

# Memorandum

To: CALIFORNIA ENERGY COMMISSION  
1516 Ninth Street  
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Date: July 30, 2015

From: **Samantha Arens**  
**Office of the Chief Counsel**

Subject: **CEQA Application to Funding Restrictions for the Alternative and Renewable Fuel and Vehicle Technology Program**

Docket: **15-OIR-02**

The California Environmental Quality Act (CEQA) (Pub. Resources Code §§ 21000 et seq.; see also CEQA Guidelines, Cal. Code Regs., tit. 14, §§ 15000 et seq.) generally applies to “projects proposed to be carried out or approved by public agencies...” (Pub. Resource Code § 21080(a).) The CEQA Guidelines (Cal. Code Regs., tit. 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 list 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).)

The activity in this case is the Commission’s adoption of the proposed section 3103 to its regulations on the Alternative and Renewable Fuel and Vehicle Technology Program (ARFVTP). The regulation revises and clarifies funding restrictions on projects under the ARFVTP. The proposed regulation does not, in and of itself, approve or authorize any specific ARFVTP project, nor does it create any new emissions credits. A “project” as defined by Cal. Code Regs., tit. 14, § 15378 does not include the creation of government funding mechanisms or other government fiscal activities that do not involve any commitment to any specific project. This regulation is part of a government funding program (ARFVTP) that will fund currently unidentified and unspecified projects. This regulation clarifies details of the funding program

and sets forth administrative procedures of process and eligibility for funding, but does not direct any specific activity, task or project that would cause direct or indirect impacts on the environment. The Commission separately considers each project funded under the ARFVTP, including its potential effect on the environment and compliance with CEQA. As such, the Commission's approval of the proposed regulation should not be considered the approval of a project under CEQA. 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.

The proposed regulation eliminates a credit discounting requirement and clarifies existing definitions. The proposed regulation also reorganizes and makes nonsubstantive changes and edits to the text of section 3103. These proposed revisions are administrative in nature. As such, the Commission's approval of the proposed regulation 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).

Assuming arguendo, however, that the adoption of the proposed regulation does in fact constitute a "project" under CEQA, the Commission's action is nevertheless exempt under CEQA Guidelines, § 15061(b)(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).) This is commonly referred to as the "common sense" exemption, and for it to apply courts have held that the activity in question need not have a direct effect on the environment, but that 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 there could be environmental impacts associated with the development of ARFVTP projects, the causal link between the Commission's

adoption of the proposed regulation and the environmental effects associated with these projects is missing because the adoption of the proposed regulation will not create new projects.

For the reasons stated in this Memorandum, the Commission's adoption of the regulation is not a "project" under CEQA and California Code of Regulations, Title 14, section 15378; and in the event that readoption were determined to be a project, it would nonetheless be exempt from CEQA requirements pursuant to the "common sense" exemption (Cal. Code Regs., tit. 14, § 15061, subd. (b)(3)).