

Client Alert.

September 13, 2011

2011 California Renewable Energy Legislation: Watershed Year for Streamlining, Siting and Permitting

By **Dian Grueneich, David Gold, Miles Imwalle, and Paul Esformes**

The Challenge of Implementing California's Ambitious RPS

California's new 33% renewable portfolio standard (RPS) law provides tremendous opportunities for renewable developers. To meet the challenge of the nation's most ambitious renewable development law, the California Legislature focused this year on streamlining the permitting, environmental review, and judicial review of renewable energy projects.

This Client Alert summarizes six key new bills affecting California renewable project permitting and development.

A.B. 1x 13 (Perez), the only bill signed into law to date by Governor Jerry Brown, alters the siting and permitting of certain renewable energy power plants, particularly those proposed to be located in the Mojave and Colorado deserts. Specifically, the geographic area subject to the bill matches the area under the state's [Desert Renewable Energy Conservation Plan](#), which facilitates the review and approval of renewable energy projects by coordinating permitting for biological and natural resources impacts.

In addition, the Legislature passed five bills at the close of the legislative session that now await the Governor's signature:

- **A.B. 900 (Buchanan & Gordon)**: streamlining judicial review of challenges under the California Environmental Quality Act ("CEQA")
- **S.B. 226 (Simitian & Vargas)**: CEQA exemption for solar projects on rooftops and parking lots
- **S.B. 16 (Rubio)**: establishing permit review deadlines for renewable projects
- **S.B. 618 (Wolk)**: conversion of nonproductive Williamson Act agricultural lands to solar power uses
- **S.B. 267 (Rubio)**: exemption from requirement to prepare water supply assessments for solar photovoltaic and wind projects

Together, these bills address obstacles in the often-cumbersome permitting and review process for renewable energy projects and demonstrate the State's commitment to the development of renewable energy. However, given the unprecedented scope of renewable project development in the state, the actual implementation of these new measures, as well as the possibility of additional legislation in 2012, will be a major focus in the months ahead.

Client Alert.

ENACTED LEGISLATION

A.B. 1x 13 (Pérez): Renewable Energy Siting Act

On August 29, 2011, Governor Brown signed into law the Renewable Energy Siting Act (the “Act”), A.B. 1x 13, authored by Assemblymember V. Manuel Pérez (D-Coachella), which addresses the siting and permitting of renewable energy power plants in California.

- **Expansion of In-Lieu Mitigation Program for State-Listed Species.** The Act expands the scope of a program started last year under S.B. 34 that allowed certain solar thermal and photovoltaic (“PV”) power plants the option of paying the Department of Fish and Game (“DFG”) mitigation fees in lieu of the traditional permitting process for impacts to state-listed species. DFG uses the in-lieu fees to acquire and restore habitat lands for impacted species. S.B. 34 applied only to solar thermal and PV power plants that are seeking funding from the Department of Energy and meet certain deadlines. The Act expands the definition of “eligible projects” in two ways. First, wind and geothermal projects may qualify, not just solar. Second, the program is no longer limited to stimulus projects, but covers all projects meeting the “covered activity” definition in the final Desert Renewable Energy Conservation Plan. The Desert Renewable Energy Conservation Plan, which covers the Mojave and Colorado deserts in California, facilitates the review and approval of renewable energy projects by coordinating permitting for biological and natural resources impacts. This expansion will assist both solar and non-solar projects in what can be a long and often contentious part of the permitting process.
- **Funding for Renewable Energy Planning Grants for Local Jurisdictions.** The Act requires the Energy Commission, upon legislative approval, to fund \$7 million in grants to counties in the Desert Renewable Energy Conservation Plan to revise their renewable generation and transmission planning and zoning ordinances. Many desert counties have planning documents that have yet to catch up to the recent increase in renewable energy development in the region, so this funding will assist counties to prepare planning documents that better account for renewable resources.
- **Permitting Fees.** The Act standardizes permit processing fees charged by the DFG for incidental take permits, based on project size. The fee is paid into the Renewable Resources Permitting Account in order to finance DFG’s Incidental Take Permit application processing costs and administrative costs. Additional fees may be charged if the project costs are particularly high.

PASSED LEGISLATION AWAITING GOVERNOR'S SIGNATURE¹

A.B. 900 (Buchanan & Gordon): CEQA Judicial Review Streamlining (the “Jobs and Economic Improvement through Environmental Leadership Act of 2011”)

A.B. 900, sponsored by Assemblymembers Joan Buchanan (D-Alamo) and Richard Gordon (D-Los Altos), enacts major changes to judicial review of CEQA challenges for large projects, including certain renewable energy projects. The bill was introduced just a day before the end of the 2011 legislative session and quickly passed by both houses. The bill contains dramatic changes to the procedure for judicially challenging a CEQA document and will be subject to intense lobbying in the month ahead over signature by the Governor, as well as likely challenges in its implementation, if it is enacted into law. Nevertheless, its provisions offer a level of streamlining and limited judicial review for renewable project developers not encompassed by current law.

¹ The Governor has 30 days from the end of each year of the legislative session to sign a bill passed by the end of that legislative session. Cal. Const. Art. IV, § 10(b)(1)

Client Alert.

- **“Leadership Projects” Designated by the Governor.** Under A.B. 900, California’s governor can designate certain large projects, including wind and solar energy projects, as “leadership projects,” subject to certain findings. Eligible projects must involve investment of \$100 million or more, produce high-wage, highly skilled jobs, not result in net additional greenhouse gas (GHG) emissions, and agree to mitigate their environmental impacts. The bill does not apply to waste incineration or biomass conversion projects. The governor has considerable discretion to designate a project and gubernatorial findings are not subject to judicial review. A.B. 900 will sunset at the end of Governor Brown’s term.
- **Expedited Legal Review.** A.B. 900 takes aim at the delay and uncertainty created by the judicial review process, which can easily take in excess of 3 years to obtain a decision from the Court of Appeal. Under A.B. 900, any legal challenge to a “leadership project” is heard directly by the Court of Appeal, bypassing the Superior Court, and the Court of Appeal must issue a decision within 175 days. To assist with this expedited review, lead agencies are required to assemble the administrative record concurrently with the environmental review process.

S.B. 226 (Simitian & Vargas): Rooftop Solar CEQA Exemption and Other CEQA Reforms

S.B. 226, authored by Senators Joe Simitian (D-Palo Alto) and Juan Vargas (D-San Diego), exempts certain solar projects on rooftops from review under CEQA, and provides other more general CEQA reforms.

- **Rooftop Solar Project CEQA Exemption.** The bill exempts from CEQA review solar PV projects and their associated equipment of no more than 500 square feet installed on the roof of an existing building or in a parking lot.
- **Other CEQA Reform Under S.B. 226.** In addition, the bill contains other minor reforms to the CEQA process, aimed at expediting environmental and legal review:
 - Authorizes scoping meetings with stakeholders to take place concurrent with referral of a proposed action to adopt or amend a general plan of a municipality;
 - States that a project’s GHG emissions are not, in and of themselves, sufficient for a project to be excluded from an exemption;
 - Where a prior environmental impact report (EIR) has been certified for a planning level decision, allows CEQA review of certain infill project to be limited to the effects on the environment that are specific to the infill project or not addressed in the prior EIR.

S.B. 16 (Rubio): Renewable Energy Permit Review Deadlines

S.B. 16, sponsored by Senator Michael J. Rubio (D-East Bakersfield), streamlines the processing of incidental take permits that address the impacts of solar thermal and PV power plants on endangered, threatened, or candidate species.

- **Timeline for Consideration of Incidental Take Permit Applications.** The bill expedites the application process for solar facilities by requiring DFG to determine whether the incidental take permit application is complete and to notify the developer within 45 days of receiving the application. If the application is incomplete, DFG is required to identify the specific missing information and inform the applicant. Once the application is complete, DFG must approve or reject it within 60 days.

S.B. 16 also requires DFG to report to the Legislature on its statistics for processing incidental take permits, beginning in 2014. S.B. 16 is a companion bill to A.B. 1x 13.

S.B. 618 (Wolk): Local Government Solar-Use Easement

S.B. 618, sponsored by Senator Lois Wolk (D-Davis) also awaits signature by Governor Brown. Under existing law, the

Client Alert.

Williamson Act authorizes a municipality to enter into 10-year contracts with property owners that agree to devote their land to agricultural uses in exchange for their land being taxed at lower rates. Once land is subject to the Williamson Act, property owners cannot convert to nonagricultural uses without waiting 10 years or, in limited circumstances, cancelling the contract subject to substantial fees. The Williamson Act has presented a significant hurdle to renewable energy developers hoping to site projects on agricultural lands, even when such lands are no longer in production or are of marginal agricultural value.

S.B. 618 allows owners of property subject to Williamson Act contracts to rescind their contracts immediately in order to enter in a so-called “solar-use easement,” under which the property owner agrees to use the land for solar PV facilities for at least 10 or 20 years. Like a Williamson Act contract, a solar-use easement is automatically renewed annually. A solar-use easement can be terminated by nonrenewal; cancellation, which is subject to paying a fee; or entering into a new Williamson Act contract. The solar-use easement option is available only for land that has significantly reduced agricultural productivity as a result of soil conditions, topography, drainage, or other physical reasons.

S.B. 267 (Rubio): Renewable Energy Project Water Supply Assessments

S.B. 267, sponsored by Senator Michael J. Rubio (D-East Bakersfield), exempts solar PV and wind projects from the requirement to prepare a S.B. 610 water supply assessment. Under the bill, solar photovoltaic and wind energy projects are exempt from the requirement, provided they demand no more than 75 acre-feet of water per year. The bill’s authors intentionally omitted solar thermal projects, which traditionally require much larger amounts of water than solar PV projects.

Morrison & Foerster has extensive experience in every aspect of the procurement, permitting, and financing of renewable energy projects and distributed generation.

For further information about these and other important energy developments, please contact:

Dian Grueneich

(415) 268-6976

dgrueneich@mofo.com

David Gold

(415) 268-7205

dgold@mofo.com

Miles Imwalle

(415) 268-6523

mimwalle@mofo.com

Paul Esformes

(415) 268-6628

pesformes@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We’ve been included on *The American Lawyer’s* A-List for seven straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.