

DOCKETED

Docket Number:	97-AFC-01C
Project Title:	High Desert Power Plant
TN #:	210930
Document Title:	Legal Briefing Pursuant to Orders After Prehearing Conference
Description:	Legal Brief
Filer:	Nancee Murray
Organization:	California Department of Fish and Wildlife
Submitter Role:	Intervenor
Submission Date:	4/1/2016 3:45:58 PM
Docketed Date:	4/1/2016

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT

COMMISSION OF THE STATE OF CALIFORNIA

In the Matter Of:)
)
High Desert Power Project)
)
_____)

Docket No. 97-AFC-01C

LEGAL BRIEFING PURSUANT TO
ORDERS AFTER MARCH 16, 2016 PREHEARING CONFERENCE
CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

WENDY BOGDAN
General Counsel

NANCEE M. MURRAY
Senior Staff Counsel
Attorneys for
California Department of Fish and Wildlife
1416 Ninth Street, 12th floor
Sacramento, CA 95814
Telephone: (916)654-3821

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CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

INTRODUCTION

In accordance with the Committee’s Orders After March 16, 2016 Prehearing Conference (“Orders”) docketed on March 22, 2016, California Department of Fish & Wildlife (CDFW) submits this legal brief. CDFW is only responding to the question regarding the application of the California Environmental Quality Act to the current proceeding, as that is the question most relevant to CDFW’s role as the trustee for the State’s natural resources.

b. Does CEQA Apply to the Petition for Modification to Drought-Proof the High Desert Power Project?

California Environmental Quality Act

The California Environmental Quality Act (Public Resources Code §21000 et seq, CEQA) states that, except as otherwise provided, CEQA shall apply to discretionary projects proposed to be carried out or approved by a public agency. (Pub. Res. Code §21080(a)). Therefore, four things must be present for CEQA to apply: *approval* by a *public agency*, *discretion*, and a *project*.

For purposes of CEQA, a public agency is “any state agency, board or commission, any county, city and county, city, regional agency, public district, redevelopment agency or other political subdivision. (Pub. Res. Code §21063.) The State Energy Resources Conservation and Development Commission (CEC) is a Commission within the California Natural Resources Agency, and is therefore a “commission” within the definition of public agency under CEQA.

Activities that involve public agency *approval* include public agency issuance of a lease, permit, license, *certificate*, or other entitlement for use. Pub. Res. Code §210659(c); 14 Cal Code Regs §15378(a)(3). See *Natural Resources Defense Council, Inc. v. Arcata Nat'l Corp.* (1976) 59 CA 3d 959.

Issuance of a permit or other approval of a private activity triggers CEQA's requirements even though the activity had been conducted under a prior permit or authorization. An agency must consider compliance with CEQA in connection with each discretionary decision to approve an activity. If qualified new information develops after the initial approval, a subsequent CEQA document must be prepared in connection with the next discretionary approval. *Fort Mojave Indian Tribe v. Dep't of Health Serv.*, 28 Ca. App. 4th 1574, 1597 (1995). Here, the CEC has the authority to amend the existing conditions of certification as HDPP as requested, to amend the certification as the CEC staff have requested, to amend the license in a different manner that would lessen the potential impact on the environment or, possibly, not to amend the certification at all. The potential impact to the environment stemming from the new proposal to use one hundred percent recycled water at HDPP was not evaluated at the time of the original certification for HDPP operations in 2000 or at the time of the approval of changed conditions for operations in 2009 and 2014. The new proposals put forward by the CEC staff and HDPP could have impacts to the environment different than what has been previously analyzed, thus, a supplemental or new CEQA document must be prepared to mitigate or avoid the significant effects on the environment from HDPP operations under the newly proposed conditions of its certification. (Pub. Res. Code §21002.1)

An action is *discretionary* if it requires judgment or deliberation by the public agency in approving or disapproving it. (14 Cal Code Regs §15357). To determine whether agency action is discretionary or ministerial, courts apply a functional test that examines "whether the agency has the power to shape the project in ways that are responsive to environmental concerns." *Friends of Juanca Briones House v. City of Palo Alto* (2010) 190 CA 4th 286, 302. Under this test, an approval is discretionary if the agency has authority to modify the project or deny approval for environmental reasons. (*Id.* p. 302). The CEC has accepted opening testimony in this proceeding and is considering changing the conditions for certification for the HDPP that ranges from requiring the HDPP to use one hundred percent recycled water to using a range of water supplies in a Loading Sequence proposed by HDPP. Thus the decision by the CEC clearly involves discretion.

The fourth foundational element triggering CEQA is the existence of a *project*. "Project" is broadly defined in CEQA 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 involves the issuance of a permit or license by a public agency. (Pub. Res. Code §21065). The standard set forth in CEQA is low. The definition of a project is not based on whether there will certainly be a significant adverse impact. The threshold question is whether or not the activity *may* cause either a direct physical change in the environment or a *reasonably foreseeable indirect physical change* in the environment. (Pub. Res. Code §21065). The term "environment" is defined in 14 Cal Code Regs §15360 as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance."

Here, the CEC certified the HDPP for operation on May 3, 2000, amended that certification in 2009 and 2014, and is contemplating another amendment in the current proceeding. HDPP argues in its Petition for Modification to Drought-Proof the High Desert Power Project (TN# 206468, Petition) that the modification of its certification to allow for additional water supplies does not require new infrastructure or construction and will not result in any physical change in the environment. "Implementation of the Loading Sequence is therefore not a "project" as defined by CEQA because it is neither 'an activity [with] the potential to cause direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.'" (Petition, p. 23.)

CDFW Opening Testimony (TN# 210565, CDFW Testimony) states, "[t]he proposed use of 100% recycled water at the HDPP has the potential to reduce the storage of groundwater in the Transition Zone and impact the riparian habitat, which would be an undesirable result." (CDFW Testimony, p. 7). While the HDPP proposes to use slightly less than 100 percent recycled water, that amount of use of recycled water *may* cause a direct physical change in the environment by potentially decreasing the amount of surface water discharge to the Transition Zone, which would negatively impact the riparian habitat in the Transition Zone. Alternatively, the proposed increase in the use of recycled water at HDPP could be considered to result in a *reasonably foreseeable indirect physical change* in the environment. The diversion of a high volume of recycled water from the Transition Zone to HDPP has the potential to increase the depth to groundwater in the Transition Zone, which could negatively impact the riparian habitat in that area. Thus, the proposed use of one hundred percent recycled water, or slightly less than one hundred percent recycled water, may cause a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment, and would be a "project" under CEQA.

Executive Order B-29-15

At the Preliminary Hearing on March 15, 2016, the attorney for HDPP asserted that the proposed change in the conditions of certification for the HDPP is exempt from CEQA by virtue of Executive Order B-29-15. CDFW disagrees.

Executive Order B-29-15 was issued by Governor Edmund G. Brown Jr on April 1, 2015. Executive Order B-29-15 states in part that expedited actions are needed to reduce the harmful impacts from water shortages and other impacts of the drought. Paragraph 25 of Executive Order B-29-15 provides that the Energy Commission shall expedite the processing of all applications or petitions for amendments to power plant certifications for the purpose of securing alternate water supply *necessary for continued power plant operation* and authorizes the creation of an alternative process to consider such petitions. (Emphasis added.) Paragraph 26 provides, in part, that for purposes of carrying out the directives in Paragraph 25, CEQA is suspended until May 31, 2016.

The directive in Paragraph 25 does not necessarily apply to the proposals for changed conditions of certification for the HDPP. First, it is not clear, and has not been demonstrated, that an alternate water supply is "necessary for continued power plant operation" as required under Paragraph 25 of Executive Order B-29-15. HDPP currently operates under conditions of certification that allow it to use recycled

water, SWP water, Banked SWP water and Mojave River adjudicated water. CEC staff have submitted a proposal recommending that the CEC “amend the project to use 100 percent recycled water” (TN#206321, *Response to recycled water feasibility study summary report*. October 9, 2015, p. 14), but have not demonstrated in the record that the proposed change is “necessary for continued power plant operation.” Similarly, the petition that the HDPP filed (TN# 206468, *Petition for Modification to Drought-Proof the High Desert Power Project*. October 30, 2015, p. 2) proposing a “Loading Sequence” such that recycled water is the primary supply, with State Water Project (SWP) Water, Banked SWP Water and Mojave River Adjudicated Water are the backup supplies does not demonstrate that the Loading Sequence is “necessary for continued power plant operation.”

Governor Brown issued his first Proclamation of a State of Emergency regarding the current drought on January 17, 2014. In that Proclamation, Governor Brown suspended the strict adherence to CEQA for very specific actions of the Department of Water Resources and the California State Water Resources Control Board “on the basis that strict compliance with them [CEQA regulations] will prevent, hinder, or delay the mitigation of the effects of the emergency.” (Proclamation, Paragraph 9.) Thus the purpose of suspending CEQA was to bring immediate aid for drought relief. By contrast, in this instance, there is no need to suspend CEQA and its regulations so as not to prevent, hinder or delay the mitigation of the effects of the drought emergency do not apply to this proceeding. HDPP currently has a certification that allows it to use a combination of recycled water and surface water. Complying with CEQA need not prevent, hinder or unduly delay any mitigation that HDPP may seek as a result of the continuing drought.

CEC Regulations

20 Cal. Code Regs 1769(a)(1)(E) requires that an analysis be conducted to address any potential impacts that a Post Certification Amendment or Change may have on the environment and to propose measures to mitigate any significant adverse impacts. Thus, independent of CEQA’s requirement to analyze a proposed project’s potential environmental impacts, discuss alternatives, and develop mitigation measures to minimize any potentially significant impacts, the regulations adopted by the CEC to guide and inform the process of evaluating Post Certification Amendments or Changes also requires this analysis be done.

In Addition to CEQA, and CEC Regulations, the Public Trust Doctrine Requires the Evaluation of the Potential Environmental Impacts of the Conditions of Certification for the Operation of the HDPP on Public Trust Resources

CDFW holds the fish and wildlife resources of the state in trust for the benefit of all the people of the state and is responsible for administering and enforcing the California Fish and Game Code. (Cal. Fish & Game Code §§702,711.7(a), 1802.) As the state’s lead trustee for the state’s fish and wildlife resources, CDFW has “jurisdiction over the conservation protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species.” (*Id.* §1802.)

In addition to CDFW’s trustee responsibilities to protect the state’s fish and wildlife resources in general, CDFW has extensive experience and expertise protecting the resources in the Mojave River watershed.

Beginning in 1991, CDFW was a party litigating and ultimately became a party to the Stipulated Judgment in Riverside County Superior Court that was upheld by the California Supreme Court. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal 4th 1224, "Mojave River Judgment".) CDFW participated in the CEC proceedings that resulted in the issuance of the certification for the HDPP in 2000. CDFW owns land in both the Baja Subarea as delineated in the Mojave River Judgment, and the Alto Subarea, where the HDPP is located. CDFW actively participates in the ongoing implementation of the Mojave River Judgment.

The public trust doctrine is a longstanding California common law doctrine which holds that the state's tidelands and navigable waterways are owned and held in trust by the state for the benefit of the people of the state. (*Marks v. Whitney*, 6 Cal. 3d 251, 259-260 (1971).) The doctrine, which has existed in California since 1854, originally applied to protect the public's right to use the state's tidelands and navigable waterways for purposes of commerce, navigation, and fishing. (*Eldridge v. Cowell*, 4 Cal. 80, 87 (1854); *Colberg, Inc. v. State ex. Rel. Dep't of Pub. Works*, 67 Cal. 2d 408, 417 (1967).) However, the California courts subsequently expanded the doctrine to include, *inter alia*, the preservation of trust lands and waters in their natural state, "so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life..." *Marks*, 6 Cal. 3d at 259-260.)

In 1983, in *National Audubon*, 33 Cal 3d 419, the California Supreme Court held that the state has an affirmative duty to "protect the people's common heritage" of streams and lakes, "to take the public trust into account" in its decision making, "and to protect trust uses whenever feasible." (*National Audubon*, 33 Cal 3d at 441, 446.) The state "retains continuing supervisory control over its navigable waters and the lands beneath those waters" and has a continuing duty to seek an accommodation between competing interests and "to preserve, so far as is consistent with the public interest, the uses protected by the trust." (*Id.* at 445-447.)

The state has the affirmative duty to protect public trust uses whenever feasible. (*Id.* at 446.) When presented with conflicting testimony, the CEC must recognize that it is HDPP, as the party wishing to utilize groundwater and surface water native to the Mojave River watershed, that bears the burden of proof. See *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 381 (1935). With regard to the HDPP Petition, HDPP has the burden of proving either that its proposed Loading Sequence will not harm public trust resources, or that it is not feasible to protect public trust resources.

In addition to the common law public trust doctrine that applies directly to the diversion and use of navigable waters, there is a separate, but related branch of the public trust doctrine that protects wild fish as trust resources in and of themselves, independent of navigable waters. See *California Trout Inc. v. State Water Resources Control Board*, 207 Cal. App 3d, 585, 630 (1989) ("[w]ild fish have...been recognized as a species of property the general right of ownership of which is in the people of the state."); *People v. Murrison*, 101 Cal. App. 4th 349, 360 (2002) ("The State owns the fish in its streams in trust for the public"). "[T]he right and power to protect and preserve" fisheries "for the common use and benefit is one of the recognized prerogatives of the sovereign." *People v. Truckee Lumber Co.*, 116 Cal. 397, 400 (1897).

The Transition Zone is vital to the recovery of several species listed as threatened or endangered under the California Endangered Species Act (Fish and Game Code §2050 et seq. "CESA"), including the Mojave tui chub, a fish listed as endangered under CESA. (TN# 210554, Committee Questions for Parties. February 29, 2016, pp. 5-6.) Moreover, in the context of a desert landscape, a particularly substantial percentage of the area's biodiversity depends on the Transition Zone. Perennial free-flowing water and associated wetland and riparian habitats provide food, cover, and water to diverse bird, fish, mammal, mollusk, and insect species that would otherwise not be found in this part of the Mojave Desert. (*Id.* p. 1).

CONCLUSION

CEQA was conceived primarily as a means to require public agency decision makers to document and consider the environmental implications of their actions. (See Pub. Res. Code §§21000, 21001; *Friends of Mammoth v. Board of Supervisors* 8 Cal 3d 247, 254-256 (1972)(*Friends of Mammoth*). In *Friends of Mammoth*, the California Supreme Court commanded that CEQA should be interpreted so as to *afford the fullest possible protection* to the environment within the reasonable scope of the statutory language. (8 Cal 3d at pp. 259, 262) (*italics added*). Here, the CEC must comply with CEQA and perform a full analysis of the HDPP proposal, the CEC staff proposal, and other reasonable alternatives that might result in a less than significant impact on the environment. In addition, as the *National Audubon* court held, the State retains a continuing supervisory duty to seek an accommodation between competing interests and to protect the public trust resources whenever feasible. Here, CDFW believes that the CEC will not be able to make a fully informed determination regarding the environmental impacts of the competing proposals until the CEC has done the necessary environmental impact analysis regarding each proposal. The CEC has a duty to perform this analysis, as required by CEQA, its own regulations and the public trust doctrine.

Respectfully submitted,



Nancee M. Murray
Senior Staff Counsel
California Department of Fish & Wildlife

Date: _____

4/1/16