

## DOCKETED

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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  
STATUS REPORT AND PROPOSED SCHEDULE FOR THE REMAINING  
PROCEEDINGS**

**INTRODUCTION**

Pursuant to the Committee's *Notice of Committee Conference and Related Orders*<sup>1</sup> ("Notice"), High Desert Power Project, LLC ("HDPP" or the "Project Owner") provides the following *Status Report and Proposed Schedule for the Remaining Proceedings* related to the High Desert Power Project (the "Facility").

**I. SUMMARY OF AGREEMENTS REACHED AT STAFF WORKSHOP**

Since the Committee Conference on June 5, 2017, the Project Owner, California Energy Commission ("CEC") Staff, and the California Department of Fish and Wildlife ("CDFW") (collectively, the "Parties") have continued to work diligently to narrow the remaining issues. There have been exchanges of language and teleconferences among the parties.

First, and foremost, the Parties remain in agreement regarding percolation. Specifically, with respect to the storage of State Water Project ("SWP") Water via percolation for the Facility, the Project Owner, CEC Staff and CDFW have agreed in principle to the Stipulation. This agreement has not changed since the June 5<sup>th</sup> Committee Conference, and discussions since that Committee Conference have focused exclusively on issues other than percolation.

**II. SUMMARY OF THE SUBJECT AREAS THAT REMAIN DISPUTED**

The Parties made significant progress, but have remaining important issues regarding water supply parameters unrelated to percolation. Most of those remaining issues focus on condition Soil&Water-1 (sometimes referred to as "S&W-1").

To bring this proceeding to closure, HDPP is willing to accept new limits on its currently approved, California Environmental Quality Act ("CEQA") compliant water supplies. Specifically, in principle, HDPP has agreed to stipulate to three new limitations on its water supply: (1) a limit of 2,500 acre-feet per year (AFY) for recycled water use in any calendar year (the "Maximum Annual Recycled Water Use"); (2) a limit of 2,000 AFY calculated on a 3-year calendar year rolling average (the "Average Annual Recycled Water Use") for recycled water

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<sup>1</sup> TN #: 219987.

use; and (3) a new mandatory minimum use of 20% recycled water for annual cooling water needs, excluding periods recycled water is not available or is not of sufficient quality, calculated on a three-year rolling average basis (the “Average Annual Recycled Water Blend Percentage”).

These limits are not based on any technical studies or evidence of environmental impact; rather, the upper and lower limitations on the current approved water supplies represent a negotiated balance between the contrasting positions of CDFW and the CEC Staff. Conditions (1) and (2) are in response to CDFW’s desire to *minimize* Recycled Water use; in contrast, condition (3) is in response to the CEC Staff’s desire to *maximize* Recycled Water use.

HDPP has entertained these two limits and the one mandatory minimum in an effort to reach voluntary agreement with the parties, and these proposals do not represent a request by HDPP for an affirmative change in operation.<sup>2</sup>

The remaining substantial differences relate to: (1) the minimum amount of recycled water that should be used by the Facility; (2) the measures that should be taken should the Facility use too much or too little recycled water; and (3) clean-up of existing Condition of Certification S&W-6(d) language. Specifically, the Parties have not reached agreement on the following issues:

**1. Average Annual Recycled Water Blend Percentage:**

- a. **HDPP Proposal:** HDPP is willing to accept that the Facility use a minimum of twenty percent (20%) of annual cooling water needs, excluding periods recycled water is not available or is not of sufficient quality, calculated on a three-year rolling average basis.
  - i. HDPP’s experts examined water availability and took into account historic supplies in reaching the 20% figure. They are not comfortable with pushing the envelope based on historic deliverability. While using percolated water is anticipated to enhance input consistency (compared to direct use of SWP water), HDPP has not been able to realize benefits from this change. As discussed many times, HDPP would prefer to use more recycled water as it benefits the economics of the facility. However, increased renewable resource generation has shortened the run times and increased the starts at the Facility, making blending water supplies of different qualities more complex and challenging. HDPP’s proposed revisions to S&W-1 to incorporate this proposal are set forth in Attachments A (clean) and B (redline).

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<sup>2</sup> HDPP hopes to reach a stipulation on all issues. However, if this is not accomplished, HDPP reserves the right to amend the Petition’s requested relief, including, but not limited to seeking only the authority to percolate SWP Water, or any other relief as necessary and appropriate.

- b. **CEC Staff Proposal:** Staff proposes a twenty-five percent (25%) minimum. This percentage is based on Staff's assumption that HDPP will eliminate the injection of SWP water although Staff stated that it does not take a position as to whether the authority to inject SWP water should be eliminated. It is HDPP's position that eliminating injection would not materially enhance the Facility's ability to use recycled water.
  - c. The parties had a good discussion on this issue but it is unclear whether a compromise may be reached.
2. **Meet and Confer versus "Mitigation" and Additional Enforcement Measures:** The parties disagree on what, if any, enforcement provisions should be included for the three-stipulated maximum and minimum limits on recycled water use. CEC staff and DFW propose "mitigation" in a proposed new S&W-23. HDPP asserts that the Conditions of Certification should not include specific "mitigation" payments or other enforcement measures for non-compliance with the three proposed limits on recycled water use because these negotiated limits are not based on any technical studies or evidence of environmental impact.
- a. **HDPP Proposal:** The Project Owner proposes a Meet and Confer process to examine the root cause of a potential non-compliance with the S&W-1 recycled water limits. The Meet and Confer should be a cooperative, joint inquiry and allow for the possibility that the Facility operated outside the S&W-1 recycled water bands due to reasons beyond the reasonable control of HDPP. If the cause was beyond HDPP's control, there should be no further action. If the cause was in HDPP's control, then any enforcement measures should be tailored to address the harm resulting from noncompliance.
    - i. Nexus or Causation: The Meet and Confer process would document a Nexus between HDPP's recycled water use, the targets in S&W-1, and an adverse effect on the environment. At the most basic level, it needs to be determined that HDPP's water use may have operated outside of the requirements of S&W-1 and that it was not caused by events or circumstances beyond HDPP's control.

It could be that events beyond the control of HDPP affected available water supplies and blending percentages. Such events beyond HDPP control could include, for example, an unanticipated outage of the Recycled Water treatment plants, an "upset" of the Recycled Water treatment plants' systems, planned maintenance outages of the Recycled Water treatment plants, outages to allow for capital improvements at the Recycled Water treatment plants, and SWP Water system issues, including, levee and other SWP system failures. The Meet and Confer would need to examine and document a Nexus between HDPP water use and water use outside the bands set forth in S&W-1.

- ii. **Proportionality:** The Project Owner is willing to agree to substantial reductions and limitations on its approved water supplies in the spirit of compromise and settlement of issues. Any exactions or remedial actions imposed after the Meet and Confer must be proportional to the documented adverse impacts caused by the Facility's water use, if any. The Facility's maximum water usage is a small fraction of the Recycled Water produced and an even smaller fraction of the total water usage in the Adjudicated Mojave Basin.

HDPP's proposed revisions to S&W-1 to incorporate this proposal are set forth in Attachments A and B.

- b. **CEC Staff and CDFW Proposal:** Staff and CDFW propose a new Condition of Certification, Soil&Water-23 ("S&W-23"). S&W-23 has been characterized alternatively as (1) "mitigation" or (2) an "enforcement mechanism."
  - i. First, there have been no adverse impacts identified that are associated with the proposed, negotiated reductions and limitations on the Facility's current, approved water use. Therefore, there are no significant impacts requiring CEQA "mitigation". The Project Owner disagrees with Staff and CDFW's proposal on this basis.
  - ii. Second, and in the alternative, if S&W-23 is intended to be an "enforcement mechanism", the Project Owner disagrees with Staff and CDFW's proposal for the following reasons.

The CEC's regulations already contemplate and provide for enforcement of conditions of certification. Informal dispute resolution is followed by formal dispute resolution. Thereafter, regardless of the outcome of the attempts to resolve the dispute formally or informally, the CEC has the option, but not the obligation, to bring a "Complaint" action against a project for non-compliance. In short, the CEC already has a sufficiently strong and real "enforcement mechanism," the Complaint process. The additional "enforcement" process proposed in S&W-23 provides for monetary exactions from the Project Owner without any of the Due Process protections or regulatory process provided by the CEC's regulations.

- 3. **Clean-up of Soil and Water 6.d Language:** As discussed at the June 5, 2017 Status Conference, cleanup of "vestigial" language from the Conditions is necessary to ensure conformity and clarity going forward.
  - a. **HDPP Proposal:** The Project Owner proposes deleting Condition S&W-6d. This 2001 Condition states: "The project shall not operate for longer than thirty (30) years unless the Commission has approved an amendment to its license that

specifically evaluates the water resources impacts of continued operation and imposes any mitigation necessary to ameliorate any identified impacts.”

Deletion of the 30- year period in S&W-6.d is appropriate given the 2009 amendment that occurred subsequent to the licensing decision that examined the Facility’s water resources impacts and water supply issues. The 2009 amendment lifting the ban on use of Recycled Water satisfied the 2001 requirement, making the 2001 language “vestigial.” Specifically, removing the complete prohibition on Recycled Water in 2009 was certainly an approved “...amendment to its license that specifically evaluates the water resources impacts of continued operation and imposes any mitigation necessary to ameliorate any identified impacts.”

In addition to the seminal 2009 amendment and other HDPP water amendments since 2001, it is also clear that the current amendment we are now processing makes this language vestigial. It should be deleted.

The Parties will continue to discuss revisions to Condition of Certification S&W-1 and will provide an update at the July 10th Committee Conference.

### **III. PROPOSED SCHEDULE FOR THE REMAINING PROCEEDINGS**

The draft Percolation Stipulation contains citations to the record, which demonstrates that there are no significant environmental effects associated with using Mojave Water Agency’s existing percolation infrastructure and compliance with applicable LORS. Thus, the percolation issues could be fully resolved via the attached Percolation Stipulation without the need for hearings or briefing.

As to the few remaining but important issues related to Condition of Certification S&W-1 and the newly proposed S&W-23, HDPP believes that the Parties can further narrow their differences through additional informal discussions. Such consensus, if achieved, could result in a global settlement of all issues through either an additional water supply stipulation or revisions to, and renaming of, the Percolation Stipulation to include all issues. HDPP has proposed revisions to S&W-1, as set forth in Attachments A and B, to achieve global settlement of all issues.

In the alternative, if the parties cannot reach agreement on these issues, then HDPP believes that the remaining issues can be heard at a single, half-day hearing, followed by briefing on issues as directed by the Committee. For a briefing schedule, HDPP proposes submission of opening briefs by the parties 30 days after publication of evidentiary hearing transcripts. Reply briefs would be due 14 days following submission of opening briefs. CEC Staff and CDFW

would each bear the burden of proof on any proposed amendments to S&W-1 and new S&W-23.

**CONCLUSION**

HDPP greatly appreciates the Committee's efforts to focus and expeditiously resolve this proceeding.

Respectfully submitted,

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/s/

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**ATTACHMENT A**

**HDPP'S PROPOSED REVISIONS TO CONDITION OF CERTIFICATION  
SOIL&WATER-1 (CLEAN)**



## **SOIL&WATER-1 Water Supplies**

The only 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

- a. The project owner shall use recycled waste water to the extent it is available and its quality is sufficient to maintain cooling tower functions and reliable operation of the facility, provided that the use of recycled waste water:
  1. shall not exceed 2,500 acre-feet per year (AFY) in any calendar year (the "Maximum Annual Recycled Water Use");
  2. shall not exceed 2,000 AFY calculated on 3-year calendar year rolling average (the "Average Annual Recycled Water Use"); and
  3. shall meet a minimum of 20% of annual cooling water needs, excluding periods recycled water is not available or is not of sufficient quality, calculated on a three-year rolling average basis (the "Average Annual Recycled Water Blend Percentage").

The Maximum Annual Recycled Water Use, the Average Annual Recycled Water Use and Average Annual Recycled Water Blend Percentage shall be calculated and reported based on the metered data. The project owner shall exclude from the calculations (1) water used when recycled water is unavailable when the project requests recycled water; and (2) water used when recycled water of sufficient quality is unavailable when the project requests recycled water per the water quality specification in the project owner's agreement with its retail water supplier. Recycled Water unavailability shall be logged by the facility's operators and reported monthly to the Energy Commission Compliance Project Manager (CPM).

- b. Recycled waste water may be blended with either (a) directly available SWP water or (b) banked SWP Water that has been either percolated or injected ("Banked SWP Water") and is available for extraction in accordance with SOIL&WATER-6.

At the project owner's discretion, dry cooling may be used instead, if an amendment to the Commission's decision allowing dry cooling is approved.
- c. The project owner shall report, on or before the 15th of each month, the use of water from all sources for the prior month to the CPM in acre-feet. The monthly report shall include acre-feet usage by source, as well as total. Specific recycled water events of unavailability or quality issues will also be included with daily detail.
- d. The project's water supply facilities shall be appropriately sized and utilized to meet project needs. The project shall make maximum use of recycled waste water for power plant cooling given current equipment capabilities and permit conditions.

**VERIFICATION:** The project owner shall report all use of water and recycled water unavailability in acre feet to the CPM and CDFW on a monthly basis for each supply: Recycled Water, SWP Water, and Banked SWP Water. The monthly report shall contain a brief statement on the water quantity and water quality of the supplies available in the prior month.

The project owner, the CPM, and the CDFW shall meet and confer as soon as practicable if it appears that the project's water use may fall outside the following bands:

1. The Maximum Annual Recycled Water Use may exceed 2,500 acre-feet per year (AFY) in any calendar year;
2. The Average Annual Recycled Water Use may exceed 2,000 AFY calculated on 3-year calendar year rolling average; or
3. The Average Annual Recycled Water Blend Percentage may be less than a minimum of 20% of annual cooling water needs, excluding periods recycled water is not available or is not of sufficient quality, calculated on a three-year rolling average basis.

If any of these three criteria are not satisfied because of an extensive, unavoidable disruption of water supply due to an Act of God, a natural disaster, an emergency, or other unforeseen circumstance outside the exclusive control of the project owner, the CPM, project owner, and CDFW shall meet and confer to determine how best to restore water use consistent with the terms of SOIL&WATER-1 as soon as practicable.

If any of these three criteria are not satisfied because of circumstances within the exclusive control of the project owner, the CPM, project owner, and CDFW shall meet and confer to develop and have the project owner fund on a one-time basis an environmental enhancement program for the benefit of the Mojave River riparian habitat in the Transition Zone to address potentially significant adverse impacts resulting from the failure to satisfy the criteria. If the parties cannot agree upon a program and funding level, then the Staff may initiate, or CDFW may recommend, a formal Complaint against the project owner pursuant to the Commission's rules and regulations.

**ATTACHMENT B**

**HDPP'S PROPOSED REVISIONS TO CONDITION OF CERTIFICATION  
SOIL&WATER-1 (REDLINE)**

## **SOIL&WATER-1 Water Supplies**

The only 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) ("MRB Water Rights") as administered by the Watermaster (the "Judgment").~~

~~b. The project owner shall implement an interim "Loading Sequence" in the following order:~~

~~a. 1. The project owner will~~**shall** use recycled waste water as the primary water supply, to the extent it is available and its quality is sufficient to maintain cooling tower functions and reliable operation of the facility, **provided that the use of recycled waste water:**

- 1. shall not exceed 2,500 acre-feet per year (AFY) in any calendar year (the "Maximum Annual Recycled Water Use");**
- 2. shall not exceed 2,000 AFY calculated on 3-year calendar year rolling average (the "Average Annual Recycled Water Use"); and**
- 3. shall meet a minimum of 20% of annual cooling water needs, excluding periods recycled water is not available or is not of sufficient quality, calculated on a three-year rolling average basis (the "Average Annual Recycled Water Blend Percentage").**

**The Maximum Annual Recycled Water Use, the Average Annual Recycled Water Use and Average Annual Recycled Water Blend Percentage shall be calculated and reported based on the metered data. The project owner shall exclude from the calculations (1) water used when recycled water is unavailable when the project requests recycled water; and (2) water used when recycled water of sufficient quality is unavailable when the project requests recycled water per the water quality specification in the project owner's agreement with its retail water supplier. Recycled Water unavailability shall be logged by the facility's operators and reported monthly to the Energy Commission Compliance Project Manager (CPM).**

~~b. 2. If there is insufficient recycled waste water of quality or quantity sufficient to maintain cooling tower functions and reliable operation of the facility, r~~**Recycled waste water may be blended with either (a) directly available SWP water or (b) banked SWP Water that has been either percolated or injected ("Banked SWP Water") and is available for extraction in accordance with SOIL&WATER-6.** ~~from the four HDPP wells as long as the amount of banked SWP water used does not exceed the amount of water~~

~~determined to be available to the project pursuant to SOIL&WATER 5.~~

~~3. If there is insufficient directly available SWP Water of quality or quantity sufficient to maintain cooling tower functions for reliable operation of the facility and the amount of banked SWP water determined to be available to the project pursuant to SOIL&WATER 5 is less than 4,000 acre-feet (AF) in water year 2015/2016 (ending September 30, 2016) and less than 5,000 AF in water year 2016/2017 (ending September 30, 2017), the project owner may blend recycled waste water with MRB Water Rights to achieve the required cooling tower blowdown rate or cooling tower functionality, subject to the limitations contained above.~~

~~4. The Project Owner shall consume no more than 2,000 AF of MRB Water Rights in water year 2015/2016 (October 1, 2015 — September 30, 2016) and no more than 2,000 AF in water year 2016/2017 (October 1, 2016 — September 30, 2017). The acquisition, use and transfer of MRB Water Rights shall comply with the Judgment and Rules and Regulations of the Watermaster.~~

At the project owner's discretion, dry cooling may be used instead, if an amendment to the Commission's decision allowing dry cooling is approved.

**b c.** The project owner shall report, on or before the 15th of each month, the use of water from all sources for the prior month to the ~~Energy Commission~~ CPM in acre-feet. The monthly report shall include acre-feet usage by source, as well as total. **Specific recycled water events of unavailability or quality issues will also be included with daily detail.**

**e d.** The project's water supply facilities shall be appropriately sized and utilized to meet project needs. The project shall make maximum use of recycled waste water for power plant cooling given current equipment capabilities and permit conditions.

**VERIFICATION:** ~~The project owner shall provide final design drawings of the project's water supply facilities to the CPM, for review and approval, thirty (30) days before commencing project construction. The project owner shall submit to the CPM documentation showing the agreements entered into between the project owner, MWA Watermaster, and water right owners in MRB regarding the acquisition, use and transfer of MRB Water Rights. The project owner shall report all use of water **and recycled water unavailability** in acre feet to the ~~Energy Commission~~ CPM **and CDFW** on a monthly basis for each supply: Recycled Water, SWP Water, **and** Banked SWP Water, **and MRB Water Rights**. The monthly report shall contain a brief statement on (1) the water quantity and water quality of the supplies available in the prior month and (2) a summary of efforts to use available supplies to provide cooling water for operations, build the HDPP groundwater bank, and/or preserve the HDPP water bank.~~

**The project owner, the CPM, and the CDFW shall meet and confer as soon as practicable if it appears that the project's water use may fall outside the following bands:**

- 1. The Maximum Annual Recycled Water Use may exceed 2,500 acre-feet per year (AFY) in any calendar year;**
- 2. The Average Annual Recycled Water Use may exceed 2,000 AFY calculated on 3-year calendar year rolling average; or**
- 3. The Average Annual Recycled Water Blend Percentage may be less than a minimum of 20% of annual cooling water needs, excluding periods recycled water is not available or is not of sufficient quality, calculated on a three-year rolling average basis.**

**If any of these three criteria are not satisfied because of an extensive, unavoidable disruption of water supply due to an Act of God, a natural disaster, an emergency, or other unforeseen circumstance outside the exclusive control of the project owner, the CPM, project owner, and CDFW shall meet and confer to determine how best to restore water use consistent with the terms of SOIL&WATER-1 as soon as practicable.**

**If any of these three criteria are not satisfied because of circumstances within the exclusive control of the project owner, the CPM, project owner, and CDFW shall meet and confer to develop and have the project owner fund on a one-time basis an environmental enhancement program for the benefit of the Mojave River riparian habitat in the Transition Zone to address potentially significant adverse impacts resulting from the failure to satisfy the criteria. If the parties cannot agree upon a program and funding level, then the Staff may initiate, or CDFW may recommend, a formal Complaint against the project owner pursuant to the Commission's rules and regulations.**