

<b>DOCKET</b> <b>07-SPPE-2</b>	
<b>DATE</b>	<b>NOV 0 1 2007</b>
<b>RECD.</b>	<b>NOV 0 1 2007</b>

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

In the Matter of:

The Application for a Small Power Plant  
Exemption for the Orange Grove Power  
Plant Project

Docket No. 07-SPPE-2

**ORANGE GROVE ENERGY, L.P.'S RESPONSE TO THE COMMITTEE'S REQUEST  
FOR CLARIFICATION**

(November 1, 2007)

Jane E. Luckhardt  
DOWNEY BRAND LLP  
555 Capitol Mall, 10th Floor  
Sacramento, California 95814  
Telephone: (916) 444-1000  
FAX: (916) 444-2100  
E-mail: [jluckhardt@downeybrand.com](mailto:jluckhardt@downeybrand.com)  
**Attorneys for Applicant**

November 1, 2007

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

In the Matter of:

Docket No. 07-SPPE-2

The Application for a Small Power Plant  
Exemption for the Orange Grove Power  
Plant Project

**ORANGE GROVE ENERGY, L.P.'S RESPONSE TO THE COMMITTEE'S REQUEST  
FOR CLARIFICATION**

Orange Grove energy, L.P. ("Orange Grove Energy") expects to receive a mitigated negative declaration from the California Energy Commission (CEC) when the CEC makes a determination on its request for a Small Power Plant Exemption (SPPE). At this early stage in this proceeding Orange Grove Energy is still providing information to the CEC Staff and responding to CEC Staff and public concerns. Orange Grove Energy expects to address CEC Staff concerns such that those issues do not present significant impacts but instead are resolved through project modifications or mitigation.

At this point in this proceeding there are no specific facts properly before the CEC upon which the Committee or the CEC has been asked to make a determination regarding whether the Orange Grove Project would have a substantial adverse impact on the environment. In conducting legal analysis, the law is always applied to a specific set of facts. In this proceeding the Committee has requested an analysis of the law before the facts in the case are presented in testimony to the Committee. Thus, the analysis presented below is conceptual and may or may not be applicable to a specific fact pattern in this proceeding.

The CEC's Orange Grove SPPE Committee ("Committee") presented the following issues for clarification.

1. What is the proper legal standard that the Committee should use in recommending that the CEC exercise its discretion to either grant or deny Orange Grove Energy, L.P.'s ("Orange Grove Energy") application for exemption from the CEC's regular application process?
2. What would be the effect of a fair argument that the Orange Grove power plant project ("Orange Grove Project") may have a substantial adverse impact on the environment?

Orange Grove Energy supports the standard applied by the CEC in its decision on the Riverside Energy Resource Center (Docket No. 04-SPPE-1, December 2004, 800-04-017, at pp. 11-17.) Any application of the fair argument standard should be conducted after the mitigation measures have been applied to the project and the records should be analyzed to see if the public or decision makers would be better informed regarding any potential substantial adverse impacts or whether any substantial adverse impacts could be avoided through the application for certification (AFC) process. Should the Committee, the Commission or by agreement the applicant determine a fair argument of a substantial adverse impact on the environment and the public review and analysis of the issue would be substantially increased through an expanded review, the proceeding should transition into an AFC to a point in the discovery/preliminary staff assessment stage depending on the level of information in the proceeding at the point of transition.

#### ***The Small Power Plant Exemption***

The CEC may grant an SPPE for a powerplant with a generating capacity of less than 100 MW if it finds that "no substantial adverse impact on the environment or energy resources . . . will result from the construction or operation of the proposed facility . . ." (Cal. Pub. Resources Code § 25541).

The stated purpose of the SPPE process is to expedite the procedures necessary for the approval and development of alternate sources of electric generation. (20 Cal. Code of Regs. § 1934).

#### ***The Proper Legal Standard***

Pursuant to CEQA Guidelines § 15251(j), the CEC's power plant site certification program has been certified by the Secretary of the Resources Agency as meeting the requirements of Cal. Pub. Resources Code § 21080.5. In addition, the CEC must look to the conformity of a future facility with applicable state, local, or regional standards, ordinances, or laws, including the California Environmental Quality Act (CEQA). (Cal. Pub. Resources Code §§ 25523(d), 25525.)

In discussing substantial adverse impacts on the environment, the CEC has stated in previous SPPE proceedings that its decision whether to grant an SPPE (or to require an Application for Certification (AFC)) is equivalent to a state or local agency's decision whether to

prepare a negative declaration or to require an environmental impact report (EIR) under CEQA.<sup>1</sup> A negative declaration is a written statement by the lead agency briefly describing the reasons that a proposed project will not have a significant effect on the environment and therefore, does not require the preparation of an EIR. (CEQA Guidelines § 15371.)

The legal standard for choosing between a negative declaration and an EIR (and thus for choosing between an SPPE and an AFC) is whether substantial evidence exists, in light of the whole record before a lead agency, that a project may have a significant adverse effect on the environment. (CEQA Guidelines § 15064(a)(1)). An EIR is required whenever substantial evidence in the record supports a "fair argument" that significant impacts may occur: Even if other substantial evidence supports the opposite conclusion, the agency nevertheless must prepare an EIR. *No Oil Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75. Thus, if there is substantial evidence that a project may have a significant effect on the environment, the CEC must evaluate whether an AFC proceeding would provide the public or decision makers with additional information or avoid a substantial adverse impact.

The fair argument standard should consider mitigation measures so that a mitigated negative declaration may also be considered. Just as with the previous SPPE applications<sup>2</sup> where the fair argument test has been recognized and applied by the CEC, the CEC should make the determination that an AFC is appropriate only after it considers the mitigation measures undertaken by the applicant.

In applying the above legal standard, the CEC must determine both (1) whether there is substantial evidence, in light of the whole record, that a project may have an adverse effect on the environment and (2) if there is such evidence of an effect, whether the effect is significant.

The CEQA Guidelines define a "significant effect on the environment" as "a substantial, or potentially substantial, adverse change in any physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." (CEQA Guidelines § 15382). The CEC has previously stated

---

<sup>1</sup> p. 11 CEC SPPE Decision and Mitigated Negative Declaration, Riverside Energy Resource Center (Docket No. 04-SPPE-1).

<sup>2</sup> The Modesto Irrigation District Electric Generating Station SPPE Decision (Docket No. 03-SPPE-1) and the Riverside Energy Resource Center SPPE Decision (Docket No. 04-SPPE-1).

that it equates a "substantial" adverse environmental impact with a "significant" adverse environmental impact.<sup>3</sup>

Whether Substantial Evidence Exists That Significant Impacts May Occur

A "significant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in . . . the physical conditions . . . affected by the project." (CEQA Guidelines § 15382).

The CEQA statute expressly defines "substantial evidence," as the term is used in the context of a decision whether to prepare a negative declaration or an EIR, as follows:

[S]ubstantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact. Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.

Cal. Pub. Resources Code § 21080(e)(1)-(2).

The CEQA Guidelines define the term "substantial evidence" as:

[E]nough 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 . . . . Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

CEQA Guidelines § 15384(a)-(b).

The fair argument test has been recognized and applied by the CEC in previous SPPE proceedings, including the Modesto Irrigation District Electric Generating Station SPPE Decision (Docket No. 03-SPPE-1) and the Riverside Energy Resource Center SPPE Decision (Docket No. 04-SPPE-1). Although the fair argument standard creates a "low threshold" for requiring preparation of an EIR (see *Citizens Action to Serve All Students v. Thornley* (1st Dist. 1990) 222 Cal.App.3d 748, 754), several CEQA-cases have required the reviewing court to carefully examine the evidence on which a petitioner bases its demands for an EIR.

Speculative possibilities do not constitute substantial evidence, and "pure speculation with no evidentiary support" cannot trigger environmental review requirements:

---

<sup>3</sup> p. 12 CEC SPPE Decision and Mitigated Negative Declaration, Riverside Energy Resource Center (Docket No. 04-SPPE-1).

We do not believe an expert's opinion which says nothing more than "it is reasonable to assume" that something "potentially . . . may occur" constitutes . . . substantial evidence. . . . "Substantial evidence" is defined in the CEQA guidelines to include "expert opinion supported by facts." It does not include "[a]rgument, speculation, unsubstantiated opinion or narrative."

*Apartment Association of Greater Los Angeles v. City of Los Angeles* (2d Dist. 2001) 90 Cal.App.4th 1162, 1176.

In *Citizens' Committee to Save Our Village v. City of Claremont* (2d Dist. 1995) 37 Cal.App.4th 1157, the court emphasized that speculation and conjecture regarding a project's potential impacts do not amount to substantial evidence, even when that speculation and conjecture is posed by an expert. In addition, "in the absence of a specific factual foundation in the record, dire predictions by non experts regarding the consequence of a project [did] not constitute substantial evidence." *Gentry v. City of Murrieta* (4th Dist. 1995) 36 Cal.App.4th 1359, 1417.

Other examples of expert evidence that have been held not to be substantial include irrelevant evidence, evidence lacking a necessary factual foundation, evidence that is inherently improbable, evidence outside the expert's field, or evidence presented by a biased expert. See *Lucas Valley Homeowner's Association v. County of Marin* (1st Dist. 1991) 233 Cal.App.3d 130, 157; and *Brentwood Association for No Drilling, Inc. v. City of Los Angeles* (2d Dist. 1981) 134 Cal.App.3d 491, 504.

#### Expert Testimony

In the CEQA-context, expert testimony that a project would not have a significant impact, if uncontradicted, constitutes substantial evidence in support of the agency's decision to adopt a negative declaration. *Uhler v. City of Encinitas* (4th Dist. 1991) 227 Cal.App.3d 795, 805, disapproved on other grounds by *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (4th Dist. 1994) 29 Cal.App.4th 1597, 1603 and overruled on other grounds by *Stanislaus Audubon Society v. County of Stanislaus* (5th Dist. 1995) 33 Cal.App.4th 144, 151.

On the other hand, credible expert testimony that a project may have a significant impact, even if contradicted, is generally dispositive and, under such circumstances, an EIR must be prepared. *City of Livermore v. Local Agency Formation Commission* (1st Dist. 1986) 184 Cal.App.3d 531, 541-542.

However, an agency may disregard expert testimony if it lacks adequate foundation. Expert opinions that rely solely on speculation and conjecture do not constitute a fair argument. *Citizens' Committee to Save Our Village* at 1170-1171. In addition, a lead agency may disregard expert testimony if it lacks adequate foundation, or if the testimony relates to a subject outside of the expert's field, or if the person giving the testimony is not shown to be an expert. *Lucas Valley Homeowners Association* at 157. A lead agency may disregard evidence submitted by an expert found to lack credibility. *Bowman v. City of Berkeley* (1st Dist. 2004) 22 Cal.App.4th 572, 582, 583.

In some circumstances, the testimony of a lay witness may constitute substantial evidence. "Statements of area residents who are not environmental experts may qualify as substantial evidence if they are based on relevant personal observations or involve 'nontechnical issues.'" *Bowman* at 583.

#### ***Applying the Legal Standard***

The CEC's process for evaluating applications for a SPPE typically results in mitigation measures added to the project under review. Because these mitigation measures become part of the project, the application of the fair argument standard should always be applied to the project as mitigated. To apply the standard prior to the mitigation measures would be to apply the standard to a different project.

Furthermore, the fair argument standard should be applied consistent with the purposes of CEQA in requiring environmental impact reports. Two of those purposes are to: 1) provide governmental decision makers and the public with environmental information about proposed projects, and 2) to avoid environmental damage by requiring mitigation wherever feasible. CEQA Guidelines, §§ 15002(a) and 15003. Often negative declarations are short summary documents describing why a proposed project will not have a significant effect on the environment whereas an environmental impact report is a larger more comprehensive document. Because the CEC often prepares comprehensive environmental analyses for SPPE projects that can resemble the analysis conducted by the CEC on a simple AFC, the stated purposes under CEQA for preparing an environmental impact report may have already been completed by the analysis conducted for an SPPE.

In addition, the opportunities for public comment on an SPPE often greatly exceed those afforded the public on an environmental impact report. Thus, the details of the proceeding

and the issue at dispute need to be analyzed beyond the fair argument standard used in CEQA to be sure additional delay and paperwork are not the only result of applying the fair argument standard.

### ***The Effect of a Fair Argument***

The CEC site-certification process is a CEQA-equivalent process. As stated above, an EIR is required whenever substantial evidence in the record supports a "fair argument" that significant impacts may occur. Thus, if there is substantial evidence that a project may have a significant effect on the environment and if that environmental impact has not been fully analyzed by the CEC in the SPPE, the CEC should review the project through the AFC process. This is the case even if other substantial evidence supports the opposite conclusion, the agency nevertheless must prepare an EIR. *No Oil Inc. v. City of Los Angeles* at 75.

If a fair argument that the Orange Grove Project may have a substantial adverse impact on the environment is presented and that issue is not fully heard in the SPPE process, it would have the result of requiring an AFC rather than an SPPE. If the above-mentioned requirements for substantial evidence showing a significant effect on the environment are met, an AFC would be the proper document.

Orange Grove Energy is aware of efforts in previous and current SPPE cases to prepare an environmental impact report instead of the equivalent of a mitigated negative declaration. Orange Grove Energy has not analyzed this potential solution.

### ***Conclusion***

The CEQA legal standard for choosing between a negative declaration and an environmental impact report is whether substantial evidence exists, in light of the whole record before a lead agency, to support a fair argument that a project may have a significant adverse effect on the environment. Careful examination of the evidence is important; the required substantial evidence supporting the fair argument must be relevant and based on a factual foundation in the record. An expert's testimony must relate to a subject within the expert's field and that expert must possess credibility. Speculative possibilities and conjecture do not constitute substantial evidence.

Should such an argument be presented in this proceeding, and prior to simply moving the proceeding into an AFC, the Committee should consider the state of the record in the contested areas. If the governmental decision makers and the public would not be further informed about a

potentially substantial adverse impact or the project would not be further mitigated, the only result of moving the project into the AFC process would be delay and additional paperwork.

Should such an argument be presented and the Committee decide additional analysis and potentially additional mitigation would be obtained by moving the project into an AFC proceeding, the Committee should take a look at the record for the proceeding and determine where in the discovery/preliminary staff assessment stage of the AFC proceeding the project would best fit. Since an SPPE proceeding often results in the same or nearly the same level of analysis needed for an AFC, it is procedurally inefficient to begin the AFC proceeding on the assumption the SPPE proceeding had not occurred.

Currently, Orange Grove Energy's analysis shows no significant impacts as a result of the construction and operation of the Orange Grove Project. Orange Grove Energy is also in the process of addressing concerns identified by CEC Staff. Orange Grove Energy expects that a mitigated negative declaration will be the proper document for this project.

DATED: November 1, 2007

DOWNEY BRAND LLP

By:

  
Jane E. Luckhardt

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

**APPLICATION FOR SMALL POWER  
PLANT EXEMPTION FOR THE  
ORANGE GROVE POWER PLANT**

DOCKET NO. 07-SPPE-2  
(SPPE filed 10/10/07)

**PROOF OF SERVICE**

**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](mailto:docket@energy.state.ca.us)

<b><u>APPLICANT</u></b>  Stephen Thome J-Power USA Development 1900 East Golf Road, Suite 1030 Schaumburg, IL 60173 <a href="mailto:sthome@ipowerusa.com">sthome@ipowerusa.com</a>	Charles Diep, PE, CPP TRC 21 Technology Drive Irvine, CA 92619 <a href="mailto:cdiep@trcsolutions.com">cdiep@trcsolutions.com</a> <a href="mailto:cdiep@Roadrunner.com">cdiep@Roadrunner.com</a>
Mike Dubois J-Power USA Development 1900 East Golf Road, Suite 1030 Schaumburg, IL 60173 <a href="mailto:mdubois@ipowerusa.com">mdubois@ipowerusa.com</a>	<b><u>COUNSEL FOR APPLICANT</u></b>  Jane Luckhardt Downey Brand, LLP 555 Capital Mall, 10th Floor Sacramento, CA 95814 <a href="mailto:jluckhardt@downeybrand.com">jluckhardt@downeybrand.com</a>
<b><u>APPLICANT CONSULTANT</u></b>  Uday Singh, Vice President TRC 21 Technology Drive Irvine, CA 92619 <a href="mailto:usingh@trcsolutions.com">usingh@trcsolutions.com</a>	Wayne Song Morgan, Lewis & Bockius LLP 300 S Grand Avenue, 22nd Floor Los Angeles, CA 90071 <a href="mailto:wsong@morganlewis.com">wsong@morganlewis.com</a>

<p>Joe Stenger, PG, REA  TRC  2666 Rodman Drive  Los Osos, CA 93402  <a href="mailto:jstenger@trcsolutions.com">jstenger@trcsolutions.com</a></p>	<p><b><u>INTERESTED AGENCIES</u></b></p> <p>Larry Tobias  Ca. Independent System Operator  151 Blue Ravine Road  Folsom, CA 95630  <a href="mailto:LTobias@caiso.com">LTobias@caiso.com</a></p>
<p>Electricity Oversight Board  770 L Street, Suite 1250  Sacramento, CA 95814  <a href="mailto:esaltmarsh@eob.ca.gov">esaltmarsh@eob.ca.gov</a></p>	<p><b><u>ENERGY COMMISSION</u></b></p> <p>JAMES D. BOYD  Presiding Member  <a href="mailto:jboyd@energy.state.ca.us">jboyd@energy.state.ca.us</a></p>
<p>Steve Taylor  San Diego Gas &amp; Electric  8306 Century Park Court  San Diego, CA 92123  <a href="mailto:srtaylor@semprautilities.com">srtaylor@semprautilities.com</a></p>	<p>ARTHUR ROSENFELD  Associate Member  <a href="mailto:pflint@energy.state.ca.us">pflint@energy.state.ca.us</a></p>
<p><b><u>INTERVENORS</u></b></p> <p>Gloria D. Smith  Marc D. Joseph  Adams Broadwell Joseph &amp; Cardozo  601 Gateway Boulevard, Suite 1000  South San Francisco, CA 94080  <a href="mailto:gsmith@adamsbroadwell.com">gsmith@adamsbroadwell.com</a></p>	<p>Kenneth Celli  Hearing Officer  <a href="mailto:kcelli@energy.state.ca.us">kcelli@energy.state.ca.us</a></p> <p>Felicia Miller  Project Manager  <a href="mailto:fmiller@energy.state.ca.us">fmiller@energy.state.ca.us</a></p>
<p>Anthony J. Arand  219 Rancho Bonito  Fallbrook, CA 92028  (760) 728-7388 Voice  <a href="mailto:toney@envirepel.com">toney@envirepel.com</a></p>	<p>Jared Babula  Staff Counsel  <a href="mailto:jbabula@energy.state.ca.us">jbabula@energy.state.ca.us</a></p> <p>Public Adviser's Office  <a href="mailto:pao@energy.state.ca.us">pao@energy.state.ca.us</a></p>

**DECLARATION OF SERVICE**

I, Lois Navarrot, declare that on November 1, 2007, I deposited a copy of the attached ORANGE GROVE ENERGY, L.P.'S RESPONSE TO THE COMMITTEE'S REQUEST FOR CLARIFICATION in the United States mail at Sacramento, California with first-class postage thereon fully prepaid to CALIFORNIA ENERGY COMMISSION, Attn: Docket No. 07-SPPE-2, 1516 Ninth Street, MS-4, Sacramento, California 95814-5512. Each individual on the proof

of service list shown above received a transmission via electronic mail consistent with the requirements of the California Code of Regulations, title 20, sections 1209, 1209.5 and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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



Lois Navarrot