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**STATE OF CALIFORNIA  
STATE ENERGY RESOURCES  
CONSERVATION AND DEVELOPMENT COMMISSION**

**IN THE MATTER OF:**

**Docket No. 19-SPPE-04**

**SAN JOSE CITY BACKUP  
GENERATING FACILITY**

**STAFF'S PREHEARING CONFERENCE STATEMENT, EXHIBIT AND WITNESS  
LISTS, AND RESPONSE TO COMMITTEE QUESTIONS**

**I. STAFF'S PREHEARING CONFERENCE STATEMENT AND WITNESS AND  
EXHIBIT LISTS**

On April 29, 2022, the Committee for the San Jose City Backup Generating Facility Small Power Plant Exemption filed a *Notice of Prehearing Conference and Evidentiary Hearing, Revised Scheduling Order, and Further Orders* (Order). This document set May 12, 2022, as the deadline for the California Energy Commission Staff (Staff) to file a Prehearing Conference Statement, including evidence lists, witness lists and responses to Committee questions, in accordance with specific guidance outlined in that Order.

**1. The subject areas that are complete and ready to proceed to Evidentiary Hearing.**

All subject areas are complete and ready to proceed to the Evidentiary Hearing.

**2. The subject areas upon which any party proposes to introduce testimony in writing rather than through oral testimony.**

Staff proposes that all subject areas be covered by written testimony and that oral testimony be limited to responding to questions from the Committee. Staff will be relying on the following filed testimony covering all subject areas: The Final Environmental Impact Report (FEIR) Parts 1 and 2, the addendum to the FEIR, the mitigation monitoring and reporting program, and Staff's declarations and resumes.

**3. The subject areas that are not complete and not yet ready to proceed to Evidentiary Hearing and the reasons therefor.**

All subject areas are complete and ready to proceed to the Evidentiary Hearing.

**4. The subject areas that remain disputed and require adjudication, the issues in dispute, and the precise nature of the dispute for each issue.**

Staff is aware of no areas in dispute between Staff and the applicant. Intervenor *California Unions for Reliable Energy* has not filed any testimony or comments on the staff's EIR and has indicated they are no longer participating.

Intervenor Robert Sarvey filed a document titled "Robert Sarvey's Testimony", in which he questions whether the applicant's natural gas backup generators qualify to participate in the Pacific Gas and Electric (PG&E) Base Interruptible Program (BIP). This is a matter for the applicant to resolve with PG&E based on requirements set forth by the California Public Utilities Commission (CPUC). Resolution of this issue is not relevant to the findings and conclusions of the FEIR and does not require adjudication. The environmental analysis included emissions data relative to applicant's potential participation in the BIP, which were not found to be significant. This less than significant finding is true even in the event that applicant operated well beyond the typical hours called for under the BIP. If the applicant is unable to participate in the BIP or can participate, but is never called, the hours of operation and emissions from the backup generators will be even lower. (See FEIR Part 2, pp. 7-58 to 7-59.)

**5. The identity of each witness the party intends to sponsor at the Evidentiary Hearing, the subject area(s) about which the witness(es) will offer testimony, whether the testimony will be oral or in writing, a brief summary of the testimony to be offered by the witness(es), qualifications of each witness, the time required to present testimony by each witness, and whether the witness seeks to testify telephonically.**

Because there is no disputed issue relevant to the FEIR, Staff intends to offer written testimony through declarations filed in the proceeding's docket and does not intend to offer any additional oral testimony unless the Committee has specific questions. In the event the Committee has questions, Staff witnesses intend to appear in person; however, telephonic/Zoom appearances may be necessary for some staff. For Staff's qualifications, please see Staff's declarations and resumes in Exhibit 204 (TN 242605).

BIP is a program administered by PG&E and regulated by the CPUC. Intervenor Sarvey may seek to cross examine the CEC Staff regarding whether the backup generators are eligible for the BIP. The issue of eligibility for BIP is a legal issue based on the program requirements and regulations. The CEC Staff do not administer this program and do not possess sufficient expertise to testify on the

subject. Because the CEC Staff are not qualified to testify about the PG&E BIP program, Staff will not be able to testify on the matter. Further, the issue is not relevant to a determination on whether to certify the FEIR or reach a decision on the small powerplant exemption application.

- 6. Subject areas upon which the party desires to question the other parties' witness(es), a summary of the scope of the questions (including questions regarding witness qualifications), the issue(s) to which the questions pertain, and the time desired to question each witness. (Note: a party who fails to provide, with specificity, the scope, relevance, and time for questioning other parties' witness(es) risks preclusion from questioning witnesses on that subject area).**

None identified at this time; however, Staff reserves its right to question witnesses on any relevant topic raised at the hearing by any other party.

- 7. A list identifying exhibits with transaction numbers (TN) that the party intends to offer into evidence during the Evidentiary Hearing and the technical subject areas to which they apply (see below for further details on Exhibit Lists).**

**STAFF'S PROPOSED EXHIBIT LIST**

<b>Exhibit Number</b>	<b>TN</b>	<b>Title</b>	<b>Subject Area(s)</b>
200	241977-1	San Jose Data Center Final EIR Part 1	All
201	241977-2	San Jose Data Center Final EIR Part 2	All
202	242489	Addendum to the Final Environmental Impact Report Part 1 for the San Jose Data Center SPPE Proceeding	Hazardous Materials
203	242492	San Jose Data Center Mitigation Monitoring and Reporting Program	All
204	242605	Staff's Opening Testimony with Declarations and Resumes for the San Jose Data Center SPPE Proceeding	All
205	242932	City of San Jose Concurrence to MMRP for San Jose Data Center EIR	All

206	TBD	Attachment A to Staff's Prehearing Conference Statement	Air Quality/Biological Resources
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**8. Proposals for briefing deadlines or other scheduling matters.**

Staff proposes to continue following the most recent Committee-adopted schedule. Because no legal issues have arisen which would be appropriate for briefing, Staff does not propose briefing deadlines at this time.

Attached as Appendix A are Staff's responses to the Committee's questions.

Date: May 12, 2022,

Respectfully submitted,

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Jared Babula  
Counsel for Staff  
California Energy Commission

## Attachment A

### 1. Air Quality:

- a. On page 4.3-33 of the FEIR, CEC Staff discuss the anticipated cumulative contributions from particulate matter. The FEIR states that both the modeled 24-hour and annual PM10 concentrations would exceed the applicable significant impact levels (SILs). The FEIR then predicts PM10 concentration at the fence line and states that the 24-hour PM10 concentration would be below the SILs, and that the annual PM10 emissions at the nearest residential receptors would be “much lower than the maximum shown.” Similarly, for PM2.5, the FEIR states that the maximum modeled 24-hour PM2.5 concentration “would decrease rapidly with distance from the fence line,” while annual PM2.5 would be less than applicable significance thresholds.
  - i. What are the estimated annual PM10 concentrations at the nearest residential receptor? Does it fall below the applicable significance thresholds?

**Staff Response:** The annual PM10 concentration during construction at the nearest residential receptors would be no greater than 0.16  $\mu\text{g}/\text{m}^3$ , which is below the PM10 SILs of 1  $\mu\text{g}/\text{m}^3$  for annual impacts.

The comment concerns the ambient air quality impacts caused by the project’s particulate matter emissions during construction, shown in FEIR Table 4.3-7 (discussed on pages 4.3-32 to 4.3-33). As noted on the table, the ambient air already exceeds the standards for PM10 and PM2.5. The EIR focuses on whether the project might make a substantial contribution to an existing exceedance of the ambient air quality standards. Staff quantified the project’s construction related emissions and concentrations to identify the project’s contribution for both PM10 and PM2.5 to the existing exceedance.

To determine whether the project’s construction related PM10 and PM2.5 impacts were significant, staff uses United States Environmental Protection Agency (U.S. EPA) Significant Impact Levels (SILs) as a guide for whether the project’s contribution to existing exceedances could be significant. In the FEIR staff noted the project’s construction related emissions would exceed the SILs at the fence line but nevertheless concluded the PM10 and PM2.5 emissions from construction would not be significant because substantial concentrations would not occur at sensitive receptors.

To minimize construction PM10 and PM2.5 emissions, the analysis under criterion “b” in the FEIR, **Section 4.3 Air Quality** recommends mitigation measure **AQ-1**, which would require implementation of fugitive dust control (p.4.3-26).

Mitigation measure **AQ-1** follows the Bay Area Air Quality Management District’s (BAAQMD) California Environmental Quality Act (CEQA) Guidance that recommends applying Best Management Practices (BMPs) as a way to mitigate construction-related dust impacts to less than significant, which obviates the need to use quantitative dispersion modeling to determine significance. Under BAAQMD current CEQA

Guidelines, by definition, the implementation of BMPs means construction PM10 and PM2.5 fugitive dust emissions are not significant. (BAAQMD 2017b)

In this case, staff took a conservative approach in quantifying construction related PM10 and PM2.5 impacts with dispersion modeling and comparing them to U.S. EPA SILs.

The FEIR concluded that the project construction would not expose sensitive receptors to substantial pollutant concentrations (p.4.3-33).

The FEIR focused on the nearest 1,000 feet as the area of greatest impact, and this response provides additional quantification of the impact at the nearest residential neighborhood that is located approximately 1,650 feet (0.3 mile) south of the project site (p.4.3-13).

The FEIR tabulates the maximum annual concentration of PM10 during construction as  $1.85 \mu\text{g}/\text{m}^3$  (Table 4.3-7) at the middle of the southern property line, along Alviso Milpitas Road. For locations south of the fence line, concentrations decrease rapidly with distance. At 1,000 feet from the site, the annual PM10 concentration would be no greater than  $0.28 \mu\text{g}/\text{m}^3$ , and at the nearest residential receptors, the annual PM10 concentration would be no greater than  $0.16 \mu\text{g}/\text{m}^3$ . These confirm that concentrations at the sensitive receptors would be below the PM10 SILs of  $1 \mu\text{g}/\text{m}^3$  for annual impacts.

In consideration of the impacts on sensitive receptors, not fencelines, and the implementation of BMP, staff was able to conclude in the FEIR that PM10 and PM2.5 emissions from construction would be less than significant.

- ii. What are the estimated 24-hour PM2.5 concentrations at the nearest residential receptor? Does it fall below the applicable significance thresholds?

**Staff Response:** The 24-hour PM2.5 concentration at the nearest residential receptors would be no greater than  $0.46 \mu\text{g}/\text{m}^3$ , which is below the PM2.5 SILs of  $1.2 \mu\text{g}/\text{m}^3$  for 24-hour impacts.

The FEIR tabulates the maximum 24-hour PM2.5 concentration during construction as  $1.67 \mu\text{g}/\text{m}^3$  (Table 4.3-7) at the middle of the southern property line, along Alviso Milpitas Road. At 1,000 feet from the site, the 24-hour PM2.5 concentration would be no greater than  $0.61 \mu\text{g}/\text{m}^3$ , and at the nearest residential receptors, the 24-hour PM2.5 concentration would be no greater than  $0.46 \mu\text{g}/\text{m}^3$ . These confirm that concentrations at the sensitive receptors would be below the 24-hour PM2.5 SILs of  $1.2 \mu\text{g}/\text{m}^3$ .

The analysis under criterion “b” in the FEIR, **Section 4.3 Air Quality** demonstrates that construction emissions would be less than significant with the implementation of the BMPs, and mitigation required by **AQ-1**.

- b. On page 4.3-34 of the FEIR, as part of its air quality impact analysis (AQIA) for criteria pollutants, the FEIR estimates the emissions from the natural gas-fired generators when operating “load shedding and demand response under various load scenarios,” in addition to routine maintenance and testing. This operation is

due to the project's anticipated participation in PG&E's Base Interruptible Program (BIP). (Page 3-17.) The BIP is triggered "when the California Independent System Operator issues a curtailment notice." (Page 3-17.) Page 3-17 of the FEIR describes the scenarios that the generators are anticipated to operate for participation in the BIP and for maintenance. In contrast, the FEIR states that use of the natural gas-fired generators and diesel-fired administrative generators for emergency operations is typically not evaluated during facility permitting and air districts do not conduct such an assessment. (Page 4.3-46.) The FEIR states that modeling air quality impacts from emergency operations "would require a host of unvalidated, unverifiable, and speculative assumptions" that "would not provide meaningful information by which to determine project impacts." (Page 4.3-46.) As a result, the FEIR assesses air quality impacts from participation in BIP, which occurs under emergency reliability conditions, but not for other types of emergency operations.

Please explain whether the air quality impact analysis modeling assumptions and scenarios used to assess emissions, including BIP participation, are or are not appropriate for assessing emissions from emergency operations.

**Staff Response:** The air quality impact analysis considers the effects of running the proposed engine-generator sets to provide site power during infrequent and unplanned emergencies, and for load shedding, demand response and behind-the-meter resource adequacy (RA) ancillary services (p.4.3-1).

Because the applicant proposes to operate the generators for load shedding and demand response, staff views the applicant's proposal to participate in PG&E's BIP as a plan for the facility to operate during a California Independent System Operator (CAISO) curtailment notice. This mode of operation is a planned part of the project proposal, and the applicant has discretion in choosing whether to participate in the BIP. The applicant also provided 500 hours of operation to analyze, even if those hours significantly exceed the hours historically operated by other facilities under the BIP. This provides some modeling parameters which are absent when considering unplanned emergency operations.

Load shedding and demand response events are distinct and separate from emergencies, like an unplanned power outage or other disruption, upset, or instability that triggers a need for emergency backup power at the data center. As such, staff treats load shedding and demand response as being more predictable, and the facility would have a longer lead time of advance notice than in other emergency situations that trigger unplanned operation.

Staff acknowledges that modeling the BIP operations requires making conservative project-specific assumptions, in this case 500 hours of operation, that should exceed any real-world actual amounts. The BIP data contained in the FEIR indicates a facility is typically only called on to operate no more than 30 hours. (Jacobs 2021y)



Staff's emissions estimates (Table 4.3-6) and AQIA modeling scenarios (Table 4.3-8) capture use of the natural gas-fired generators during load shedding and demand response. For example, the FEIR quantifies the short-term effects of operating all natural gas generators at the maximum 1-hour rate for up to 24 hours per day (p.4.3-47).

Staff believes that emergency events that trigger unplanned operation are infrequent, irregular, and unlikely and the resulting emissions are not easily predictable or quantifiable. However, for emergency event scenarios that require use of the San Jose Data Center (SJDC) project generators for a few hours or less, the resulting impacts would not be likely to exceed those presented in the FEIR analysis that includes load shedding and demand response for air quality (Table 4.3-8) and health risks (Table 4.3-10).

As a result, staff's analysis of the applicant's proposal is sufficiently conservative to account for the possibility of emergency operations for purpose of the air quality and health risk assessments (p.4.3-48). Impacts during emergency events are not likely to exceed those presented for air quality (Table 4.3-8) and health risks (Table 4.3-10).

## 2. Biological Resources:

- a. On page 4.4-2 of the FEIR, Staff states that Applicant performed habitat surveys of the project area. On page 4.4-10, Staff describes surveys for special status plant species. On page 4.4-12, Staff states that while the California Department of Fish & Wildlife recommended a habitat survey for salt marsh harvest mouse, "a habitat survey was not performed." Regarding other biological resource surveys, in the FEIR Response to Comments, page 7-73, Staff acknowledges that surveys completed in 2016 are not considered "recent" survey efforts.
  - i. Please provide the dates for the biological resources surveys and studies of the project area and associated linear features, including surveys for wildlife such as burrowing owl, golden eagle, and salt-marsh harvest mouse, and surveys for ordinance-sized trees. Please explain whether those surveys are still current and valid given the amount of time that has elapsed between when those surveys were performed, when the project filed an application, and when Staff published a Notice of Preparation for the project.

**Staff Response:** Surveys for ordinance size trees were performed in October 2015, (San Jose 2017a, Appendix E, and TN 231294). The bulk of biological surveys were performed in 2016 and 2017, including protocol burrowing owl surveys in 2016. The Notice of Preparation was filed on February 1, 2021 (TN 236537). Typically, within the biological field, survey data is considered valid for 1 to 2 years, but specific state or federal agency guidelines on this issue are limited to formalized protocol survey guidelines which, for species potentially affected by the project, are available for the burrowing owl and golden eagle. At the time of filing, November 2019, the surveys were becoming potentially outdated but based on the specific facts of this case, staff determined that updated surveys were not necessary for staff to assess impacts and

develop any necessary mitigation. In this case, as noted in the FEIR, the project site and the region around the site are subject to the Santa Clara Valley Habitat Plan (SCHVP), which is a source of information regarding various species in the area as well as standard mitigation requirements. The SCVHP grants take permits for federally listed species, and in this case, is also accompanied by a state Natural Community Conservation Plan (NCCP), which covers state listed species.<sup>2</sup> Staff also discussed the presence of species in the area and mitigation measures with California Department of Fish and Wildlife (CDFW), United States Fish and Wildlife Service (USFWS), and local wildlife agencies, as discussed below in staff's response to question 2. a. ii. The results of this extensive coordination with the resource agencies are agreement that updated survey data is not necessary because there is no indication that the nature of the site's habitat or environmental setting has changed, and because preconstruction surveys are required for most species which will ensure the mitigation is implemented based on the most recent site data. Tree surveys are particularly unnecessary at this point because of their slow growth habitat and burrowing owl surveys are unnecessary as the site is already mapped, by the SCVHA which undertakes annual surveys, and preconstruction surveys are already required pursuant to **BIO-4**.

Surveys for eagle nests are not necessary as a recent search of the CNDDDB by staff revealed no new known nests within the area, and extensive outreach has been conducted as outlined in staff's response to question 2. a. ii. Further, onsite or adjacent offsite nesting is not expected to occur and buffers for nesting birds and raptors are already prescribed under measure **BIO-1**.

- ii. If no habitat or biological resources survey was performed, please explain what information was used to establish a baseline for these biological resources against which to evaluate potential environmental impacts.

**Staff Response:** Staff used a variety of data to update baseline biological survey data as project review progressed. Such sources included the CNDDDB<sup>1</sup>, the Colonial Waterbird Nesting database<sup>2</sup>, and outreach to the CDFW<sup>3</sup>, the USFWS<sup>4</sup>, a USFWS staff member assigned to the Don Edwards National Wildlife Refuge<sup>5</sup>, a local biological

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1 CNDDDB 2021 – California Natural Diversity Database (CNDDDB). RareFind 5. California Department of Fish and Wildlife [Version 5.12.14]. Accessed on: March 5, 2021

2 SFBBO 2021 – San Francisco Bay Bird Observatory (SFBBO). Colonial Waterbird Nesting Sites. Accessed on: May 20, 2021. Available online at: <https://www.colonialwaterbirdprogram.weebly.com/science.html>

3 CEC 2021I – California Energy Commission (CEC). (TN 238428). Report of Conversation with Kristin Garrison, California Department of Fish and Wildlife, dated June 22, 2021. Available online at: <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=19-SPPE-04>

4 CEC 2021m – California Energy Commission (CEC). (TN 238429). Report of Conversation with Andrew Raabe, Bay Delta Branch of the U.S. Fish and Wildlife Service, dated June 22, 2021. Available online at: <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=19-SPPE-04>

5 CEC 2021o – California Energy Commission (CEC). (TN 238431). Report of Conversation with Rachel Tertes, U.S. Fish and Wildlife Service, dated June 22, 2021. Available online at: <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=19-SPPE-04>

resources advocacy group, the San Francisco Bay Bird Observatory<sup>6</sup>, and the SCVHA<sup>7</sup>, all of which occurred in 2021. Staff further notes that preconstruction surveys are required for most potentially affected special status species under the FEIR, the SCVHP<sup>8</sup>, the Envision San Jose 2040 General Plan Policies<sup>9</sup> (page 4.4-6 to 4.4-8 of the FEIR, TN 241977-1), and the tree ordinance of the city of San Jose (Chapter 13.32 of the Municipal Code), which specifically requires preconstruction surveys.

Staff relied upon the above efforts to further the already-conducted surveys of the project site in establishing a baseline, and, subsequently, formulate a protective measure (**BIO-17**), and specifically dictated that such species be part of the Worker Environmental Awareness Program (**BIO-13**). Specific surveys for the salt marsh harvest mouse were not requested as only marginal habitat occurs on site. Staff coordinated the development and language of these measures with appropriate agencies. The nearest known salt marsh harvest mouse sightings are (conservatively) around 5,500 feet north of the project site, based on staff's most recent CNDDDB database search (May 5, 2022), and are unchanged from data staff collected when searching the database in 2021<sup>10</sup>. In addition, no other new species detections were noted.

- b. On page 4.4-11, the FEIR states "This Draft EIR includes the Technical Biological Report (Live Oak Consultants, Appendix D), and Tree Inventory (HM Engineers, Appendix E)." Appendix D of the DEIR/FEIR is the Nitrogen Deposition Modeling, and Appendix E of the DEIR/FEIR is the Mailing List. Please identify the location of the Technical Biological Report and the Tree Inventory; if the items are not currently in the docket, please either file them with the docket or explain why they should not be filed.

**Staff Response:** The full citation reads: "Staff also considered the City of San Jose Draft Environmental Impact Report (San Jose 2017b). This Draft EIR includes the Technical Biological Report..." Staff was referencing the DEIR the City of San Jose prepared for an earlier development project on the site which was subsequently replaced by the current data center project. These appendices were also requested to be part of the project's docket by staff in a data request, and are available at Data Responses Set 1, TN 231774. These appendices have been recently docketed again by

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6 CEC 2021n – California Energy Commission (CEC). (TN 238430). Report of Conversation with Max Tarjan, San Francisco Bay Bird Observatory, dated June 22, 2021. Available online at: <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=19-SPPE-04>

7 SCVHA 2021 – Santa Clara Valley Habitat Agency. GeoBrowser. Accessed on: October 7, 2021. Available online at: [www.hcpmaps.com/habitat/](http://www.hcpmaps.com/habitat/)

8 SCVHP 2012 – Santa Clara Valley Habitat Plan. 2012. Santa Clara Valley Habitat Plan. Available online at: <https://www.scv-habitatagency.org/178/Santa-Clara-Valley-Habitat-Plan>

9 San Jose 2020 – City of San Jose (San Jose). *Envision San Jose 2040 General Plan*. Last update: March 2020. Available online at: <https://www.sanjoseca.gov/home/showpublisheddocument?id=22359>

10 CNDDDB 2021 – California Natural Diversity Database (CNDDDB). RareFind 5. California Department of Fish and Wildlife [Version 5.12.14]. Accessed on: March 5, 2021

the applicant (see TNs 242961-2 and 242961-3). Pursuant to TN 242961-1, which was recently docketed, the applicant has updated the tree surveys with the docket inclusion of an arborist report which indicated exactly which trees would be impacted by the project. This information is a refinement of the original tree survey (TN 231774) and indicates trees recommended for removal. This information does not change the analysis or conclusions regarding project impacts or mitigation related to onsite trees.