

Memorandum

To: Docket 08-AFC-04C

Date: August __, 2022

From: Kirk Oliver, Staff Counsel
Office of Chief Counsel
California Energy Commission
715 P Street
Sacramento, California 95814

Subject: Basis for Finding the Approval of the Orange Grove Energy Center Settlement Agreement is Not a Project and Exempt Under the California Environmental Quality Act

I. Introduction.

The California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.; see also CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq.) requires that state agencies assess and prepare environmental documents disclosing any significant adverse environmental impacts of discretionary project approvals. However, discretionary approvals that do not fit the definition of a “project” are not subject to CEQA, and, additionally, CEQA designates certain projects exempt from its requirements. Of relevance here and discussed below in relation to the approval of the Orange Grove Energy Center settlement agreement (“Settlement”) is the fact that activities that will not result in a direct or reasonably foreseeable indirect physical change in the environment are excluded from the definition of “project” (Cal. Code Regs., tit. 14, §§ 15060(c)(2)-(3) and 15378(a) & (b)(5)), the Class 21 exemption (Cal. Code Regs., tit. 14, §§ 15321; see also 15061(b)(2)), and the common-sense exemption (Cal. Code Regs., tit. 14, § 15061(b)(3)).

II. The approval of the Settlement is not a project.

CEQA applies to discretionary project approvals, and although a vote to approve the Settlement would be a discretionary act, the Settlement does not meet the definition of a “project” under the CEQA Guidelines (See Cal. Code Regs., tit. 14, § 15378). Under CEQA, the definition of “[p]roject does not include . . . administrative activities of governments that will not result in direct or indirect physical changes in the environment.” (Cal. Code Regs., tit. 14, § 15378(b)(5)). CEQA Guidelines sections 15060(c)(2)-(3) and 15378(a) further reinforce that CEQA does not apply activities that will not result in a direct or reasonably foreseeable indirect physical change in the environment.

Approval of the Settlement does not meet the definition of a project because it does not have the potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. (Cal. Code Regs. tit. 14, § 15378(a).) Furthermore, the Settlement terms provide for the payment of a civil penalty to settle CEC-alleged violations of the power plant’s license—it does not modify the design, operation, or

environmental impacts of the power plant. Accordingly, it is evident that approval of the Settlement does not directly result in any physical change in the environment or any reasonably foreseeable indirect impacts.

III. Even if Approval of the Settlement were a project, the Class 21 exemption and the common-sense exemption would apply.

California Code of Regulations, title 14, section 15321, also referred to as the Class 21 exemption, exempts actions taken by regulatory agencies to “enforce or revoke a lease, permit, license, certificate, or other entitlement for use issued, adopted, or prescribed by the regulatory agency or enforcement of a law, general rule, standard, or objective, administered or adopted by the regulatory agency.” The Class 21 exemption includes the “adoption of an administrative decision or order enforcing or revoking the lease, permit, license, certificate, or entitlement for use or enforcing the general rule, standard, or objective.” Because the CEC’s action to approve the Settlement would be an administrative order adopted for the purpose of enforcing the conditions within the Orange Grove Energy Center’s license, this exemption is directly applicable. Furthermore, none of the exceptions to exemptions listed in CEQA Guidelines section 15300.2 apply here, and there is no reasonable possibility that the approval will have a significant effect on the environment due to unusual circumstances. For these reasons, this project is exempt from CEQA.

Approval of the Settlement would also be exempt from CEQA under the common-sense exemption. (Cal. Code Regs., tit. 14, § 15061(b)(3).) As noted above in Section II, CEQA only applies to projects that have the potential for causing a significant effect on the environment. A significant effect on the environment is defined as a substantial, or a potentially substantial, adverse change in the environment, and does not include an economic change by itself or beneficial changes to the environment. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382.) Because this approval concerns the payment of a civil penalty for alleged license violations, and it does not provide for any physical or operational changes to the Orange Grove Energy Center, it can be seen with certainty that there is no possibility that the Settlement may have a significant effect on the environment.

IV. Conclusion.

As shown above, approval of the Settlement is a regulatory action that is not a project under CEQA and is an enforcement action by a regulatory agency, consistent with the Class 21 exemption in section 15321 of the CEQA Guidelines. Additionally, the Settlement is consistent with the common-sense exemption under section 15061(b)(3) of the CEQA Guidelines. For these reasons, approval of the Settlement by the CEC would be exempt from CEQA, and a Notice of Exemption may be filed with the Office of Planning and Research.

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The California Energy Commission (“Energy Commission” or “Commission”) and Orange Grove Energy, LP (“OGE”) as owner of the Orange Grove Energy Center (“OGEC” or “Facility”), enter into this Settlement Agreement and Release (“Agreement”).

I. INTRODUCTION

1. Pursuant to California Public Resources Code section 25500, the Energy Commission “shall have the exclusive power to certify all sites and related facilities in the state.” A “facility” includes any thermal power plant with generating capacity of 50 megawatts or more, and any facilities appurtenant thereto. (Pub. Resources Code §§ 25110, 25120.)
2. The Facility is a 96-megawatt simple-cycle, natural gas-fired peaker power plant located near the community of Pala, San Diego County. The project was certified by the CEC on April 8, 2009 and began commercial operation on April 1, 2010. The Final Commission Decision (08-AFC-04C “Final Decision”) governs the construction and operation of the OGEC.
3. Pursuant to Public Resources Code section 25532, the Energy Commission has established a monitoring system to assure that any facility certified by the Commission is constructed and operated in compliance with applicable laws and conditions specified in the Commission Decision certifying such Facility.
4. Pursuant to California Code of Regulations, title 20, section 1770, the Energy Commission is to provide adequate monitoring of all conditions and measures set forth in the Final Decision required to mitigate potential impacts and to assure that facilities are constructed and operated in compliance with all applicable laws including, but not limited to, air quality, water quality, and public health and safety laws, ordinances, regulations, and standards (“LORS”).
5. Pursuant to California Code of Regulations, title 20, section 1769, after a license becomes effective, “the owner shall petition the commission for any change it proposes to the project design, operation, or performance requirements.”
6. Pursuant to Public Resources Code section 25534, subdivision (b), the Energy Commission may after notice and a hearing administratively impose a civil penalty against a facility owner for reasons that include significant failure to comply with the terms or conditions of approval of the application for certification, as specified by the Commission in its written decision, and a violation of any regulation or order issued by the Energy Commission. Any civil penalty shall be imposed in accordance with section 25534.1 and may not exceed seventy-five thousand dollars (\$75,000) per violation. A civil penalty may be increased by an amount not to exceed \$1,500 for each day the violation occurs or persists, but the total per day penalties may not exceed fifty thousand dollars (\$50,000).
7. On October 23, 2018, CEC staff (staff) conducted a routine site inspection of the

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OGEC. Part of the inspection included requesting all records related to the fire protection system testing at the facility. Staff observed that the OGEC had not performed the required annual fire pump testing. Staff further investigated to assess how long the OGEC had been out of compliance with the fire pump testing requirements and what steps OGEC staff were taking to come back into compliance.

8. On January 12, 2021, Energy Commission staff sent OGEC a Notice of Violation alleging noncompliance with the fire pump testing provisions of the Final Decision.
9. The Parties share the common objective of ensuring that the fire protection systems at the Facility operate in a safe and reliable manner. OGE cooperated with the Commission throughout the Commission's investigation and has submitted all documents requested by Commission staff and Commission staff and OGE participated in numerous meetings.

II. SUMMARY OF PERTINENT FINAL DECISION PROVISIONS

The Final Decision contains a Compliance Monitoring Plan, including General Conditions and Closure Plan and includes the following requirements.

GEN-1 incorporates of the California Fire Code and addresses the testing and maintenance of fire protection systems including fire pumps. The California Fire Code incorporates Title 19 of the California Code of Regulations, which in turn incorporates the National Fire Protection Association (NFPA). NFPA 25 section 8.3.3.1 requires the annual testing of the fire pumps. Relevant portions of these provisions appear below:

GEN-1 provides:

“The project owner shall design, construct, and inspect the project in accordance with the 2007 California Building Standards Code (CBSC), also known as Title 24, California Code of Regulations, which encompasses the California Building Code (CBC), California Administrative Code, California Electrical Code, California Mechanical Code, California Plumbing Code, California Energy Code, California Fire Code, California Code for Building Conservation, California Reference Standards Code, and all other applicable engineering laws, ordinances, regulations, and standards (LORS) in effect at the time initial design plans are submitted to the chief building official (CBO) for review and approval.” Final Decision 2009, p. 62.

2007 California Fire Code, Section 913.5 provides:

“Fire pumps shall be inspected, tested, and maintained in accordance with the requirements of this section and Title 19 California Code of Regulations, Chapter 5.”

Title 19 California Code of Regulations, Chapter 5 states:

“All automatic fire extinguishing systems, including systems installed as an alternate to other building requirements, shall be inspected, tested, and maintained in accordance with the following frequencies. Local authorities may require more frequent inspection,

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testing and maintenance and additional procedures.”

Title 19, California Code of Regulations, section 904(a)(1) provides:

“Water-based fire protection systems shall be inspected, tested and maintained in accordance with the frequencies required by NFPA 25 (2011 edition) including Annexes A, B, C, D, and G as amended by the State of California (Published as NFPA 25, 2013 California Edition), which is hereby incorporated by reference.”

NFPA 25 (a) Chapter 8 Fire Pumps, Section 8.3.3 Annual Flow Testing provides at Section 8.3.3.1:

“An annual test shall be conducted by qualified personnel under minimum, rated, and peak flows of the fire pump by controlling the quantity of water discharged through approved test devices.”

COMPLIANCE-14 incorporates the requirements of Title 20, California Code of Regulations section 1769 into the facility’s conditions of certification. Section 1769 requires the facility owner to file a petition with the CEC for any change in operation, design, or performance of the facility.

COMPLIANCE-14 provides, in pertinent part:

“The project owner must petition the Energy Commission pursuant to Title 20, California Code of Regulations, section 1769, in order to modify the project (including linear facilities) design, operation or performance requirements, and to transfer ownership or operational control of the facility. It is the responsibility of the project owner to contact the CPM to determine if a proposed project change should be considered a project modification pursuant to section 1769. Implementation of a project modification without first securing Energy Commission, or Energy Commission staff approval, may result in enforcement action that could result in civil penalties in accordance with section 25534 of the Public Resources Code.” Final Decision 2009, p. 50.

III. INVESTIGATION FINDINGS

1. Energy Commission staff investigated an alleged failure to conduct annual fire pump testing at the OGEC. Staff conducted a site inspection of the OGEC on October 23, 2018. Part of the inspection included reviewing the fire protection system testing records for the Facility. Specifically, staff requested the annual flow test reports for the electric and diesel fire pumps at the OGEC. OGEC personnel were unable to provide them. Staff then conducted an investigation to determine how long OGEC had been out of compliance on the fire pump testing requirements.
2. In addition to the staff’s October 23, 2018 visit to the Facility, the investigation included calls and discussions with OGEC personnel and a review of all relevant documents. Based on this information, Energy Commission staff determined that the

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OGE failed to complete the required annual flow testing for its electric and diesel fire pumps for the years 2015, 2016, 2017, and 2018.

3. On January 12, 2021, Energy Commission Staff sent a Notice of Violation alleging that the OGE's failure to complete the annual flow testing of its diesel and electric fire pumps constituted violations of OGE's conditions of certification. Subsequently, Energy Commission staff has alleged that OGE's failure to test its fire pumps also constituted an unapproved change in operation at the facility in violation of the compliance provisions of the Final Decision and title 20, section 1769.

IV. RESPONSE TO COMMISSION INVESTIGATION

1. OGE has worked cooperatively with Energy Commission staff since the October 23, 2018 site visit.
2. Given OGE's continuing and diligent cooperation, the Energy Commission staff and OGE believe that rather than engaging in formal adjudication, it would be more productive to enter into this Agreement to allow the Parties to focus on ensuring that the fire protection systems at OGE remain safe and reliable.
3. In developing this Agreement, the Commission considered the cooperation of OGE, the facts developed by the Energy Commission staff and OGE during the course of the investigation and applied the relevant factors in Public Resources Code Section 25534.1(e), to determine that settlement, rather than formal adjudication, is a more appropriate use of the Commission's and OGE's collective resources.

V. TERMS

To resolve the above-described alleged violations and terminate and settle these matters, and in consideration of Energy Commission staff not pursuing an administrative action under Public Resources Code section 25534 or otherwise seeking legal redress against OGE for the above-described alleged violations, the Energy Commission and OGE agree as follows:

1. OGE shall execute the Agreement and provide a copy no later than thirty (30) days after the Energy Commission approves the Agreement at a publicly noticed Business Meeting, to the attention of:

Shawn Pittard
Deputy Director, Siting Transmission and Environmental Protection
Division California Energy Commission
715 P Street
Sacramento, CA 95814

2. OGE shall submit to the California Energy Commission a payment in the amount of \$200,000 (the "Settlement Amount") to settle these matters. The settlement payment

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is due within 30 days after OGE receives written notification by the Commission's Compliance Project Manager ("CPM") of the execution of the Settlement Agreement by the Executive Director. Payment shall be made by electronic transfer to the California Energy Commission. Banking information and instructions necessary to complete the electronic transfer shall be provided by the Energy Commission.

3. If the Energy Commission does not approve the Agreement, it shall become null and void. OGE further agrees that if this matter comes before the Energy Commission in an administrative adjudication, members of the Energy Commission and the Executive Director shall not be disqualified from participation because of prior consideration of this Agreement.
4. This Agreement shall apply to and be binding upon OGE and its principals, officers, directors, receivers, trustees, employees, successors and assignees, subsidiary corporations, affiliates, and parent corporations, and upon the Energy Commission and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.
5. This Agreement shall constitute the full and final settlement of the matters identified in Articles I and III herein, subject to OGE's payment of the Settlement Amount.
6. In consideration for OGE's entry into this Agreement and for the one-time payment of the Settlement Amount, the Commission hereby releases OGE and its principals, directors, officers, agents, employees, shareholders, subsidiaries, affiliates, parent corporations, and predecessors and successors from any and all claims for violations of the Warren-Alquist Act, the Commission's Regulations, the Final Decisions, LORS, and applicable fire codes, for the matters identified in Articles I and III above (the "Release").
7. OGE does not admit, and this Agreement does not constitute an admission by OGE as to any of the Energy Commission Staff's allegations outlined herein, and further does not constitute an admission by OGE that it violated the Conditions of Certification contained in the Final Decision or any other law, ordinance, regulation or standard applicable to the OGE.
8. OGE will conduct and report the results of its fire pump testing and will file a petition with the CEC for any change in operation, design, or performance of the facility. OGE reserves the right to contest the use of this Agreement in any other matter or proceeding except in a proceeding to enforce the Agreement itself.
9. To the extent required by law, neither Party shall disclose any confidential information provided in support of this Agreement unless (a) written permission to do so has been provided by the Party providing the information, or (b) disclosure is required by law. To be confidential, information must be marked with wording such as "Confidential," "Proprietary," "Trade Secret," or other terms sufficient to provide notice of the confidential nature of such information. In connection with requests for disclosure under law to the extent allowed by law, the disclosing Party will use

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reasonable efforts to: (i) notify the other Party prior to any disclosure of confidential information, and (ii) reasonably cooperate with the other Party's efforts to prevent or limit such disclosure.

10. This Agreement constitutes the entire agreement and understanding between the Parties and this Agreement fully supersedes and replaces any and all prior negotiations and agreement of any kind regarding the matters herein, whether written or oral, between the Energy Commission and OGE.
11. No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, shall be valid or enforceable unless it is in writing and signed by all parties to this Agreement.
12. Each Party to this Agreement has reviewed the Agreement independently, has had the opportunity to consult counsel, is fully informed of the terms and effect of this Agreement, and has not relied in any way on any inducement, representation, or advice of any other Party in deciding to enter into this Agreement.
13. This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice of law rules.
14. Any civil litigation to enforce this Agreement shall be filed in the Superior Court of California, County of Sacramento.
15. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect.
16. The failure of any Party to enforce any provision of this Agreement shall not be construed as a waiver of any such provision, nor prevent such Party thereafter from enforcing such provision or any other provision of this Agreement. The rights and remedies granted all Parties herein are cumulative and the election of one right or remedy by a Party shall not constitute a waiver of such Party's right to assert all other legal remedies available under this Agreement or otherwise provided by law.
17. This Agreement is deemed to have been drafted equally by the Parties; it will not be interpreted for or against either Party on the ground that said Party drafted it.
18. The undersigned represent that they have the authority to execute this Agreement.
19. This Agreement is effective upon the last date of execution by all of the undersigned.

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20. The Parties agree that pdf signatures and multiple signature pages are acceptable for purposes of executing this Agreement.

California Energy Commission

Orange Grove Energy, LP

By: _____

By: _____

Name: Drew Bohan

Name:

Title: Executive Director

Title:

Date:

Date:

STATE OF CALIFORNIA
STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF:

Orange Grove Energy Center

Docket No.: 08-AFC-04C

Order Approving Settlement

I. BACKGROUND

Orange Grove Energy, LP (OGE) owns and operates the Orange Grove Energy Center (OGEC or “facility”) licensed by the California Energy Commission (CEC) and located in San Diego County, California. The Final Commission Decision (Commission Decision) was issued on April 8, 2009, certifying the power project (Docket No. 08-AFC-04C). The Commission Decision governs the construction, operation, and decommissioning of the OGEC.

II. STAFF RECOMMENDATION

CEC Staff investigated an alleged failure to conduct fire pump testing and report this change in facility operation at the OGEC. The investigation included an October 23, 2018 visit to the OGEC, calls and discussions with OGEC personnel and a review of all relevant documents. On January 12, 2021, CEC Staff sent OGEC a Notice of Violation alleging noncompliance with its fire pump testing provisions, which appear at page 62 of the Commission Decision. Staff’s review also later determined that the facility had not reported or sought CEC’s approval for this change in operation as required by its compliance conditions, which appear at page 50 of the Commission Decision.

OGE has worked diligently with CEC Staff since the October 23, 2018 site visit and cooperated with the investigation. OGE’s cooperation and other efforts saved the CEC time and resources in further investigation and adjudication of the alleged violations.

Given OGE’s continuing and diligent cooperation, CEC Staff and OGEC believe that rather than engaging in formal adjudication, it would be more productive to enter into a settlement to resolve this matter.

In developing this settlement, CEC Staff considered the cooperation of OGEC, the specific facts developed by CEC Staff and OGE during the course of the investigation and applied the relevant factors in the Public Resources Code Section 25534.1(e) to

determine that settlement, rather than formal adjudication, is a more appropriate use of the CEC's and OGE's collective resources.

The legal requirements at issue, as well as Staff's allegations, and OGE's admissions and denials, are included in the Settlement Agreement, which provides for a payment of \$200,000 by OGE to the CEC.

Staff recommends that the CEC approve the Settlement Agreement and direct the Executive Director to execute the Settlement Agreement on behalf of the CEC.

III. ENERGY COMMISSION FINDINGS

- 1) Public Resources Code section 25532 requires the CEC to establish a monitoring system to assure that any facility certified by the CEC is constructed and is operating in compliance with air and water quality, public health and safety, and other applicable regulations, guidelines, and conditions adopted or established by the CEC or specified in the written decision.
- 2) Public Resources Code section 25534 empowers the CEC to amend or revoke a license or impose administrative civil penalties.
- 3) Public Resources Code section 25534.1 sets forth factors to consider when determining the amount of an administrative civil penalty.
- 4) In reaching resolution, Staff has considered the factors identified in Public Resources Code section 25534.1, specifically the nature, circumstance, extent, and gravity of the alleged violations, the cost to the state in pursuing the enforcement action, efforts by OGE to resolve issues, and its overall cooperation.
- 5) The agreed settlement is appropriate and reflects a fair resolution of the issues.
- 6) Approval of the settlement is exempt from the California Environmental Quality Act as set forth in the California Code of Regulations Title 14, sections 15060(c)(2), 15060(c)(3), 15061(b)(2), 15061(b)(3), 15321, and 15378(a) & (b)(5).

IV. CONCLUSION AND ORDER

The CEC hereby approves the Settlement Agreement and directs the Executive Director or their designee to execute the Settlement Agreement on behalf of the CEC, file a Notice of Exemption with the Office of Planning and Research, and take any other steps necessary to execute the Settlement Agreement.

IT IS SO ORDERED.

CERTIFICATION

The undersigned Secretariat to the CEC does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the CEC held on September 14, 2022.

AYE:

NAY:

ABSENT:

ABSTAIN:

Dated:

Liza Lopez
Secretariat