

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

APPLICATION FOR SMALL POWER PLANT
EXEMPTION FOR THE ORANGE GROVE
PROJECT

DOCKET No. 07-SPPE-2

COMMITTEE ORDER AND TENTATIVE DECISION

AND

NOTICE OF HEARING ON COMMITTEE RECOMMENDATION TO DENY THE SMALL
POWER PLANT EXEMPTION

The Committee assigned to the above-captioned proceeding has scheduled a hearing as follows:

Thursday, April 24, 2008
Beginning at 1:00 p.m.
California Energy Commission
Hearing Room A
1516 Ninth Street
Sacramento, Ca 95814

On July 19, 2007, Orange Grove Energy L.P. filed its Application for a Small Power Plant Exemption (SPPE). On September 28, 2007, the Orange Grove SPPE Committee issued a Committee Scheduling Order that specified the Final Initial Study to be completed by December 17, 2007. With the exception of Status Reports, none of the enumerated tasks were completed as scheduled.

On January 4, 2008, Applicant filed substantial changes to the description of the project, which included using reclaimed water for use in the inlet chiller. Under the proposed changed description, over sixteen tons of reclaimed water would be delivered every hour via diesel truck from a waste water facility in Fallbrook to the project site. This would occur during peak generation periods of the year and over a distance of about fifteen miles one-way.

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At the Status Conference held on February 19, 2008, the Applicant again introduced additional substantial changes to their project description. Originally, the project description called for a potable water pipeline constructed along Pala Del Norte Road connecting to an existing Rainbow Municipal Water District pipeline. The new description instead requires trucking potable water three miles from a source in Rice Canyon for use in NOx control and inlet cooling at a frequency of two round trips per hour. The new changes also re-route a natural gas pipeline through riparian habitat, some state and federal jurisdictional waterways, and areas of special-status species habitat. The original plan ran the gas pipeline along the SR 76 roadway. The stated purpose for re-routing the gas pipeline through these biologically sensitive areas is to avoid temporary traffic congestion impacts during construction.

As a result of the re-routing of the gas pipeline, several additional permits and agency approvals will be required which were not required for the roadside pipeline as originally proposed. They include a Section 404 Nation Wide Permit, a Section 401 Water Quality Certification, and a Section 106 consultation with the State Historic Preservation Office. The Applicant acknowledges the increased likelihood of the need for an Endangered Species Act Section 7 consultation and consultation with the Army Corps of Engineers to determine the need for formal consultation and a Biological Opinion from the United States Fish and Wildlife Service. A streambed alteration agreement from the California Department of Fish and Game is already required for the project due to boring underneath a normally dry drainage for installation of the transmission line interconnection. Since the changed natural gas pipeline route would affect additional State jurisdictional waters, the scope of the original streambed alteration agreement would need to be expanded.

At the Status Conference, Staff characterized the Applicant's proposed schedule as "underestimating" the length of time required for relevant agencies to respond. Staff also pointed out that the Applicant's proposed schedule requires Staff to complete its analysis concurrent with Applicant's biological surveys (which Staff's analysis would necessarily rely on) and requires Staff to complete its analysis before the responsible agencies conclude their permits and consultations. Staff indicated at the Status Conference that, "[t]hat's not going to work." [2/19/08 RT pp. 43, 54.]

The Applicant's own proposed schedule optimistically estimates that the SPPE process, including the previously noted additional permits and consultations, would extend the Final Decision in this matter to the middle of September 2008, making this SPPE Application a fourteen month process. By contrast, Staff estimates that the Applicant's changes would extend the Final Decision in this matter to March 1, 2009, totaling twenty months from start to finish. The Committee can take official notice that the average SPPE takes about eight months from start to finish.

Pursuant to Title 20, California Code of Regulations, section 1945, an SPPE decision is due 135 days after the application is filed, but the time may be extended to allow full and fair examination of the issues. Under section 1947, the Applicant may extend the schedule with a written stipulation. On February 29, 2008, the Applicant filed a ***Stipulation for an Extended Review Schedule***, but only through November 30, 2008.

A Small Power Plant Exemption is an expedited procedure designed to exempt from Commission licensing small, efficient and relatively environmentally benign sources of electric generation. At the Status Conference, the Committee made clear that the complex changes the Applicant has added to this application both heightened the possibility of substantial environmental impact and undermined the time-saving purposes behind the Small Power Plant Exemption.

Instead of the Initial Study level of review traditionally used in SPPEs, Staff has determined that this matter requires an Environmental Impact Report (EIR) level of analysis. Along with the heightened level of analysis, Staff has built in to its proposed schedule the additional notice requirements for an EIR proscribed under CEQA. Staff's schedule and the Applicant's Stipulation for an Extended Review Schedule are incompatible. Under the circumstances, this Committee cannot produce a Revised Scheduling Order that will permit full and fair examination of the issues without prejudice to either party. Furthermore, Staff's determination that the Orange Grove project should undergo an EIR level of review poses several problems for this Committee.

The first problem involves the legal standard to apply. On November 1, 2007, the Applicant, Staff and one Intervenor (CURE) submitted briefs in response to the Committee's Request for Clarification of the legal standard to be applied to an SPPE application. All parties agreed that the standard would be the "fair argument" standard; that is, the SPPE will be denied if the record discloses substantial evidence to support a fair argument that the project will cause a significant impact on the environment or energy resources.

Traditionally, in the context of an SPPE, Energy Commission Staff has prepared a document essentially similar to an Initial Study under the California Environmental Quality Act (CEQA). This document formed the basis to determine whether a qualifying powerplant could be exempted from the Commission's Application for Certification (AFC) licensing process. If such an exemption is granted, the Commission relinquishes primary licensing authority over the power plant to responsible local agencies.

If the SPPE is denied, the Applicant may or may not choose to seek project licensing under the AFC process, but the denial of an exemption does not automatically trigger commencement of the AFC process or the undertaking of an EIR level of review. Again, the SPPE/Initial Study process is most appropriate for qualifying projects which

appear to be environmentally benign and possess little likelihood of creating adverse environmental consequences.

An AFC is a certified regulatory program that is exempt from the EIR provisions of CEQA. The AFC process is the functional equivalent of CEQA's EIR process. The level of information gathered and analyzed in the AFC/EIR process is more extensive than that of the SPPE/Initial Study process. The AFC is required for all power plants which will produce greater than 100 megawatts. The AFC is also appropriate in situations where a smaller project may impose a significant adverse impact or where it is necessary to resolve disputes over the efficacy of proposed mitigation measures. The Committee believes that the AFC process is also appropriate when a smaller project just does not fit within the stated purposes of an SPPE. Unlike an SPPE, in the AFC process, the Commission is the licensing authority over the power plant and retains the authority to monitor compliance with the conditions it imposes for the life of the project.

If, as the parties have acknowledged, an Initial Study gives rise to a "fair argument" based upon substantial evidence that the project may create a significant adverse impact, then the consequence under CEQA is a higher level of scrutiny. In other words, an EIR is the consequence of a fair argument that a small power plant could result in an unmitigated significant impact. If, as Staff believes, an EIR is now required for the 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?

The second problem arising from Staff's determination to proceed by way of an EIR is the question of what law the Committee should apply to this project. There is no mention of an EIR in Public Resources Code section 25541 or Title 20, Chapter 5, Article 5 of the Code of California Regulations. Only the site certification program in Chapter 6 of the Warren-Alquist Act is certified by the Secretary of Resources pursuant to the CEQA Guidelines section 15251(j). If the SPPE program is not part of Chapter 6 and, therefore, not a certified program, then is the SPPE process governed entirely by CEQA?

The final and perhaps most critical problem relates to the delay in the proposed schedules. Applicant's Stipulation for an Extended Review Schedule lapses before Staff can complete a full and fair exploration of issues within what Staff considers to be a reasonable time frame.

The Energy Commission has granted nineteen SPPEs in its history. Only 3 of those took longer than a year and the remainder averaged between seven and eight months to complete. The proposed schedules for the Orange Grove project will take double or triple the amount of time it takes to complete compared to the average SPPE even without allowing for potential additional delays.

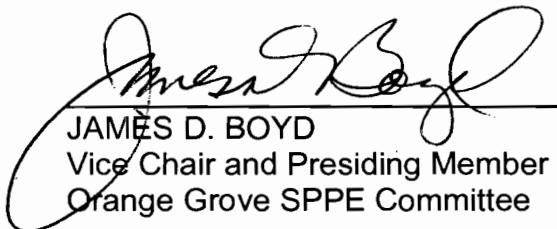
There appears to be no existing law respecting the length of time a project can consume before the schedule can be deemed too lengthy to qualify for an SPPE. There also appears to be no law respecting how complex a project can be before it is too complex to qualify for an SPPE. Public Resources Code section 25541 empowers the Energy Commission to exercise its discretion to allow for SPPEs according to its own policies.


The Applicant's revised proposal for an "improved gas pipeline" permanently encroaches upon the habitat of several protected species in order to avoid temporarily inconveniencing traffic on the road to the local casino. We have not even heard evidence yet as to the impacts, if any, that the 17-ton truck may have on the condition of the roadway, traffic and air quality. Nevertheless, Applicant's pursuit of its "improved pipeline" has opened the Pandora's Box of federal and state permitting scenarios which were not required with the original pipeline. Arguably, this flies in the face of the SPPE's stated purpose of "*expediting* the procedures necessary for the approval and development of alternate sources of electric generation." [20 Cal. Code Regs. § 1934.]

The Committee has not yet opened evidentiary hearings in this case. Only one party, Intervenor Anthony Arand, has urged the Committee to recommend denying the exemption. Based upon the disparate schedules submitted, changes in Staff's procedure and discussions at the Status Conference, it is clear to us that the Orange Grove project does not appear compatible with our normal SPPE scheme. Therefore, the Committee would recommend that the Orange Grove Project Application for a Small Power Plant Exemption be **DENIED**.

Based upon the foregoing, the Committee Orders the parties to submit briefs responding to the questions raised in this Order, and our tentative decision to recommend the Commission deny the Orange Grove Application for a Small Power Plant Exemption as a matter of policy. Responsive briefs are due by close of business on April 1, 2008, and parties may file rebuttal briefs by April 15, 2008.

Dated March 10, 2008, at Sacramento, California.


JAMES D. BOYD
Vice Chair and Presiding Member
Orange Grove SPPE Committee


ARTHUR H. ROSENFELD
Commissioner and Associate Member
Orange Grove SPPE Committee

Proof of Service List (Revised on 10/16/07)
filed as Original Document. Mailed from
Sacramento on 3/11/08.

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)

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:

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DECLARATION OF SERVICE

I, Maggie Read, declare that on March 11, 2008, I deposited copies of the attached Committee Order and Tentative Decision and Notice of Hearing on Committee Recommendation to Deny 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.

OR

Transmission via electronic mail was consistent with the requirements of 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.

Original signature in Dockets
MAGGIE READ