



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA  
1516 NINTH STREET, SACRAMENTO, CA 95814  
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**In the Matter of:**

Rulemaking to Consider Modification of Regulations Establishing a Greenhouse Gases Emission Performance Standard For Baseload Generation of Local Publicly Owned Electric Utilities

Docket No. 12-OIR-1

RULEMAKING WORKSHOP

<p align="center">California Energy Commission <b>DOCKETED</b> <b>12-OIR-1</b></p>
<p align="center">TN # 66156 JUL 09 2012</p>

**TENTATIVE CONCLUSIONS AND REQUESTS FOR  
ADDITIONAL INFORMATION**

**Background**

In 2007, the Energy Commission adopted a greenhouse gases emission performance standard and related requirements at California Code of Regulations, title 20, sections 2900 through 2913 (the EPS).<sup>1</sup> The EPS applies to “covered procurements” entered into by local publicly owned electric utilities (POUs). The Commission adopted the EPS under the authority of Senate Bill 1368 (Perata, Stats. 2006, Ch. 598, § 2), codified at Public Utilities Code sections 8340 and 8341.

On January 12, 2012, the Energy Commission adopted an Order Instituting Rulemaking (OIR) to initiate a rulemaking proceeding to consider possible modifications to the EPS. The OIR focuses on whether to:

1. Establish a filing requirement for all POU investments in non-EPS compliant facilities regardless of whether the investment could be considered a covered procurement;
2. Establish criteria for, or further define, the term “covered procurement,” including specifying what is meant by “designed and intended to extend the life of one or more generating units by five years or more” and “routine maintenance”;
3. Make changes consistent with the requirements of Public Utilities Code section 8341, subdivision (f). This subdivision requires the Energy Commission, in a duly

<sup>1</sup> All legal citations are to the Commission’s Regulations unless otherwise indicated.

noticed public hearing and in consultation with the California Public Utilities Commission and the State Air Resources Board, to reevaluate and continue, modify, or replace the greenhouse gases emission performance standard when an enforceable greenhouse gases emissions limit applicable to POUs is established and in operation.

4. Make any other changes to carry out the requirements of SB 1368.

On April 18, 2012, the Energy Commission conducted a public workshop regarding the OIR. Workshop participants included representatives from interested organizations and POUs.<sup>2</sup> Commissioners Weisenmiller and Peterman and Commission staff facilitated the workshop.

### **Discussion**

Based on the workshop discussion and related comments, the following discussion (1) presents tentative conclusions on the factual and legal issues before the Commission and (2) identifies topics that warrant further input and evaluation. The four above-listed OIR topics frame the discussion.

1. Whether to establish a filing requirement for all POU investments in non-EPS compliant facilities regardless of whether the investment could be considered a covered procurement.

Within 10 days after a POU enters into a covered procurement<sup>3</sup> it must submit documentation to the Energy Commission that would allow the Commission to evaluate whether the covered procurement complies with the EPS. (Regs., §§ 2909, 2910.) These “compliance filings” are the only required filings under the EPS. However, POUs may request Commission determinations on whether a prospective procurement would extend the life of a powerplant by five years, constitute routine maintenance, or comply with the EPS. (Regs., § 2907.)

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<sup>2</sup> In particular, participants included representatives from the Natural Resources Defense Council (NRDC), Sierra Club, Los Angeles Department of Water and Power, M-S-R Public Power Agency, Southern California Public Power Authority (SCPPA) San Juan Participants, California Air Resources Board, U.S. Environmental Protection Agency, and the California Municipal Utilities Association.

<sup>3</sup> A covered procurement is either a new ownership investment in a baseload generation powerplant or a particular type of new or renewed POU contract commitment for the procurement of electricity with a term of five or more years. (Regs., § 2901, subd. (d).) In turn, a “new ownership investment” includes any investment in an existing, non-deemed compliant powerplant owned in whole or in part by a POU that is either (1) designed and intended to extend the life of one or more generating units by five years or more, not including routine maintenance or (2) results in an increase in the rated capacity of the powerplant, not including routine maintenance. (Regs., § 2901, subd. (j).)

As NRDC and Sierra Club point out, no POU has submitted a compliance filing or Section 2907 request for determination for a non-EPS compliant facility. They suggest that the absence of these filings signals possible non-compliance with the EPS or a misunderstanding of EPS requirements. Yet, neither they nor anyone else offer evidence of POU non-compliance. Such evidence is essential to overcome the legal presumption that POU decision-makers regularly perform official duties under the EPS. (See, Evid. Code, § 664 [providing that “[i]t is presumed that official duty has been regularly performed].) <sup>4</sup>

Notwithstanding the statutory presumption that favors POU, NRDC and Sierra Club reasonably question the transparency of POU decision-making. The April 18 workshop comments and related submissions indicate that POU make most investment decisions at the staff level and present few such decisions to their board of directors. While these POU decision-making processes are consistent with the EPS, they arguably inhibit public scrutiny and review of investment decisions. Given that ratepayer (i.e., public) protection is an essential feature of SB 1368, it is reasonable and appropriate to require greater transparency regarding POU investments (including those solely for routine maintenance).

Thus, the issue is how to achieve greater transparency without imposing onerous financial and administrative burdens on POU. Section 2908 might be a useful guide. Section 2908 requires POU to post specified notices in accordance with Government Code section 54950 and following, whenever their governing bodies will deliberate in public on a covered procurement. Section 2908 also requires POU make public the information and supporting documents provided to the governing bodies for their deliberations. POU can satisfy these noticing requirements by providing the Commission with the uniform resource locator (URL) that links to the required information. (Regs., § 2908, subs. (a), (b).)

The POU workshop submissions already provide some guidance on this topic but, as discussed during the April 18 workshop, Commission decision-making would benefit from additional information about POU decision-making processes. Therefore, the Energy Commission requests that the POU provide the following information to allow for a better understanding of how investment decisions are made:

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<sup>4</sup> NRDC and Sierra Club suggest that the Commission might obtain possible evidence or a better understanding of POU practices by requiring POU to provide data on past, current, and planned investments in non-complaint powerplants. However, mere speculation about POU practices is insufficient to justify requiring the requested disclosures. Instead, if anyone has supportable reasons to question POU investments, the appropriate manner of raising these concerns is filing a complaint or request for investigation with the Commission under Section 2911.

- Copies of written procedure and policies for approving expenditures, particularly expenditures relating to non-compliant powerplants.
- A description of the procedure for bringing expenditure or investment requests to the governing body. Explain what threshold point or points trigger submitting a particular investment for governing body approval.

2. Whether to establish criteria for, or further defining, the terms “covered procurement,” including specifying what is meant by “designed and intended to extend the life of one or more generating units by five years or more” and “routine maintenance.”

To date, there are no specific recommendations for further refining or defining the phrases “designed and intended to extend the life” or “routine maintenance.” Nor is it clear that consideration of any such recommendations would be productive. In fact, regarding the difficulty of further refining these phrases, the Commission’s *Final Statement of Reasons for Adoption of Regulations Establishing and Implementing a Greenhouse Gases Emission Performance Standard for Local Publicly Owned Electric Utilities* (Final Statement) states:

The Energy Commission believes that this provision [“designed or intended to extend the life of one or more generating units by five years or more, not including routine maintenance”], ... coupled with the opportunity to seek a pre-determination from the Energy Commission under section 2907, provides sufficient guidance to regulated entities as to which investments are “designed and intended to extend the life of” a powerplant by 5 years or more. The originally-proposed Section 2901(j)(4)(A) was taken directly from the CPUC’s decision. To provide clarity and address concerns raised by commenters, the Energy Commission made explicit that routine maintenance does not trigger the provisions of these regulations to make clear that activities meeting this description are not considered designed and intended to extend the life of a power plant by five years or more.

(Final Statement, pp. 38-39, emphasis added.)

Moreover, the Commission determined that “[t]o attempt to further define the phrase ‘designed and intended to extend the life’ would be fraught with difficulties and a high likelihood of unintended consequences, because whether an investment will extend the life of a powerplant, or more relevant, is designed and intended to, is heavily dependent upon the factual circumstances of that investment.” (Final Statement, p. 39.)

Accordingly, “[g]iven the complexity of the issue, there is no way to simplify all the factors that go into such a determination and condense them into a concise and

workable rule. Therefore, establishing an adjudicatory proceeding [under Section 2907] to make these determinations was deemed the most workable approach.” (*Id.*)

Notably, Section 2907 allows POUs to request Commission determinations on whether a prospective procurement would extend the life of a powerplant by five years, constitute routine maintenance, or comply with the EPS. Regarding routine maintenance, the Commission contemplated that various, different capital improvements, renovations, or upgrades, may well come within the ambit of routine maintenance. It also made clear that there should be no doubt that activities go beyond routine maintenance when, for instance, they are undertaken solely or principally for compliance with legal or regulatory requirements or to achieve environmental improvements. (See, e.g., Final Statement, pp. 21, 23, 26-28, 32, 35, 39-40, 42-43, 78.)

In explaining why routine maintenance is exempt from the EPS, the Commission stated:

The record is replete with comments from the POUs that if they are not allowed to perform routine maintenance on their facilities, then both reliability and their ability to comply with environmental laws will degrade. SB 1368 is not intended to shut down currently operating power plants; its focus is ensuring that substantial investments are not made that would lead to further costs when AB 32, or a similar program establishing a greenhouse gases emissions limit, is implemented.

Routine maintenance may include replacing parts when they wear out. New parts are sometimes made better than previous iterations and improvements in some parts (e.g., turbine blades) can lead to an increase in efficiency and capacity. The Energy Commission determined that it is necessary to ensure that POUs are not prohibited from maintaining the operation of their power plants simply because there might be an incidental increase in capacity resulting from such maintenance.

(Final Statement, pp. 16-17.)

If a POU is uncertain if an activity is routine maintenance, it can petition for a Commission determination under Section 2907. Similarly, if the Commission or a POU determines that an activity will go beyond routine maintenance, the POU may seek an exemption from the Commission as provided by Sections 2912 and 2913. (See Regs., §§ 2912 [allowing case-by-case Commission review and exemption for reliability and financial exemptions] and 2913 [allowing for case-by-case Commission review and exemption for pre-existing multi-party commitments].)

Although the EPS gives POUs the initial opportunity to determine what activities constitute “routine maintenance” or are “designed and intended to extend the life,” the Commission and public may challenge those determinations. In particular, Section 2911 authorizes the Commission to conduct complaint or investigation proceedings, or both, on its own motion or at anyone’s request. Yet, despite the general accessibility of POU annual reports, operating budgets, resource plans, and the like, the Commission has received no complaints or investigation requests.

Absent clear recommendations or guidance for further refining or defining “routine maintenance” and “designed and intended to extend the life,” or facts establishing POU misapplication of the EPS compliance requirements, there is no basis for modifying these phrases or establishing additional criteria for a “covered procurement.”

3. Whether the Commission must or should make changes consistent with the requirements of Public Utilities Code section 8341, subdivision (f).

Subdivision (f) requires the Energy Commission, in a duly noticed public hearing and in consultation with the California Public Utilities Commission and the State Air Resources Board (ARB), to reevaluate and continue, modify, or replace the greenhouse gases emission performance standard when an enforceable greenhouse gases emissions limit is established and in operation, that is applicable to local publicly owned electric utilities.

As the agency tasked with implementing AB 32, the Energy Commission believes the ARB is best able to characterize whether the regulations established thereunder constitute an emissions limit applicable to local publicly owned electric utilities pursuant to SB 1368. Upon close consideration and in consultation with ARB, the Energy Commission determines that there is currently no greenhouse gases emissions limit applicable to POUs. Based on this conclusion, the Energy Commission will not “reevaluate and continue, modify, or replace” the Commission’s EPS at this time. The ARB points out that the EPS is an important part of California’s overall approach to reducing greenhouse gas emissions and provides an important complement to cap-and-trade.<sup>5</sup> They further believe that there is a threshold question that must be addressed, beyond the questions outlined by the Energy Commission in the rulemaking. In the Notice of Rulemaking Workshop, the Energy Commission asked parties to comments on:

Whether the requirements of Public Utilities Code section 8341, subdivision (f), have been triggered by the State Air Resources Board’s (ARB) recent adoption of cap-and-trade regulations [footnote omitted] or whether ARB must first verify

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<sup>5</sup> Email RE: Docket No. 12-OIR-1 Rulemaking to Consider Modification of Regulations Establishing a Greenhouse Gases Emission Performance Standard For Baseload Generation of Local Publicly Owned Electric Utilities, from Steven Cliff, California Air Resources Board, June 28, 2012.

the efficacy of and compliance with its cap-and-trade regulations before Section 8341, subdivision (f) is triggered.

(Notice of Rulemaking Workshop, Docket 12-OIR-1, March 6, 2012, p.5-6.)

The ARB believes that “the trigger” for Section 8341, subdivision (f) depends on whether or not an emissions limit applicable to local publicly owned electric utilities is established and in operation, rather than on ARB’s verification of the efficacy of and compliance with the cap-and-trade regulation.<sup>6</sup> By statute, the Energy Commission is to undertake a reevaluation of the EPS when an emissions limit is established that is “applicable to local publicly owned electric utilities.” ARB explains:

ARB is implementing a cap-and-trade program that creates an enforceable economy-wide cap covering approximately 85 percent of California’s greenhouse gas emissions. The cap-and-trade program became effective January 1, 2012. The program does not set any specific emissions limit for any single entity, or for any sector nor does the program require specific reductions in emissions from any entity or sector. Instead, it establishes a program-wide limit on aggregate emissions from those covered by the program. This limit on emissions (the cap) and the ability to trade create a price signal needed to drive long-term investment in cleaner fuels and more efficient use of energy. The program is designed to provide covered entities, including local publicly owned utilities, the flexibility to seek out and implement the lowest-cost options to reduce emissions.

Because the cap-and-trade program does not create an emissions limit applicable to local publicly owned electric utilities, ARB believes the trigger for the Energy Commission to reevaluate the emission performance standard has not been met as a result of ARBs enforceable cap-and-trade regulation.<sup>7</sup>

The ARB provided a number of public documents that demonstrate how the cap-and-trade program is intended to function with an economy-wide cap, rather than establishing limits on specific entities or sectors. For example, the cap is described as a “cap on aggregate emissions,” “it applies to all sources combined” and “individual facilities do not have caps.”<sup>8</sup> Based on the information provided by the ARB regarding their interpretation of AB 32, the Energy Commission agrees that no “emissions limit”

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<sup>6</sup> *ibid*

<sup>7</sup> *ibid*

<sup>8</sup> Staff Presentation, Public Hearing to Consider the Adoption of a Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation, Including Compliance Offset Protocols, Dec 16, 2010. See slide 9. Staff Presentation, ARB Public Hearing to Consider Adoption of the Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation, Including Compliance Offset Protocols, October 20, 2011. See slide 7.

that applies to publicly owned utilities has been established by the cap-and-trade regulations and that reevaluation of the EPS regulations is not triggered.

4. Whether to make any other changes to the EPS carry out the requirements of SB 1368.

Except as discussed above, there was no meaningful workshop discussion of additional recommendations to modify the EPS to carry out the requirements of SB 1368. The Commission is aware that there is an interest in revising the current greenhouse gases emission performance standard, which is currently set under commission regulation section 2902 at 1100 pounds of carbon dioxide per megawatt hour of electricity. The Commission welcomes comments on this issue.

### **Next Steps**

The Lead Commissioner for this rulemaking proceeding invites comments on the tentative conclusions and issues discussed above and asks POUs to provide the information requested above in discussion item 1.

File any such comments and requested information with the Energy Commission Dockets Unit by 4:30 p.m. on Friday, July 27, 2012. Include Docket Number "12-OIR-1" in the subject line or first paragraph of your comments.

You may hand deliver or mail comments to:

California Energy Commission  
Dockets Office, MS-4  
Re: Docket No. 12-OIR-1  
1516 Ninth Street  
Sacramento, CA 95814-5512

Alternatively, you may attach your comments to an e-mail and submit the e-mail to the Dockets Unit at [docket@energy.ca.gov](mailto:docket@energy.ca.gov). E-mail attachments should be in Microsoft Word format or in portable document format (PDF).

All written material relating to the rulemaking proceeding will be filed with the Dockets Unit and become part of the public record.

### **Public Adviser and Public Participation**

The Energy Commission's Public Adviser's Office provides the public assistance in participating in Energy Commission activities. If you want information on how to participate in this forum, please contact the Public Adviser's Office at (916) 654-4489 or 800-822-6228 or e-mail at: [publicadviser@energy.ca.gov](mailto:publicadviser@energy.ca.gov)



## Information

If you have a disability and need assistance to participate in this event, contact Lourdes Quiroz no less than five days prior to the hearing at (916) 654-5146 or e-mail:

[lquiorz@energy.ca.gov](mailto:lquiorz@energy.ca.gov).

Please direct all news media inquiries to the Media and Public Communications Office at (916) 654-4989, or by e-mail at: [mediaoffice@energy.ca.gov](mailto:mediaoffice@energy.ca.gov).

If you have questions on the technical subject matter of this meeting, please contact Sekita Grant, Advisor to Chair Weisenmiller, at (916) 651-0460, or by e-mail at:

[sgrant@energy.ca.gov](mailto:sgrant@energy.ca.gov).

Dated: July 9, 2012, at Sacramento, California.

*Original Signed By:*

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ROBERT B. WEISENMILLER  
Chair and Lead Commissioner  
12-OIR-1 Rulemaking