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November 28, 2010

Mr. Craig Hoffman
Project Manager
California Energy Commission
Sitting, Transmission and Environmental Protection Division
1516 Ninth Street, MS 15
Sacramento, CA 95814

Subject: Mariposa Energy Project, Comments on Proposed Soil & Water Resources Testimony

Dear Mr. Hoffman:

This letter is written on behalf of Byron Bethany Irrigation District (BBID) regarding the proposed testimony on Soil and Water Resources. While the testimony acknowledges BBID's pre-1914 entitlement to water there continues to be some ambiguity in the testimony regarding BBID's relationship to the State Water Project. BBID operates separately from the State Water Project and holds an entitlement to water that is senior to and of higher priority than the water rights for the State Water Project. BBID's only relationship to the State Water Project (SWP) is the location of its pumping plants on the intake channel for the Harvey O. Banks Pumping Plant.

BBID's original point of diversion on Italian Slough was destroyed by the California Department of Water Resources (DWR) with the construction of the Harvey O. Banks Pumping Plant. To compensate BBID for the destruction of its diversion, DWR granted BBID the permanent and perpetual use of the Banks Pumping Plant Intake Channel as a replacement point of diversion. Accordingly, BBID diverts water under its own water right at its facilities located on the Banks Pumping Plant Intake Channel.

In the proposed testimony, staff concludes on page 4.12-15 that the Mariposa Energy Project's (MEP) use of water for construction purposes would impact other water users. Staff has not and could not provide any quantitative evidence for its conclusions. The use of up to 2.1 acre-feet of water for construction purposes is insignificant. There is simply no support in fact for staff's conclusion.

Similarly, MEP's annual use of water up to a maximum of 187 acre-feet per year is also inconsequential and would have no impact on the SWP's operations. In comparison to the quantities of water diverted by the SWP, the annual use of water by MEP is so small that it would be impossible to measure any physical impact on SWP's diversions. Staff provides no

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supporting evidence (nor could it) for its conclusion that MEP's annual use "could increase limitations for other Delta-source water users during drought years."

Moreover, staff's conclusions ignore the fundamental principle of California water law of first in time, first in right. *City of Barstow v. Mojave Water Agency*, (2000) 23 Cal. 4th 1224, 1243. Because BBID has water rights senior to the SWP, it is legally entitled to divert water before the SWP even if its use of water results in less water available to the SWP. BBID's exercise of its senior water rights does not constitute an adverse impact since the SWP does not have a legal right to water diverted by BBID.

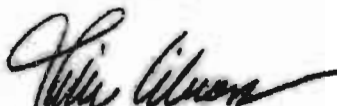
As BBID has previously noted in its earlier correspondence, the diversion and beneficial use of water is not regulated by the California Energy Commission (CEC), and it is questionable whether the CEC can impose any type of water conservation fee for the diversion and use of water by MEP. Moreover, the imposition on the right to divert water, a property right under California law, likely runs afoul of Article XIII A of the California Constitution. Furthermore, the staff's proposed water conservation fee is also contrary to the recently approved Proposition 26 that amends Article XIII A, section 3 of the California Constitution.

BBID considers its role as a good steward of its water resources to be of crucial importance and therefore practices the efficient use of water. BBID is currently making improvements to its operations to reduce seepage, evaporation and operational spills. To ensure that BBID has the financial resources to continue its water conservation efforts, BBID will establish a water rate structure for MEP in accordance with the constitutional requirements that include a proportional water conservation fee.

BBID appreciates the opportunity to comment on the proposed Staff Assessment. In addition to the comments set forth in this letter, BBID is providing a redlined version of the proposed staff assessment with changes BBID considers critical.

BBID looks forward to addressing these comments at the workshop on November 29, 2010 and representatives will be present to answer any questions the staff may have.

Very truly yours,



Rick Gilmore
General Manager

cc: Board of Directors
Sandra Dunn, General Counsel
Bo Buchynsky, Diamond Generating Corporation