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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  
REPLY BRIEF  
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 for the High Desert Power Project (the "Facility") to issues raised in the opening briefs of the California Department of Fish and Wildlife ("CDFW") and California Energy Commission Staff ("Staff") below.

**DISCUSSION**

**I. RESPONSE TO THE DEPARTMENT OF FISH AND WILDLIFE'S OPENING BRIEF**

In several places in its opening brief, CDFW recognizes that the Staff's Substitute Proposal advocates for the use of 100% recycled water, which CDFW opposes. In other places, CDFW characterizes HDPP's *Petition for Modification to Drought-Proof the High Desert Power Project* ("Petition") as a proposal to use "slightly less than 100 percent recycled water." (CDFW Opening Brief ("OB"), p. 3.) This characterization of HDPP's Petition is incorrect.

HDPP's Petition simply requests authorization to extend the time for use of an additional source of backup water to the Facility's water supply, groundwater from the Mojave River Basin acquired pursuant to the terms of the Judgment ("MRB Adjudicated Water"). (See, Ex. 1002.) This backup supply will be used primarily for blending when other water supplies may be unavailable or not of sufficient quantity or quality for reliable plant operation. (Ex. 1002, pp. 6-7.) HDPP's Petition proposes that use of MRB Adjudicated Water be restricted in both amounts and use in accordance with the proposed Loading Sequence. (Ex. 1002, pp. 32-34.) Adding another source of water to act as a backup supply provides HDPP with a flexible diversity of water supplies, which will support reliable plant operations. HDPP's request is consistent with the Governor's Executive Order ("EO") B-29-15 to expedite the processing of petitions for the purpose "of securing alternate water supply necessary for continued power plant operation." (EO B-29-15, § 25.)

The Petition preserves the Facility’s existing, authorized water supply — the blending of recycled water with an existing, authorized source of water, SWP Water, whether banked or not — and does not require any new infrastructure or construction. The Petition does not otherwise seek to use State Water Project (“SWP”) water or recycled water in amounts other than that which the Facility is already authorized to utilize. As demonstrated in Exhibit 1002, Attachment C, recycled water use is estimated to range from 800-1,450 acre-feet per year under the normal range of expected operations. (Ex. 1002, Attachment C, p. 31.) These amounts are consistent with the acceptable levels of recycled water use identified in column two of Table 4 of CDFW’s testimony. (Ex. 3001.)

Therefore, HDPP’s Petition does not propose use of “slightly less than 100 percent recycled water”. Instead, HDPP’s Petition requests the extension of use of an additional backup water supply to drought-proof the Facility, and does not seek any changes to the existing authorizations to use SWP Water and recycled water.

## **II. RESPONSE TO THE COMMISSION STAFF’S OPENING BRIEF**

### **A. Staff Misrepresents The Petitioner’s Position Regarding The Application of LORS.**

Staff’s Opening Brief states, “Petitioner argues in the current proceeding that only the LORS in effect 16 years ago, in 2000 when the original project was licensed, apply to the project forevermore, regardless of the amendments they propose or the changes in laws or circumstances (such as severe drought).” (Staff Opening Brief, hereinafter “Staff OB”, pp. 5-6.). The Staff is incorrect, as evidenced by HDPP’s Opening Brief, which discusses new LORS that came in effect after the licensing of the Facility that are applicable to the Petition. (See, HDPP Opening Brief, hereinafter “HDPP OB”, pp. 1, 3-4.)

As to the 2003 Integrated Energy Policy Report (“2003 IEPR”), HDPP agrees with Staff, and indeed has consistently stated that the 2003 IEPR is the summary of the Commission’s *policy* with respect to water use by Commission jurisdictional powerplants. However, the 2003 IEPR policy cannot be given the weight of law because it was not adopted pursuant to the requirements of the Administrative Procedure Act. (See, Cal. Gov. Code, § 11340.5; see also, *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 571, 575.)

Further, the 2003 IEPR policy cannot be relied upon to unilaterally require an operating power plant to cease using its authorized water supplies, stop operations, and undergo a massive capital project to implement Staff’s 100% recycled water supply proposal. (HDPP OB, pp. 4-6.)

### **B. A CEQA “Project” Is the Activity at Issue, Not The Governmental Approval.**

Staff’s Opening Brief states that a California Environmental Quality Act (“CEQA”) analysis is necessary because the Commission’s approval for the Petition is “discretionary.” (Staff OB, pp. 5-6.) HDPP agrees that the Commission has discretion to either approve or reject the proposed modifications. However, HDPP disagrees that every discretionary approval by the Commission necessarily triggers environmental review under CEQA.

CEQA defines the term “project” as the *activity* subject to discretionary approvals, not the government approval itself, and requires consideration of whether the *activity* has “a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (See, 14 C.C.R. §§ 15378(a), (c).) To suggest that every discretionary governmental approval is necessarily then a CEQA “project” is incorrect. This truism is demonstrated by the fact that the Commission makes numerous discretionary approvals at every Business Meeting, but not each approval requires a CEQA analysis. In this case, the continuation of service of MRB Adjudicated Water from Victorville Water District to the Facility in accordance with the Court-administered Adjudication does not have the potential for resulting in a direct or indirect physical change in the environment. Therefore, the Petition does not constitute a project under CEQA.

**C. Rather than Addressing Fundamental Vested Rights to Continue Operation of the Facility, Staff Incorrectly Focuses on Vested Rights In the Land Development.**

Staff’s declaration (Staff’s OB, p. 7.) that “an assertion of vested rights is misplaced” fails to acknowledge that HDPP has a Fundamental Vested Right to continue lawful operations. (HDPP OB, pp. 17-19.)

As explained in HDPP’s Opening Brief, California law recognizes two forms of vested rights: (1) the right to undertake an activity or development that vests after the expenditure of substantial resources in reliance on the lawfully issued permit; and (2) the right to continue lawful operations of a business. (HDPP OB, pp. 17-19.) As acknowledged in Staff’s Opening Brief, “it is well established that the rights which may vest through reliance on a government permit are no greater than those specifically granted by the permit itself.” (Staff OB, p. 7, citing *Santa Monica Pines v. Rent Control Board* (1984) 35 Cal.3d 858, 866.) In this case, the Commission certified the construction and operation of the Facility in 2000. HDPP relied on the Commission’s certification of the Facility; constructed a powerplant with a water treatment system built to process the approved water supply, SWP Water; and has operated since certification by utilizing its approved water supply, including the recycled water supply subsequently authorized by the Commission. Thereafter, a right vested in HDPP to continue lawful operation of the Facility.

Staff’s Substitute Proposal would threaten HDPP’s vested right to continue its lawful operation of the Facility. Staff’s Substitute Proposal would revoke HDPP’s right to use SWP Water, which the Facility was authorized and constructed to utilize; revoke HDPP’s right to build its groundwater bank through injection; unilaterally require HDPP to design, engineer, and then retrofit the existing Facility to utilize a different water supply at significant costs; and unilaterally require the Facility to shut down and cease operations to effectuate Staff’s proposal. Such revocations and new conditions implicate Fundamental Vested Rights.

Most troublesome, Staff's Substitute Proposal would require the Facility to utilize 100% recycled water, a water supply that HDPP has already studied and found to be infeasible. Such a water supply is infeasible due not only to the substantial capital expenditures involved, but also because a recycled water supply is not available in all years and under all conditions.<sup>1</sup> Thus Staff's Substitute Proposal threatens HDPP's Fundamental Vested Rights to continue lawful operation of the Facility because the factual record confirms that a 100% recycled water is not feasible.

**D. The Commission's Direction That HDPP Conduct A Feasibility Study Does Not Support Staff's Unilateral Attempt To Require The Facility To Convert To A 100% Recycled Water Supply.**

HDPP disagrees with Staff's assertion that "by requiring the Petitioner to investigate the feasibility of 100% use of recycled water, Petitioner was *put on notice* that this was something the Commission might consider in the future, should circumstances warrant." (Staff's OB, p. 7; emphasis added.) The "notice" theory is absurd.

The purpose of the Feasibility Study was to evaluate just that – the *feasibility* of converting the Facility a 100% recycled water supply. This focus on feasibility necessarily allows for two possible outcomes: conversion is feasible or conversion is infeasible. Staff ignores the second possibility, suggesting instead that the Feasibility Study was instead a mandate to convert. It was not.

The suggestion of "notice" – opaque language in past actions limiting future vested rights via incantation – is not supported by any legal authorities. No authorities are cited for just this reason. There is also nothing in the language of decisional documents to provide legally effective "notice" that Commission Staff would act unilaterally to propose a modification requiring the Facility to undergo such a change, despite the results of the Feasibility Study that concluded that conversion to a 100% recycled water supply for the Facility is infeasible.

**E. The Petitioner Bears The Burden Of Proof For The Modifications Proposed In The Petition; Staff Bears The Burden Of Proof For Its Proposed Modification.**

Staff's Opening Brief states that "the recommendations made in Staff's testimony are particular to modifications proposed for SOIL&WATER-1", and that therefore Staff's testimony "is not offered as an alternative condition under the Energy Commission's regulations." (Staff OB, p. 11.) This position is inconsistent with Staff's own testimony.

Instead of "recommendations," Staff's testimony specifically advocates "rejecting those modifications" proposed in the Petition (Staff's Opening Testimony, p. 25), and replacement of

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<sup>1</sup> "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.)" (HDPP OB, p. 15.)



condition of certification SOIL&WATER-1 “with a *new condition of certification* SOIL&WATER-1, which is *fundamentally different* from that proposed by the project owner in its opening testimony.” (Staff’s Rebuttal Testimony, p. 39; emphasis added.)

Thus, in marked contrast to its testimony, Staff’s Opening Brief significantly understates the magnitude of its proposal to convert the Facility to a 100% recycled water supply. Staff’s Opening Brief suggests that the Staff’s Substitute Proposal is “particular to modifications proposed for SOIL&WATER-1,” rather than a substantial modification to the design and operations of the Facility that is “fundamentally different from that proposed in the Petition.” (Staff OB, p. 11.) Staff suggests that its “alternative” would merely “require the project to shift to more recycled water use.” (Staff OB, p. 11.) This is not the case. Rather than a “shift,” Staff proposes revocation of existing water supplies and complete reliance on recycled water alone.

In contrast to the fundamentally different changes proposed by Staff, HDPP’s Petition simply requests authorization to use an additional source of backup water to the Facility’s water supply, MRB Adjudicated Water, for blending and times when other water supplies may be unavailable or not of sufficient quantity or quality for reliable plant operation. HDPP’s Petition proposes that use of MRB Adjudicated Water be restricted to the amounts necessary to drought-proof the Facility and used in accordance with the proposed Loading Sequence, with transparent and appropriate reporting and notification requirements. The Petition preserves the Facility’s existing, authorized water supply — the blending of recycled water with an existing, authorized source of water, SWP Water, whether banked or not — and does not require any new infrastructure or construction.

Staff’s Substitute Proposal goes well beyond HDPP’s request for an additional source of backup water supplies, and instead recommends a “fundamentally different” project modification that fundamentally changes the existing water supply for the Facility, requires a major Facility construction project, and affects the Facility’s operations.

First, Staff’s Substitute Proposal would fundamentally change the existing water supply for the Facility by proposing that the Facility’s current, existing authorization to use SWP Water be revoked. (See, Staff’s Opening Testimony, pp. 25-26.) Staff also proposes that the Facility’s current authorization to build a groundwater bank through injection be revoked. (Staff’s Opening Testimony, pp. 24-25.)

Second, Staff’s Substitute Proposal would require alterations to the Facility’s design, as substantial changes and capital improvements are required to convert the Facility to a 100% recycled water supply, which the Facility was neither designed nor constructed to sustain. Conversion to a 100% recycled water supply, which HDPP has already demonstrated to be infeasible,<sup>2</sup> would require a new project design that incorporates a water treatment system to utilize a 100% recycled water supply. Once the engineering is complete, new approvals from the Commission would be required to approve the modified project design, in addition to potential

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<sup>2</sup> See Ex. 1003, the Feasibility Study, and Ex. 1002, the GSI Report, Exhibit C, *Availability and Use Of Alternative Water Supplies At The High Desert Power Project*.

land use approvals that may be required for an expanded project site to accommodate a new water treatment system, assuming such lands are of sufficient size and available for use. New infrastructure would need to be installed, and significant capital expenditures required to effectuate the conversion.

Third, Staff's Substitute Proposal would affect the Facility's operations, as it requires that conversion to a 100% recycled water supply be accomplished in three years. Such a conversion would require at least three years to accomplish, during portions of which the Facility would be offline and under construction. Staff's Substitute Proposal would further affect the Facility's operations as a 100% recycled water supply is not available in all years, and under all conditions.

In short, Staff does not merely propose language changes to HDPP's proposed modification of SOIL&WATER-1. Instead, Staff has independently proposed a modification of the Facility's design and operation, in addition to completely new condition of certification language for SOIL&WATER-1 to effectuate the Staff-proposed modifications – modifications that are "*fundamentally different* from that proposed by the project owner." The new conditions and project modifications would be substantive requirements, enforceable through Public Resources Code section 25534 and related regulations. Therefore, Staff bears the burden for its proposed modifications, including the "burden of making a reasonable showing to support the need for and feasibility of the condition, modification, or provision." (20 C.C.R. § 1745(d).)

**F. Even If The Petition Is Not Exempt From CEQA, An Alternatives Analysis Is Not Required Because There Are No Significant Impacts.**

As set forth in HDPP's Opening Brief, the modifications proposed in the Petition are exempt from CEQA. (See HDPP OB, pp. 8-13.) However, assuming *arguendo* that the modifications proposed in the Petition are not exempt from CEQA, Staff's argument that its Substitute Proposal is a "CEQA alternative" fails.

On page 11 of Staff's Opening Brief, Staff states that converting the Facility to use a 100% recycled water supply "is both a feasible and reasonable alternative pursuant to CEQA to mitigate or avoid the environmental effects on the Delta from using State Water Project water. . ." CEQA provides that potential alternatives to a project are those "that could feasibly accomplish most of the basic project objectives of the project and could avoid or substantially lessen one or more of the significant effects" of the project. (14 C.C.R. § 15126.6(c).) When considering whether an effect of a proposed project is significant, the Commission must "limit its examination to changes in the existing physical conditions in the affected area at the time ... environmental analysis is commenced." (14 C.C.R. § 15126.2(a).)

In this case, the Facility was authorized and constructed to utilize SWP Water as its water supply, and has operated since April 2003 with SWP Water as part of its water supply. Because of this, use of SWP Water by the Facility is a baseline condition by which the Commission should consider the significance of environmental impacts from the Petition. (See, 14 C.C.R. § 15125(a).) The Petition does not propose any changes to its existing authorized use of SWP Water. While Staff continues to speculate, there is no evidence showing a potential for a significant effect associated with the activities set forth in the Petition. Staff's Opening Brief and

its testimony do not identify a potentially significant adverse impact associated with the use of water proposed by the Petition.

In its testimony, 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.<sup>3</sup> In its Opening Brief, Staff carries the speculation to a new extreme. In addition to speculating on potentially significant impacts, Staff then “posits” that the Commission “would be unable to override the impacts and thus, would be required to reject the Petition.” (Staff OB, p. 11.) Failing to identify potentially significant impacts with specificity fails to meet CEQA’s substantive mandates. Further arguing – without any supporting analysis – that those unspecified impacts would not allow for a Statement of Overriding Consideration is wholly unsupported by the record and applicable law. The Commission should reject these claims.

Alternatives to a project must be considered when for a project that may have potentially significant effects on the environment. (Pub. Resources Code § 21064.5; 14 C.C.R. § 15126.6(a), (f).) Alternatives are not required when revisions are incorporated into the project that avoid or mitigate the effects and there is no substantial evidence in light of the whole record that the project, as revised, may have a significant effect on the environment. (Pub. Resources Code § 21064.5.) Because there are no potential impacts from the modification, there is no requirement to consider Staff’s Substitute Proposal as an alternative to the proposed modification.

In short, there are no potential impacts from the modification, let alone any significant adverse effects requiring either mitigation or consideration of an alternative. Staff’s assertion that an alternative is required to “mitigate or avoid the environmental effects on the Delta from using State Water Project water” is not supported by any evidence, let alone substantial evidence, and is simply incorrect.

**G. Further Delay Is Unnecessary Because The HDPP Feasibility Study And The GSI Report Provide Substantial Evidence For The Commission To Approve The Relief Requested In The Petition.**

The Committee should act to approve the Petition without further delay. First, the Feasibility Study submitted by HDPP in November of 2014 provides detailed analyses as to why it is simply infeasible to use 100% recycled water at HDPP. While Staff may disagree with the conditions in the Feasibility Study, there is no denying (1) that the project owner has provided information on the infeasibility of conversion to the use of 100% recycled water and (2) that the Feasibility Study provides substantial evidence upon which the Committee may rely in approving the relief requested in the Petition.

In addition to the evidence in the Feasibility Study, HDPP has filed with its Petition, the GSI Report analyzing the availability of recycled water. The GSI Report confirms that there is

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<sup>3</sup> See, Pub. Resources Code §§ 21080(e), 21082.2(c); 14 C.C.R. § 15064; See also HDPP OB, pp. 5-6.

insufficient recycled water available. Specifically, there is insufficient recycled water quantity in some years (i.e., less than 4,000 AFY) and insufficient instantaneous recycled water (i.e., the inability to provide 4,000 gallons per minutes required for full load operations for longer than 21 hours).<sup>4</sup>

There is substantial evidence in the record supporting the Petition. There is no need to delay the requested approvals to fill a record gap that does not exist.

### **CONCLUSION**

HDPP appreciates the opportunity to respond to these issues.

Interim relief has been requested and is certainly appropriate. Access to MRB Adjudicated Water through the end of Water Year 2017-2018 is appropriate to allow for prudent business planning. In addition, granting the requested changes to allow for percolation is equally appropriate. (HDPP OB, pp. 19-20 and Attachment A Conditions.)

Executive Order B-29-15 directed the Commission to “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 power plant operation.” (EO B-29-15, § 25.) The fact that interim relief is appropriately before the Committee is further evidence that the Committee is authorized to recommend that the Commission should approve the Petition using the Executive Order authority granted.

Moreover, HDPP’s position on the interstate pipeline system upstream of the LA Basin will play a critical role in providing electric reliability, given the Alison Canyon gas storage problems affecting electric reliability. The Facility’s operating history supports the conclusion that the Facility’s location on the interstate pipeline will be critical to address the reliability issues similar to those raised by the Aliso Canyon natural gas storage leak – as HDPP was in February 2014 when the CAISO relied on the Facility due to low gas inventories in the Southern California area on the SoCalGas and Southwest Gas system.<sup>5</sup> The Staff’s Substitute Proposal, including a potentially costly and protracted outage to convert to 100% recycled water in three years, would effectively restrict and potentially temporarily incapacitate a project that will be an important component of shoring up electric reliability in the Southern California.

But while interim relief is appropriate and necessary, HDPP does not support the grant of interim relief as justification to further delay action on the Petition. The Petition is properly before the Committee, and substantial evidence supporting the requested relief is presented in HDPP’s testimony, the Feasibility Study, the GSI Report, and other documentation. In marked contrast, the Staff’s substitute Proposal is not properly before the Committee as it is not a CEQA alternative and it has the potential to interfere with Fundamental Vested Rights of an ongoing business.

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<sup>4</sup> HDPP OB, p. 15.

<sup>5</sup> Ex. 1009, High Desert Power Project Response to Committee Question 3(b), pp. 5-6.

HDPP respectfully requests that the Committee act expeditiously to grant interim relief and decide the Petition on the merits.

Respectfully submitted,



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