

DOCKETED

Docket Number:	97-AFC-01C
Project Title:	High Desert Power Plant
TN #:	220913
Document Title:	California Department of Fish and Wildlife Opening Brief on Condition of Certification Soil & Water-6d
Description:	N/A
Filer:	Xochitl Miranda
Organization:	California Department of Fish and Wildlife
Submitter Role:	Intervenor
Submission Date:	8/25/2017 2:55:00 PM
Docketed Date:	8/25/2017

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

Application for Certification of the
HIGH DESERT POWER PROJECT

Docket No. 97-AFC-1C

**STATE OF CALIFORNIA
DEPARTMENT OF FISH AND WILDLIFE
OPENING BRIEF ON CONDITION OF CERTIFICATION SOIL & WATER-6d**

Pursuant to the Committee's *Orders After July 10, 2017 Committee Conference* (TN #220543), the California Department of Fish and Wildlife (CDFW) staff files this Opening Brief on Condition of Certification SOIL & WATER 6d for the operation of the High Desert Power Project (HDPP).

QUESTION PRESENTED

Has Condition of Certification Soil & Water-6.d been satisfied so that it is no longer relevant to the proceedings?

SHORT ANSWER

Condition of Certification Soil & Water-6.d has not been satisfied and is still very relevant to these proceedings.

DISCUSSION

2000 Commission Decision on the High Desert Power Project

Condition of Certification Soil & Water-6.d 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.

Condition of Certification Soil & Water-6.d. was included in the original Commission Decision, issued on May 4, 2000, outlining the conditions under which the HDPP would be authorized to operate (TN#14407, 2000 Decision). The 2000 Decision came after several days of evidentiary hearings, testimony submitted by the California Department of Fish and Game (now CDFW) raising concerns about water availability in an overdrafted groundwater basin, opposing testimony from a landowner in the Mojave River Basin who intervened in the proceeding and raised similar concerns about potential impacts from the project to the overdrafted groundwater basin, and many residents in the Mojave River area submitting letters in opposition to the HDPP being constructed in the Mojave River Basin. Further, the 2000 Decision came after a December 15, 1999 Presiding Member's Proposed Decision recommending that the Application for Certification for the HDPP not be approved and that the

Commission not grant the Applicant a license to construct and operate the project due to concerns regarding "Air Quality" and "Soil and Water Resources". (Presiding Member's Proposed Decision, Dated December 15, 1999)

The 2000 Decision acknowledges that the issue of water availability for the operation of HDPP "was the most highly contested area in these proceedings". (2000 Decision, p. 208.) CDFW opposed the use of recycled water for HDPP operation, "since such use would take water from the basin and potentially cause adverse impacts to riparian vegetation. (2000 Decision, p. 223, citations to RT and exhibits omitted.) Intervenor Gary Ledford also opposed the use of recycled water for HDPP operations, citing similar concerns for the potential impact to the groundwater basin. (2000 Decision, p. 223, fn 49.) The Commission, in its Decision in 2000 also made the finding that the "Mojave River Groundwater Basin is severely overdrafted." (2000 Decision, p. 230). The Mojave River Groundwater Basin is still severely overdrafted today.

In addition to submitting testimony in the evidentiary hearings, CDFW also commented on issues raised by the Commission in this proceeding and on testimony submitted by Commission staff. On February 16, 2000, CDFW submitted "Comments of the Department of Fish and Game on Testimony Submitted for the Hearing on February 18, 2000 For the High Desert Power Project" (Date Uploaded to Docket, February 17, 2000). The CDFW comments state in part:

DFG supports the Commission staff's recommendation that Soil&Water 6(d) be added to ensure that water resource impacts from operation of the plant longer than 30 years be evaluated as a condition of extending the project's life. Since the Commission analysis is based on a 30-year project life, this provision is appropriate to ensure that longer-term operations do not adversely affect the Mojave River system.

CDFW supported the inclusion of Soil & Water-6.d in 2000 and continues to support its inclusion in the Conditions of Certification today. Soil & Water-6.d was an important piece of the Findings that lead to the conclusion that HDPP "will not create any significant adverse direct, indirect, or cumulative impacts upon water resources". (2000 Decision, p. 231). It is still relevant and necessary to better ensure that the operations of the HDPP do not create any significant adverse direct, indirect, or cumulative impacts upon the water resources in the Mojave River Groundwater Basin.

2009 Order Approving a Petition to Modify Soil and Water Conditions Relating to Use of Recycled Water for Project Cooling (TN# 54277, 2009 Order)

The 2000 Decision was adopted after multiple days of evidentiary hearings conducted in 1999 and 2000 and is approximately 360 pages long. The 2009 Order is eight (8) pages long and was adopted without evidentiary hearings. HDPP counsel has asserted that the 2009 Order satisfied both the requirement in Soil & Water-6.d that a specific evaluation of the water resources impacts of continued operation be done *and* the requirement in Soil & Water-6.d that mitigation be imposed necessary to ameliorate any identified impacts. (TN#218802, p. 25).

The 2009 Order states up front that the Order proposes to Modify Soil& Water-1 to: "...enable the project to use recycled tertiary water for approximately 1/3 of its project cooling water needs." (2009 Order, p. 1). The Notice of Decision filed by the Commission on November 24, 2009 regarding the 2009 Order in the Project Description indicates that the project that had been approved in the 2009

Order would allow the project to "begin using recycled water for about 1/3 of their current needs". (TN#54286).

On October 20, 2009, HDPP submitted comments on the September, 2009 Revised Staff Analysis. (TN#53706). In Section I, General Comments, HDPP indicated, that "HDPP expects to be able to use up to 1,000 ac-ft/yr of reclaimed water, approximately one third of current water useage." (TN#53706, p. 1). HDPP further stated *its proposal* as, "HDPP's proposal to use up to 1,000 ac-ft/yr of reclaimed water" (TN#53706, p.2). Assuming that a specific evaluation of the water resource impacts of continued operation had been done, it would presumably have been done on the HDPP proposal to use up to 1,000 ac-ft/yr of reclaimed water.

On September 30, 2009, Commission staff docketed an errata to its revised analysis of proposed modifications to remove the prohibition of the use of recycled water for project operations (TN#53500, 2009 Staff Analysis). The 2009 Staff Analysis relies heavily in its short discussion on the 2003 Memorandum of Understanding by and between the California Department of Fish and Game and the Victor Valley Wastewater Reclamation Authority regarding the Discharge to the Mojave River Transition Zone (TN#210503, 2003 MOU). The 2009 Staff Analysis concludes, "[i]n 2003, CDFW and VVWRA executed a Memorandum of Understanding (MOU) that specifies discharge requirements that VVWRA must maintain to *ensure there will be no impacts to riparian resources in the Mojave River.*" (2009 Staff Analysis, p. 4, emphasis added). The rest of the brief analysis addresses supply logistics of obtaining recycled water. The 2009 Staff Analysis does not contain a groundwater analysis of the potential impact of allowing the use of up to 1,000 ac-ft/yr of recycled water at HDPP. The 2009 Staff Analysis does not contain a groundwater analysis of the potential impact of allowing an unlimited amount of recycled water use at the HDPP. The 2009 Staff Analysis does not constitute an evaluation of the "water resources impacts of continued operation" as required by Soil & Water-6.d.

The statement regarding the 2003 MOU made in the 2009 Staff Analysis is not correct. The 2003 MOU does not ensure there will be no impacts to riparian resources in the Mojave River. As further discussed in testimony submitted in this proceeding by Kit Custis on behalf of CDFW, a large diversion of native groundwater, in the form of recycled water, diverted to a 100% consumptive use by HDPP, would likely lower groundwater levels, which may create a significant impact to the health of the riparian habitat and wildlife. (See TN# 210565, Testimony of Kit Custis, pp. 7-12 and associated tables and figures).

CONCLUSION

Soil & Water-6.d is still relevant today and has not yet been satisfied. No specific evaluation of the water resources impacts of HDPP using recycled water has yet been done. No specific mitigation necessary to ameliorate any identified impacts has yet been adopted.

Respectfully Submitted,



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