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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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PETITION TO AMEND THE
HIGH DESERT POWER PLANT

Docket No. 97-AFC-01C

STAFF'S BRIEF
RESPONDING TO COMMITTEE'S LEGAL QUESTIONS

I. Introduction

On March 15, 2016, the Committee for the High Desert Power Plant Petition to Amend (Committee) held a Prehearing Conference to discuss the parties' readiness for evidentiary hearings and related topics. On March 22, 2016, the Committee issued "Orders After March 16, 2016 Prehearing Conference" (Order) in which the Committee ordered in part that Staff and the Petitioner docket legal briefs responding to a series of questions posed by the Committee no later than April 1, 2016. The following is Staff's response to the Committee's questions.

II. Staff's Reponses to the Committee's Questions

a. In analyzing the Petition, what is the role of adopted laws, ordinances, regulations, and standards (LORS) adopted after the original approval of the HDPP in 2000, such as the 2003 IEPR? Were there other LORS already in place at the time of the original approval of the HDPP in 2000 that apply to the analysis of the Petition?

Conserving the State's fresh water and avoiding wasteful use of water was the policy of the State of California long before the High Desert Power Plant (HDPP) was licensed in 2000. In 1975, the State Water Resources Control Board (SWRCB) issued Resolution 75-58, which provides statewide water quality principles and guidance for adoption of discharge requirements, and implementation actions for power plants that depend upon inland waters for cooling. Inland waters are defined as all waters within the territorial limits of California exclusive of the waters of the Pacific Ocean outside of enclosed

bays, estuaries, and coastal lagoons. Fresh inland waters include inland water (both surface water and groundwater) suitable for use as a source of domestic, municipal, or agricultural water supply or that provide habitat for fish and wildlife. The Resolution states, in part:

> Where the SWRCB has jurisdiction, use of fresh inland waters for power plant cooling will be approved by the Board only when it is demonstrated that the use of other water supply sources or other methods of cooling would be environmentally undesirable or economically unsound. The Board will consider the reasonableness of the proposed water use when compared with other present and future needs for the water source, and when viewed in the context of alternative water sources that could be used for other beneficial purposes. ***Furthermore, the SWRCB encourages the use of wastewater for power plant cooling***. (Emphasis added. Water Quality Control Policy of the Use and Disposal of Inland Waters Used for Power Plant Cooling, 6/19/75.)

The State mandated water conservation goals that include the integration of water reclamation, such as the water conservation goals applied to state-owned facilities, are set forth in the Warren-Alquist Act, Public Resources Code section 25008. In 2009, state goals to increase the use of recycled water were incorporated into the SWRCB Recycled Water Policy, Resolution No. 2009-0011 (May 14, 2009).

In 1976, Article X, Section 2 of the California Constitution added a framework of rights to emphasize the principle of reasonable use of water, which states in part:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. (California Constitution, Article X, Section 2, *Sec. 1 added June 8, 1976, by Prop. 14; See also* Water Code, § 100, restating Article X, Section 2.)

The “beneficial use” of water refers to the many ways water can be used for the benefit of people and wildlife. California law states that beneficial uses specifically include “industrial supply” and “power generation” (Water Code, § 13050.) Case law does not clearly define what constitutes a “reasonable use” of water, but courts stress the

importance of weighing the facts in each case. (*United States v. State Water Resources Control Bd*. (1986) 182 Cal.App.3d 82, 131, n.24 ("Racanelli"); *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 150 ("Forni").) Whether a use is reasonable depends on factors such as the competing needs of all parties in a particular use area, the particular uses, and reasonable methods of use and diversion. (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, 524-525.) A determination of reasonableness can change if the circumstances change. (*Id*.) A beneficial use can, nevertheless, be unreasonable. (*Forni*, *supra*, 54 Cal.App.3d at 751, affirming *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132.) Thus, reasonable use supersedes beneficial use.

The Energy Commission's energy and water policy is based on existing laws and on the 2003 Integrated Energy Policy Report (2003 IEPR), which is based largely on the SWRCB Resolution 75-58 from 1975. In Petitioner's 2008 Petition to Amend and the current 2015 Petition (Petition), the 2003 IEPR was referenced as a basis for the post-certification water supply project condition modifications. However, in the current proceeding Petitioner asserted to the Committee that Staff's reference to the 2003 IEPR energy and water policy is inappropriate for two reasons. First, Petitioner asserted that the 2003 IEPR does not require a project use 100% recycled water. Second, Jeff Harris, counsel for the Petitioner, stated that Staff violated "a very strong legal standard about retroactive application of a new law" by referencing the 2003 IEPR in Staff's testimony. Mr. Harris continued this reasoning by stating that "vested rights apply". (Prehearing Conference Transcript, 3/15/16, p.19-20.)

Staff hereby addresses Petitioner's assertions concerning "retroactive application" and "vested rights". In particular, Petitioner argues that the Energy Commission's 2003 IEPR does not apply to its Petition since the HDPP was licensed in 2000, prior to the 2003 IEPR. Mr. Harris also stated in the Prehearing Conference that, "I think on the face of the IEPR, 2003, talks about certification of projects. Doesn't talk about projects already certified." (Prehearing Conference Transcript, 3/15/16, p.19.) Mr. Harris incorrectly paraphrased the IEPR text at the Prehearing Conference; nowhere in the IEPR does it

state that the IEPR is limited to Applications for Certification (AFCs) because it "talks about certification of projects." The pertinent part of the 2003 IEPR states:

> Consistent with the [SWRCB] Board policy and the Warren-Alquist Act, the Energy Commission ***will approve the use of fresh water for cooling purposes by power plants which it licenses*** only where alternative water supply sources and alternative cooling technologies are shown to be 'environmentally undesirable' or 'economically unsound'…The Energy Commission interprets 'environmentally undesirable' to mean the same as having a 'significant adverse environmental impact' and 'economically unsound' to mean the same as 'economically or otherwise infeasible'. (Emphasis added, 2003 IEPR, 2009, p. 41.)

Nothing in this section indicates the 2003 IEPR water policy applies only during certification of a new power plant. The operative words "will approve" indicate the IEPR policy is applicable in AFCs and post-certification petitions. Furthermore, pursuant to the Warren-Alquist Act, the Energy Commission has exclusive jurisdiction over thermal power plants 50 MW or greater. The Warren-Alquist Act states, "the commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility." (Pub. Resources Code, § 25500.) The HDPP was licensed in 2000 by the Energy Commission, and the Energy Commission retains exclusive jurisdiction over any changes to the conditions of certification that the project owner may propose. After a final decision is effective under Title 20, California Code of Regulations, section 1720.4, a petition for any post-certification modifications must be filed with the Energy Commission. (Cal. Code of Regs., tit. 20, § 1769.)

There has been no retroactive application of any law in this proceeding and no vested rights are impacted. As a licensed power plant, Petitioner is required to file a petition requesting any modifications to the project's water supply conditions of certification. The Petition must be evaluated by Staff pursuant to current laws, ordinances, regulations and standards (LORS) and the California Environmental Qualities Act (CEQA), taking into consideration changes to the environment that occurred since the last discretionary review of a project modification.

Petitioner has come before the Energy Commission on several occasions to amend the original conditions set forth in the 2000 Final Decision. In 2009, the Energy Commission approved HDPP's request to amend Condition of Certification SOIL&WATER-1 to allow the use of recycled water. SOIL&WATER-1 was revised in part to state:

> e. The project's water supply facilities shall be appropriately sized to meet project needs. The project shall make maximum use of recycled waste water for power plant cooling ~~needs~~ given current equipment capabilities and permit conditions.
> f. The project owner shall continue with the feasibility study evaluating the use of 100 percent recycled water for evaporative cooling purposes and other industrial uses. The feasibility study shall be completed by the project owner and submitted to the CPM no later than December 31, 2011. (Order Approving a Petition to Modify Soil and Water Conditions Relating to Use of Recycled Water for Project Cooling, p.3.)

Then in 2011, Petitioner came before the Energy Commission requesting a modification of SOIL&WATER-1 to extend the due date of the feasibility study. The Energy Commission approved the change to extend the due date of the final feasibility report until November 1, 2013. (Order Approving Petition to Modify Soil and Water Conditions Relating to Submittal Date for Completion of a Reclaimed Water Feasibility Study, 11/3/11.) Once again, in 2014, Petitioner came before the Energy Commission with a petition to modify the HDPP to allow installation of an ultraviolet treatment system with the existing water treatment facilities, and an enhancement in the existing cold lime facilities, which was approved. (Order Approving Petition to Modify the Project Description, 10/20/14.) Staff's analysis of the petition which discussed LORS, states:

> The same LORS for the original analysis and the subsequent amendments of 2005, 2009, and 2011 are still applicable. In addition, in January 2013 the State Water Resources Control Board (State Water Board) adopted Resolution 2013-003 which modifies the State Water Board recycled water policy. ***The purpose of the modification is to encourage use of recycled water whenever water is needed for a use for which recycled water is permitted***. (Emphasis added, Staff Analysis of the Proposed Petition to Allow High Desert Power plant to use Alternative Water Supplies, 9/28/14, p. 14.)

Petitioner argues in the current proceeding that only the LORS in effect 16 years ago, in 2000 when the original project was licensed, apply to the project forevermore,

regardless of the amendments they propose or the changes in laws or circumstances (such as severe drought). For this argument to be persuasive the Committee would have to ignore the Energy Commission's statutory authority pursuant to the Warren-Alquist Act, completely ignore the regulations—in particular Title 20 of the California Code of Regulations, section 1769 for post-certification amendments—and also deny the applicability of CEQA to this case.

Each time Petitioner has filed for an amendment to the Soil and Water Resources section of the 2000 Decision, Staff has reviewed all LORS applicable at the time of the petition to ensure compliance, as required under Title 20, California Code of Regulations, section 1769 (a)(3)(B). With every petition for modification filed by Petitioner, Staff's review included Energy Commission and state water policy. Though Petitioner is presently arguing that only LORS in effect in 2000 apply to the project, Petitioner has repeatedly sited to the significance of the 2003 IEPR in their petitions, including the current Petition, by referencing the 2003 IEPR as, "The most concise and often cited statement of Commission's Water policy is set forth in the 2003 Integrated Energy Policy Report". (Applicant's Petition for Modification to Drought-Proof the High Desert Power Project, 10/30/15, pgs. 24-25.)

Petitioner's attorney asserted at the Prehearing Conference that Staff's recommendation to convert HDPP to using 100% recycled water is a violation of the Petitioner's vested rights. Mr. Harris reasoned, "that general administrative law principles of being able to rely on your petition" led to the conclusion that "vested rights apply." (Prehearing Conference Transcript, 3/15/16, p. 20; see also Petitioner's Rebuttal Testimony, 2/12/16, p 6.) Staff interprets Petitioner's statements to mean they are claiming vested rights stemming from one or more of the Energy Commission's previous approvals pertaining to this power plant, and not the Petition currently before the Commission, as it would strain reason to argue that a right has vested in a petition that is pending before an agency and not yet approved.

California courts have held that the doctrine of vested rights generally applies to developers who have gained a permit to build, invested substantial sums of money in

reliance on the permit, and then zoning or other local laws or ordinances change, thereby prohibiting the developer from moving forward. (See *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 132 Cal. Rptr. 386, 389.) However, it is well established that the rights which may vest through reliance on a government permit are no greater than those specifically granted by the permit itself. (*Santa Monica Pines v. Rent Control Board* (1984) 35 Cal.3d 858, 866.)

In this instance, an assertion of vested rights is misplaced. Petitioner was certified to build the HDPP as licensed in 2000, and the power plant began commercial operation in 2003. The Petitioner was able to rely on the license it received in 2000 and build and operate the project. Any vested rights it had as a result of the original license were satisfied. However, as stated above, Petitioner, of its own volition, came back to the Energy Commission several times for amendments to the original license. In particular, Petitioner came to the Energy Commission in 2008 with a petition seeking modification to the conditions to allow for recycled water use. In 2009, the Energy Commission amended the license conditions to grant the project the ability to use recycled water, and further required Petitioner to conduct a feasibility study for the use of 100% recycled water use. Again, the Energy Commission approved all of these amendments, and any vested rights Petitioner may have had in them are satisfied. Furthermore, by requiring the Petitioner to investigate the feasibility of 100% use of recycled water, Petitioner was put on notice that this was something the Commission might consider in the future, should circumstances warrant. Even if, for the sake of argument, there was some vested right remaining as a result of any of these approvals, which Staff does not believe to the be case, courts have nevertheless recognized that “vested rights” are not absolute in that the State has an interest in enacting laws that protect the environment, even if they impede a developer with a specific project. In *Lakeview Development Corp. v. City of South Lake Tahoe*, the Ninth Circuit Court stated that “the California courts have recognized that the law of vested rights must balance two conflicting interests: the public interest in lowering construction costs that result from providing developers a fair degree of certainty about their investments and the public interest in controlling pollution

and congestion effectively." (*Lakeview Development Corp. v. City of South Lake Tahoe* (1990*)* 915 F.2d 1290, 1298.)

For the reasons discussed above, Petitioner does not have a vested right that would prevent the Energy Commission from rejecting the Petition currently before it, or considering an alternative that would require the project to shift to more recycled water use.

b. At the Prehearing Conference, the Petitioner argued that the Petition does not constitute a project under CEQA. Discuss.

Petitioner argues that the Petition is not a project under CEQA. Specifically, Petitioner claims that the Petition does not result in a physical change to the environment and does not propose the addition of any new infrastructure. Furthermore, Petitioner argues there is no significant environmental impact because the area in question is an adjudicated water basin.

CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies. . . ." (Pub. Resources Code, § 21080 (a).) A "discretionary project" is one which "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine where there has been conformity with applicable statutes, ordinances, or regulations." (Cal. Code of Regs., tit. 14, § 15357.) A "project" is defined as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: . . . (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement . . . " (Pub. Resources Code, § 21065.)

Public Resources Code section 25500 *et seq*. concerning power facility and site certification, in addition to California Code of Regulations Title 20, section 1701 *et seq*., illustrates the statutory and regulatory scheme providing the Energy Commission with the sole discretion to approve or disapprove an application for certification of a power plant. As to the definition of a "project," even action that may be characterized as

"government paper-shuffling" suffices, as long as it culminates in a physical impact to the environment. (*Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 277-281.) Courts will interpret CEQA "in such manner as to afford the fullest possible protection to the environment within the reasonable scope of statutory language . . . even where the process is largely ministerial." (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal. App.3d 259, 271-273.) Although Petitioner claims no physical change to the environment will occur as a result of the Petition, it is reasonably foreseeable that the "Loading Sequence" establishing a preference for State Water Project (SWP) water, banked SWP water, and adjudicated groundwater from the Mojave Basin, in that order, to be blended with recycled water at the HDPP facility will affect the quantity and quality of water diverted into and flowing into the Alto Subarea of the Mojave Basin in which the facility is located. To determine that such activity is not a "project" would be contradictory to the letter of the law and CEQA's statutorily defined purpose.

The Petition pending before the Energy Commission is premised on a need to drought-proof the project. In 2009, the post-certification modification allowing the use of recycled water, coupled with comprehensive conditions of certification, resulted in the project complying with all LORS and with environmental impacts reduced to less than significant levels or fully mitigated. Staff cannot ignore the changed circumstances of the drought, particularly since the drought is the basis for the Petition. Staff must analyze changed or new information which was not known and could not have been known at the time the environmental analysis was certified as complete. (Pub. Resources Code, § 21166.) In accordance with CEQA Guidelines section 15162, Staff re-analyzed the conclusions of the 2009 Decision alongside new information in the Petition, the feasibility study, LORS, as well as the drought's impacts on water supplies. (Cal. Code Regs., tit. 14, § 15162.) During droughts, groundwater supplies are pumped faster than can be replenished, and, in 2014, the State Water Project allocation was just 5 percent of that which was requested. Considering these changed circumstances, Staff properly applied CEQA to the Petition by analyzing the proposed changes in light of the current environment and water supplies.

In *Meridian Ocean Systems v. California State Lands Commission*, the Court of Appeal upheld a decision of the State Lands Commission to prepare an Environmental Impact Report (EIR), even though it had previously granted an exemption under CEQA for marine geophysical surveys, after substantial evidence was discovered of a reasonable possibility of a substantial adverse impact on the environment. Petitioner in the case argued that the exemption could only be withdrawn if the State Lands Commission had shown that the geophysical activities were being conducted in a different manner than prior to the exemption or that there had been a change in the environment. The court stated that accepting the petitioner's position would "directly contradict CEQA's stated purpose of "[t]he maintenance of a quality environment for the people of this state now, and in the future…" (Pub. Resources Code, §2100 (a).) Inherent in the Commission's power to issue permits is the ability to re-evaluate the conditions surrounding their issuance as warranted by changing circumstances." (*Meridian Ocean Systems v. California State Lands Commission* (1990) 222 Cal.App.3d 153, 165.) Furthermore, the court stated that the petitioners were "adequately apprised of the Commission's intent" to prepare an EIR. (*Id*.)

HDPP's argument that there is no significant environmental impact on the environment, because there is "nothing new on the ground," is not supportive of the claim that the Petition is not a project under CEQA. (Prehearing Conference Transcript, 3/15/16, p. 32.) The definition of "project" does not state a concern with the significance of an environmental impact, but merely whether any physical change, direct or indirect, may occur. The Petition is clearly a project.

c. After reviewing Petitioner's proposed 2015 Petition to Amend, Staff has proposed that the HDPP use reclaimed water exclusively for cooling purposes. Is Staff's proposal an alternative under CEQA, or is it an alternative condition under the Energy Commission's regulations (California Code of Regulations, title 20, section 1745)? How does this affect who bears the burden of proof and persuasion?

Staff's analysis of the Petition and proposal to transition HDPP to use 100% recycled (reclaimed) water in three years is an alternatives analysis pursuant to CEQA. The recommendations made in Staff's testimony are particular to modifications proposed for

SOIL&WATER-1. The testimony of Staff is not offered as an alternative condition under the Energy Commission's regulations, thus Staff is not proposing, "any additional condition, modification, or other provision relating to the manner in which the proposed facility should be designed, sited, and operated in order to protect environmental quality . . . " (Cal. Code of Regs., tit. 20, § 1745 (d).)[1] Accordingly, the burden of proof for making a reasonable showing to support the need for the modification (e.g. the Petition before the Commission), and the impacts the modification may have on the environment and proposed measures to mitigate any significant adverse impacts, rests with the Petitioner pursuant to the Petition filed in accordance with Title 20, California Code of Regulations, section 1769(a) and Title 20, California Code of Regulations, section 1745 (c) [burden of proof].

Pursuant to statutes and regulations, the Energy Commission may approve the Petitioner's proposed post-certification modifications if there will be no significant environmental impact; the project will comply with all LORS in accordance with Public Resources Code section 25525; there will be a benefit to the public, applicant, or intervenors; and, there has been a substantial change in circumstances justifying the change. (Cal. Code of Regs., tit. 20, § 1769.) However, the Petition will result in significant unmitigable impacts, requiring the Energy Commission to reject it or make the findings required for an override. Staff identified alternatives to the Petition that avoid those impacts. Therefore, Staff posits, the Energy Commission, after considering evidence on the matter, would be unable to override the impacts and thus, would be required to reject the Petition. Staff looks forward to working with the parties on its recommendation to transition HDPP to use 100% recycled water in three years since it is both a feasible and reasonable alternative pursuant to CEQA to mitigate or avoid the environmental effects on the Delta from using State Water Project water, and would eliminate the use of groundwater from an adjudicated basin.

[1] Title 20, Cal. Code of Regs. § 1748(e) was repealed and renumbered to new § 1745(d), effective 1/1/16.

d. What are the options to grant interim water supply relief to the Petitioner during the pendency of the proceedings?

At the Prehearing Conference on March 15, 2016, Petitioner distributed to the parties alternate proposed modifications to Conditions of Certification SOIL&WATER-4, 5, 6, 12 and 13. Petitioner requested that the Committee grant interim water supply relief pursuant to the proposed modifications. Staff's response to Petitioner's proposal was docketed on March 25, 2016, but was provided to the parties after the Prehearing Conference concluded on March 15, 2016, and may be discussed at the noticed workshop scheduled on April 15, 2016. (Staff Proposed Changes to Exhibit 1000, TN 210088; Project Owner's Opening Testimony of High Desert Power Project, TN 210860.) State Water Project deliveries will increase during the pendency of the proceeding, which has the additional benefit of allowing the project owner to increase the amount of banked water. Specifically, Staff's testimony has recommended the elimination of SWP water injection, but the Committee will note in Staff's response to Petitioner's request that SOIL&WATER-4, paragraph (d) allows for the injection of SWP water on an interim basis. However, Staff sees tremendous benefit in replacing the project's injection groundwater bank through percolation using Mojave Water Agency (MWA) facilities. (SOIL&WATER-4, paragraph (e), TN 210860.) Staff further recommended that once the MWA water bank for HDPP is greater than 2,000 acre feet, HDPP no longer bank through direct injection. (SOIL&WATER-4, paragraph (f), TN 210860.) Since banking is important to ensure reliability of the plant, Staff also recommended that HDPP maintain a combined bank of 13,000 acre feet plus or minus 4,000 acre feet for use in any one year, by September 30, 2021. The only other additional changes to Petitioner's proposed interim conditions that Staff recommended in their reply were to add to SOIL&WATER-4 and 5 verification language limiting use of banked water for the exclusive use of HDPP.

If the Commission grants interim water supply relief to the Petitioner, any additional or alternative water allowances should not be granted indefinitely. Rather, any interim water supply relief granted should end once the current proceeding ends.

III. Conclusion

Based on the above discussion, applicable LORS have been properly applied in Staff's analysis of the HDPP Petition, including the 2003 IEPR; the Petition is a project under CEQA; Staff's recommendation to modify SOIL&WATER-1 is an alternative under CEQA; and, any options to grant interim water supply relief should be predicated on a showing by Petitioner of a need for interim water supply relief, and time limitations should be imposed in any interim relief granted by the Energy Commission.

Dated: April 1, 2016

Respectfully submitted,

Original Signed By

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