflect the rebuttable presumption of an overall net positive economic benefit implements Public Resources Code section 25545.9(b) and removes a duplicative showing from the application.
- *Real property rights.* Section 1877(h) implements Public Resources Code section 25545.2 by accepting an applicant's affirmation and description of its real property rights as adequate evidence absent evidence to the contrary, and by allowing projects on federal land to describe the status of their right-of-way applications. As discussed below under Site Control, Appendix B should be conformed to this standard.
- *Completeness review.* Limiting pre-completeness requests to missing information (Section 1878(a)) and extending the Staff Assessment schedule only for delays in receiving requested information (Section 1879(a)) are consistent with Public

[2] Pub. Resources Code §§ 25545.4, 25545.7.2, 25545.7.6.

Resources Code section 25545.4. Section 1878 should also reflect the statute's 45-day deadline for follow-up requests for missing information.[3]

- *Local agency reimbursement.* The revisions to Section 1878.1 that limit reimbursable costs to the technical areas identified in staff's request, clarify that local agencies are not expected to perform studies or retain consultants, and allow applicants and local agencies to execute their own reimbursement agreements will improve predictability for applicants and local agencies alike.
- *Changes in ownership or operational control.* New Section 1882(f) establishes a clear, staff-level process for approving a change in ownership or operational control. ACP-California recommends clarifying that upstream or parent-level ownership changes, and tax equity or other financing transactions that do not change the certificate holder or operator, do not require a petition.

3. Applicability

The proposed regulations do not make clear whether the amendments would apply to pending applications. In some cases, the regulations would apply to steps that have already occurred for certain applications. We encourage the CEC to make all of the amendments apply only to applications submitted after the amendments take effect. At a minimum, the CEC should make clear that the amendments will not apply to any procedural steps that have already been completed before the amendments take effect (e.g., the completeness determination).

4. Early Termination of Applications

The proposed new language would include amendments to Section 1877.5 of Title 20 of the California Code of Regulations ("CCR") to require the Executive Director to request, and allow the Commission to order, early termination of an application at any time during review, including before the environmental document is complete. Section 1877.5(e) should be deleted in its entirety as both a matter of law and policy.

Section 1877.5(e) should be removed because it does not meet the California APA requirements for authority and clarity. Section 14 of Title 1 of the CCR sets forth the requirements for "authority," which can be express or implied. Courts have interpreted these requirements to apply to specific aspects of regulations. "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."[4] Courts have also made clear that "an administrative agency may not adopt a regulation that exceeds the scope of, or is inconsistent with, the enabling

[3] Pub. Resources Code § 25545.4(b)(1).

[4] *Bearden v. U.S. Borax, Inc.*, 138 Cal. App. 4th 429, 41 Cal. Rptr. 3d 482 (2006), citing Gov. Code § 11342.2 and *Agnew v. State Bd. of Equalization*, 21 Cal. 4th 310, 981 P.2d 52 (1999).

statute."[5] "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations."[6]

There is no express authority to terminate applications under Sections 25545 *et seq*. of the Public Resources Code. There is also no implied authority that can be reasonably read into the enabling statute because doing so would conflict with the express provisions in statute. Implementing proposed Section 1877.5(e) would conflict with the express requirement for staff to review the application and make a recommendation for the Commission's consideration.[7] Section 25545.4(e) requires the Commission to determine whether to certify the environmental document and issue a certificate within 270 days after an application is deemed complete. Creating a separate pathway to terminate an application before that determination is inconsistent with the express procedures set forth in statute and would deprive applicants of the review process the statute provides.

Section 1877.5(e) would also violate the APA's requirements for clarity in all proposed regulations. Under Section 16 of Title 1 of the CCR, a regulation is presumed not to meet the clarity standard if it "can, on its face, be reasonably and logically interpreted to have more than one meaning." Section 1877.5(e)(1)(v) would allow termination of an application due to "any other significant impediment that more likely than not renders the project undevelopable within a reasonable time." This standard is open to many reasonable interpretations and gives applicants no way to know in advance what circumstances would trigger termination.

Even if the termination provision were consistent with state law, it still should not be adopted as a matter of policy. The intent of the Opt-In Certification Program is to provide a streamlined permitting pathway for projects the state needs to meet its climate and clean energy goals. This provision would frustrate that objective by creating a new barrier to development. Since an application could be terminated on broad and subjective grounds, financing parties will perceive the Opt-In Certification process as carrying significant risk that cannot be readily mitigated due to the broad nature of the termination power. This in turn will make project financing more expensive and more difficult to obtain for the development budgets necessary to undergo permitting. The proposal would also allow termination where a federal agency fails to timely process a right-of-way application (Section 1877.5(e)(1)(i)), a circumstance entirely outside the applicant's control.

For all of these reasons, ACP-California recommends removing the proposed Section 1877.5(e) from the regulatory package prior to submission to the OAL. If the CEC nonetheless moves forward with an early termination provision, we urge the CEC to ensure it is narrowly tailored, provides notice of proposed termination and an express opportunity to cure the termination determination before it takes effect.

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[5] *Bisno v. Santa Monica Rent Control Bd.*, 130 Cal. App. 4th 816, 30 Cal. Rptr. 3d 441 (2005), as modified (July 14, 2005).

[6] *In re Gadlin*, 10 Cal. 5th 915, 477 P.3d 594 (2020); *Camarillo Sanitary Dist. v. State Water Res. Control Bd.*, 113 Cal. App. 5th 407, 335 Cal. Rptr. 3d 404 (2025).

[7] Pub. Resources Code § 25545.6.

5. Community Benefit Agreements

ACP-California members support CBAs and agree that providing bounds on funding levels could help set expectations and streamline the process in furtherance of the intent of the Opt-In Certification Program. As proposed, however, we are concerned that the funding levels set forth in the proposed emergency regulations will become the starting point for negotiations and be ratcheted up over time. This would create a situation where the requirements for CBAs become a barrier to participating in the Opt-In Certification process. The rulemaking record should explicitly acknowledge that excessive requirements for CBAs will increase the cost of clean energy projects and result in higher costs for ratepayers. The rulemaking record should further acknowledge that CBA payments sit on top of development fees and property tax payments to local governments. For solar projects, the sunset of the longstanding property tax exclusion on December 31, 2026 (Rev. & Tax. Code § 73) will afford significant new revenue to local governments to fund community initiatives. The CBA language in the Opt-In Certification regulations should provide discretion for developers to enter into agreements that ensure funds are actually used in the communities where projects are located. For example, the proposed provision requiring the CEC to consider "the number of agreements" should not disfavor a CBA with community foundations as they are often in a better position than developers to assess the needs of a host community and have established channels and relationships by which to disburse funds.

To provide the predictability the CEC intends without creating a barrier to participation, ACP-California recommends the following refinements to proposed Section 1879.5:

- Treat the funding levels in Section 1879.5(c) as a safe harbor: agreements that meet or exceed them are deemed to satisfy Public Resources Code section 25545.10, while agreements below them may still satisfy the statute based on the totality of benefits provided.
- Reconsider the per-megawatt-hour metric for energy storage, which would require an 8-hour project to provide roughly twice the funding of a 4-hour project with the same capacity.
- Clarify that funding may be paid over time and conditioned on the start of construction or commercial operation, and that in-kind contributions and workforce commitments count toward the total.
- Allow confidential treatment of financial and commercial terms in agreements filed under Section 1879.5(b), consistent with the CEC's confidentiality procedures.

6. BESS Requirements

The CEC should remove the requirement for "worst-case" dispersion modeling and instead rely on empirical data from large-scale fire tests. "Worst-case" is a subjective standard that would not provide consistent or useful information to the CEC. It also risks creating significant confusion in the public record about the actual safety profile of BESS projects. We also recommend revising the setback requirement in Appendix B, subdivision (b)(1)(E)(i), which measures the distance from the nearest BESS to the property line of the nearest residential

receptor. While we understand that property boundaries may be a starting point for establishing whether sensitive receptors must be analyzed in the first place, the analysis of whether the project will potentially impact sensitive receptors should focus on the actual location of the sensitive receptors. In some cases, sensitive receptors may be located at a significant distance from an adjoining property line.

In addition, ACP-California supports the following recommendations provided by the California Energy Storage Alliance:

- Limit detailed safety-mechanism disclosures to the manufacturer and equipment ultimately selected for the project.
- Narrow failure-incident reporting to relevant thermal runaway or comparable safety events involving the same product, model, and battery chemistry.
- Allow confidential treatment of proprietary manufacturer and testing information.
- Limit required descriptions of corrective or preventive measures to information relevant to the proposed project's design and safety systems.

7. Site Control

As part of the application process, the proposed regulations would require "[w]ritten proof of site control evidencing sufficient real property rights to currently access, construct, and operate the proposed project site, gen-tie line, and all ancillary elements of the proposed project." A project that is located partially or wholly on state or federal lands will not be able to satisfy this requirement at the application phase. To remedy this issue, ACP-California recommends modifying the requirement to allow applicants to submit proof of a submitted application for access to state or federal land for the duration of the project life. Proposed Section 1877(h) already takes this approach: consistent with Public Resources Code section 25545.2, it accepts an applicant's affirmation and description of its real property rights as adequate evidence absent evidence to the contrary, and it allows projects on federal land to describe the status of their right-of-way applications. Appendix B should be conformed to Section 1877(h), and the federal-land provision in Section 1877(h)(1) should be extended to state lands and to gen-tie routes, where rights are often secured after an application is filed.

8. Confidentiality

The proposed regulations would provide that "[a]ll documents, except for copyright-protected records, placed in the record of proceedings shall be publicly available at the time the Staff Assessment is filed." This provision does not make reference to documents that are protected from public disclosure through the CEC's confidentiality procedures. ACP-California recommends making explicit reference to the CEC's application for confidential designation process and clarifying that any records that are subject to an exception from disclosure will not be made publicly available. The same clarification should apply to community benefits agreements, which proposed Section 1879.5(b) would require to be filed in unredacted form, and to information obtained through the investigatory authority in proposed Section 1878(d).

CONCLUSION

ACP-California appreciates the opportunity to comment on the workshop and the proposed amendments to the Opt-In Certification Program regulations. We urge the CEC to adopt the amendments that implement SB 254 and SB 283, defer the remaining proposals to a second track, and address the concerns identified above. We look forward to continuing to work with staff to improve the Opt-In Certification Program.

Respectfully submitted,

/s/

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