

March 26, 2012

In the Matter of:

Rulemaking to Consider Modification of Regulations Establishing a Greenhouse Gases Emission Performance Standard For Baseload Generation of Local Publicly Owned Electric Utilities

Docket No. 12-OIR-1
Rulemaking Workshop

DOCKET	
12-OIR-01	
DATE	MAR 26 2012
RECD.	MAR 26 2012

**Joint Comments of the Natural Resources Defense Council and the Sierra Club
in Response to the Energy Commission’s Notice of Rulemaking Workshop**

Introduction:

The Natural Resources Defense Council (NRDC) and the Sierra Club appreciate the Energy Commission (Commission) initiating a proceeding to ensure publicly owned utility (POU) investment in existing coal plants is compliant with SB 1368. We welcome this initial opportunity to comment.

In enacting the Emissions Performance Standard (EPS) under SB 1368, the Legislature declared it vital that all California utilities “internalize the significant and underrecognized cost of emissions ... and to reduce California’s exposure to costs associated with future federal regulation of these emissions.”¹ The EPS was designed specifically to “reduce potential financial risk to California consumers for future pollution-control costs” from high-emitting resources.² Since the enactment of the EPS, California and a number of others have begun implementing greenhouse gas reduction programs and the EPA has issued the necessary findings to begin a process to develop federal regulation. Furthermore, the EPA has initiated new pollution control standards affecting high-emitting power plants. In spite of SB 1368’s core intent to limit California electricity customer exposure to pollution-control costs from high-polluting facilities, POUs have made ongoing investments at existing non-compliant power plants and have plans for even more investments over the coming years, including potentially significant investments in pollution control equipment. To date, these investments have been made without Commission oversight or guidance.

To ensure compliance with SB 1368 and protect the California ratepayer, our Petition asks the Commission to provide sufficient guidance and oversight to prevent the POUs from making new long term financial commitments at non-compliant power plants. In order to complete the evaluation contemplated in the Order opening this rulemaking, the Commission must be able to evaluate whether the existing standard has been applied consistently and in accordance with the

¹ SB 1368 (2006) Sec. I (g).

² SB 1368 (2006) Sec. I (i).

statute. The Commission requires complete information on the range of investments made and considered at the non-compliant power plants prior to making these evaluations.

The questions in the Commission's Notice do not request enough information for the Commission to make an informed decision regarding whether its implementing regulations for the EPS need to be updated to carry out the purposes of SB 1368. Accordingly, the Commission should enlarge the scope of the information requested from the POUs through this rulemaking to ensure it develops a sufficient record upon which to conduct a meaningful review and support a final decision.

The Commission needs sufficient information to develop appropriate criteria. The Commission should request information from the POUs on:

- 1) All past and planned investments from POUs at non-compliant power plants;
- 2) Any and all information on alternative investment options considered or under consideration, including alternative investments at the non-compliant plants and alternative energy and capacity supply options; and
- 3) A full review of all obligations, options, and opportunities for California POUs under their existing contracts at non-compliant plants should the POUs claim that they are contractually bound to make investments at the non-compliant power plants.

This information may overlap with information that might be necessary in an enforcement investigation. However, that potential similarity does not make the information any less critical to the Commission making an informed decision about whether to require ongoing reporting of planned investment and whether additional guidance or criteria are necessary to ensure compliance with the EPS.

Responses to specific questions in the Notice are set forth below.

Responses to Notice questions:

- 1) Whether to establish a filing/reporting requirement for local publicly owned electric utilities' (POU) investments in non-deemed compliant powerplants, regardless of whether the investment comes within the meaning of "covered procurement." (See Regs., §§ 2901, subd. (d), 2907.)

We firmly believe that such a requirement is necessary to ensure all potential investments by California's POUs at baseload power plants are subject to transparency and scrutinized according to uniform and consistently applied state standards. This reporting requirement, will provide the Commission with the information necessary to determine whether the POUs are interpreting the regulation in a similar manner or in a manner consistent with the purposes and objectives of the EPS. We reiterate that since the regulations implementing the EPS for the POUs came into effect in 2007, **the Commission has not received a single compliance request from any POU for an investment in an existing base load power plant.** The POUs have been given free reign to interpret the Commission's implementing regulations with regard to millions, perhaps hundreds of millions, of dollars of investments made in baseload power plants that do not

comply with the EPS. Additional reporting requirements supplies a mechanism to evaluate how the POUs are interpreting the EPS regulations and ensure the POUs' ongoing investments in non-compliant plants are subject to transparent, and consistent scrutiny.

2) Whether to establish additional criteria for a "covered procurement." (Regs., § 2901, subd. (d).)

Additional criteria may be helpful to ensure that the EPS is fairly and evenly enforced. The requirements of the EPS and the Commission's implementing regulations already preclude certain classes of investments at existing non-EPS compliant facilities.³ However, it is not clear that the POUs have interpreted the existing regulations to limit their investments at these facilities. Furthermore, it is not clear without information that the POU interpretations have been consistent across the state, or in keeping with the purpose of the statute. We also believe supplementary guidance would be helpful with regard to large investments at existing non-compliant facilities.

Had the Commission chosen to require automatic reporting when it first drafted its regulations, it is possible that the accumulation of responses to planned investments would provide a body of guidance and no further criteria would be necessary at this time. However, to the extent that POUs are contemplating significant new investments – and as we document in our petition there is substantial evidence to substantiate that they are - more guidance may be helpful to ensure POUs' investments in non-compliant plants do not violate the EPS.

The Public Utility Commission's (PUC) rulemaking on the EPS ultimately concluded that it would allow no further investment at Southern California Edison's (SCE) Four Corners power plant after December 31, 2012 to ensure that SCE did not become entangled with significant new investments, including pollution control investments, beyond that date, even though SCE's contract did not expire until 2016.⁴ The PUC also required the use of certain criteria for evaluation of investments prior to that date. Those criteria were drafted in consideration of the preclusion of any new investments after December 31, 2011, and different criteria may be needed here. Nonetheless, criteria for investments can be useful in categorizing classes of acceptable and unacceptable investments to ensure consistent application of the EPS.

3) Whether to refine the meaning of "new ownership investment" by, for example, defining the phrase "designed and intended to extend the life of one or more generating units by five years or more, not including routine maintenance" or defining the term "routine maintenance." (Regs., § 2901, subd. (j)(4)(A).)

The term "new ownership investment" is already defined in § 2901 (j) as follows:

³ As noted in our Petition, NRDC and the Sierra Club retain the right to bring an enforcement action for past or planned investments in these facilities, whether or not the Commission determines additional criteria would be helpful in determining which investments are allowed and disallowed at non-compliant facilities.

⁴ The PUC approved the sale of SCE's interest in Four Corners on March 22, 2012: http://docs.cpuc.ca.gov/word_pdf/AGENDA_DECISION/162229.pdf. The foreclosure of investments was determined in D. 10-10-016: http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/125183.pdf.

“New ownership investment” means:

- (1) Any investments in construction of a new powerplant;
- (2) The acquisition of a new or additional ownership interest in an existing non-deemed compliant powerplant previously owned by others;
- (3) Any investment in generating units added to a deemed-compliant powerplant, if such generating units result in an increase of 50 MW or more to the powerplant’s rated capacity; or
- (4) Any investment in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility that:
 - (A) is designed and intended to extend the life of one or more generating units by five years or more, not including routine maintenance;
 - (B) results in an increase in the rated capacity of the powerplant, not including routine maintenance; or
 - (C) is designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant.

This definition provides meaningful restrictions to POUs on their allowed ongoing participation in non-compliant baseload power plants. However, it is not clear that the POUs have thus far restricted their participation in any way. We believe further guidance and criteria may be useful to that effect. We firmly believe the Commission should examine the range of past and planned investments in non-compliant baseload power plants and evaluate whether they are designed or intended to extend the life of the power plant by five years or more, whether alternative options are available that do not similarly extend the operable life of the plant,⁵ or whether California’s POUs must seek alternative investment options to comply with the EPS.

The POUs have commented in this rulemaking that all of their past and planned investments comply with the EPS *and* that they are bound to make investments at non-compliant powerplants, regardless of their views on EPS compliance.⁶ However, we believe that guidance, based on a full evaluation of past and planned investments would ensure a clear, statewide application of the EPS to investment under consideration under the relevant contractual obligations.

4) How and in what instances have POUs applied the terms “routine maintenance” and “designed and intended to extend the life” in deciding whether investments in non-deemed compliant power plants are consistent with the Commission’s EPS

⁵ For example we are aware, through a Public Records Act request, that participants in the San Juan Generating Station have analyzed how to minimize investments in the plant in order to time retirement of the facility with the end of the existing contractual period.

⁶ We reserve judgment on these questions for the time-being. However, we note that SCE also raised concerns about its contractual obligations in the PUC proceeding on the EPS. After evaluation of the Contract, the PUC considered opening an ethics proceeding. While the PUC ultimately did not pursue enforcement of an ethics violation, it did not find the contractual obligations to over ride the EPS. The full proceeding is available here: <http://docs.cpuc.ca.gov/Published/proceedings/R0604009.htm#>

regulations and SB 1368? Is there an industry custom or practice that guides these determinations? Provide supporting documentation.

We look forward to responses from the POU's to this question. However, we think it would be more fruitful to request a more comprehensive review of the past and planned investments at non-compliant power plants.

5) For the period of 2007 to the present and based on your understanding of existing law, identify all covered procurements for which a POU made or plans to make a "new ownership investment" in an existing, non-deemed compliant powerplant owned by the POU in whole or in part, where the investment was for "routine maintenance." For each such investment, describe the nature and scope of the maintenance. Provide supporting documentation.

We look forward to responses from the POU's to this question. However, we are concerned that as worded it may not provide much new information. The question can be read to be internally contradictory and it relies on POU interpretations of key regulatory terms, which are at the heart of this proceeding. In particular, the terms "new ownership investment" and "covered procurement" are likely to be interpreted as mutually exclusive of "routine maintenance."

If POU's simply apply their existing interpretation of the Commission's implementing regulations, which to date has not prompted a single request for Commission review of a potential "covered procurement" at a non-compliant EPS plant they will likely reply "none," leaving the Commission with no new information. For this reason we recommend the Commission seek to further information on the full range and categories of investments being considered by the POU's, in order to determine if additional criteria are necessary to define "covered procurement."

To the extent that this question does not solicit significant responses from the POU's, we recommend the Commission request additional information on past and planned investments at non-compliant power plants, along with descriptions of how the POU's determined that the EPS does or does not apply.

6) Is the public informed or notified about proposed POU investments that are either "routine maintenance" or "designed and intended to extend the life of one or more generating units by five years of more"? Provide supporting documentation.

We are concerned by the potential implications of this question. The Commission is responsible for enforcement of the EPS, including POU investments at baseload power plants. This question indicates that the Commission has not monitored the investment decisions made by California POU's and has no way to verify that there has been uniform or adequate compliance with the EPS, let alone a meaningful public process.

SB 1368 designated the Commission to adopt enforcement regulations for the POU's with regard to the EPS and gave the Commission authority to oversee investments to ensure compliance.

Varying levels of public process at each of the state's POU's should not be a substitute for the Commission's independent responsibility under the statute.⁷

7) Whether the requirements of Public Utilities Code section 8341, subdivision (f), have been triggered by the State Air Resources Board's (ARB) recent adoption of cap-and-trade regulations or whether ARB must first verify the efficacy of and compliance with its cap-and-trade regulations before Section 8341, subdivision (f) is triggered. Section 8341, subdivision (f), provides that

the Energy Commission, in a duly noticed public hearing and in consultation with the [California Public Utilities] commission and the State Air Resources Board, shall reevaluate and continue, modify, or replace the greenhouse gases emission performance standard *when an enforceable greenhouse gases emissions limit is established and in operation*, that is applicable to local publicly owned electric utilities. (Emphasis added.)

The requirements of Public Utilities Code section 8341, subdivision (f), have not been triggered. The State Air Resources Board's (ARB) recent adoption of cap-and-trade regulations do not yet trigger such a review and the Commission and ARB must first verify the efficacy of and compliance with its cap-and-trade regulations before Section 8341, subdivision (f) is triggered. Even if the Commission were to decide against waiting for verification of compliance, the cap and trade program is not yet in operation or enforceable. Furthermore, regardless of the timing of the review, SB 1368 remains a critical back-stop to eliminate the opportunity for new long term investments in the highest emitting power plants.

Nor does the statute contemplate elimination of the standard. The cited section states that the Commission shall "reevaluate and *continue, modify, or replace*" the standard. (emphasis added) The statute does not include elimination of the standard as an option upon further review. Thus, once § 8341 (f) is triggered, the Commission should reevaluate the standard and, depending on the findings of that evaluation, consider whether to continue the existing standard, modify it, or replace it with another standard. In making that evaluation, the Commission should consider the purposes of SB 1368, the state's ongoing need to ensure greenhouse gas reductions from the power sector and the state of baseload energy generation technology.

8) Whether the Petitioners' concerns regarding possible violations of the EPS would be better addressed through initiation of the Commission's complaint and investigation proceedings found at Regulations sections 1230 through 1237.

While we retain our right to initiate such a proceeding, we believe it is in the best interest of all parties if the Commission develops more clear criteria for evaluating past and planned investments under the EPS through this proceeding.

⁷ PU Code § 8431 (c)

If the Commission requests and receives sufficient information to address the questions in this Rulemaking, this Rulemaking can provide a consolidated forum to shed light on past and planned investments at non-compliant plants and develop more clear criteria to evaluate investments going forward. We also maintain that the change in reporting requirements we requested is necessary to ensure the POUs apply investment criteria uniformly and transparently. If the Commission chooses not to conduct such an evaluation, we may determine that requests for enforcement are the most appropriate option.

9) Whether any other changes to the Energy Commission's EPS regulations are necessary to carry out the requirements of SB 1368.

We request the Commission also consider modifying its EPS regulations to ensure adequate monitoring and verification of any geologic sequestration:

On July 29, 2010, the California Public Utilities Commission adopted Decision 10-07-046 granting, in part, the petition to modify Decision 07-01-039 filed by Natural Resources Defense Council, the Environmental Defense Fund, Green Power Institute, Union of Concern Scientists, and The Utility Reform Network. This decision built on existing language in the regulations implementing the EPS for utilities seeking to demonstrate compliance for any covered procurement that employs geologic sequestration of carbon dioxide emissions. Before the modification, LSEs were required to "provide documentation demonstrating that the CO₂ capture, transportation and geological formation injection project has a reasonable and economically and technically feasible plan that will result in a permanent sequestration of CO₂ once the injection project is operational." Decision 10-07-046 clarified that "[t]he plan must comply with Federal and/or State monitoring, verification and reporting requirements applicable to projects designed to permanently sequester CO₂ by preventing its release from the subsurface. If at the time the application is filed Federal and/or State requirements have not been finalized, the plan must include monitoring activities to detect releases of injected CO₂ from the subsurface, must provide for verification of any detected releases and must include a schedule for reporting any detected releases to the Commission or other Federal and/or State agencies requesting that information."

We request that the Commission adopt a similar modification to its rules implementing the EPS to clarify that appropriate monitoring, reporting and verification is to be undertaken by utilities seeking to demonstrate compliance through the use of geologic sequestration.

Conclusion:

We thank the Commission for this first opportunity to Comment and hope the Commission will move expeditiously to ensure it has sufficient information available to evaluate the full range of investments made and considered by POUs at non-compliant plants in order to determine if the

existing regulations require further guidance. We also encourage the Commission to adopt our requested change to reporting requirements in order to ensure that future investments comply with the EPS.

We look forward to our ongoing participation and collaboration in this proceeding.

Respectfully Submitted,



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