



Leadership is our business

Associated Industries of Massachusetts

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By email at DOER.SREC@state.ma.us

June 21, 2013

Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

Re: SREC-II Policy Design; AIM Comments

To whom it may concern:

Associated Industries of Massachusetts (AIM) is pleased to comment on the policy design referenced above.

AIM is the state's largest nonprofit, nonpartisan association of Massachusetts employers. AIM's mission is to promote the well-being of its thousands of members and their employees and the prosperity of the Commonwealth of Massachusetts by improving the economic climate, proactively advocating fair and equitable public policy, and providing relevant, reliable information and excellent services.

AIM is concerned about the design of this program primarily in two areas – the use of an emergency regulation to increase the current cap on solar installations and the potential cost of the program. Since the cost is related to the use of emergency regulations to immediately implement the design and therefore increase costs, AIM will focus on that issue.

DOER intends to use emergency regulations to increase the current 400 MW cap on solar installations for those projects currently in various places in the queue in order for them to obtain a statement of qualifications (SQ) for subsidies under the existing SREC program. This will be done to create a bridge linking the original 400 MWs and additional MWs (the subject of the request for comments by the Department) to a much larger program which will be adopted in the future under the Massachusetts Administrative Procedure Act, Chapter 30A.

We believe an emergency promulgation for this design is inappropriate and would be a violation of Section 30A of the Administrative Procedures Act.

Chapter 30A, Section 2 of the Massachusetts General Laws clearly outlines the procedures required for any proposed regulations. These include such important steps as proper notice, hearing(s), comment period, and small business impact analysis – all before a rule is effective. Such processes can be bypassed, at least initially, under the emergency provision of 30A, which states:

If the agency finds that immediate adoption, amendment or repeal of a regulation is necessary for the preservation of the *public health, safety or general welfare, and that observance of the requirements of notice and a public hearing would be contrary to the public interest*, the agency may dispense with such requirements and adopt, amend or repeal the regulation as an emergency regulation. (Emphasis added.)

It is hard to see on its face where this particular design – expanding the solar REC program - would qualify as an exception to the normal administrative procedures.

AIM understands that the issuance of emergency regulations would not be for the entire expansion of the program, but for those projects identified as somewhere in the queue. Nevertheless, it is a major expansion to the existing program and is not what was contemplated in the original design that was adopted pursuant to the Act several years ago. By calling this increase an emergency, the ratepayer is in essence left out of the process, at least for those projects already in the queue. The rule will be effective and rights will be assigned to those in the queue before public notice is issued, hearing(s) are held, comments are received, and economic impact is presented.

The pre-promulgation notice and hearing process under the Act is important in any regulatory setting. Completing the formal 30A process is also vital to AIM members because under the Act a small business impact statement is required that identifies the cost of the program to ratepayers and the public before a rule is final and effective. Unfortunately, by using the emergency process under the Act in this instance, the public and ratepayers will not know the impact until weeks or months later. Finally, the request for comments about the design in no way satisfies or substitutes for the formal notice, comment and economic impact requirements of the Act. It is at best a failed attempt to appear open to stakeholder concerns, but it lacks the formality, scope of notice, and detailed wording of a proposed rule, which would accompany a proposed rulemaking.

Emergency regulations are rarely used, and for good reason. For obvious reasons, the legislature created a high bar for the use of emergency regulations. Since hearings and notice occur after the regulations are implemented, emergency regulations should only be used in very narrow cases - where the needs of protecting society are overwhelming and where not acting would cause harm, and where no other option would solve the problem. Typically, they are used to address public health emergencies, such as health issues related to diseases. Sometimes they are used when federal or state laws collide or when a court decision is issued, and the collision or decision would result in a severe disruption of services or the marketplace. Even the Department of Public

Health, the Department of Environmental Protection, and the Department of Public Safety rarely use emergency regulations, and those agencies are areas where public health and welfare are demonstrably at stake.

Here, we have a setback for some solar installations because the cap has been reached. It appears that the reason for the “emergency” is because some projects are caught up in the Statement of Qualifications (SQ) queue which is oversubscribed. DOER asserts that this would result in business suspensions or other delays. While reaching the cap may delay some of these installations, the cap was well known to the industry and the DOER and so was the speed of applications for the queue. It appears that some of this havoc may be self-inflicted by DOER’s unwillingness to say no to projects or failing to notify stakeholders of the speed of applications into the queue and thereby manage expectations. Inaction by DOER to develop regulations earlier or to manage the process earlier is not a reason to use emergency regulations. There is no public health emergency.

AIM often participates in regulatory development through public hearings and requests for comment under the Act and always encourages our members to participate in the process with the expectation that their views will be heard and taken into account when regulations are developed. In the end, maintaining the vitality and usefulness of the 30A process should be one of the hallmarks of every agency. It should not be overwhelmed by situations which are not related to true emergencies. Bypassing this up-front hearing and comment process for reasons not authorized by the legislature make the public believe that fairness will be compromised for expediency and it lessens the trust in public agencies.

When the original program was first proposed, stakeholders based their comments on what was proposed – a 400 MW solar carve out in the Class I REC program with associated costs. Had AIM, the public and the legislature known at that time the original program would be increased at the whim of DOER on an “emergency” basis when it reached capacity, AIM’s comments may have been very different. By using emergency regulations to circumvent real discussion, DOER is not only ignoring the concerns of the ratepayer but also ignoring those who participated in the earlier process, which included solar developers.

AIM’s concern about the process is not opposition to the subject matter. In fact, some AIM members could be caught up in this delay and moreover AIM has encouraged members to take advantage of solar subsidies whenever appropriate.

We urge DOER not to use an emergency promulgation to increase the size of the current program. Rather it should use the appropriate 30A process so that all stakeholders may participate. While there may be some short term disruptions, the result will maintain the integrity of the 30A process and signal the thoughtfulness of the Department in making such a significant change to its original solar carve out rule. DOER needs to take a deliberative approach and not rush to a decision in this matter. In fact, a recent communication from the chairs of the Joint Telecommunications, Utilities and Energy to the Department urged such deliberation and thoughtfulness to ensure the next phase of the solar program is realistic and least cost.

Thank you for allowing us the opportunity to submit comments. We look forward to further participation in this important matter.

Sincerely,

A handwritten signature in black ink that reads "Robert A. Rio". The signature is written in a cursive style with a large, prominent initial "R".

Robert A. Rio, Esq.