

Ms. Nancy Katyl, RWQCB
1515 Clay Street, Suite 1400,
Oakland, CA 94612
Email: nkatyl@waterboards.ca.gov
Phone: 510-622-2408

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Dear Nancy Katyl,

In behalf of CALifornians for Renewable Energy Inc. (CARE) we file the following comments and objections on the Supplemental Investigation and Risk Assessment Report prepared by the City and County of San Francisco for their proposed San Francisco Electric Reliability Project (SFERP). The online documents provided by the RWQCB at <http://www.geotracker.waterboards.ca.gov>, under file number 38S0055, are lengthy and extensive. Because of CARE's lack of expertise in the specific technical areas examined it has retained the services of Clifton Smith¹, REA. Mr. Smith will require several weeks to review and prepare technical comments on the Supplemental Investigation and Risk Assessment Report prepared by the City and County of San Francisco.

The CEC's environmental analysis remained a draft document at the time of the Notice and therefore the RWQCB is required to prepare its own CEQA analysis of the project's impacts

The Notice of an opportunity for public comment on the Supplemental Investigation and Risk Assessment Report is deficient under the California Environmental Quality Act (CEQA) because the San Francisco Bay Regional Water Quality Control Board (RWQCB) is depending on the CEQA analysis "currently in the licensing process with the California Energy Commission (CEC)." In issuing the notice in September 2006 the RWQCB, acting as a responsible agency under CEQA Guidelines Section 15253, presumed it would be appropriate to use the CEC's CEQA analysis as a substitute EIR. The CEC, as the lead agency under CEQA, was required to provide the RWQCB documentation of the CEC granting discretionary approval for the project and the CEC's findings concerning the project's significant environmental effects as required by CEQA Guidelines Section 15253(b). Without the CEC taking action on the project's

¹ E-mail: clifton.smith@sbcglobal.net

approval for the project or making findings, the CEC Presiding Member's Proposed Decision remained a draft document and thus could not be used as an EIR equivalent by the RWQCB. Therefore the Notice of an opportunity for public comment on the Supplemental Investigation and Risk Assessment Report is deficient as the RWQCB should complete its own EIR on the proposed project, including the associated activities that constitute the "whole of an action" being carried out by the public agencies involved capable of having an adverse environmental impact (14 Cal. Code Regs. § 15378(a); see also Pub. Res. Code § 21065), in permitting the proposed San Francisco Energy Reliability Project including the proposed remedial actions for the cleanup of contamination on the site considered together must be subjected to an independent environmental review conducted by the RWQCB pursuant to CEQA to ensure that all the entire project's adverse, potentially significant impacts on the Bayview Hunters Point community, as well as the entire region in which the project is located are considered.

CARE does not concede that the CEC RWQCB Memorandum of Understanding (MOU) was exempt from the requirements of the Bagley-Keene Open Meeting Act

CARE does not concede that the CEC RWQCB Memorandum of Understanding (MOU) was exempt from the requirements of the Bagley-Keene Open Meeting Act, contending instead that this provides evidence of the conspiracy by the CEC in concert with the RWQCB to violate the Open Meeting Act, CEQA, Title VI of the Civil Rights Act of 1964, Section 65040.12 (c) of the California Government Code" as well as the "equal protection" mandates of the Federal and State Constitutions.

During the evidentiary hearings, intervenors asked which entity has the ultimate authority in reviewing Applicant's proposal. In fact, the Conditions of Certification give each agency a meaningful and appropriate role. In the case of the Energy Commission, the CPM must approve the documents as meeting the Conditions of Certification. However, the Conditions of Certification give an enforcement role to both the Regional Board and the CEC. The joint enforcement is further memorialized and enforced by the formal MOU entered by the staffs of the two agencies on June 5, 2006.^[2]

² Memorandum of Understanding (MOU) Between the California Energy Commission staff and Staff of the San Francisco Bay Regional Water Quality Control Board, dated June 5, 2006, docketed June 8, 2006. The MOU is part of the administrative record in this case and supplements testimony in evidence. (5/31/06 RT 11-12,19.) CARE contends that the MOU between Staff and the Regional Board staff which

At a May 31, 2006 evidentiary hearing Stephen Hill, head of the Toxics Cleanup Division for the Regional Board staff, testified that the health protective standards proposed by the Commission staff to address CEQA mitigation are appropriate, and that the Regional Board has agreed to implement them through the conditions of the Regional Board's SCP^[3]. (See 5/31/06 RT 13.) The proposed performance standards for the project's CEQA mitigation are similar to the kinds of conditions used by the Regional Board, which also typically employs performance standards. (Id.) Mr. Hill also stated that the MOU between the Regional Board staff and Commission Staff would provide for the Commission to have an advisory role when the Regional Board prescribes any future site remediation requirements.^[4] (5/31/06 RT 19-20.) In this consultative role the Commission staff will be able to assure the implementation of measures that will meet the performance standards that protect public health and worker safety. (Ibid.) [PMPD at page 236]

Mr. Hill never testified because he was not allowed to be subjected to cross examination by CEC Intervener Sarvey by a decision of the CEC Hearing Officer.

In response to the letter dated June 22, 2006, where the Executive Officer of the Regional Board staff rejected CARE's Open Meetings Act violation notice to correct or cure, Section 13223(a), Division 7, of the California Water Code (CWC) provides that a regional water quality control board may delegate any of its powers and duties to its executive officer, except (1) the promulgation of any regulations; (2) the issuance, modification or revocation of any water quality control plan, water quality objectives or waste discharge requirement; (3) the issuance, modification or revocation of any cease and desist order; (4) the holding of any hearing on water quality control plans; and, (5) the application to the attorney General for judicial enforcement except where specific delegation has been made in a cease and desist order or when a need for immediate action

covers site remediation measures violates the Open Meetings Act. (CARE Brief pp. 19-23) However, agreements between agency staffs (as opposed to decision-making boards and commissions) are not subject to the Open Meetings Act, and the legal authority cited by CARE is not on point. It deals with closed sessions of a City Council, which is a deliberative decision-making body. In a letter dated June 22, 2006, the Executive Officer of the Regional Board staff also rejected CARE's Open Meetings Act argument

³ Mr. Hill appeared at the May 31 evidentiary hearing, at the Committee's request, to corroborate the Staff's and Applicant's proposed mitigation approach and to answer Committee questions. (5/31/06 RT 5-24.)

⁴ The staff-to-staff MOU, signed by the staff directors of both agencies, was docketed on June 6, 2006, and placed on the Commission's SFERP website.

results in a request to correct conditions of pollution or nuisance pursuant to CWC Section 13002(c) and Sections 13304 and 13340.

Therefore, since the RWQCB executive officer had been delegated authority to take action, including execution of the MOU with the CEC in behalf of the San Francisco Bay RWQCB, the MOU should have been subjected to the 10 day public notice requirements specified in the Bagley-Keene Open Meeting Act.

Deferring mitigation until after the project is approved' denies public input to the decision-making process and amounts to a 'piecemeal' analysis prohibited by CEQA

As we stated in our comments on the CEC Presiding Member's Proposed Decision (PMPD) deferring mitigation until after the project is approved' denies public input to the decision-making process and amounts to a 'piecemeal' analysis prohibited by CEQA. The RWQCB has now lost control over the level of meaningful public participation that must be afforded to the public and CARE as a CEC power plant siting process Intervener to preserve our statutory, civil, and constitutional rights, by allowing the Applicant, the CEC Staff, and the Staff of the RWQCB to conduct meetings in secret and carry out the public's business without any opportunity for public participation. The CEC PMPD [at pages 236] illustrates this where it attempts to justify allowing the Applicant to defer its Proposed Remedial actions to clean up the contamination on the site until after the permit is issued for the project by the CEC. The PMPD [at page 236] represents the reason for Mr. Hill's participation during the evidentiary hearing [at footnote 44] as "to corroborate the Staff's and Applicant's proposed mitigation approach" while Intervener was misled by the Committee to think it was in response to CARE's request for the attendance of San Francisco Bay RWQCB Staff, Nancy Katyl. By deferring the RWQCB Site Cleanup Plan until after the permit is issued for the project by the CEC, the RWQCB has failed to provide Intervener and the public an opportunity to meaningful and informed participation in the projects mitigation for contamination present on the site.

CARE contends that it is improper for the Applicant to defer its Proposed Remedial actions to clean up the site until after the permit is issued for the project by the

CEC. To do so violates the city's own ordinances, and the California Environmental Quality Act (CEQA) which requires all feasible mitigation be adopted or that the project be denied for inducing significant unmitigated adverse impacts on the environment.

CEQA is primarily a public disclosure statutory scheme allowing the affected community to be informed and members of the public to voice their opinion, and to have input, about projects that may affect their environment. CEQA requires a review of the environmental impacts of overall activities (“the whole of an action” – 14 Cal. Code Regs. § 15378(a)) defined as “projects.” (Pub. Res. Code § 21065.) This strong, broad right of public participation under CEQA has a political component (i.e., CEQA allows the compilation of a record concerning the approval of development projects that can be used by the public to vote environmentally insensitive decision makers out of office come election day), the violation or deprivation of which has constitutional ramifications on an affected community as well as the public at large.

Additionally, in deferring the mitigation plan until after the project is approved the CEC as the lead agency and the RWQCB as the responsible agency under CEQA is “piecemealing” the overall activity. CEQA strongly forbids this kind of “chopping up [of] a proposed project into bite-size pieces which, individually considered, might be found to have no significance on the environment.” (Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 716, citing Orinda Assn. v. Board of Supervisors (1986) 182 Cal.App.3d 1145, 1171, 1172; see also Bozung v. LAFCO (1975) 13 Cal.3d at 283-284; Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296, 309.)

CEQA provides that a proposed project may have a significant effect on the environment when the possible effects on the environment are individually limited but “cumulatively considerable.” (Pub. Res. Code § 21083(b); 13 Cal. Code Regs. § 15065.) “‘Cumulatively considerable’ means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” (14 Cal. Code Regs. § 15065.) In addition to analyzing the direct impacts of a project, the CEQA Lead Agency in consultation with the RWQCB as the responsible agency must also consider a project’s potentially significant cumulative impacts.

Recent statutory law has invigorated CEQA's role in ensuring "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies" (i.e., environmental justice)." (Emphasis added; see SB 115, Solis; Stats. 99, ch. 690, Gov. Code § 65040.12 and Pub. Res. Code §§ 72000-720001.) In conjunction with the regulatory provisions of the federal Clean Air Act and Division 26 of the Health and Safety Code,⁵ CEQA provides an ideal mechanism for ensuring that Environmental Justice will be addressed in all activities and projects that may have a significant effect on the environment.

CEQA requires that environmental documents (i.e., an environmental impact report (EIR) or equivalent) be prepared whenever a public agency proposes to undertake a discretionary activity (which is defined extremely broadly as the "whole of an action" being engaged in) that may have a significant effect on the environment. (See Pub. Res. Code §§ 21002.1, 21061, 21064, and 21080.1; see also 14 Cal. Code Regs. § 15002.)

"Every citizen has a responsibility to contribute to the preservation and enhancement of the environment" and CARE's members are attempting to carry out their duties to do so. (Pub. Res. Code § 21000(e).)

The recent enactment of Public Resources Code sections 71110 through 71115, and Government Code section 65040.12, in conjunction with other statutory and regulatory requirements, such as the Bay Area Air Quality Management District State Implementation Plan, and EPA regulations, require the CCSF, CEC, as well as other agencies, like the RWQCB, to infuse Environmental Justice into every aspect of decision-making. This panoply of statutory authority supplements the general authority to "do such acts as may be necessary for the proper execution of the powers and duties granted to, and imposed upon [a public agency]..." (Health & Saf. Code § 39600.) Further, the rules, regulations, and standards that the CCSF, CEC, and other agencies adopt must be "consistent with the state goal of providing a decent home and suitable living environment for every Californian" (Id. § 39601 (c).)

⁵ This overlapping of statutory goals and requirements (see Pub. Res. Code § 21000(g), quoted above) is typical among statutory schemes aimed at protecting the public health.

Therefore the proposed project, and all associated activities constituting the “whole of an action” being carried out by the public agencies involved capable of having an adverse environmental impact (14 Cal. Code Regs. § 15378(a); see also Pub. Res. Code § 21065), and therefore the proposed San Francisco Energy Reliability Project and the proposed remedial actions for the cleanup of contamination on the site considered together must be subjected to environmental review pursuant to CEQA to ensure that all the entire project’s adverse, potentially significant impacts on the Bayview Hunters Point community, as well as the entire region in which the project is located, are fully and fairly investigated, identified, analyzed, evaluated and, perhaps most importantly of all, mitigated – while also ensuring that project alternatives capable of avoiding or reducing the impacts are considered and, if feasible, adopted.

For example the PMPD explains [at page 227] Intervenors CARE argued that the approach agreed upon by Applicant and Staff violates the City’s ordinances and CEQA. (CARE Opening Brief at 24.) CARE urges that ‘...deferring mitigation until after the project is approved...’ denies public input to the decision-making process and amounts to a ‘piecemeal’ analysis prohibited by CEQA (Id. at 25).” The PMPD failed to provide adequate citation of evidence that “piecemeal” analysis and deferred public participation in the RWQCB approved Human Health Risk Assessment (HRA), Screening Level Ecological Risk Assessment (ERA), Site Cleanup Plan (SCP), Risk Management Plan (RMP), and Site Management Plan (SMP) for the containment or removal of contamination on the project site, by the RWQCB, is necessary to carry out its duties, as a responsible agency under CEQA, Title VI of the Civil Rights Act of 1964, Section 65040.12 (c) of the California Government Code” as well as the “equal protection” mandates of the Federal and State Constitutions.

Conclusion

CARE's requests Mr. Clifton Smith, REA be granted several weeks to review and prepare technical comments on the Supplemental Investigation and Risk Assessment Report prepared by the City and County of San Francisco.

CARE respectfully objects to the RWQCB's notice of an opportunity for public comment on the Supplemental Investigation and Risk Assessment Report as deficient as the RWQCB should complete its own EIR on the proposed project, and further objects to the fact that deferring the mitigation plan until after the project is approved by the CEC as the lead agency in conspiracy with the RWQCB as a responsible agency under CEQA is “piecemealing” the overall activity.

CARE also objects to the execution of the MOU with the CEC in behalf of the San Francisco Bay RWQCB, as the MOU should have been subjected to the 10 day public notice requirements specified in the Bagley-Keene Open Meeting Act, since the executive officer of the San Francisco Bay RWQCB was delegated authority to act in the Regional Boards behalf, but not in the absence of a public meeting.

Respectfully submitted,



Lynne Brown –Vice President, CARE
Resident, Bayview Hunters Point
24 Harbor Road
San Francisco, CA 94124
E-mail: l_brown369@yahoo.com



Michael E. Boyd – President, CARE
5439 Soquel Dr., Soquel, CA 95073-2659
Tel: (408) 891-9677
Fax: (831) 465-8491
E-mail: michaelboyd@sbcglobal.net

Verification

I am an officer of the commenting corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of October 2006, at Soquel, California.



Michael E. Boyd – President, CARE
CALifornians for Renewable Energy, Inc. (CARE)
5439 Soquel Dr.
Soquel, CA 95073-2659
Tel: (408) 891-9677
Fax: (831) 465-8491
E-mail: michaelboyd@sbcglobal.net