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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 POINTS AND AUTHORITIES IN RESPONSE TO COMMITTEE'S ORDERS AFTER MARCH 16, 2016 PREHEARING CONFERENCE

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INTRODUCTION

The Committee's *Orders After March 16, 2016 Prehearing Conference*, requested briefs on four questions specifically focusing on the legal points and authorities supporting the responses. High Desert Power Project, LLC ("HDPP") provides its responses below. In summary fashion, HDPP answers the Committee's questions as follows:

- Question (a): Two specific applicable laws, ordinances, regulations, or standards ("LORS") were adopted after the original approval of the HDPP in 2000: (1) the 2015 Executive Order B-29-15 and (2) the Court-Administered Judgment for the Mojave River Basin. The post-Certification *2003 Integrated Energy Policy Report* ("2003 IEPR" or "IEPR") policy statement regarding the conditions under which fresh water use will be approved by the Commission for cooling purposes is not an applicable LORS, and does not have the force of law, because it was not adopted in accordance with the requirements of the Administrative Procedure Act. Even if the 2003 IEPR had been adopted as a regulation, there is nothing in the plain language of the 2003 IEPR that suggests that it was the intent of the Commission to apply the policy retroactively to projects that have already been licensed and constructed. Further, even if the 2003 IEPR policy had been adopted as a regulation and is applied retroactively, the policy would not require the Facility to use 100% recycled water.

- Question (b): The modification proposed by the Petition does not constitute a project under the California Environmental Quality Act ("CEQA") because no discretionary approvals are required and the modification does not have the potential to result in any significant adverse environmental effects. Furthermore, the modification proposed by the Petition is categorically exempt from CEQA, exempt pursuant to Executive Order B-29-15, and exempt because actions consistent with the Court-Administered Judgment are not subject to CEQA.

- Question (c): Staff's proposal to require the High Desert Power Project ("Facility") to convert to a 100% recycled water supply (Staff's "Substitute Proposal") is not an alternative under CEQA, but rather an alternative proposed modification. Because the Project Owner's Petition is not a "project" as defined by CEQA, and because the application of CEQA is suspended for the Petition under Executive Order B-29-15, there

is no "project" requiring consideration of an alternative pursuant to CEQA. Staff's Substitute Proposal is instead a proposed modification to the Facility's design, operations, and conditions of certification. However, notwithstanding the above, should the Commission give any consideration to Staff's Substitute Proposal in this proceeding, the Staff bears a heightened burden of proof with respect to its Substitute Proposal because the Substitute Proposal would impair HDPP's fundamental vested right to continue operation of the Facility.

- Question (d): HDPP is requesting that two types of interim relief be granted: (1) that Condition SOIL&WATER-1 be modified to extend the two-year limitation on the use of MRB Adjudicated Water through Water Year 2017-2018, ending on September 30, 2018; and (2) that HDPP be granted the authority to pursue an agreement allowing HDPP to bank State Water Project ("SWP") Water through percolation in existing Mojave Water Agency ("MWA") facilities by amending Conditions SOIL&WATER-4, 5, 6, 12, and 13 (collectively, the "percolation conditions"). Language for amendment of these conditions is set forth in Attachment A hereto.

  There are three mechanisms by which interim relief can be granted.

  - First, the Committee can recommend that pursuant to EO B-29-15, the requirements of Section 1769 are waived as to the percolation conditions and requested extension of MRB Adjudicated Water use, and the Commission can approve the interim relief at the next Business Meeting.

  - Second, because the Commission has delegated amendment approval authority to the Executive Director under EO B-29-15, the Executive Director can approve the requested interim relief.

  - Third, the Commission can act under EO B-29-15 to adopt an alternative process to process water supply petitions such as the Petition, whereby the Committee is granted the authority to grant interim relief. The Committee can then act to grant interim relief either on its own motion or that of HDPP.

DISCUSSION

Question (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?

I. WHAT IS THE ROLE OF ADOPTED LAWS, ORDINANCES, REGULATIONS, AND STANDARDS (LORS) ADOPTED AFTER THE ORIGINAL APPROVAL OF THE HDPP IN 2000?

The following LORS came into effect after the Final Decision, and apply to the analysis of the Petition.

A. Executive Order B-29-15 Directs The Commission To Expeditiously Evaluate And Act Upon The Petition.

California Government Code section 8571 authorizes the Governor to "suspend any regulatory statute or statute prescribing the procedure for conduct or state business, or the order, rules, or regulations of any state agency…where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency."

On April 1, 2015, Governor Brown issued Executive Order B-29-15 ("EO B-29-15"), proclaiming a State of Emergency in California due to severe drought conditions. EO B-29-15 directed the Commission to "expedite the processing of all applications or petitions for amendments to power plant certifications issued by the Energy Commission for the purpose of securing alternate water supply necessary for continued power plant operation." (EO B-29-15, § 25.) EO B-29-15 further provides that Section 1769 of the Commission's regulations are waived for such petitions, and that the provisions of the California Environmental Quality Act ("CEQA") and CEQA Guidelines are suspended for any action taken by the Commission in furtherance of the directives of EO B-29-15. (EO B-29-15, § 25.) The suspension of CEQA and the CEQA Guidelines is in effect until May 31, 2016, but continues to apply to drought relief actions under EO B-29-15 started prior to May 31, 2016.

EO B-29-15 applies to the processing of the Petition, which HDPP filed on October 30, 2015 requesting that the Commission approve a proposed modification that would drought proof the Facility's water supply, and implement reliable primary and backup water supplies for the Facility. Therefore, pursuant to EO B-29-15, the Commission should expedite consideration of the Petition. Furthermore, because drought relief actions were commenced with the filing of the Petition on October 30, 2015, any action taken by the Commission with respect to consideration of the Petition is exempt from CEQA, even if actions are taken after May 31, 2016.

B. The MRB Adjudication And Judgment Provide The Legal Framework And Guidance For Water Use In the Mojave River Basin.

During the pendency of the original certification proceeding for the Facility, the Riverside Superior Court's adjudication of groundwater rights in the Mojave River Basin Water was pending review by the California Supreme Court. Recognizing that the litigation could affect the "existing supply regimen"[1] for the Facility, the Commission granted certification of the Facility.

When analyzing the water supply plan for the Facility in 2000, the Commission stated "it is important only that the project's water plan not interfere with [the Mojave Water Agency's ("MWA")] ability to address the overdraft,"[2] and concluded that "[u]se of imported State Water Project water by the High Desert Power Project will not negatively affect water levels or supply in the local aquifers, in the Mojave River, or create a significant new demand upon the supply of State Water Project, nor prevent the Mojave Water Agency from addressing the basin's overdraft."[3]

On August 21, 2000, three months after the Commission's certification of the Facility, the California Supreme Court substantially affirmed the Judgment of the Riverside County Superior Court adjudicating the water rights in the Mojave Basin and appointing the MWA to act as the Watermaster to implement the adjudication.[4]

The Judgment must be considered when analyzing the Petition because the Judgment is binding legal authority with respect to the "water needs of the public trust resources of the Mojave Basin Area", including wildlife species and riparian habitat, were specifically considered and incorporated into the physical solution mandated by the Judgment." (Judgment, Exhibit H, Biological Resource Mitigation.) Compliance with the Judgment governs water use in the Mojave River Basin. The modifications proposed in the Petition expressly utilize provisions in the Judgment to govern the Facility's water use, and do not interfere with MWA's ability to address overdraft in the Mojave Basin.

C. The 2003 IEPR Is Not A LORS.

The 2003 IEPR policy states that the Commission will approve the use of fresh water for cooling purposes only where alternative water supply sources or alternative cooling technologies are shown to be ''environmentally undesirable" or "economically unsound" (2003 IEPR, p. 41). In the 2003 IEPR, the Commission interpreted "environmentally undesirable" as equivalent to a "significant adverse environmental impact" under CEQA, and "economically unsound" as meaning "economically or otherwise infeasible," also under CEQA (2003 IEPR, p. 41).

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[1] See, Final Decision for the High Desert Power Project, pp. 209-220.
[2] See, Final Decision for the High Desert Power Project, p. 222.
[3] Final Decision for the High Desert Power Project, pp. 230-231, Finding of Fact 12.
[4] See, *City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224.

The 2003 IEPR policy is not a law, regulation, or standard applicable to the Petition for three reasons.

First, the 2003 IEPR is not a law, ordinance, regulation or standard because it was not adopted in the manner required by law for the adoption of a law or standard. The IEPR language regarding the use of fresh water is, at best, a "policy", not a regulation.

The 2003 IEPR was not adopted pursuant to the provisions of the Administrative Procedures Act ("APA") for the adoption of a regulation. Instead, the policy was promulgated without any of the significant procedural safeguards required to protect the due process rights of affected parties. Unlike other sections of the 2003 IEPR, the water policy identified above was not subject to a meaningful opportunity for public comment or workshops during the year-long proceeding. Instead, the proposed policy was presented to the public for the first time on October 30, 2003 when the Committee for the 2003 IEPR issued the Final Draft 2003 IEPR. (See, Ex. 1001, pp. 8-10.) The statement has not been adopted as a regulation in a rule-making proceeding pursuant to the APA.

Because the policy has not been adopted as a regulation pursuant to a rule-making proceeding, the language in the IEPR regarding the use of recycled water is not an applicable law, regulation, ordinance, or standard. The language is, at best, a policy guideline, but cannot be enforced by the Commission until it has been adopted as a regulation. The APA provides:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation[5] and filed with the Secretary of State pursuant to this chapter. (Cal. Gov. Code §11340.5.)

Therefore, policy statements, such as that put forth in the 2003 IEPR, cannot be enforced as an applicable law, ordinance, regulation, or standard. (See, *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 571, 575 (providing that a policy constituted a regulation and could not be enforced or given deference as it was not adopted pursuant to the APA).)

Second, even if the 2003 IEPR had been adopted as a regulation, there is nothing in the plain language of the 2003 IEPR that suggests that it was the intent of the Commission to apply the policy retroactively to projects that have already been licensed and constructed. Retroactive application was not intended because retroactive application to existing projects would have

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[5] The term "regulation" is defined as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Cal. Gov. Code § 11342.600.)

constituted an unlawful action contrary to applicable California case law, as discussed in response to Committee question (c) below.

Third, even if the 2003 IEPR policy had been adopted as a regulation, it would not require HDPP to use 100% recycled water. The 2003 IEPR policy provides that a project is not required to use alternative water supplies if such use is shown to be either (1) environmentally undesirable or (2) economically unsound. The 2003 IEPR defines "environmentally undesirable" as the "equivalent to a 'significant adverse environmental impact' under CEQA."

Staff's testimony does not identify a potentially significant adverse impact associated with the use of water proposed by the Petition. Staff merely asserts a "belief" that access to MRB Adjudicated Water "could" result in significant impacts. (Staff Soil and Water Testimony, p. 14.) Mere speculation does not constitute substantial evidence of a significant adverse environmental impact.[6] In the absence of evidence that the use of diverse and varied water supplies proposed by the Petition is environmentally undesirable, the blending of several supplies is not prohibited by the 2003 IEPR policy.

The 2003 IEPR defines "economically unsound" as "meaning 'economically or otherwise infeasible,' also under CEQA." CEQA defines feasibility as follows: "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Resources Code § 21061.1, 14 CCR § 15364.) HDPP has demonstrated in its 2014 Feasibility Study and the confidential January 2016 financial information supplied to Staff that it is economically unsound for HDPP to incur the costs of the large capital expenditures that would be required to treat and use up to 100% recycled water.

II. 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?

Appendix A of the *Application for Certification for the High Desert Power Project Commission Decision* sets forth the LORS applicable to the Facility when it was certified in 2000, including the Porter-Cologne Water Quality Control Act.

Certain provisions of the Porter-Cologne Water Quality Control Act apply to the analysis of the Petition, such as the requirements for injection of surface water into a groundwater aquifer. However, the inquiry is limited to whether the Facility will remain in compliance with the Porter-Cologne Water Quality Control Act, such as the requirements for injection, as a result of the proposed modification.

[6] See, Pub. Resources Code §§ 21080(e), 21082.2(c); 14 C.C.R. § 15064.

A. The Water Code Provisions Related To The Use Of Recycled Water In Cooling Towers, In Place At The Time Of The Original Certification, Are Not Applicable To The Petition.

Water Code Section 13552.8, which was in place at the time of the original approval of the Facility, does not apply to the analysis of the Petition. Section 13552.8 provides that a public agency *may* require the use of recycled water in "floor trap priming, cooling towers, and air-conditioning devices" for *new* industrial facilities and subdivisions and for any structure retrofitted to permit the use of recycled water and for which the State Department of Public Health has approved the use of recycled water.[7] The Facility is an existing powerplant. Because it is not a new industrial facility or subdivision, this Section of the Water Code does not apply to the Petition. Therefore, Section 13552.8 is not applicable to the analysis of the Petition.[8]

B. Recycled Water of Sufficient Quality Is Not Available In Sufficient Quantity As Defined By The California Water Code.

Water Code section 13550, also in existence at the time of certification, is applicable to the Petition, but does not mandate the use of recycled water by the Facility. Instead, Section 13550(a) states that the State Water Resources Control Board can order the use of recycled water after the Board makes certain findings and after providing notice and a hearing. Specifically, the Board could order the use of recycled water if the "cost of supplying the treated recycled water is comparable to, or less than, the cost of supplying potable domestic water."

Water Code § 13550(a)(2) states in full:

> The recycled water may be furnished for these uses at a reasonable cost to the user. *In determining reasonable cost*, the state board shall consider all relevant factors, including, but not limited to, *the present and projected costs of supplying, delivering, and treating potable domestic water for these uses and the present and projected costs of supplying and delivering recycled water for these uses*, and shall find that the cost of supplying the treated recycled water is comparable to, or less than, the cost of supplying potable domestic water." (Emphasis added.)

Significantly, Staff has not offered evidence to support such findings. The Staff testimony does not include financial testimony regarding the costs of HDPP using additional recycled water. The Staff testimony cites its response to the HDPP recycled water feasibility study, but the testimony itself does not make the required findings. In marked contrast, in its Opening Testimony and documents filed in support of its Petition, HDPP demonstrated that the quality of recycled water is not adequate for use without blending other waters of higher quality. Undertaking capital improvements to use up to 100% recycled water when available, increases

[7] California Water Code § 13552.8(b)(1)-(2).
[8] See also, Ex. 1001, pp. 11-12, which further discusses the provisions of Water Code § 13550.

the cost of recycled water, taking into account the additional treatment, such that the cost of recycled water would greatly exceed the cost of the other sources of water.

Further, the use of recycled water will not be required if such use will adversely affect downstream water rights, degrade water quality, or be injurious to plantlife, fish, and wildlife. (Cal. Water Code § 13550(a)(3).) CDFW has stated that the discharge of recycled water to the Mojave Basin and Mojave River helps sustain riparian habitats and provides other positive environmental benefits that may be undermined by the Staff's Substitute Proposal for HDPP to use 100% recycled water.

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

III. THE MODIFICATION PROPOSED IN THE PETITION IS NOT A PROJECT UNDER CEQA.

The Petition is not a CEQA "project," as that legal term of art is defined and applied. The Petition is not a project under CEQA because: (1) under applicable local LORS, the activity would not require any discretionary approvals; (2) the activity for which the Petition requests approval does not have a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment; (3) the activity is exempt from CEQA under the "Common Sense Exemption" because it can be seen with certainty that there is no possibility that the activity may have a significant effect on the environment (14 CCR § 15061(b)(3)); (4) EO B-29-15 expressly waives Section 1679 of the Commission's regulations, including the requirement that the petition contain a CEQA analysis of the impacts the modification may have on the environment and proposed measures to mitigate any significant adverse impacts; and (5) just as decisions of the Courts are not subject to CEQA, actions taken that are consistent with Court-Administered Judgment are not subject to CEQA.

A. Under Applicable LORS, The Relief Requested By The Petition Would Not Require Any Discretionary Approvals.

To be a project under CEQA, an activity must meet three criteria:

- The activity must be subject to one or more discretionary government approvals (14 CCR § 15378(c).)
- The activity must have a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (14 CCR § 15378(a)); and
- The activity must not be otherwise exempt from CEQA (14 CCR § 15062).)

The CEQA term "project" refers to the activity being approved. In this case, the activity for which the Petition requests approval will (a) maximize the Facility's use of recycled water and (b) provide HDPP with continued access to other water supply sources that must be blended

with available Recycled Water to drought-proof the Facility. (Ex. 1000, p. 2.) In short, HDPP seeks diversity of water supplies to implement the Loading Sequence necessary for continued plant operation, i.e., water supply diversity.

The authority of the Commission to license power plants derives from the fact that the Commission's permit is in lieu of any otherwise applicable governmental permits and approvals. (Public Resources Code (hereinafter "PRC") §25500.) The Commission "stands in the shoes" of the local agency. In this instance, the relief requested by the Petition is a request to extend the authorization granted by the Commission to HDPP to continue to receive water service from the City of Victorville. The City of Victorville's water use in turn is subject to the jurisdiction and the rules of the Mojave Water Agency as the Watermaster for the Judgment. Significantly, there are no discretionary environmental reviews and approvals required to continue this water service. HDPP is an existing customer of the City of Victorville entitled to purchase recycled water and MRB groundwater like any other customer within the City's service area. Victorville is entitled to serve MRB groundwater to its customers under its water right adjudicated and governed by with the Court-Administered Judgment and without receiving discretionary approvals from any court or agency.

In the absence of the Commission's jurisdiction, the requested use of supplemental water supply would not require any discretionary approval or environmental review by the City of Victorville or MWA. Therefore, applying applicable LORS, the activity requested by the Petition is not subject to discretionary governmental approval.[9] Without a discretionary governmental approval, CEQA does not apply.

The Commission stands in the shoes of local and state agencies, and standing in the shoes does not create new or different authorities. There is no discretionary approval, and there are no discretionary actions that would be required for any other water user in this basin. *No other water user in the Mojave Basin would be required to go through the environmental review and approval processes Staff proposes for HDPP*. There is no basis in law for such discriminatory treatment because the relief requested by the Petition is not a discretionary CEQA project.

B. Use Of Water Consistent With The Court-Administered Judgment Does Not Have The Potential To Result In Either A Direct Physical Change In The Environment, Or A Reasonably Foreseeable Indirect Physical Change In The Environment – Unless Staff Assumes That MWA Will Fail To Implement The Court-Administered Judgment And Such Failure Is Not Cured By The Court.

The relief requested by the Petition does not have a potential for resulting in a direct physical change in the environment, or a reasonably foreseeable indirect physical change. The

[9] Staff might argue that a decision by the Commission to modify the license and to authorize the requested drought proofing measures is a discretionary decision. However, it is only the fact that the license needs to be amended, and not the underlying activity, that requires a discretionary approval. The term "project" refers to the activity being approved. The term project does not refer to the government approval. (20 CCR §15378(c).)

activities requested by the Petition are consistent with the plans and policies for water use in a basin that has been adjudicated by the California Supreme Court and remains subject to the continuing jurisdiction of the Riverside County Superior Court.[10]

MWA has exclusive authority to administer the Basin, and the Court retains continuing jurisdiction pursuant to the Judgment. (On MWA's authorities and the Court's administration, see Ex. 1002, Sections 3.5-3.9, pp. 26-31, *passim.*) The only way to assume a potential significant effect could occur is to assume that MWA fails to implement the Judgment. These assumptions are unfounded, and Staff cannot assume such hypothetical failures to manufacture a potential for significant effect.[11] Therefore, the relief contemplated by the Petition, consistent with the Judgement, will not result any direct or indirect physical change in water use authorized by the Judgment.

C. CEQA's "Common Sense Exemption" Applies Because It Can Be Seen With Certainty That There Is No Possibility That The Relief Requested By The Petition May Have A Significant Effect On The Environment.

Even assuming, *arguendo*, that the relief requested in the Petition had a potential for a direct or indirect physical change, the activities are exempt from CEQA under the "Common Sense Exemption" that "CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." (14 CCR § 15061(b)(3).)

In this case, the modification proposed by the Petition primarily memorializes the Facility's current water supply, which is the baseline condition, with the exception of the request for authorization to access – under limited circumstances and in accordance with the requirements of the Court-Administered Judgment -- up to 3,090 acre-feet/year on a five year-rolling average of Mojave River Basin Adjudicated Water. Currently, the Facility has access to 2,000 acre-feet for Water Years 2014-15 and 2015-16, which ends on September 30, 2016.

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[10] Judgment, Section 19: "19. Jurisdiction Reserved. Full jurisdiction, power and authority are retained by and reserved to the Court for purposes of enabling the Court upon the application of any Party, by a motion noticed in accordance with the notice procedures of Paragraph 36 hereof, to make such further or supplemental order or directions as may be necessary or appropriate for interim operation before the Physical Solution is fully operative, or for interpretation, enforcement or carrying out of this Judgement, and to modify, amend or amplify any of the provisions of this Judgment or to add to the provisions thereof consistent with the rights herein decreed * * *."

[11] As Staff argues in response to CDFW, the Watermaster has authority to protect the Basin and the Committee should assume those tools will be applied: "It appears that CDFW is acknowledging the ability of the Watermaster to "correct" deficiencies by importing water or adjusting the FPA, but then their testimony suggests that the Watermaster will not use the tools or the tools are no longer adequate. * * * The CDFW analysis does not recognize that tools available under the adjudication including Mojave Water Agency (MWA) purchase of freshwater from the State Water Project (SWP) for make-up water needed to recharge the Alto subbasin would significantly enhance water quality in the MRB and make more, higher quality, freshwater available for greater beneficial uses." (Ex. 2012, pp. 3-4.)

The report prepared by GSI Water Solutions, Inc., establishes that there are *de minimis*, i.e., less than significant, impacts to the Mojave River Basin from the Facility's water use, even assuming a worst-case scenario where the Facility operated solely on Mojave River Basin Adjudicated Water. (Exhibit 1002, Exhibit C, "Report: Availability And Use Of Alternative Water Supplies At The High Desert Power Project, Prepared By GSI Water Solutions, Inc., October 2015" (the "GSI Report").) This evidence of no potential for significant effects is unrefuted and conclusive.

Further, MWA is required to manage the Basin pursuant to the terms of the Judgment. MWA serves as Watermaster of the Mojave River stream system and the Basin on the appointment of the Court.[12] MWA's responsibilities include, among other things, annual monitoring and reporting on Basin conditions, management of Basin safe yield through enforcement of pumping limits, and importation of surface water from the State Water Project to replace pumped groundwater.[13] The Judgment was substantially affirmed by the California Supreme Court in August 2000, shortly *after* HDPP was licensed by the Commission.[14] The Superior Court of Riverside County maintains continuing jurisdiction over the Judgment.[15] The Judgment adjudicated the water rights to the Basin and affirmed a physical solution to appoint a Watermaster to balance withdrawals (pumping) and recharge to maintain the safe yield of the Basin.

MWA's authorities to manage the Mojave River Basis are described in detail in the Petition (Ex. 1002, Sections 3.5-3.9, pp. 26-31, *passim*). Therefore, the Petition is exempt from CEQA as it can be seen with certainty that there is no possibility that the relief requested in Petition may have a significant effect on the environment.

D. The Petition Is Exempt From CEQA Pursuant To Executive Order B-29-15.

In addition to the Common Sense Exemption, the modification proposed by the Petition is exempt from CEQA under two separate provisions of Executive Order B-29-15, which was issued by Governor Brown to proclaim a State of Emergency in California due to severe drought conditions.

First, EO B-29-15 provides that the Commission "shall expedite the processing of all applications or petitions for amendments to powerplant certifications issued by the Energy Commission for the purpose of securing alternate water supply necessary for continued powerplant operation." (EO B-29-15, § 25.) The Executive Order further provides that Section 1769 of the Commission's Rules is waived for such petitions:

> The Energy Commission shall expedite the processing of all applications or petitions for amendments to power plant

[12] Judgment, ¶¶ 4(nn); 23(c).
[13] *See generally* Judgment, ¶¶ 24-29.
[14] *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.
[15] Judgment, ¶¶ 19, p. 24.

> certifications issued by the Energy Commission for the purpose of securing alternate water supply necessary for continued power plant operation. Title 20, section 1769 of the California Code of Regulations is hereby waived for any such petition, and the Energy Commission is authorized to create and implement an alternative process to consider such petitions. This process may delegate amendment approval authority, as appropriate, to the Energy Commission Executive Director. (EO B-29-15, Paragraph 25.)

The Petition seeks approval of the Project Owner's efforts to secure alternative water supply necessary for continued plant operations. Because Section 1769 is waived, then Section 1769(a)(1)(e) (requiring that the Petition contain "An analysis of the impacts the modification may have on the environment and proposed measures to mitigate any significant adverse impacts") is also waived.

Second, EO B-29-15 specifically "suspended" the application of both CEQA and the CEQA Guidelines to any actions taken by the Commission to expedite the processing of the applications or petitions for amendments submitted to the Energy Commission for the purpose of securing alternate water supply necessary for continued powerplant operation: "For purposes of carrying out directives 2-9, 11, 16-17, 20-23, and 25, Division 13 (commencing with section 21 000) of the Public Resources Code and regulations adopted pursuant to that Division are hereby suspended." (EO B-29-15, Paragraph 26.) This CEQA waiver is absolute and unequivocal.

The Executive Order is unambiguous in waiving the Section 1769 process and CEQA. The provisions of the Executive Order cited were developed precisely to ensure "continued power plant operation," drought-proofing the Facility as requested in the Petition. The relief requested by the Petition is exempt from CEQA pursuant to EO B-29-15.

E. Just As Decisions Of The Courts Are Not Subject To CEQA, Actions Consistent With Court-Administered Judgment Are Not Subject to CEQA.

CEQA does not apply to the courts of the state, nor to the opinions and orders of the courts. The CEQA Guidelines expressly provide that California's Courts are not "public agencies" subject to CEQA:

> 'Public agency' includes any state agency, board, or commission and any local or regional *agency*, as defined in these Guidelines. *It does not include the courts of the state*. This term does not include agencies of the federal government." (14 CCR 15379, defining "Public agency"; emphasis added.)

MWA serves as Watermaster of the Mojave River stream system and the Basin on the appointment of the Court.[16] The California Supreme Court affirmed the Judgment administered by the MWA.[17] The Superior Court of Riverside County maintains continuing jurisdiction over the Judgment.[18] Therefore, while MWA's administration of water rights with respect to the Mojave River Basin pursuant to the Judgment as approved and administered by the courts may have environmental consequences, MWA's administration of water rights and water use is not subject to CEQA.

Further, the separation of powers between the Judicial Branch and Executive Branch agencies are enshrined in both the U.S. Constitution[19] and the California Constitution.[20] These principles provide that the Court-Administered actions of MWA and the actions of the City of Victorville consistent with the Judgement are not subject to CEQA. For these reasons, to the extent that consumption of water by users within the basin is consistent with the Judgment, such use and the administration of use by MWA is not subject to CEQA.

Question (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?

IV. STAFF'S 100% RECYCLED WATER PROPOSAL IS NOT A CEQA ALTERNATIVE.

A. Staff's Substitute Proposal Is Not A CEQA "Alternative."

As set forth above in the response to Committee "Question (b)" above, the relief requested by the Petition does not constitute a CEQA "project." If the relief requested by the Petition is not a project under CEQA, then the CEQA provisions that would require an analysis of alternatives to a project are not applicable.[21]

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[16] Judgment, ¶¶ 4(nn); 23(c).
[17] *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.
[18] Judgment, ¶¶ 19, p. 24.
[19] U.S. Constitution, Articles I (Legislative powers), II (Executive powers) and III (Judicial Powers).
[20] California Constitution, Article IV (Legislative). Article V (Executive), and Article VI (Judicial).
[21] 14 C.C.R. §15126.6 Consideration and Discussion of Alternatives to the *Proposed Project*. (a) Alternatives to the Proposed Project. An EIR shall describe a range of reasonable alternatives to *the project…*" (Emphasis added.) An EIR must contain alternatives to a project as that term is defined by CEQA. If there is no CEQA project, there would be no EIR, and no discussion of alternatives to the project.

B. The Staff's Substitute Proposal Does Not Satisfy The Legal Requirements To Be A CEQA Alternative.

Even assuming *arguendo* that the relief requested by the Petition was a project under CEQA (which it is not), the Staff's Substitute Proposal does not satisfy the substantive legal requirements of CEQA to be considered as a proper alternative. The CEQA Guidelines provide that an EIR's discussion and consideration of alternatives to a project must consider, among other things:

> …a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. (14 CCR 15126.6)

Against these criteria, the Staff's Substitute Proposal is clearly not an alternative.

First, Staff's Substitute Proposal does not present a "reasonable range of alternatives." Instead, it offers one single decree: convert to a 100% recycled water supply. This single-minded proclamation, with no plan to achieve its objective, is not a reasonable range of alternatives.

Second, and central to CEQA's alternatives analysis, a proper CEQA alternative is one "which would feasibly attain *most* of the basic objectives of the project." The primary basic project objective, as articulated by the Commission in directing HDPP to file the Petition is to "implement reliable primary and backup HDPP water supplies" as stated in HDPP Conditions SOIL&WATER-1. In short, the primary objective is to "drought-proof" the Facility. Staff's Substitute Proposal fails to satisfy what is certainly the primary objective of implementing reliable primary and backup HDPP water supplies.

The undisputed facts demonstrate that the Staff's Substitute Proposal will not implement a reliable primary and backup water supply for the Facility:

- Staff concedes that conversion of the Facility to a 100% recycled water supply will result in "years" when there is not sufficient recycled water to supply the Facility:

  > "In light of the foregoing, staff concludes that CVV and VVWRA have the flexibility under the MOU to serve the necessary supply for HDPP operation *for most of the years*, with the exception of a limited number of years right after commission of some sub-regional treatment plants." (Ex. 2005, Staff Response to the Feasibility Study, TN# 206321, p. 6; emphasis added.)

- HDPP's testimony also confirms that there will not be sufficient recycled water to allow the Facility to run in all years:

> "As discussed in HDPP's Opening Testimony and herein, recycled water availability, both the 4,000 AFY and the 4,000 gallons per minute (gpm) required, is not available at all times and is an inadequate supply in 3 of 10 years." (Ex. 1001, HDPP Rebuttal testimony, p. 12.)

Under both parties' independent assessments, a 100% recycled water supply will not allow the Facility to operate reliably under all conditions. Therefore, because Staff's Substitute Proposal does not satisfy the primary project objective of providing a reliable water supply, it cannot be considered as an alternative to the Petition.

Staff's Testimony and the Project Owner's testimony are in complete agreement on this critical point: there would not be sufficient recycled water available to the HDPP project under foreseeable conditions. The Staff's Substitute Proposal—by its own admission – will not drought-proof the Facility. On these undisputed, collaborating facts of both parties, the Committee should order no further consideration of the entirety of Staff's Substitute Proposal.

Third, Staff has not provided any evidence that its Substitute Proposal is feasible. A CEQA alternative must "feasibly attain most of the basic objectives". CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Resources Code § 21061.1.) Staff's Substitute Proposal has not provided information on whether the conversion to 100% recycled water can be accomplished taking into consideration economic, environmental, social, and technological feasible.

Staff expresses no opinion on the question of economic infeasibility: "The project owner provided confidential financial data for staff review, but after thorough consideration it is still not clear to staff if or how the cost of conversion would impact the project reliability or operation." (Ex. 2007, p. 5.) On environmental feasibility, the CDFW has correctly asserted that the Staff's Substitute Proposal is lacking detail needed to make a determination on the feasibility. (Ex. 3000, pp. 7, 12.) Staff's Substitute Proposal simply asserts no significant effects from its proposal, but provides no supporting analysis. On technological feasibility, while the technology to convert an existing powerplant from non-recycled water to 100% recycled water exists, Staff's Substitute Proposal provides no analysis on this issue, asserting instead in Rebuttal Testimony -- without any supporting analysis -- that "repurposing" existing HDPP water treatment plants can provide some undefined benefits. (Ex. 2007, pp. 9, 28.) As explained by HDPP's witnesses, it is not feasible to repurpose the existing water systems as Staff suggests because, among other reason, the existing systems will not address dissolved solids, which are a limiting factor in recycled water as a supply.

Fourth, as discussed above, the Petition is not a CEQA "project" and it does not result in any potentially significant impacts. Thus, the Staff's Substitute Proposal cannot "avoid or substantially lessen any of the significant effects of the [CEQA] project" since none exist.

V. WITH RESPECT TO ITS SUBSTITUTE PROPOSAL, COMMISSION STAFF BEARS BOTH THE BURDEN OF PROOF AND PERSUASION.

As the moving party presenting its own Substitute Proposal, including substitute conditions of certification, Staff bears the burden:

> The moving party – *the party asserting the claim or making the changes* – generally has the burden of proof in an administrative hearing. *Schaffer v. Weast* (2005) 546 US 49, 126 S Ct 528 [additional cites omitted].[22]

In acting as the sole proponent of its Substitute Proposal, Staff is asserting claims and proposing to make changes to the Facility. As such, for its Substitute Proposal, Staff bears both the burden of proof and the burden of persuasion. This is supported by the Commission's siting regulations.

A. Section 1745 Of The Commission's Regulations Supports the Position That The Burden Of Proof Is On The Staff As A Proponent Of Additional Conditions And Modifications.

In addition to the general principle of administrative law that the party asserting the claim or making the changes bears the burden of proof, the burden may also depend on applicable statute or regulation.[23] Section 1745 of the Commission's revised Siting Regulations is titled, "Evidentiary Hearings; Purposes; *Burden of Proof*; Schedule for Filing and Service of Evidence." (20 CCR 1745; emphasis added.) Section 1745 (d) sets forth, in pertinent part, that the burden of proof is on the proponent for a proposed additional condition, modification, or other provision in an AFC proceeding:

> The *proponent* of any additional condition, modification, or other provision relating to the manner in which the *proposed facility*[24] should be designed, sited, and operated in order to protect environmental quality and ensure public health and safety *shall have the burden* of making a reasonable showing to support the need for and feasibility of the condition, modification, or provision. * * * (Emphasis added.)

A similar burden is imposed on Staff, where, as here, Staff has proposed additional conditions of certifications and modifications other than that proposed by the Project Owner. Therefore, Staff bears the "burden of making a reasonable showing to support the need for and feasibility of the

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[22] *California Administrative Hearing Practice* (Second Edition), CEB, §7.50; emphasis added.
[23] *California Administrative Hearing Practice* (Second Edition), CEB, §7.50.
[24] Section 1748's reference to "proposed facility" clearly demonstrates that this provision of the Commission's Siting Regulations applies to project proposed in an AFC proceeding – not existing powerplants in the post-Certification processes.

condition, modification, or provision." Accordingly, Staff has both the burden of proof and the burden of persuasion for its Substitute Proposal.

B. Staff Bears A Heightened Burden of Proof Because Its Substitute Proposal Would Impair HDPP's Fundamental Vested Right To Continue Operation of the Facility.

Staff's Substitute Proposal would revoke the Facility's authorization to use SWP Water, revoke HDPP's authorization to build its groundwater bank through injection, require HDPP to make significant capital improvements at great cost to allow the Facility to utilize recycled water, and require the implementation of a recycled water supply for the Facility that Staff acknowledges is not available in all years or under all conditions.

There are two separate lines of cases within the protections afforded through "Vested Rights": (1) land use decisions where an initial right to develop vests after the expenditure of substantial resources in reliance on the lawfully issued permit[25]; and (2) the right to continue lawful operations of a business.

The second category of vested rights – those at issue in the Petition -- focus on decisions related to permits or other land use entitlements held by established businesses which have made substantial investments. Specifically, when an administrative decision involves the right to continue operating an established business "in which [the owner has] made a substantial investment," a *fundamental vested right* is implicated. (*Goat Hill Tavern v. City of Costa M*esa (1992) 6 Cal.App.4th 1519, 1529.)

In *Goat Hill Tavern*, the City of Costa Mesa denied a request for renewal of a conditional use permit. Goat Hill Tavern had been in operation for over 35 years as a legal nonconforming use, including investments of $1.75 million in refurbishments, including substantial exterior façade improvements. The owner applied for a conditional use permit for an expansion of the tavern to include a game room, which was granted on a temporary basis for six months. The owner then sought an extension of the conditional use permit to allow for the continued operation of a game room. The city council refused to grant the conditional use permit unless the tavern agreed to limit its hours of operation. The owner refused to limit the hours and the conditional use permit was denied by the city.

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[25] In the first of the two categories of vested rights in the land use context, it is a well-accepted principle of California law that land use rights may "vest" upon substantial expenditures by a project proponent in reliance upon their lawfully issued permits. Case law provides that these rights to develop based on initial construction related activities and expenditure of substantial resources may be thought of as "classic vested rights."[25] Specifically, material expense incurred and substantial work performed in reliance on a conditional use permit creates a vested right in its holder which limits the government's power to modify or revoke the permit and heightens the showing of "good cause" necessary to revoke the permit. (*O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal. App. 3d 151, 158.)

The city argued that the tavern's interest were purely economic and thus did not amount to a "vested fundamental right." The court disagreed, finding that the continued operation of the existing business that had made substantial expenditures in conformity with its permit approvals was a fundamental vested right:

> This is not, as the city so strongly urges, a 'purely economic privilege.' *It is the right to continue operating an established business in which he has made a substantial investment*.
>
> Interference with the right to continue an established business is far more serious than the interference a property owner experiences when denied a conditional use permit in the first instance. Certainly, this right is sufficiently personal, vested and important to preclude its extinction by a nonjudicial body. (*Id.* at 1529.)

The tavern's status as an existing, ongoing business was fundamental to the court's conclusion that the right to continued operations is a fundamental vested right:

> We might conclude differently were this, as the city attempts to suggest, a simple case of a property owner seeking a conditional use permit to begin a use of property. But it is not. Rather, Goat Hill Tavern is an existing business and a legal nonconforming use. (*Id.* at 1530.)

As the court explained, citing to existing law:

> 'Once a use permit has been properly issued the power of a municipality to revoke it is limited. [Citation.] Of course, if the permittee does nothing beyond obtaining the permit it may be revoked. [Citation.] *Where a permit has been properly obtained and in reliance thereon the permittee has incurred material expense, he acquires a vested property right to the protection of which he is entitled*. [Citations.] When a permittee has acquired such a vested right it may be revoked if the permittee fails to comply with reasonable terms or conditions expressed in the permit granted [citations] or if there is a compelling public necessity. [Citations.] [P] A compelling public necessity warranting the revocation of a use permit for a lawful business may exist where the conduct of that business constitutes a nuisance.' (*O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 158 [96 Cal.Rptr. 484]; *Trans- Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776 [194 P.2d 148]; see also *Upton v. Gray* (1969) 269 Cal.App.2d 352 [74 Cal.Rptr. 783]; *Community Development Com. v. City of Fort Bragg* (1988) 204

> Cal.App.3d 1124 [251 Cal.Rptr. 709].) (*Id.* at 1530-1531; emphasis added.)

Similarly, HDPP has a fundamental vested right in the continued operation of the Facility. The Facility's license was properly obtained and in reliance thereon HDPP incurred a material expense in constructing and operating the business. The operation of the Facility is a conforming, lawful use. HDPP has acquired a fundamental vested right in the continued operation of the Facility, including the right to use any lawful source of water. Rather than being a purely economic privilege, HDPP is seeking the ability to continue operating an established business in which it has made a substantial investment. As the court explains, HDPP's substantial investments create a "right to continue operating an established business in which [][it] has made a substantial investment."

Therefore, where the Staff's Substitute Proposal amounts to a material change in the terms and conditions for operation of the Facility (and would also impose upon the Project Owner substantial costs and threaten the reliable operation of the Facility) the Staff bears the burden of demonstrating a "compelling public necessity". The consequences of the Staff's Substitute Proposal are much more onerous than limiting the hours of operation each day. Staff's Substitute Proposal would revoke HDPP's right to use SWP Water, which was authorized by the Commission in the Final Decision, revoke HDPP's authorization to build its groundwater bank through injection, require HDPP to make significant capital improvements, and require the use a recycled water supply that Staff acknowledges is not available in all years, foreclosing operation of the Facility for substantial period of time under certain conditions. Staff has not demonstrated a compelling public interest for impairing the fundamental vested rights of the HDPP. Indeed, Staff has failed to demonstrate any justification at all. Therefore, Staff's Substitute Proposal should be rejected because it would impair HDPP's fundamental vested right to continue operation of the Facility without clear and convincing evidence of a compelling public interest for such impairment.

Question (d): What are the options to grant interim water supply relief to the Petitioner during the pendency of the proceedings?

VI. THERE ARE TWO FORMS OF INTERIM RELIEF THAT SHOULD BE GRANTED DURING THE PENDENCY OF THE PROCEEDINGS.

HDPP has two recommended forms of interim relief.

First, HDPP requests that the two year limitation on the use of MRB Adjudicated Water be extended for two more years, through Water Year 2017-2018, ending September 30, 2018. One sentence in Condition SOIL&WATER-1, paragraph would be revised as follows:

> The Project Owner shall consume no more than 2000 AF in water year 201~~4~~**6**/201~~5~~**7** (October 1 201~~4~~**6** September 30, 201~~5~~**7**) and no more than 2,000 AF in water year 201~~5~~**7**/201~~6~~**8** (October 1, 201~~5~~**7**- September 30, 201~~6~~**8**) of MRB Water Rights and the acquisition, use ~~and~~ **or** transfer of MRB Adjudicated Water Rights shall be in

> compliance with the Judgment and Rules and Regulations of the MWA Watermaster.

These minor changes would allow HDPP to plan for use and acquire additional supplies.

Second, in order to allow HDPP to use the supplies of SWP Water available this year, the second form of interim relief, as discussed at the March 15, 2015 Prehearing Conference, would be to grant HDPP the authority to pursue agreement to allow HDPP to bank SWP Water through percolation in existing MRB facilities. HDPP identified the percolation-related conditions at the Prehearing Conference. (3/16 RT 58-59.) Specifically, HDPP requests approval of its proposed modifications to SOIL&WATER-4, 5, 6, 12, and 13 (collectively, the "percolation conditions"), which would allow HDPP to seek an agreement with MWA to allow for the banking of SWP water through percolation using existing MWA facilities.

No parties object to HDPP seeking approval from MWA to build its groundwater bank via percolation. The only dispute relates to Staff's proposal for additional conditions that HDPP cease banking via injection—a method that the Facility is currently entitled to use to build its groundwater bank. The Commission can and should grant interim relief to allow HDPP seek MWA approval to percolate water while deferring action on conditions related to the Staff Substitute Proposal.

HDPP's proposed revisions to Condition SOIL&WATER-1 for use of MRB Adjudicated Water and conditions SOIL&WATER-4, 5, 6, 12, and 13 related to percolation are attached hereto as Attachment A.

VII. THERE ARE THREE MECHANISMS THAT CAN BE USED TO GRANT INTERIM RELIEF.

There are three mechanism that can be used to grant interim relief in this proceeding.

First, the Committee could place the approval of the interim relief on the next regularly scheduled Commission Business Meeting. At that meeting, the full Commission could approve an order amending HDPP's conditions to allow for the requested interim relief.

Second, EO B-29-15 specifically authorizes the Energy Commission to delegate amendment approval authority to the Executive Director of the Commission. The Commission delegated this authority to the Executive Director at the May 13, 2015 Business Meeting. Therefore, the Executive Director can approve the requested changes to Condition SOIL&WATER-1 for the two-year extension of access to MRB Adjudicated Water and Conditions SOIL&WATER-4, 5, 6, 12, and 13 related to percolation.

Third, EO B-29-15 authorizes the Energy Commission to create and implement an alternative process to consider such petitions. One potential alternative process would be an alternative process whereby a committee designated by the Commission, such as the Committee overseeing the instant proceeding, is delegated approval authority over petitions for amendments needed to secure alternate water supply necessary for continued power plant operation. The delegated approval authority could include the authority to grant interim relief as needed during

the pendency of the proceedings. This mechanism would require the Commission to consider and adopt an order at the next Commission Business Meeting that would delegate to a committee approval authority over petitions for amendments needed to secure alternate water supply necessary for continued power plant operation. If the Committee is delegated such authority, the Committee can either act on its own motion to grant interim relief, or upon a motion by HDPP.

CONCLUSION

HDPP appreciates the opportunity to brief these issues, and summarizes its responses to the Committee as follows:

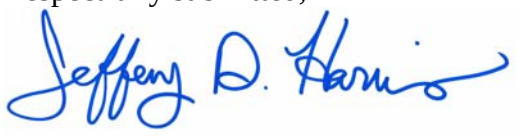
- Question (a): EO B-29-15 and the Court-Administered Judgment are LORS applicable to the analysis of the Petition. The 2003 IEPR policy statement is not an applicable LORS.

- Question (b): The modification proposed by the Petition does not constitute a project under the California Environmental Quality Act. Furthermore, the modification proposed by the Petition is exempt from CEQA.

- Question (c): Staff's Substitute Proposal is not a CEQA alternative, but rather an alternative proposed modification to the Facility's design, operations, and conditions of certification. As to its Substitute Proposal, Staff bears a heightened burden of proof as its proposal would impair HDPP's fundamental vested right to continue operation of the Facility.

- Question (d): HDPP proposes the adoption of two forms of interim relief during the pendency of these proceedings. First, HDPP requests extension of the two-year limitation on the use of MRB Adjudicated Water. Second, HDPP requests that the percolation conditions proposed in Attachment A be adopted. The interim relief can be granted by one of three mechanisms: approval by the full Commission at the next Business Meeting; approval by the Executive Director pursuant to the authority delegated by the Commission under EO B-29-15; or adoption by the Commission of an alternative process under EO B-29-15 to approve amendments whereby the Committee is delegated the authority to grant interim relief.

Respectfully submitted,



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ATTACHMENT A

Proposed Revisions to Condition SOIL&WATER-1 (MRB Adjudicated Water) and Conditions SOIL&WATER-4, 5, 6, 12, and 13 (Percolation Conditions)

ATTACHMENT A

Proposed Revisions to Condition SOIL&WATER-1 (MRB Adjudicated Water) and Conditions SOIL&WATER-4, 5, 6, 12, and 13 (Percolation Conditions)

SOIL&WATER-1

Water used for project operation (except for domestic purposes) shall be State Water Project (SWP) water obtained by the project owner consistent with the provisions of the Mojave Water Agency's (MWA) Ordinance 9 and/or appropriately treated recycled waste water, and/or an alternative water supply obtained from the Mojave River Basin ("MRB") consistent with the "Judgment After Trial" dated January, 1996, in City of Barstow, et al. v. City of Adelanto, et al. (Riverside County Superior Court Case No. 208568) (collectively, "MRB Water Rights") as administered by the MWA Watermaster (the "Judgment").

a. Whenever recycled waste water of quality sufficient for project operations is available to be purchased from the City of Victorville, the project owner shall use direct delivery of maximum quantities of such water for project operations. Whenever the quantity or quality of recycled waste water is not sufficient to support project operations, the project may supplement recycled water supplies with SWP water, banked SWP water from the four HDPP wells as long as the amount of water used does not exceed the amount of water determined to be available to the project pursuant to SOIL&WATER-5, and/or MRB Water Rights. The Project Owner shall consume no more than 2000 AF in water year 201~~4~~**6**/201~~5~~**7** (October 1 201~~4~~**6** September 30, 201~~5~~**7**) and no more than 2,000 AF in water year 201~~5~~**7**/201~~6~~**8** (October 1, 201~~5~~**7**-September 30, 201~~6~~**8**) of MRB Water Rights and the acquisition, use ~~and~~ **or** transfer of MRB Adjudicated Water Rights shall be in compliance with the Judgment and Rules and Regulations of the MWA Watermaster.

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ATTACHMENT A

Proposed Revisions to Condition SOIL&WATER-1 (MRB Adjudicated Water) and Conditions SOIL&WATER-4, 5, 6, 12, and 13 (Percolation Conditions)

SOIL&WATER-4 Injection Schedule

a. The project owner shall inject one thousand (1000) acre-feet of SWP water within twelve (12) months of the commencement of the projects commercial operation.

b. By the end of the four years and two months from the start of commercial operation, the project owner shall install and begin operation of a pre-injection ultraviolet (UV) disinfection system.

c. By the end of the fifth year of commercial operation, the project shall submit a report to the CPM demonstrating that HDPP has maintained an average THM concentration level consistent with the WDR permit requirements.

d. After the end of the fifth year of commercial operation, the project owner shall inject SWP water when it is available in excess of volumes needed to operate the project, up to a cumulative quantity of 13,000 acre-feet, subject to equipment capabilities and permit requirements. The amount of **injected SWP** water available to HDPP for extraction is equal to Injection minus Extraction minus Dissipation minus 1000 acre-feet, as defined in **SOIL&WATER-6**.

e. As an additional method to build the project's groundwater bank, the project owner will work with the Mojave Water Agency (MWA) to seek a feasible agreement or modify existing agreements to allow the project to bank SWP water in the Mojave River Basin through percolation using existing MWA facilities.

Verification: The project owner shall submit an installation and operation report describing the pre-injection ultraviolet disinfection system (UV) by the end of the fourth year of commercial operation. Forecasted estimates of SWP water to be injected shall be included in the quarterly Aquifer and Storage Recovery Well Report. The project owner shall submit a UV performance report by the fifth year of commercial operation. For other related items, see the verification to **Condition 5**. See also the verification to **Condition 12**. **If the project owner and MWA are able to reach an agreement or modify existing agreements regarding use of existing MWA facilities for the percolation and banking of SWP water that is feasible for the facility, the project owner shall provide a copy of such agreement or modified agreements to the CPM.**

SOIL&WATER-5 Calculation of Balance

a. The amount of banked groundwater **as injected SWP water** available to the project shall be calculated by the CEC staff using the HDPP model, FEMFLOW3D. **The amount of banked groundwater as percolated SWP water by MWA available to the project shall be calculated by MWA or the Mojave Basin Area Watermaster.** The amount of banked groundwater available shall be updated on a calendar year basis by the CEC staff, taking into account the amount of groundwater pumped by the project during the preceding year and the amount of water banked by the project during the preceding year.

ATTACHMENT A

Proposed Revisions to Condition SOIL&WATER-1 (MRB Adjudicated Water) and Conditions SOIL&WATER-4, 5, 6, 12, and 13 (Percolation Conditions)

SOIL&WATER-6 Banked Water Available for Project Use

a. The amount of banked groundwater available to the project during the first twelve (12) months of commercial operation is the amount of SWP water injected by the project owner into the High Desert Power Project (project) wells, minus the amount of groundwater pumped by the project owner, minus the amount of dissipated groundwater, and minus any amount described in SOIL&WATER-5(b).

b. The amount of banked groundwater available to the project after the first twelve (12) months of commercial operation is**: (1)** the amount of SWP water injected by the project owner into the project wells**,** minus the amount of groundwater pumped by the project owner, minus the amount of dissipated groundwater, minus one thousand (1,000) acre feet, and minus any amount described in SOIL&WATER-5(b) **and (2) the amount of SWP water percolated by MWA**.

SOIL&WATER-12

The project owner shall prepare and submit to the CEC CPM and, if applicable, to the Lahontan RWQCB for review and approval, a water treatment and monitoring plan that specifies the type and characteristics of the treatment processes and identify any waste streams and their disposal methods. The plan shall provide water quality values for all constituents monitored under requirements specified under California Code of Regulations, Title 22 Drinking Water Requirements, from all production wells within two (2) miles of the injection wellfield for the last five (5) years.

The plan shall also provide SWP water quality sampling results from Rock Springs, Silverwood Lake, or other portions of the East Branch of the California Aqueduct in this area for the last five (5) years. Also identified in the plan will be the proposed treatment level for each constituent based upon a statistical analysis of the collected water information. The statistical approach used for water quality analysis shall be approved prior to report submittal by the CEC CPM and, if applicable, the RWQCB. Treatment of SWP water prior to injection shall be to levels approaching background water quality levels of the receiving aquifer or shall meet drinking water standards, whichever is more protective. The plan will also identify contingency measures to be implemented in case of treatment plant upset.

The plan submitted for approval shall include the proposed monitoring and reporting requirements identified in the Report of Waste Discharge (Bookman-Edmonston 1998d) with any modifications required by the RWQCB.

Verification: Ninety (90) days prior to ~~banking~~ **injection** of SWP water within the Regional Aquifer, the project owner shall submit to the Lahontan RWQCB and the CEC CPM a proposed statistical approach to analyzing water quality monitoring data and determining water treatment levels. The project owner shall submit the SWP water treatment and monitoring plan to the CEC CPM and, if appropriate, to the Lahontan RWQCB for review and approval. The CEC CPM s review shall be conducted in consultation with the MWA, the VVWD, and the City of

ATTACHMENT A

Proposed Revisions to Condition SOIL&WATER-1 (MRB Adjudicated Water) and Conditions SOIL&WATER-4, 5, 6, 12, and 13 (Percolation Conditions)

Victorville. The plan submitted for review and approval shall reflect any requirements imposed by the RWQCB through a Waste Discharge Requirement.

SOIL&WATER-13

The project owner shall implement the approved water treatment and monitoring plan. All ~~banked~~ **injected** SWP water shall be treated to meet local groundwater conditions as identified in Condition SOIL&WATER-12. Treatment levels may be revised by the CEC and, if applicable, by the RWQCB, based upon changes in local groundwater quality identified in the monitoring program not attributable to the groundwater banking program. Monitoring results shall be submitted annually to the CEC CPM and, if applicable, to the RWQCB.