

# California and the U.S. Department of Energy Take Action to Smooth the Way for Renewable Projects

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The push to support renewable energy development has resulted in several changes in state and federal law and regulations aimed at streamlining environmental review for renewable projects. In California, the new 33% renewable portfolio standard (RPS) law signed April 12, 2011,<sup>1</sup> kicked off an active legislative season. Gov. Jerry Brown recently signed several bills into law that will do the following:

- shorten the judicial review of legal challenges to land use entitlements for certain large renewable projects (AB 900)
- offer environmental review exemptions to rooftop and parking lot solar installations and expand the jurisdiction of the California Energy Commission to include photovoltaic plants for a small number of solar projects (SB 226)
- clarify that water supply assessments would not be required for certain renewable projects (SB 267)
- speed up the endangered species review process for renewable energy projects (AB X1 13 and SB 16)
- facilitate solar development on marginal farmlands (SB 618)

For its part, the U.S. Department of Energy (DOE) has also crafted a set of new environmental review exemptions, including some for small renewable energy projects and transmission infrastructure. Despite the breadth of this list, these changes are by and large incremental in nature; the actual impacts of these changes will depend on whether project proponents manage to qualify their projects for these benefits.

## I. California Developments

To address some perceived and some real permitting hurdles faced by renewable projects in California, the state legislature tackled a host of incremental changes to the California Environmental Quality Act (CEQA),<sup>2</sup> as well as some needed streamlining to the California Endangered Species Act (CESA)<sup>3</sup> and Williamson Act processes (as discussed below).<sup>4</sup>

## II. AB 900 Streamlines Judicial Review of Certain Large “Leadership” Projects, Including Renewables

The most recent and late-breaking bill that was passed at the end of the legislative session was AB 900 (Buchanan), which authorizes the governor to certify large “leadership projects” for streamlined judicial review of CEQA and all other land use entitlements. Once such projects are certified, opponents must bring all CEQA and entitlement claims together in the court of appeal (skipping the trial court entirely), which then must render a decision within 175 days.<sup>5</sup> AB 900 also provides for preparation of an electronic administrative record concurrently with the administrative process, intended to speed up project review.<sup>6</sup>

Wind and solar projects are among those that may qualify for this streamlined process. However, whether many wind and solar projects will be able to take advantage of AB 900’s judicial review benefits is unclear. Such projects will compete with other nonrenewable projects and must be certified by the governor. To be certified, the governor must make specific findings (subject to the Joint Legisla-

1. SB X1 2.

2. CAL. PUBLIC RES. CODE §§21000 et seq.

3. CAL. FISH & GAME CODE §§2050 et seq.

4. CAL. GOV’T CODE §§51200 et seq. AB 900 adds chapter 6.5 to the end of CEQA, §§21178-21183.9.

5. CAL. PUB. RES. CODE §21185(a)(3).

6. CAL. PUB. RES. CODE §21186.

tive Budget Committee's concurrence) that the qualifying project involves a minimum \$100-million investment, creates "high-wage" jobs, results in no net additional greenhouse gas (GHG) emissions, and is subject to monitored and enforceable CEQA mitigation measures as conditions of approval.<sup>7</sup> Even where this hurdle can be met, there is a deadline to this process that narrows the scope of its reach: all certifications will expire on June 1, 2014, so all CEQA documents must be certified and the time during which an action may be filed must end by that date.<sup>8</sup> On the whole, only a small set of projects are likely to qualify under AB 900, and those that do face procedural hurdles that will require careful planning and effective advocacy at the governor's office.

### III. SB 226 Exempts Rooftop Solar From CEQA Review; SB 267 Exempts Photovoltaic and Wind Projects From Having to Prepare Water Supply Assessments

SB 226 (Simitian) offers a package of amendments to existing law, three of which are related to renewable energy. The first of these creates a statutory exemption from CEQA for rooftop and parking lot solar installations under 500 square feet.<sup>9</sup> However, since these structures are arguably already categorically exempt under CEQA (as either additions to existing structures,<sup>10</sup> construction of small structures,<sup>11</sup> or accessory structures,<sup>12</sup> depending on the nature of the installation), this is likely to benefit only a small set of projects relative to existing law. Under the existing categorical exemptions, projects would lose the use of an exemption if they fell within any of the enumerated exceptions (that is, if the project is located in a sensitive environment, has a cumulative impact or significant effect, harms scenic resources within a scenic highway, causes substantial adverse impacts to historical resources, or is a hazardous waste facility<sup>13</sup>). Under the new statutory exemption, photovoltaic, or wind projects qualifying for the statutory exemption under SB 226, would only be ineligible for the exemption if they fall within one of the statutory exceptions, which SB 226 lists as impacting waterways, wetlands, or endangered species that would trigger requirements for permits under the Clean Water Act,<sup>14</sup> Porter Cologne Act,<sup>15</sup> the federal Endangered Species Act<sup>16</sup> or the CESA,<sup>17</sup> or a streambed alteration permit.<sup>18</sup> Thus, the narrower list of exceptions could help a small

subset of these renewable installations, such as those on historic buildings, along scenic highways, or on hazardous waste facilities.

Another component of SB 226 is a new paragraph of CEQA, which provides that a project's GHG emissions alone may not disqualify it for categorical exemption if the project is consistent with a local, regional, or statewide GHG emissions plan.<sup>19</sup> This provision likely has limited effect on renewable projects that, to date, have been able to show that they reduce GHG emissions over the life of the project, as they generally replace older, more polluting power plants. Finally, a third component of SB 226 offers real benefits to projects that have already been through the California Energy Commission environmental review process, but then change their technology to photovoltaic—a technology over which the California Energy Commission normally has no siting jurisdiction. For these projects, SB 226 clarifies that the Energy Commission may retain jurisdiction.<sup>20</sup> While this would apply only to a handful of projects directly, it eliminates a huge permitting uncertainty for those projects and may suggest that the legislature has some appetite to allow utility-scale photovoltaic plants to use the same "one-stop-shop" Energy Commission permitting available to solar thermal power plant proponents.

SB 267 (Rubio) provides an exemption from renewable projects subject to CEQA that might otherwise be interpreted to require the preparation of a water supply assessment. The bill eliminates an uncertainty raised by *Center for Biological Diversity v. County of San Bernardino*,<sup>21</sup> a case that held that outdoor industrial facilities occupying more than 40 acres of land meet the California Water Code definition of a project requiring preparation of a water supply assessment, even where water use was negligible.<sup>22</sup> To counter that case, SB 267 clarifies that solar photovoltaic and wind energy projects are exempt from the requirement, provided they demand no more than 75 acre-feet of water per year.<sup>23</sup>

### IV. AB X1 13, SB 16, and SB 618 Streamline Endangered Species Review of Desert Renewable Energy Projects

A trio of bills—AB X1 13 (Perez), SB 16 (Rubio), and SB 618 (Wolk)—work together to simplify required mitigation and to expedite endangered species review for certain RPS-eligible renewable energy projects. Generally, under the CESA, the Department of Fish and Game (DFG) may authorize projects that will "take" threatened, endangered, or candidate species, but only after the project has "fully mitigated" its impacts to the potentially affected species. Mitigation often requires purchase of large swaths of habi-

7. CAL. PUB. RES. CODE §21183, 21184.

8. CAL. PUB. RES. CODE §21189.1.

9. SB 226 adds CAL. PUB. RES. CODE §21080.35 to CEQA.

10. CEQA Guidelines §15380.1.

11. CEQA Guidelines §15303.

12. CEQA Guidelines §15311.

13. CEQA Guidelines §15300.2.

14. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

15. CAL. WATER CODE §13000 et seq.

16. 16 U.S.C. §§1531-1544, ELR STAT. ESA §2-18.

17. CAL. FISH & GAME CODE §2050 et seq.

18. CAL. PUB. RES. CODE §21080.35.

19. CAL. PUB. RES. CODE §21084(b).

20. CAL. PUB. RES. CODE §25500.1.

21. 185 Cal. App. 4th 866, 40 ELR 20146 (2010).

22. See Betsy Lake & Chelsea Maclean, Holland & Knight alert: CEQA Update: Water Supply Assessment Case Injects Unwanted Uncertainty for Renewable Energy Projects (Sept. 23, 2010).

23. CAL. WATER CODE §10912, added by S.B. 267 (Oct. 8, 2011).

tat in fee or by conservation easement, and such transaction costs can be exorbitant and result in dispersed and uncoordinated preservation. Last year, California adopted a limited fix that allowed a small number of large-scale solar thermal and photovoltaic projects in the planning area of California's Desert Renewable Energy Conservation Plan (DRECP) that qualified for stimulus funding to mitigate by paying in-lieu fees to the DFG.<sup>24</sup> AB X1 13 expands this option to apply to wind and geothermal power plants within the DRECP planning area; the program is no longer limited to projects seeking stimulus funding.<sup>25</sup> Any developer who chooses this approach would pay a fee, proportional to the impact caused by the project, into a fund that is used to support the mitigation actions developed by the DFG.<sup>26</sup> Additionally, the bill standardizes permit processing fees charged by the DFG for incidental take permits, based on project size, and authorizes the California Energy Commission to provide up to \$7 million in grants to the eight San Joaquin Valley counties to update policies, such as general plans, zoning ordinances, or natural community conservation plans, to encourage renewable energy development.<sup>27</sup>

As a companion bill to AB X1 13, SB 16 provides for procedures for the DFG to assist developers of RPS-eligible projects to submit timely and complete applications for incidental take permits.<sup>28</sup> (Note: SB 16 applies to all RPS-eligible projects, rather than the limited set covered under AB X1 13.) The bill requires that the DFG respond to applications within 45 days, and if the application is incomplete, the DFG is required to identify the specific missing information and notify the applicant. Once the application is complete, the DFG must render a determination on complete applications within 60 days.<sup>29</sup>

Finally, SB 618 provides a path for a formerly vexing problem in California: how to obtain coverage for a project that may take a California "fully protected species."<sup>30</sup> SB 618 expands the scope of the Natural Community Conservation Planning Act to allow the issuance of a take permit for fully protected species through a Natural Community Conservation Plan (NCCP). Although this provision does not expressly grant benefits to renewable energy projects, the expanded take permit authority comes at an important time, because the DCREP, which is an NCCP, is currently under development and would be able to incorporate take authorization for fully protected species for the renewable projects covered under that plan.

## V. SB 618 Also Creates a New "Solar Easement" to Facilitate Solar Development on Agricultural Lands Protected by Williamson Act Contracts

SB 618 adds agricultural conservation to the list of areas in which California policymakers have granted renewable energy projects streamlined procedures or exceptions to existing law. Agricultural preservation has long been a state policy, especially under the Williamson Act, which provides for local jurisdictions to offer tax incentives to local landowners in exchange for contracts prohibiting development on the contracted agricultural lands. Normally, ending such Williamson Act contracts in order to develop contracted lands requires either nonrenewal and a 10-year waiting period, or a contract cancellation by the local jurisdiction, a potentially complicated and expensive process.

Citing the prospect of "utility scale photovoltaic energy facilities on marginally productive or physically impaired land,"<sup>31</sup> SB 618 provides for a new mechanism for contract cancellations, specifically for solar projects. Under SB 618, landowners and local jurisdictions may rescind existing Williamson Act contracts by simultaneously creating "solar easements" that permit only approved solar development on the easement lands, generally for a period of 20 years (but not less than 10 years), and generally for lower fees than would apply to a regular contract cancellation.<sup>32</sup> To be eligible for a solar easement (as determined by the Department of Conservation, in consultation with the Department of Food and Agriculture), the contracted land must have significantly reduced agricultural productivity because of chemical or physical limitations or other adverse soil conditions and not be located in prime farmland, unique farmland, or farmland of statewide importance.<sup>33</sup> Furthermore, before a solar easement can be created, the landowner must also show that the impacts to production on neighboring parcels will be minimized and that the land will be restored to original condition after the end of the easement. Finally, these solar easements may end through nonrenewal (if the easement is a self-renewing easement), termination, or by returning the lands to their previous Williamson Act contract, in most cases requiring restoration of the lands to their prior state.<sup>34</sup> As with the bills discussed above, qualifying for a solar easement for project siting on agricultural lands calls for careful consideration of the procedural and substantive requirements.

## VI. Federal Developments

On the federal level, in the wake of criticism that the environmental review process was standing in the way of otherwise "shovel ready" renewable energy projects that qualified for Federal American Recovery and Reinvestment Act

24. CAL. FISH & GAME CODE §2069, added by SB X8 34 (Mar. 22, 2010).

25. CAL. FISH & GAME CODE §2069(b)-(c).

26. CAL. FISH & GAME CODE §2099(b).

27. CAL. PUB. RES. CODE §25619. CAL. FISH & GAME CODE §2099.10(b).

28. CAL. FISH & GAME CODE §2099.20.

29. *Id.*

30. Fully protected species are listed under provisions of the *Fish & Game Code* distinct from the CESA. Under this section of the *Fish & Game Code*, "take" is defined more narrowly to mean "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill," but not habitat destruction, generally. CAL. FISH & GAME CODE §§86 3511, 4700, 5050, & 5515.

31. SB 618 §1(g).

32. SB 618 §8; CAL. GOV'T CODE §§51191.2, 51255.1.

33. CAL. GOV'T CODE §51191.

34. CAL. GOV'T CODE §§51192, 51192.1.



(ARRA) of 2009 funding, the Council for Environmental Quality has been working with federal agencies to complete the National Environmental Policy Act (NEPA)<sup>35</sup> process, and recently reported that federal agencies had completed 190,000 of 190,694 required reviews.<sup>36</sup> To further expedite the NEPA process for renewable projects, on October 13, 2011, DOE promulgated some 20 new categorical exclusions to apply in its own NEPA reviews. DOE's new categorical exclusions span a wide range of activities, including several exclusions potentially relevant to renewable energy development.

## VII. DOE Creates New Procedures Regarding Categorical Exclusions, Including for Small-Scale Renewable and Transmission Projects

In particular, 10 categorical exclusions apply specifically to renewable projects, while two new and two revised exclusions may support renewable-related infrastructure.<sup>37</sup> Most of these renewable energy-related exclusions apply only to fairly small-scale installations.<sup>38</sup> For example, the exclusions for small-scale research and development or pilot projects, for small-scale research and development or pilot projects in aquatic environments, and for drop-in hydro-electric systems are expressly limited to "small" projects.<sup>39</sup> Similarly, the exclusions for solar photovoltaic systems, solar thermal facilities, and wind turbine installations all are limited to small-scale projects, either as attached to buildings or in areas of under 10 acres of previously disturbed lands (photovoltaics and solar thermal), or of no more than two small-scale turbines (wind turbines).<sup>40</sup> The categorical exclusions for combined heat and power or cogeneration, methane gas recovery and utilization facilities, biomass power plants, and ground source heat pumps are similarly limited to existing facilities (in the case of methane recovery or cogeneration) or to single new facilities (in the case of biomass power plants and heat pumps).<sup>41</sup> Additional exclusions may support infrastructure important to marketing renewable energy, such as alternative

fueling stations or electric car stations and power storage (including battery arrays or flywheels).<sup>42</sup> In addition, exclusions for the construction or upgrade of interconnection facilities and short power lines have been revised to potentially allow easier interconnection of renewable facilities<sup>43</sup> (though interconnections associated with generation would likely be considered a segment of the larger project).

Using these exclusions in practice may prove somewhat more complicated, because before any of these exclusions may be applied, DOE must first determine that there are no extraordinary circumstances that may affect the significance of environmental impacts, such as scientific controversy about the impacts, uncertain effects, unknown risks, or unresolved conflicts concerning resources involved, and also that the project has not been segmented from a larger project.<sup>44</sup> Furthermore, most of the new exclusions applicable to renewable energy resources also require additional determinations that the projects do not threaten violations of environmental, health, and safety laws, or have potentially significant effects on sensitive resources.<sup>45</sup>

Overall, the impact of these new exclusions may be fairly limited. Between the limitations on the applicability of these new exclusions and the generally small scale of excluded projects, this regulatory change is likely to benefit a somewhat small subset of all renewable energy projects.

## VIII. Conclusion

Policymakers at both state and federal levels are likely to continue their efforts to promote renewable energy development in ways both large and small. However, as with the current set of legislative and regulatory changes, how big an effect these changes will have on the ground will depend on whether projects will be able to take advantage of new streamlining and other benefits. As renewable project proponents seek to avail themselves of the opportunities offered by these legislative and regulatory changes, navigating the way through the various requirements will be increasingly important and require careful legal consideration.

35. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

36. THE NINTH REPORT ON THE NATIONAL ENVIRONMENTAL POLICY ACT STATUS AND PROGRESS FOR AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (May 2011).

37. 76 Fed. Reg. 63764 (Oct. 13, 2011).

38. 10 C.F.R. §1021 Subpart D, app. B5.

39. *Id.* apps. B5.15, B5.24, & B5.25.

40. *Id.* apps. B5.16, B5.17, & B5.18.

41. *Id.* apps. B5.14, B5.19, B5.20, & B5.21.

42. *Id.* apps. B5.1, B5.22, & B5.23.

43. *Id.* apps. B4.11 & B4.12.

44. 10 C.F.R. §1021.410; *see also* 76 Fed. Reg. 63764 (Oct. 13, 2011).

45. 10 C.F.R. §1021 Subpart D, app. B5.