

STATE OF CALIFORNIA  
Energy Resources Conservation  
And Development Commission

<b>DOCKET</b> 07-SPPE-2
DATE _____
RECD. NOV 01 2007

In the Matter of: ) DOCKET No. 07-SPPE-02  
)  
The Application for a Small Power )  
Plant Exemption for the ) **Staff's Brief on the Standard for**  
ORANGE GROVE POWER PLANT PROJECT ) **Exempting a Small Power Plant**  
\_\_\_\_\_ ) **and the Effect of a Fair Argument**  
)

**INTRODUCTION**

Pursuant to the Committee's request of October 16, 2007, staff submits the following discussion in response to the Committee's two questions regarding the proper legal standard to apply in granting or denying the Orange Grove application for a Small Power Plant Exemption (SPPE) and the effect of the fair argument standard.

**Question 1: What is the proper legal standard that the Committee should use in recommending that the California Energy Commission exercise its discretion to either grant or deny Orange Grove Energy, L.P.'s application for exemption from the Commission's regular application process?**

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. As a general matter, 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.) In addition, Public Resources Code section 25519(c) 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).) By statute, then, the Energy Commission has the responsibilities of a lead agency under CEQA in deciding whether to approve an application for a small power

plant exemption and must make certain findings of no substantial adverse impact in granting an exemption to an eligible facility.

Public Resources Code section 25901 provides further legal guidance. It specifies when an “aggrieved person” may seek judicial review of the Energy Commission’s determination on any matter specified in the Commission’s enabling statute, the Warren-Alquist Act (contained in Public Resources Code section 25000 et seq.). 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 up 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.

Toward that end, the Commission's regulations governing an exemption proceeding direct that hearings be held to receive relevant evidence, including environmental impact documentation. (Cal. Code Regs., tit. 20, §§ 1943, 1944).

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. The fair argument standard is discussed below in the response to the Committee's second question.

The third legal requirement for upholding a Commission decision is that the Commission proceeded in the manner required by law. If the Commission, as lead agency, proceeds in accordance with CEQA and the Commission's regulations that apply to the exemption process, it will satisfy this requirement.

**Question 2: What would be the effect of a fair argument that the Orange Grove power plant project may have a substantial adverse impact on the environment?**

Staff understands this question to be about the consequence in the Orange Grove proceeding at this time if such a “fair argument” were made in the case. By way of general background, the CEQA Guidelines require the lead agency to conduct an initial study to determine if there is substantial evidence that the project may have a significant effect on the environment. (Cal. Code Regs., tit. 14, § 15063). Absent substantial evidence in the record of any significant environmental effect from the project, the lead agency is directed by CEQA to prepare a negative declaration or a mitigated negative declaration based on agreed-upon revisions that avoid potentially significant effects. (Pub. Resources Code, § 21080(c).) Either document may be used (and has been used) to support the requisite findings of “no substantial adverse impact” for a small power plant exemption under Public Resources Code section 25541.

On the other hand, “[i]f there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared.” (Pub. Resources Code, § 21080(d).) As stated before, the CEQA Guidelines define “substantial evidence” in the case of an initial study to mean “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, § 15284(a).) Put another way, whenever there is substantial evidence in the record to support a “fair argument” that significant impacts may occur, an EIR is required. *Friends of “B” Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1000-1003 [165 Cal.Rptr. 514]. The lead agency’s responsibility when applying the fair argument standard is not to weigh competing evidence and determine which is most persuasive. Rather, it must determine whether any substantial evidence exists in the record to support a fair argument that a significant impact on the environment may occur. (Remy, Thomas and Moore, *Guide to the California Environmental Quality Act*,” at p. 251 (2007)). This low threshold for requiring preparation of an EIR presents two options with respect to an application for an exemption under Public Resources Code section 25541 where the project has the potential to create a significant adverse impact.

One option is for the staff to prepare an EIR on the project that is the subject of the exemption application. The EIR, together with testimony received from other parties at the evidentiary hearing, would provide the record upon which to make the findings required for an exemption. Nothing in Public Resources Code section 25541 or in CEQA precludes the use of an EIR to help form the evidentiary record upon which to make the requisite findings for an exemption.

The other option is to recommend that the Commission deny the SPPE and require the applicant to re-file the project as an AFC or to consider converting the exemption proceeding into an AFC proceeding. This option assumes the findings needed for an exemption should only be based on a negative declaration or mitigated declaration concluding the proposed project would clearly have no significant effect on the environment or on energy resources.

For this case, staff has begun preparing an initial study. If, based on all information and evidence received, there is a fair argument supported by substantial evidence that the proposed project may cause a significant environmental impact, staff plans to prepare an EIR. The EIR would be offered as staff's testimony at the hearings required by the Commission's regulations. (Cal. Code Regs., tit. 20, §§ 1943, 1944.)

In sum, if there is a fair argument based on substantial evidence, that the project may have a significant effect on the environment, there are two options available with respect to an exemption proceeding. One option is to prepare an EIR; the other option is simply to recommend the Commission deny the SPPE and require the applicant to re-file the project as an AFC.

Preparing an EIR would be the more efficient option, as staff has already begun analyzing the project, assessing its potential for environmental impacts, and considering the need for mitigation measures. The EIR and other testimony in the record would then provide the evidence upon which to make the findings needed to justify an exemption.

Dated: November 1, 2007

Respectfully submitted,



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Jared Babula  
Senior Staff Counsel

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

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

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

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**DECLARATION OF SERVICE**

I, Julie Mumme, declare that on November 1, 2007, I deposited copies of the attached Staff's Brief on the Standard for Exempting a Small Power Plant and the Effect of a Fair Argument 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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Julie Mumme