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STATE OF CALIFORNIA
STATE ENERGY RESOURCES
CONSERVATIONAND DEVELOPMENT COMMISSION

APPLICATION FOR SMALL POWER PLANT EXEMPTION FOR THE:

GREAT OAKS SOUTH BACKUP GENERATING FACILITY

Docket No. 20-SPPE-01

Staff's September 10, 2020 Status Report

On August 31, 2020 the California Energy Commission (CEC) Committee assigned to oversee the Great Oaks South Backup Generating Facility Small Power Plant Exemption Proceeding[1] issued a Notice of Committee Conference and Related Orders, which ordered the parties in their September 10, 2020, status reports "to identify the specific facts or law underlying the recommendation to prepare an EIR and identify the additional analyses that will be included in the EIR to assist the Commission in rendering a decision on the Application." Energy Commission staff hopes the Committee finds the following discussion of the thinking underlying the recommendation helpful and looks forward to further discussion of these matters at the September 23, 2020, Committee Conference.

The Facts and Law Underlying Staff's Recommendation to Prepare an EIR

The Warren-Alquist Act (WAA) allows the CEC to grant an exemption to an otherwise jurisdictional facility between 50 and 100 megawatts if it finds that "no substantial adverse impact on the environment or energy resources will result from the construction or operation of the proposed facility or from the modifications."[2] The WAA also designates the CEC as the lead agency under the California Environmental Quality Act (CEQA) for these proceedings.[3] The CEC produces a document in conformance with CEQA for this purpose. Notably, the WAA does not specify what environmental document should or must be produced to satisfy the CEC's review obligations and arrive at the necessary findings for exemption.

[1] On May 13, 2020, the CEC appointed a Committee consisting of Karen Douglas, Commissioner and Presiding Member, and David Hochschild, Chair and Associate Member, to preside over this SPPE Application. (TN 233123.)
[2] Pub. Resources Code, §25541.
[3] Pub. Resources Code, §25519, sub. (c).

With the exception of Certified Regulatory Programs[4], CEQA requires an agency to analyze a project's potential impacts by first conducting an Initial Study and, based on the information gleaned there, then determining which of the following three different types of documents is appropriate for completing the review: a negative declaration, a mitigated negative declaration, or an environmental impact report.[5] Negative Declarations (ND) are issued when an initial study shows no substantial evidence, or reasonable inferences therefrom, that the project may produce significant, adverse impacts.[6] Mitigated Negative Declarations (MNDs) may be used where an initial study shows substantial evidence that significant environmental effects might occur, but the project proponent agrees to modify the project so as to eliminate all such possible significant impacts or to reduce them to a level of insignificance and "there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment."[7] An EIR is required whenever substantial evidence in the record supports a fair argument that significant impacts may occur.[8, 9] This fair argument standard creates a "low threshold" for requiring an EIR, reflecting the legislative preference for resolving doubts in favor of environmental review.[10,11] In general, there is a fair amount of overlap between the circumstances supporting an MND and those supporting preparation of an EIR and, to staff's knowledge, no court has struck down use of an EIR because it determined an MND was more appropriate.[12] This overlap presents a grey area (between a project with no impacts fitting squarely into an ND, and a project showing unmitigable impacts fitting squarely into an EIR) where there are significant, adverse impacts, but the agency believes they are mitigable. Projects in this area present a decision-point for an agency: produce a quick MND in the hopes no substantial evidence will be produced showing an impact not considered or mitigated, or produce a more thorough EIR, gaining a more resilient document for the extra time and effort required.

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[4] While the Energy Commission's Application for Certification process is a Certified Regulatory Program, its Small Power Plant Exemption process is not.

[5] See generally, Pub. Resources Code §21080, subs. (c) and (d) and Cal. Code Regs., tit. 14, §15064, subd. (f).

[6] Title 14, Cal. Code Regs., §15064, subd. (f)(3).

[7] See Pub. Resources Code, §21064.5 and Cal. Code Regs., tit. 14, §15382.

[8] Pub. Resources Code, §21080, subd. (d) and Cal. Code Regs., tit. 14, §15064, subd. (f)(1) [incorporating *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75].

[9] In a recent decision, *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019), 7 Cal.5th 1171, at pp. 1186-1187, the Supreme Court appears to add another provision ("and a mitigated negative declaration is inappropriate") to the statutory and regulatory language specifying when an EIR is required. The import of this addition is unclear. Staff assumes this language is intended to address those situations where an MND and an EIR may equally be appropriate, clearly giving the agency discretion on which to choose, but the court does not elaborate.

[10] "Environmental Review" in this context meaning an EIR.

[11] *Save the Agoura Cornell Knoll v. City of Agoura Hills*, 46 Cal.App.5th 665, 676.

[12] In fact, courts are predominantly more likely to strike down the use of an MND, finding that an EIR was instead required.

While the CEC has traditionally produced MNDs for SPPE proceedings, as mentioned above, the WAA does not designate that particular document be prepared and nothing in the WAA prevents the CEC from issuing an EIR in an exemption proceeding instead, so long as the necessary findings supporting an exemption can be made. Nor does the production of an EIR necessarily mean a project's impacts cannot be mitigated, as EIRs are not limited to only those situations where an agency has concluded that significant, adverse impacts cannot be adequately mitigated.[13]

Since neither statute necessarily dictates one document over the other, staff decided to consider whether it made sense, at least in some circumstances, to produce an EIR as part of the exemption process. The following discussion outlines the factors staff considered in reaching its recommendation in this proceeding.

Staff already conducts an EIR-level analysis

As discussed in staff's Status and Issues Identification Update[14], staff already conducts an EIR-level analysis of every technical area. Thus, no extra time would be needed to upgrade the quality or depth of the analysis. It is important here to emphasize that, at this time, barring some unforeseen information, staff expects all of the project's impacts to be reduced to less than significant, though information is still being collected, and it remains to be seen what information the California Air Resource Board (CARB) and perhaps the Bay Area Air Quality Management District (BAAQMD) intends to provide in these proceedings. At this stage though, staff's recommendation to produce an EIR, is not a proclamation that significant, adverse unmitigable impacts are expected and the project may not be suitable for an exemption. Were that the case, staff would instead recommend a status conference or similar hearing to consider potential mechanisms for transitioning to an Application for Certification proceeding. As discussed below, there are reasons other than concern about unmitigable impact that support the concept of producing an EIR for an SPPE proceeding.

Because the CEC Conducts Evidentiary Hearings After Staff's Draft Document is Produced, Substantial Evidence Constituting Fair Argument of a Significant Impact May Be Presented After the Type of Document is Decided Upon and Produced

The majority of agencies that are required to comply with CEQA do so without appending evidentiary hearings. These agencies would, as a single entity, conduct an Initial Study, review the record, and based on that determine whether an MND or EIR is most appropriate, issue that environmental document, and then make a decision on the project after considering comments. The process at the CEC is more drawn out. First, the CEC does not act as one, but instead functions as two discrete entities with different responsibilities

[13] See, e.g., Cal. Code Regs., tit. 14, §15093 [describing when a statement of overriding considerations is required as part of adopting an EIR, indicating that some EIRs will not require one because all identified impacts have been mitigated].

[14] Status and Issues Identification Update and Updated Staff Proposed Schedule for the Great Oaks South Backup Generating Facility Small Power Plant Exemption (20-SPPE-01), August 7, 2020 (TN 234271).

over the review at different times: staff, who conducts the initial data gathering and analysis, producing a draft document for public comment, and the Committee (and ultimately Commission), who conducts evidentiary hearings subsequent to the release of the draft document to review staff's analysis, public comment, and other parties' testimony, among other things, and reaches a conclusion on whether impacts have been sufficiently mitigated and whether an exemption should be issued. This bifurcation makes the process a little less nimble than it otherwise would be and creates a second forum after the document is produced and commented on that invites more information to be added to the record.

Thus, an important piece of information that would tip the balance in favor of producing an EIR, *a fair argument based on substantial evidence that the project may result in a significant, adverse impact*, may not appear in the record until after a draft MND was already issued.[15] If this were to happen, the process would need to start over again, with the issuance of a Notice of Preparation (NOP), a waiting period of 30 days before a draft EIR could be issued (with the inclusion of an alternatives analysis), a waiting period of 45 days for comments on the draft, and the potential need to hold additional evidentiary hearings if the comments raised issues or presented evidence not previously considered or in the record.

This is a particular risk where opposition to the proposed project has materialized, as is the case here. As the docket shows, several residents have already expressed opposition to, and concern with, the project as proposed. It is conceivable that at some point one or more of the commentators may choose to intervene and may present an expert witness to testify that there is the potential for the project to result in a significant adverse impact. Or, indeed, such residents could present lay opinion via public comment about an impact that a court could conclude rises to the level of substantial evidence. Or, as the CEC experienced recently, agencies may provide comments late in the process, including new comments at the adoption hearing. In such situations, even if staff has presented substantial evidence proving that no impact would occur, and even if the Committee were persuaded by staff's evidence of no impact, the Committee would not legally be able to weigh the evidence and proceed with the exemption. It could, as it has before, conclude that the testimony provided does not constitute substantial evidence, but once something is provided that meets this low bar, the Committee would have to require the production of an EIR to allow it to weigh the competing evidence in order to ultimately approve the exemption.[16]

By producing an EIR from the beginning, staff provides the Committee, and the Commission, with flexibility to weigh and address evidence provided at the evidentiary

[15] And, in fact, this information may come in as late as the adoption hearing for the proposed decision and still potentially require a change in course.
[16] Presumably, though, should the CEC decide to deny an exemption it could do so without finalizing a CEQA document.

hearing and comment provided on the Committee's proposed decision and at the adoption hearing.[17] Otherwise, the evidentiary hearing provided for in the SPPE proceeding can only be used to accept non-conflicting testimony and determine whether any conflicting opinion provided fails to meet the substantial evidence threshold. It is becoming increasingly clear that this flexibility may prove to be important: data centers with diesel backup generating facilities are seemingly becoming more controversial. There may ultimately be tough choices the Commission may have to make in deciding whether to exempt these facilities, and having an EIR produced in the first instance to help support those choices would make the process easier overall.

If the Commission Determines a Project's Impacts Preclude an Exemption, Transitioning to an Application For Certification Proceeding with a Draft EIR May Be More Efficient

While not at the forefront of staff's consideration in the recommendation, it is worth noting that producing an EIR instead of an MND in a situation where an exemption is ultimately determined to not be available may help speed review in a subsequent Application for Certification proceeding. While the CEC is a certified regulatory agency and not obligated to produce an EIR, having all the elements that would otherwise go into staff's EIR-equivalent document, including a robust alternatives analysis, could result in some time-saving.

The Additional Analyses That Will Be Included In The EIR To Assist The Commission In Rendering A Decision On The Application

An EIR differs from an MND in two main respects: process and substance. For full consideration of the implications of producing an EIR in lieu of an MND, staff addresses each below.

Few Substantive Additions Would Be Required for An EIR, With Minimal Additional Time and Resources Needed

Substantively, there are few distinctions between the content of an MND and an EIR, especially considering staff's already robust approach to analyzing impacts, regardless of environmental document used. As discussed in our updated status report, staff already performs an EIR-level analysis, so the individual technical sections would not require more time or work than already occurs. Generally, CEQA requires an initial study to identify those technical areas requiring additional review, with the EIR focusing on those identified areas. Staff uses the Initial Study to conduct a comprehensive review in the first instance, basically providing an EIR-level analysis within the Initial Study itself.

The most significant difference between the documents as produced by staff, then, would be the addition of an alternatives analysis, a required element in an EIR. This Committee

[17] The triggers requiring recirculation of these documents are also different, with a much lower bar for MNDs than EIRs. If the Commission wanted to add a mitigation measure to address concerns expressed at the evidentiary hearing after publication of these documents, there is less of a chance it would have to recirculate an EIR than it would an MND. See Cal. Code Regs., tit 14, §15073.5 [recirculation of MNDs] and §15088.5 [recirculation of EIRs].

inquired about the availability of alternative technologies to the proposed backup generators at the last status conference, which staff intends to address more fully in the analysis, regardless of what document is produced.[18, 19] All other additional requirements are effectively minor and already part of staff's MND analysis, including, where applicable, cumulative impacts, growth-inducing impacts, mitigation measures, and CEQA Guidelines Appendix F's discussion of Energy Conservation (which is considered by staff in its analysis of impacts to energy resources required by the WAA).

Extra Process Requirements for an EIR on this Would Be Minimal, With Little Relative Effect on this Schedule

On the process front, a few extra steps would be required. A Notice of Preparation (NOP) would be required to be issued, mainly for the purpose of notifying other agencies and providing them an opportunity to comment. The EIR may not be published until 30 days after the NOP has issued. An agency may also hold a scoping meeting (at any time prior to release of the EIR), which is optional unless the project is deemed of Statewide, Regional, or Areawide Significance under section 15206 of the CEQA Guidelines.[20] A few minor extra requirements are involved in how and where the EIR is published (including the requirement for a Notice of Completion filed with the Office of Planning and Research), and, as mentioned above, an EIR is subject to a 45-day public comment period, as opposed to the 30-day public comment period attached to an MND. With an EIR, comments submitted by public agencies must be responded to 10 days prior to certification of the EIR and must be included in the final EIR.[21] While this is technically different from the MND, which has no similar requirement under CEQA, in practice staff has already been doing this at the direction of the overseeing Committees.[22]

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[18] Transcript of July 13, 2020 Committee Conference, pp. 51-52 (TN 233988).

[19] Recent comments by CARB and BAAQMD at the Sequoia hearing also highlight these agencies' interest in exploring alternatives to the diesel generators proposed to be used, further supporting staff's inclination to expand on its investigation of feasible options, though, despite these agencies' optimistic statements, staff has so far seen little evidence that a viable technology alternative exists that meets the reliability requirements of the project owners. Renewable diesel seems promising, but does not avoid all of the potential criteria pollutant emissions that remain of concern to these agencies. Staff looks forward to continued input from these agencies and stakeholders on alternative options.

[20] At this point, staff recommends erring on the side of caution and holding a scoping meeting, though whether a project qualifies as a Project of Statewide, Regional, or Areawide Significance could be determined on a case by case basis.

[21] The proposed schedule published on August 7, 2020 (TN 234271) contained one inadvertent error that staff would like to correct here. Between the Evidentiary Hearing and the Committee Proposed Decision it indicated staff would publish the Final EIR. This is incorrect. The Final EIR would be prepared prior to approval, but it seems more reasonable for it to be produced by the Committee as their proposed decision. See, Cal. Code Regs., tit. 14, §15089 and §15132.

[22] A few additional requirements that are slightly different than for an MND would also apply when the Commission adopts a final EIR, including certification of the document, particular findings that are required, the contents of the Notice of Determination, and how the FEIR is made available to the public and responsible agencies. See, e.g., Cal. Code Regs., tit. 14, §§15090, 15091, 15094, and 15095.

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Conclusion

Staff weighed several factors in recommending that it produce an EIR for the Great Oaks South exemption proceeding, including the minimal extra work and time required, the interest seemingly expressed by the Committee in seeing an alternatives analysis, and the potential opposition to the project and the concomitant risk that substantial evidence may be produced at some point in the proceeding ultimately necessitating an EIR. For the reasons discussed above, it is staff's opinion that all these factors weigh in favor of producing an EIR.

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Respectfully submitted,

Approved by:

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