

**DOCKETED**

<b>Docket Number:</b>	20-DECARB-01
<b>Project Title:</b>	Building Initiative for Low-Emissions Development (BUILD) Program
<b>TN #:</b>	241497
<b>Document Title:</b>	BUILD Guidelines CEQA Exemption Memo
<b>Description:</b>	N/A
<b>Filer:</b>	Camille Remy-Obad
<b>Organization:</b>	California Energy Commission
<b>Submitter Role:</b>	Commission Staff
<b>Submission Date:</b>	2/9/2022 9:39:47 AM
<b>Docketed Date:</b>	2/9/2022

# Memorandum

To: Docket 20-DECARB-01

Date: February 8, 2022

From: **Nick Oliver, Staff Counsel**  
**Office of Chief Counsel**  
California Energy Commission  
715 P Street  
Sacramento, California 95814

Subject: Basis for Finding the Approval of the Building Initiative for Low-Emissions Development (BUILD) Program Guidelines is Not a Project and Exempt Under the California Environmental Quality Act

## I. Introduction.

The California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.; see also CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq.) requires that state agencies assess and prepare environmental documents disclosing any significant adverse environmental impacts of discretionary project approvals. However, discretionary approvals that do not fit the definition of a “project” are not subject to CEQA, and, additionally, CEQA designates certain projects exempt from its requirements. Of relevance here and discussed below in relation to the adoption of the BUILD Program Guidelines are the exclusion of administrative policy and procedure making and government funding mechanisms and fiscal activities from the definition of “project” (Cal. Code Regs., tit. 14, § 15378(b)(2) & (4)), the Class 7 and 8 exemptions (Cal. Code Regs., tit. 14, §§ 15307 and 15308), and the common-sense exemption (Cal. Code Regs., tit. 14, § 15061(b)(3)).

## II. The objective of the BUILD Program Guidelines is the reduction of harmful greenhouse gas emissions and other pollutants from buildings in California.

The CEC’s program guidelines for the BUILD Program establish the rules for the program, including eligibility requirements, participation procedures, and incentive structure. BUILD is a building decarbonization initiative established by Senate Bill (SB) 1477 (Stern, Chapter 378, Statutes of 2018) that will provide technical assistance and financial incentives for new, low-income residential building projects using near-zero-emission building technologies. BUILD is further governed by California Public Utilities Commission (CPUC) Decision (D.) 20-03-027, which also established the CEC as the program administrator and assigned the CEC responsibility to prepare and approve the BUILD Program Guidelines. Incentive applicants are required to adopt all-electric building design and technologies in their new housing developments for low-income Californians, reducing greenhouse gas emissions (GHGs) and energy demands from future buildings. Consistent with SB 1477, incentives are determined based on the estimated GHG reduction quantities achieved through the installation of eligible technologies, with the option of increasing the incentive amounts through specific technology

use, and incentive approval is determined through a purely ministerial process. In addition, technical assistance will be offered to eligible low-income residential developers and builders.

BUILD's authorizing statute, SB 1477, clearly states its aim to protect the environment through the abatement and avoidance of GHGs and other pollutants associated with new buildings in California. Public Utilities Code section 921.1(a) requires BUILD to be administered to "provide incentives to eligible applicants for the deployment of near-zero-emission building technologies to significantly reduce the emissions of GHGs from those buildings below the minimum projected emissions reductions that would otherwise be expected to result from the implementation of the prescriptive standards described in Section 150.1 of Subchapter 8 of Part 6 of Title 24 of the California Code of Regulations." Additionally, Public Utilities Code section 921.1(b) requires incentive amounts "be based on the projected amount of reduction in the emissions of GHGs resulting from the installation of the near-zero-emission building technology" in a building.

SB 1477 fits within a robust landscape of aggressive GHG mitigation and decarbonization policies in California. The California Global Warming Solutions Act of 2006 authorizes the California Air Resources Board to use market-based compliance mechanisms to regulate GHGs. Auction proceeds from the cap-and-trade market fund all incentives to be provided under the BUILD Program Guidelines. Additionally, Senate Bill 100 (De León, Chapter 312, Statutes of 2018) committed California to a 100 percent carbon-free electricity supply by 2045. The burning of fossil fuels in gas-powered appliances in California's buildings contributes to changes in the Earth's climate by releasing GHGs, such as carbon dioxide and methane, and generates other air pollutants that can harm building occupants such as nitrogen dioxide. The State of California has set ambitious goals to reduce or eliminate GHG emissions in the building sector in hopes of mitigating the increasingly observable impacts of climate change. To reach these goals, the state will need to utilize clean energy resources and near-zero-emission technologies in new buildings rather than fossil-fuel generation. As noted in the uncodified portion of SB 1477, "[d]espite the favorable economics of achieving deep emissions reductions in new buildings, there is little uptake of near-zero emissions construction practices and clean heating technologies are not widely available in the marketplace." Thus, the main objective of the proposed BUILD Program Guidelines is to facilitate market transformation through the removal of technical and economic obstacles to "achieving deep emissions reductions in new buildings" through "uptake of near-zero emissions construction practices and clean heating technologies."

### **III. The BUILD Program Guidelines are not a project.**

CEQA applies to discretionary project approvals, and although a vote to approve BUILD Program Guidelines would be a discretionary act, the Guidelines themselves do not meet the definition of a "project" under the CEQA Guidelines (See Cal. Code Regs., tit. 14, § 15378). Under CEQA, the definition of "[p]roject does not include . . . [c]ontinuing administrative or maintenance activities, such as purchases for supplies, personnel-related actions, *general policy and procedure making*" (Cal. Code Regs. tit. 14, § 15378(b)(2)). The BUILD Program Guidelines set the eligibility criteria, participation procedures, and incentive structure for the BUILD program—with incentive reservations being approved and paid through a purely ministerial process. While the Guidelines fill the procedural and administrative gaps in the implementation framework set by SB 1477 and D. 20-03-027, they do not commit the CEC to provide incentives to any specific future building project. Any future projects receiving a BUILD incentive reservation will still be required to comply with applicable local permitting and project-

specific environmental review requirements, and the Guidelines expressly state that funding is unavailable if it would result in the CEC becoming lead agency for a project under CEQA.

Under the CEQA Guidelines, the definition of project also does not include 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” (Cal. Code Regs. tit. 14, § 15378(b)(4)). The BUILD Program Guidelines fit within this provision because they relate exclusively to “government fiscal activities” and “funding mechanisms,” i.e., the payment of incentives by the CEC to eligible low-income housing developers that incorporate eligible near-zero-emission building technologies into the design of eligible projects. The BUILD Program Guidelines do not commit the CEC to provide incentives to any specific project which may result in a potentially significant physical impact on the environment, and the Guidelines are not being adopted with any specific project proposals in mind. The Guidelines position the CEC to administer funding and provide potential applicants clarity about what is required to reserve an incentive. Any future projects receiving a BUILD incentive reservation will still be required to comply with applicable local permitting and project-specific environmental review requirements, and the Guidelines expressly state that funding is unavailable if it would result in the CEC becoming lead agency for a project under CEQA.

Finally, the BUILD Program Guidelines do not meet the definition of a project because they do not have the 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)). As a guidance document, it is self-evident that the BUILD Program Guidelines do not directly result in any physical change in the environment. Any indirect impacts derived from the incentives and technical assistance to be offered under the BUILD Program Guidelines would not be reasonably foreseeable because the Guidelines do not commit funding or technical assistance to any specific site or future project. There is simply not enough information about the location, design, and specific technologies that will be incorporated into future projects that receive technical assistance and BUILD incentives at this time to conduct a meaningful review and public disclosure of indirect physical changes in the environment that could eventually be—at least in part—supported by the technical assistance and incentives in the BUILD Program Guidelines.

#### **IV. Even if the BUILD Program Guidelines were a project, the Class 7 and 8 exemptions, and the common-sense exemption, would apply.**

California Code of Regulations, title 14, sections 15307 and 15308 exempt actions taken by a regulatory agency pursuant to state law to “assure the maintenance, restoration, or enhancement of a natural resource” and actions taken to “assure the maintenance, restoration, enhancement, or protection of the environment” where the regulatory process involves procedures for protection of the environment. The BUILD Program Guidelines will have no significant adverse effect on the environment and fall within the categorical exemptions of sections 15307 and 15308. As discussed above in Section II, the BUILD Program Guidelines further SB 1477’s goals of achieving deep reductions of GHGs and other air pollutant emissions from new buildings built in California. This action is taken for the express purpose of enhancing a natural resource (e.g., air quality, climate) and is also a “regulatory process” involving procedures for the enhancement and protection of the environment from energy waste, GHGs, and other harmful air pollutants associated with burning fossil fuels in gas-powered appliances in buildings, such as nitrogen dioxide.

These Guidelines squarely address these issues and qualify as an action taken by the CEC, as directed by the state law, to assure the maintenance, restoration, enhancement, or protection of the environment (Class 8), and as action to assure the maintenance, restoration or enhancement of a natural resource (Class 7), where the regulatory process involves procedures for protection of the environment. Furthermore, none of the exceptions to exemptions listed in CEQA Guidelines section 15300.2 apply to this project. Additionally, there is no reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. For these reasons, this project is exempt from CEQA.

The BUILD Program Guidelines are also exempt from CEQA under the common-sense exemption (Cal. Code Regs., tit. 14, § 15061(b)(3)). As noted above in Section III, CEQA only applies to projects that have the potential for causing a significant effect on the environment. A significant effect on the environment is defined as a substantial, or a potentially substantial, adverse change in the environment, and does not include an economic change by itself or beneficial changes to the environment (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382). The goal of the BUILD Program Guidelines is to provide economic and technical support for the uptake of near-zero emissions construction practices and clean heating technologies in new low-income buildings in California, but the Guidelines do not guarantee that the support offered will be substantial enough to transform building design practices within California's low-income housing market. However, even if the Guidelines attain these goals and make available sufficient incentives to shift market behaviors toward cleaner building practices, this outcome will be environmentally beneficial, any specific future projects receiving a BUILD incentive reservation will still be required to comply with applicable local permitting and project-specific environmental review requirements, and the Guidelines expressly state that funding will be unavailable if it will result in the CEC becoming lead agency for a project under CEQA. Because the Guidelines do not commit to the CEC a definite course of action on any specific future project that could cause adverse environmental impacts, "it can be seen with certainty that there is no possibility that [approving the BUILD Program Guidelines] may have a significant effect on the environment."

## **V. Conclusion.**

As shown above, approval of the BUILD Program Guidelines is a regulatory action that is not a project under CEQA and would protect natural resources and the environment, consistent with the categorical exemptions to CEQA review under sections 15307 and 15308 of the CEQA Guidelines. Additionally, the Guidelines are consistent with the common-sense exemption under section 15061(b)(3) of the CEQA Guidelines.