

**DOCKETED**

<b>Docket Number:</b>	17-SPPE-01
<b>Project Title:</b>	McLaren Backup Generating Facility
<b>TN #:</b>	226162
<b>Document Title:</b>	Energy Commission Staff's Reply to Helping Hand Tools Petition
<b>Description:</b>	N/A
<b>Filer:</b>	Liza Lopez
<b>Organization:</b>	California Energy Commission
<b>Submitter Role:</b>	Commission Staff
<b>Submission Date:</b>	12/20/2018 11:32:16 AM
<b>Docketed Date:</b>	12/20/2018



Before the Energy Resources Conservation and Development  
Commission of the State of California  
1516 Ninth Street, Sacramento, CA 95814  
1-800-822-6228 – [www.energy.ca.gov](http://www.energy.ca.gov)

**APPLICATION FOR A SMALL POWER PLANT  
EXEMPTION FOR THE:**

**MCLAREN BACKUP GENERATING FACILITY**

**Docket No. 17-SPPE-01**

## **ENERGY COMMISSION STAFF'S REPLY TO HELPING HAND TOOLS PETITION FOR RECONSIDERATION**

### **I. INTRODUCTION**

On November 7, 2018, after a public hearing, the California Energy Commission issued an order granting a small power plant exemption (SPPE) for the McLaren Backup Generating Facility (MBGF). The exemption allows the local jurisdiction, in this case the City of Santa Clara, to permit the project. On December 7, 2018, Helping Hand Tools (2HT) filed a petition requesting the Commission reconsider its order exempting the MBGF from the Commission's jurisdiction. On December 19, 2018, the Commission invited parties to the MBGF proceeding to submit comments on the petition. The following is Staff's response to the petition.

### **II. BACKGROUND ON THE SPPE PROCESS**

The SPPE process allows the Commission to exempt from its jurisdiction small power plant projects, 100 megawatts (MW) or less, that do not have significant impacts on the environment or energy resources. With the exemption, the local jurisdiction would then complete its own process under the California Environmental Quality Act (CEQA) and ultimately decide on whether the project gets approved or denied. (Pub. Resources Code, § 25541.) If the Commission denies the SPPE because the project is over 100 MW or because there are significant impacts to the environment or energy resources, the applicant would have to file an application for certification with the Commission. (Pub. Resources Code, § 25500.) It is important to note that the end result of an SPPE proceeding is never an approval of the project, only a determination of the appropriate jurisdiction to approve or deny the project.

### III. PUBLIC RESOURCES CODE SECTION 25530 AND TITLE 20 SECTION 1720 DO NOT APPLY TO SPPE PROCEEDINGS

Two authorities are cited by 2HT in its petition for reconsideration, Public Resources Code section 25530 and Title 20, California Code of Regulations, section 1720.<sup>1</sup> These provisions allowing reconsideration only apply to the Commission's application for certification process, not the SPPE process. This limitation makes sense in the case of an SPPE because once the Commission approves an exemption, the local government has jurisdiction over the project, at which point, project specific issues should be taken up with the jurisdiction that will actually permit the construction of the facility and implement any mitigation. In this case, the City of Santa Clara currently has jurisdiction over MBGS. Therefore, from a purely procedural perspective, the petition for reconsideration should be denied because there is no right to reconsideration of an Energy Commission decision granting an SPPE.

#### A. Public Resources Code section 25530

The Commission's authorizing statute states, "*the commission may order a reconsideration of all or part of a decision or order on its own motion or on petition of any party.*" (Pub. Resources Code, § 25530.) This permissive provision is contained in chapter 6 of the Public Resources Code covering the Commission's siting process. The single provision covering the authorization for SPPE exemptions is contained in Public Resource Code section 25541 also in Chapter 6. The operative language of section 25541 states, "*the commission may exempt from this chapter thermal powerplants with a generating capacity of up to 100 megawatts... if the commission finds that no substantial adverse impact on the environment or energy resources will result from the construction or operation of the proposed facility....*" Thus, once an SPPE is granted, the provisions of Chapter 6 no longer apply, including the provision allowing for reconsideration, and the project automatically transfers to the local government's jurisdiction. Had the Legislature intended otherwise, it either would have moved the reconsideration provision to another chapter (perhaps Chapter 3, which applies more generally to Energy Commission proceedings) or would have qualified section 25541 to say that an SPPE is exempt from the chapter *except for the reconsideration provision in section 25530*. That the Legislature chose to do neither strongly indicates that it did not intend for reconsideration to apply to decisions on an SPPE.

Even if it could be argued that section 25530 applies to all siting related proceedings, including SPPEs, the operative language of *may order a reconsideration* means the action is permissive. The Commission's regulations provide the operational detail

---

<sup>1</sup> All references are to Title 20, California Code of Regulations unless otherwise noted.

lacking in Public Resources Code section 25530 and further limit the applicability of a petition for reconsideration to applications for certification.<sup>2</sup>

B. Title 20, section 1720

Section 1720 sets forth the details of the petition for reconsideration including the timing and mechanics of filing and the basis for the reconsideration. (Cal. Code Regs., tit. 20, § 1720.) Section 1720 is contained in Article 1 and the scope of Article 1 is found in section 1701.

*Article 1 applies to all notice of intent proceedings and all application for certification proceedings... Article 5 of this chapter shall apply to all applications for a Small Power Plant Exemption. (Cal. Code Regs., tit. 20, § 1701.)*

The scope provides the general rule that the provisions in Article 1 only apply to applications for certification and notice of intent proceedings. The provisions setting forth the SPPE process are primarily contained in Article 5 which correspond to sections 1934-1947 of the regulations. There is no provision in the SPPE section that provides for the equivalent of the section 1720 petition for reconsideration.<sup>3</sup>

Because the Commission actually permits the construction, operation and closure of a facility it licenses through the application for certification process, having a motion to reconsider is an important mechanism to allow for errors in fact or law to be addressed. In the case of the SPPE, the Commission's decision is not a decision on whether the project can or cannot be built but is designed to be a relatively quick jurisdictional proceeding, preferably taking no longer than 135 days, from initial filing to a decision on the exemption application. (Cal. Code Regs., tit. 20, § 1945.) Once the exemption has been granted, reconsideration is not necessary given the opportunity for issues to be presented before the jurisdiction actually permitting the facility. In this case, the City of Santa Clara and the Bay Area Air Quality Management District will be providing the permits and are each statutorily required to address public comments.

---

<sup>2</sup> Specifically the provision of the regulations covering reconsideration covers both applications for certification and notices of intent, but notices of intent are not relevant to the discussion and need not be considered in this reply.

<sup>3</sup> While currently there are a few provisions in Article 1 that specifically apply to SPPE proceedings based on specific language in the text, such as sections 1710, 1714, and 1720.2, effective January 1, 2019, these provision will no longer contain reference to SPPEs as all sections related to the SPPE proceeding will be contained in Article 5. This change improves the clarity of the SPPE process and ensures consistency with the existing scope of Articles 1 and 5 as set forth in section 1701. (See TN# 226043 <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=17-OIR-02>.)

#### **IV. EVEN IF SECTION 1720 APPLIED, NO NEW EVIDENCE OR ERRORS OF LAW OR FACT HAVE BEEN IDENTIFIED AS REQUIRED**

Although section 1720 does not apply to SPPE proceedings, if the Commission is inclined to hear the petition to reconsider under its general authority to manage proceedings as set forth in section 1203, and apply the requirements of section 1720, the petition should be denied because it has failed to identify any new evidence or error in law or fact, or otherwise raise an issue that was not already fully adjudicated. (Cal. Code Regs., tit. 20, § 1720.)

A petition for reconsideration must specifically set forth either:

*1) new evidence that despite the diligence of the moving party could not have been produced during evidentiary hearings on the case; or 2) an error in fact or change or error of law. The petition must fully explain why the matters set forth could not have been considered during the evidentiary hearings, and their effects upon a substantive element of the decision.* (Cal. Code Regs., tit. 20, § 1720.)

2HT identifies three claimed errors: 1) the calculation of the project's generating capacity, 2) NO<sub>2</sub> emissions impacts, and 3) the public noticing and outreach of the Commission's proceeding. (Petition to Reconsider, pp. 2-7.)

##### 1) Calculating Generating Capacity

It is undisputed that 2HT simply does not agree with the method of calculating generating capacity utilized by Staff, the Applicant, and ultimately adopted by the Commission. Specifically, the issue is the use of the building demand in the generating capacity calculation. 2HT argues this methodology is not appropriate and 2HT was given ample opportunity to make its argument. Not agreeing with the calculation does not provide a basis for reconsideration. On the contrary, considerable time and effort was given to fully flesh out the various methodologies for determining generating capacity, including all parties responding to specific questions by the Committee on this exact issue. (See Exhibit 202, pp. 3-5, 7-9; Exhibit 205, pp. 1-5, Staff Issue Statement, pp. 1-6, RT 10/10/18, pp. 18-23.)

2HT relies primarily on a 10-year old letter from the Commission's former executive director regarding one of the first data centers to be evaluated by Commission Staff. The letter was introduced as evidence in the SPPE proceeding. (Exhibit 306.) In assessing generating capacity, the letter outlines a methodology acceptable to 2HT because the building demand was not included in the calculation. (Exhibit 306.) Subsequent to issuance of this letter, Staff further refined its approach to calculating

generating capacity where data centers are concerned, and concluded that it was appropriate to consider building demand in the calculation. Staff provided evidence in the record to support this approach. There is no authority that prevents Staff from learning more about how data centers operate and improving its methodology to more appropriately reflect the unique operating parameters of data centers. The 2008 letter is not binding authority and was never ratified by the Commission in any type of decision and does not provide evidence of an error in law or fact.

All the issues raised regarding generating capacity in 2HT's petition for reconsideration (Petition to Reconsider, pp. 2-5.) were addressed in detail during the two hearings and multiple filings by the parties on the topic. No new evidence was included in the motion to reconsider. A disagreement with a result does not equate to an error in law or fact.

## 2) NO<sub>2</sub> Emissions Impacts

In its petition to reconsider, 2HT next asserts that the decision mistakenly assumes the project's nitrogen oxide (NO<sub>x</sub>)<sup>4</sup> emissions have been modeled with all 47 generators operating at once. (Petition to Reconsider, p. 5.) Again air quality issues, and NO<sub>x</sub> emissions in particular, were fully discussed during the multiple hearings and evidentiary filings.

The record establishes that for the 1-hour NO<sub>2</sub> NAAQS and CAAQS analyses for the emergency back-up generators, a typical operating scenario was modeled that includes one 4-hour load banking test that is conducted for *one generator at a time*, once annually, for maintenance and readiness testing. During this 4-hour test, the generator is ramped up in load. The first hour of testing is at 50 percent load, the second hour is at 75 percent load, and the last two hours are at 100 percent load. (Exhibit 23, p.5, Staff Issue Statement, p. 10.)

There is no language in the decision which is inconsistent with this modeling analysis. The decision includes a discussion of the annual NO<sub>x</sub> emissions based on testing and maintenance of the backup generators.

*The evidence establishes that at 50 hours of operation, the Backup Project would generate 40 tons of nitrogen oxide (NO<sub>x</sub>) annually; this exceeds the BAAQMD mass emissions threshold. Under BAAQMD's Rule 2-2-302, new sources that emit more than 10 tons per year (tpy) of NO<sub>x</sub> must fully offset emissions.*

---

<sup>4</sup> The petition to reconsider uses the nomenclature, NO<sub>2</sub>. For purposes of this response, the generic NO<sub>x</sub> (both (NO<sub>2</sub> and NO) is used, except when referring to the health based standards specific to NO<sub>2</sub>.

*To offset emissions, the Applicant intends to use BAAQMD's small facility bank; use of that bank would require the Backup Project's total NOx emissions be below 35 tpy. The significance thresholds in the BAAQMD CEQA guidelines for mass emissions of NOx are 10 tons per year, and 54 pounds on an average daily basis. In order to qualify for the small facility bank, the Draft Authority to Construct provided by the BAAQMD limits emissions from testing and maintenance from Backup Project to 35 tpy NOx by limiting the annual testing and operating hours to 43. Thus, the Backup Project's NOx emissions will be offset to zero on both an annual basis and an average daily basis. (Final Decision, p. 15.)*

The only time all generators might possibly be running at the same time would be if there was an emergency scenario. But as noted in the record, NOx emissions from emergency operation (and source testing) are exempt from permitting per Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines. (Staff Issue Statement, p. 10.) While the final decision considered the feasibility of modeling cumulative air quality impacts from emergency operations, i.e. all generators running simultaneously, the Commission agreed with staff when it found cumulative air quality impacts for emergency operations is speculative, as defined in CEQA Guidelines, section 15145, because of the number of unknown variables. (Final Decision, p. 15.)

Therefore, there is no inconsistency between the decision and the facts in the record and no error in law or fact. In addition, 2HT has not provided any new information in its petition to reconsider.

### 3) Public Participation

Finally, 2HT argues, as it did during the hearings, that the Commission failed to engage the general public and environmental justice community in the MBGF proceeding. There can be no error of law or fact as to public participation or engagement because information about public participation or engagement is not a component of a decision in an SPPE proceeding. (Cal. Code Regs., tit. 20, §§ 1720, 1946.) Nevertheless, the petition fails to acknowledge the public proceedings at both the City of Santa Clara and at the Commission. Prior to the Commission's proceeding, MBGF was publicly reviewed by the City of Santa Clara for over a year, and the Commission held two publicly noticed hearings in addition to complying with CEQA for the noticing of the Initial Study and proposed Mitigated Negative Declaration. (Cal. Code Regs., tit. 14, § 15072(b)(3).) The Public Adviser also conducted outreach to the local community prior to the evidentiary hearing. Therefore, the section of the petition for reconsideration covering public participation and engagement is neither new evidence nor shows an error in law or fact.

## V. CONCLUSION

The 2HT petition should be denied because section 1720 is only applicable to applications for certification and not SPPEs. In addition, a petition for reconsideration is not appropriate because the Commission is not permitting the MBGF. With the granting of the exemption, the project is now with the City of Santa Clara for permitting. Even if the Commission, under its general authority to manage a proceeding, chooses to consider the petition for reconsideration, it should be denied as the petition conflates disagreement with the findings and conclusions of the final decision with an error of law or fact. The petition failed to identify any new information or issue not already fully addressed during the evidentiary proceeding and therefore, does not meet the elements of section 1720.

Date: December 20, 2018

Respectfully submitted,

***Original signed by:***

---

JARED BABULA  
Attorney IV  
California Energy Commission  
1516 Ninth Street, MS-14  
Sacramento, CA 95814  
Ph: (916) 651-1462  
[Jared.Babula@energy.ca.gov](mailto:Jared.Babula@energy.ca.gov)