

## DOCKETED

<b>Docket Number:</b>	16-RPS-01
<b>Project Title:</b>	Developing Guidelines for the 50 Percent Renewables Portfolio Standard
<b>TN #:</b>	215524
<b>Document Title:</b>	Revisions to Renewables Portfolio Standard Eligibility Guidebook, Ninth Edition
<b>Description:</b>	Memorandum
<b>Filer:</b>	Darlene Burgess
<b>Organization:</b>	California Energy Commission
<b>Submitter Role:</b>	Commission Staff
<b>Submission Date:</b>	1/23/2017 3:58:29 PM
<b>Docketed Date:</b>	1/23/2017

# Memorandum

To: Commr. David Hochschild  
Renewables Lead Commissioner

Date: January 20, 2017

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

Subject: **Docket No. 16-RPS-01**  
**Revisions to Renewables Portfolio Standard Eligibility Guidebook, Ninth Edition**

## Summary

This memo addresses the application of the California Environmental Quality Act (“CEQA”) to the Commission’s adoption of proposed revisions to the *Renewables Portfolio Standard Eligibility Guidebook* (“Guidebook”), as reflected in the Ninth Edition. The Guidebook is being revised to address changes in law as a result of Senate Bill 350 (Stats. 2015, ch. 547) and Senate Bill 1393 (Stats. 2016, ch. 677), to incorporate requirements and criteria previously adopted by the Commission in 2016 under Resolution Nos. 16-0309-04a and 16-0309-04b, clarify various requirements and processes related to RPS certification and verification, and transition to the RPS Online System to streamline RPS certification and annual reporting.

Based on a review of CEQA and the pertinent legal authority, I have concluded that the Commission’s adoption of the proposed Guidebook revisions 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 Guidebook describes the eligibility requirements and administrative procedures for certifying electrical generating facilities as eligible renewable energy resources for California’s RPS in accordance with Public Utilities Code, section 399.11 et seq., and Public Resources Code, section 25740 et seq. The Guidebook identifies the statutory requirements specific to each type of RPS-eligible renewable energy resource (biomass, wind, solar, geothermal, hydroelectric, landfill, gas, etc.) and administrative procedures for certifying facilities for the RPS. The Guidebook also describes how the Commission tracks and verifies compliance with the RPS and includes procedures for this purpose.

The Commission first adopted the Guidebook in April 2004 and has since revised it multiple times to implement changes in law and to clarify the requirements and process for certifying facilities and verifying the generation and procurement from such facilities. These Guidebook revisions were adopted pursuant to Public Resources Code, section 25747 (a).

In summary, the proposed Guidebook revisions will do the following:

- Implement changes in law under Senate Bill 350, which increased the renewable energy procurement target for the RPS to 50 percent by 2030 and amended the RPS eligibility requirements for a facility engaged in the combustion of municipal solid waste;
- Implement changes in law under Senate Bill 1393, which further clarified the eligibility requirements for a facility engaged in the combustion of municipal solid waste;
- Incorporate Resolution Nos. 16-0309-04a and 16-0309-04b, which were adopted by the Commission in March 2016 to (1) update the Appeals section of the Guidebook consistent with amendments to the Commission’s regulations for complaints and investigations in California Code of Regulations, title 20, section 1230 et seq., and (2) establish a process for local publicly owned electric utilities (POUs) to request to move surplus RECs reported for a specified compliance period to the following compliance period;
- Clarify the eligibility requirements for i) hydroelectric generation facilities operated as part of a water supply or conveyance system, ii) biomethane delivered using a fuel container, iii) aggregated units, iv) energy storage, and v) for existing facilities recertified under the Eight Edition Guidebook, the de minimis allowance for non-renewable fuel use;
- Revise and add new procedural requirements to address the launch of the RPS Online System, which will replace the RPS certification application, supplemental certification forms, and verification reporting forms, and change the process for submitting RPS certification applications, requests for time extensions for certification applications, and the annual facility and load-serving entity verification reports. These changes include revisions to the deadline and submission date requirements for applications, reports, and supplemental information using the RPS Online System;
- Revise and clarify other administrative and procedural requirements, including i) requirements on the use of the Interim Tracking System, which is recast as a process for making Western Renewable Energy Generation Information System (WREGIS) adjustments and describes how the WREGIS adjustment process may be used in limited circumstances using the RPS Online System, ii) the eligibility date and deadline for submitting a certification application, iii) the criteria and deadline for amending an application for certification, iv) the reporting requirements for biomethane delivered through common carrier pipelines and functionally dedicated pipelines, v) the criteria and process for creating retroactive RECs in WREGIS and for reporting these RECs, vi) the WREGIS registration requirement for certification applications, and vii) the description of RPS certification types and facility certification statuses;
- Clarify the definitions of select terms in the Glossary, including i) “biomethane” so it is consistent with Public Resources Code, section 25741, and Public Utilities Code, section 399.12.6, and ii) “retail sales” and “Western Electricity Coordinating Counsel” so they are consistent with the Commission’s regulations in California Code of Regulations, title 20, section 3201;
- Remove topics or sections that are no longer applicable from the main body of the Guidebook and add them to the Guidebook’s Archive Appendix for reference only; and
- Make other minor, non-substantive edits and corrections to the text in various sections of the Guidebook.

## CEQA

CEQA (Pub. Resources Code, § 21000 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. Resources Code, § 21080(a).) The CEQA Guidelines (Cal. Code Regs., title 14) 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....” (CEQA Guidelines, § 15378(a).) The CEQA Guidelines lists 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. (CEQA Guidelines, § 15378(a)(1) - (3).) The CEQA Guidelines also list several activities that do not fall within the meaning of the term “project” and thus are not subject to CEQA, including a public agency’s “[c]ontinuing administrative or maintenance activities such as ... general policy and procedure making....” (CEQA Guidelines, § 15378(b)(2).)

### Adoption of Guidebook Revisions

The activity in this case is the Commission’s adoption of the proposed Guidebook revisions, as set forth in the Ninth Edition. As explained above, the proposed revisions implement changes in law under Senate Bill 350 and Senate Bill 1393 and revise and clarify existing Guidebook requirements and procedures previously adopted by the Commission. Although the proposed Guidebook revisions do not, in and of themselves, approve any specific electrical generating facility for the RPS, they do commit the Commission to a specific course of action with respect to future applications for RPS certification, because they authorize a facility’s certification based on the revised and clarified requirements and procedures in the proposed Guidebook revisions.

However, some of the proposed Guidebook revisions are based on requirements in statute such as the requirements under Senate Bill 350 and Senate Bill 1393. As such, the Commission’s approval of proposed Guidebook revisions for these requirements should not be considered the approval of a discretionary project under CEQA, because the requirements in statute must be implemented and, therefore, the Commission has no discretion but to implement the requirements. This is consistent with court decisions that have held the adoption of guidelines that provide procedural requirements for the implementation of laws are not projects under CEQA.

Similarly, the Commission’s approval of proposed Guidebook revisions that incorporate requirements and procedures previously adopted by the Commission in 2016 under Resolution Nos. 16-0309-04a and 16-0309-04b should not be considered approval of a discretionary project under CEQA, because these requirements and procedures have already been approved and adopted by the Commission. In this case, the Commission’s approval of the Guidebook revisions is merely adding these requirements and procedures to the

Guidebook, so that all certification and verification requirements and procedures for the RPS are compiled in one document.

The remaining proposed revisions to the Guidebook clarify existing eligibility requirements, revise and clarify administrative and procedural requirements, clarify the definitions of select terms in the Glossary, and make other minor, non-substantive edits and corrections to the Guidebook text. Of these revisions, the most significant are the changes necessary to transition to the new RPS Online System, which requires new procedures in order to be implemented. All of these proposed Guidebook revisions are administrative in nature. As such, the Commission's approval of the proposed revisions should be characterized as a continuing administrative or maintenance activity related to general policy and procedure making, and thereby excluded from the definition of a "project" under CEQA Guidelines, section 15378(b)(2).

For these reasons, the adoption of the proposed Guidebook revisions should not be considered a "project" subject to CEQA. Assuming arguendo, however, that the adoption of the proposed revisions does in fact constitute a "project" under CEQA, the Commission's action is nevertheless exempt under CEQA Guidelines, section 15061(b)(3). 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. (CEQA Guidelines, § 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. (CEQA Guidelines, § 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.

Although it is true that there could be environmental impacts associated with the development or continued operation of electrical generating facilities for the RPS, the causal link between the Commission's adoption of the proposed Guidebook revisions and the environmental effects associated with these facilities is missing. The adoption of the proposed Guidebook revisions will not create the need for new electrical generating facilities or the continued operation of existing generating 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 utilities and other market participants to procure increasing amounts of electricity from renewable energy resources. Moreover, the development and continued operation of these facilities is not controlled by the Commission's actions in

adopting the proposed Guidebook revisions, 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 facilities.

For these reasons, the Commission's adoption of the proposed Guidebook revisions is exempt from CEQA.

#### Follow Up

The legal office will file this memo as part of the record in the RPS proceeding, Docket No. 16-RPS-01, to support the Commission's action if it chooses to adopt the proposed Guidebook revisions.

Additionally, if the proposed Guidebook revisions are adopted, the legal office will prepare and file a Notice of Exemption with the Office Planning and Research pursuant to Public Resources Code, section 21108 (b) and CEQA Guidelines, sections 15061 (d) and 15062.