State Of California | The Resources Agency of California

Memorandum

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Subject : **CEQA Assessment of Emerging Renewable Program Guidelines; Docket No. 02-REN-1038**

Summary

This memo addresses the application of the California Environmental Quality Act ("CEQA") to the Commission's adoption of revisions to the *Emerging Renewables Program Guidebook*. This *Guidebook* sets forth the guidelines governing the Commission's Emerging Renewables Program (ERP). The *Guidebook* was initially adopted by the Commission in February 2003, and subsequently revised on several occasions.

The *Guidebook* is being revised again to adopt guideline changes for the following purposes: 1) to maintain the current rebate levels for eligible solar photovoltaic, fuel cell, and solar thermal electric systems, and increase the rebate level for eligible wind systems; 2) to extend the reservation period for standard rebate reservations from 6 months to 9 months; 3) to decrease the rebate reduction associated with the receipt of funding from other government or utility sources; 4) to adjust the capacity factor used for calculating the amount of funding reserved for applications under the Pilot Performance-Based Incentive Program element; 5) to require the use of energy consultants certified by the California Association of Building Energy Consultants to verify compliance with the energy efficiency standards required for affordable housing projects to qualify for higher rebates; 6) to simplify the rebate calculations for system modifications and additions; and 7) to clarify other existing requirements, including requirements dealing with time extensions for 18-month rebate reservations for schools and systems installed on new construction, and dealing with the suspension of the Solar Schools Program element.

Based on a review of CEQA, the CEQA Guidelines, and pertinent legal authority, it is my opinion that the adoption of revisions to the ERP guidelines 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 ERP is one of several programs within the umbrella of the Commission's Renewable Energy Program. The ERP was created to help develop a self-sustaining market for renewable energy systems that supply on-site electricity needs across California. The ERP provides funding to offset the cost of purchasing and installing new renewable energy systems that use eligible emerging technologies. These emerging technologies include solar photovoltaic (PV), solar thermal electric, fuel cells using renewable fuels, and small wind turbines less than 50 kilowatts of rated capacity. The ERP provides funding in the form of rebates that decline over time and are based on the system size (up to 30 kilowatts), the emerging technology used, and the type of installation. These rebates are paid in lump sum once a renewable energy system is installed and operational.

In addition, the ERP provides funding in the form of production incentives under a pilot program known as the Performance-Based Incentive Program (PBIP). Incentives under the PBIP are paid at a fixed cent/kilowatt-hour incentive level based on a system's actual generation over a period of three years. Participation in the PBIP is limited to systems using solar photovoltaic technology, although systems are not constrained by the 30 kilowatt size limit for ERP rebates. The amount of funding available for this pilot program is limited to $10 million dollars.

The ERP was developed pursuant to Senate Bill 1038 (SB 1038, Stats. 2002, Ch. 515, §§ 15 & 16), as codified in Public Utilities Code sections 381, 383.5, and 445 and amended by Senate Bill 183 (SB 183, Stats. 2003, Ch. 666, §§ 1 & 2) in Public Resources Code sections 25740 – 25751.

The ERP guidelines are set forth in the *Emerging Renewables Program Guidebook*, and were initially adopted by the Commission on February 19, 2003, pursuant to Public Utilities Code section 383.5(h)(1), which directed the Commission to adopt guidelines governing the implementation of its Renewable Energy Program. These guidelines are statutorily exempt from the formal rulemaking requirements of the Administrative Procedures Act. (Pub. Util. Code § 383.5(h)(1).) The guidelines were subsequently revised pursuant to this authority and Public Resources Code section 25747(a) on December 17, 2003, May 19, 2004, June 30, 2004, January 19, 2005, and June 22, 2005. The guidelines describe eligible renewable energy systems, eligible applicants, funding limitations, rebate and incentive levels, and the administrative procedures to apply for and receive funding from the ERP. The guidelines also include the necessary application forms and instructions to apply for a rebate or incentive and describe how the Commission will review, process and approve applications for rebates and incentives.

The guidelines for the ERP are being revised for the following purposes: 1) to maintain the current rebate levels for eligible PV, fuel cell, and solar thermal electric systems and increase the rebate level for eligible wind systems; 2) to extend the reservation period offered for standard rebate reservations from 6 months to 9 months; 3) to decrease the rebate reduction associated with the receipt of funding from other government or utility sources; 4) to adjust the capacity factor used for calculating the amount of funding reserved for applicants under the PBIP; 5) to require the use of energy consultants certified by the California Association of Building Energy Consultants to verify compliance with the energy efficiency standards required for affordable housing projects to qualify for higher rebates; 6) to simplify the rebate calculations for system modifications and additions; and 7) to clarify other existing requirements, including requirements dealing with time extensions for 18-month rebate reservations for schools and systems installed on new construction, and dealing with the suspension of the Solar Schools Program element.

Revisions to Rebate Levels

Under the current ERP guidelines the rebate levels for all technology types are scheduled to be reduced by $0.20/watt every six month on January 1 and July 1, unless the Commission determines otherwise. As applied to eligible PV systems, this reduction would result in the rebate level dropping from $2.80/Watt to $2.60/Watt effective January 1, 2006. The proposed guideline revisions would hold the rebate level constant so that eligible PV systems would qualify for rebates at the $2.80/Watt level until at least June 30, 2006.

Similarly, the proposed revisions would hold the rebate level constant for eligible solar thermal electric systems and fuel cells using renewable fuels, so that eligible systems would qualify for rebates at the $3.20/Watt level until at least June 30, 2006.

In addition, the proposed revisions would increase the rebate level for eligible wind systems from $1.70/Watt to $2.50/Watt for the first 7.5 kilowatts of a system and from $0.70/Watt to $1.50/Watt for increments of a system above 7.5 kilowatts and below 30 kilowatts in size.

These rebate revisions are being proposed to stimulate participation in the ERP and to quell a steady decline in the number of rebate applications submitted to the ERP in light of rising equipment costs and worldwide equipment shortage, particularly with respect to PV modules. The number of rebate applications for PV systems has steadily decreased over the last two years as a result of declining rebate levels and increasing systems costs. The total number of ERP-funded systems installed during 2004 was 4,615 systems, the vast majority of which were PV systems. This is approximately 25% more than the 3,443 ERP-funded systems installed in 2005.[1] During this two-year period the average system cost to purchase and install PV systems increased from a net cost (actual less ERP rebates) from $5.75/Watt in 2004 to $5.94/Watt in 2005.[2]

[1] Based on Staff Analysis as presented in "Recommended ERP Guidebook Changes for Consideration, Sixth Edition," dated November 9, 2005. Data reflects systems installed as of November 8, 2005.

[2] These averages exclude PV systems installed under the Solar Schools Program element. Systems installed under the Solar Schools Program element qualify for higher rebates as described later in this memo.

The total number of ERP-funded wind systems installed over the last several years has declined more significantly. The total number of wind systems installed in 2003 was 44. This number dropped to 17 in 2004 and only 5 systems were installed in 2005.[3] This reflects a reduction of approximately 70% in the number of ERP-funded wind systems installed over the last two years.

No fuel cell or solar thermal electric systems have been funded by ERP since its inception in 2003.

Extend Standard Reservation Period from 6 Months to 9 Months.

Under the current ERP guidelines applicants may apply for a rebate reservation in advance of installing their renewable energy system. The rebate reservation identifies the amount of ERP funding reserved for an applicant's renewable energy system and the period of time during which these funds are reserved. Applicants must install their systems and apply for a rebate payment within the reservation period or the reservation is automatically cancelled.

The current reservation period for standard rebate reservations is 6 months from the date the rebate reservation is issued.[4] The proposed revisions to the ERP guidelines would change the reservation period for standard rebates from 6 months to 9 months.

The ERP originally provided a 9-month reservation period when it was established in 2003. However, the reservation period was changed to 6 months in July 2004 in an effort to discourage applicants from applying for ERP reservations too soon and tying up funds before the applicants were ready to install their systems. However, it is becoming increasingly more difficult to install systems within the 6-month reservation period, because of delays associated with the worldwide demand and shortages of PV modules. To address this issue the standard rebate reservation is being extended to 9 months. In addition, applicants with active 6-month rebate reservations will have their reservations automatically extended by an additional three months.

Rebate Reduction Associated With Funding from Other Sources

Under the ERP guidelines, incentives received from another state agency, the federal government, or a utility that lower the cost of a renewable energy system must be considered in determining the amount of an ERP rebate. The ERP guidelines currently require that 50% of the incentives received or expected from these other sources be subtracted from the rebate amount the applicant is otherwise eligible for.[5] For example, if the applicant receives $10,000 under a federal grant for the installation of a PV system, the applicant's total ERP rebate is reduce by $5,000.

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[3] Reflects installations completed as of October 2005.

[4] Rebate reservation for systems installed on new construction and schools under the Solar Schools Program element qualify for rebate reservations of up to 18 months.

[5] State and federal tax credits are not considered incentives for purposes of rebate reduction under the ERP.

The proposed guideline revisions would change the level of rebate reduction from 50% to 5% to encourage applicants to seek funding from other sources whenever possible and thereby reduce system costs.

Adjustment of Capacity Factor for Pilot Performance-Based Incentive Program

Under the current ERP guidelines the amount of funds reserved and available for production incentives under the PBIP is based in part on the generating capacity of an eligible PV system, which is assumed to have a capacity factor of 30%. This default capacity factor was purposely set high to ensure that sufficient PBIP funds were reserved for a system and thereby available to make the requisite incentive payments over the course of the three-year payment period.

On average, however, fixed PV systems, which do not utilize equipment to track the sun's movement and maximize the recovery of solar energy, have a capacity factor of only 15%.[6] As a result of the disparity between the actual and assumed capacity, excessive funds are being reserved for fixed PV systems under the PBIP. The proposed guidelines revisions would adjust the assumed capacity factor for fixed PV systems from 30% to 20% and thereby free up funding for other systems under the PBIP. The capacity factor for PV systems that utilize tracking equipment will remain at 30% under the proposed guideline revisions.

Use of CABEC-Certified Energy Consultants for Affordable Housing Projects

Under the current ERP guidelines eligible renewable energy systems installed on affordable housing projects may qualify for a rebate that is 25% higher than the standard rebate level. In order to qualify for this higher rebate the applicant must show that the system is being installed on a residential unit within an affordable housing project and that the residential unit is at least 10 percent more energy efficient than the current Title 24 standards or has or will take measures to reduce the unit's energy use by at least 10% as calculated pursuant to Title 24 compliance models. The current guidelines, however, do not specify how this showing should be made or by whom. As a result, it is possible for the energy efficiency calculations to be performed by any individual, whether or not that individual has had any formal training or proven their competence.

The proposed guideline revisions would require the energy efficiency calculations be performed by an individual certified by the California Association of Building Energy Consultant Consultants (CABEC) as a Certified Energy Plans Examiner. A list of Certified Energy Plans Examiners is provided on the Commission's website. This list identifies the names of individuals who have satisfactorily completed a voluntary certification program in which they have demonstrated a broad understanding of how to prepare and review building plans.

[6] Average as reported by ERP staff.

Simplify Rebate Calculations for System Modifications and Additions

Under the current ERP guidelines applicants with approved rebate reservations may modify or add to their renewable energy systems before requesting a rebate payment, but are subject to a rebate reduction under certain circumstances. If the generating capacity of the system is increased the rebate amount for entire system is recalculated based on the applicable rebate level in place at the time notice of the modification is provided to the Commission. If there has been a change in the rebate level at the time this notice is provided, the applicant's overall rebate amount could be reduced. The proposed guideline revisions would simplify the rebate calculation in these circumstances, so that only the rebate corresponding to the incremental increase in system capacity would be calculated based on the rebate level in place at the time notice of the modification is provided.

Clarification to Various Existing Requirements

In addition to the proposed revisions discussed above, the guidelines are being revised to clarify various existing requirements, including the requirements dealing with time extensions for 18-month rebate reservations for schools and systems installed on new construction, and dealing with the suspension of the Solar Schools Program element.

Under the current ERP guidelines no applicant with a standard or non-standard rebate reservation may qualify for a time extension. However, applicants that were issued rebate reservations under prior versions of the ERP guidelines may apply for time extensions as permitted under the ERP guidelines in place at the time they submitted their rebate applications. The proposed guideline revisions clarify this point for applicants that were issued non-standard 18-month rebate reservations under the Solar Schools Program element or for new construction projects.

The proposed guideline revisions also clarify how the Solar Schools Program element is being suspended. Under the Solar Schools Program element of the ERP, public schools are eligible to receive higher rebates for the installation of eligible solar PV systems. These higher rebates are funded in part through an agreement with the California Power Authority; Interagency Agreement No. R500-02-006. In July of 2005 the Commission suspended the Solar Schools Program element for all new applications, because all of the funding available under Interagency Agreement R500-02-006 had been reserved for qualifying schools. The suspension was effective July 1, 2005, with the Commission's adoption of ERP guideline revisions on June 22, 2005. Those guidelines revisions, however, did not address funding that may become available under Interagency Agreement R500-02-006 as a result of cancelled rebate reservations to previously approved schools.

The proposed guideline revisions clarify that funds from cancelled rebate reservations under the Solar Schools Program element will be available for rebates to eligible schools that submitted rebate applications prior to the July 1, 2005, suspension date.

CEQA

CEQA applies to governmental action, which may involve 1) activities directly undertaken by a governmental agency, 2) activities financed in whole or in part by a governmental agency, or 3) private activities which require approval from a governmental agency. (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15002.) To determine whether a proposed governmental action is subject to environmental review under CEQA, an agency has to make several threshold inquiries. The results of these inquires will determine whether the governmental action is exempt from CEQA or whether the agency must prepare an initial study and eventually a negative declaration or environmental impact report (EIR).

The first inquiry is whether the agency is contemplating an "approval" of action, policy, undertaking, or private application for entitlement. If the contemplated action would not require the agency's "approval" to go forward, then CEQA would not apply. The second inquiry is whether the subject matter of the action constitutes a "project" subject to CEQA . If the subject matter is not a "project," then no further review under CEQA is required. If an agency action appears to involve "approval" of a "project," the third inquiry is whether the project is nevertheless exempt from CEQA review, either by statute or by a categorical exemption in the CEQA Guidelines. (Guide to the California Environmental Quality Act, pg. 57.) If the project is exempt from CEQA, the state agency may file a Notice of Exemption with the Office of Planning and Research.

If the governmental action involves approval of a project, but the project is not statutorily or categorically exempt from CEQA, then the agency must determine whether, as a matter of common sense, it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment. (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15061(b)(3).) If the agency answers this inquiry in the affirmative, the activity is exempt from CEQA. If the agency determines it is possible that the activity in question will have a significant effect on the environment, then the agency must prepare an initial study and eventually a negative declaration or EIR.

CEQA generally applies to "discretionary projects proposed to be carried out or approved by public agencies…." (Pub. Res. Code § 21080(a) (emphasis added).) 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, and which is any of the following:

(1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100-65700.

(2) An activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
(3) An activity involving the issuance to a person of a lease, permit, license, certificate, or entitlement for use by one or more public agencies.
(CEQA Guidelines, Cal. Code Regs., tit. 14, § 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. These projects include the following activities:

(1) ......
(2) Continuing administrative or maintenance activities, such as purchases for supplies, personnel-related actions, general policy and procedure making (except as they are applied to specific instances covered above);
(3) .....
(4) The creation of governmental funding mechanisms or other governmental fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment;
(5) .....
(CEQA Guidelines, Cal. Code Regs., tit. 14, § 15378(b).)

<u>Adoption of Revisions to ERP Guidelines</u>

The activity in this case is the adoption of revised guidelines for the ERP, as set forth in the *ERP Guidebook*. As discussed above, these guideline revisions do the following: 1) to maintain the current rebate levels for eligible PV, fuel cell, and solar thermal electric systems and increase the rebate level for eligible wind systems; 2) to extend the reservation period offered for standard rebate reservations from 6 months to 9 months; 3) to decrease the rebate reduction associated with the receipt of funding from other government or utility sources; 4) to adjust the capacity factor used for calculating the amount of funding reserved for applicants under the PBIP; 5) to require the use of energy consultants certified by the California Association of Building Energy Consultants to verify compliance with the energy efficiency standards required for affordable housing projects to qualify for higher rebates; 6) to simplify the rebate calculations for system modifications and additions; and 7) to clarify other existing requirements, including requirements dealing with time extensions for 18-month rebate reservations for schools and systems installed on new construction, and dealing with the suspension of the Solar Schools Program element.

The guideline revisions do not approve any public works construction or related activities, any contracts, grants, subsidiaries, loans or other forms of assistance, or any leases, permits, licenses, certificates, or other entitlements within the meaning of CEQA Guidelines section 15378. Nor do the guideline revisions approve the development of any new renewable energy systems or projects which may have a direct or indirect physical impact on the environment, or award funding for any such project. Instead, the revisions to the ERP guidelines merely adjust or clarify administrative procedures governing an existing funding program.

As such, the adoption of the ERP guideline revisions appears to fall within the list of activities excluded from the definition of "project" under CEQA Guidelines sections 15378(b)(2) and (4). As described above, section 15378(b)(2) excludes continuing administrative and maintenance activities such as "...general policy and procedure making.." and section 15378(b)(4) excludes "The creation of government funding mechanisms or other government fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment..."

CEQA Exemption

Assuming arguendo, that the adoption of the ERP guidelines does in fact constitute a "project" under CEQA, this project is nevertheless exempt from CEQA. 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, 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. (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15061(b)(3).)

Adoption of the ERP guidelines will not have a direct or indirect significant effect on the environment. The action being taken by the Commission to adopt guideline revisions merely establishes or adjusts administrative procedures governing an existing funding program. It does not commit funding for any particular renewable energy system or project. Nor is the action expected to result in a net increase in the number or size of renewable energy systems installed under the ERP overall.[7] Such might be the case if the rebate revisions were expected to increase ERP participation above historic levels. However, as explained above, participation in the ERP has declined by approximately 25% in the last two years for PV systems, and declined by approximately 70% for wind systems in the same period. Consequently, it is unrealistic to think that the proposed rebate revisions will increase participation above historic participation levels, especially in light of increased equipment costs and equipment shortages.

Adjusting the rebate reduction associated with the receipt of funding from other state or federal government entities or utility sources is not likely to affect overall ERP

[7] For argument purposes, it is assumed that a net increase in the number or size of renewable energy systems, relative to historic participation levels, would have a direct or indirect significant effect on the environment that would be negative in nature. In actuality, a net increase in the installation of renewable energy systems is likely to have a positive effect on the environment by reducing a corresponding amount of fossil fuel-fired electrical generation.

participation, and certainly will not increase participation above historic levels, because of the lack of any such funding. Commission staff is aware of only one federal government program which provides funding similar to the ERP to lower the cost of renewable energy systems. This program, administered by the US Department of Agriculture, Rural Business-Cooperative Service, provides limited grant funding on a competitive basis to encourage investment in renewable energy systems and energy efficiency improvements by agricultural producers and small businesses.[8] Staff is aware of no other state government or utility programs which provide incentives to lower the cost of renewable energy systems, with the exception of the Self-Generation Incentive Program (SGIP) approved by the California Public Utilities Commission. Funding from the SGIP, however, can not be combined with ERP funding.[9]

Extending the reservation period from 6 months to 9 months is not likely to affect ERP participation, because under the current ERP guidelines participants are free to reapply for a new rebate reservation if their existing rebate reservation expires. Adjusting the reservation period, however, is expected to reduce the Commission's administrative burden of processing new reservation applications when existing reservations expire.

Adjusting the capacity factor for purposes of calculating the amount of funding reserved under the PBIP is not likely to affect ERP participation, because this adjustment only affect the amount of funding reserved for an applicant and does not change the amount of funding an applicant receives. The amount of funding an applicant receives is based on a system's actual generation, not its expected generation.

Requiring the use of CABEC-certified energy consultants to verify compliance with the energy efficiency requirement for affordable housing projects is not likely to affect ERP participation. If anything, this requirement will make it more difficult to obtain higher rebates for affordable housing projects by restricting the pool of individuals that may perform the necessary energy efficiency calculations, and thereby reduce the number of applications submitted to the ERP for affordable housing projects.

Simplifying the rebate calculations for system modifications and additions will not affect ERP participation, because the simplified calculations affects only a small fraction of applications and can not be expected to spur program participation above historic levels. Moreover, the simplified calculations have no affect on the rebate amount when the rebate levels (at the time of reservation issuance and notice of modification) are the same. As discussed above, this will be the case until at least June 30, 2006, while the rebate levels are held constant.

The remaining guideline revisions merely clarify existing ERP requirements, and as such are administrative in nature and not likely to affect ERP participation.

[8] Code of Federal Regulations, Title 7, Part 4280

[9] The ERP Guidebook clearly indicates that systems funded under the SGIP are not eligible for ERP funding. Likewise, the Handbook for the SGIP indicates that systems funded under the ERP are not eligible for SGIP funding.

Based on the foregoing, it is appears that the adoption of the ERP guideline revisions will not result in a significant effect on the environment, and therefore the guideline adoption is exempt from CEQA pursuant to CEQA Guidelines sections 15061 and 15378.