

DOCKETED

Docket Number:	16-RPS-01
Project Title:	Developing Guidelines for the 50 Percent Renewables Portfolio Standard
TN #:	210586
Document Title:	CEQA assessment regarding proposed resolutions to establish process for surplus retired RECs and to update RPS appeal process
Description:	Memo
Filer:	Gabriel Herrera
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	3/1/2016 5:06:16 PM
Docketed Date:	3/2/2016

Memorandum

To: California Energy Commission
Docket No. 16-RPS-01

Date: February 26, 2016

From: Gabe Herrera, Staff Counsel
Office of Chief Counsel
California Energy Commission
1516 Ninth Street
Sacramento CA 95814-5512

Subject: **Resolutions Establishing Process for Surplus Retired RECs and Updating Appeal Process**

Summary

This memo addresses the application of the California Environmental Quality Act (CEQA) to the California Energy Commission's (Commission) adoption of two separate resolutions related to the Renewables Portfolio Standard (RPS).

The first resolution establishes a process to allow local publicly owned electric utilities (POUs) to move surplus retired renewable energy credits (RECs) reported for one specified RPS compliance period to the next compliance period. The second resolution updates the appeal process in Section VII.C. of the *Renewables Portfolio Standard Eligibility Guidebook, Eighth Edition (RPS Guidebook)*, to address recent amendments to the Commission's complaint and investigation process in Title 20, California Code of Regulations, section 1230, et seq. The resolutions modify existing requirements and procedures in the *RPS Guidebook*. These modifications are needed now for the Commission to efficiently and effectively implement the RPS, but will be incorporated into the next edition of the *RPS Guidebook* when it is revised to implement changes in law under Senate Bill 350 (Stats. 2015, ch. 547).

Based on a review of CEQA and the pertinent legal authority, I have concluded that the Commission's adoption of the proposed resolutions is exempt from CEQA, either because the action is not a "project" under CEQA, or because the action is exempt under what is commonly referred to as the "common sense" exception to CEQA.

Background

The *RPS Guidebook* describes the eligibility requirements and administrative procedures for certifying electrical generating facilities as eligible renewable energy resources for California's RPS. The *RPS Guidebook* identifies the statutory requirements specific to each type of RPS-eligible renewable energy resource (biomass, wind, solar, geothermal, hydroelectric, land fill gas, etc.) and administrative processes for certifying facilities for the RPS, and includes application forms and instructions for submitting needed information to verify eligibility. The *RPS Guidebook* also describes how the Commission tracks and verifies electricity generation

and procurement for RPS compliance, and includes the necessary reporting forms and instructions for this purpose.

Regarding electricity generation, the *RPS Guidebook* includes requirements and processes for using the Western Renewable Energy Generation Information System (WREGIS) to verify the generation and procurement of electricity from an RPS-certified facility to assess compliance with the RPS. Generation from a certified facility is tracked through WREGIS via the issuance of an electronic WREGIS certificate, also known as a renewable energy credit or REC, which represents one megawatt-hour of electricity generation from an RPS-certified facility. When a POU procures electricity from an RPS-certified facility, RECs associated with the electricity generation are transferred into one of the POU's WREGIS accounts. The POU may then retire RECs from that WREGIS account to verify its procurement to satisfy RPS procurement requirements. A POU may request that WREGIS withdraw its previously retired RECs within 12 months of the REC retirement date, consistent with WREGIS Operating Rules. To verify compliance with RPS requirements, the Commission requires a POU to submit annual reports by July 1 of each year for the retirement of RECs made for the previous calendar year.

Regarding RPS certification, the *RPS Guidebook* establishes a two-level appeal process for challenging the denial or revocation of an application for certification. This appeal process is specified in Section VII.C of the *RPS Guidebook* and requires an applicant to show that factors other than those described in the *RPS Guidebook* were applied by Commission staff in denying or revoking RPS certification. The first level of appeal under Section VII.C is for the applicant to file a petition for reconsideration with the Executive Director. If the applicant disagrees with the Executive Director's decision on the petition, the applicant may pursue the second level of appeal by filing a letter of appeal with the Commission. Section VII.C requires the letter of appeal to be processed as a request for investigation pursuant to the Commission's regulations for complaints and investigations in California Code of Regulations, title 20, § 1230 et seq.

Purpose

The purpose of the first resolution is to establish a process to allow POUs to move surplus retired RECs reported for one RPS compliance period to the next RPS compliance period. Although a POU may request that WREGIS withdraw its previously retired RECs within 12 months of the REC retirement date, thereby facilitating use of the RECs for a different compliance period, there is no process in place to allow a POU to withdraw retired RECs beyond this 12-month period. There could be circumstances that justify a need to withdraw previously retired RECs. For example, a POU may have mistakenly retired RECs and not discovered the error until after the 12-month period to withdraw RECs in WREGIS had passed, or miscalculated its retail sales numbers, resulting in more RECs (surplus RECs) being retired than are needed to satisfy the POU's RPS procurement requirements. In these situations, the POU cannot move the surplus retired RECs forward and use them for the next RPS compliance because of the Commission's restrictions, and the RECs are effectively stranded. The first resolution addresses this issue by establishing a process that would allow the Executive Director or his designee to approve a POU's request to move surplus retired RECs from one compliance period to the next, if certain criteria are met.

The purpose of the second resolution is to update the appeal process in Section VII.C of the *RPS Guidebook* to address recent amendments to the Commission’s complaint and investigation process in California Code of Regulations, title 20, § 1230 et seq., which is referenced in the appeal process. The amendments to the Commission’s complaint and investigation process took effect on January 1, 2016, and were developed as part of a broader rulemaking initiated under the Commission’s Order Instituting Informational Proceeding No. 10-1201-20. The amendments to the complaint and investigation process clarify the actions the Executive Director may take in response to a request for investigation as well as the actions the Chair may take in responding to an appeal from the Executive Director’s dismissal of a request for investigation. The second resolution updates the appeal process in Section VII.C of the *RPS Guidebook* to align the appeal process with the amendments to the Commission’s complaint and investigation process.

CEQA

CEQA (Pub. Resources Code, § 21000 et seq.; see also CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq.) requires state agencies to consider the environmental impacts of their discretionary decisions. CEQA generally applies to “discretionary projects proposed to be carried out or approved by public agencies...” (Pub. Resource Code, § 21080(a).) However, an activity is not subject to CEQA if 1) the activity is not a “project” as defined in CEQA or 2) the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment. (Cal. Code Regs., tit. 14, §§ 15060(c) and 15061(b)(3).) The CEQA Guidelines define a “project” to mean “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...” (Cal. Code Regs., tit. 14, § 15378(a).) The CEQA Guidelines list activities that may be considered a “project,” including approvals by public agencies for public works construction or related activities, contracts, grants, subsidiaries, loans or other forms of assistance, or leases, permits, licenses, certificates, or other entitlements. (Cal. Code Regs., tit. 14, § 15378(a)(1) - (3).) The CEQA Guidelines also list activities that do not fall within the meaning of “project” and thus are not subject to CEQA. These activities include a public agency’s “[c]ontinuing administrative or maintenance activities such as . . . general policy and procedure making . . .” and its “[o]rganizational or administrative activities . . . that will not result in direct or indirect physical changes in the environment.” (Cal. Code Regs., tit. 14, § 15378(b)(2) and (5).)

Adoption of Proposed Resolutions

The activity in this case is the Commission’s adoption of two resolutions that would modify existing requirements and procedures in the *RPS Guidebook* as discussed above. The modifications proposed by both resolutions are administrative in nature since the first resolution would merely establish a process to account for the use of surplus retired RECs from one RPS compliance period to the next compliance period, and the second resolution would merely update the appeal process for RPS certification to reflect amendments to the Commission’s complaint and investigation process, which is referenced in the appeal process. As such, the Commission’s adoption of the proposed resolutions should be characterized as a continuing administrative activity related to general policy and procedure making, and

thereby excluded from the definition of “project” under section 15378(b)(2) and (5) of the CEQA Guidelines.

Assuming arguendo, however, that the adoption of the proposed resolutions does in fact constitute a “project” under CEQA, the Commission’s action is nevertheless exempt under section 15061(b)(3) of the CEQA Guidelines. By law, certain projects are exempt from CEQA. These include projects that have been granted an exemption by statute, projects that fall within a categorical exemption established in the CEQA Guidelines, and activities that fall within the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment. (Cal. Code Regs., tit. 14, § 15061(b)(1) - (3).) Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is exempt from CEQA. (Cal. Code Regs., tit. 14, § 15061(b)(3).)

In applying the latter, which is commonly referred to as the “common sense” exception, courts have held that the activity in question need not have a direct effect on the environment, but it must be a necessary or essential step in a chain of events that will culminate in a physical impact on the environment. In these cases, courts have looked to the causal link between the governmental action and the alleged environmental impact in determining whether the governmental action is a project subject to CEQA. If the governmental action did not create the need for the activity causing the environmental impact, courts have found the causal link missing, and concluded the governmental action is not an essential step culminating in action that may affect the environment.

In this case the proposed resolutions pertain to the RPS, which POUs must meet by procuring qualifying electricity products from electrical generation facilities certified for the RPS. The continued operation or development of these facilities could have environmental impacts. However, the causal link between the Commission’s adoption of the proposed resolutions and the environmental effects associated with these electrical generation facilities is missing. Neither the *RPS Guidebook* nor the proposed resolutions create the need for new electrical generation facilities or the continued operation of existing electrical generation facilities. The need for such facilities was created by the state legislature when it enacted the RPS statute and the obligations this law, and other similar laws, place on POUs and other utilities and market participants to procure increasing amounts of electricity from renewable energy resources. Moreover, the development and continued operation of these electrical generation facilities is not controlled by the Commission’s actions in adopting the proposed resolutions, but by factors outside the Commission’s control, such as financing, the availability of procurement contracts, and the requirements and conditions imposed by governmental entities with permitting authority over the electrical generation facilities.

For these reasons, the Commission’s adoption of the proposed resolutions is exempt from CEQA.

Follow Up

If the Commission adopts the proposed resolutions, the Office of Chief Counsel will prepare and file a Notice of Exemption with the Office of Planning and Research pursuant to sections 15061 (d) and 15062 of the CEQA Guidelines.