

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

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In the Matter of:

The Application for Small Power Plant
Exemption for the ORANGE GROVE
POWER PLANT PROJECT

Docket No. 07-SPPE-2

**CALIFORNIA UNIONS FOR RELIABLE ENERGY'S
RESPONSE TO COMMITTEE REQUEST FOR
CLARIFICATION**

October 31, 2007

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CURE'S RESPONSE TO COMMITTEE REQUEST FOR CLARIFICATION

On October 16, 2007, the committee requested that parties address the following two legal issues:

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?
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?

1. Legal Standard

The Commission may exempt a project not exceeding 100 MW in capacity from the certification process if it finds that no substantial adverse impacts on the environment or on energy resources will result from the construction or the operation of the project at issue.¹

The AFC process is the functional equivalent of an EIR under CEQA. Thus, the decision to exempt an application from the AFC process is based on the same standard as a decision under CEQA to exempt a project from the requirement for an EIR, and instead issue a negative declaration.

Accordingly, the committee's recommendation on whether to grant or deny Orange Grove Energy, L.P. an SPPE is governed by the "fair argument" standard established under CEQA. This standard is derived from CEQA section 21151, which requires full environmental review for any project

“which may have a significant effect on the environment.”² More specifically, CEQA section 21151 requires preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.³ If there is substantial evidence of such an impact, then contrary evidence is not adequate to support a decision to dispense with full review and prepare a negative declaration instead.⁴ The question is whether any environmental review is warranted.⁵ At the initial stage of the process, CEQA “reflects a preference for resolving doubts in favor of environmental review.”⁶ Thus, if the project triggers the EIR standard, the Commission may not issue a negative declaration and exempt the project from the AFC process.

The Commission has long followed these principles. For example, in its decision on the Modesto Irrigation District Electric Generation Station (“MEGS”), the Commission explained the standard this way:

“The Initial Study performed for this Small Power Plant Exemption (SPPE) process is fundamentally a preliminary analysis to determine whether we must pursue our environmental impact report (EIR) equivalent Application for Certification (AFC) process or whether we may exempt the project from that process. In reviewing the evidence of record, and in deciding whether to grant the MEGS project an exemption, we have applied the “fair argument” standard. Under this standard, we must require AFC level review if

¹ This is the definition of the SPPE process and is codified at Public Resources Code section 25541.

² Public Resources Code section 21151(a).

³ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316.

⁴ *League for Protection of Oakland's Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905.

⁵ *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073.

⁶ *Sierra Club, supra*, at pp. 1316-1317.

there is any substantial evidence in the record which supports a fair argument that the MEGS project may have a significant effect upon the environment. In applying the fair argument standard, our task is not to weigh competing evidence and determine which is more persuasive, but rather to determine whether substantial evidence exists in the record to support the prescribed fair argument. If such evidence is found, it cannot be overcome by substantial evidence to the contrary.

We reviewed the evidence in light of the record as a whole in order to determine whether substantial evidence of a significant adverse impact attributable to the MEGS project exists. For these purposes, "substantial evidence" includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." It does not include "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.

Opinions submitted by qualified experts, and based upon reliable and credible foundations, are generally conclusive. Statements by members of the public may constitute substantial evidence if these statements are supported by an adequate factual foundation."⁷

Under this well-settled standard, if the Commission is presented with evidence of potentially significant impacts, it may not grant an SPPE. The Commission may, at any time in the process, make a determination on the appropriateness of an SPPE based upon evidence supplied by the applicant, staff, intervenors and/or the public.

Importantly, SPPE projects exempted from the AFC process remain subject to applicable local permitting requirements, such as those imposed by

⁷ Modesto Irrigation District Electric Generating Station Small Power Plant Exemption Decision And Mitigated Negative Declaration, February 2004, pp. 6-7.

local air district.⁸ Exempt projects may also result in a mitigated negative declaration (“MND”) where the Commission incorporates into the project license various conditions of exemption (COE) imposed by the Commission to fully mitigate any significant adverse environmental impacts identified in the SPPE proceeding.⁹ An MND is the result of a comprehensive process which provides for opportunity for public review and comment, and is subject to extensive environmental review by Commission staff and participating agencies in order to identify and mitigate project impacts.¹⁰ The public process is comprised of public hearings and workshops and review and comment on applicant, staff, agency and intervenor documents. In order to grant an SPPE, the Commission must craft a final decision that shows that the project will have no adverse impacts on the environment or upon energy resources. If this is achieved through an MND, the final decision and license will contain COEs to mitigate any identified impacts.

In summary, the Commission may grant the SPPE if an agency operating under standard CEQA principles would be authorized to issue a mitigated negative declaration.

⁸ See Riverside Energy Resource Center (04-SPPE-1), Decision and Mitigated Negative Declaration, at p. 1 (December 2004).

⁹ *Id.*

¹⁰ *Id.* at pp. 5-6.

2. Effect of the Fair Argument Standard on this Proceeding

CURE has set out the appropriate legal standards for determining whether a given project is eligible for an SPPE, including the MND process. If the Commission determines that Orange Grove does not qualify for the SPPE process, then the Commission must initiate an AFC. Based upon the information provided in this proceeding thus far, CURE takes no position on whether the Commission should convert the Orange Grove SPPE into an application for certification.

Dated: October 31, 2007

Respectfully submitted,

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PROOF OF SERVICE

I, Bonnie Heeley, declare that on October 31, 2007, I deposited copies of the attached

**CALIFORNIA UNIONS FOR RELIABLE ENERGY'S RESPONSE TO
COMMITTEE REQUEST FOR CLARIFICATION**

in the United States mail at South San Francisco, California with first-class postage thereon fully prepaid and addressed to the following.

Via U.S. Mail to:

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COMMISSION
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ATTN: Docket Unit 07-SPPE-2
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

On October 31, 2007, I emailed the document to the following. Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5 and 1210.

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I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, California, on October 31, 2007.

Bonnie Heeley