

DOCKETED

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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 **GREAT OAKS
SOUTH BACKUP GENERATING
FACILITY**

DOCKET NO: 20-SPPE-1

SV1 STATUS REPORT NUMBER 1

SV1, in accordance with the Notice of Committee Conference and Related Orders (TN 234539), dated, August 31, 2020 (“Committee Orders”), hereby files this Status Report Number 1. The Committee Orders requested the parties address in Status Report Number 1 Staff’s suggestion that the appropriate California Environmental Quality Act (CEQA) environmental document for the Great Oaks South Backup Generation Facility (GOSBGF) be an Environmental Impact Report (EIR) instead of an Initial Study/Mitigated Negative Declaration (IS/MND). Staff suggested this approach in its Issue Identification Update dated August 7, 2020 (TN 234271). SV1 disagrees that the GOSBGF and GOSDC would require preparation of an EIR and urges the Committee to instruct Staff to prepare an IS/MND in the same manner that it has for the prior four approved data center SPPE Applications.

An agency has discretion to decide what type of environmental document to prepare to comply with CEQA. CEQA guidance is clear that a Mitigated Negative Declaration (MND) can be prepared when after preparation of an Initial Study (IS) the agency finds that the IS demonstrates with substantial evidence that the impacts from the proposed project are less than significant with the incorporation of measures by the project

proponent.¹ An EIR should be prepared whenever substantial evidence in the record supports a fair argument that significant impacts may occur.² Staff's suggested approach is not illegal, but it is clearly unwarranted. Staff's primary reason for suggesting an EIR should be prepared is to be precautionary and not because it anticipates any unmitigatable impacts. Staff's reasoning is that ***in the future*** some person ***may make an argument that could rise to level meeting the fair argument standard***. If Staff's approach were followed judiciously and routinely, every agency would choose to prepare an EIR because a potential fair argument may be made in the future. Applying this precautionary principle in every case would result agencies never electing to prepare an IS/MND rendering the CEQA IS/MND provisions irrelevant. All of the issues raised by the public to date have already been thoroughly addressed in the prior IS/MND and the SPPE Application, and will be addressed by Staff in its environmental analysis, whether that document be an EIR or an IS/MND.

Staff fails to give appropriate weight to a critical fact that distinguishes the GOSBGF and GOSDC from some of the other data center projects that either received or are in the process of requesting a SPPE from the Commission. The GOSDC was already approved pursuant an IS/MND by the City of San Jose on February 1, 2017. The adopted IS/MND formed the basis for the SPPE Application, with the SPPE Application incorporating each and every mitigation measure contained in the IS/MND Mitigation Monitoring Reporting Plan (MMRP), with modifications to a few mitigation measures to incorporate the specific language that Staff prefers.

If the requirement for a CEC SPPE did not exist, the City of San Jose would be processing the changes proposed by SV1 to the Approved Project through preparation of an Addendum to the prior 2017 IS/MND. This is the process followed by most Cities and Counties to avoid duplicative work using CEQA's recommendations for tiering using prior environmental analysis. This tiering is clearly reflected in the Commission's own regulations. Specifically Section 1943 of the Commission Regulations pertaining to the evidence that should be entered into the record during the SPPE Evidentiary Hearing states:

All testimony together with any other relevant documentary evidence, ***such as any environmental impact documentation or other environmental document prepared by the lead agency***, may be offered

¹ Public Resources Code Section (PRC) 21064.5; California Code of Regulations (CCR) Title 14, Section 15382.

² PRC Section 21080 (d) and CCR Title 14, Section 15064 (f)(1)

by any party and shall be filed with the Docket Unit no later than 7 days prior to the hearing at which such testimony is to be offered, or at such other time as ordered by the presiding member. **(Emphasis Added.)**³

Notwithstanding the fact that the Commission is the lead agency for a SPPE, Section 1943 specifically contemplates that a lead agency (other than the Commission) may have prepared a prior environmental document that should be used and relied upon by the Commission in its evidentiary record. Therefore, Staff should begin with the prior environmental document prepared by the City of San Jose, which includes an IS and an MND. Then Staff should look to the modified mitigation incorporated into the design of the project by SV1 in the SPPE Application to determine whether the GOSBGF and the GOSDC could potentially result in significant environmental impacts.

The Staff should be performing the analysis that the City would perform if an SPPE were not required. The only impacts that have not yet been incorporated into a CEQA environmental document are those that result from the modifications of the original approved project as identified in the SPPE Application and subsequent changes.

The original approved configuration of the GOSDC consisted of three, two-story buildings each encompassing 191,000 gross square feet (gsf), for a total of approximately 573,000 gsf. The data center buildings were originally designated SV-12, SV-13 and SV-14. Each of the data center buildings was originally planned to be served by seven (six primary plus one redundant) backup diesel fired generators, each with peak capacity rating of 3 MW.

The revised GOSDC and GOSBGF currently before the Commission optimizes the building layouts and now proposes that the GOSDC consist of three two-story buildings encompassing a total building square footage of roughly 547,050 gsf and total electrical load at full buildout not to exceed 99.0 MW. The reconfigured GOSDC will be constructed in three phases and the designations for Buildings SV-14 and SV-13 will now be SV-18 and SV-19, respectively. Backup generation has been increased from 21 to 36 3.25-MW and three 0.5-MW generators to serve the additional electrical load and will be served by the GOSBGF.

³ CCR Title 20, Section 1943

The Commission should give great weight to the fact that:

- The approved project and the revised project are on the same land.
- The approved project and the revised project will receive electric service from the Santa Teresa Substation, which was included in the City's prior IS/MND and approved by the California Public Utility Commission and currently under construction.
- The total square footage of the three buildings has been reduced by approximately 8600 square feet per building.
- The revised project has eliminated evaporative cooling reducing total water use from approximately 1300 AFY to approximately 4 AFY.
- The revised project will replace the approved (21) 3 MW generators with (36) 3.25 MW generators.
- The revised project will add (3) 0.50 MW emergency generators, 1 per building
- The revised project will relocate the generators and associated electric equipment, each serving its respective data center building.
- The revised project has incorporated diesel particulate filters on the new generators, although not required by the Bay Area Air Quality Management Best Available Control Technology rules, to further reduce emissions whereas the approved project did not incorporate them.

Staff has reviewed the analysis of these changes and issued data requests to further understand and quantify any potential environmental impacts. The primary changes to impacts relate to air quality and SV1 has revised its air quality and public health analysis twice in accordance with Staff direction. SV1 has committed to running only one generator at a time for testing and maintenance activities and incorporated emission control technology to reduce emissions. All of the potential air quality and public health impacts are less than significant using extremely conservative analytical methodologies. Water use has been reduced over 99 percent over the Approved Project. Potential noise impacts from the new generators and revised cooling technology were evaluated demonstrating that all potential impacts meet City of San Jose requirements and will not result in significant noise impacts to residences and other nearby receptors. The revised project will result in similar or less potential environmental impacts than the Approved Project, which relied on an IS/MND and not an EIR.

Staff has more than enough information relating to the changes to the revised project and the prior IS/MND to conclude that the GOSDC and GOSBGF is not likely to result in

significant impacts. Staff concedes that it is not recommending an EIR be performed because it anticipates significant unmitigated impacts.

It is true that members of the public have commented on the project. Based on prior experience with Staff's work on prior data center SPPE Applications, SV1 is confident that those comments will be addressed thoroughly in the IS/MND that Staff will publish. As Staff has stated in prior filings, the scope of its analysis is nearly the same regarding the issues raised by the public whether it does an EIR or an IS/MND. The only exception would be the noticing period, a Notice of Preparation, and inclusion of an analysis of alternatives which are addressed below.

Noticing

As Staff explains, the public comment period for an EIR is 15 days longer than the period for an IS/MND. With respect to Commission proceedings that include evidentiary hearings which allow public comment and the additional public comment period on a proposed decision, this difference in the amount of time to comment on the EIR is essentially immaterial because the public will have significantly more time and opportunity than the 45 days provided by CEQA Guidelines. The public will have ample opportunity to provide input the Commission about its concerns relating to the Commission's decision. Whether the Commission prepares an EIR or an IS/MND, the Commission regulations provide more opportunities for the public to comment in the Commission process than in the processes employed by local jurisdictions.

Notice of Preparation

If the Commission authorizes Staff to prepare an EIR, it would be required to prepare a Notice of Preparation (NOP) and wait 30 days for public comment on the scope of the issues to include in an EIR. Staff has already decided to address **every** potential topic in its IS/MND and the public has already had opportunity to voice its concerns at the prior Informational Hearing and Status Conference held on July 13, 2020, and will have the opportunity to do so again at the Status Conference scheduled for September 23, 2020. In addition, the public has been allowed to docket comments through the help of the Public Advisor at any time and has done so. The public comment raised to date request the same issues be studied and evaluated in the IS/MND that Staff is already addressing and are the types of comments that would be received by publishing a NOP. Preparing a NOP would simply be duplicative to the notices and public hearing already

conducted by the Staff and the Committee, and would not yield input not already being addressed by Staff. The NOP would simply cause delay.

Alternatives Analysis

The subject of alternatives has come up in prior proceedings and has been addressed through incorporating documentary and oral testimony at evidentiary hearings. In response to concerns relating to alternatives, SV1 included an analysis of alternative backup generation technologies in Chapter 5 of its SPPE Application even though such information is not legally or technically required. In response to public comment, SV1 revised Chapter 5 to include additional technology and alternative fuels and include alternatives to the data center project as well. The revised Chapter 5 was docketed on August 25, 2020 (TN234485). Nothing prevents Staff from performing its own alternatives analysis to provide information to the public and to the Committee. However, CEQA is clear that alternatives to the project are selected only if the project results in unacceptable and significant unmitigatable environmental impacts. As demonstrated in the combined analysis of the prior IS/MND and the supporting analyses contained in the SPPE Application and data responses, the GOSBGF and GOSDC will not result in significant unmitigatable environmental impacts. We are confident that Staff will come to the same conclusion.

CONCLUSION

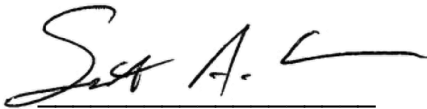
An EIR is not warranted for evaluation of the GOSBG and GOSDC and, as Staff concedes, an EIR will not provide any additional analysis of environmental impacts than would be included in its IS/MND. CEQA encourages applicants to design their projects with mitigation in mind in the exact matter SV1 employed. Hence, a project proponent who designs a project with mitigation incorporated to ensure impacts are reduced to less than significant levels, qualifies for the slightly more efficient IS/MND process. In this case the agency that will ultimately decide whether the project can be constructed and operated is the City of San Jose, which already has a good understanding of the site and the issues surrounding a data center like the GOSDC.

We request that Staff be ordered to prepare an IS/MND and publish it in accordance with the prior schedule, which provided a publication date of 30 days after Staff has received complete answers to its data requests. At this time, SV1 believes that Staff has received all of the answers to its data requests, except for the information it is

seeking from PG&E. A conference call with PG&E to clarify its written responses to Staff's questions is scheduled for September 11, 2020.

Dated: September 10, 2020

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Scott A. Galati", written over a horizontal line.

Scott A. Galati
Counsel to SV1