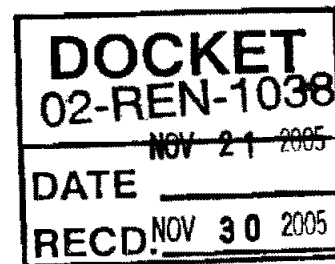


# Memorandum

Date: November 21, 2005

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To : B. B. Blevins, Executive Director

cc: Scott Matthews,  
Chief Deputy DirectorFrom : California Energy Commission - Gabe Herrera, Legal Office  
1516 Ninth Street  
Sacramento, CA 95814-5512Subject : **CEQA Assessment of Existing Renewable Facilities Program Guidelines;  
Docket No. 02-REN-1038**

## Summary

This memo addresses the application of the California Environmental Quality Act ("CEQA") to the Energy Commission's adoption of revisions to the *Existing Renewable Facilities Program Guidebook*. This *Guidebook* sets forth the guidelines governing the Energy Commission's Existing Renewable Facilities Program (ERFP). The *Guidebook* was initially adopted by the Energy Commission in February 2003, and is being revised to adjust criteria for calculating the payment of production incentives to eligible biomass facilities. This adjustment will increase allowable production incentives by \$0.008 per kilowatt-hour for November 2005 through April 2006 generation and by \$0.005 per kilowatt-hour for May and June 2006 generation. This adjustment is necessary to reflect the higher costs of diesel fuel to collect, process, and transport biomass fuel to participating biomass facilities, and is being implemented pursuant to Public Resources Code section 25742, subdivision (b), which authorizes the Energy Commission to make adjustments to reflect changing market and contractual conditions as well as inflation.

Based on a review of CEQA, the CEQA Guidelines, and pertinent legal authority, it is my opinion that the adoption of revisions to the *Guidebook* 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 ERFP is one of several programs within the umbrella of the Energy Commission's Renewable Energy Program (REP). The ERFP was created pursuant to Public Utilities Code section 383.5, subdivision (c)<sup>1</sup>, to help improve the competitiveness of existing in-state renewable electricity generation facilities and to secure for the state the environmental, economic, and reliability benefits that the continued operation of these facilities provide. The ERFP provides funding in the form of a simple cent per kilowatt-

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<sup>1</sup> Public Utilities Code section 383.5, subdivision (c), was amended and recast as Public Resources Code section 25742 pursuant to Senate Bill 183 (stats. 2003, ch. 666, sec. 2).

hour (kWh) production incentive for each kWh of electricity generated by an eligible renewable electricity generation facilities. Eligible renewable generation facilities include biomass and solar thermal electric facilities, categorized as Tier 1 facilities, and wind generation facilities, categorized as Tier 2 facilities. The production incentives vary by tier and are based on the lowest of three possible calculations: 1) the difference between a pre-determined Target Price and Market Price; 2) a pre-determined cents per kWh Cap; and 3) a funds-adjusted price which takes into consideration the total ERFP funds available for a tier in a given month and the total eligible generation for that month from all participating facilities in that tier.

The *Guidebook* sets forth the guidelines governing the ERFP and describes the requirements renewable generation facilities must satisfy to qualify for and receive production incentives from the ERFP. The *Guidebook* was initially adopted by the Energy Commission on February 19, 2003, pursuant to Public Utilities Code section 383.5, subdivision (h), paragraph (1)<sup>2</sup>, which directed the Energy 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. Res. Code § 25747(a).)

#### Adjusting Target Price and Cap for Tier 1 Biomass Facilities

The guidelines for the ERFP are being revised to adjust the pre-determined Target Price and Cap used for calculating production incentives for eligible Tier 1 biomass facilities. The revisions will do the following:

- Increase the Target Price for Tier 1 biomass facilities by \$0.008 per kWh (from \$0.0537 to \$0.0617 per kWh) for November 2005 through April 2006 generation, and by \$0.005 per kWh (from \$0.0537 to \$ 0.0587 per kWh) for May and June 2006 generation.
- Increase the Cap for Tier 1 biomass facilities by \$0.005 per kWh (from \$0.010 to \$0.015 per kWh) for November 2005 through June 2006 generation.
- The increased Target Prices and Cap will apply to generation produced from November 1, 2005 through June 30, 2006 only.

Under the current ERFP guidelines, the Target Price and Cap for Tier 1 biomass facilities are set at \$0.0537 per kWh and \$0.010 per kWh, respectively. According to participating biomass facilities<sup>3</sup>, the current Target Price and Cap for Tier 1 facilities no longer reflect the operating costs of existing biomass facilities and need to be adjusted to reflect the higher cost of diesel fuel to collect, process, and transport biomass fuel.

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<sup>2</sup> Public Utilities Code section 383.5, subdivision (h), paragraph (1), was amended and recast as Public Resources Code section 25747, subdivision (a), pursuant to Senate Bill 183 (stats. 2003, ch. 666, sec. 2).

<sup>3</sup> As represented by the California Biomass Energy Alliance, LLC.

Without this adjustment, participating Tier 1 biomass facilities may be unable to procure adequate supplies of biomass fuel to continue operating at existing levels of generation. This could cause some Tier 1 biomass facilities to curtail operations and generate less electricity, and thus require other generators, which may or may not be renewable or as environmentally-friendly, to make up the difference. In addition, without the adjustment some biomass facilities may be unwilling to procure remotely located biomass fuel which is typically more costly because of processing and transportation costs. As a result, this biomass fuel may be open-burned or disposed of in a manner having greater environmental consequences.

Although the Target Price and Cap are being increased, these guideline revisions are not expected to result in any net increase in generation by participating Tier 1 biomass facilities. Nor are they expected to result in any increased participation in the ERFP by new biomass facilities. Instead, the guideline revisions will allow participating biomass facilities to maintain generation levels and avoid curtailment.

### 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 inquiries 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).)

### Adoption of Revisions to ERFP Guidelines

The activity in this case is the adoption of revised guidelines for the ERFP, as set forth in the *ERFP Guidebook*. As discussed above, the guidelines for the ERFP are being revised to adjust the pre-determined Target Price and Cap used for calculating production incentives for eligible Tier 1 biomass facilities.

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 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 ERFP guidelines merely adjust the criteria for calculating the payment of production incentives for existing biomass facilities as is authorized by Public Resources Code section 25742, subdivision (b), to reflect changing market and contractual conditions as well as inflation.

As such, the adoption of the revisions to the ERFP guidelines falls 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 ERFP 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 revisions to the ERFP guidelines will not have a direct or indirect significant effect on the environment. The action being taken by the Energy Commission to adopt guideline revisions merely establishes or adjusts administrative procedures. This action is not expected to result in any net increase in generation by participating Tier 1 biomass facilities. Nor is it expected to result in any increased

participation in the ERF by new biomass facilities which have not previously participated. Instead, the action will allow participating biomass facilities to maintain generation levels and avoid curtailment. By doing so, the action maintains the status quo and results in no net effect on the environment.<sup>4</sup>

Based on the foregoing, the adoption of the 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.

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<sup>4</sup> For argument purposes, it is assumed that maintaining the status quo results in no net effect on the environment. In actuality, however, by maintaining the status quo the action may yield a positive effect on the environment by reducing the amount of biomass fuel that would be open-burned or disposed of in a manner having greater environmental impacts.