

## Lawyer Insights

### Calif. Order Shows Power Act's Enviro Liability Shield At Work

By Frederick Eames

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On Sept. 6, Bruce Walker, the U.S. assistant secretary of energy for electricity, issued an order under Section 202(c) of the Federal Power Act, declaring an emergency shortage of electric generation. The order directed that if the [California Independent System Operator](#), or CAISO, determined that the electrical output of certain gas-fired generators in the state was necessary to meet demand, the CAISO could require their operation, even if the operation caused a conflict with air quality limitations.

Circumstances behind the order clearly show companies drawing upon the liability protection Congress added to Section 202(c) in 2015, the so-called Olson language — named after the legislation's sponsor, Rep. Pete Olson, R-Texas — for cases where an order to operate might result in an environmental violation.

The order applied during afternoon and evening hours from Sept. 6 through Sept. 13. It came in response to a request from CAISO, also issued on Sept. 6, that the [U.S. Department of Energy](#) find that an electric reliability emergency exists within California, and that the department order that electric generating units identified by the CAISO be ordered to operate "at their maximum generation output levels when directed to do so by the CAISO, notwithstanding air quality or other permit violations."<sup>1</sup>

It followed a state declaration of emergency by Gov. Gavin Newsom on Sept. 2, suspending air quality permitting requirements and conditions "that prevent [a] facility from generating additional power during peak demand hours, from 3:00 p.m. to 10:00 p.m., or as otherwise needed to respond to the Extreme Heat Event."<sup>2</sup> As the CAISO request noted, "this proclamation does not suspend permitting requirements that arise from federal law."<sup>3</sup>

During August and early September, California experienced an unprecedented heat wave. Los Angeles County recorded its highest temperature ever on Sept. 6, reaching 121°F in Woodland Hills.<sup>4</sup> Extreme heat was widespread throughout the West, reducing the ability of other states to export power to California.

Wildfires forced transmission lines out of service on Sept. 5, causing the unavailability of 1,600 megawatts of generation.<sup>5</sup> Moreover, the extreme heat continued into the evenings, creating an additional challenge for the state. Solar energy supplies more than 20% of California's electricity,<sup>6</sup> but solar output drops in the evening, requiring replacement generation.

CAISO has called the timing difference between demand and supply from renewables a "duck curve." The daily graph plotting the electricity supply that must come from nonrenewable sources shows a marked drop between morning and evening when solar output is available, resembling a duck's belly. As solar generation has increased in the state, the duck curve has steepened, meaning an increasing

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volume of dispatchable resources, such as natural gas-fueled power plants, must be available to ramp up to meet evening demand.

The DOE's order directs CAISO to order the dispatch of power from the generation units specified in the order if CAISO "determines that generation from the Specified Resources is necessary to meet the exceptional levels of electricity demand that the CAISO anticipates in California."<sup>7</sup> The order is limited to operation "only as needed to maintain the reliability of the power grid in California" between 2:00 p.m. and 10:00 p.m., "on days when the demand on the CAISO system exceeds expected energy and reserve requirements."

The order directs CAISO to "exhaust all reasonably and practically available resources, including demand response and identified behind-the-meter generation resources to the extent that such resources provide support to maintain grid reliability, prior to dispatching the Specified Resources."<sup>8</sup>

The DOE made the limitations of the order so explicit because the Olson language requires the department to limit emergency orders to the "hours necessary to meet the emergency and serve the public interest" where the order "may result in a conflict with a requirement of any Federal, State, or local environmental law or regulation."<sup>9</sup> The order must "to the maximum extent practicable, [be] consistent with any applicable Federal, State, or local environmental law or regulation and minimize ... any adverse environmental impacts."

The Olson language provides liability protection to companies that exceed environmental requirements while operating under a Section 202(c) emergency order. The effort to provide liability protection in such circumstances was prompted by penalties levied in two cases against the owners of power plants alleged to have violated air restrictions after being ordered to operate their facilities under a Section 202(c) order.

During the California energy crisis in 2000 and 2001, [Mirant Corp.](#) was ordered to operate the Portrero Power Plant to maintain electric reliability. This required the plant to operate in excess of its annual operating limit of 877 hours.

Mirant obtained an administrative order on consent from the [U.S. Environmental Protection Agency](#), as well as approval from the [Bay Area Air Quality Management District](#), to operate in excess of 877 hours. The city of San Francisco and environmental groups sued Mirant for operating in excess of its operating limit after it continued to operate for reliability purposes after the Section 202(c) order expired.

In 2006, the owner of the Potomac River Generating Station — unluckily, Mirant again — was sued by the commonwealth of Virginia for environmental exceedances while operating under a Section 202(c) emergency order. This latter experience led to a legislative effort, resulting some years later in enactment of the Olson language.

This is not the first Section 202(c) order the DOE has issued requiring the operation of electric generation facilities since the Olson language was enacted. In 2017, the DOE issued two orders: the first requiring the [Grand River Dam Authority](#) in Oklahoma to operate one of its units to provide reactive power; the second requiring [Dominion Energy Virginia](#) to operate Yorktown Units 1 and 2 to address reliability needs. In both instances, the DOE limited the orders to require only such operation of the facilities as necessary to meet the emergencies, to limit the potential for environmental violations.

Notwithstanding language in the Yorktown order limiting operation only to those periods where operation

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was requested by regional grid operator [PJM Interconnection LLC](#) to maintain electric reliability, the [Sierra Club](#) requested a rehearing, challenging the order on the grounds (among others) that "[t]he Department has not provided measures to limit the operations of the Yorktown Power Station to the hours necessary to meet the claimed emergency, nor imposed restrictions sufficient to provide the maximum practicable compliance with applicable environmental laws."

In subsequent orders in the Yorktown matter, the DOE enhanced the operating limitations, requiring that, "[c]onsistent with good utility practice, PJM and Dominion shall exhaust all reasonably and practically available resources, including demand response and behind-the-meter generation resources, prior to operating" the Yorktown units. This appears to have served as the template for the limitations in the Sept. 6 CAISO order.

The generation units specified in the CAISO order include the following:

- Units 1-5 of the Walnut Creek Energy Park, El Segundo, California;
- Units 5/6 and 7/8 of the El Segundo Energy Center, El Segundo, California; and
- Units 1-4 of the Long Beach Generating Station, Long Beach, California.

### Notes

1. CAISO letter to Secretary of Energy Dan Brouillette, Sept. 6, 2020.
2. <https://www.gov.ca.gov/wp-content/uploads/2020/09/9.3.20-Extreme-Heat-Event-Proclamation-text.pdf>.
3. CAISO letter.
4. <https://earthobservatory.nasa.gov/images/147256/california-heatwave-fits-a-trend>.
5. CAISO letter.
6. <https://www.seia.org/state-solar-policy/california-solar>.
7. DOE order, p. 3.
8. Id.
9. 16 U.S.C. 824a.

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*Disclosure: The author's firm represented Mirant Corp. with respect to the 2006 Section 202(c) order covering the Potomac River Generating Station discussed in this article.*

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