

# Article Reprint

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## Delivering on Renewable Energy

By Joel H. Mack and Mark T. Campopiano

California's existing Renewables Portfolio Standard is one of the most ambitious in the United States, requiring retail sellers of electricity to procure 20 percent of their electricity from eligible renewable energy resources by 2010. Efforts to spur further renewable generation and slash greenhouse gas emissions have led California Air Resources Board among others to call for raising the Renewables Portfolio Standard to 33 percent by 2020.

At the 11th hour of its recent legislative session, the California Legislature passed two bills that would do just that. Senate Bill 14 and Assembly Bill 64 would raise the Renewables Portfolio Standard to 33 percent by 2020 and advance numerous other provisions that could significantly affect how energy is sited, generated, bought and sold in California and the western states.

The day after the bills were passed, however, Governor Arnold Schwarzenegger announced he would veto over concerns about restricting the eligibility of out-of-state renewable energy resources and instead, would use his executive powers to raise the Renewables Portfolio Standard. Although the Governor has not vetoed the bills as

of this publication date, we anticipate that the veto will occur. At this time, there does not appear to be adequate legislative support to overcome a veto.

The Governor's objections focus on the following restrictions: The Renewables Portfolio Standard bills would have modified renewable energy "delivery" requirements to limit substantially the eligibility of out-of-state solar and wind projects. The bills would restrict how out-of-state intermittent resources, such as wind and solar could be "firmed" and "shaped" with traditional energy resources.

Firming and shaping involves combining energy schedules from a renewable energy resource with a non-intermittent, traditional energy resource to account for the intermittent nature of wind and solar generation and facilitate the firm delivery of energy into California. As described by the California Public Utilities Commission, out-of-state wind or solar energy must be firmed and shaped to make it marketable to a California retail energy provider. By adopting strict "deliverability" requirements for out-of-state resources that are not directly interconnected with a transmission provider in California, the bills would have restricted the

Reprinted from

*Daily Journal*

September 28, 2009

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eligibility of most out-of-state solar and wind resources and would have limited transactions that only involved tradable Renewable Energy Credits, as described below.

The bills would have limited the use of "tradable" Renewable Energy Credits or "Renewable Energy Credits-only" transactions to satisfy Renewables Portfolio Standard requirements.

Renewable Energy Credits are certificates that represent the environmental attributes of renewable energy generation that can be traded or sold separately from the underlying energy deliveries. Tradable Renewable Energy Credits can be associated with renewable energy that is never actually delivered to California.

Under existing California law, there are no specified limits on the use of tradable Renewable Energy Credits (although an initial annual five percent limitation for the three large investor-owned utilities' procurement had been included in a California Public Utilities Commission Proposed Decision issued by Administrative Law Judge Anne E. Simon). The bills would have capped the use of tradable Renewable Energy Credits at 25 to 30 percent of a retail seller's total requirement.

On Sept. 15, 2009, Governor Schwarzenegger issued Executive Order S-21-0911 requiring California Air Resources Board to adopt regulations by July 31, 2010 to meet the 33 percent Renewables Portfolio Standard by 2020 target.

Compared to the complexity and detail contained in the Renewables Portfolio Standard bills, the Executive Order's key feature is its brevity. The Executive Order vests substantial discretion with California Air Resources Board to develop the regulations. California Air Resources Board is given wide flexibility to "increase the target and accelerate and expand the time frame" and to delegate "any policy development or program implementation responsibilities" to the California Public

Utilities Commission or California Energy Commission for implementation. Only parameters such as providing "the greatest environmental benefits with the least environmental costs and impacts" and a specific directive to include resources "throughout the Western Interconnection" appear to limit California Air Resources Board's discretion.

Governor Schwarzenegger's Executive Order sends a strong signal that the state executive branch seeks to facilitate California utilities' ability to meet the state's ambitious 33 percent goal through at least partial reliance on out-of-state generation. And, by designating California Air Resources Board as the agency for implementing the 33 percent standard, the Executive Order also marks a significant administrative shift in which that state agency will take the lead on key features of Renewables Portfolio Standard implementation.

The lack of parameters limiting California Air Resources Board's discretion may increase uncertainty associated with the program in the absence of new legislation. Although California Air Resources Board's regulations are mandated to be in place by July 31, 2010, legal challenges could bring further delays and uncertainty. Given current shortfalls in meeting the existing Renewables Portfolio Standard, ambiguity over the scope and content of the requirements may jeopardize eventual compliance. In addition, the Executive Order and potential legal challenges raise the question of whether the California Public Utilities Commission will continue to postpone its Renewable Energy Credits proceeding (and any action on Simon's March 27, 2009 proposed decision). Consequently, it remains uncertain whether and to what extent the California Public Utilities Commission will act on any Renewable Energy Credits-related transactions involving California investor owned utilities until California Air Resources Board's regulations become effective.

Critics have questioned the legality of the Executive Order and whether it would be binding once the Governor leaves office. AB 32 does not expressly provide the authority to raise the Renewables Portfolio Standard or apply it to publicly owned utilities. Nonetheless, AB 32 gives California Air Resources Board broad powers to adopt and enforce regulations to reduce greenhouse gas emissions, including emissions from the energy sector. It is unclear, however, whether California Air Resources Board's authority is so expansive under AB 32 that it can intrude upon the authority of the California Public Utilities Commission and California Energy Commission, which traditionally have regulated the energy sector, and recast a regulatory scheme as complex and widespread as the Renewables Portfolio Standard program. Ultimately, this issue may be resolved in court.

Implementation of any mandate, whether via the Executive Order or legislation, will pose substantial challenges to California's infrastructure and economy. To issue some legal mandate requiring renewable energy usage is simple, but actually achieving sufficient renewable generation supported by an adequate transmission infrastructure will be much more challenging. A recent California Public Utilities Commission report highlights the myriad technical, economical and political challenges - many of which are outside the control of California decision-makers - impeding implementation of a 33 percent by 2020 mandate. According to the California Public Utilities Commission, the "magnitude of the infrastructure that California will have to plan, permit, procure, develop and integrate in the next ten years is immense and unprecedented." As a result, it remains to be seen whether and the extent to which California is able to develop and finance the infrastructure required to achieve this mandate.

In summary, if California's Renewables Portfolio Standard is raised to 33 percent by 2020 and the Executive Order's directive is ultimately binding, it will significantly affect how energy is sited, generated, bought and sold in California and the Western states.

Given Governor Schwarzenegger's threatened veto of the bills, questions over the legality of Executive Order, and uncertainty over the eventual scope of California Air Resources Board's regulations, we expect a rapidly shifting regulatory and legal landscape for the program and renewable energy projects.

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