

DOCKETED

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Memorandum

To: Docket 21-DECARB-01

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Subject: Basis for Finding the Approval of the CalEHP Guiding Principles is Not a Project and is 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 CalEHP (California Electric Homes Program) Guiding Principles are the exclusion of administrative policy and procedure making, 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 CalEHP Program is the reduction of harmful greenhouse gas emissions and other pollutants from buildings in California.

The CEC’s Guiding Principles for CalEHP establish high-level guidance and policy findings for the program, including eligibility criteria and policy considerations for potential third-party program administrators. CalEHP is a building decarbonization incentive program established by Assembly Bill 137 (Ting, Stats. 2021, Ch. 77) that will provide technical assistance and financial incentives for new, market-rate residential building projects using an all-electric building design and energy storage systems. CalEHP’s authorizing statute, Public Resources Code section 25403.2, indicates that a goal of the program to spur significant market adoption of all-electric buildings and energy storage systems. As the Guiding Principles further elaborate, “buildings contribute to 25% of the state’s greenhouse gas emissions,” and CalEHP “will help support California reach its 2030 GHG reduction goals through the building of new all-electric homes above current building code standards.” Accordingly, an objective of CalEHP is to protect the environment through the avoidance of GHGs and other pollutants associated with new buildings in California.

CalEHP 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. 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. 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, energy storage systems, and all-electric technologies in new buildings, rather than fossil-fuel generation.

Thus, the main objective of the proposed CalEHP Guiding Principles is to facilitate market transformation through the removal of technical and economic obstacles to emissions reductions in new buildings through the uptake of all-electric building design and residential energy storage systems.

III. The CalEHP Guiding Principles are not a project.

CEQA applies to discretionary project approvals, and although a vote to approve CalEHP Guiding Principles would be a discretionary act, the Guiding Principles 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 CalEHP Guiding Principles are intended to be high-level guidance and policy direction for the program. The CalEHP Guiding Principles also establish that, moving forward, the CEC intends to seek a third-party administrator to manage the incentives for CalEHP. As such, the CalEHP Guiding Principles do not commit the CEC to provide incentives to any specific future building project. Any future projects receiving a CalEHP incentive will still be required to comply with applicable local permitting and project-specific environmental review requirements.

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 CalEHP Guiding Principles fit within this provision because they relate exclusively to “government fiscal activities” and “funding mechanisms,” i.e., the payment of incentives by the CEC or its third-party administrator to eligible housing developers. The CalEHP Guiding Principles 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 Guiding Principles are not being adopted with any specific project proposals in mind. Rather, the Guiding Principles position the CEC to solicit a third party to administer funding, while providing policy direction to future incentive applicants about how the CEC will apply certain statutory requirements. Any future projects receiving a CalEHP incentive will still be required to comply with applicable local permitting and project-specific environmental review requirements.

Finally, the CalEHP Guiding Principles 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 high-level policy guidance document, it is self-evident that the CalEHP Guiding Principles 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 CalEHP would not be reasonably foreseeable because the Guiding Principles 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 features that will be incorporated into future projects that receive technical assistance and CalEHP 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 that will be available under CalEHP.

IV. Even if the CalEHP Guiding Principles 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 CalEHP Guiding Principles 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 CalEHP Guiding Principles further the statutory goals of achieving market transformation and 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 Guiding Principles 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 CalEHP Guiding Principles 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 CalEHP is to provide economic and technical support for the uptake of all-electric construction practices and energy storage in new market-rate buildings in California, but the Guiding Principles do not guarantee that the support offered will in fact transform building design practices within California’s housing market. However, even if CalEHP attains these goals and makes available sufficient incentives to shift market behaviors toward cleaner building practices, this outcome will be environmentally beneficial, any specific

future projects receiving a CalEHP incentive will still be required to comply with applicable local permitting and project-specific environmental review requirements. Because the Guiding Principles 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 CalEHP Guiding Principles] may have a significant effect on the environment.”

V. Conclusion.

As shown above, approval of the CalEHP Guiding Principles 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 Guiding Principles are consistent with the common-sense exemption under section 15061(b)(3) of the CEQA Guidelines.