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Hunters Point: Energy Development Meets Environmental Justice

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Community reaction to a proposal to build the first new power plant in decades in San Francisco has forced a California agency, the California Energy Commission (CEC), to hold the first ever evidentiary hearings explicitly on the issue of environmental justice. In the process, fundamental questions regarding civil rights, energy development, environmental decision-making and economic development in poor communities are being litigated. At stake is the public and economic health of a community and perhaps the conscience of our environmental regulatory system.

In 1994, San Francisco Energy Company (SFEC) was formed as a California Limited Partnership comprised of AES Pacific, Inc. and Southern Natural Gas Company. SFEC submitted an application for certification to the CEC for approval of a proposal to build a 221 megawatt natural gas-fired power plant. The proposal's preferred site was near residential areas in Southeast San Francisco, known as the Bayview-Hunters Point community. An alternative site, later selected as the preferred site, was less than a half-mile away from residential areas in Bayview-Hunters Point, on a site owned by the Port of San Francisco. SFEC proposed to lease the Port site for its power plant.

Bayview-Hunters Point is predominately African-American, about 62% of the population in the area. The second largest group is Asian-American, about 22 percent. Whites account for 11 percent of the population, and other minorities account for 4 percent.

Bayview-Hunters Point is a community struggling with economic decline. In San Francisco as a whole, the number of manufacturing jobs declined from about 50,000 jobs to 40,000 jobs between 1980 and 1990. In Bayview-Hunters Point, 61% of the jobs are industrial. More than 30% of the Bayview-Hunters Point population has household incomes less than $15,000, as compared to the overall City's percentage of 18.8. Forty-six percent (46%) of Bayview-Hunters Point household incomes are below $25,000. The CEC Staff found that only 10 of 31 census tracts affected by the emissions from the project had poverty rates less than 15%.

If one wants to operate a polluting business, one would find plenty of company in the Bayview-Hunters Point area. According to the San Francisco Health Department, the area has a disproportionate number of sources of toxic chemicals. Bayview-Hunters Point has 3.79% of the population of San Francisco, yet it has 14.34% of the sites permitted by the Bay Area Air Quality Management District (BAAQMD), 100% of the Superfund sites, 12.67% of the hazardous waste generators, 33.33% of the waste water treatment plants, 33.98% of the underground storage tanks, and 60% of the Bay discharge sites.[1]

The United States Environmental Protection Agency Region 9 (EPA) in a pilot environmental justice project also examined the toxic concentration in Hunters Point. One of the principal sources of pollution was the Hunters Point Naval Shipyard, now a designated federal Superfund site. According to EPA:

> The Bay at Hunters Point is subject to high levels of a variety of contamination in subsurface and shoreline sediments adjacent to the Naval Shipyard in the southeastern corner of San Francisco. In this area of the lower Bay, eight toxic metals, polychlorinated biphenyl (PCBs) and the extremely toxic aquatic pesticide tributyltin (TBT) have been discovered to exceed toxic concentrations in sediments and pose a threat to aquatic life. Petrochemicals have also been detected. Thallium in sediments exceeds toxic levels by nearly 100 times, antimony by 19 times, chromium and tributyltin by 13 times, copper by 5 times, nickel by 4 times, silver by 3 times and beryllium and mercury have been measured at 2 times toxic levels.[2]

This pollution in the Bay is not just an aquatic animal issue, according to EPA. It is another potential pathway for toxics affecting human health in Bayview-Hunters Point:

> According to the Navy, extensive fishing takes place two miles north to two miles south of HPA, and swimming takes place infrequently. The area around BVHP provides one of the few recreational angling opportunities in an area of industrialized and developed South San Francisco Bay shoreline, where public access for recreational fishing is extremely limited. The Navy reported that up to 150 people have been seen shore fishing in the area at one time. The population fishing in the area has changed over the years. Only the military personnel were permitted to fish off HPA when the base was operational. The India Basin area, .75 miles northwest of the center of HPA and the Hunters Point Power Plant area are popular fishing sites. Creek surveys conducted by Pacific Gas & Electric of anglers fishing near the Hunters Point Power Plant site indicated that recreation and food consumption were the primary reasons for fishing at the site. People who eat fish and shellfish may be exposed to contaminants in fish. People considered at special risk are Asians (about 14% of population of BVHP) whose fish and shellfish ingestion rates are greater and more frequent than the general population.[3]

The Bayview-Hunters Point community is also surrounded by the major powerplants in San Francisco. The public utility, PG&E, has units generating electricity directly in Hunters Point and at its nearby Potrero station. These units together produce yearly, based on 1992 estimated data, 44 tons of particulate matter less than 10 micrometers (PM10), 2381 tons of nitrogen dioxide (NOx), 90 tons of sulfur dioxide (SOx), 40 tons of total organics (VOC) and 418 tons of carbon monoxide (CO).

While there is, according to the CEC staff, a "dearth" of information on the neighborhood level about local public health impacts, let alone the source of these impacts, some disturbing evidence is appearing. For its review, the CEC staff performed a hospital discharge data review for census tracts impacted by potential PM10 emissions from the proposed SFEC project. It found that bronchitis/asthma discharges were twice as great in these areas as compared to the rest of San Francisco. The San Francisco Department of Public Health in commenting upon the proposed new power plant noted that the most common reason for a clinic visit to its Southeast Health Center located in Bayview Hunters Point is respiratory symptoms. Inhalers are also a larger proportion of prescriptions issued than at any other DPH health centers.

Even more alarming, the San Francisco Public Health Department conducted an investigation of breast and cervical cancer in Bayview-Hunters Point. Using information provided by the California Cancer Registry and the Northern California Cancer Center, it found that invasive cervical cancer incidence was nearly twice what would be expected in Bayview-Hunters Point in 1988-92 than would be expected by San Francisco or Bay Area age and race specific incidence rates. Further, the incidence of invasive breast cancer in Bayview-Hunters Point was double that which would be expected by San Francisco or Bay Area age and race specific rates in the period 1988-1992.

The elevated breast cancer incidence was due to a statistically significant increased incidence of invasive breast cancer in African American women younger than 50. Since the levels for breast cancer in the San Francisco Bay Area are among the highest in the world, these results are quite significant.

While the San Francisco Health Department was not prepared to state the final word on the cause of these cancer rates, it could not contain its suspicion regarding environmental factors:

> Given the limitations of this study, no definitive conclusions can be made about the cause of the increase in breast and cervical cancer. Because of the higher concentration of heavy industry in the Bayview/Hunters Point area, compared to other parts of the city, the higher incidence of breast cancer may be related to environmental exposures. According to the health assessment for the Hunters Point shipyard by the Agency for Toxic Substances and Disease Registry (ATSDR), there may have been exposures to metals (antimony, arsenic, copper, vanadium, lead) polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs) and radium-226 from contaminated soils among individuals who worked in the Industrial landfill and among Navy personnel, their children, other workers, tenants and trespassers on the site. Other individuals may have been exposed to these substances and others via contaminants in fish.
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> Because risk factors for 70% of breast cancer are unidentified and because there is concern about the role of environmental exposure we will review the literature on this subject in particular detail. Many pollutants are lipid soluble and have been found to accumulate and persist in fat tissue. Some are known to be animal carcinogens as well as persistent environmental contaminants as a result of their extensive use such as in pesticides, insecticides, oils, lubricants, plasticizers and as fluid insulators of electrical components.[4]

In what might have been good news for the community on the pollution front, PG&E was faced with new air quality regulations effective in the year 2000 which would require it to shut down two of its dirtiest units, known as Hunters Point 2 and 3, or expensively retrofit the units. Given the glut of electrical capacity available through transmission grids in California and the Western United States, it had appeared possible that by 2001 Bayview-Hunters Point would enjoy a significant net reduction in pollution from these sources.

But while community residents were looking forward to a reduction of pollution, and perhaps a turnaround in their community's fortunes, larger energy development forces were at work. The first force is based upon San Francisco's geography, and assumptions that have never been a matter for significant public debate.

San Francisco is served by the local power plants and a single transmission corridor with multiple power lines. This corridor is both a blessing and a curse. The blessing is that it becomes feasible to "island" San Francisco in case of a transmission line upset anywhere beyond the San Francisco peninsula. This upset has occurred once this century. In such cases, PG&E with its current local operations can produce enough electricity to support 40% of San Francisco's needs, focused upon the downtown business and governmental center of the City. Bayview-Hunters Point and other residential communities would not receive any electricity.

The curse of the one corridor is that if the transmission corridor is damaged, such as from an earthquake or airplane crash, all external sources of electricity is cut-off, leaving San Francisco with only its local power. This has also happened once this century, during the Loma Prieta quake, however, the same quake also interfered with the local power supply, darkening San Francisco.

PG&E determined it wanted to preserve its 40% capability once two of its units were shutdown. Thus it proposed to the California Energy Commission and

the Public Utilities Commission that it be allowed to renovate these units to meet air pollution requirements and produce a significantly greater amount of electricity. These agencies agreed to this request, during proceedings scarcely attended by any San Francisco residents and virtually unknown to residents in Bayview-Hunters Point.

The other force in energy development now comes into play. In a transition to a market approach to energy development, the PUC decides to determine how this San Francisco "need" will be filled by holding an auction for "qualified" facilities. Qualified facilities mainly are those facilities which are deemed environmentally preferable due to the use of cogeneration or other favored technologies. They are not, unfortunately, environmentally benign. Nor is any consideration given to social issues, such as, whether a site will contribute to a disproportionate impact on communities of people of color.

At this point, SFEC enters the picture. SFEC participates in an "auction" conducted by the PUC to see if any other party could produce this electricity more cheaply than PG&E. SFEC submits the lowest bid and on January 10, 1994 was announced as the winner, subject to the company fulfilling various conditions required for a contract to sell electricity to PG&E. SFEC subsequently applied for certification from the California Energy Commission which, under the Warren Alquist Act, has sole jurisdiction over the siting of power plants. Pub. Resources Code, § 25000 et seq.

The power plant SFEC proposes to build has been described by the California Energy Commission as producing a maximum of 42.64 tons/year of precursor organic compounds (POC), 45.4 tons/year of PM10, 97 tons/year of NOx, 85.3 tons of CO and 6.77 tons/year of SOx.[5] It would release carcinogens and other toxic chemicals, although in amounts and concentrations that the CEC has deemed insignificant.

To many in the community, it appeared that any gains in pollution reduction resulting from PG&E's shutdown of facilities would start evaporating, particularly as to PM10 and ozone precursors. The company has suggested that it would be replacing older, more expensive, dirtier facilities and providing an opportunity for employment for community residents.

The California Energy Commission has, perhaps, the most comprehensive and complicated California Environmental Quality Act (CEQA) procedure for reviewing a project. Though its process is certified as functionally equivalent to a full CEQA process, in some respects, it far exceeds a typical CEQA review. Pub. Resources Code, § 21080.5(d)(3).

A power plant proposal touches upon almost every conceivable substantive environmental issue. The hundreds of pages included in a series of documents, a preliminary staff assessment, a final staff assessment, a presiding member's proposed decision, a presiding member's revised decision, a final decision — all with extensive text under dozens of environmental categories — speaks to the issues associated with a power plant. In this case, workshops and hearings touched upon such issues as odor, air quality, hazardous waste, hazardous materials handling, socioeconomic impacts, growth inducing impacts, transmission system engineering, biological resources, industrial safety and fire protection, facility reliability and seismic safety.

While the Commission is mandated to complete its proceedings within 12 months from the application, unless consent is given by the project sponsor, its process includes hundreds of pages of a draft and then final staff assessment, evidentiary hearings with cross-examination by potentially multiple parties, a draft decision of hundreds of pages, and a final decision of hundreds of pages. These are the minimum requirements. Additional hearings and draft decisions can be issued, if necessary.

Apparently, it is rare for community residents to be able to participate in California Energy Commission proceedings with counsel. Affording counsel for this kind of complicated and lengthy proceeding would be financially difficult even for the affluent. According to agency sources, it is unheard of for low income or working-class residents to have counsel and intervene.

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In this case, however, two community organizations, the Morgan Heights Homeowners Association and the Innes Avenue Coalition found two sets of attorneys who themselves are symbolic of the impact of the environmental justice movement on the legal profession. Morgan Heights is represented by the Golden Gate University Law School Environmental Law and Justice Clinic (ELJC) and the Innes Avenue Coalition is represented by the Environmental Law Community Clinic (ELCC) associated with Boalt Hall School of Law. An additional firm, the Lawyers Committee for Civil Rights (LCCR), associated with the Golden Gate Clinic, is providing assistance with civil rights issues inherent in the case. Counsel in-

clude ELCC's Anne Simon, LCCR's Michael Harris, ELJC's Anne Eng and the author, as well as a battery of law students certified under the State Bar's Student Certification program.

With the assistance of their counsel, representatives of the community organizations have asserted their claims that this project represents environmental injustice. As formal intervenors in the administrative process, representatives of the organizations have appeared at hearings before the Board and through their attorneys have participated fully in the evidentiary proceedings. Upon investigation, the case presented a number of difficult questions that cut to the heart of environmental justice.

The power plant in many respects represents improved technology over older powerplants. It uses natural gas which in many respects is less damaging than coal or oil or nuclear energy. However, the power plant would operate every day of the year while PG&E's older facilities to be shut down were operated mainly as back-up facilities. As a result, the power plant's maximum emissions for at least one pernicious pollutant, PM10 (particulate matter less than 10 microns in size), would be about equal to the estimated amount of all of PG&E's current San Francisco operations.

PM10 has been the subject of increasing focus of medical researchers across the country.[6] Recent estimates suggest that 50-60,000 people die each year as a result of PM10 exposure in the United States. In the San Francisco Bay Area, the BAAQMD's statistician and expert for the Intervenors, Dr. David Fairly, estimated that achieving state PM10 standards would save 1,260 to 2,940 deaths per year.

EPA is spending millions of dollars studying the issue and under court order is considering whether to issue more stringent standards for PM10. The EPA late last year recommended that the agency consider regulating the smaller PM10 particles — those less than 2.5 micrometers, which include PM10 particles emitted by power plants.

PM10 is a fine dust or aerosol associated often with combustion that, because of its microscopic size, can penetrate deep into the lungs. It is believed that these particles cause or aggravate inflammation leading to cardiovascular disease and aggravation of existing respiratory diseases such as asthma and emphysema.

Whether the PM10 emissions would impact locally has been the subject of much dispute during the evidentiary hearings. A panel of Commissioners in a tentative decision suggests most of the PM10 would blow towards the San Francisco Bay, not the community. The panel further contends that the amount of PM10 will actually be less than the maximum, and the resulting exposure is small and will not be significant.

The panel also adopted a proposal by the company to plant grass in two nearby parks to reduce dust, equating playground PM10 dust with combustion based PM10 and therefore mitigating the emissions. They further contend that the impact of the project upon the entire PG&E system will be to reduce the use of other dirtier more expensive plants, thus reducing Bay Area wide pollution.

All of these Commission arguments have been disputed by the Intervenors. "A little more" PM10, which they contend could be almost a ton a week for a number of weeks, and additional carcinogenic chemical exposure is considered by the Intervenors quite significant in a community impacted already by industrial pollution. The whole question of cumulative impacts in the context of a community going through what the Intervenors believe is a health crisis is under examination. They dispute that planting grass in a playground is adequate mitigation for power plant derived PM10s, noting that the power plant PM10s are the fine particles, PM2.5, believed by many leading PM10 researchers to be the most dangerous. Finally, in an era of deregulation and market economics, they question whether any model can predict the impact of this project on the PG&E system during the 30 year expected life of the project.

During contentious and heavily litigated evidentiary hearings, countless other environmental arguments were the subject of direct and cross-examination. For example, the power plant site adjacent to the Bay contains toxic chemicals and is near a recognized toxic hot spot in the Bay in the area where people fish. The current plan to assure no toxics migrate from the site to the Bay, in apparently the spirit of the new Brownfields initiative, is, after some construction grading and moving of debris, to site a power plant and parking lot on top of the site, thus inhibiting the rainfall from infiltrating the site. The Department of Toxic Substances Control contends in its draft Site Action Plan that at this time there is no evidence of significant migration of chemicals and constructing the project will further diminish any possibility of such migration.

The site is located in young bay mud, the kind of mud that liquified and caused extensive damage during the Loma Prieta shake. SFEC contends that by sinking pilings into the soil and other seismic design it can resolve these problems. The design, however, will be created only after certification, subject to a peer review committee monitored by the CEC. The Intervenors believe they should see the design now to assure their protection.

While the environmental issues were debated, further developments in the world of energy regulation were overtaking the project. SFEC claimed that because it won the auction, it had a binding contract with PG&E. However, PG&E claimed that SFEC had not demonstrated site control in the required time period, allegedly a prerequisite for a contract. California public utilities and other out-of-state utilities challenged the auction that seemed to authorize SFEC to seek certification for this project before the Federal Energy Regulatory Commission (FERC). Under federal law, this Commission has advisory authority over actions deemed contrary to federal energy policy. FERC declared the auction illegal, in part because it was not fully competitive.

The California Public Utilities Commission (CPUC) had, at the request of PG&E, "stayed" the auction as it affected Hunters Point pending the outcome with FERC. PG&E and SFEC have been in negotiations.

The Intervenors charged the CEC with racing ahead with its own process when the project itself

was in jeopardy, in violation of the CEC's apparent requirement that prior to consideration of certification a contract must be executed between a private and public utility.[7] The CEC determined it could go ahead even with the dispute about a contract, contending the State Legislature had determined that the mere fact an auction had taken place and SFEC was deemed the winner was a sufficient basis to make a decision on SFEC's application for certification.[8]

All of this debate comes in the shadow of the overarching argument raised by Intervenors. Does siting a power plant near a community of people of color, where all of the other power plants are always sited in San Francisco and where most of the polluting industry is located, constitute environmental injustice? Is there something inherently wrong with a Commission composed of people who are not of color telling a community of color that for the benefit of a majority population of white people they must bear some inconvenience, and perhaps a significant public health burden? And if so, is that illegal or bad policy?

The CEC held hearings with expert testimony from both sides on the subject. Intervenors testimony included Carl Anthony and Henry Holmes from Earth Island Institute's Urban Habitat program and Luke Cole from California Rural Legal Assistance's Center for Race, Poverty and the Environment. The SFEC had a number of witnesses, including Dr. Mark C. Trexler and Dr. Donald MacGregor, Senior Research Associate with Decision Science Research Institute and President of MacGregor, Bates, respectively.

As a result, the CEC appears to have adopted environmental justice as a topic that may need to be analyzed, though perhaps not on a regular basis:

> The Commission regards the goals of environmental justice to include avoiding (and in some cases counteracting) decisions or policies that result in disproportionately high pollution or health risk exposure to minorities or persons of low income. The Commission also recognizes a goal of promoting a significant measure of community self-determination in shaping future development.
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> Environmental justice is not one of the subjects the Commission regularly analyzes separately in evaluating an application for a power facility. Nor is the Commission here deciding that it should become one in future cases. However, the Commission has used this case as an opportunity to reflect on its process in comparison to the principles of environmental justice.[9]

To the disappointment of Intervenors, the revised proposed decision issued by a panel of Commissioners in February 1996 wholeheartedly determined that its process had achieved environmental justice. The proposed decision finds that there are no significant impacts from the facility, the public was able to fully participate in the process, the public will benefit from employment and community investment by the SFEC and the CEC has been sensitive to the particular needs of the population impacted.

To the credit of the Commission panel, however, it also decided to withhold its final decision until the City of San Francisco decides to go ahead with its lease of the Port site for the project, a decision which requires the approval of the San Francisco Board of Supervisors. While still allowing a majority to impose upon a minority of the City, it puts elected officials who are closer to the community in the driver's seat for the ultimate CEC decision, a step closer to the notion of environmental justice that gives importance to community participation. The panel also required SFEC to resolve its differences with PG&E, either through PUC action or a court decision.

Whether this project goes ahead in part will now be up to all of the people of San Francisco. The PUC and the Courts may also have a say. Whether this brings environmental justice to the minority in Southeast San Francisco remains to be seen.

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Endnotes

1. *Partial Inventory of Hazardous Agents in San Francisco*, San Francisco Department of Public Health, October 19, 1995.
2. *Toxic Inventory of the Bayview/Hunters Point Community*, Judy Quan, US EPA Region IX, September 15, 1995.
3. *Id. at 3-4.*
4. *Comparison of Incidence of Cancer in Selected Sites between Bayview/Hunters Point and San Francisco and the Bay Area*, Bureau of Epidemiology, Disease Control and Aids, San Francisco Health Department, at 6.
5. Presiding Members Revised Decision, Air Quality Table 1, at 257.
6. *Acute Respiratory Effects of Particulate Air Pollution*, Dockery and Pope, Annu. Rev. Public Health 1994, 15:107-32; *Weighing the Health Risks of Airborne Particulates*, Reichhardt, Environmental Science & Technology, 1995, Vol. 29, No. 8, 360-364.
7. CEC Energy Report 92.
8. Public Resources Code section 25523.5.
9. PMRD at 170.