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State of California
State Energy Resources Conservation and
Development Commission
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**APPLICATION FOR SMALL POWER PLANT
EXEMPTION FOR THE:**

***GILROY BACKUP GENERATING
FACILITY***

Docket No. 20-SPPE-03

COMMITTEE SCHEDULING ORDER AND FURTHER ORDERS

BACKGROUND

On December 17, 2020, Amazon Data Services, Inc. (Applicant) submitted an application for a small power plant exemption (SPPE) for the Gilroy Backup Generating Facility (Application)¹ to the California Energy Commission (CEC).² Applicant seeks to construct and operate the Gilroy Data Center, the Gilroy Backup Generating Facility, and related accessories (collectively, the Project).³

On June 9, 2021, the Committee⁴ issued a Notice of Committee Conference and Related Orders, which set a Committee Conference for June 28, 2021.⁵ The June 9th Notice directed CEC Staff (Staff) to file an issues identification and status report and a proposed schedule by June 14, 2021. The June 9th Notice directed Applicant to file a

¹ Information about this proceeding, including a link to the electronic docket, may be found on the CEC's [web page](https://www.energy.ca.gov/powerplant/reciprocating-engine/gilroy-backup-generating-facility) at <https://www.energy.ca.gov/powerplant/reciprocating-engine/gilroy-backup-generating-facility>. Documents related to this proceeding may be found in the [online docket](https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=20-SPPE-03) at <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=20-SPPE-03>. The Application and related addenda are TN 236004 to TN 236016 and TN 237352, TN 237353, TN 237425, and TN 237502.

² The CEC is formally known as the "State Energy Resources Conservation and Development Commission." (Cal. Pub. Resources, § 25200.) All further references are to the Public Resources Code unless otherwise specified.

³ The information in this section is taken from the Application (TN 236004).

⁴ On April 14, 2021, the CEC appointed a Committee consisting of Karen Douglas, Commissioner and Presiding Member, and Andrew McAllister, Commissioner and Associate Member, to preside over this Application (Committee). TN 237479.

⁵ TN 238169.

response to Staff's issues identification and status report and proposed schedule by June 21, 2021.⁶ Staff and Applicant met these deadlines.⁷

During the Committee Conference on June 28, 2021,⁸ Staff announced that it intends to prepare an environmental impact report (EIR) as its environmental document for the Application⁹ rather than an initial study and mitigated negative declaration. Staff and Applicant then discussed Staff's proposal to prepare an EIR.¹⁰

On June 29, 2021, Staff filed an updated issues identification and status report and proposed schedule that reflected Staff's intent to prepare an EIR for the Application.¹¹ On August 18, 2021, Staff filed a Notice of Preparation of a Draft Environmental Impact Report (NOP).¹²

DISCUSSION AND ORDERS

Staff's Proposal to Prepare an EIR

In furtherance of the legal requirements and to aid in the consideration of an application for an SPPE under both the Warren-Alquist Act¹³ and the California Environmental Quality Act (CEQA),¹⁴ Staff conducts the initial data gathering and analysis of an application for a SPPE, then publishes that analysis for public review in a CEQA-compliant environmental document regarding the Project. As noted above, Staff has stated its intent to prepare an EIR. Staff and Applicant disagree on whether an EIR is necessary.

CEQA requires a public agency to prepare an EIR instead of a negative declaration whenever a project may have a significant environmental impact or it can be fairly argued that the project will have such an impact.¹⁵ The "fair argument" standard creates

⁶ *Id.* at p. 4.

⁷ On June 14, 2021, Staff filed a memorandum addressing issues identification, status, and proposed schedule (TN 238191), and on June 21, 2021, Applicant filed its response to Staff's status report (TN 238329.)

⁸ The Reporter's Transcript of the June 28, 2021 Committee Conference is TN 238996 and is cited herein as "TN 238996, page:line or page:line-page:line." For example: TN 238996 at 1:1-2:2.

⁹ TN 238996 at 35:4-8.

¹⁰ *Id.* at 35:4-54:13.

¹¹ TN 238564.

¹² TN 239352.

¹³ Pub. Resources Code, § 25000 *et seq.*; see also Cal. Code Regs., tit. 20, § 1001 *et seq.*

¹⁴ The CEQA statutes, California Public Resources Code section 21000 *et seq.*, and CEQA Guidelines, California Code of Regulations, title 14, section 15000 *et seq.* (Guidelines), detail the protocol by which state and local agencies comply with CEQA requirements. We refer to the statutes and the Guidelines collectively as "CEQA."

¹⁵ Pub. Resources Code, §§ 21100(a), 21151; Guidelines, § 15064(a)(1), (f)(1).

a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted.¹⁶ If there is substantial evidence such that a fair argument can be made to support a conclusion—even if other conclusions might also be reached—then an EIR must be prepared.¹⁷

At the Committee Conference on June 28, 2021, Applicant asserted that Staff's proposal to prepare an EIR for the Application could cause undue delay and send the wrong message to future applicants because Staff has not identified any evidence that requires an EIR.¹⁸ Applicant suggested that the Committee direct Staff to prepare a proposed mitigated negative declaration based on an initial study as the environmental document for the Application,¹⁹ or at least require Staff to hold off from deciding to prepare an EIR.²⁰

Staff maintained that the CEC should prepare an EIR because the legal framework for adopting an EIR allows the CEC to weigh conflicting evidence, and in this proceeding Staff foresees that someone could introduce conflicting evidence about the potential significance of the Project's environmental effects on air quality, greenhouse gas (GHG) emissions, and transportation.²¹ Staff continued to investigate the evidence in these technical areas as of the time Staff published the NOP.²²

We are persuaded that an EIR is appropriate in this proceeding based on the record currently before us. As noted above, Public Resources Code section 21151 “creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted.”²³ Here, Staff foresees the potential for conflicting evidence regarding potentially significant environmental impacts on air quality, GHG emissions, and transportation. In addition, one of the basic purposes of CEQA is to inform government decisionmakers and the public about the potential significant effects of proposed activities.²⁴ To that end, an EIR is the “heart of CEQA.”²⁵ An EIR would meet the purpose of CEQA by adequately informing the public and the CEC about the

¹⁶ *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 884.

¹⁷ *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358, 370-371.

¹⁸ TN 238996 at 39:10-42:15, 49:18-52:4, 53:16-54:13.

¹⁹ *Id.* at 39:23-40:4.

²⁰ *Id.* at 54:8-13.

²¹ *Id.* at 48:6-49:1.

²² TN 239352 at p. 3.

²³ See *Jensen, supra*, 23 Cal.App.5th at 884.

²⁴ Guidelines, § 15002(a)(1).

²⁵ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

environmental effects of the Project, including disclosing alternatives to the proposed project.

Therefore, we decline Applicant's request to direct Staff to prepare a mitigated negative declaration or delay its preparation of an EIR.

Committee Request for Information about Mitigation of Agricultural Impacts

The Committee seeks supplemental information and directs the parties to respond to the following request for information. Responses by all parties to the Committee's request for information must be included in their first status report and filed in the docket for this proceeding **no later than 5:00 p.m. on October 10, 2021**.

Background

The Application identifies a significant impact from conversion of farmland to urban use, and states that mitigation pursuant to Gilroy's established Agricultural Mitigation Program is incorporated into the Project design including, in relevant part:

The project shall preserve farmland through one of the two options below. The options shall include all costs to cover program administration, monitoring and management of established easements as outlined in Section 1.02 (E) of the Agricultural Mitigation Policy:

- a) Option 1: Purchase an equal amount of land (1:1 ratio) of agricultural land within the "Preferred Preservation Areas" (as defined in the Agricultural Mitigation Policy) and the transfer of the ownership of this land to the Silicon Valley Land Conservancy or other City-approved agency.
- b) Option 2: Purchase of development rights to a 1:1 ratio on agricultural land within the "Preferred Preservation Areas" and the transfer of ownership of these rights to the Silicon Valley Land Conservancy or other City-approved agency.²⁶

The Application asserts that the Project would result in a less than significant impact to farmland because the Project is consistent with the existing General Plan designation and zoning on the site, would not require a legislative act as defined in the City's CEQA threshold, and would implement the City's Agricultural Mitigation Policy.²⁷ The Application states that the City of Gilroy considers agricultural impacts to be less than significant with implementation of the Agricultural Mitigation Policy.²⁸ The NOP reported

²⁶ TN 236004, at p.45.

²⁷ *Id.* at pp. 47-48.

²⁸ *Id.* at p. 48, fn. 11.

that based on Staff's analysis to date, the Project would have either no or less than significant impacts on agricultural resources.²⁹

Committee Request for Information

Please discuss whether the holdings in *King & Gardiner Farms, LLC v. County of Kern (King & Gardiner Farms)*³⁰ and *Masonite Corporation v. County of Mendocino (Masonite)*³¹ regarding the use of agricultural conservation easements to mitigate a significant farmland conversion impact to less than significant, are applicable to this Project. Please discuss whether the Applicant's proposed mitigation, including its proposal to implement the City's Agricultural Mitigation Policy, is legally sufficient to reduce the Project's potential impacts to less than significant in light of the holdings in *King & Gardiner Farms* and *Masonite*.

Timing of Intervention and Testimony

At the Committee Conference on June 28, 2021, both parties supported a schedule for the proceeding that would require all parties to file opening testimony concurrent with the deadline to file public comment on the environmental document.³² Staff stated that the proposed schedule would save Staff time by allowing it to simultaneously prepare its responses to issues raised in public comments and opening testimony.³³ Applicant stated that combining an intervenors' comments with opening testimony would limit an intervenor's ability to raise new issues sequentially.³⁴

The Committee agrees that, to the extent feasible, all parties, including intervenors, should raise issues in a timely manner so the other parties have an opportunity to respond with written testimony, allowing for the Committee to have more complete information on which to decide the issues that need to be adjudicated at the evidentiary hearing. Resolving petitions to intervene at an earlier date in the proceeding will facilitate the parties' ability to raise issues earlier in the proceeding. The Committee declines to require opening testimony the at time of public comment at this time. Thus, the Committee adopts the schedule below.

²⁹ TN 239352 at p.3.

³⁰ *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, as modified on denial of rehearing (Mar. 20, 2020), 829-830, 875-876.

³¹ *Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230, 241.

³² TN 238996 at 43:14-45:19.

³³ *Id.* at 43:14-44:23.

³⁴ *Id.* at 45:1-19.

Scheduling Order

The Committee hereby adopts the schedule for the proceeding that is attached below. The Committee encourages the parties to make their best efforts to complete the milestones ahead of these dates.

PUBLIC ADVISOR AND OTHER CEC CONTACTS

The CEC's Public Advisor's Office provides the public assistance with participating in CEC proceedings. For information on participation or to request interpreting services or reasonable accommodations, please contact the Public Advisor's Office at publicadvisor@energy.ca.gov, or by phone at (916) 654-4489, or toll free at (800) 822-6228. Requests for interpreting services and reasonable accommodations should be made at least five days in advance. The CEC will work diligently to accommodate all requests.

Direct questions of a procedural nature related to the Application to [Ralph Lee, Hearing Officer](#), at ralph.lee@energy.ca.gov or (916) 776-3408.

Direct technical subject inquiries concerning the Application to [Leonidas \(Lon\) Payne, Project Manager](#), at leonidas.payne@energy.ca.gov or at (916) 838-2324.

Direct media inquiries to mediaoffice@energy.ca.gov or (916) 654-4989.

AVAILABILITY OF DOCUMENTS

Information about the Application, as well as notices and other relevant documents pertaining to this proceeding, may be viewed on the [Gilroy SPPE web page](#) at: <https://www.energy.ca.gov/powerplant/reciprocating-engine/gilroy-backup-generating-facility>.

IT IS SO ORDERED.

Dated: September 22, 2021

APPROVED BY:

Karen Douglas
Commissioner and Presiding Member
Gilroy Backup Generating Facility SPPE
Committee

Dated: September 22, 2021

APPROVED BY:

Andrew McAllister
Commissioner and Associate Member
Gilroy Backup Generating Facility SPPE
Committee

Mailed to list number(s): 7540

**GILROY
BACKUP GENERATING FACILITY SPPE (20-SPPE-03)
SCHEDULING ORDER
SEPTEMBER 2021**

EVENT	DATE
All Parties File Status Reports	No later than the 10th of every month
Staff Filed Notice of Preparation of an Environmental Impact Report (EIR)	August 8, 2021
Staff Publishes its Draft EIR and Sends the Appropriate Notice to the State Clearinghouse	No later than 60 days after Staff notifies the Committee in a status report that it has received complete answers to its data requests
Last Day to File Petition to Intervene ³⁵	21 days after Staff publishes the Draft EIR
Last Day to File Objection to any Petition to Intervene ³⁶	7 days after a Petition to Intervene is filed
Close of Public Comment Period on Staff's Draft EIR	45 days after Staff publishes the Draft EIR ³⁷
Staff Files Final EIR (FEIR)	21 days after close of public comment period
All Parties File Opening Testimony	15 working days after Staff files the FEIR

³⁵ The deadline to file a petition for intervention shall be established by the presiding member, or if no deadline is established, at least 30 days prior to the first day of the evidentiary hearing. (Cal. Code Regs., tit. 20, § 1211.7, subd. (b).)

³⁶ "Motions shall be filed and responded to according to a schedule established by the presiding member. In the absence of such a schedule, responses to motions shall be filed within 14 days of the service of the motions." (Cal. Code Regs., tit. 20, § 1211.5.)

³⁷ Please note that the State Clearinghouse has 3 days to distribute. (Pub. Resources Code, § 21091, subd. (c)(3).)

All Parties to File Reply Testimony. ³⁸ Staff Files Any Errata or Addendum to FEIR.	10 days after opening testimony
All Parties File Prehearing Conference (PHC) Statements	5 days after reply testimony
PHC	7 days after PHC statement
Evidentiary Hearing (EH) ³⁹	To be determined
Committee Files Proposed Decision	To be determined
Adoption Hearing by the Commission	To be determined
Notice of Determination Published	Within 5 working days of Commission Decision

The Committee may modify the schedule at any time. The Committee will issue final dates in a later Order.

³⁸ Seven days prior to the evidentiary hearing or at such other times as ordered by the presiding member. (Cal. Code Regs., tit. 20, § 1943.)

³⁹ Evidentiary hearings shall commence no later than 100 days after filing the application for an SPPE unless otherwise ordered by the presiding member. (Cal. Code Regs., tit. 20, § 1944 subd. (b).) In the “General Orders Regarding Motions, Electronic Filing, Service of Documents, and Other Matters,” the Committee extended the deadline for the hearing pursuant to California Code of Regulations, Title 20, sections 1203, subdivision (f) and 1944, subdivision (b). (TN 237762.)