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

Application for Certification for the
HIGH DESERT POWER PROJECT

Docket No. 97-AFC-1C

**HIGH DESERT POWER PROJECT, LLC'S
QUESTIONS AND ANSWERS
TO HELP FOCUS THE REMAINING PROCEEDINGS**

INTRODUCTION

At the August 11, 2016, Status Conference, the Committee and the parties engaged in a dialogue on the proper nature and scope for this amendment proceeding. High Desert Power Project, LLC ("HDPP") is particularly thankful for the Committee's clear articulation of the remaining issues of concern to the Committee.

The Committee also invited HDPP to provide its views on how this proceeding should move forward. HDPP welcomes this opportunity to help focus this proceeding and respectfully offers the following Questions and Answers ("Q&A") on the factual and legal issues to help shape the remainder of this proceeding.

QUESTIONS AND ANSWERS

I. AS A FACTUAL MATTER, THE RELIEF REQUESTED WILL NOT ADVERSELY AFFECT THE ENVIRONMENT.

1. Will the Relief Requested¹ result in any direct changes in the environment?
 - a. No. The Relief Requested will not require new infrastructure or construction of any kind, and will not result in any physical change in the environment.
2. Will the Relief Requested result in any indirect changes in the environment?
 - a. No. HDPP is not changing any of its water supplies or its use of water.
3. Does HDPP propose a change in the Loading Sequence beyond that offered in Interim Relief?
 - a. No. As stated in the Summary of Relief, HDPP proposes that the Loading Sequence approved in the Interim Relief be made permanent, including the limitations on access to MRB Water as an emergency, backup supply if HDPP's groundwater bank falls below 4,000 acre-feet ("AF").

¹ "Relief Requested" is defined in the July 22, 2016 filing, *High Desert Power Project, LLC Summary of Relief Requested* (TN # 212397).

4. Will the extension of the Loading Sequence result in direct or indirect changes in the environment?
 - a. No. The Loading Sequence does not authorize any new water use. The Loading Sequence will not cause HDPP to use any water supply in excess of the quantities currently authorized.

5. Does HDPP propose a change in use of Recycled Water?
 - a. No. There are no changes in the use of Recycled Water. In 2009, the Commission approved the use of Recycled Water, lifting the prohibition in the 2000 Certification. The 2009 CEC Approval is the California Environmental Quality Act (“CEQA”) equivalent approval for Recycled Water use. There is no legal or factual basis supporting DFW’s argument that an analysis of HDPP’s use of Recycled Water or a new, lower cap on current authorizations are necessary. HDPP seeks no changes, and thus there are no direct or indirect changes in the environment associated with continuing the existing Recycled Water use.

6. Does HDPP propose changes in use of SWP Water?
 - a. No. There are no changes. The original certification in 2000 required the exclusive use of SWP Water and Banked SWP Water and expressly prohibited use of Recycled Water. In 2009, the CEC reaffirmed the use of SWP in its decision allowing for the use of Recycled Water. HDPP seeks no changes to its use of its SWP Water supply.

7. Does HDPP propose changes in use of MRB Water beyond that offered in Interim Relief?
 - a. No. As stated above, HDPP accepts the Interim Relief’s limitations on access to MRB Water as an emergency, backup supply only if HDPP’s groundwater bank falls below 4,000 AF. There is no new infrastructure and no physical changes to the physical environment required for HDPP to use MRB Water as an emergency backup supply.

The MRB Water and Banked SWP Water are delivered through the same infrastructure. There are four wells used to inject groundwater. The same four wells are used to extract groundwater. The system can either inject water or extract water, but it cannot do both at the same time. It is an accounting decision as to whether the water being extracted is debited to the HDPP project’s use of SWP Banked Water or MRB Water.

8. Does HDPP propose changes to the Facility’s use of Banked SWP water?
 - a. No. HDPP seeks no changes to its use of its Banked SWP Water supply.

9. Does HDPP propose changes in percolation of SWP Water beyond that offered in Interim Relief?

- a. No. HDPP seeks to make the permanent the Interim Relief approval for Mojave Water Agency (“MWA”) to percolate SWP Water into the HDPP groundwater bank. As discussed below, percolation of SWP Water by MWA using existing facilities is not a project with the potential to adversely impact the environmental and complies with all applicable laws, ordinances, regulations, and standards (“LORS”).

II. AS A MATTER OF LAW, THE RELIEF REQUESTED IS EXEMPT FROM CEQA BECAUSE IT IS NOT A CEQA “PROJECT”.

10. Is the Relief Requested a CEQA “Project”?

- a. No. The Relief Requested is not a CEQA “Project” 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.” (Pub. Res. Code § 21065).

11. Will the Relief Requested Result in any direct changes in the environment?

- a. No. The Relief Requested will not require new infrastructure or construction of any kind, and will not result in any physical change in the environment.

12. Will the Relief Requested result in any indirect changes in the environment?

- a. No. As discussed above, HDPP is not changing any of its water supplies or its use of water. No construction will occur.

13. But for the Commission’s preemptive authorities, would there be any local “discretionary” approvals associated with the Relief Requested?

- a. No. If HDPP was outside the CEC’s jurisdiction (for example, a 49.9 MW facility), HDPP would require no discretionary approvals to implement the Relief Requested. Groundwater banking is authorized by the Mojave Judgment, and existing MWA facilities will be used to percolate SWP Water for HDPP. Likewise, the continued service of MRB Water to HDPP by Victorville, pursuant to Victorville’s adjudicated groundwater right, does not require a discretionary approval. Absent the Commission’s jurisdiction, there would be no discretionary approvals, and no CEQA review required.

III. AS A MATTER OF LAW, THE RELIEF REQUESTED IS EXEMPT FROM CEQA BY THE GUBERNATORIAL EXECUTIVE ORDERS.

14. Is the Relief Requested exempt from the requirements of CEQA by the Gubernatorial Executive Orders?

- a. Yes. The Committee has properly found that the Governor’s Executive Orders exempt the Relief Requested from CEQA.

There is nothing in the Public Resources Code that would provide for a CEQA-equivalent review in contravention of the Executive Orders. Section 25523 does not allow the Commission to conduct CEQA review of the Relief Requested, given the legal effect of the Executive Orders.

15. Do the CEC's override authorities allowing it to grant a Section 25525 Approval allow the Commission to conduct CEQA review notwithstanding the Executive Orders?
 - a. No. The Commission can override LORS inconsistencies using its Public Resources Code Section 25525 Override Approval authorities, but it cannot override the Executive Orders.

IV. THE ISSUE OF RECYCLED WATER USE BY THE FACILITY HAS ALREADY BEEN EXAMINED AND APPROVED BY THE COMMISSION.

16. Has the Facility's use of Recycled Water been considered by the Commission?
 - a. Yes. In 2009, the Commission approved HDPP's use of Recycled Water. That 2009 approval was made pursuant to the CEC's CEQA-equivalent Certified Regulatory Program. The substantive mandates of CEQA were satisfied in 2009, and HDPP seeks no changes in its use of Recycled Water, SWP Water, Banked SWP Water, and the use of MRB Water. It would require no changes as MRB Water is delivered from the same four-well pumping system as Banked SWP Water.
17. When did DFW's request for a Water Balance Study first arise?
 - a. DFW's initial request for a Water Balance Study arose in response to Staff's Substitute Proposal, which required 100% Recycled Water use by the Facility. As set forth in its Prehearing Conference Statement, DFW intervened for "the limited purpose of presenting evidence regarding the potential use of one hundred percent recycled water on the water balance in the area."²
18. Does DFW's request for a Water Balance Study challenge the approvals for Recycled Water use granted in the 2009 CEC Decision?
 - a. Yes. In effect, DFW's request for a Water Balance Study and limitations to the Facility's Recycled Water use is an untimely collateral attack of the 2009 CEC Decision. The issue of Recycled Water use by the Facility has already been litigated, adjudicated, and decided. Challenging the authorization for Recycled Water use now, several years after the original authorization, is a collateral attack on the 2009 CEC Decision that only serves to delay the processing of the amendment before the Commission. Furthermore, DFW's request for a Water Balance Study is not relevant to any decision that the Commission must make in this proceeding because the Petition does not propose 100% use of Recycled Water by the Facility.

² TN#: 210647, p. 1.

V. THE COMMISSION'S AMENDMENT PROCESS IS NOT THE PROPER FORUM TO CRITICIZE AND SEEK TO REOPEN THE MOU BETWEEN DFW AND VVWRA.

19. Is the request for a Water Balance a challenge to the provisions of the MOU between DFW and VVWRA?
- a. Yes. The 2003 MOU was negotiated, executed, and approved by both VVWRA and DFW. If DFW believes that the MOU, which guarantees minimum flows of water to the Mojave River, should be re-negotiated, DFW should make that case to VVWRA in the appropriate forum. To use this CEC forum to attack the provisions of the MOU is improper, unnecessarily costly, unfair to HDPP, and wasteful for both the private and the public sectors.

VI. THE COMMISSION'S AMENDMENT PROCESS IS NOT THE PROPER FORUM TO RE-LITIGATE THE ADJUDICATION AND THE WATERMASTER'S MANAGEMENT OF THE BASIN.

20. Is the request for a Water Balance Study a challenge to MWA's management of the Mojave River Basin?
- a. Yes. DFW has participated in the Judgment, and the Department owns land on the Mojave River. DFW regularly advocates in the court-administered Watermaster proceedings for reduction in groundwater production from the Baja Subarea where its Camp Cady is located. To use this CEC forum to attack the Watermaster's management of the Mojave River Basin is improper.
21. Does the Proposal to use the FEMFLOW3D model or any other model to track "dissipation" conflict with the Judgment and the Watermaster's administration of the Basin?
- a. Yes. A dissipation model assumes that molecules of water injected or percolated on behalf of HDPP must be available to withdraw from HDPP wells and if not that water is lost. That is not a correct assumption and fails to account for the benefits to the overall region of injection and percolation of water by HDPP. Significantly, the Mojave Judgment does not require that the specific molecules of water stored in groundwater basin be available for withdrawal by the storer. HDPP will address this issue further in its filing in response to the Committee's *Memo to All Parties re: Committee Conference: Technical Expert Discussion and Date Availability* (TN #: 212860).

CONCLUSIONS

HDPP is, at the end of the day, just a customer of the local water suppliers.

Thank you for the opportunity to provide this Q&A, offered in hopes of helping focus the remainder of this proceeding.

Respectfully submitted,

A handwritten signature in blue ink that reads "Jeffery D. Harris". The signature is written in a cursive style and is positioned above a horizontal line.

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