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Memorandum

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From: **Kari Anderson, Senior Counsel Chief Counsel's Office**
California Energy Commission

Subject: Basis for Finding the Strategic Reliability Reserve (Department of Water Resources) Facility Certification Procedures are Exempt under the California Environmental Quality Act

I. CEQA

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 consider the environmental impact of their discretionary decisions. California Code of Regulations, title 14, section 15060 states, in part, that a lead agency must first determine whether an activity is subject to CEQA and that an activity is not subject to CEQA if the activity is not a project as defined in section 15378. CEQA Guidelines section 15378 states that an activity is a project if it has the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.

CEQA generally applies to discretionary agency actions that meet the definition of a project, but the statute allows for certain projects to be exempted from its requirements. Of relevance here are the common sense exemption (Cal. Code Regs., tit. 14, §15061(b)(3)), and the Categorical Exemption for Information Collection (Cal. Code Regs., tit. 14, §15306). Also of relevance here, the legislature may create additional statutory exemptions from CEQA. (See e.g., Pub. Resources Code, §25794.1(b).)

II. The CEC's Strategic Reliability Reserve Procedures for Issuing a Certificate for Department of Water Resources Facilities

The Warren-Alquist Act establishes the California Energy Commission (CEC) as California's primary energy policy and planning agency. Most, if not all, actions taken by the CEC are taken to protect the environment and natural resources, either in the near term with, for example, specific regulatory actions or the long term with, for example, long-term planning and investments in research. The Legislature over the years has made specific findings concluding that the CEC's work in regulating the electricity sector is imperative for environmental protection. Notably, the Legislature has found the following: "it is the responsibility of state government to ensure that a reliable supply of electrical energy is maintained at a level consistent with the need for such energy for protection of public health and safety, for promotion of the general welfare, and for environmental quality protection." (Pub. Resources Code, §25001.)

Additionally, on June 30, 2022, Governor Newsom signed AB 205 (Ting, Stats. 2022, Ch.61), and on September 6, signed AB 209 (Pan, Stats 2022, Ch. 251), which establish the Strategic Reliability Reserve (SRR) program. One portion of the Strategic Reliability Reserve program authorizes the Department of Water Resources (DWR) to develop facilities that are dispatchable in the event of extreme events that pose risk to the reliability of energy across the State. Beginning October 31, 2022, those SRR DWR facilities must be certified by the CEC, and the CEC is required to establish an expedited process, as specified in Article 6 of Chapter 8.9 of Division 15 of the Public Resources Code. (Pub. Resources Code §25794 – 25794.10.)

In AB 205, the Legislature finds that “California must ensure electricity reliability during this period of heightened risk, which includes extraordinary near-term measures and substantive changes to mid-term energy policy, while also ensuring the multifaceted California electrical grid is best positioned to sustainably and equitably achieve California’s clean energy future, climate targets, and air quality requirements” and provides funding to DWR to develop the facilities, and to CEC to administer the certification process. That process is statutorily exempt from CEQA. (Pub. Resources Code §25794.1(b).) Many aspects of the process are set forth in detail in Article 5. In addition, limited discretion is conferred on the CEC to identify any additional information it may require in order to evaluate the impacts of proposed facilities on the environment, public health and safety, and to require such impacts be mitigated to the maximum extent possible before issuing a certificate for the site. AB205 also requires the CEC to adopt its expedited process as an emergency rulemaking in accordance with Government Code section 11346.1. (Pub. Resources Code, § 25793(e).)

The CEC’s required rulemaking activity is not expressly exempt from CEQA, but the process of reviewing an application and issuing a certificate for a site and related facility is expressly exempt. (Pub. Resources Code, §25794.1(b).) The placement of this exemption in the same chapter (Chapter 8.9, Strategic Reliability Reserve) with a mandate for the CEC to “establish a process to expedite review” of DWR applications creates a reasonable inference that the legislature also intended for this rulemaking to be exempt from CEQA.

Finally, none of the exceptions to exemptions listed in CEQA Guidelines section 15300.2 apply here, and there is no reasonable possibility that the approval will have a significant effect on the environment due to unusual circumstances. For these reasons, the adoption of the opt-in emergency regulations is exempt from CEQA.

III. The Proposed Action

The goal of this action is to implement procedures to expedite the process of approving an application for the certification of a site and related facility to be developed by DWR for use in stabilizing electricity demand during an extreme event. AB 205, as modified by AB 209, requires such facilities to be described, fully evaluated, and approved within approximately six months of a complete application being accepted. The legislation also limits the types of facilities that may be certified in this manner and requires consultation among CEC and DWR in order to ensure the optimal location of SRR DWR facilities. To implement these requirements in this expedited process, a pre-filing meeting between the agencies to ensure the various statutory requirements are being met, and to ensure the types of data listed in these regulations are submitted, is included. As discussed further below, the regulations the CEC is proposing here to implement the DWR permitting program established in AB 205, as modified by AB 209, establish informational requirements for an application and the process by

which an application submitted by DWR would be considered by the CEC. The regulations themselves would not result in a direct physical change to the environment.

IV. CEQA Does Not Apply to this Rulemaking Action

In this rulemaking, the proposed emergency regulations set forth a process for submitting and reviewing an application to certify a site and related facility proposed by the Department of Water Resources. The action to establish procedural requirements in emergency regulations does not result in any direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, but implements an administrative process. Therefore, the adoption of the emergency regulations is not a project and is not subject to CEQA. If CEQA did apply to this rulemaking action, the exemptions set forth below would apply.

V. Common Sense Exemption

The adoption of these SRR DWR expedited certification procedures are exempt from CEQA under the common sense exemption. CEQA only applies to discretionary projects that have the potential for causing a significant effect on the environment. (Cal. Code Regs., tit. 14, §§15002(i) and 15061(b)(3).) 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. (Pub. Resources Code, §21068; Cal. Code Regs., tit. 14, §15382.) The goal of the proposed regulations is to implement, through efficient procedures and reliable data requirements, the CEQA-exempt process of reviewing an application and issuing a certificate for the siting of a facility proposed by DWR. No significant adverse impacts to the environment have been identified as resulting from this action. For these reasons, adoption of emergency regulations would not be subject to CEQA under the common sense exemption of section 15061(b)(3) of the CEQA Guidelines.

VI. Categorical Exception

The adoption of the SRR DWR expedited certification procedures are also exempt from CEQA as a categorical exemption under the Class 6 Information Collection exemption. (Pub. Resources Code, § 15061(b)(2); Cal. Code Regs., tit. 14, §15306.) Pursuant to section 15306, activities that involve data collection, research, experimental management, and resource evaluation activities that do not result in a serious or major disturbance to an environmental resource, have been determined not to have a significant effect on the environment and are therefore exempt from CEQA. Here, the emergency regulations establish a process that involves collecting information and evaluating that information to determine whether to issue a certification based on standards contained in the statute. As such, the action to adopt emergency regulations to establish a process to review CEQA-exempt projects will not result in any disruption to an environmental resource.

VII. LEGISLATIVE EXEMPTION

The expedited process created in AB 205 is statutorily exempt from CEQA. Public Resources Code § 25794.1(b) states: "The issuance of a certificate by the commission for a site and related facility pursuant to this article shall be in lieu of any permit, certificate, or similar document, ... and shall not be subject to the requirements of the California Environmental Quality Act (Division 13 (commencing with section 21000)) and regulation adopted pursuant to

that division.” The requirement that CEC establish a process to expedite review of an application submitted under the SRR DWR facility certification program should also be considered as exempt from CEQA. The provision exempting the process from CEQA (Pub. Resources Code §24794.1(b)) and the provision directing CEC to adopt regulations establishing the process (Pub. Resources Code §25794.2(a)) are in sequential, related sections of the Public Resources Code and under the same umbrella of Article 5, *Certification of Facilities*. Since the legislature’s express intent is to exempt this process from CEQA, and there is no indication the legislature intended the rulemaking process to be subject to CEQA, it is reasonable to conclude that the legislature intended the CEQA exemption apply to this rulemaking activity of the CEC. As discussed above, the regulations simply establish informational requirements and the process by which the CEC will review applications under this program – elements that will not result in any direct physical change to the environment. Since the legislature has exempted from CEQA the facilities that will be permitted as a result of this program, some of which arguably are likely to result in some physical change to the environment, it makes sense that implicit within this exemption is also an exemption for the regulations themselves.

VIII. Conclusion

As shown above, the proposed adoption of emergency regulations to implement the expedited process set forth in AB 205 that is itself exempt from CEQA is not a project as defined in CEQA. In the event a determination is made that CEQA does apply, several provisions would exempt this rulemaking from CEQA. Specifically, the common sense exemption under section 15061(b)(3) applies since no significant adverse impacts to the environment have been identified as resulting from this action. Also, the categorical exemption under section 15061(b)(2) of the CEQA Guidelines applies because the procedures entail collection of data and information, which has been determined not to have a significant adverse impact on the environment. (Cal. Code. Regs. §15306.) Finally, the legislative intent, expressed in AB 205, that the process of certifying facilities be exempt from CEQA, reasonably includes the rulemaking action to adopt CEQA-exempt procedures. (Pub. Resources Code, §§ 25794.1, 25794.2.) For these reasons, this rulemaking action is exempt from CEQA and a Notice of Exemption may be filed with the Office of Planning and Research.