DOCKETED	
Docket Number:	26-OIR-04
Project Title:	Emergency Rulemaking Amending the Opt-In Regulations
TN #:	273513
Document Title:	Defenders of Wildlife and the Center for Biological Diversity Comments - Defenders of Wildlife and Center for Biological Diversity's Comments on CEC Emergency Rulemaking Amending the Opt-In Regulations
Description:	N/A
Filer:	System
Organization:	Defenders of Wildlife and the Center for Biological Diversity
Submitter Role:	Public
Submission Date:	11/10/2026 3:31:20 PM
Docketed Date:	11/10/2026

Comment Received From: Defenders of Wildlife and the Center for Biological Diversity
Submitted On: 11/10/2026
Docket Number: 26-OIR-04

Defenders of Wildlife and Center for Biological Diversity's Comments on CEC Emergency Rulemaking Amending the Opt-In Regulations

Additional submitted attachment is included below.

November 10, 2026

California Energy Commission
Docket Unit, MS-4
Docket No. 26-OIR-04
715 P Street
Sacramento, California 95814-5512

Delivered via email to: docket@energy.ca.gov

RE: Opt-In Certification Program Rulemaking and September 29, 2026 Draft Express Terms

Defenders of Wildlife (Defenders) and the Center for Biological Diversity (Center) respectfully submit these comments on the proposed rulemaking updates to the California Energy Commission's (Commission) Opt-In Certification Program contained in the September 29, 2026 draft Express Terms and presented at the November 2, 2026 Workshop. Defenders protects and restores America's wildlife at risk of extinction, advancing a vision of a future in which wildlife thrives, sustained by broad public support and a resilient network of healthy lands and waters and has 2.1 million members and supporters in the United States, 311,000 of whom reside in California. We employ science, public education and participation, media, legislative advocacy, litigation, and proactive on-the-ground solutions to prevent the extinction of species, associated loss of biological diversity, and habitat alteration and destruction. The Center focuses on protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.8 million members and supporters throughout the United States, including many members in California.

We strongly support the development of renewable energy production. A low-carbon energy future is critical for California's economy, communities, and environment. Achieving this future, and *how* we achieve it, is critical for protecting California's internationally treasured wildlife, landscapes, and diverse habitats. We believe transitioning to a renewable energy future need not exacerbate the ongoing extinction crisis by thoughtfully planning projects while protecting habitat critical to species.

Comments

We appreciate staff's efforts and collaboration with stakeholders to update and refine the Opt-In Certification Program and we offer the following comments.

Support Early Termination

We support the Commission's proposed amendments to section 1877.5(e), which would authorize earlier termination of Opt-In applications when significant barriers call into question whether a project can reasonably proceed to construction and operation. In particular, we support allowing the Commission to consider early termination where applicants lack necessary site control or entitlements, cannot secure grid interconnection, cannot demonstrate that their technology will function at the proposed scale, face bankruptcy proceedings, or encounter other significant impediments that make project development unlikely within a reasonable timeframe. The Opt-In Certification Program provides an expedited permitting pathway that requires substantial public resources to evaluate projects and their environmental impacts. We do not believe it is efficient or prudent, given limited state resources and staff capacity, to continue to process applications for projects that face fundamental barriers to development. Specifically, forcing the Commission to continue reviewing these applications can unnecessarily consume limited agency resources, impose burdens on reviewing agencies and the public, and divert attention from viable projects. We particularly support the proposed provision allowing termination before completion of the environmental document, rather than requiring the Commission to expend additional resources evaluating projects that are unlikely to proceed. The proposed requirement for Commission consideration at a public business meeting, together with consideration of project viability, potential remedies, and the costs of continued review, provides an appropriate framework for exercising this authority. We encourage the Commission to adopt these proposed amendments.

Copyrighted Documents Must Not Be Withheld

We are concerned with the proposed amendment to section 1880.5(b), which would exempt copyright-protected records from the requirement that documents comprising the administrative record be publicly available when the Staff Assessment is filed. While we recognize the Commission's obligation to comply with federal copyright law, the proposed language creates significant tension with the fundamental principles of public transparency, meaningful participation, and judicial review underlying the California

Environmental Quality Act (CEQA). Public Resources Code section 21167.6(e) requires the administrative record to include materials relevant to the agency's environmental analysis and decision-making, including studies, reports, and other evidence relied upon by the agency. The public must have a meaningful opportunity to examine and evaluate the information supporting the Commission's conclusions, particularly where those conclusions concern environmental impacts, public health and safety, biological resources, and the adequacy of mitigation measures. Allowing the Commission to rely upon copyrighted studies, technical analyses, or other documents without providing meaningful public access to those materials could prevent interested parties from independently evaluating the evidence, identifying errors, or submitting informed comments during the expedited Opt-In review process.

Federal copyright law does not impose an absolute prohibition on the disclosure or reproduction of copyrighted materials. Section 107 of the Copyright Act (17 U.S.C. § 107) recognizes the doctrine of fair use, which permits certain uses of copyrighted works for purposes including criticism, comment, scholarship, and research. Whether disclosure qualifies as fair use depends on the circumstances, including the public purpose of disclosure, the nature of the copyrighted work, the amount reproduced, and the potential effect on the market for the work. Providing access to technical materials for purposes of public participation in a governmental environmental review process presents substantial public-interest considerations that should be evaluated under this framework. Although fair use does not automatically authorize wholesale electronic distribution of every copyrighted document, the Commission should not presume that copyright protection categorically precludes public access.

Further, the Commission should distinguish between excluding copyrighted materials from electronic distribution and excluding them from public access altogether. Public Resources Code section 21186(g) provides an important statutory model for addressing this issue. That provision excuses certain copyrighted materials not prepared specifically for a project from electronic disclosure requirements but ***expressly requires*** the lead agency to identify locations where hard copies are available for public inspection. The proposed language in section 1880.5(b) contains neither this distinction nor a corresponding guarantee of public access. Copyright protection should not remove a document from the administrative record or eliminate the public's ability to inspect materials relied upon in environmental review. Moreover, documents prepared specifically for a proposed project should not be withheld merely because an applicant or consultant asserts copyright protection over the materials.

Therefore, we urge the Commission to revise section 1880.5(b) to eliminate the blanket exception for copyright-protected records and instead establish procedures that maximize public access consistent with federal copyright law. At a minimum, the Commission should require applicants to secure appropriate permissions or licenses for public disclosure of copyrighted materials submitted in support of their applications; evaluate whether fair use permits disclosure when such permissions are unavailable; and provide alternative means of public inspection where electronic distribution presents legitimate copyright concerns. Any decision to restrict access should be supported by a documented, case-specific legal justification, rather than the mere assertion that a document is copyrighted. Where copyrighted materials cannot lawfully be made available electronically, the Commission should maintain an accessible index identifying those materials and the locations where they can be inspected in hard copy, consistent with the approach established in Public Resources Code section 21186(g). The Commission should also ensure that materials essential to its environmental findings are accessible with sufficient time in the review process to permit meaningful public review and comment. Public access to the evidence underlying the Commission's environmental analysis is fundamental to informed public participation and the integrity of the CEQA process.

Oppose Deletion of Section 1880.5(e) - Requests to Modify the Administrative Record

We oppose the proposed deletion of Section 1880.5(e), which currently requires the Commission to consider requests to modify the administrative record that have not been acted upon by the executive director and requires the executive director to provide a written explanation for failing to act. This provision establishes an important safeguard to ensure the completeness and integrity of the administrative record and provides the public with a meaningful opportunity to raise concerns about omitted or improperly included documents before the Commission approves a project.

The proposed deletion is particularly concerning when compared with the Commission's traditional power plant licensing process under the Warren-Alquist Act. In those proceedings, Title 20, California Code of Regulations, section 1212(b)(2) expressly authorizes parties to challenge the inclusion of evidence in the hearing record and requires the presiding member to resolve evidentiary disputes based on fairness, hearing efficiency, and adequacy of the record. Section 1716(g) also provides for committee review of unresolved information requests, while Section 1727(b) authorizes the Commission or

assigned committee to reopen the evidentiary record when additional evidence is warranted. These provisions demonstrate the importance of independent review of disputes concerning the evidence supporting Commission decisions.

In an effort to create a more efficient and faster process, the Opt-In Certification Program does not provide the same formal evidentiary hearing process, including opportunities for cross-examination and evidentiary objections. Consequently, the existing requirement that unresolved requests to modify the record be considered by the full Commission is particularly important. Eliminating this requirement could leave members of the public without an express mechanism to obtain Commission consideration of disputes concerning the completeness of the record before project approval. It would also remove the requirement that the executive director explain why a request was not acted upon, further reducing transparency and accountability.

These concerns are heightened by the expedited nature of the Opt-In process and the proposed changes to Section 1880.5 that would exclude copyright-protected materials from the requirement for public availability. Ensuring that the administrative record includes all relevant materials and that disputes over its completeness are resolved transparently is essential to meaningful public participation and effective judicial review.

Therefore, we urge the Commission to retain section 1880.5(e). At a minimum, the regulations should preserve a requirement that unresolved requests to modify the administrative record be presented to the Commission before project approval, together with a written explanation of the executive director's reasons for declining to make the requested modifications. This modest procedural safeguard would not require the Commission to delay project certification but would help ensure that decisions are based on a complete and transparent administrative record.

Support Requiring Evidence of Site Control – Appendix B (4)(i)

The Opt-In Certification Program provides an expedited permitting pathway that requires substantial public resources to evaluate projects and their environmental impacts. Given limited state resources and staff capacity, we do not believe it is efficient or prudent to process applications for projects that lack evidence of the fundamental real property rights necessary to access, construct, and operate the proposed project, including gen-tie lines and all ancillary facilities. Absent site control, a project is fundamentally speculative, as there is no assurance that the applicant can secure the property interests required to develop the project as proposed. Requiring applicants to demonstrate site control before

entering the Opt-In process would help ensure that scarce public resources are directed toward projects with a credible and achievable path to implementation.

Conclusion

We thank the Commission for the opportunity to provide input on the proposed updates to the Opt-In Certification Program and look forward to actively participating in the ongoing updates and refinement of the Program. Please contact Pamela Flick at pflick@defenders.org, Lisa Belenky at lbelenky@biologicaldiversity.org, or Kim Delfino at kdelfino@earth-advocacy.com with any questions.

Sincerely,

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