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STATE OF CALIFORNIA — NATURAL RESOURCES AGENCY

Gavin Newsom, *Governor*

CALIFORNIA ENERGY COMMISSION

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CEC-70 (Revised 11/2021)



IN THE MATTER OF:

STACK Backup Generating Facility

Docket No. 21-SPPE-02

COMMITTEE SCHEDULING ORDER AND ORDER REQUESTING SUPPLEMENTAL INFORMATION

BACKGROUND

In December 2021, STACK Infrastructure (Applicant) submitted an application for a small power plant exemption (SPPE) for the SVY Backup Generating Facility (Application)¹ to the California Energy Commission (CEC). Applicant seeks to construct and operate the STACK Trade Zone Boulevard Technology Park in San Jose, California that includes: a data center; a backup generating facility to ensure reliable backup electricity to the data center in the event of a loss of electrical service from its local utility; an advanced manufacturing building for light industrial and ancillary support uses; a multi-story parking-garage; onsite substation; and other related project features (collectively, the Project).²

On June 7, 2022, CEC Staff (Staff) filed a notice of preparation of a draft Environmental Impact Report (EIR).³ On July 14, 2022, the Committee⁴ issued a Notice of Committee Conference and Related Orders, which set a Committee Conference for August 2, 2022.⁵ The notice also directed Staff to file an issues identification and status report and a proposed schedule (Issues Identification

¹ Information about this proceeding, including a link to the electronic docket, may be found on the CEC's [web page](https://www.energy.ca.gov/powerplant/tradezonepark) at <https://www.energy.ca.gov/powerplant/tradezonepark>. Documents related to this proceeding may be found in the [online docket](https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=21-SPPE-02) at <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=21-SPPE-02>. The Application consists of various documents filed in the online docket beginning with TN 240910.

² See TN 240910.

³ TN 243460; see Pub. Resources Code, § 21092.

⁴ On May 11, 2022, the CEC appointed a committee consisting of Andrew McAllister, Commissioner and Presiding Member, and Kourtney Vaccaro, Commissioner and Associate Member, to preside over any proceedings arising from the Application. (TN 243043.)

⁵ TN 244081.

Report) by July 20, 2022, and directed Applicant to file a response to Staff's Issues Identification Report by July 27, 2022.⁶ Staff and Applicant met these deadlines.⁷

Staff's Issues Identification Report proposed that the Committee issue a schedule that allows Staff 60 days to file its draft EIR after Staff notifies the Committee in a status report that Staff has received completed answers to its data requests, and that allows Staff 30 days after close of public comment on the draft EIR for Staff to file a final EIR including Staff's responses to comments on the draft EIR.⁸ Applicant's response made several proposals regarding the processing of the Application, specifically requesting that the Committee:

1. require any intervenor to file a petition to intervene no later than 10 days before the close of the public comment period for the draft EIR;
2. require any intervenor to file comments on the draft EIR, and to treat those comments as the intervenor's opening testimony;
3. review Staff's response to the comments on the draft EIR and final EIR, then move directly to an evidentiary hearing for the sole purpose of moving exhibits into the record (not taking oral testimony unless it is to hear new evidence unique to the STACK Trade Zone Boulevard Technology Park and required by CEQA) and adopting the final EIR with any revisions it may deem necessary;
4. require Staff to file the draft EIR within 30 days after full responses to any outstanding data requests are provided (i.e., the completion of discovery); and
5. require Staff to file responses to comments on the draft EIR within 15 days after the close of the public comment period on the draft EIR.⁹

During the Committee Conference on August 2, 2022, among other things, Committee, Applicant, and Staff discussed the requests contained in Applicant's Response.¹⁰ Additionally, Staff reported that it is continuing to investigate the Project's potential environmental effects, and that Staff has not reached its ultimate recommendation.¹¹

SCHEDULE

Discussion

The Committee has considered the requests of both Staff and Applicant. Regarding Applicant's five requests regarding processing of the Application mentioned above, the Committee finds as follows.

⁶ *Id.* at p. 4.

⁷ TN 244144 (Staff's Issues Identification Report); TN 244221 (Applicant's response).

⁸ TN 244144, p. 5.

⁹ TN 244221, pp. 4-5.

¹⁰ TN 245069, p. 38, line 4 - p. 42, line 12 (38:4-42:12).

¹¹ *Id.* at 36:6-11.

1. During the Committee Conference on August 2, 2022, Staff did not express a preference either for or against Applicant's request for a deadline to file a petition to intervene no later than 10 days before the close of the public comment period for the draft EIR.¹² Resolving petitions to intervene at an earlier date in the proceeding would facilitate the parties' ability to raise issues earlier in the proceeding. Accordingly, the attached schedule establishes the deadline for petitions to intervene during the public review and comment period on the draft EIR¹³ and sets a briefing schedule that shortens the time to respond to such petitions.¹⁴
2. During the Committee Conference on August 2, 2022, Staff did not express a preference either for or against Applicant's request to require any intervenor to file comments on the draft EIR and treat those comments as opening testimony.¹⁵ The Committee declines to require that opening testimony be filed at the same time as public comment on the Draft EIR in this proceeding. The attached schedule sets the deadline to file opening testimony after publication of the final EIR on a timeframe to be determined based on the status of the proceeding closer to the evidentiary hearing.
3. It is more efficient for the Committee to set the timeline for prehearing conference and evidentiary hearing now, as separate events, and then to consider consolidating them later if there are no contested issues, than it would be for the Committee to later schedule a separate evidentiary hearing to address any contested issues that become apparent later in the proceeding. Accordingly, the attached schedule sets a timeline for a prehearing conference and separate evidentiary hearing. When Staff issues the final EIR, the Committee will consider any motion from the parties regarding expediting the schedule or limiting oral testimony.
4. During the Committee Conference on August 2, 2022, Staff responded to Applicant's request by stating that Staff needs flexibility of up to 60 days to file its draft EIR once it receives complete responses to its data requests because Staff may be finishing the most complicated subjects during that period. Staff stated that it would file sooner if possible.¹⁶ The Committee finds that up to 60 days to file the draft EIR once Staff notifies the Committee that it has received complete responses to its data requests is reasonable based on Staff's statement that it may need the time and will file sooner if possible. The attached schedule allows up to 60 days.
5. During the Committee Conference on August 2, 2022, Staff responded to Applicant's request, to limit Staff's time to respond to comments to 15 days, by repeating its request for 30 days to

¹² *Id.* at 42:9–11.

¹³ The deadline to file a petition for intervention shall be established by the presiding member, or if no deadline is established, at least 30 days prior to the first day of the evidentiary hearing. (Cal. Code Regs., tit. 20, § 1211.7, subd. (b).)

¹⁴ "Motions shall be filed and responded to according to a schedule established by the presiding member. In the absence of such a schedule, responses to motions shall be filed within 14 days of the service of the motions." (Cal. Code Regs., tit. 20, § 1211.5.)

¹⁵ TN 245069, 42:9–11.

¹⁶ *Id.* at 37:4–38:2.

accommodate the possibility of extensive comments toward the end of the public comment period. Staff stated that it would publish sooner if possible.¹⁷ Applicant responded that a workshop during the 45-day comment period on the draft EIR could elicit comments earlier and help Staff meet a 15-day deadline.¹⁸ Applicant stated it would not object to an extension if extensive comments were received at the comment deadline.¹⁹ The Committee finds that it is more efficient to allow up to 30 days to file responses to comments and the final EIR rather than extending the time later based on comments received. The attached schedule allows up to 30 days. Staff may, at its option, conduct a public workshop on the draft EIR during the public comment period.

Status reports will be required monthly, beginning September 28, 2022, as described in the scheduling order below.

Scheduling Order

The Committee hereby adopts the attached schedule for the proceeding. The Committee encourages the parties to make their best efforts to complete the milestones ahead of these dates.

The parties are hereby ordered to submit monthly status reports beginning September 28, 2022, and no later than the 28th day of every month thereafter as set forth in the attached schedule. Status reports shall inform the Committee whether or not the case is progressing satisfactorily and bring potential delays and other relevant matters to the Committee's attention.

WATER SUPPLY ASSESSMENT

Discussion

At the Committee Conference on August 2, 2022, the Committee asked the parties if a water supply assessment should be required for the Project based on comments from the Santa Clara Valley Water District (Water District) on Staff's notice of preparation of a draft EIR, which stated that "... data centers and manufacturing facilities can use significant amount of water. Impacts related to water use and an analysis of water supply should be conducted as part of the [EIR]."²⁰ Applicant responded that revised modeling of the Project's water usage shows the Project would use less water than originally modeled, and that based on the revised modeling Applicant and the Water District agree that a water supply assessment is not required.²¹ Applicant stated that it will publish further information in its responses to Staff's data requests.²²

¹⁷ *Id.* at 38:16–39:6.

¹⁸ *Id.* at 40:8–16.

¹⁹ *Id.* at 40:8–16.

²⁰ *Id.* at 48:3–16 (quoting TN 244153).

²¹ *Id.* at 48:17–49:17; see TN 244221, p. 3.

²² *Ibid.*

The Committee then asked if CEQA guideline section 15155(a)(1)(E)²³ nevertheless requires a water supply assessment based on the Project's industrial nature and square footage.²⁴ Applicant responded that much of the Project's square footage would not be used for industrial uses.²⁵ Applicant offered to provide a more detailed response.²⁶ Staff added that it will evaluate information received from Applicant and confer with the Water District, Santa Clara County, and the City of San Jose in determining whether a water supply assessment is required.²⁷ Staff also requested that the Committee inform the parties sooner than later whether it will require the EIR to include a water supply assessment.²⁸

On September 7, 2022, Applicant filed its Response to CEC Staff Data Request Set 2 (60-85), which addresses whether a water supply assessment is required.²⁹

Order for Further Information Regarding Water Supply Assessment

The Committee seeks supplemental information and directs the parties to respond to the questions listed below. Responses by all parties to the Committee's questions must be filed in the docket for this proceeding with the parties' first status reports, **no later than 5:00 p.m. on September 28, 2022.**

1. Provide a legal analysis of whether a water supply assessment is required for the Project. In preparing the legal analysis, include a discussion of whether the Project is a "project" within the meaning of Water Code section 10912(a)(5) and CEQA Guideline 15155(a)(1)(E). Additionally, include a discussion on *Guardians of Turlock's Integrity v. Turlock City Council* (1983) 149 Cal.App.3d 584, specifically on whether the court's approach to calculating the total acreage under the CEQA Guidelines' former section 15161.6 (now section 15206(b)(2)(E))³⁰ is applicable or relevant to how the CEC should calculate the square footage of industrial space under the similarly worded CEQA Guideline's provision for determining whether a water supply assessment is required.³¹
2. Provide an update on any conversations with the city of San Jose and the Santa Clara Valley Water District regarding their views of the need for a water supply assessment for the Project.
3. Provide a proposed schedule for resolving the question of whether a water supply assessment is needed and include the time that would be required to prepare a water supply assessment for the Project if the Committee determines one is required.

²³ Cal. Code Regs., tit. 14, § 15155, subd. (a)(1)(E); see Wat. Code, § 10912, subd. (a).

²⁴ TN 245069, 50:2-12.

²⁵ *Id.* at 50:13-51:9.

²⁶ *Ibid.*

²⁷ *Id.* at 52:6-51:25.

²⁸ *Id.* at 51:22-52:3.

²⁹ TN 245892, pp. 21-22.

³⁰ *Guardians of Turlock's Integrity v. Turlock City Council* (1983) 149 Cal.App.3d 584, 595-596 (interpreting Cal. Code Regs., tit. 14, § former section 15161.6 (now § 15206(b)(2)(E))).

³¹ Cal. Code Regs., tit. 14, § 15155, subd. (a)(1)(E); see Wat. Code, § 10912, subd. (a)(5).

PUBLIC ADVISOR AND OTHER CEC CONTACTS

The CEC's Public Advisor provides assistance to members of the public with participating in CEC proceedings. For information on how to participate in this proceeding, please contact the Public Advisor at publicadvisor@energy.ca.gov, or (916) 957-7910. Requests for interpreting services, reasonable accommodations, and other modifications should be made at least five days in advance. The CEC will work diligently to accommodate all requests based on the availability of the service or resource needed.

Direct questions of a procedural nature related to the Application to Hearing Officers Ralph Lee at ralph.lee@energy.ca.gov or (916) 776-3408, or Deborah Dyer at deborah.dyer@energy.ca.gov.

Direct technical subject inquiries concerning the Application to Project Manager, Lisa Worrall at lisa.worrall@energy.ca.gov or (916) 661-8367.

Direct media inquiries to mediaoffice@energy.ca.gov or (916) 654-4989.

AVAILABILITY OF DOCUMENTS

Information about the Application, as well as notices and other relevant documents pertaining to this proceeding, may be viewed on the [STACK Trade Zone Park web page](#) at:

<https://www.energy.ca.gov/powerplant/tradezonepark> or scan the following QR code:



IT IS SO ORDERED.

Dated: September 6, 2022

APPROVED BY:

Andrew McAllister
Commissioner and Presiding Member
STACK Backup Generating Facility
SPPE Committee

Dated: September 9, 2022

APPROVED BY:

Kourtney Vaccaro
Commissioner and Associate Member
STACK Backup Generating Facility
SPPE Committee

Mailed to: List Number: 7545

**STACK BACKUP GENERATING FACILITY SPPE
(21-SPPE-02)
SCHEDULING ORDER
SEPTEMBER 2022**

EVENT	DATE
All Parties File Status Reports	No later than the 28th of every month
Staff Filed Notice of Preparation of an Environmental Impact Report (EIR)	June 7, 2022
Staff Publishes its Draft EIR (DEIR) and Sends the Appropriate Notice to the State Clearinghouse	No later than 60 days after Staff notifies the Committee in a status report that it has received complete answers to its data requests
Last Day to File Petition to Intervene ³²	21 days after Staff files the DEIR
Last Day to File Objection to any Petition to Intervene ³³	7 days after a Petition to Intervene is filed
Close of Public Comment Period on Staff's DEIR	45 days after Staff files the DEIR ³⁴
Staff Files Final EIR (FEIR) and Response to Public Comment	30 days after close of public comment period
All Parties File Opening Testimony	To be determined
All Parties to File Reply Testimony. ³⁵ Staff Files Any Errata or Addendum to FEIR	To be determined

³² The deadline to file a petition for intervention shall be established by the presiding member, or if no deadline is established, at least 30 days prior to the first day of the evidentiary hearing. (Cal. Code Regs., tit. 20, § 1211.7, subd. (b).)

³³ "Motions shall be filed and responded to according to a schedule established by the presiding member. In the absence of such a schedule, responses to motions shall be filed within 14 days of the service of the motions." (Cal. Code Regs., tit. 20, § 1211.5.)

³⁴ Please note that the State Clearinghouse has 3 days to distribute. (Pub. Resources Code, § 21091, subd. (c)(3).)

³⁵ Seven days prior to the evidentiary hearing or at such other times as ordered by the presiding member. (Cal. Code Regs., tit. 20, § 1943.)

All Parties File Prehearing Conference (PHC) Statements	5 days after reply testimony is filed
PHC	7 days after PHC statement is filed
Evidentiary Hearing ³⁶	To be determined
Committee Files Proposed Decision	To be determined
Adoption Hearing by the Commission	To be determined
Notice of Determination Published	Within 5 working days of Commission Decision

The Committee may modify the schedule at any time. The Committee will issue final dates in a later Order.

³⁶ Evidentiary hearings shall commence no later than 100 days after filing the application for an SPPE unless otherwise ordered by the presiding member. (Cal. Code Regs., tit. 20, § 1944 subd. (b).) In the "General Orders Regarding Motions, Electronic Filing, Service of Documents, and Other Matters," the Committee extended the deadline for the hearing pursuant to California Code of Regulations, Title 20, sections 1203, subdivision (f) and 1944, subdivision (b). (TN 244085, p. 5.)