Leadership is our business

Associated Industries of Massachusetts
One Beacon Street, 16th Floor
Boston, MA 02108
617.262.1180 | www.aimnet.org

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

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

Re: SREC-II Emergency Regulations, 225 CMR 14.00; AIM Comments

To whom it may concern:

Associated Industries of Massachusetts (AIM) is pleased to comment on the emergency regulations 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.

The comments below are similar to our comments submitted on June 21st, 2013 related to the design of the SREC program. At that time we took exception to the notion that these regulations should be considered "emergency" based on the clear reading of the statute governing such designation. Since this comment period is related to the emergency regulations themselves, we will reiterate some of main objections.

DOER's use of emergency regulation in this instance is inappropriate and is a clear violation of Section 30A of the Administrative Procedures Act. In addition, DOER is not presenting clear costs for the implementation of this and other programs also as required by Section 5 of the Act.

Chapter 30A, Section 2 of the Massachusetts General Laws clearly outlines the threshold for any regulation to be considered emergency:

> 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 program – expanding the solar REC program - would qualify as an exception to the normal administrative procedures.

As we said in our June 21st comments, 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 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.

Bypassing the normal up-front hearing and comment process for reasons not authorized by the legislature lessens the trust in public agencies, because after the fact comments are nothing more than a mere formality to "check the box" and move on.

Additionally, we believe that the DOER has not been transparent when it comes to releasing cost estimates of this emergency regulation, as well as cost estimates for the full anticipated expansion of the program.

Chapter 30A, Section 5 of the Massachusetts General Laws clearly states the requirement for a small business impact for proposed regulations:

> No rule or regulation so filed with the state secretary shall become effective until an estimate of its fiscal effect including that on the public and private sector, for its first and second year, and a projection over the first five-year period, or a statement of no fiscal effect has been filed with said state secretary. In addition, no rule or regulation so filed, unless filed for the purposes of setting rates within the commonwealth, shall become effective until an agency has filed with the state secretary a statement considering the impact of said regulation on small business.

It is imperative that a full cost analysis be performed, including impact on the electricity cost for small businesses. We could find no record of this small business impact requirement on file with the Secretary of State. The cost impact should not just include the cost of this program but also an acknowledgment that other programs run by DOER are also impacting the cost of electricity here in the commonwealth.

The ratepayer has a right to know why their electric rates are currently near the top in the United States and what the future holds. Sadly, the DOER has been remiss in releasing a breakdown of all the costs on a typical energy bill that have been added in recent years, preferring instead to compartmentalizing each program as only a small increase, while ignoring the cumulative impact on the customer.

The statutory provision in the Green Communities Act on which the entire solar program and its expansion are based is contained in two sentences, neither of which mentions solar. Those sentences give DOER discretion – without legislatively created limits – to "carve out" from the RPS requirement a separate requirement for a specific technology. In this context, DOER has on its own created a multi-billion dollar cost impact on ratepayers. As a consequence, DOER bears a heavy transparency responsibility to the public. Using emergency regulation and not fully disclosing projected costs to ratepayers in this discretionary context is inappropriate and ducks DOER's responsibility to the ratepayer.

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

Sincerely,

Robert A. Rio, Esq.