STATE OF CALIFORNIA
California Energy Commission

In the Matter of:

Informational Proceeding on Methods for Satisfaction of California Environmental Quality Act Requirements Relating to Greenhouse Gas Emission Impacts of Power Plants

Docket No. 08-GHG OII-1

DOCKET
08-GHGOII-1
DATE Nov 7 2008
RECD. Nov 7 2008

COMMENTS OF THE CALIFORNIA UNIONS FOR RELIABLE ENERGY

November 7, 2008

Marc D. Joseph
Loulena A. Miles
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
(650) 589-1660 Voice
(650) 589-5062 Facsimile
mdjoseph@adamsbroadwell.com
lmiles@adamsbroadwell.com

Attorneys for the CALIFORNIA UNIONS FOR RELIABLE ENERGY

1299-006d

STATE OF CALIFORNIA
California Energy Commission

In the Matter of: Informational Proceeding on Methods for Satisfaction of California Environmental Quality Act Requirements Relating to Greenhouse Gas Emission Impacts of Power Plants	Docket No. 08-GHG OII-1

I. Introduction

CURE is a coalition of unions whose express purpose is to help solve the State's energy problems by building, maintaining and operating conventional and renewable energy power plants. Since its founding in 1997, CURE has been an active participant in a number of siting cases and appreciates this opportunity to submit comments on the Commission's obligations concerning greenhouse gas emissions under the California Environmental Quality Act (CEQA).

II. Climate Change Impacts Must Be Studied Under CEQA

The Commission has played a valuable role in responding to the climate change crisis as it has developed over the years. The Commission must continue its efforts full force as the effects of climate change are just now becoming more acute. In response to the Commission's first question in Order 08-1008-11, studying the global impacts of greenhouse gas (GHG) emissions is properly the Commission's

responsibility under CEQA. The Legislature and Governor have legally recognized the importance of combating global warming with the passage of AB 32 in 2006. Further, SB 97 directs the Office of Planning and Research to prepare guidelines for mitigating GHG emissions for use in CEQA analyses so that agencies may meaningfully analyze the effects posed by each project. Based upon this authority and a growing body of agency guidance, comments on projects by the Attorney General and trial court decisions, the environmental effects of climate change have unequivocally become a part of the analysis any project with potentially significant environmental impacts must undergo in order to comply with CEQA.

CEQA requires agencies to refrain from approving projects with significant adverse environmental impacts if there are feasible alternatives or mitigation measures that can substantially reduce or avoid those impacts.[1] In carrying out the functionally-equivalent CEQA process during power plant siting proceedings, the Commission must meaningfully analyze GHG emissions, thoroughly look for alternative project designs that would reduce or avoid GHG emissions, solicit and consider public comments, and mitigate or avoid these impacts whenever feasible.

The Governor's Office of Planning and Research has issued a technical advisory that confirms this requirement.[2] The advisory addresses how agencies should analyze climate change impacts when conducting a CEQA review. The advisory recommends that lead agencies determine whether GHG may be generated by a proposed project, and if so, quantify or estimate the GHG emissions by type

---

[1] *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105.
[2] Governor's Office of Planning and Research, Technical Advisory CEQA AND CLIMATE CHANGE: Addressing Climate Change Through California Environmental Quality Act, June 19, 2008.

and source. Second, the lead agency must assess whether those emissions are individually or cumulatively significant. When assessing whether a project's effects on climate change are "cumulatively considerable" even though its' GHG contribution may be individually limited, the lead agency must consider the impact of the project when viewed in connection with the effects of past, current, and probable future projects. Finally, if the lead agency determines that the GHG emissions from the project as proposed are potentially significant, it must investigate and implement ways to avoid, reduce, or otherwise mitigate the impacts of those emissions. These recommendations follow the standard process for CEQA review of other environmental impacts. To deviate from this standard process would violate CEQA.

III. CEQA and Thresholds of Significance

The GHG emissions from most power plants proposed today completely dwarf any arguable significance threshold that has been discussed by various agencies. Electric power generation is responsible for about 20% of California's emissions of greenhouse gases. The San Joaquin Valley Unified Air Quality Management District proposed a threshold of 38,477 MT CO_2/yr. CARB proposed a mandatory reporting threshold of 25,000 MT of CO_2/yr. The WCI is setting mandatory reporting for entities emitting more than 10,000 MT CO_2/yr. Others have argued for a zero threshold of emissions due to the fact that additional emissions might put us over an environmental tipping point. By way of reference, the CO_2 emissions

from a 500 MW gas-fired combined cycle are about 2 million tons per year. Thus, whether the Commission supports a zero threshold or a non-zero threshold, we believe that the question of what emissions level crosses the threshold of significance is not one that should give the Commission pause, because the GHG emissions from most gas-fired power plants will be well over the threshold and will, by law, require a GHG analysis.

IV. Commission Should Follow Well Established CEQA Process

CEQA provides specific requirements for analyzing significant environmental impacts. Although some are suggesting that analyzing GHG emissions in the electricity sector should diverge from the standard CEQA analysis of other environmental impacts, the Governor's Office of Planning and Research has issued draft guidance in June of 2008 that instructs project applicants to follow traditional methodology when performing a CEQA analysis for climate change impacts. If the lead agency determines that "the GHG emissions from the project as proposed are potentially significant, it must investigate and implement ways to avoid, reduce, or otherwise mitigate the impacts of those emissions."[3] These guidelines instruct lead agencies to "make a good-faith effort, based on available information, to calculate, model, or estimate the amount of CO_2 and other GHG emissions from a project,

[3] Governor's Office of Planning and Research CEQA AND CLIMATE CHANGE: Addressing Climate Change Through California Environmental Quality Act (CEQA) Review, June 19, 2008.

including the emissions associated with vehicular traffic, energy consumption, water usage and construction activities."[4]

V. The Role of AB 32 in a CEQA Analysis

Although AB 32 sets out statutory requirements for GHG emission reductions in California, AB 32 is a separate statute from CEQA. No AB 32 program implemented by CARB can absolve the Commission of its obligation to evaluate GHG emissions when reviewing a project under CEQA. Just as when a housing project complies with a General Plan, its impacts on traffic still must be evaluated and mitigated; or an industrial project complies with all of the air quality rules that comprise a State Implementation Plan, the air quality impacts still must be evaluated and mitigated; even if a power plant complied with CARB's AB 32 implementation plan its GHG impacts still must be evaluated and mitigated.

Further, no program design or regulatory detail for AB 32 has been settled upon. The guidance submitted by this Commission and the Public Utilities Commission has not been wholly embraced in ARB's Proposed Scoping Plan. At this stage, the California Air Resources Board has only released a *proposed* scoping plan. The scoping plan merely supplies a vision for drafting the regulatory details. There are still many outstanding questions about how or if a cap and trade system would work. Further, the regulatory detail will not be effective before 2012. Even if AB 32 provided a viable method for mitigating GHG emissions in a CEQA document, power plant siting projects are under Commission consideration now and

[4] Id.

a GHG analysis and meaningful mitigation is unquestionably needed for each of these projects. It simply will not be legally adequate for the Commission to omit meaningful project-specific analysis and mitigation of climate change impacts on the assumption that AB 32 regulations that have not been adopted, and will not be in effect for more than three years, will sufficiently meet that requirement under CEQA.

VI. The Humboldt Decision Should Not Be Followed

Stakeholders have suggested that the Commission should utilize its decision in the Humboldt Bay Repowering Project as a model for future climate change analysis under CEQA.[5] This is not appropriate. In the Humboldt decision, the plant being constructed was electrically isolated and was a one-for-one replacement of an older facility. The reduced GHG emissions from eliminating the old plant were clearly linked to the new emissions from the new plant. The methodology employed in that decision is not useful for broad application because it does not apply beyond the unique set of circumstances under which the decision was made.

Moreover, the Humboldt decision includes broad language that would not survive judicial scrutiny beyond its unique circumstances. It states:

> [E]ven if it were not replacing this existing facility, it would be speculative to conclude that the project would result in a cumulatively significant GHG impact. AB 32 emphasizes that GHG emission reductions must be 'big picture' reductions that do not lead to 'leakage' of such reductions to other states or countries. If a gas-fired power plant is not built in California, electricity to serve the load will likely come from another generating source. That could be renewable

[5] Humboldt Bay Repowering Project 06-AFC-7, September 2008.

> generation like wind or solar, but it could also be from higher carbon emitting sources such as out of state coal imports that are still a significant part of the energy that serves California.

First of all, this conflates the requirements of CEQA with the requirements of AB 32. Although AB 32 may emphasize big picture reductions, AB 32 is a separate statute from CEQA with a separate mandate. CEQA requires project-specific analysis and mitigation of environmental impacts through a process that includes public and agency participation. If a project-specific analysis is not undertaken, many viable mitigation opportunities would be missed. Further, California trial courts have ruled that the significance of GHG emissions is not speculative for the purposes of CEQA. Finally, this statement fails to consider the gains that will be achieved by the energy efficiency programs currently underway and the regulatory restrictions on coal contracts that will flow from the emissions performance standards established in SB 1368. It simply isn't legally adequate to omit a project-specific CEQA analysis of GHG emissions on the basis that these power plants are regulated by an as-yet unknown AB 32 program.

Further, many environmental benefits could be achieved through a project-specific CEQA evaluation and mitigation of climate change impacts. Project applicants could at least partially mitigate GHG emissions by reducing water usage, upgrading construction equipment, utilizing adjacent land for renewable generation, and utilizing other innovative technologies that are available or will be in the near future. These gains would not be possible if the project would be given a pass from CEQA evaluation due to the project's participation in an AB 32 program.

CEQA also requires the lead agency to foster public participation by providing public notice, soliciting public comments and responding to public comments. If the Commission were to require only that power plants comply with AB 32 regulatory requirements, this vital part of a CEQA analysis would be missed.

VII. Conclusion

At this pivotal juncture in history, the Commission has an opportunity to harness the power of two key laws together: AB 32 and CEQA. AB 32 codified the state's mandate to address global warming and thus made it clear that these impacts must be considered in a CEQA process. The regulations that will one day flow from AB 32 will be a compliment to, and not substitute for, a CEQA analysis. This analysis will no doubt be needed for most power plants sited by the Commission because these plants will produce an amount of GHG emissions that will be above any legally defensible threshold of significance. CEQA will compliment AB 32 because it requires a project-specific analysis that will leave no stone unturned when evaluating opportunities to reduce GHG emissions. CEQA also promotes informed decision-making and provides a platform for the public to weigh in on the process. Analysis of the environmental impacts of global warming

should be included in the Commission's siting process that follows the standard CEQA analysis employed to study other environmental impacts.

Dated: November 7, 2008

Respectfully submitted,

_____

Marc D. Joseph
Loulena A. Miles
Adams Broadwell Joseph & Cardozo
601 Gateway Blvd., Suite 1000
South San Francisco, CA 94080
(650) 589-1660 Telephone
(650) 589-5062 Fax
mdjoseph@adamsbroadwell.com
lmiles@adamsbroadwell.com

Attorneys for California Unions for Reliable Energy