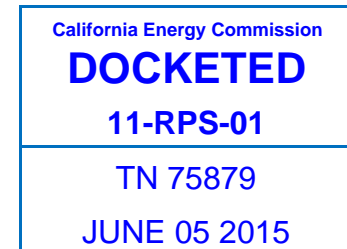


Memorandum

To: Commr. David Hochschild,
Renewables Lead Commissioner

Date: June 2, 2015

From: Gabe Herrera, Staff Counsel
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California Energy Commission
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Subject: **Docket No. 11-RPS-01**
Revisions to Renewables Portfolio Standard Eligibility Guidebook, 8th Edition

Summary

This memo addresses the application of the California Environmental Quality Act (“CEQA”) to the Commission’s adoption of proposed revisions to the *Renewables Portfolio Standard Eligibility Guidebook* (“Guidebook”), as reflected in the 8th Edition. The Guidebook is being revised to address changes in law as a result of Assembly Bill 1478 (Stats. 2014, ch. 664), to incorporate requirements and criteria previously adopted by the Commission in 2014 under separate resolutions, to clarify various requirements and processes related to certification and verification for the Renewables Portfolio Standard (“RPS”), and to improve clarity and organization of the text in several sections of the Guidebook.

Based on a review of CEQA and the pertinent legal authority, I have concluded that the Commission’s adoption of the proposed Guidebook revisions 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 Guidebook describes the eligibility requirements and administrative procedures for certifying electrical generating facilities as eligible renewable energy resources for California’s RPS in accordance with Pub. Util. Code, § 399.11 et seq., and Pub. Resources Code, § 25740 et seq. The Guidebook identifies the statutory requirements specific to each type of RPS-eligible renewable energy resource (biomass, wind, solar, geothermal, hydroelectric, land fill gas, etc.) and administrative processes for certifying facilities for the RPS, and includes application forms and instructions for submitting needed information to verify eligibility. The Guidebook also describes how the Commission tracks and verifies compliance with the RPS, and provides the necessary reporting forms and instructions for this purpose.

The Commission first adopted the Guidebook in April 2004 and has since revised it multiple times to implement changes in law and to clarify the requirements and process for certifying facilities and verifying the generation and procurement from such facilities. These Guidebook revisions were adopted pursuant to Pub. Resources Code, § 25747 (a).

In summary, the proposed Guidebook revisions will do the following:

- Implement changes in law under Assembly Bill 1478, which revised the requirements for hydroelectric generation units with a capacity of not exceeding 40 megawatts that are operated as part of a water supply or conveyance system;
- Revise and clarify the requirements for RPS-certified multifuel facilities related to their use of nonrenewable energy resource consistent with prior changes in law under Assembly Bill 1954 (Stats. 2010, ch. 460);
- Incorporate requirements and procedures previously adopted by the Commission in 2014 under Resolution Nos. 14-0422-11, 14-1007-10, and 14-1117-14 for time extensions, creation of retroactive renewable energy credits, and the certification of hydroelectric generation units with a capacity not exceeding 40 megawatts that are operated as part of a water supply or conveyance system;
- Revise and clarify the Guidebook definitions of i) “dedicated pipeline” to include a functionally dedicated pipeline with new reporting requirements for biomethane, ii) “station service” so it better aligns with the operating rules of the Western Renewable Energy Generation Information System (“WREGIS”), iii) “prime generating equipment” for repowered facilities so equipment used for different renewable resources is treated consistently, and iv) various other terms used in the Guidebook to reflect updates and the nonsubstantive changes and edits to the Guidebook text;
- Revise and clarify multiple administrative and procedural requirements, including i) how a generating facility’s RPS eligibility date is determined, ii) the method for determining the amount of incremental generation from hydroelectric generation facilities using rated facility improvements, iii) the conditions under which a local publicly owned electric utility’s (POU) may claim generation from POU-owned aggregated units beginning January 1, 2011, iv) the “receipt” date for purposes of processing applications, v) the submission of applications using a new format, vi) the record retention period for certified facilities, and vii) the addition of two new forms - one for facilities related to their use of nonrenewable energy resource and one for biomethane facilities using a functionally dedicated pipeline;
- Reorganize and make nonsubstantive changes and edits to the text in various sections of the Guidebook to improve clarity and reduce duplications; and
- Update various application and reporting forms as needed to reflect the revisions to the Guidebook.

CEQA

CEQA (Pub. Resources Code, § 21000 et seq.) requires state agencies to consider the environmental impacts of their discretionary decisions. CEQA generally applies to “discretionary projects proposed to be carried out or approved by public agencies...” (Pub. Resource Code, § 21080(a).) The CEQA Guidelines (Cal. Code of Regs., title 14) 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....” (CEQA Guidelines, § 15378(a).) The CEQA Guidelines lists activities that may be considered a “project,” including approvals by public agencies for public works construction or related activities, contracts, grants, subsidiaries, loans or other forms of assistance, or leases, permits, licenses, certificates, or other entitlements. (CEQA Guidelines, §

15378(a)(1) - (3).) The CEQA Guidelines also lists several activities that do not fall within the meaning of the term “project” and thus are not subject to CEQA, including a public agency’s “[c]ontinuing administrative or maintenance activities such as ... general policy and procedure making...” (CEQA Guidelines, § 15378(b)(2).)

Adoption of Guidebook Revisions

The activity in this case is the Commission’s adoption of the proposed Guidebook revisions, as set forth in the 8th Edition. As explained above, the proposed revisions implement changes in law under Assembly Bill 1478 and revise and clarify existing Guidebook requirements and procedures previously adopted by the Commission. Although the proposed Guidebook revisions do not, in and of themselves, approve any specific electrical generating facility for the RPS, they do commit the Commission to a specific course of action with respect to future applications for RPS certification, because they authorize a facility’s certification based on the revised and clarified requirements and procedures in the proposed Guidebook revisions.

However, some of the proposed Guidebook revisions are based on requirements in statute, such as the requirements under Assembly Bill 1478 and Assembly Bill 1954. As such, the Commission’s approval of proposed Guidebook revisions for these requirements should not be considered the approval of a discretionary project under CEQA, because the requirements in statute must be implemented, so the Commission has no discretion but to implement the requirements. This is consistent with court decisions that have held the adoption of guidelines that provide procedural requirements for the implementation of laws are not projects under CEQA.

Similarly, the Commission’s approval of proposed Guidebook revisions that incorporate requirements and procedures previously adopted by the Commission in 2014 under Resolution Nos. 14-0422-11, 14-1007-10, and 14-1117-14, should not be considered approval of a discretionary project under CEQA, because these requirements and procedures have already been approved and adopted by the Commission. In this case, the Commission’s approval of the Guidebook revisions is merely adding these requirements and procedures to the Guidebook, so all certification and verification requirements and procedures for the RPS are compiled in one document.

The remaining proposed revisions to the Guidebook revise and clarify existing definitions and several administrative and procedural requirements in the Guidebook. The proposed revisions also reorganize and make nonsubstantive changes and edits to the text in various sections of the Guidebook and update various application and reporting forms as needed to reflect the revisions to the Guidebook. These proposed Guidebook revisions are administrative in nature. As such, the Commission’s approval of the proposed revisions should be characterized as a continuing administrative or maintenance activity related to general policy and procedure making, and thereby excluded from the definition of a “project” under CEQA Guidelines, § 15378(b)(2).

For these reasons, the adoption of the proposed Guidebook revisions should not be considered a “project” subject to CEQA. Assuming arguendo, however, that the adoption of the proposed revisions does in fact constitute a “project” under CEQA, the Commission’s action is nevertheless exempt under CEQA Guidelines, § 15061(b)(3).

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, § 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, § 15061(b)(3).)

In applying the latter, which is commonly referred to as the “common sense” exception, courts have held that the activity in question need not have a direct effect on the environment, but it must be a necessary or essential step in a chain of events which will culminate in a physical impact on the environment. In these cases, courts have looked to the causal link between the governmental action and the alleged environmental impact in determining whether the governmental action is a project subject to CEQA. If the governmental action did not create the need for the activity causing the environmental impact, courts have found the causal link missing, and concluded the governmental action is not an essential step culminating in action which may affect the environment.

Although it is true that there could be environmental impacts associated with the development or continued operation of electrical generating facilities for the RPS, the causal link between the Commission’s adoption of the proposed Guidebook revisions and the environmental effects associated with these facilities is missing. The adoption of the proposed Guidebook revisions will not create the need for new electrical generating facilities or the continued operation of existing generating facilities. The need for such facilities was created by the state Legislature when it enacted the RPS statute and the obligations this law, and other similar laws, place on utilities and other market participants to procure increasing amounts of electricity from renewable energy resources. Moreover, the development and continued operation of these facilities is not controlled by the Commission’s actions in adopting the proposed Guidebook revisions, but by factors outside the Commission’s control, such as financing, the availability of procurement contracts, and the requirements and conditions imposed by governmental entities with permitting authority over the facilities.

For these reasons, the Commission’s adoption of the proposed Guidebook revisions is exempt from CEQA.

Follow Up

The legal office will file this memo as part of the record in the RPS proceeding, Docket No. 11-RPS-01, to support the Commission’s action if it chooses to adopt the proposed Guidebook revisions.

Additionally, if the proposed Guidebook revisions are adopted, the legal office will prepare and file a Notice of Exemption (“NOE”) with the Office Planning and Research (“OPR”) pursuant to Pub. Resources Code, § 21108 (b) and CEQA Guidelines, §§ 15061 (d) and 15062.