Climate Change and Clean Technology Blog

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Summary of "Green" Legislation for the 2009 California Legislative Session

by Daniel P. Bane

At the end of the 2009 legislative session, Governor Schwarzenegger signed a remarkable potpourri of "green" legislation into law. While some of these measures are new edicts, others supplement or amend existing statutory schemes in hopes of catalyzing swift growth in the area of private renewable energy generation to help California achieve its ambitious clean energy goals as well as the goals of the California Global Warming Solutions Act of 2006 (Health & S C §§ 38500-38598 ("AB 32"). Specifically, this article addresses the following recent bills signed by the governor: SB 32, AB 920, AB 758, SB 104, AB 881, and AB 1366.

The synopses below are meant to highlight the key components of some of these newly enacted measures. However, this discussion is not meant to be all encompassing and thus, readers should review the complete text of the chaptered bills to familiarize themselves with the nuances of this newly enacted legislation. Copies of the chaptered bills may be obtained for a small fee from the Legislative Bill Room, State Capitol, 712 R Street, Sacramento, CA 95814, (916) 445-2323, or from the website maintained by the legislative counsel at www.leginfo.ca.gov.

Private Renewable Energy Generation

With the enactment of Chapters 328 (SB 32 – McLeod) and 376 (AB 920 – Huffman), Californians now have more incentive than ever to invest in renewable energy generation for their homes or businesses. However, behind the glowing press releases, these acts are not without their share of controversy and dissent in renewable energy industry circles.

SB 32

In an effort to encourage further renewable energy development, SB 32 expands the existing feed-in-tariff (FIT) program by requiring investor owned utilities (IOUs) and local publicly

owned electric utilities (POUs) with 75,000 or more retail customers[1] to purchase all electricity produced by eligible renewable electric generation facilities that are up to three (3) megawatts (MW) in size and located within the service area of the utility. While there are subtle differences in the FIT programs for local POUs and IOUs, the goals for each program are essentially the same: to encourage the siting of clean generation close to load centers in order to meet increases in the demand for electricity by removing the barriers for smaller projects in the competitive bidding process under the renewables portfolio standard (RPS) program. Importantly, for POUs and IOUs, each kilowatt hour (kWh) of electricity purchased from an eligible electric generation facility under this FIT program counts toward meeting the utilities' RPS annual procurement targets.

As with the existing California FIT program, SB 32 makes the expanded FIT program available to eligible electric generation facilities and defines them as generation facilities located within the service territory of, and developed to sell electricity to, either a local POU or IOU and that meets all of the following criteria: (1) has an effective capacity of not more than three MW; (2) is interconnected and operates in parallel with the electrical transmission and distribution grid; (3) is strategically located and interconnected to the electrical transmission and distribution grid in a manner that optimizes the deliverability of electricity generated at the facility to load centers; and (4) is an eligible renewable energy resource pursuant to Public Resources Code sections 399.11 *et seq.*

However, electric generation facility operators should be aware that the FIT program is not unlimited. SB 32 establishes program limits for both local POUs and IOUs. No local POU or IOU is required to purchase, under the FIT program, more than its fair share of electricity produced by eligible renewable electric generation facilities. This measure prevents local POUs and IOUs, and their ratepayers, from being unduly burdened by the FIT program.

While the FIT program is generally seen as a step in the right direction, some in the renewable energy industry feel the step may not be big enough to make a real difference toward meeting California RPS goals. First, SB 32 is limited because it, like the RPS program, does not appear to have any teeth in the event POUs and/or IOUs fail to meet their RPS annual procurement goals. Second, some renewable energy advocates are concerned that the FIT project (three MW) and program (750 MW) size limitations contained in SB 32 are arbitrary and would not allow more renewable energy capacity on the grid. Third, there is concern that SB 32 will detract focus from the bill's ultimate objective – to create a more robust market for medium scale 1-20 MW renewable projects through the revision of California's existing FIT program – by sidetracking California Public Utilities Commission ("CPUC") staff that would otherwise be free to implement what are perceived to be more effective programs (i.e. the Reverse Auction Mechanism (RAM) proposal) currently under consideration by the PUC and legislature. (See http://docs.cpuc.ca.gov/efile/RULINGS/106275.pdf).

Lastly, and perhaps of greatest concern to renewable energy advocates, SB 32 does little to fix the seeming fatal flaw of AB 1969 (Chapter 731 – Yee), which was a FIT based on the MPR, a price that was below the actual cost to produce renewable energy. As a result, few renewable energy projects have been constructed pursuant to AB 1969 during the approximately three years since its enactment on September 29, 2006. Consequently, renewable energy advocates fear that

with a similar pricing mechanism based on the MPR, even with some additional consideration for renewable attributes, SB 32 may suffer the same fate as AB 1969.

AB 920

AB 920 focuses on residential and small-business wind and solar projects by expanding the existing net-metering programs to allow net-metered customers to sell any excess electricity they produce over the course of a year to their electric utility. In the past, any excess electricity was the property of the electric utility without any compensation provided to the net-metered residential or small-business customer. According to AB 920, this expansion is seen as a way to (1) encourage substantial private investment in renewable energy resources, (2) stimulate in-state economic growth, (3) reduce demand for electricity during peak consumption periods, (4) help stabilize California's energy supply infrastructure, (5) enhance the continued diversification of California's energy resource mix, (6) reduce interconnection and administrative costs for electricity suppliers, and (7) encourage conservation and efficiency.

While AB 920 is sure to create additional interest in solar rooftops and the like, one key limitation that faces this bill is the two and one half percent of the electric utility's aggregate customer peak demand cap placed on the net-metering program. AB 560 (Skinner) was proposed concurrently to increase the net-metering program cap to five percent of the electric utility's aggregate customer peak demand. However, AB 560 failed to pass during the 2009 legislative session. Currently, it is projected that some parts of California will reach the two and one half percent program cap by as early as 2010. (See http://www.pr-inside.com/california-solar-bill-ab-560-stalls-r1479660.htm) Consequently, without an increase in the net-metering program cap, AB 920 may not be enough to spur the substantial private investment in renewable energy resources or stimulate the economic growth initially contemplated.

Energy Conservation
AB 758

Rather than promoting the development of additional energy supplies like Chapters 328 and 376 above, Chapter 470 (AB 758 – Skinner) focuses on meeting California’s energy needs by decreasing overall demand through cost-effective improvements in energy efficiency. Specifically, AB 758 requires the California Energy Resources Conservation and Development Commission (Energy Commission), by March 1, 2010, to establish a regulatory proceeding to develop a comprehensive program to achieve great energy savings in California’s existing residential and nonresidential building stock. The program established by the Energy Commission, in coordination with several specified entities, may include, but is not limited to, the following: (1) a broad range of energy assessments; (2) building benchmarking; (3) energy rating; (4) cost-effective energy efficiency improvements; (5) public and private sector energy efficiency financing options; (6) public outreach and education efforts; and (7) “green” workforce training.

In addition to mandating the creation of a comprehensive program that accomplishes a laundry list of directives, AB 758 also requires the CPUC, by March 1, 2010, to open a proceeding investigating the ability of electrical corporations and gas corporations to provide various energy

efficiency financing options to their customers for the purpose of implementing the Energy Commission's energy conservation program developed pursuant to AB 758.

Expansions Of The Global Warming Act of 2006

SB 104

The enactment of Chapter 331 (SB 204 – Oropeza) expands the definition of greenhouse gases included in the Global Warming Act of 2006 to include nitrogen triflouride, a gas used as an etchant in microelectronics. Consequently, manufacturers using nitrogen triflouride will now be subject to the compliance requirements of the Global Warming Act of 2006. For a comprehensive discussion of the Global Warming Act of 2006, see Towill and Theard, The Global Warming Solutions Act (AB 32): Raising the Temperature of California Business (November 2007).

AB 881

Chapter 375 (AB 881 – Huffman) creates the Sonoma County Regional Climate Protection Authority (Climate Protection Authority), until December 1, 2015, to assist local agencies in Sonoma County to meet greenhouse gas (GhG) emission reduction goals. The Climate Protection Authority is to be governed by the same board as that governing the Sonoma County Transportation Authority.

Specifically, the newly created Climate Protection Authority is authorized to (1) reduce energy consumption, (2) coordinate and implement energy efficiency projects, (3) increase water use efficiency, (4) utilize carbon sequestration opportunities, (5) administer grants to local entities, (6) develop alternative transportation options, and (7) measure and quantify ongoing greenhouse gas reductions.

Though a press release from Governor Schwarzenegger's office has indicated that this bill would allow the Climate Protection Agency to coordinate with other local public agencies to reduce GhG emissions in Sonoma county by 25 percent below 1990 levels by 2015, it does not appear from the text of AB 881 that level of GhG reductions is expressly mandated.

Water Quality

AB 1366

Chapter 527 (AB 1366 – Feuer) gives authority and discretion to any local agency that owns or operates a community sewer system or water recycling facility, within specified areas of the state, [2] to take action, by ordinance or resolution, after a public hearing on the matter, to control salinity inputs from residential self-generating water softeners to protect the quality of the waters in California, if the appropriate regional board makes a finding that the control of residential salinity output will contribute to the achievement of water quality objectives.

The bill specifically lists several actions that may be taken by local agencies in order to control

residential self-regenerating water softener salinity inputs such as buy back programs and use restrictions. However, if the local agency requires removal of self-regenerating water softeners, the local agency must compensate the owners for the reasonable value of the water softener, as determined by the local agency.

For more information, please contact Daniel P. Bane. Dan Bane is an associate in the Real Estate, Land Use and Environmental Practice Group in the firm's Orange County office. A more detailed version of this article appeared in the November 2009 issue of the CEB Real Property Law Reporter.

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[1] There was no previously existing FIT program for local POUs.

[2] AB 1366 only applies to the Central Coast, South Coast, San Joaquin River, Tulare Lake, and the Counties of Butte, Glenn, Placer, Sacramento, Solano, Sutter, and Yolo.