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STATE OF CALIFORNIA

Energy Resources  
Conservation and Development Commission

In the Matter of:

Application For Small Power Plant  
Exemption for the **WALSH BACKUP  
GENERATING FACILITY**

**DOCKET NO: 19-SPPE-2**

**651 WALSH PARTNERS, LLC'S  
OPENING BRIEFS**

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The record in this proceeding is robust and conclusively supports the findings required by Public Resources Code Section 25541 for granting the Walsh Backup Generating Facility (WBGF) a Small Power Plant Exemption. This brief will focus on the specific questions contained in the Committee Orders After Evidentiary Hearing And Second Revised Scheduling Order, dated June 9, 2020 and docketed on June 10, 2020.

**COMMITTEE QUESTIONS**

1. Page 5.8-15 of the Initial Study/Mitigated Negative Declaration states in pertinent part: "[T]he Cap-and-Trade Program, through the regulation of upstream electricity producers, would account for GHG emissions from the project and require emissions from covered sectors to be reduced by the amount needed to achieve AB 32's 2030 goal." How does the Cap-and-Trade Program apply, if at all, to the analysis under CEQA Guideline 15064.4, of the greenhouse gas emissions from the electricity consumption of the proposed project?
2. Explain whether the incremental contribution of the project's greenhouse gas emissions indirectly caused by the electricity consumption of the proposed project are significant.

To properly answer these questions, the following discuss provides the necessary context.

## LEGAL OVERVIEW

### GHG CEQA Framework

Section 15064.4 of the CEQA Guidelines outlines the general obligation and framework for a CEQA lead agency to evaluate GHG emissions. Specifically, it provides:

- (a) A lead agency shall make a good-faith effort, based to the extent possible on scientific and factual data, to **describe, calculate or estimate the amount** of greenhouse gas emissions resulting from a project. A lead agency shall have discretion to determine, in the context of a particular project, whether to:
  - (1) Quantify greenhouse gas emissions resulting from a project; and/or
  - (2) Rely on a qualitative analysis or performance based standards.
  
- (b) In determining the significance of a project's greenhouse gas emissions, the lead agency should focus its analysis on the reasonably foreseeable incremental contribution of the project's emissions to the effects of climate change. A project's incremental contribution may be cumulatively considerable even if it appears relatively small compared to statewide, national or global emissions. The agency's analysis should consider a timeframe that is appropriate for the project. **The agency's analysis also must reasonably reflect evolving** scientific knowledge and **state regulatory schemes**. A lead agency should consider the following factors, among others, when determining the significance of impacts from greenhouse gas emissions on the environment:
  - (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;
  - (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project.

- (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions (see, e.g., section 15183.5(b)). Such requirements must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project's incremental contribution of greenhouse gas emissions. If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project. ***In determining the significance of impacts, the lead agency may consider a project's consistency with the State's long-term climate goals or strategies, provided that substantial evidence supports the agency's analysis of how those goals or strategies address the project's incremental contribution to climate change and its conclusion that the project's incremental contribution is not cumulatively considerable. (Emphasis Added)***

The CEQA Guidelines generally address greenhouse gas emissions as a cumulative impact due to the global nature of climate change. (Pub. Resources Code, § 21083, subd. (b)(2).) As the California Supreme Court explained, "because of the global scale of climate change, any one project's contribution is unlikely to be significant by itself." (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497 at 512.). Thus, "[t]he question therefore becomes whether the project's incremental addition of greenhouse gases is 'cumulatively considerable' in light of the global problem, and thus significant." (*Cleveland National Forest Foundation San Diego Assn. of Governments*, 3 Cal.5th 497 at 512.) The court also stated that "***the analysis must keep apace with*** scientific knowledge and ***regulatory schemes.***" (*Cleveland National Forest Foundation v. San Diego Assn. of Governments*, 3 Cal.5th 497 at 519.)

### **CEQA Defines Types of Impacts**

CEQA directs agencies to evaluate not only the potential direct impacts from a project but also those that are an indirect result of the project. Specifically, Section 15064 (d) provides:

- (d) In evaluating the significance of the environmental effect of a project, the Lead Agency shall consider ***direct physical changes*** in the

environment which may be caused by the project and ***reasonably foreseeable indirect physical changes*** in the environment which may be ***caused by the project. (Emphasis added)***

- (1) A direct physical change in the environment is a physical change in the environment which is caused by and immediately related to the project. Examples of direct physical changes in the environment are the dust, noise, and traffic of heavy equipment that would result from construction of a sewage treatment plant and possible odors from operation of the plant.
- (2) An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment. For example, the construction of a new sewage treatment plant may facilitate population growth in the service area due to the increase in sewage treatment capacity and may lead to an increase in air pollution.
- (3) An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable.

In this case, and in accordance with the CEQA definitions, the GHG emissions from the WBGF generators, and from the construction activities of the WDC are directly emitted from the project and therefore are treated as ***direct physical changes in the environment***. It is undisputed in the record that the vast majority of the project's GHG emissions are not directly emitted from either the WBGF or the WDC. Rather the WDC's consumption of electricity results in the generation of electricity from a various combination of electrical generation assets owned, or contracted by Silicon Valley Power (SVP). Therefore, the vast majority of GHG emissions are treated as ***indirect physical changes in the environment***.<sup>1</sup>

### **GHG Significance Thresholds**

<sup>1</sup> Exhibit 1, page 106, Exhibit 200, pages 5.8-8 through 5.8-11.

The CEQA Guidelines define a “threshold of significance” as “an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.” (CEQA Guidelines, § 15064.7, subd. (a).) The selection and development of thresholds requires a lead agency to “make a policy decision in distinguishing between substantial and insubstantial adverse environmental impacts based, in part, on the setting.” (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614 at 625.)

A lead agency may choose to review a project’s environmental impacts using more than one threshold of significance. (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* 3 Cal.5th 497 at 507, where the court acknowledged that the EIR in question used three different significance thresholds)

Pursuant to the California Supreme Court’s decision in *Center for Biological Diversity v. Department of Fish & Wildlife*, 62 Cal.4th 204, a lead agency may use compliance with state goals as a threshold. A threshold need not be numeric.

### **CEQA GHG Impact Methodology Employed**

The SPPE Application and the IS/MND comply with all three directives in Section 15064.4 (b) while still treating the GHG emissions from the WBGF as direct impacts and the GHG emissions from electricity generation as indirect impacts of the WDC.

1. **Quantification of GHG Emissions:** The SPPE Application and the IS/MND quantify the direct and indirect GHG emissions to extent feasible.
  - a. Direct GHG emissions from the WBGF are quantified based on worst case maintenance and testing operations on an annual basis.<sup>2</sup>
  - b. The direct impacts from construction and demolition activities of the WDC are quantified and estimated on an annual basis.<sup>3</sup>
  - c. The worst case indirect GHG emissions associated with the WDC’s maximum electricity demand are quantified and estimated on an

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<sup>2</sup> Exhibit 1, SPPE Application, page 105, Exhibit 200, IS/MND, page 5.8-8.

<sup>3</sup> Exhibit 1, SPPE Application, page 105, Exhibit 200, IS/MND, page 5.8-7.

annual basis.<sup>4</sup> Since these emissions are not emitted from WBGF or WDC equipment, the SPPE Application and IS/MND make assumptions based on SVP's published power mix using its average CO<sub>2</sub>e per MWh.<sup>5</sup> Exhibit 30 demonstrates that SVP's carbon intensity factor is projected to continue its downward trend.

2. **Thresholds of Significance:** The only relevant quantitative threshold of significance for GHG emissions that is applicable to the project is the 10,000 metric tons CO<sub>2</sub>e per year<sup>6</sup> threshold for stationary sources established in BAAQMD's 2017 CEQA Guidelines, which applies only to the direct emissions of the WBGF. This threshold was established by BAAQMD to capture 95 percent of the stationary source sector GHG emissions in the Bay Area. Both the SPPE Application and the IS/MND use the BAAQMD CEQA significance threshold for evaluation the GHG emissions from the WBGF and correctly determine that the direct GHG emissions are below the threshold of significance<sup>7</sup>. No further analysis is required.

The BAAQMD CEQA Guidelines does not identify a GHG emission threshold for these short term construction-related emissions. Instead, BAAQMD recommends that GHG emissions from construction be quantified and disclosed, which was done. BAAQMD further recommends incorporation of Best Management Practices (BMPs) to reduce GHG emissions during construction, as feasible and applicable. WBGF is incorporating BMPs.<sup>8</sup>

It is undisputed in the record that there is no published numeric threshold of significance for indirect GHG emissions resulting from the generation of electricity to meet the WDC demands<sup>9</sup>. As explained by Mr. Lisenbee, using the BAAQMD Guidelines numeric threshold for land uses would be misplaced as it was created to meet 2020 goals and is also outdated.<sup>10</sup> Mr. Hilken of the Bay Area Air Quality Management District (BAAQMD) agreed that it was outdated and should not be used.<sup>11</sup>

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<sup>4</sup> Exhibit 1, SPPE Application, page 105, Exhibit 200, IS/MND, pages 5.8-8 through 5.8-10.

<sup>5</sup> Exhibit 1, page 105, Exhibit 200, page 5.8-9.

<sup>6</sup> Exhibit 25, Page 2-4.

<sup>7</sup> Exhibit 1, page 105, Exhibit 200, page 5.8-7.

<sup>8</sup> Exhibit 200 page 5.8-8.

<sup>9</sup> Exhibit 203, page 11, Exhibit 24, page 11.

<sup>10</sup> 5/27/20 RT 94-95

<sup>11</sup> 5/27/20 RT 98

3. Because there is no published threshold of significance for indirect GHG emissions from the generation of electricity to meet the WDC demands, both the SPPE Application and the IS/MND used the third method of analysis contained in Section 15064.4 (b) (3)<sup>12</sup> and sanctioned by the California Supreme Court in both *Center for Biological Diversity v. Department of Fish & Wildlife* 62 Cal.4th 204.
  - a. The first comparison performed by the SPPE Application and the IS/MND is to the Santa Clara Climate Action Plan (CAP). Both determine the WDC would comply with the GHG reduction measures outlined in the CAP. Because the CAP would not be applicable to the WDC because its measures expire in 2020, neither the IS/MND nor the SPPE Application used the CAP pursuant to CEQA Guidelines Section 15183.5.<sup>13</sup> The WDC has incorporated several energy efficiency measures to reduce its electricity consumption<sup>14</sup> and will have a PUE of 1.18 to 1.23<sup>15</sup>, significantly below the industry average.<sup>16</sup>
  - b. With respect to the indirect GHG emissions from SVP's generation and/or procurement of electricity to serve the WDC, the significance threshold is whether the project would comply with state goals. Since the GHG emissions from electricity are not generated by the WDC, the more appropriate threshold question is whether the WDC prevents SVP from complying with state laws, regulations, policies and plans to reduce its GHG emission profile of its power mix and meet the State's GHG reduction goals.

### **California's Electricity Goals**

The SPPE Application and the IS/MND correctly identified California's laws and policies addressing GHG emissions and methods and targets for reduction.<sup>17</sup> There is no evidence in the record that the IS/MND failed to identify a California law or policy that would be applicable to electricity generation. The IS/MND correctly identifies that it is Silicon Valley Power (SVP) that must comply with these applicable California laws and

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<sup>12</sup> Exhibit 1, page 106 through 110, Exhibit 200, pages 5.8-8 through 5.8-14.

<sup>13</sup> 5/27/20 RT 104-107.

<sup>14</sup> Exhibit 1, page 104.

<sup>15</sup> 5/27/20 RT 51.

<sup>16</sup> Exhibit 23, page 3.

<sup>17</sup> Exhibit 1, page 110, Exhibit 200, pages 5.8-2 through 5.8-5.

policies.<sup>18</sup> The IS/MND correctly identifies that SVP has met, and trends indicate that it will continue to meet, whatever GHG emission reductions and power mix goals are adopted and enforced by the State of California.<sup>19</sup>

At the evidentiary hearing, Mr. Kevin Kolnowski, Chief Operating Officer of SVP, explained how SVP was meeting its goals and identified the SVP 2018 Integrated Resource Plan (SVP 2018 IRP, Exhibit 28) as the document that outlined and proved it could in fact meet the goals for the electricity sector<sup>20</sup>. The 2018 SVP IRP demonstrates that SVP's GHG planning target is met for the year 2030.<sup>21</sup>

The SVP 2018 IRP identifies at page 1-1 that it has been prepared to meet a specific GHG emission planning target range allocated to SVP by the California Air Resources Board, pursuant to its authority under SB 350, codified as Public Utility Code 9621. Section 2.3.1 of the SVP 2018 IRP identifies in detail the specific California goals and state laws that it was developed to meet and comply with. Specifically outlined is the 2030 GHG reduction target which CARB developed to ensure that SVP achieved GHG emission reductions to support the electricity's sector allocation of meeting the State goal of reducing GHG emissions in California to levels that are 40 percent below those in 1990. The SVP 2018 IRP describes that the CEC reviews it to ensure it complies with applicable law and that it must be updated and submitted to the CEC every five years.

Section 4 of the SVP 2018 IRP outlines how SVP forecasts its electricity demand and describes that it works closely with large data centers customers to routinely adjust its load forecasting. Mr. Kolnowski discussed this at the evidentiary hearing.<sup>22</sup>

To summarize, the State of California has adopted specific GHG numeric targets for SVP to ensure that GHG emissions are reduced by 2030 to 40 percent below 1990 levels. That level is set to ensure California is doing its part to combat warming of the planet in excess of 2 degree Celsius. The State of California then requires SVP to prepare a IRP on how it will meet those targets, and requires the CEC to review and approve the IRP every 5 years. SVP has prepared such a plan, the CEC has reviewed it and it shows that SVP can meet those targets on what it currently has procured. Mr. Kolnowski testified that the WDC would not prevent SVP from meeting the GHG goals

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<sup>18</sup> Exhibit 200, page 5.8-2 through 5.8-5.

<sup>19</sup> Exhibit 200, pages 5.8-8 and 5.8-9.

<sup>20</sup> 5/27/20 RT 22-25.

<sup>21</sup> Exhibit 28, pages 2-9 and 8-10.

<sup>22</sup> 5/27/20 RT 42-45.

and policies outlined in the 2018 SVP IRP, the same conclusion reached by Staff in the IS/MND.<sup>23</sup>

Mr. Sarvey simply disagrees. Mr. Sarvey's resume certainly does not demonstrate he is qualified to understand or perform electricity forecasting, electricity infrastructure planning, or electricity procurement. He is allowed to disagree, but he is simply not qualified as an expert in the field such that his opinion should be given any weight. Giving any weight to Mr. Sarvey's opinion would require a determination that Mr. Kolnowski and his SVP Staff are wrong, the CEC Staff who wrote the IS/MND are wrong, and the CEC Staff who approved the IRP are wrong. That simply is an untenable conclusion.

### **CONCLUSION**

The answer to Question 1 is that as identified in the 2018 SVP IRP, the cap and trade program is one of the tools available for a utility to meet its GHG reduction goals.<sup>24</sup>

The answer to Question 2 is the WDC's indirect GHG emissions from its consumption of electricity are not significant. They cannot be deemed to be significant under CEQA because the WDC will not prevent or interfere with SVP meeting the very goals determined to be necessary by CARB to prevent further warming of the planet using methods outlined in its SVP and approved by the CEC pursuant to the IRP iterative process.

Dated: June 12, 2020

Respectfully Submitted,



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<sup>23</sup> 5/27/20 RT 25-26; 5/27/20 RT 40-41.

<sup>24</sup> Exhibit 28, page 2-15.