



AGENDA NO: 9.a

MEETING DATE: September 24, 2024

Staff Report

TO: Honorable Mayor and City Council **DATE:** September 17, 2024

FROM: Airlin Singewald, Community Development Director
Dan McCrain, Fire Chief
Chris F. Neumeyer, City Attorney

SUBJECT: Vistra Battery Energy Storage System (BESS) Project – Status Update

RECOMMENDED ACTION

Receive and file an update on the proposed Vistra BESS Project, including:

1. Status and estimated timeline for the processing of the Vistra BESS project application,
2. Offsite Consequence Analysis, and
3. Assembly Bill (AB) 205

ALTERNATIVES

No alternatives.

FISCAL IMPACT

The processing of the Vistra BESS project has no impact on the City's General Fund. The City's time and materials cost to process the BESS project is reimbursed by Vistra, in accordance with a reimbursement agreement between the City and Vistra.

BACKGROUND/DISCUSSION

1. BESS Project Application Status and Anticipated Timeline

The purpose of this item is to update the Council on the status and estimated timeline for the continued processing of Vistra's application to develop a BESS project at the former power plant property. **This item is informational only. The Council should refrain from expressing their opposition or support of the project, since this is not a noticed public hearing to deliberate on the merits of the project.**

In 2020, Vistra applied to the City for a coastal development permit (CDP) and other City approvals to allow for the development of a 600 MW BESS facility on a 24-acre site at the former power plant property. As required by Plan Morro Bay, Vistra also proposed a master plan to allow for redevelopment of the site, including changing the existing Visitor-Serving Commercial (VSC) zoning to Industrial, which would make the BESS an allowable use on the site, subject to CDP approval. The master plan and land use change will require an amendment to the City's Local Coastal Program (LCP).

Prepared By: AS/CFN/DM Dept Review: AS

City Manager Review: YK City Attorney Review: CFN

As required by the California Environmental Quality Act (CEQA), the City is also preparing an Environmental Impact Report (EIR) for the proposed project. In 2021, the City contracted with Rincon Consultants to prepare the EIR, at Vistra’s expense. The City published its notice of availability of the Draft EIR for the BESS project on March 11, 2024. This started a public comment period that ended on May 28, 2024. Rincon Consultants is currently reviewing the public and agency comments and preparing written responses for inclusion in the Final EIR.

The purpose of an EIR is to promote informed decision-making and transparency by studying and disclosing a project’s environmental impacts. The City would be required to certify the EIR before approving the project. By certifying the EIR, the City would recognize the EIR was prepared in accordance with the applicable requirements of CEQA. Certifying an EIR (on its own) does not approve a project. In fact, in some cases a lead agency will certify an EIR without approving the underlying project. This allows a lead agency to potentially rely on the EIR when considering other future development projects within the same project area.

While the EIR and project approvals are separate, they are closely related. For example, the City may use information in the EIR, most commonly the alternatives chapter, to consider a modified version of the project. The EIR will also provide critical information to substantiate the required findings (e.g., that the project would not be contrary to public health or safety) for the City to approve or disapprove the project.

Phased Approach

As described above, the proposed project requires a CDP and an LCP amendment. The LCP amendment is to satisfy the master plan requirement and to change the zoning to make the BESS an *allowable* use on the power plant property, subject to CDP approval. The CDP is to authorize development of the BESS in the Coastal Zone. The LCP amendment requires final approval by the California Coastal Commission (CCC). The City’s decision on the CDP is appealable to the Coastal Commission.

Approval	Purpose	Final Approval Body	Standard of Review
LCP Amendment	To approve master plan and land use change to make BESS approvable , subject to a CDP.	Coastal Commission	LCP and Coastal Act
CDP	Authorizes development of the BESS project, consistent with the master plan.	Coastal Commission (on appeal). CDP could be approved by Planning Commission and is appealable to Council and CCC.	LCP, including Power Plant Master Plan

To date, staff has concurrently processed the LCP amendment and CDP application. This means staff planned to bring the LCP amendment and CDP application to the Planning Commission and City Council for consideration together at the same time. If approved by the City Council, staff would have sent both the LCP amendment and CDP application to the CCC for final consideration and action. The City’s approval of the CDP would have been contingent on the CCC approving the LCP amendment.

In a letter dated 8/2/2024, CCC staff directed the City to process the LCP amendment first and then the CDP application. This is because the CDP for the BESS project is not approvable until CCC certifies the LCP amendment. Since the CCC is the final approval authority for the LCP amendment, City staff has notified Vistra of our intent to segment the CDP and LCP amendment applications per CCC staff direction.

As shown in the estimated timeline below, the City would process the project in two phases, per CCC staff direction. The first phase would be the LCP amendment, with final approval required by the CCC. If the CCC approves the LCP amendment, the City would then proceed with processing the CDP application (Phase 2). Assuming that the critical planning issues associated with the BESS are addressed at the master plan level, the City should be able to find the CDP application consistent with the master plan and EIR. Staff estimates this “segmented” process will add at least 3 months to the timeline to account for separate CDP hearings before the Planning Commission, City Council (on appeal), and Coastal Commission (on appeal).

The segmented process is not expected to change the trajectory of the Final EIR. This is because the EIR is required to evaluate the impacts of the proposed master plan and foreseeable development. Since the BESS project is a foreseeable result of the master plan it needs to be analyzed in the EIR at the same time as the master plan. This is the case whether or not the process is segmented.

Timeline

The following is an estimated timeline for the continued processing of the BESS project, given the CCC’s recommended two-phase approach.

Phase 1 – LCP Amendment		
Agency Consultation and Final LCP Amendment (Power Plant Master Plan)	The current draft of the Master Plan may need to be updated based on public and agency comments.	October 2024
Prepare Final EIR.	The Final EIR would evaluate the LCP amendment and BESS project (as foreseeable development).	December 2024
Prepare Planning Commission staff report packet for LCP amendment.	This would include a detailed staff report, with recommended findings and conditions.	February 2025
Planning Commission hearing(s).	The Planning Commission’s role is a recommendation to City Council.	March/April 2025
City Council hearing to consider LCP amendment.	If LCP amendment is approved by City Council, it will be forwarded to the CCC for consideration.	May 2025
CCC hearing(s) to consider LCP amendment.	The CCC would be the final approval authority on the LCP amendment.	August 2025
<i>At this point, if the LCP amendment was approved, the City could now process the CDP application</i>		

Phase 2 – CDP Application		
Review CDP for consistency with LCP amendment and prepare findings and conditions.	The City would review the CDP for consistency with the Power Plant Master Plan and Final EIR.	September 2025
Planning Commission hearing(s).	The Planning Commission would be the review authority on the CDP, with appealability to the City Council.	October 2025
City Council hearing(s) [on appeal].	The City Council would hear an appeal of the Planning Commission's action on the CDP	November 2025
CCC hearings(s) [on appeal].	The City's approval of the CDP would be appealable to the CCC. The CCC would first hold a "substantial issue" hearing to determine if the appeal raises a coastal resource issue.	January 2026
<i>At this point, the BESS project could potentially be approved, and if so, then developer could proceed with construction permits.</i>		

Project Status / Next Steps

City staff is currently working on two parallel efforts to process the BESS project. First, the City is working with Rincon to review and prepare written responses to the 214 public and agency comment letters on the Draft EIR. The City's responses to comments will be included in the Final EIR that will be released to the public prior to the first Planning Commission hearing.

At the same time, City staff is deciding on a recommendation to the Planning Commission. A major factor in this decision is staff's analysis of the project's consistency with the City's LCP. Since the CCC would play a significant role in the permitting of the project, including final approval authority of the LCP amendment and appeal jurisdiction of the CDP, City staff will look to CCC staff for guidance on questions of LCP and Coastal Act consistency. CCC staff's 8/2/2024 letter (see attachment 4) concluded that the project faces "development constraints" that "...at the current time appear to preclude such a use/development altogether under the Coastal Act and the LCP." City staff will be meeting with CCC staff, including CCC's attorneys, and the BESS project applicant to discuss how these development constraints may affect the project.

In deciding a recommendation, staff would have the following options:

1. **Recommend denial of the project.**
2. **Recommend approval of the project as proposed.** To pursue this path, City staff would need to show that the project, as currently proposed, is consistent with the LCP.
3. **Recommend approval of one of the EIR alternatives.** City staff would need to show that the selected alternative is consistent with the LCP.
4. **Recommend approval of a modified project (not an EIR alternative).** Under this option, Vistra would need to modify its proposal as necessary to be consistent with the City's LCP. The modified project would need to be analyzed in the Final EIR.

Depending on City staff's analysis and how discussion go with CCC staff, Vistra would always have the option to withdraw their application at any time.

2. Offsite Consequence Analysis

See PowerPoint Presentation provided as Attachment 1

3. Assembly Bill 205

Assembly Bill 205 (“AB 205”) was approved by the Governor on June 30, 2022. (See Attachment 2 and https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB205). AB 205 made multiple statutory changes to implement energy related items of the 2022 Budget Act.

Chapter 6.2 (“Certification of Nonfossil-Fueled Powerplants, Energy Storage Facilities, and Related Facilities”) was added to Division 15 of the Public Resources Code. These new State laws are in Public Resources Code sections 25545-25545.15 comprising eight pages of new laws.

According to the Legislative Counsel’s Digest¹ for AB 205, the bill establishes “a new certification process for... an energy storage system capable of storing 200 megawatt hours or more of electricity... The bill would authorize a person proposing to construct those facilities, no later than June 30, 2029, to file an application for certification with the [California] Energy Commission.” A summary from the California Energy Commission of the so-called “Opt-in Certification Program” is provided as Attachment 3 and is also available at <https://www.energy.ca.gov/programs-and-topics/topics/power-plants/opt-certification-program>.

A. BESS Permitting Authority

AB 205 authorizes qualifying battery energy storage system (“BESS”) developers the option to seek all necessary permits for BESS development (including otherwise necessary permits from a local government) directly from the California Energy Commission (“CEC”) and, as applicable, a few other State agencies such as the California Coastal Commission (“CCC”). The current application being processed by City staff from Vistra for development of a BESS in Morro Bay qualifies for the AB 205 permitting process and is subject to the CCC’s jurisdiction.

Public Resources Code section 25545.1(a)2 provides “[u]pon receipt of the application, the [CEC] shall have the exclusive power to certify the site and related facility...”

Section 25545.1(b)(1) further provides “the issuance of a certificate by the [CEC] for a site and related facility pursuant to this chapter shall be in lieu of any permit, certificate, or similar document required by any... local... agency... for the use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any... local... agency...”

Section 25545.1(b)(2) provides, however, that this permitting authority of the CEC “does not supersede the authority of the State Lands Commission to require leases and receive lease revenues, if applicable, or the authority of the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, the State Water Resources Control Board, or the applicable regional water quality control boards.” Refer to below Section B(iv) for more details concerning the CCC.

¹ https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB205

² Hereinafter the Public Resources Code sections will simply be referred to as “Sections.”

B. Permitting Requirements

AB 205 provides authority for any proposed developer of a BESS project in Morro Bay to bypass the normally applicable permitting authority of the City and go directly to the CEC and CCC for certification. However, there remain relevant requirements for a developer to use the AB 205 process to secure permits from the CEC and CCC (rather than the City). Below are some requirements.

i. Net Positive Economic Benefit to Local Government

Section 25545.9 provides that for the CEC to certify a new BESS the CEC must make findings “that the construction or operation of the facility will have an overall net positive economic benefit to the local government that would have had permitting authority over the site and related facility. For purposes of this section, economic benefits may include, but are not limited to, any of the following: (a) Employment growth. (b) Housing development. (c) Infrastructure and environmental improvements. (d) Assistance to public schools and education. (e) Assistance to public safety agencies and departments. (f) Property taxes and sales and use tax revenues.”

ii. Benefits Agreement with One or More Community-Based Organization(s)

Section 25545.10 provides that for the CEC to certify a new BESS the CEC must find “that the applicant has entered into one or more legally binding and enforceable agreements with, or that benefit, a coalition of one or more community-based organizations, such as workforce development and training organizations, labor unions, social justice advocates, local governmental entities, California Native American tribes, or other organizations that represent community interests, where there is mutual benefit to the parties to the agreement.”

The contents of such an agreement may “include, but are not limited to, any of the following: (1) Terms of employment, such as wages and benefits, employment status, workplace health and safety, scheduling, and career advancement opportunities. (2) Worker recruitment, screening, and hiring strategies and practices, targeted hiring planning and execution, investment in workforce training and education, and worker voice and representation in decision making affecting employment and training. (3) Establishing a high road training partnership, as defined in Section 14005 of the Unemployment Insurance.” (Section 25545.10(a).)

Furthermore, the agreement “may also include, but not be limited to, funding for or providing specific community improvements or amenities such as park and playground equipment, urban greening, enhanced safety crossings, paving roads and bike paths, and annual contributions to a nonprofit or community-based organization that awards grants to organizations delivering community-based services and amenities.” (Section 25545.10(b).)

iii. Finding of Public Convenience and Necessity if Preempt Local Laws

“If a project is approved, CEC’s certificate is in lieu of any local permit or local law or ordinance. However, to grant a certificate to a project, the CEC must make findings that the project will comply with all applicable laws, ordinances, regulations, and standards, or make findings that despite the non-conformance, the project is required for public convenience and necessity, and that there are not more prudent and feasible means of achieving public convenience and necessity.” California Energy Commission, *Opt-in Certification Program*, September 9, 2024, <https://www.energy.ca.gov/programs-and-topics/topics/power-plants/opt-certification-program>.

iv. Local Coastal Program and California Coastal Commission

The allowable land uses for the site in Morro Bay where Vistra has proposed to site a BESS are contained within the City's Local Coastal Program ("LCP"). The City's LCP currently does not allow for a BESS use in the proposed site and would need to be amended to allow for such use and issuance by the City of a Coastal Development Permit ("CDP"). If the applicant were to use AB 205, then "the California Coastal Commission shall assume coastal development review authority, using the certified local coastal program as guidance." (Section 25545.5(d)(1).) Of note is the statute does not require that the CCC follow the LCP, rather consistency with the Coastal Act is the standard of review, with the LCP to be used as non-binding "guidance." In a letter dated August 2, 2024 the CCC addressed a number of questions and issues regarding the proposed BESS including those concerning the CCC's role related to potential LCP changes and CDPs. (See Attachment 4.)

C. Further AB 205 Details

i. Initial Local Agency Consultation

"The CEC is required to invite the local government to attend a mandatory pre-filing meeting with an applicant." (California Energy Commission, *Opt-in Certification Program*, September 9, 2024, <https://www.energy.ca.gov/programs-and-topics/topics/power-plants/opt-certification-program>.)

ii. Public Meetings

"The CEC will announce the receipt of an opt-in application through its email subscription service, and by advertising in a newspaper of general circulation in the project area. Within 30 days of an application being deemed complete and prior to publication of the Draft EIR, the CEC is required to hold a public information and scoping meeting as close as practicable to the proposed project site. There will be a comment period on the Draft EIR, and the CEC will hold at least one public workshop in the project area to take public comment. All public meetings will be announced at least 10 days in advance." (California Energy Commission, *Opt-in Certification Program*, September 9, 2024, <https://www.energy.ca.gov/programs-and-topics/topics/power-plants/opt-certification-program>.)

iii. Labor Requirements

Sections 25545.3.3, 25545.3.5 provide for certain labor requirements. These include mandates to pay prevailing wages and use of a skilled and trained workforce and/or to enter into a project labor agreement.

iv. Expedited Timelines

Upon submission of a BESS application, the CEC shall either determine the application is complete within **30 days**, or request further information from the applicant within 30 days necessary to deem the application complete. (Section 25545.4.)

"[N]o later than **270 days** after [a BESS] application is deemed complete, or as soon as practicable thereafter, the [CEC] shall determine whether to certify the environmental impact report and to issue a certificate for the site and related facilities pursuant to" AB 205, absent limited circumstances such as substantial changes are proposed in the project that may involve new significant environmental effects. (Section 25545.5)(e)(1).)

Other agencies that retain jurisdiction under the AB 205 process, such as the CCC, “shall take final action on the eligible facility within **90 days** after the certification by the [CEC] of the environmental impact report for the site and related facilities, if the applicant has filed a complete, final application for a permit or waste discharge requirement, as applicable, with those agencies before the certification of the environmental impact report.”

v. CEQA

Use of the AB 205 process by a BESS developer renders the CEC the lead agency for purposes of CEQA compliance. “The CEC must make findings under CEQA for any project that would have a significant effect on the environment. For each significant effect, the CEC must find that project changes have been required to avoid or substantially lessen the significant effect, or that mitigation or alternatives to avoid or substantially lessen the significant effect are infeasible. To approve a project that is found to have a significant and unavoidable impact on the environment, the CEC will need to adopt a statement of overriding considerations that identifies how the project’s benefits will outweigh any unavoidable impact.” (California Energy Commission, *Opt-in Certification Program*, September 9, 2024, <https://www.energy.ca.gov/programs-and-topics/topics/power-plants/opt-certification-program>)

CONCLUSION

This report provides for receive-and-file by the Council of an estimated project timeline, an on offsite consequences analysis and a review of AB 205 as it relates to the project. The project is currently at a critical point in the process where staff will consider all the information in the record (EIR analysis, technical study results, public and agency comment letters, etc.) to decide on a recommendation to the Planning Commission. This is an iterative process requiring input from the applicant and various agencies, which could in-turn result in project modifications and further analysis. Ultimately, unless Vistra withdraws its application or does not remain consistent with its cost reimbursement obligations, staff is required under law to continue processing the application. Staff will follow CCC staff direction to segment the CDP and LCP amendment, by first processing the LCP amendment and then the CDP once/if CCC approves the LCP amendment.

ATTACHMENT(S)

1. Offsite Consequence Analysis Presentation
2. AB 205 Bill Text
3. CEC Summary – Opt-in Certification Program
4. August 2, 2024 CCC letter re proposed BESS Project