

LEGAL ANALYSIS OF THE USE OF SB 71 STE FOR ALTERNATIVE SOURCE ENERGY GENERATION FACILITIES

The comments on this question have focused almost exclusively on the definition of “project” included in SB 71 and now codified at Public Resources Code (PRC) Section 26003(g)(2) and how it relates to the definition of alternative source found at PRC Section 26003(c)(1). For example, one commenter provided the following interpretation:

The term “alternative source products, components, or systems” clearly can be interpreted to include the production of alternative renewable energy. We see no reason that CAEATFA cannot determine that certain forms of renewable energy constitute a “*product*” eligible for sales and use tax exclusion under SB 71. Similarly, “alternative source *system*” can be interpreted by CAEATFA to include *renewable energy production systems* – including equipment used to generate renewable electricity according to the provisions of SB 71. Finally, “alternative source *components*” can clearly be interpreted to include renewable *energy production components* – including the equipment used to generate renewable electricity according to SB 71. (Emphasis in original)

Viewed in a vacuum, perhaps the language of PRC 26003(g)(2) could be interpreted to encompass all of those aspects of the renewable energy generation industry. However, SB 71 was not enacted in a vacuum, but rather against the backdrop of existing law. For this reason, it is not enough to look at and parse the language of PRC 26003(g)(2). One must also consider the provisions of the CAEATFA statute as it existed prior to the enactment of SB 71. Specifically, consideration must be given to the pre-existing definition of project now found at PRC 26003(g)(1).

In coming to a conclusion regarding the project definition adopted in SB 71, CAEATFA has relied on the plain language of the statute and legislative history. In looking to the plain language, CAEATFA has undertaken a comparison and analysis of the pre-SB 71 definition of project in Public Resources Code Section 26003(g)(1) to the Section 26003(g)(2) definition adopted in SB 71.

The differences between the two give a good idea of the legislature’s intent and lead to a conclusion that the legislature did not contemplate generating facilities to be included in the SB 71 program.

26003(g) (1) "Project" means a land, building, improvement to the land or building, rehabilitation, work, property, or structure, real or personal, stationary or mobile, including, but not limited to, machinery and equipment, whether or not in existence or under construction, that utilizes, or is designed to utilize, an alternative source, or that is utilized for the design, technology transfer, manufacture, production, assembly, distribution, or service of advanced transportation technologies, or an arrangement for the purchase, including prepayment, or sale of energy derived from an alternative source pursuant to subdivision (g) of Section 26011.

First, under PRC Section 26003(g)(1) CAEATFA has no authority to provide financial assistance to alternative source product manufacturers. The reference to manufacture in this section applies

only to advanced transportation technologies. Second, it is clear that under PRC Section 26003(g)(1) CAEATFA has the authority to provide financial assistance to alternative source generating facilities as “machinery and equipment... that utilizes or is designed to utilize an alternative source...”.

With this in mind, CAEATFA believes it is reasonable to assume that had the legislature intended to include both alternative source generation and manufacturing in SB 71 it could have done so by simply adding alternative source manufacturing to the PRC Section 26003(g)(1) definition. But that is not what happened¹. With SB 71, the legislature adopted a completely different definition of project:

26003(g)(2) "Project," for the purposes of Section 26011.8, means any tangible personal property that is utilized for the design, manufacture, production, or assembly of advanced transportation technologies or alternative source products, components, or systems.

Apart from the addition of authority to provide financial assistance to alternative source manufacturing, the most obvious difference between 26003(g)(1) and SB 71's (g)(2) is the deletion of the reference to machinery or equipment that utilizes or is designed to utilize an alternative source. The Legislative decision to delete this language from the SB-71 definition cannot be ignored. It is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place, and has excluded it in another, it should not be implied where excluded. (*State Building and Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289).

To include generation – “machinery and equipment that utilizes or is designed to utilize an alternative source” – in the SB 71 program would require CAEATFA to ignore the obvious differences between the two project definitions.

In sum, the legislature tailored the SB 71 program to give CAEATFA a limited ability to provide assistance to manufacturers of alternative source products, components or systems. By omitting the reference to facilities that utilize an alternative source, it carved alternative source generation out of the program.

Going beyond the plain language of the statute and looking to the legislative history of SB 71 reinforces this conclusion and demonstrates that the Legislature firmly believed that generation was encompassed in CAEATFA's pre-existing authority. That being the case there was no need to include it in the SB 71 program.

Excerpts from the Senate Floor Analysis for SB 71 (3/23/10)

Summary: Expands the range of projects which may be approved for a sales tax exclusion to include equipment used to manufacture products that produce energy from alternative sources such as solar, wind and biomass.

¹ It's worth noting, that the addition of alternative source manufacturing to the pre-SB 71 definition (now 26003(g)(1)) was considered and rejected by the legislature in AB 1111 (Blakesley).

Existing Law: CAEATFA was established in 1980 as a means to encourage the use of equipment using alternative or renewable energy sources, such as wind, solar, cogeneration and geothermal. Under its existing authority, CAEATFA may approve projects and authorize financial assistance for the purchase of equipment that uses such alternative energy sources. CAEATFA is authorized to provide financial assistance to projects that meet its approval through the issuance of bonds, loans, loan guarantees and credit enhancements. In addition, existing law permits CAEATFA to approve projects and exclude equipment purchased pursuant to those projects from state and local sales and use tax. Currently projects that may be approved by the authority do not include equipment that is used to manufacture alternative or renewable energy products (such as solar panels, photovoltaic cells or wind turbines).

When speaking of SB 71 the legislature understood the provisions to apply to equipment used to manufacture products that produce energy from alternative sources. Logically then, SB 71's project definition would be limited to the machinery and equipment necessary to manufacture solar panels or wind turbines. In contrast, when speaking of existing law, the Legislature spoke in terms of equipment that uses alternative sources.

From the plain language and the legislative history, it is clear that the Legislature knew CAEATFA had the existing authority to provide financial assistance including sales and use tax exclusions to projects under the pre-SB71 definition. SB 71 was enacted to grant some authority to provide similar financial assistance to manufacturing.