

OBJECTION TO HDPP'S PETITION FOR REVISIONS/ADMINISTRATIVE CHANGES TO SOIL AND WATER CONDITION NO. 4

This Objection is filed to address the Commission's failure to enforce compliance with the Conditions relative to water treatment and injection. Specifically, HDPP Soil and Water Condition #4. The record supports Intervenor's standing to bring this Motion in this case.

BACKGROUND

HDPP filed an Application for Certification to construct a power plant, June 30, 1997. Between initial filing and certification, the three-year debate centered around the potential environmental impacts of the use of State Water Project water which was intended to recharge the massive overdraft in the Mojave Dessert water table. My position was that the power plant's 100 percent consumptive use of water was, in and of itself, a negative environmental impact that could only be mitigated by requiring the use of dry cooling.

I have never objected to the building of the power plant in Victorville with the exception of the use of fresh water for cooling. I would have not intervened if the Commission were inclined to require dry cooling as it did in Sutter and subsequently in Otay Mesa. Instead, the Commission approved the water-cooled project with representations/assurance to the public that the Commission's license was very tightly drawn and that the Commission would stand vigilant to protect Mojave water quality. The Commission represented there would be a plan for ground water banking and no negative impact to existing water quality. The evidentiary record is extensive and

detailed on the applicant's duties and the Commission's responsibility to assure the public's/environmental protection.

HDPP submitted its final design drawings on March 27, 2001. The Commission's compliance staff authorized construction of the HDPP on May 17, 2001 with HDPP commencing commercial operation April 22, 2003.

Intervenor found that the type of treatment facility was subsequently amended and filed a Complaint October 11, 2001. The Complaint alleged the HDPP has violated or intends to violate certain Conditions of Certification related to HDPP's water plan (Condition 12).

Responding to my Complaint, the Commission stated, "We recognize that the type of treatment facility was subsequently amended in consultation with the responsible water agencies." But on November 9, 2001, Intervenor's Complaint was never the less dismissed without prejudice on the grounds that the Motion was not ripe. It was difficult to agree with the Commission's conclusions on the Complaint, but the Commission's decision again promised to protect the Mojave Desert ground water and affirmed or restated these protections:

- The certification decision also found that the project would need approximately 4,000 acre-feet of water per year for cooling. (Commission Decision at p. 213.)
- The water treatment facilities, however, must be adequately sized to simultaneously provide for both plant cooling and groundwater injection to meet the requirement that 13,000 acre-feet (a three-year supply plus 1,000 acre-feet) be banked during the first five years of project operation. (Condition 4.) " From the "Proposed Decision"

- Condition 12 requires HDPP to submit a water treatment and monitoring plan that specifies the type and characteristics of the treatment processes and identifies any waste streams and their disposal methods. The plan must include the proposed monitoring and reporting requirements identified in HDPP's Report of Waste discharge (Bookman-Edmonston 1998d), which is part of the evidentiary record.¹²

HDPP is before the Commission again asking for changes to the conditions of certification as a simple "administrative change". Why? To save money! During certification, Applicant produced the evidence on water quality upon which the Commission relied in making the "Finding" of no negative environmental impact in the area of soil and water saying. Applicant testified and applicant's experts produced evidence stating that Reverse Osmosis (R/O) was required to bring the injected water quality to meet or exceed background water quality levels. Applicant agreed to the costs associated with R/O and the banking plans and they were fully disclosed in testimony and are in the evidentiary record. Applicant advised the Public that banking could be done in three years. Almost immediately after certification, however, the HDPP backed away from the Water Treatment Train placed in evidence as APPLICANT'S Exhibit 54 (R/O). Instead, HDPP purchased and installed the Ultra Filtration system (not R/O). HDPP has been in operation for three years using Ultra Filtrations system. During the last year and an half there was virtually no water banking. Why? After choosing the Ultra-filtration process (the cheaper method), HDPP could not comply with the promised water quality protection given at the time of certification and make the mandated water bank. HDPP is not able to meet the

obligations of the conditions requiring HDPP to treat and store ground water in the mandated amount of 13,000 acre-feet [or more] by the end of the fifth year of operation. HDPP's "adapted" water treatment conditions are simply not working and the potential of further lessening of environmental protection is the anticipated outcome if the Commission agrees to the HDPP's Petition for "administrative change" to Condition No. 4.

SOIL & WATER NO. 4

Soil and Water Condition #4 states as follows:

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 project's commercial operation.
- b. **By the end of the fifth year of commercial operation**, the amount of water injected minus the amount of banked groundwater used for project operation, minus the amount of dissipated groundwater **shall meet or exceed thirteen thousand (13,000) acre-feet.** (emphasis added)

POINTS AND AUTHORITIES

1. The Commission cannot grant an "Administrative" change to a Condition of Certification when a member of the public objects without processing as a formal amendment to the decision..

The applicable section states: "Amendments

(3) If staff determines that a modification does not meet the criteria in subsection (a)(2), or if a person objects to a staff determination that a modification does meet the criteria in subsection (a)(2), the petition must be processed as a formal amendment to the decision and must be approved by the full commission at a noticed business meeting or hearing. The commission shall issue an order approving, rejecting, or modifying the petition at the scheduled hearing, unless it decides to assign the matter for further hearing before the full commission or an assigned committee or hearing officer. The commission may approve such modifications only if it can make the following findings:

(A) the findings specified in section 1755 (c), and (d), if applicable;

§ 1755. Final Decision.

(c) The commission shall not certify any site and related facilities for which one or more significant adverse environmental effects have been identified unless the commission makes both of the following findings:

(1) With respect to matters within the authority of the commission, that changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant environmental effects identified in the proceeding.

(2) With respect to matters not within the commission's authority but within the authority of another agency, that changes or alterations required to mitigate such effects have been adopted by such other agency, or can and should be adopted by such other agency.

(d) If the commission cannot make both the findings required under subsection (c), then it may not certify the project unless it specifically finds both of the following:

(1) That specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the application proceeding; and

(2) That the benefits of the project outweigh the unavoidable significant adverse environmental effects that may be caused by the construction and operation of the facility.

2. The proposed amendment will violate LORS (Public Resources Code Section 25525) because the Regional Water Control Board (nor other local water jurisdictions) have not and cannot approve lower water quality than required by the Commission's license without formal amendment by the Commission to the license.

Local Water Boards follow these Objectives and Rules:

a). General Direction Regarding Compliance With Objectives

“Where more than one objective is applicable, the **stricter objective shall apply.**”

b). Nondegradation Objective

“ . . . whenever the existing quality of water is better than that needed to protect all existing and probable future beneficial uses, **the existing high quality shall be maintained** until or unless it has been demonstrated to the State that any change in water quality will be consistent with the maximum benefit of the people of the State, and will not unreasonably affect present and probable future beneficial uses of such water. **Therefore unless these conditions are met, background water quality concentrations (the concentrations of substances in natural waters which are unaffected by waste management practices or contamination incidents) are appropriate water quality goals to be maintained. . . in no case may such increases cause adverse impacts to existing or probable future beneficial uses of the waters of the State.**”

Commission’s License requires mitigation to below a level of significance and no adverse effects upon water quality.

Testimony at hearings on water quality by the board was: “We believe that the weight of the evidence of record establishes that the comprehensive requirements set forth below are adequate to mitigate the impacts of the HDPP **to below a level** of significance and to preclude use of project facilities from resulting in growth inducing impacts or **from any adverse effects upon water resources.**”

The operative words here are to **mitigate** the impacts of HDPP to **“below” a level of significance and “preclude” . . . “impacts” . . . “from any adverse effects upon water resources”.**

The plain language of the testimony, CRWQCB-L letters to the CEC and the evidence presented at the hearings was that **the HDPP “injected” water would “ . . . inject treated state water project water into the regional aquifer that is essentially identical in quality.”**

In the LORS section of the Commission’s decision, it states to the Public that SWRCB has the following obligation:

“The RWCQB will {emphasis added} require a ROWD to operate injection/extraction wells using SWP water. Pursuant to SWQCB Resolution 68-16 (Anti-degradation Policy) and the

Water Quality Control Plan for the Lahontan Region, the RWQB requires that selected chemical constituents in SWP water (e.g. Total Dissolved Solids (TDS), chloride and sulfate) be reduced to background levels in native groundwater prior to injection.”

CRWQCB-L made its position clear in a February 17, 1999 letter from Hisam Baqui to Rick Buell of the Commission’s staff (which is now a part of the record) stating HDPP mitigated to a level of non-significance the issue of water quality when they agree to “treat” the water to a point that was equal or “better” than the receiving ground water:

The WDR or the Waiver can be more restrictive but not less. [See San Luis Obispo Golf & Country Club – Order 99-18]

3. The proposed amendment will not be beneficial to the public or intervenors and only helps the applicant save money by abandoning their agreement to bank water at the same quality level as in the native ground water.

4. There is no a substantial change in circumstances since Commission certification. All the information was known and fully disclosed in the three years of consideration. The final recommended conditions were made under oath as sworn testimony. Applicant either exercised reasonable diligence to discover the quality of the SWP Water or they misrepresented that they did so.

An example of water board testimony during Commission hearings shows Applicant’s assertion that conditions changed or that information about SWP quality could not have been known is not truthful. The Board testified:

- “Board staff’s primary concern with any ground water banking project is that the water to be imported **may be of lesser quality** than the native receiving ground waters.
- Board staff expressed concerns to the Applicant during the development of the RWD,
- **and the Applicant subsequently proposed in the RWD to treat the imported State Water Project (SWP) water to a quality that is equal to or better than the receiving ground waters.**

- As such, provided that the SWP is treated and injected as proposed in the RWD, Board staff believes that the proposed project will not have a significant effect on the quality of the receiving ground waters.

5. Review of the Commission Docket Log reveals the all-too familiar pattern by applicants. Generally, they agree to any condition to obtain a license and gain construction approval. Once licensed, applicants routinely use the administrative amendment process to change (dilute) environmental requirements.

Why? If no-one complains about the change, then the amendment is routinely approved. In truth, because of the public input when conditions are put in place - the public is promised that the environment will be protected. But once the plant is built the Public will be gone. It is nearly impossible to get public participation again as it is obvious that their opportunity for meaningful input has ended.

ARGUMENT

There can be no question that the “condition” for certification agreed to by HDPP was that they would meet or exceed the Condition 4 by the end of the fifth year of operation.

HDPP did not bank any water during the second year of operation.

HDPP would like for the public to believe that “no banking” was the not the result of their poor choice for water treatment, but instead was because conditions have changed. Alternatively, Applicant simply did not know how bad the water in the State Water Project was or what the level of treatment would be needed to meet injecting to background levels. These contentions are not true, defy the evidence in the record and give distrust to the process.

Water treatment problems are not “new.” As early as 2002, I argued that HDPP was not using the proper type of water treatment facilities, and that the proposed treatment will not result in water approaching background water quality levels.

HDPP has elected to ignore its own sworn testimony – the very evidence used to gain certification - and selected a different Water Treatment Train. HDPP’s water treatment will degrade the water quality in the HDPP well fields for TDS and Chlorides over the existing water quality. (It’s a money issue to save HDPP millions of dollars over the life of the project).

More than two years after certification, the HDPP is in operation and cannot comply with Condition #4 Soil and Water. The Ultra Filtration water treatment process HDPP purchased and placed in operation is not able to meet the obligations of the conditions requiring HDPP to treat and store ground water in the mandated amount of 13,000 acre-feet by the end of the fifth year of operation.

There is absolutely no assurance that HDPP’s new treatment process will work. The Commission’s own staff sees the uncertainty in HDPP’s plan and is proposing conditions with R/O as a back up treatment plan, with “trigger” times. In fact many of the positive benefits of building a Water Mound of 13,000 AF simply go away, all for the benefit of the HDPP’s quest to save money.

By failing to mandate that HDPP use the process that their own evidence and testimony states was required (R/O) and potentially injecting degraded water but spreading the compliance measurement time from five to twelve years or longer is at the unquestioned expense of the general Public in the High Desert. HDPP has petitioned the Commission because it selected a water-treatment process that

CANNOT comply with Condition No.4, yet HDPP testified Condition No. 4 was acceptable to them.

CONCLUSION

1. Intervenor requests the Commission to make a determination that the RPMPD and final Order does NOT allow for the degradation of ground water in the water banking operation of HDPP. While the Commission interpreted the Conditions of Certification so that HDPP could select the process to treat the water, the evidence in the record did not include the applicant-selected Ultra Filtration water treatment train. Now three years later, their chosen money saving process does not work. The solution is NOT the Dissolution of water quality protections provided by Condition 4. HDPP is mandated by the Condition 4 to provide 13,000 acre-feet of banked water by the end of the fifth year of operation or face shutting the plant down.

2. The Compliance Officer shall issue a Shut Down Order in the event that the full 13,000 acre-feet or more of water is not banked by the end of fifth year of operation because HDPP did not comply with the conditions they agreed to. During evidentiary hearings, HDPP and the Energy Commission's experts all stated that failure to comply with water quality and water banking would lead to shutting down HDPP...from the record...

Mr. Ledford: "But again my point is . . . the Energy Commission going to shut this plant down?"

Ms Bond: "That's what the conditions of certification require, correct"

Mr. O'Hagen: ". . . As a staff of the Commission, if these conditions are, in fact, adopted by the Commission, I would hope that we would enforce that."

3. Although Intervenor filed letter objections prior to the workshop, there has been no response from staff, Intervenor is advised and believes that if this formal

Objection is not filed by June 26th, he may lose standing. Intervenor intends to file supplemental pleadings in this matter.

4. Grant Intervenor recovery of out of pocket costs in bringing this action.

Respectfully Submitted:

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In Pro Per

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STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:) Docket No. 97-AFC-1
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The Application for Certification) PROOF OF SERVICE
For the High Desert Power Project [HDPP])
_____)

I, Gary Cooper, declare that on _____, I deposited copies of the attached **Motion to for an Order to Show Cause and Motion to Compel Compliance**, in the United States mail in Apple Valley California with first class postage thereon fully prepaid and addressed to the following:

Signed original document plus 11 copies to the following address:

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I declare under penalty of perjury that the foregoing is a true and correct.

Gary Cooper