



September 13, 2012

Via Electronic Mail

Federal Housing Finance Agency
c/o Alfred M. Pollard
General Counsel
Attn: Comments/RIN 2590-AA53
Eight Floor, 400 Seventh Street SW
Washington, D.C. 20024

RegComments@fhfa.gov

Re: Comments of the Sierra Club on Federal Housing Finance Agency Notice of Proposed Rulemaking Re: Property Assessed Clean Energy, RIN 2590-AA53

Dear Mr. Pollard:

The Sierra Club submits these comments on the Notice of Proposed Rulemaking (“NPR”) concerning whether, and under what conditions, the Federal National Mortgage Association (“Fannie Mae”), and the Federal Home Loan Mortgage Corporation (“Freddie Mac”) (collectively, the “Enterprises”) will purchase mortgages of properties participating in local Property Assessed Clean Energy (“PACE”) programs.¹ These comments supplement the joint comment letter on the NPR submitted by the Sierra Club together with local governments, trade associations, energy companies, and other environmental groups (“Joint Comment Letter”).

The Sierra Club is a non-profit public benefit corporation, incorporated in California, with 600,000 members nationwide. The Sierra Club’s mission includes promotion of the responsible use of the earth’s ecosystems and resources, and education of the public about the need to protect and restore the quality of the natural and human environment. Sierra Club is a leader in the effort to reduce the nation’s dependence on fossil fuels. The highest priority of Sierra Club’s work is eliminating the need for fossil fuel-fired power plants through increased energy efficiency and the development of renewable energy. PACE programs significantly further this objective by creating a financing mechanism that allows homeowners to affordably install solar and retrofit their homes. Because this rulemaking will largely determine the fate of residential PACE programs, the Sierra Club, and its many members who want to participate in PACE, are significantly affected by its outcome.

¹ Federal Housing Finance Agency, Enterprise Underwriting Standards, 77 Fed. Reg. 36086 (Jun. 15, 2012).

In the NPR, FHFA continues its unmerited and strident opposition to PACE programs. FHFA proposes a rule that would flatly prohibit the Enterprises from purchasing “any mortgage that is subject to a first-lien PACE obligation.”² The proposed rule is based on FHFA’s unsupported conclusion that blocking PACE programs “is reasonable and necessary to limit, in the interest of safety and soundness, the financial risks that first-lien PACE programs would otherwise cause the Enterprises to bear.”³ As set forth in the Joint Comment Letter, herein incorporated by reference, FHFA lacks any legitimate evidentiary basis to support this determination. Indeed, the overwhelming weight of the evidence supports the opposite finding. PACE programs *reduce* risk to the Enterprises by increasing home value and homeowner cash flow. By failing to “examine the relevant data and articulate a satisfactory explanation for its action” and “offer[ing] an explanation for its decision that runs counter to the evidence before the agency,” FHFA has violated the Administrative Procedures Act (“APA”).⁴

The NPR’s alternatives analysis is also inconsistent with the APA. In discussing proposed alternatives, FHFA seeks an alternative that “would provide mortgage holders with equivalent protection from financial risk to that of the Proposed Rule, and could be implemented as readily and enforced as reliably as the Proposed Rule.”⁵ In other words, FHFA is only willing to seriously consider an alternative that functions exactly like FHFA’s proposal to block PACE programs in their entirety. FHFA’s stated refusal to consider alternatives that do not possess identical attributes as its own proposal violates the APA.⁶ FHFA must give full and fair consideration to alternatives to the proposed action. As set forth in the Joint Comment Letter, Sierra Club supports a modified Alternative 3. With modification, Alternative 3 is practical to implement and addresses FHFA’s concerns of purported risks posed by already low-risk PACE programs.

FHFA’s singular and narrow focus on eliminating *any* risk to the Enterprises also runs afoul of FHFA’s own authorizing legislation, the Safety and Soundness Act. In addition to ensuring that the Enterprises operate in a financially “safe and sound manner,” the Safety and Soundness Act requires FHFA “to ensure that ... the activities of each regulated entity and the manner in which such regulated entity is operated *are consistent with the public interest.*”⁷ Despite this mandate, FHFA has failed to ensure its proposal is consistent with the public interest. Instead, the NPR summarily brushes aside the many comments on the Advanced NPR highlighting PACE’s benefits to the environment, energy security, and the economy.⁸

Finally, FHFA must complete a NEPA analysis on the environmental impacts of its proposed rule. NEPA requires the preparation of an Environmental Impact Statement

² 77 Fed. Reg. at 36107.

³ *Id.*

⁴ 5 U.S.C. § 706; *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010).

⁵ 77 Fed. Reg. at 36107.

⁶ *See, e.g., Neighborhood TV Co., Inc. v. FCC*, 752 F.2d 629, 639 (D.C. Cir. 1984) (agency must “consider[] reasonable alternatives to its decided course of action.”).

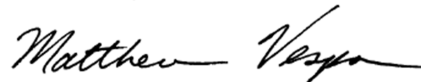
⁷ 12. U.S.C. § 4513(a)(1)(B)(v) (emphasis added).

⁸ 77 Fed. Reg. at 36098-99.

(EIS) for “major federal actions significantly affecting the quality of the human environment” to ensure that an agency has taken the required “hard look” at the environmental consequences of its proposed action.⁹ As set forth in comments by the County of Sonoma on the Advanced NPR, “[d]ata from Sonoma County projects supports the conclusion that the availability of the County’s PACE program results in energy projects being completed that otherwise would not have been done.”¹⁰ By proposing a rule that blocks PACE programs nationwide, FHFA has also blocked action that would have otherwise been taken to reduce greenhouse gas pollution through increased renewable energy and energy efficiency. FHFA must analyze and disclose the environmental impacts of the proposed rule and “[r]igorously explore and objectively evaluate all reasonable alternatives.”¹¹

Thank you for your consideration of these comments, and the comments in the Joint Comment Letter.

Respectfully Submitted,



Matthew Vespa
Staff Attorney
Sierra Club



Dave Hamilton
Director of Clean Energy
Beyond Coal Campaign
Sierra Club

⁹ *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 711 (9th Cir. 2009); 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.9(a).

¹⁰ Letter from County of Sonoma to FHFA re: Comments/RIN 2590-AA53 dated March 23, 2012 at 12, available at http://www.fhfa.gov/webfiles/23639/216_Sonoma_County_Board_of_Supervisors.pdf

¹¹ 40 C.F.R. § 1502.14(a).