

STATE OF CALIFORNIA
Energy Resources Conservation
And Development Commission

In the Matter of:)	Docket No. 07-SPPE-2
)	
)	
The Application of a Small Power Plant)	Staff's Brief in Response to
Exemption for the ORANGE GROVE)	the Committee's Tentative
POWER PLANT PROJECT)	Decision to Deny the Small
_____)	Power Plant Exemption
)	

INTRODUCTION

On March 10, 2008, the Orange Grove Committee issued a tentative decision recommending the denial of the application for a small power plant exemption submitted by the applicant, Orange Grove Energy LP. As part of the tentative decision, the committee ordered all parties to submit briefs addressing various questions of law discussed in the tentative decision and to respond to the tentative decision to deny the small power plant exemption.

DISCUSSION

The Committee would recommend that the Orange Grove Application for a Small Power Plant Exemption be denied

A. Staff Recommends a Suspension

Staff would not oppose a final decision to deny the Small Power Plant Exemption. Another option, staff recommends, is to suspend the Orange Grove project until the project applicant is able to address significant unresolved problems and provide essential information as discussed below. Whether the Orange Grove project is denied and re-filed as an Application for Certification or continues to seek a small power plant exemption,

staff will not be able to perform the required environmental analysis and propose appropriate mitigation until the applicant provides essential information as described below and fully defines the project. Staff believes a suspension would be the most efficient way for staff and the applicant to utilize the work done to date, but would allow staff to stop work on the project until the applicant provides the information described in this brief. Once the applicant provides all the information requested for staff's analysis, staff would resume work on the case without further procedural requirements having to be met.

B. Information Needed for Staff to Complete its Analysis of the Project

The following is a list of the major issues which would need to be addressed by the applicant prior to staff resuming work on the Orange Grove Project:

- 1) Complete biological surveys for the following species: California coastal gnatcatcher, Southwestern willow flycatcher, Least Bell's vireo, Arroyo toad, Chaparral nolina, Felt-leaved monardella, Mesa horkelia, Parry's tetracoccus and Robinson's peppergrass.
- 2) Assess potential impacts to Parry's tetracoccus and propose feasible mitigation.
- 3) Assess temporary and permanent impacts to the waters of the United States due to gas pipeline construction and propose avoidance and minimization measures for reducing these impacts.
- 4) Assess the temporary and permanent impacts to coastal sage scrub and other habitat types (including vegetation cleared for fire protection in the vicinity of new project features) and propose mitigation for the impacts.
- 5) Complete steps to annex the area of the proposed site to the county so as to come within the service territory of the local fire district.
- 6) Provide analysis of the traffic and school bus route impacts from the three water truck trips per hour during operation.

- 7) Discuss the cumulative traffic and transportation impacts introduced by this project and the following identified projects within the vicinity of the Orange Grove facility--(a) the widening of the existing highway from two lanes to four lanes through the quarry area; (b) the construction and operation of the new county landfill; (c) the construction and build out of the new mixed use/residential plan unit development; and (d) the proposed new community college campus to be constructed.
- 8) Provide evidence of the agreement between the applicant and Rainbow Water District for the purchase of water for industrial use and evidence that the applicant would have unrestricted access to the water main to fill the water trucks.
- 9) Provide information on soil characteristics along newly proposed gas pipeline as well as project impacts to soil resources and agricultural land uses.
- 10) Provide additional information to more precisely identify potential cultural resources in proximity to the new gas pipeline.
- 11) Address the ability of the project to receive a Major Use Permit from the County of San Diego which so far has rejected Orange Grove's application.

This list represents critical information which generally should have been provided at the time of filing or shortly thereafter. Given the project is now nine months into the process and major information items such as biological surveys, fire protection, cultural data and water resources are incomplete, staff reiterates the need to suspend this project until the applicant can present a complete project.

C. The Use of an Environmental Impact Report

Confusion exists regarding the drafting of an Environmental Impact Report (EIR) in the context of a Small Power Plant Exemption (SPPE). The Committee queried in the tentative decision:

"If the SPPE program is not part of Chapter 6 of the Warren-Alquist Act, therefore, not a certified program, then is the SPPE process governed entirely by CEQA?"

To clarify, the statutory section authorizing small power plant exemptions (SPPEs) is part of Chapter 6 of the Warren-Alquist Act. Chapter 6 of the Act contains Public Resources Code sections 25500 through 25543. Section 25541 authorizes the Energy Commission to exempt a thermal power plant from its licensing jurisdiction if the plant has a generating capacity of at least 50, but no more than 100, megawatts (MW) and the Energy Commission finds that construction and operation of the power plant will not cause a substantial adverse impact on the environment or energy resources. (Pub. Resources Code, § 25541.)

Public Resources Code section 25519(c) (also in Chapter 6 of the Warren-Alquist Act) specifically designates the Energy Commission as the lead agency under the California Environmental Quality Act (CEQA) “for projects that are exempted from ... certification pursuant to Section 25541.” (Pub. Resources Code, § 25519(c).) The Commission’s regulations governing the exemption process are contained in Title 20, California Code of Regulations, sections 1934—1947. These sections are outside the certified regulatory program under CEQA for applications for certification. Therefore, compliance with CEQA for the exemption process entails compliance with the requirements for either a negative declaration (or mitigated negative declaration) or an environmental impact report, depending on the potential for significant impacts. SPPE projects, therefore, are governed directly by CEQA.

The Committee stated in the tentative decision,

“Instead of the initial study level of review traditionally used in SPPEs, staff has determined that this matter requires an Environmental Impact Report level of analysis.”

Respectfully, staff believes this statement incorrectly describes the CEQA process. The initial study is used to determine if the project may have a significant effect

on the environment. (Cal. Code Regs., tit. 14, § 15063(a).) The initial study is not a detailed level of review under CEQA, but a preliminary review to assess the project's potential for impacts. In no case can an initial study serve as a final environmental document. From an initial study, a determination is made whether to draft an EIR, negative declaration or mitigated negative declaration. A negative declaration or mitigated negative declaration is appropriate only if there is no substantial evidence the project may have a significant effect on the environment. (Cal. Code Regs., tit. 14, § 15063(b)(2).) If the lead agency determines that an EIR will clearly be required for the project, by finding that there is substantial evidence the project may have a significant effect on the environment, an initial study is not required. (Cal. Code Regs., tit. 14, § 15063(a) and (b).)

In the present case, there is substantial evidence that the project may cause significant environmental impacts in biology, traffic, fire protection, water resources and cultural resources. Therefore, in accordance with CEQA, staff determined the appropriate environmental document is an EIR. So long as the Commission makes the findings required in section 25541, the Commission is free to grant an exemption based on findings supported by a negative declaration, mitigated negative declaration, or environmental impact report.

Related to the confusion regarding the initial study, the committee stated:

“If an EIR is now required for Orange Grove project instead of an initial study, then what legal standard becomes appropriate? Is staff relying on section 15060(d) of the CEQA guidelines?”

This question assumes that an initial study is required for an SPPE. As discussed above, it is not required if it is clear that the project may cause a significant

environmental impact, in which case, the lead agency may dispense with an initial study and prepare an EIR. If the EIR concludes that the project's significant impacts are mitigated, the EIR can support the findings required for an exemption under Public Resources Code section 25541. What has been typical in the past for an SPPE is for staff to file an initial study and a mitigated negative declaration in accordance with CEQA rather than an EIR. (Cal. Code Regs., tit. 14, § 15071.) But each project is different with different impacts and mitigation.

D. The Legal Standard for an Exemption Based on an EIR

Regarding the legal standard, staff understands this question to be about the legal requirements or criteria a court would apply in deciding whether to uphold the Energy Commission's decision to grant or deny an exemption under Public Resources Code section 25541. Subsection (b) of section 25901 specifies the legal criteria that a court would apply in deciding whether to sustain the Commission's decision on any matter, including an exemption under section 25541. The legal criteria are stated as follows:

The decision of the commission shall be sustained by the court unless the court finds (1) that the commission proceeded without, or in excess of its jurisdiction, (2) that, based exclusively upon a review of the record before the commission, the decision is not supported by substantial evidence in light of the whole record, or (3) that the commission failed to proceed in the manner required by law.

(Pub. Resources Code, § 25901(b).) If the court finds that each legal criterion is met by the Commission in making its decision, then the decision will be upheld. In the case of a small power plant exemption under section 25541, the court would first look to see if the Commission, in granting the exemption, acted within its jurisdiction. Assuming a facility is a thermal power plant with a generating capacity of 50 to 100 megawatts, the

Commission acts within its jurisdiction in granting an exemption if it makes the requisite findings.

The court would next look to see if the Commission's findings for an exemption are supported by "substantial evidence in light of the whole record." CEQA defines "substantial evidence" as including "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub. Resources Code, § 21080(e).) The CEQA Guidelines further define "substantial evidence" as meaning "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal. Code Regs., tit. 14, § 15384(a).) Accordingly, the Commission's findings under section 25541 must be supported by a record of substantiating facts, reasonable assumptions based on facts, or expert opinion supported by facts to be legally sufficient.

In reviewing the administrative record to determine whether the agency's decision is supported by substantial evidence, the court must consider all relevant evidence in the record, but "it is for the agency to weigh the preponderance of conflicting evidence." (*Eden Hosp. Dist. v. Belshe* (1998) 65 Cal.App.4th 908, 915; see also *Sierra Club v. Calif. Coastal Comm.* (1993) 12 Cal.App.4th 602, 610.) When applying the substantial evidence test, "Courts may reverse an agency's decision only if, *based on the evidence before the agency*, a reasonable person could not reach the conclusion reached by the agency." (*Greenbaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 402 [emphasis in original, citing *McMillan v. American Gen. Fin. Corp.* (1976) 60 Cal.App.3d 175, 186]; *Eden Hosp. Dist. v. Belshe, supra*, 65 Cal.App.4th at p. 915.)

Courts “may not substitute their own judgment for that of the agency,” and must “resolve all doubts in favor of the agency’s findings and decision.” (*McMillan, supra*, at p. 182.) “The court may not reweigh the evidence and must view the evidence in the light most favorable to the [agency’s] actions and indulge all reasonable inferences in support thereof.” (*Taylor Bus Serv. v. San Diego Bd. of Ed.* (1987) 195 Cal.App.3d 1331, 1340.) However, where the Commission decision under review is one which includes adoption of a negative declaration, CEQA case law indicates that courts have applied the “fair argument” standard to decide whether an environmental impact report (EIR) should have been prepared. Here, where staff is planning to prepare an EIR, the fair argument standard does not apply; it is only relevant to an agency’s decision that an EIR is not required.

E. An EIR is the Appropriate Document for this Exemption

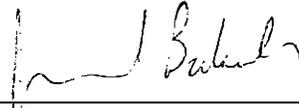
The final question asked by the Committee is whether staff is relying on CEQA Guidelines section 15060(d), which advises that any preliminary review of the project can be skipped once the agency determines an EIR is necessary. Yes, staff is relying on section 15060(d), as well as on section 15063. Given the number of special status species in the area of the proposed site, including several individual plants on the project site itself, and issues regarding traffic, water, air quality, and fire protection, staff has determined that an EIR is required to analyze the project’s potential for significant impacts and, pursuant to CEQA, is dispensing with an initial study.

CONCLUSION

For the reasons given above, staff believes the Orange Grove project should be suspended in order to give the applicant time to address the significant issues and lack of data and present the committee and staff with a fully defined project. If the proceeding continues with or without a suspension, staff is prepared to complete an EIR given the number of areas where the project may cause significant environmental impacts.

Dated: April 1, 2008

Respectfully submitted,



JARED BABULA
Senior Staff Counsel

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE
STATE OF CALIFORNIA

**ORANGE GROVE POWER
PLANT REPLACEMENT PROJECT
SMALL POWER PLANT EXEMPTION**

Docket No. 07-SPPE -2
PROOF OF SERVICE
Revised (10/16/07)

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the Docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-SPPE-2
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

APPLICANT

Stephen Thome
J-Power USA Development
1900 East Golf Road, Suite 1030
Schaumburg, IL 60173
sthome@jpowerusa.com

Mike Dubois
J-Power USA Development
1900 East Golf Road, Suite 1030
Schaumburg, IL 60173
mdubois@jpowerusa.com

APPLICANT CONSULTANT

Uday Singh, Vice President
TRC
21 Technology Drive
Irvine, CA 92619
usingh@trcsolutions.com

Joe Stenger, PG. REA
TRC
2666 Rodman Drive
Los Osos CA 93402
jstenger@trcsolutions.com

Charles, Diep, PE, CPP
TRC
21 Technology Drive
Irvine, CA 92619
cdiep@trcsolutions.com
cdiep@Roadrunner.com

COUNSEL FOR APPLICANT

Jane Luckhardt
Downey Brand, LLP
555 Capitol Mall, 10th Floor
Sacramento, CA 95814
jluckhardt@downeybrand.com

Wayne Song
Morgan, Lewis & Bockius LLP
300 S Grand Avenue, 22nd Floor
Los Angeles, CA 90071
wsong@morganlewis.com

INTERESTED AGENCIES

Larry Tobias
Ca. Independent System Operator
151 Blue Ravine Road
Folsom, CA 95630
LTobias@caiso.com

Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814
esaltmarsh@eob.ca.gov

Steve Taylor
San Diego Gas & Electric
8306 Century Park Court
San Diego, CA 92123
srtaylor@semprautilities.com

INTERVENORS

Gloria D. Smith
Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
gsmith@adamsbroadwell.com

* **Anthony J. Arand**
219 Rancho Bonito
Fallbrook, CA 92028
tony@envirepel.com

ENERGY COMMISSION

JAMES D. BOYD
Presiding Member
jboyd@energy.state.ca.us

ARTHUR ROSENFELD
Associate Member
pflint@energy.state.ca.us

Kenneth Celli
Hearing Officer
kcelli@energy.state.ca.us

Felicia Miller
Project Manager
fmiller@energy.state.ca.us

Jared Babula
Staff Counsel
jbabula@energy.state.ca.us

Public Adviser's Office
pao@energy.state.ca.us

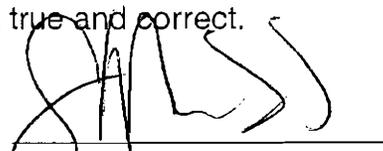
DECLARATION OF SERVICE

I, Scott McDonald, declare that on April 1, 2008, I deposited copies of the attached Staff's Brief in Response to the Committee's Tentative Decision to Deny the Small Power Plant Exemption in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

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



Scott McDonald