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

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| Application for Certification for the<br><br>HIGH DESERT POWER PROJECT | Docket No. 97-AFC-1C |

**REPLY BRIEF OF**
**HIGH DESERT POWER PROJECT, LLC**
**IN RESPONSE TO ORDERS AFTER JULY 10, 2017, COMMITTEE CONFERENCE**

## INTRODUCTION

Condition of Certification Soil&Water-6.d., added in the initial certification of the High Desert Power Project, states that "The project shall not operate for longer than thirty (30) years unless the Commission has approved an amendment to its license that specifically evaluates the water resources impacts of continued operation and imposes any mitigation necessary to ameliorate any identified impacts." Project Owner's opening brief describes how the 2009 and 2015-2016 amendments to the license satisfied the express requirement of Soil&Water-6.d. The opening brief also describes how the concerns that led to condition Soil&Water-6.d. are no longer relevant today.

On September 1, 2017, after the parties submitted their opening briefs on condition Soil&Water-6.d, the parties entered into a Comprehensive Stipulation and Agreement on all Soil&Water conditions.[1] Approval of the parties' Comprehensive Stipulation and Agreement will definitely resolve and mitigate any water resources impacts of continued operation of the facility in satisfaction of condition Soil&Water-6.d. The CEC staff's and DFW's opening briefs focus almost exclusively on whether the 2009 Recycled Water amendment satisfied condition Soil&Water-6.d. Accordingly, this reply focuses primarily on that issue.

In 2009, the Commission lifted the prohibition on the use of Recycled Water, allowing HDPP access to this new water supply. Adding a wholly new supply – one that had been expressly banned before – necessarily required the Commission to "specifically evaluate[] the water resources impacts of continued operation and impose[] any mitigation necessary to ameliorate any identified impacts," as required by Soil&Water-6.d. This should be the end of the inquiry with the Committee finding that Soil&Water-6.d has been satisfied.

Surprisingly, in support of their positions that Soil&Water-6.d was not satisfied when the Commission analyzed and approved the use of recycled water, the Staff attacks its own Staff

[1] TN #: 221008.

Analyses from 2009. It is the approval of the Commission in 2009, based on the entirety of the record, that matters, not the retrospective angst of the Staff in 2017.

The record in 2009 confirms that thorough impacts and LORS analyses were performed in support of the Commission's approval, satisfying Soil&Water-6.d. Undermining prior CEQA and LORS-compliant approvals embodied by Soil&Water-6.d serves only to weaken the integrity of the Commission's processes in this proceeding and in every other proceeding that has or will come before the Commission. Similar bids to re-characterize and revisit decisions made by the Department of Fish & Wildlife ("CDFW" or the "Department") in 2003 and by this Commission in 2009 based on CDFW's 2003 actions are likewise unavailing and destabilizing.

In addition to the 2009 Recycled Water and the 2015-2016 interim drought relief approvals, in approving the pending Amendment to make percolation permanent and other matters within the Comprehensive Stipulation, the Committee will necessarily evaluate the water resources impacts for the second time, imposing any mitigation necessary, further satisfying Soil&Water-6.d.

Based on the entire record in this proceeding, the Committee should find that Soil&Water-6.d has been satisfied.

## REPLY TO THE COMMISSION STAFF

### I. STAFF RECENT MISGIVINGS ABOUT ITS OWN ANALYSES OF THE 2009 RECYCLED WATER AMENDMENT DO NOT AFFECT THE SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE 2009 AMENDMENT ANALYZED POTENTIAL IMPACTS AND IMPOSED MITIGATION, AS REQUIRED BY SOIL&WATER-6.D

Ironically, the Staff argues that the 2009 Recycled Water Amendment failed to satisfy the requirements of CEQA and LORS *because the Staff's own analysis was defective*: "Staffs analysis in 2009 did not include an evaluation of potential water resource impacts." (Staff's Opening Brief ("OB"), p. 3.) This argument lacks credibility.

First, and foremost, the Staff is not the Commission. It is the decision of the Commission that matters. Staff's own, newly-articulated misgivings about its own prior analyses are irrelevant as the Commission based its decision in 2009 on the entire record.

Staff is an independent party, no different than the Project Owner. The Staff ***and*** the Project Owner submitted evidence on the 2009 Amendment. It is simply contrary to fact (the amendment proceeding record), the law (vesting the Commission with approval authority, not Staff), and precedent for the Staff to argue that the Commission "relied"[2] solely on Staffs' analysis in making its decision in 2009.

[2] "In approving the amendment, the Energy Commission relied on Staffs recycled water analysis filed in September 2009." (Staff OB, p. 3.)

The record in the 2009 Amendment is robust.[3] The record includes "substantial evidence," as that term of art is defined, and is not based solely on the Staff's analysis. It is the Decision of the Commission, not the arguments of the Project Owner, the Staff or any other independent party that matters as the full Commission holds approval authority.

As set forth in the Project Owner's Opening Brief, the Commission found – based on the entire record, not just Staff's analysis -- that the 2009 Amendment satisfied both CEQA and applicable LORS, satisfying Soil&Water-6.d. The Commission expressly issued conclusions of law that the water supply for HDPP would not result in "any significant impact to public health and safety, or the environment."[4] In addition, the Commission's approval Order made the following further findings of fact and conclusions of law:

> The Energy Commission public review process has been certified as a CEQA equivalent, ***and therefore satisfies CEQA requirements***. The Energy Commission finds that:
>
> • The petition ***meets*** all the filing ***criteria of Section 1769(a)*** concerning post-certification project modifications.
>
> • The modification will ***not change*** the findings in the Energy Commission's Final Decision pursuant to Section 1755.
>
> • The project will ***remain in compliance*** with all applicable laws, ordinances, regulations, and standards, subject to the provisions of Public Resources Code section 25525;
>
> • The Change will be ***beneficial to the public*** because there will be a decrease in the use of potable SWP water for project operation.
>
> • The change is based on information that was not available to the parties prior to Commission certification. The availability of fresh water from the State Water Project has diminished dramatically in comparison with estimates available at the time of certification for reasons that were not anticipated during project certification, which threatens the reliability of project operations.[5]

Staff's misgivings in 2017 about the 2009 Amendment are an attack on itself, and by extension, an attack on the integrity of the Commission's approval process. Fortunately, Staff's self-doubts today are irrelevant. The Commission decided these issues in 2009 based on the entire record, finding CEQA and LORS compliance. In doing so, the Commission's approval Order confirms that the Commission analyzed potential impacts and imposed any required mitigation, in satisfaction of Soil&Water-6.d.

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[3] See the voluminous hearing record on the 2009 Amendment proceeding, a portion of which is attached to the Project Owner's OB, Attachments 2, 3, 4, 5 and 6, TN #: 220912.)

[4] *Id.*

[5] *Id*. (emphasis added).

## II. STAFF'S CLAIMS THAT ITS 2009 EVALUATIONS WERE NOT IMPACTS ANALYSES ARE CONTRADICTED BY THE RECORD, INCLUDING STAFF'S OWN 2009 ANALYSES

To question its own analyses in 2009, the Staff in 2017 reaches back to 2003. Specifically, in 2017 Staff cites to its own reliance on the 2003 MOU between the CDFW and Victor Valley Wastewater Reclamation Authority ("VVWRA") in an attempt to undermine Staff's conclusions in 2009:

> Instead [of performing potential water resources impacts analysis], Staff referred to the 2003 Memorandum of Understanding (MOU) between the California Department of Fish and Game and the Victor Valley Wastewater Reclamation Authority (VVWRA)[fn] which "specifies discharge requirements that VVWRA must maintain to ensure there will be no impacts to riparian resources in the Mojave River." (Staff OB, p. 4.)

While we are surprised to have to say this in responding to the Staff, but we believe the Staff did its job in 2009.

Staff supplied its analyses, part of the whole record, as cited below. Indeed, Staff's own words in 2009 rebut Staff's claims today that the 2009 analysis was not a water resources impacts analysis:

> The proposed use of recycled water and the modification to the aquifer banking requirements have the ***potential to cause environmental impacts*** to soil and water resources due to pipeline construction and the delivery, use, and discharge of recycled water. ***These aspects of the proposed petition to amend have been evaluated in accordance with the California Environmental Quality Act (CEQA) and current laws, ordinances, regulations, and standards (LORS)***. (September 30, 2009, "Revised Staff Analysis of Proposed Modifications to Remove the Prohibition of the Use of Recycled Water," p. 1.)[6]
>
> * * *
>
> The modification is ***consistent with Energy Commission water policy and California Water Code section 13550*** which are intended to protect freshwater supplies for other beneficial uses. This change in water use ***would not result in any impacts*** and would be ***consistent with previous project analysis*** if the proposed changes to the existing conditions of certification are adopted and implemented. (*Id*., p. 13; emphasis added)

[6] TN #: 53500 (emphasis added); Staff's Revised analysis is reproduced as Attachment 3 to Project Owner's Opening Brief, TN #: 220912

Criticism from the Staff in 2017 notwithstanding, the Staff in 2009 stated emphatically and unambiguously performed the "impacts" analyses required. The Commission should look to the hearing record created in 2009, not the Staff's 2017 brief.

More important, as set forth in Section I above, the Commission did its job in 2009. The Commission relied on the entire record in that proceeding, including analyses provided by the Project Owner and Staff to conclude that the 2009 amendment would comply with CEQA and not result in any significant impacts, all as memorialized in the 2009 Order of Approval, satisfying Soil&Water6.d.

## III. STAFF RELIES ON CDFW'S CRITICISM OF STAFF'S ABANDONED POSITION REQUIRING 100% USE OF RECYCLED WATER TO ATTACK THE 2009 APPROVAL

Commission Staff uses CDFW's attack on Staff's now abandoned "100% recycled water" position as evidence of defects with the Commission's approval in 2009. In calling into question its own 2009 analysis, Staff points to CDFW's February 2016 docketed filing:

> The reduced recharge resulting from the ***100% recycled water use*** at the HDPP will likely result in a long-term deficit in the groundwater in the Transition Zone. * * * I have not seen an analysis done in the documents that I have reviewed in the docket that addresses the potential impacts from a reduction in recharge to the Transition Zone that would ***result from the HDPP using 100% recycled water***. (Staff OB, p. 4)

Staff adds that it was "unaware" that the MOU between VVWRA and CDFW "may be insufficient to manage recycled water discharges" and thus concludes, "The Energy Commission's 2009 Order, therefore, is not a reflection of a complete analysis of potential impacts and cannot be used to justify the removal of Condition of Certification Soil&Water-6.d."[7]

First, and foremost, it was Commission Staff, not the Project Owner, that proposed using 100% recycled water. Staff has since abandoned this position. How the CDFW's attack on the Staff's proposal to use 100% recycled water in 2016 leads to a conclusion that the 2009 Order was not a valid approval satisfying Soil&Water-6.d is perplexing, at best.

Second, and of greater legal importance, the Project Owner is not advocating for any changes in water use, other than making percolation permanent, a position supported by the Staff and CDFW.[8] This strawman on 100% recycled water usage is irrelevant to the question of whether Soil&Water-6.d has been satisfied.

The 2009 Order approving the use of recycled water was CEQA and LORS-compliant as it "specifically evaluate[d] the water resources impacts of continued operation and impose[d]

[7] Staff OB, p. 4.
[8] TN #: 220246: Transcript of the 07/10/2017 Continued Committee Status Conference, p. 4, lines 4-25.

any mitigation necessary to ameliorate any identified impacts," as required by Soil&Water-6.d. Arguments in 2016 about Staff-proposed and abandoned positions do not change the Commission's findings of fact and conclusions of law.

As a matter of law, the time to challenge any alleged infirmities in the 2009 Approval have long since passed. Administrative reconsideration and judicial review are required within 30 days of the docketing of the Commission's Order of approval. (Public Resources Code 25530 and 25531; 20 CCR § 1720.4.) Staff's misgivings are not a basis for reopening the Commission approval, especially the unassailable CEQA and LORS-compliant approvals made in 2009, satisfying Soil&Water-6.d. It would be an absurd result to allow these decisions to be collaterally attacked today. It would be equally absurd to limit or qualify these prior approvals based on "awareness" or any other misgivings in 2017. Misgivings notwithstanding, Soil & Water-6.d has been satisfied.

## REPLY TO THE DEPARTMENT'S STAFF

### IV. THE MAJORITY OF THE DEPARTMENT'S OPENING BRIEF REVISITS ISSUES AS THEY WERE IN THE YEAR 2000

It is not disputed that the water issues were the "most highly contested" in the original proceeding that culminated in a decision in the Year 2000. The Commission's Final Decision in the High Desert Power Project proceeding memorializes these disputes. The Department's Opening Brief relies most heavily on its own testimony in the 2000 proceeding.

The relevant issue is not, however, the testimony of any one party in the Year 2000. The instant briefing deals with whether Soil & Water-6.d has been satisfied. Since no one claims Soil&Water-6.d was satisfied in 2000, the Department's reflections on the Year 2000 are irrelevant to the question presented.

### V. THE DEPARTMENT'S ARGUMENTS ARE ANCHORED IN THE DEPARTMENT'S DISAGREEMENT WITH THE COMMISSION'S FINAL DECISION ON THE 2009 AMENDMENT

The Department has been unambiguous in professing its distain for the 2009 Amendment. Notwithstanding the Department's positions, the Commission's Decision on the 2009 Amendment is a valid, CEQA and LORS-compliant decision that satisfied Soil&Water-6.d and cannot be revisited simply because the Department now dislikes the outcome of that proceeding.

The Department assails the 2009 proceedings, incorrectly claiming deficiencies. For example, the Department notes the lack of "evidentiary hearings" on the 2009 Amendment. (Department OB, p. 3.) In fact, the overwhelming majority of the Commission's decisions on amendments are processed without evidentiary hearings. Indeed, most are reviewed and approved without appointment of a Committee or any public meetings. These amendments are nevertheless CEQA and LORS-compliant, satisfying Soil&Water-6.d.

## VI. THIS LICENSING PROCEEDING IS NOT THE PROPER FORUM TO RELITIGATE THE 2003 MOU BETWEEN THE DEPARTMENT AND VVWRA

The Department's Opening Brief attacks Commission Staff for its citation to and reliance on the 2003 MOU between the Department and VVWRA. (Department OB, p. 3.) The Department's absence in 2009, voluntary or otherwise, does not afford the opportunity to re-litigate these issues. They were decided in the Commission's CEQA and LORS-compliant approvals on water supply and mitigation measures made in 2009, satisfying Soil&Water-6.d.

The 2003 MOU between the Department and VVWRA is not at issue in this Amendment proceeding. This individual licensing proceeding is not the proper forum to re-litigate the 2003 MOU.

## VII. IS IT THE OFFICIAL POSITION OF THE DEPARTMENT THAT THE 2003 MOU FAILS TO PROTECT THE ENVIRONMENT?

The suggestion that the 2003 MOU is somehow defective or otherwise not protective of the environment is a serious self-indictment, unsupported by the facts: "The 2003 MOU *does not ensure there will be no impacts to riparian resources* in the Mojave River." (Department OB, p. 3.) As set forth on the face of the MOU, this statement is patently false: "VVWRA and DFG desire to enter into this MOU *to cooperatively address their respective concerns regarding VVWRA's current and future discharges to the Mojave River Transition Zone*." (TN #: 210503, CDFW-VVWRA MOU, p. 2.) The 2003 MOU is aimed at ensuring no impacts to the Mojave River. We note also that the Department has not terminated the 2003 MOU, confirming that the MOU is still meeting these stated purposes.

It is unclear if the argument that the MOU fails to meet its stated objectives is the official position of the Department. It is clear, however, that the Department would not enter into an MOU without diligently confirming that that MOU would not harm the environment, nor would the Department forego its right to terminate an ineffective agreement if the environment was at risk. These statements about whether the 2003 MOU is protective of the environment are irrelevant to any decision the Commission must make related to Soil&Water-6.d. The 2009 Order properly addressed water supply issues for HDPP and imposed mitigation measures in satisfaction of Soil&Water-6.d.

## VIII. THE APPROVAL OF PERCOLATION AND THE PARTIES' COMPREHENSIVE STIPULATION AND AGREEMENT IN THIS AMENDMENT WILL SATISFY THE REQUIREMENT OF SOIL&WATER-6.D

In approving the pending Amendment to make percolation permanent, the Committee will necessarily determine compliance with the requirements of CEQA and the Commission's regulations and determine whether the proposed changes would not result in "any significant impact to public health and safety, or the environment. In doing so, the Commission will in this proceeding specifically "evaluate[] the water resources impacts of continued operation and impose[] any mitigation necessary to ameliorate any identified impacts," as required by

Soil&Water-6.d. The Committee Order approving this Amendment will also satisfy Soil&Water-6.d.

The parties' Comprehensive Stipulation and Agreement filed after the opening briefs addresses any remaining water resource impacts of continued operation and imposes any mitigation necessary to ameliorate any identified impacts. Specifically, the concerns raised by CEC Staff and DFW about the CEC Staff Analysis on the 2009 Recycled Water Amendment are definitively resolved by the Stipulation's minimum Recycled Water requirement, which was requested by CEC Staff, and maximum Recycled Water requirements, which was as requested by DFW.

## IX. ADDITIONAL, COMPULSORY AMENDMENTS SHOULD BE AVOIDED BY CONFIRMING THAT SOIL&WATER-6.D HAS BEEN SATISFIED

This Amendment was compulsory. The Project Owner did not file this Amendment on its own volition. Instead, prior versions of Condition Soil&Water-1 required this filing. As a matter of good public policy, the Commission should avoid mandating that certificate holders file amendments (especially now where the financial burden for both the project owner and the Staff's time falls solely on the project).

The change the Project Owner seeks is simply to make permanent the percolation of State Water Project ("SWP") Water using Mojave Water Agency's existing facilities. As a matter of law and good policy, no future amendments should be required where there are no significant impacts under CEQA and the project remains in compliance with applicable LORS.

In contrast, if the Committee finds that Soil&Water-6.d has not been satisfied, by the 2009 Amendment or by this Amendment, it is tantamount to mandating another amendment proceeding on these same issues. The Committee should avoid mandating another amendment, expressly or by finding that Soil&Water-6.d was not satisfied in 2009 or by its approval in 2017.

## CONCLUSIONS

The express terms of Condition Soil&Water-6.d were met in 2009 with the approval that lifted the prohibition on the use of recycled water. By removing the ban on recycled water and allowing for a use of this new supply, the Commission necessarily, "specifically evaluate[d] the water resources impacts of continued operation and impose[d] any mitigation necessary to ameliorate any identified impacts" in a CEQA and LORS-compliant manner, as required by Soil&Water-6.d.

In addition, since 2009, there have been multiple CEQA and LORS-compliant Commission approvals of water supply amendments, including, the anticipated approval of this amendment in 2017. These CEQA and LORS-compliant processes "specifically evaluate[d] the

water resources impacts of continued operation and impose[d] any mitigation necessary to ameliorate any identified impacts." Condition Soil&Water-6.d has been satisfied.

Dated: September 8, 2017

Respectfully Submitted,

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