

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTH COAST AIR QUALITY MANAGEMENT
DISTRICT,

Petitioner,

v.

CALIFORNIA PUBLIC UTILITIES
COMMISSION,

Respondent.

CASE NO. S151156

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On Review from California Public Utilities Commission Decision 06-09-039
(effective September 21, 2006; mailed September 28, 2006) in
Rulemaking 04-01-025 (Filed January 22, 2004)

***AMICUS CURIAE BRIEF OF
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Real Parties in Interest.

CERTIFICATE ON INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rules 8.208, 8.490, 8.496)

The following entities or persons are real parties to the proceeding and may have either; (1) an ownership interest of 10 percent or more in the party or parties filing this certificate; or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves:

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3. BHP Billiton LNG International Inc.;
4. BP Energy Co.;
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6. California Independent Petroleum Association;
7. California Natural Gas Producers Association;
8. Calpine Construction Finance Co, LP;
9. Calpine Corp.;
10. Chevron USA, Inc.;
11. City of San Diego;
12. Clearwater Port LLC;
13. The Community Environmental Counsel;
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15. Coral Energy Resources, LP;
16. Crystal Energy, LLC;
17. Delta Energy Center, LLC;
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40. Otay Mesa Energy Center, LLC;
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42. Questar Southern Trails Pipeline Co.;
43. Ratepayers for Affordable Clean Energy;
44. San Diego Gas & Electric Co.;
45. San Joaquin Energy Center, LLC;
46. The School Project for Utility Rate Reduction;
47. Sempra Global;
48. Sempra LNG;
49. SES Terminal LLC;
50. Shell Trading Gas & Power;
51. South Coast Air Quality Management District;
52. Southern California Edison Co.;
53. Southern Gas Co.;
54. Southern California Generation Coalition;
55. Southwest Gas Corp.;
56. Transwestern Pipeline Co.;
57. The Utility Reform Network;
58. Western States Petroleum Association;
59. Wild Goose Storage, Inc.; and
60. Woodside Natural Gas Inc.

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CALIFORNIA PUBLIC UTILITIES
COMMISSION,

Respondent.

CASE NO. S151156

INTRODUCTION

This case poses important issues under the California Environmental Quality Act (CEQA), with implications for air quality and public health, and under the relevant statute, only this Court can review the case and rectify the California Public Utilities Commission's (PUC) violation of the law. The PUC's decision, allowing the widespread use in California power plants of liquified natural gas (LNG) that burns hotter and produces greater air pollution than non-liquified natural gas, is clearly a "project" under CEQA, with significant and far-reaching potential environmental impacts in the most polluted air basins in the State. Because the PUC's compliance with CEQA here has been held to be subject only to Supreme Court review, only this Court can address the PUC's failure to address these large-scale impacts.

At issue is a decision by the PUC approving changes to utility regulations, called tariffs, to allow the use of LNG that burns hotter than the natural gas that has been the norm throughout California for decades. The PUC's decision: 1) changes the way in which utilities measure the quality of natural gas that they distribute, by substituting the different and more comprehensive "Wobbe" scale for the current measurement scale; and 2) sets the actual Wobbe number at a level that allows the use of gas that burns much hotter than gas historically used in California. Undisputed evidence in the record shows that this hot-burning, high-Wobbe LNG produces greater emissions of nitrogen oxide, a pollutant that helps cause photochemical smog, than historic natural gas. Despite the obvious environmental damage that increased emissions of this precursor to photochemical smog could do, the PUC argues that its approval of the use of hot-burning LNG is not a real change from current regulatory practice, and therefore is not a "project" that requires CEQA review.

This was not the PUC's position in its administrative decision, subject to this appeal. The PUC's administrative decision acknowledges that a central impetus to the rule-making was to provide "regulatory certainty" to the utilities that they could legally sell hot-burning LNG. (App.69:2689; App.11:69:2691.) The energy industry told the PUC that it would not invest in facilities to import and regassify LNG without a change in the regulations governing natural gas

use in California, and the PUC's Decision gave industry that certainty. (App. 11:69:2689; App.11:69, 2691.) Because the PUC's adoption of the Wobbe scale and a high-Wobbe number for permissible gas distribution was an essential step toward the use of LNG that would increase air pollution – undeniably an environmental harm – the PUC's decision triggers CEQA and requires environmental review.

The air quality in the South Coast Air Basin^{1/} is already an environmental and public health crisis.^{2/} Hospital admissions and mortality statistics track spikes and trends in ozone concentrations, and children suffer what may be life-long impairment in lung function simply by living, playing, and breathing there.^{3/} The South Coast Air Quality Management District (SCAQMD) is the agency charged with making the air safe to breathe for the millions of people that live in that air basin, a task that is already Herculean. SCAQMD's job will be much more difficult if pollution producing, hotter

1. The South Coast Air Basin encompasses all of Orange County and the urban portions of Los Angeles, Riverside and San Bernardino counties. This area of 10,743 square miles is home to over 16 million people, nearly half California's population of California. It is the second most populated urban area in the United States. (<http://www.aqmd.gov/aqmd/index.html>.)

2. In 2006, the last year for which data are provided on the SCAQMD website, the South Coast Air Basin exceeded state health-based air quality standards for ozone on 102 days, and federal health-based ozone standards on 86 days. <http://www.aqmd.gov/smog/o3trend.html>.

3. Gauderman, et al., The Effect of Air Pollution on Lung Development from 10 to 18 Years of Age; *New England Journal of Medicine*, vol. 351: 1057-1067 (Sept. 9, 2004).

burning LNG is allowed in Southern California, and it reasonably asks that the PUC be required to evaluate the environmental impacts of its regulatory changes.

The Attorney General is also concerned that the standard of review the PUC advocates here would turn the CEQA process on its head by essentially reversing the current burden of proof at the very point where agencies determine whether or not CEQA will apply at all to an action. The standard the PUC advocates could result in untold numbers of projects that could harm the environment escaping any CEQA review, thereby undermining the statute's most fundamental purposes – environmental full disclosure, prevention of environmental harm, and public accountability of decision makers.

INTEREST OF THE ATTORNEY GENERAL

California Attorney General Edmund G. Brown Jr. submits this brief in support of Petitioner. The Attorney General's interest in CEQA stems both from his general responsibilities as the State's chief law officer to see that the laws are appropriately enforced and from the special responsibilities for the enforcement of CEQA assigned by the Legislature to the Attorney General. CEQA requires that any party filing an action pursuant to CEQA must serve a copy of the complaint or petition commencing that action upon the Attorney General, so that the Attorney General may evaluate the case and take appropriate action. (Pub. Resources Code, § 21167.7.) This section gives the

Attorney General a special role in ensuring CEQA compliance by “permit[ting] the Attorney General to lend its power, prestige, and resources to secure compliance with CEQA and other environmental laws. . . .” (*Schwartz v. City of Rosemead* (1984) 155 Cal.App.3d 547, 561; Pub. Resources Code, § 21167.6; Code Civ. Proc., § 388.) The statute contemplates that the Attorney General may participate in any such case, as shown by Public Resources Code section 21177, subdivision (d), which allows the Attorney General to bring or enter a CEQA case without having exhausted administrative remedies.

The Attorney General is also specially charged by the Government Code with protection of the California environment and its natural resources. (Gov. Code, § 12600, et seq.) He is authorized to participate in any judicial proceeding that may impair or destroy the natural environment or resources of this State. (Cal. Const., art. V, § 13; Gov. Code, § 12600-612; *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) The possibility of harm to the natural environment and the scope of such possible harm are issues in this case, and the Attorney General seeks to participate as *amicus curiae* to fulfill his responsibilities to protect the natural resources of the State.

The Attorney General is familiar with the administrative record in this case, submitted an *amicus* brief below supporting reconsideration of the Decision at issue here, has reviewed the briefs filed in this Court, and is familiar with the legal and factual issues in the case.

FACTUAL STATEMENT

Amicus assumes the facts are as set out in the Petitioner SCAQMD's Petition.

STANDARD OF REVIEW

Because of the unusual posture of this matter, suspended between the Court of Appeal and the Supreme Court, the standard of review poses some idiosyncracies. The Court of Appeal held that it lacked jurisdiction over this case because the case primarily concerns an alleged violation of CEQA. If this Court does not agree that this is primarily a CEQA case (and is, instead, primarily related to the PUC decision rather than the environmental review), it may wish to consider a remand to the Court of Appeal for that court to determine whether or not it has jurisdiction, considering the case as a non-CEQA case.

Assuming that this Court concurs that this is primarily a CEQA case subject to direct Supreme Court review, then the standard of review in Public Resources Code sections 21168 and 21168.5 should apply. Under that standard, the PUC's action is invalid if the PUC did not act in accordance with the law, or if its decision is not supported by substantial evidence in the record. An agency abuses its discretion if it does not proceed in accordance with the law, and "[t]hat law consists of CEQA statutes, the Guidelines, and the judicial

gloss on both.” (*East Peninsula Ed. Council, Inc v. Palos Verdes Unified School Dist.* (1989) 210 Cal.App.3d 155, 174.)^{4/}

There is no single standard of review that applies to all CEQA cases. CEQA prescribes a multi-step process, and different steps of the CEQA process have different standards of review, consistent with ensuring full public disclosure, environmental protection, and the production of documents of public accountability. In this case, the PUC has confused or conflated the standard of review that applies to CEQA documents *after* full environmental public disclosure has been made and all feasible mitigation measures adopted, with the standard of review that applies to the *initial* decision as to whether CEQA applies to a governmental agency action at all. The two standards are very different, with a deferential standard applying to agency action only *after* the agency has done a CEQA document and adopted feasible mitigation. Because this is somewhat convoluted, we trace the different CEQA steps and the standards of review that apply to them in some detail, in the context of this case.

CEQA involves a three-step process (*Muzzy Ranch Co. v. Solano County Airport Com.* (2007) 41 Cal.4th 372, 379-380); this case focuses on the first step. When an agency proposes to undertake, finance, or approve an action, it

4. In addition, this Court held in *Napa Valley Wine Train, Inc. v. Public Utilities Com'n.* (1990) 50 Cal. 3d 370, 383, that a failure by the PUC to comply with applicable CEQA law constitutes a violation of the Public Utilities Code, as well as a violation of CEQA.

must determine first whether that action has the potential to result, directly or indirectly, in a change in the physical environment. If it does, the action constitutes a “project” for CEQA purposes. (CEQA Guidelines, 14 Cal. Code of Regs., § 15060, subd. (c)^{5/}.) In its opposition brief, the PUC argues that the most deferential standard should apply to this step of the CEQA process, and that this Court should uphold the PUC’s determination that setting a Wobbe standard for the quality of natural gas that may be sold and used in California is not a “project” if the PUC determines that it has no potential to change the physical environment, even indirectly, and if substantial evidence in the record supports that determination. (PUC Brf. at 13-14.) This is not correct.

Rather, the question of whether an agency action is a “project,” and therefore within the overall ambit of CEQA, is a question of law. (*Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 794-795 (“*Fullerton*”), disapproved on other grounds by *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 918.) As a question of law, it can be determined by a court, based on uncontested evidence in the record. (*Friends of the Sierra Railroad v. Tuolumne Park and Recreation District* (2007) 147 Cal.App.4th 643, 652.) Nor is the PUC entitled to a

5. The CEQA Guidelines, found at 14 CA. Code of Regs., section 15000, et seq. (“Guidelines”), are issued by the Secretary of the Resources Agency, pursuant to Public Resources Code section 21083. This Court has held that the Guidelines’ interpretation of CEQA is entitled to great weight unless obviously in conflict with the statute. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Calif.* (1988) 47 Cal.3rd 376, 391, fn. 2.)

deferential standard of review. Resolution of this question of law “presents no question of deference to agency discretion or review of substantiality of evidence.” (*Kaufman & Broad-South Bay Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464, 470.) And, while the interpretation of a statute by the agency charged with carrying it out is entitled to deference (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1388), the PUC is not that agency as to CEQA. The PUC’s interpretation of the meaning under CEQA of “project” is not entitled to deference.

If this question of law is decided in the affirmative, and an agency action has been determined to be a “project,” the agency then considers whether the project is exempt from CEQA under a statutory exemption, a regulatory exemption, or what is usually called the “common sense” exemption.^{6/}

Whether an agency’s action fits within a particular exemption is subject to a mixed standard of review: 1) the scope of the exemption is a question of law that can and should be determined by a court (*California Farm Bureau Federation v. California Wildlife Conservation Bd* (2006) 143 Cal.App.4th 173, 185); while 2) the agency’s factual determination that its action fits within the of the scope of the exemption is subject to the substantial evidence test.

6. The common sense exemption exempts what otherwise would be considered a “project” from CEQA “[w]here it can be seen *with certainty* that there is *no possibility* that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. ” (Guidelines, § 15061, subd. (b)(3), emphasis added.)

(*Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251.) The determination as to whether an action is a “project” is jurisdictional for determining whether CEQA applies to the action at all. (*Muzzy Ranch, supra* 41 Cal. 4th at p. 380.) Here, the PUC has cited no statutory or regulatory exemption for PUC rate-making per se, nor could it.

If an action qualifies as a “project” under the first step of the CEQA process, it moves to the second step, where the agency performs an “initial study” to determine whether the project will, in fact, have a significant adverse effect on the environment. (Guidelines, §15063.) The PUC did not do an initial study for the Wobbe decision, having already decided that the decision was not a “project.” Based on the results of the initial study, the agency decides what kind of environmental analysis is appropriate for the project it is considering. If the agency decides that there is *no* substantial evidence that the project can harm the environment, the agency prepares a negative declaration, supporting that conclusion. (Guidelines, § 15070, subd. (a).)⁷ If, on the other hand, there is substantial evidence in the record supporting a fair argument that the project *may* cause a significant adverse effect on the environment, the agency *must* prepare a full EIR. (Guidelines, § 15064, subd. (a); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 82-83.)

7. An agency may also find that all significant effects can and will be mitigated to a level of insignificance and adopt a Mitigated Negative Declaration. (Guidelines, §15369.5.) The PUC did not do this.

Under the “fair argument” test, California courts have held consistently that if an agency is presented with a fair argument, based on substantial evidence in the record, that a project may harm the environment, it must prepare a full EIR, *regardless* of whether there is substantial evidence in the record that the action does not have that potential. (*No Oil, Inc.*, *supra*, 13 Cal.3d at p. 74; *Brentwood Ass’n for No Drilling v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504.) Even if contrary evidence is present, the agency cannot rely on that evidence if substantial evidence is presented to it in support of a fair argument. (*Architectural Heritage Ass’n. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1114.) This is not a deferential test that should be resolved in the agency’s favor if substantial evidence supports the agency. Whether substantial evidence exists in the record to support a fair argument of environmental harm is a question of law that may be decided by a court. (*The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928 [“Review is de novo, *with a preference for resolving doubts in favor of environmental review*”], *Italics in original.*)

In the third step of the CEQA process, if an agency has been presented with substantial evidence that the project has the potential to harm the environment, it prepares a full EIR. (*No Oil, Inc.*, *supra*, 13 Cal.3d at p. 74; *Architectural Heritage Assn. v. County of Monterey*, *supra*, (2004) 122 Cal.App.4th at p. 1109.) After preparation and public circulation of the EIR,

an agency may decide that the environmental damage done by a project has been mitigated, or that it cannot be fully mitigated, or even that such damage is acceptable because of overriding considerations of economics or other factors. (*City of Marina v. Board of Trustees of the Calif. State Univ.* (2006) 39 Cal.4th 341, 350.) Only at this point, after the agency has gone through the full CEQA process, does a deferential standard apply; an agency's decisions at this point will be upheld if they comport with the law and are supported by substantial evidence in the record, regardless of conflicting evidence in the record. (*Laurel Heights, supra*, 47 Cal.3d at p. 393.)

Here, the PUC argues that this Court should apply the substantial evidence test to the PUC's determination that the setting of the Wobbe number is not a "project" under CEQA, and that this Court should uphold the PUC's decision because there is substantial evidence to support it, even if there is conflicting evidence in the record. (PUC Brf. at 13-14.) This is precisely backward. The substantial evidence test is not applicable to the jurisdictional determination of whether the rule-making constitutes a "project," and is therefore subject to CEQA, in the first place. The jurisdictional requirement is a question of law, and subject to resolution by the courts on the basis of

uncontested evidence in the record. (*San Joaquin Raptor /Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 617-18.)

ARGUMENT

I. THE PUC'S ACTION IS A PROJECT UNDER CEQA, BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD THAT ADOPTION OF THE WOBBE NUMBER MAY HARM THE ENVIRONMENT.

There are three elements that make an action a “project” for CEQA purposes. First, a public agency must either directly undertake the action, or must give permission or support to a private entity to take the action; this definition includes *regulating* the action. (Pub. Resources Code, § 21065; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 262-263.) Second, the public agency’s action or permission must be discretionary and not ministerial. (*Friends of Westwood v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 266-67.) And third, the action must be of a kind that may reasonably be expected to have a substantial adverse effect on the environment. (Pub. Resources Code, §§ 21065 and 21068.) The term “[p]roject” is given a broad interpretation in order to maximize protection of the environment.” (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1143.)

Here, the relevant action is the PUC’s approval of tariffs for several utilities that will allow those utilities to import, distribute, and sell natural gas with a higher Wobbe Index number than natural gas historically and currently used in California. The first two prongs of the test for a “project” are easily

satisfied. First, the action is being taken by a public agency,^{8/} and is a rule-making that regulates actions by private and publicly owned entities. Rule-making and regulation are both types of action potentially subject to CEQA. (*Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal. 4th 559, 567; *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 206.) Neither the PUC as an agency, nor rate-making as a general activity, is per se exempt from CEQA.^{9/} Neither is the subject of any statutory or Guidelines categorical exemption, and the PUC does not claim one. The first prong of the test for a “project” is satisfied. Further, the setting of the Wobbe number is a discretionary action – here, a discretionary rule-making undertaken by the PUC – satisfying the second prong of the test for a “project.”

8. The Guidelines define a “public agency” to include “any state agency, board, or commission.” (Guidelines, § 15379.) See also *Napa Wine Train v. PUC*, *supra*, 50 Cal.3d at p. 376, fn. 7, where this Court treats the PUC as an agency subject to CEQA.

9. We note that this Court may look to the federal counterpart to CEQA, the National Environmental Policy Act (NEPA), found at 42 U.S.C. section 4332, et seq., for guidance on whether the setting of tariffs in particular constitutes a category of action that may have environmental effects. (*Friends of Mammoth*, *supra*, 8 Cal.3d at 260-261). The Supreme Court has affirmed that NEPA applies to the setting of tariffs. (*Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 318-319 (1975); see also *Shawn v. Goldengate Bridge, Highway and Transportation District* (1976) 60 Cal.App.3d 699, 703.)

It is the third prong of the test, the potential for environmental harm, on which the PUC concentrates. It makes three basic arguments, each lacking basis in CEQA law.

A. There Is Substantial Evidence in the Record That Use of High-Wobbe Gas May Harm the Environment.

First, the PUC argues that its action has no potential to harm the environment. Based on the evidence in the record here, we do not think this is a close question. The agency was presented with an abundance of substantial evidence, from proponents and opponents of the tariffs alike, supporting a fair argument that there may be an adverse change in air quality, at least in the South Coast Air Basin, from use of high-Wobbe gas.

1. Substantial Evidence in the Record Supports a Fair Argument That Additional Emissions of Oxides of Nitrogen Will Indirectly Result from the PUC's Decision.

Expert testimony in the record shows that the burning of high-Wobbe gas will cause the emission of greater amounts of nitrogen oxides (NO_x) into the air than would the burning of gas with historic Wobbe numbers. Sempra's expert testified that use of gas with a Wobbe number of 1400 could produce an increase in NO_x emissions of 1.7 tons per day statewide, and of 0.7 tons per day in the South Coast Air Basin from residential appliances alone. App. 2:10:0452, lines 9-16.) Southern California Gas (SoCalGas)'s expert testified that use of the high-Wobbe gas for just half the supply in the South Coast Air Basin would result in an increase of 1.2 tons per day of NO_x emissions there.

(App.4:11:0972, lines 6-22.; see PUC Decision 06-09-039 at App.10:69:2628 [SG&E/SoCalGas], App.10:69:2634 [SCAQMD], App.10:69:2638 [Calpine], and App.10:69:2654-55 [Shell].)

The SCAQMD's chief scientist, Dr. Lui, gave expert opinion testimony that a 1.2 tons per day increase in NO_x emissions would indeed have a significant, adverse effect on air quality in the South Coast Air Basin, and that the amount of NO_x emissions in question was equal to those targeted by many SCAQMD regulations. (App.4:11:0988, lines 14-21.) Dr. Lui also gave his expert opinion that the NO_x emissions increase would produce more unhealthy airborne particulate matter in the South Coast Air Basin. (App.4:11:1027, lines 9-12.) His opinions were joined by SCAQMD's Executive Director, Dr. Wallerstein, whose expertise as the head of the regulatory and technical agency responsible for air pollution control in the South Coast Air Basin^{10/} surely makes his evidence substantial. (App.10:67:2446, lines 18-23.) Thus, the agency with both the primary legal authority and the most specific technical expertise with respect to air pollution in the South Coast Basin presented substantial, expert opinion evidence that the use of high-Wobbe gas in that basin will have a significant adverse effect on the environment. Under the fair argument standard, the PUC was required to prepare an EIR after being presented with this testimony.

10. (Health & Saf. Code, §§ 40000, 40410; Cal. Code Regs., tit. 17, § 60104.)

There were also serious questions raised as to the effects of the high-Wobbe gas on the performance and reliability of large gas turbines currently producing electricity in California. Southern California Edison's expert testified that General Electric, the manufacturer of Edison's Mountainview gas turbines, cannot or will not guarantee that those turbines will perform adequately on high-Wobbe gas. (App.4:11:9080, lines 3-12.) Should these large turbines fail, such failure may adversely affect air quality, if units go out of service and higher-emitting units are used in their stead. Tests by the SCAQMD also showed that, of about 140 boilers and heaters it tested, 40 percent emitted more NOx than regulations permit when using high-Wobbe gas, some very significantly more. (App.4:11:1001, lines 11-20.)

2. The Presence of Evidence Disputing the Significance of Admitted NOx Increases Does Not Support the PUC Here, Because a Difference Among Expert Opinions Should Be Resolved by the Conclusion That a "Fair Argument" Exists, and an EIR Is Required.

There is certainly evidence in the record supporting the PUC's view that a change in the Wobbe number will not increase ozone pollution. Industry experts Mr. Bamburg and Mr. Hower, while agreeing that there would be increased NOx emissions if high-Wobbe gas were used, both disagreed with Drs. Lui and Wallerstein as to the significance of that increase. They opined that the amount of increased NOx emissions in the South Coast Air Basin would not be significant. Mr. Bamburg considered that amount to be small in

comparison with the overall NOx emissions inventory (App.2:10:0452, lines 18-19), and Mr. Hower believed that the increase would not produce a detectable effect on the amount of ozone in the ambient air. (App.4:11:1018, lines 3-7.) Dr. Lui contested those opinions, giving his expert views that the kind of air quality modeling on which Mr. Hower relied lacks the capability to show a direct effect from the NOx increases at issue here, but that this modeling limitation does not make the amount of NOx increase insignificant. (App. 4:11:1026, line 25 to 1027, line 8.) Dr. Wallerstein testified that, given the abysmal state of air quality in the South Coast Air Basin, and the huge decreases in NOx and other emissions that the SCAQMD has determined are required to meet state and federal air quality standards, a 1.2 ton increase in NOx emissions would indeed be significant. (App.10:67:2446, lines 12-27.) The upshot is that none of these experts disputed that NOx emissions would rise; they differed only in their assessment of the *significance* of that emissions increase.

Such a disagreement among experts on the significance of a potential environmental effect does not allow an agency to claim an exemption from CEQA for an action. On the contrary, it is well established law that, “if there is a disagreement among experts over the significance of an effect, the agency is to treat the effect as significant and prepare an EIR.” (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317; Guidelines, § 15064, subd. (g);

accord, *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1607.)

More importantly, as discussed previously, at the first step of the three-step CEQA process, the presence in the record of substantial evidence supporting a finding of no significant environmental impact is not dispositive. On the contrary, under long settled case law, during the first two steps of the CEQA process it is the presence of substantial evidence in the record supporting a fair argument that there may be a significant environmental impact that is dispositive. Such evidence as to a discretionary project compels the preparation of a full EIR. (*Laurel Heights Improvement Assn. v. Regents of the Univ. of Calif.* (1993) 6 Cal.4th 1112, 1123; *Brentwood Ass'n for No Drilling, supra*, 134 Cal.App.3d at 503-504; Guidelines, § 15070, subd. (a).) The PUC is arguing for a deferential standard of review that simply does not apply at the first step of the CEQA process; it leapfrogs over steps one and two and goes directly to the deferential standard of review that only applies at step three, i.e., only *after* full environmental analysis has been done. The highly deferential substantial evidence rule applies to a full EIR and related agency findings, *not* to the determination of whether an action is a “project.” The determination of whether an action is a “project” can only be made if it can be seen “with certainty” that there is no possibility of environmental harm. The PUC has not

made that showing. Under the applicable non-deferential standard of review, the PUC's action qualifies as a "project."

B. The PUC's Action Is Sufficiently Related to High-Wobbe's Potential to Cause Environmental Harm to Trigger CEQA.

Second, the PUC argues that revising the Rule 30 tariff is not a "project" because it will not directly or indirectly result in environmental damage, that it is not "an essential step" towards the importation of higher Wobbe Index gas into California and its use by utilities and consumers. (PUC Brf. at 31.) This, the PUC says, is because no actual environmental harm will result until and unless actual LNG plants are built that will produce and ship the higher Wobbe gas. Since the Wobbe decision does not confer a building permit or land use entitlement, the bare decision is not an "essential step" to LNG importation and use. (*Id.* at 27.)

The argument contradicts both common sense and the PUC's own findings below. It was settled by this Court in *Bozung v. Local Agency Formation Com.* (1984) 13 Cal.3d 263, 279, that judicial review under CEQA looks to the direct and indirect effects of an agency decision, not just the issuance of that decision. Industry testified that it needed a high-Wobbe number as "regulatory certainty" that if it built new LNG facilities, it could sell the LNG those facilities would handle. (App.10:67:2485 (Sempra); App.10:67:2490 (Shell); App.5:17:1247-48.; App.2:10:0450.) The PUC

thought so, too.^{11/} Providing such “regulatory certainty” was one of the PUC’s avowed goals in this rate-making; the PUC uses the phrase with approval in the Wobbe portion of the Decision (App.11:69:2667 (twice), 2672), and in two of the PUC’s Findings of Fact. Finding Number 65 states that the industry needs this regulatory certainty to be able to build LNG facilities, and Finding 45 states that the Decision gives the industry that certainty.^{12/} The PUC cannot have it both ways: having invoked the need for regulatory certainty as a justification for setting the tariffs at issue here, it cannot turn around and credibly assert that the tariffs were not an “essential” step in facilitating the use of high-Wobbe gas in California.

The PUC relies on *Kaufman-Broad*. In that case, the formation of a school financing district, where no particular school construction was proposed,

11. The PUC’s brief attempts to portray the Wobbe standard-setting as a minor portion of the overall rate-making procedure. It was in no way minor. The Wobbe portion of the final Decision fills 60 of the 168 pages of the text of the Decision, 38 of the 82 Findings of Fact, and 31 of the 48 Conclusions of Law.

12. The relevant Findings of Fact, emphasis added, are:

45. Approving changes to SDG&E’s and SoCalGas’ tariffs now *will provide regulatory certainty* to LNG developers and other potential natural gas suppliers. (App.11:69:2689.)

...

65. LNG developers *need regulatory certainty today* to design and build LNG import projects and arrange for sources of LNG supply. (App. 11:69:2691.)

was found not to be a “project” because it was not an “essential step” in a chain of events leading to an action (school construction) that would have definite physical effects on the environment. However, that case involved lack of reasonably foreseeable consequences. The school financing district formed in *Kaufman-Broad* was merely a funding tool whose effects on the physical environment could not be foreseen until the school district chose to use the mechanism and proposed to build an actual school. Any school that might ultimately be financed through the funding mechanism would have direct environmental impacts, but because the number, location, configuration and size of such future school or schools were unknown and unknowable at the time that the funding district was formed, *Kaufman-Broad, supra*, 9 Cal.App.4th at p. 476, the court held that environmental analysis under CEQA at that time would be “meaningless.” Notably, the *Kaufman-Broad* court distinguished *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779 and *Bozung*, in which this Court found that formation of a new high school district and approval of land annexation, respectively, were “projects,” on grounds that they forwarded or enabled school or housing construction that were foreseeable, and that could have adverse environmental impacts. (9 Cal.App.4th at 474.)

The present case is analogous to *Fullerton* and *Bozung*, not to *Kaufman-Broad*. The PUC emphasizes that, like *Kaufman-Broad*’s unknown future

schools, the exact location, size, and environmental impacts of future LNG facilities are not and cannot be known at this time. While true, that is only half the story. The record in this case shows that some of the indirect consequences of use of the LNG that these facilities will import and recondition *are* known: burning this gas will cause more NOx emissions, which in turn will worsen air quality. These indirect environmental effects of the high-Wobbe gas approval have the potential to last much longer than the direct effects of construction of LNG terminals, and will be no less real. The increased NOx emissions are so clearly foreseeable that not only were experts Bamburg and Hower able to predict that they would occur, they were able to calculate them. Where such calculations can be done, indirect environmental effects can be reasonably foreseen, and, unlike in *Kaufman-Broad*, environmental analysis is meaningful.

II. THE BASELINE FOR MEASURING THE ENVIRONMENTAL EFFECTS OF THE WOBBE DECISION IS HISTORICAL GAS USED IN THE STATE.

All parties appear to agree that it is the existing conditions that form the baseline against which the potential effects of a project are measured, but they do not agree on what the existing conditions are here.

The PUC argues that the baseline already includes high-Wobbe gas. It argues that the existing tariffs allow the use in California of natural gas that is as hot-burning as the high-Wobbe gas at issue here, and that such hot-burning gas has actually been used in some places in California. (PUC Brf. at 35.)

Assuming for the moment that there is such permission and such use, that is not dispositive here. Even if the existing tariffs – enacted decades before anyone considered importing hot-Wobbe gas and before CEQA was passed or thought of – do permit gas that burns as hot as high-Wobbe gas,^{13/} it has long been the law that the expected environmental effects of a project are compared with what exists on the ground, not what is merely permitted to occur. (Guidelines, §§ 15125, subd. (a) and 15126.2, subd. (a); *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246 [effects of rezoning are evaluated by comparing project with existing physical conditions, not full build-out allowed by zoning]; *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 289 [baseline conditions against which project’s changes are evaluated are current physical conditions]; accord, *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1315, fn. 3.) The fact that current tariffs for utilities involved in this rule-making might allow the use of gas that burns as hot as high-Wobbe gas does not mean that the giving of explicit permission to use high-Wobbe gas throughout the systems of two of California’s largest utilities will not cause new and potentially serious environmental harm.

13. The Wobbe number measures more than potential for heat production alone; otherwise, there would be no need for use of a different metric than BTU content. (PUC Brf. at 22, SCAQMD Reply Brf. at 21-22.) The Wobbe number blends heat potential and specific gravity, since both are required to be able to measure heat per unit of fuel passing through a portal of a given size per time unit. (*Id.*)

First, it is a basic tenet of CEQA that the location of a project matters, since something that would cause significant environmental damage in one area might cause only negligible damage in a different area. (Guidelines, § 15064, subd. (b).) In part, the difference in significance between areas is due to differing baseline conditions in those areas. (*Id.* [“[T]he significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area.”])

Here, it is important to remember that the PUC’s action will explicitly open the entire South Coast Air Basin to high-Wobbe gas. This air basin contains about 14.6 million people.^{14/} Thus, the air breathed by over one-third of the state’s population would be adversely affected by this decision. The South Coast Air Basin already poses a serious health risk to its residents, since it currently violates health-based federal air quality standards and the stricter health-based California air quality standards on up to 100 days a year.^{15/}

The SCAQMD elicited uncontradicted testimony before the PUC that hot-burning gas is not now being and has not been used in the South Coast Air Basin, although it may have been used in other places on an occasional or anecdotal basis. (AR 4, Exhibit 11, at 0805-08.) The ground truth here, and the

14. www.aqmd.gov/map/MapAQMD1.pdf, last visited February 26, 2008.

15. <http://www.arb.ca.gov/desig/adm/adm.htm>, last visited February 26, 2008.

appropriate baseline, is historic-quality gas usage. The burning of high-Wobbe gas would be a significant, adverse change from the existing environmental conditions in the South Coast Air Basin, adding thousands of tons of NO_x per year to an air basin that is home to millions of people, an air basin with perhaps the worst air quality in the nation. At least for this huge portion of California, the baseline should be considered to be the current physical conditions, without high-Wobbe gas. And there, its use can produce significant adverse effects. (See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718 [addition of even small amount of pollutant might be significant in light of serious existing ozone pollution.])

Second, even in areas where high-Wobbe gas may have been used at *some* times, explicit permission for its use at *all* times and in all circumstances is a change from the existing *regulatory* environment, one that may lead to a foreseeable, adverse change in the physical environment. Such a change in materials that the regulating agency allows to be used, even when the timing of the change to the physical environment from such an action cannot be definitely predicted, has been held to be a “project” in other contexts. (*Plastic Pipe and Fittings Assn. v. Cal. Buildings Stds Com.* (2004) 124 Cal.App.4th 1390, 1412-13 [“A regulation fitting the description of a discretionary project is a discretionary project under CEQA [The] activity need not cause an immediate environmental impact to be considered a project.”]) The case for

considering the tariff changes as a “project” here is even stronger than in *Plastic Pipes*. It is more than reasonably foreseeable, given how forcefully the utilities asked for “regulatory certainty” that would specifically allow the use of high-Wobbe gas throughout the SoCalGas and SDG&E service territories, that such gas will in fact be used there. This makes the regulatory change a “project” for CEQA purposes.

Further, even assuming that high-Wobbe gas has been used in some areas in California, the change of tariffs makes it reasonably foreseeable that its use will increase. Recent cases hold that increasing the intensity of a previously permitted use can have environmental effects that trigger CEQA. (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1196-97 [“nothing in the baseline concept excuses a lead agency from considering the potential environmental impacts of increases in the intensity or rate of use that may result from a project”]; *Communities for a Better Environment v. SCAQMD* (2007) 158 Cal.App.4th 1336, 1362 [“the increased use of existing equipment must be evaluated as part of the project, not part of the baseline” where no previous CEQA review of increased use had been done.]) Here, as in the *Lighthouse* and *Communities for a Better Environment* cases, regulatory permission has been given (here, a tariff) that authorizes greater or more intensive use of a resource (here, the air quality in every air basin where high-Wobbe gas will be used) than is currently being made, and no CEQA review

has occurred of that increased usage. The PUC's decision to authorize more intensive use of the state's air quality resources is a project here, just as increased use of a park was in *Lighthouse* and increased use of existing refinery boilers was in *Communities for a Better Environment*. The authorization of high-Wobbe gas use is a "project" because it has the clear potential to significantly increase the rate at which air pollutants are poured into already polluted air basins.

In sum, the baseline here for many millions of California residents is historic gas quality, and explicit permission to use high-Wobbe gas, with its undisputed ability to produce greater harmful NOx emissions, is a significant and adverse change from that baseline.

CONCLUSION

As the PUC says, green energy is vital to California's future. However, in by-passing the CEQA process, the PUC has also by-passed the opportunity to ensure that high-Wobbe LNG really *is* green energy. It has also ignored its duty under CEQA to analyze, publicly disclose, and mitigate the foreseeable

damage its regulatory decision will do to the environment. The Attorney General asks this Court to remand the matter to the PUC for full compliance with CEQA.

Dated: April 2, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with the California Rules of Court rules 8.204(c)(1) and 8.490(b)(6), the undersign hereby certifies that the text of this brief consists of 6,893 words, based on the word count of the WordPerfect 8 word-processing program used to generate this brief.

DATE: April 2, 2008

A handwritten signature in black ink, appearing to read "Susan L. Durbin", written in a cursive style.

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **SOUTH COAST AIR QUALITY MANAGEMENT
DISTRICT v. P.U.C. (ABAG PUBLICLY OWNED ENERGY)**

Case No.: **S151156**

Court of Appeal Case(s): No Data Found

No Cross-Reference Cases Found

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 2, 2008, I served the attached ***AMICUS CURIAE BRIEF OF CALIFORNIA ATTORNEY GENERAL EDMUND G. BROWN JR.*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

[See Attached Service List]

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 2, 2008, at Sacramento, California.

BESSIE WONG

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