State of California **California Natural Resources Agency**

M e m o r a n d u m

To: California Energy Commission
Docket No. 14-RPS-01

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California Energy Commission
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Subject: **Application of California Environmental Quality Act to Modifications of Regulations Establishing Enforcement Procedures for the RPS for Local Publicly Owned Electric Utilities**

Summary

This memo addresses the application of the California Environmental Quality Act ("CEQA") to the Energy Commission's adoption of proposed modifications to the regulations establishing enforcement procedures for the Renewables Portfolio Standard (RPS) for local publicly owned electric utilities ("POUs"). These regulations are being amended to implement Senate Bill 591 (SB 591, Stats. 2013, ch. 520) and clarify several existing provisions in the regulations.

Based on a review of CEQA and the pertinent legal authority, the Office of Chief Counsel concludes that the Energy Commission's adoption of the proposed modifications 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 existing regulations are codified in the California Code of Regulations, Title 20, sections 1240 and 3200 – 3208. They were adopted by the Energy Commission on June 12, 2013, subsequently approved by the Office of Administrative Law, and took effect on October 1, 2013. The regulations establish the rules and procedures the Energy Commission will use to assess a POU's procurement actions and determine whether those actions meet the RPS procurement requirements in the law. The regulations require POUs to submit various information and reports to the Energy Commission, so the Energy Commission may verify and determine compliance with the RPS, and, if appropriate, issue a notice of violation and correction for a POU's failure to comply and refer the violation to the California Air Resources Board for potential penalties.

The regulations are being amended to implement SB 591, which establishes a limited procurement exemption for a qualifying POU that receives greater than 50 percent of its annual retail sales from its own hydroelectric generation that is not an eligible renewable energy resource. In addition, the regulations are being amended to clarify several existing provisions in the regulations.

In summary, the amendments to the regulations will do the following:

- Implement changes in law under SB 591, which adds a new subdivision (k) to Public Utilities Code section 399.30 and establishes a limited procurement exemption for a POU that receives greater than 50 percent of its annual retail sales from its own hydroelectric generation that is not an eligible renewable energy resource. If this criteria is satisfied, SB 591 provides that the POU may limit its RPS procurement obligations for a given compliance period to the lesser of 1) the portion of the POU's retail sales not met by its own hydroelectric generation, 2) the procurement obligations applicable to other POUs under Public Utilities Code section 399.30 (c), or 3) the amount of procurement capped by the POU's cost limitations adopted in accordance with Public Utilities Code section 399.30. These changes in law would be implemented by amendments to sections 3204 and 3207 of the regulations;
- Clarify definitions for "bundled," "resale," and the "Western Electricity Coordinating Council" in section 3201 of the regulations;
- Clarify requirements for qualifying electricity products procured under agreements executed prior to June 1, 2010 in section 3202 of the regulations;
- Clarify requirements for electricity products qualifying as dynamic transfers in section 3203 of the regulations;
- Clarify rules for determining excess procurement related to amended contracts in section 3206 (a) of the regulations;
- Clarify the application of optional compliance measures in section 3206 (e) and (f) of the regulations;
- Clarify reporting requirements in section 3207 of the regulations; and
- Clarify procedural provisions for complaints of noncompliance in section 1240 of the regulations.

CEQA

CEQA (Pub. Resources Code, § 21000 et seq.; see also CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000 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).) However, an activity is not subject to CEQA if 1) the activity is not a "project" as defined in CEQA or 2) the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment. (Cal. Code Regs., tit. 14, §§ 15060(c) and 15061(b)(3).) 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…." (Cal. Code Regs., tit. 14, § 15378(a).) The CEQA Guidelines list 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. (Cal. Code Regs., tit. 14, § 15378(a)(1) - (3).) The CEQA Guidelines also list activities that do not fall within the meaning of "project" and thus are not subject to CEQA. These include a public agency's "[c]ontinuing administrative or maintenance activities such as . . . general policy and procedure making . . ." and its "[o]rganizational or administrative activities . . . that will not result in direct or indirect physical changes in the environment." (Cal. Code Regs., tit. 14, § 15378(b)(2) and (5).)

Adoption of Proposed Modification to Regulations

The activity in this case is the Energy Commission's adoption of proposed modifications to existing regulations, as summarized above. These proposed modifications are administrative in nature since they merely revise and clarify the rules and procedures the Energy Commission will use to assess a POU's procurement actions and determine whether those actions meet the RPS procurement requirements in the law. As such, the Energy Commission's adoption of the proposed modifications should be characterized as a continuing administrative activity related to general policy and procedure making, and thereby excluded from the definition of "project" under section 15378(b)(2) and (5) of the CEQA Guidelines.

Moreover, the proposed modifications for SB 591 are based on the requirements in statute that must be implemented. The Energy Commission's approval of these proposed modifications to the regulations should not be considered a discretionary project subject CEQA, because the Energy Commission has no discretion but to implement the statutory requirements. The Energy Commission has no authority to modify these statutory requirements. The proposed modifications to the regulations mirror the statutory requirements and include reporting and other procedural requirements needed to implement the statutory requirements. Courts have held that the adoption of guidelines to provide procedural requirements for the implementation of laws are not projects under CEQA.

For these reasons, the adoption of the proposed modifications to the regulations should not be considered a "project" subject to CEQA. Assuming arguendo, however, that the adoption of the proposed modifications does in fact constitute a "project" under CEQA, the Energy Commission's action is nevertheless exempt under section 15061(b)(3) of the CEQA Guidelines.

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. (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. (Cal. Code Regs., tit. 14, § 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 that 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 that may affect the environment.

In this case the proposed modifications to the regulations pertain to the RPS, which POUs must meet by procuring qualifying electricity products from renewable electrical generation

facilities. The continued operation or development of these renewable electrical generation facilities could have environmental impacts. However, the causal link between the Energy Commission's adoption of the proposed modifications to the regulations and the environmental effects associated with these electrical generation facilities is missing. The adoption of the proposed modifications to the regulations will not create the need for new electrical generation facilities or the continued operation of existing electrical generation 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 POUs and other utilities and market participants to procure increasing amounts of electricity from renewable energy resources. Moreover, the development and continued operation of these electrical generation facilities is not controlled by the Energy Commission's actions in adopting the proposed modifications to the regulations, but by factors outside the Energy 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 Energy Commission's adoption of the proposed modifications to the regulations is exempt from CEQA.

Follow Up

If the proposed modifications to the regulations are adopted, the Office of Chief Counsel will prepare and file a Notice of Exemption with the Office of Planning and Research pursuant to Public Resources Code, section 21108 (b), and sections 15061 (d) and 15062 of the CEQA Guidelines.