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In Pro per

STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:)	Docket No. 97-AFC-1
)	
The Application for Certification)	WEDNESDAY, May 3, 2000
For the High Desert Power Project [HDPP])	Beginning at 10 a.m.
)	California Energy Commission
)	Hearing Room A
)	1516 Ninth Street
)	Sacramento, California 95814
_____)	

**MOTION OF GARY A LEDFORD TO SET
ASIDE THE
REVISED PRESIDING MEMBER'S
PROPOSED DECISION (RPMPD) AND
REOPEN THE RECORD TO CORRECT
PROCEDURAL ERRORS AND CONFORM
THE EVIDENTIARY RECORD TO THE
FACTS**

Respectfully submitted:
May 1, 2000

GARY A. LEDFORD
PARTY IN INTERVENTION
IN PRO PER

**MOTION TO SET ASIDE THE PRESIDING MEMBER’S PROPOSED
DECISION (RPMPD) AND REOPEN THE RECORD TO CORRECT
PREJUDICIAL PROCEDURAL ERRORS AND CONFORM THE
EVIDENTIARY RECORD TO THE FACTS**

Gary A. Ledford, an Intervenor in the High Desert Power Project (HDPP) proceedings, Hereby moves to set aside the Energy Commission’s Siting Committee’s Revised Presiding Member’s Proposed Decision (RPMPD) of March 2000, docketed March 31, 2000.

This Motion is made on the grounds that:

**I. THE RPMPD IS SUBJECT TO PREJUDICIAL PROCEDURAL
ERROR BY THE SITING COMMITTEE**

The Energy Commission Committee committed procedural error when it received “DOCUMENTS” from third parties, after the HDPP evidentiary record was closed, proceeded to use the DOCUMENTS in the RPMPD, when all the while, the DOCUMENTS were not properly docketed and served on interested parties.

- “DOCUMENTS” are referred to in the RPMPD at page 232, Finding No. 20. “Impacts associated with the importation of State Water Project water by the Mojave Water Agency have been examined in environmental documentation certified by that agency.”
- “DOCUMENTS” are identified in the RPMPD at page 226, Footnote 51. “Portions of these environmental documents were provided and docketed, on

March 17, 2000. (Communication from Tom Dodson & Associates to Mr. Randy Hill, March 14, 2000; see also, Exs 109, p. 14; 110.) They constitute a portion of the administrative record pursuant to 20 Cal Code of Regs. § 1702(a).”

- Not served “DOCUMENTS” include materials from Tom Dodson containing more than 250 pages of CEQA materials on the subject of water prepared for the Victor Valley Water District.

The DOCUMENTS contain information vital to Intervenor’s position in the case and demonstrate that NO ONE has studied the 100% consumptive use of water for HDPP...or any power plant.¹

The pivotal DOCUMENTS were not served prior to the hearing on the RPMPD. And, later, when Intervenor attempted to find out about these DOCUMENTS, he discovered that the Energy Commission Docket Unit did not have a copy of the documents referenced by the Staff and Hearing Officer in the RPMPD. The DOCUMENTS were never entered in the Docket Log for HDPP.

These important DOCUMENTS were not processed in the normal/usual way.

An example of the usual process:

- Richard Bagwell’s letter was mailed to the Energy Commission on 4/12/00
- The letter was docketed on 4/14/00
- Intervenor receives a docketed copy of the letter on 4/17/00

¹ The Regional Water Management Plan (RWMP) for the Mojave Water Agency at Chapter 11, pager 11-1 and 11-2, carefully explains the issues studied as part of the RWMP. The 100% consumptive use of water for a power plant was not studied.

An example of the “unusual” process:

- Tom Dodson document(s) containing 250 pages of CEQA materials mailed 3/14/00
- Documents in possession of Staff and Hearing Office
- Documents appear in a footnote and a Finding in the RPMPD 3/2000
- Intervenor is never served a docketed copy of the DOCUMENTS

Regardless of whether the violation of Energy Commission filing requirements was an unavoidable mistake or otherwise, it is legal error that the DOCUMENTS are now referred to as “part of the administrative record.”²

² California Code of Regulations Title 20 Section 1702(a) “Administrative record” means all materials that have been entered into the docket on the proceeding. The administrative record includes but is not limited to the hearing record (as defined below).

(h) “Hearing record” means the materials that the committee or commission accepts at a hearing. While the committee or commission may rely in part on any portion of the hearing record in making a finding, only those items properly incorporated into the hearing record pursuant to Section 1212 or 1213 are sufficient in and of themselves to support a finding. The hearing record includes:

- (1) Written and oral testimony presented at a hearing, including direct and cross examination of a witness.
- (2) Supporting documentary evidence or exhibits submitted with testimony.
- (3) Public document offered at a hearing or entered into the record at a hearing.
- (4) Public agency comment offered at a hearing or entered into the record of a hearing.
- (5) Other evidence that the committee accepts at a hearing.

Section 1212 Rules of Evidence

The following rules of evidence shall apply to any adjudicatory proceeding of the commission and in such other proceedings as the commission may determine by order.

- (a) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant non-cumulative evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.
- (b) Oral or written testimony offered by any party shall be under oath.
- (c) Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross examine opposing witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence against such party.
- (d) Hearsay evidence may be used to the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions.

The presiding member may establish such additional rules as necessary for the orderly conduct of the proceeding.

Section 1213 Official Notice

During a proceeding the commission may take official notice of any generally accepted matter within the commission’s field of competence, and of any fact which may be judicially noticed by the courts of this state. Parties to a proceeding shall be informed of the matters to be noticed, and those matters shall be

The effect of the mistake denied Intervenor an opportunity to review the DOCUMENTS; question the source.

The DOCUMENTS go much further than the limited purpose found in the RPMPD. The DOCUMENTS contain new data to overwhelmingly support Intervenor's position that the RPMPD does not comply with CEQA; the 100% consumptive use of water for HDPP has never been studied; and, the Energy Commission should not certify HDPP unless (1) dry cooling is mandated or (2) HDPP's use of water is on the same basis as all other water users subject to the Adjudication.

Accordingly, Intervenor is compelled to point out to the Committee that it's non-compliance with information disclosure provisions of the Public Resources Code³ and failure to observe Title 20, California Code of Regulations⁴ render the RPMPD subject to prejudicial error.

noted in the record, or attached thereto. Any party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority.

³ Public Resources Code Section 21005 Noncompliance with information disclosure provisions as prejudicial abuse of discretion.

(a) The Legislature finds and declares that it is the policy of the state that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.

(c) It is further the intent of the Legislature that any court, which finds, or, in the process of reviewing a previous court finding, finds, that a public agency has taken an action without compliance with this division, shall specifically address each of the alleged grounds for noncompliance.

⁴ Title 20 California Code of Regulations Section 1210

(a) Unless otherwise provided by the presiding member, a copy of all written material filed by any party in a proceeding shall be served in person or by first class mail, postage prepaid, on every other party to the proceeding.

(b) The Docket Unit shall promulgate and make available a list, which shall include the names and addresses of all parties to a proceeding.

(c) Any filing by a party shall include a proof of service in compliance with subsection (a) of this section.

**II. THE RPMPD IS INCOMPLETE AND INACCURATE
WITH RESPECT TO FINDINGS REQUIRED BY THE WARREN-ALQUIST
ACT.**

The Warren-Alquist Act and its implementing regulations require the Energy Commission determine whether the HDPP, as proposed, would conform and comply with applicable federal, state, regional and local laws.⁵

The DOCUMENTS provide new and overwhelming evidence that the HDPP relies on a water use plan that violates California's Constitution and may be soon be adjudged unlawful. Because these DOCUMENTS were added to the administrative record AFTER the evidentiary hearing closed, Intervenor, or any member of the public, were denied the opportunity to properly evaluate the DOCUMENTS. As a result, the DOCUMENTS are used to support findings which are incomplete and inaccurate when all the DOCUMENT information is available.

The DOCUMENTS require a finding that the "Adjudication" requires all local water producers to "cure" the critical and severe water overdraft in the basis. The cure is by means of a "Physical Solution" requiring producers purchase replacement water two-acre feet for each acre-foot consumed. Instead of following the environmental plan developed by the Court, the RPMPD allows HDPP 100% consumptive use of water, with no consideration to the Court mandated Cure.

**III. THE RPMPD IS INCOMPLETE AND INCORRECT
WITH RESPECT TO FINDINGS REQUIRED UNDER CEQA**

CEQA requires that an environmental impact report (EIR) must serve as an “alarm bell” to alert agencies to potential adverse environmental impacts arising from projects.⁶ Under CEQA, “project”⁷ means the whole of the action. The Committee’s position that the Energy Commission is “necessarily confined”⁸ from studying the cumulative impacts of the Proposed Water Supply Agreements for HDPP and the Project, is not supported by the law.⁹ The RPMPD is incomplete because it does not follow CEQA’s requirement to afford the fullest possible protection to the environment¹⁰ for the whole of the action.

⁵ Public Resources Code Section 25523(d) and Title 20 of the California Code of Regulations (“CCR”) Section 1744

⁶ Public Resources Code Section 2100 *et seq.*; *Duesk v. Redevelopment Agency* (1985, 4th Dist) 173 Cal App 3d 1029, 219 Cal Rptr 346.

⁷ Section 15378. Defines "Project":

(a) "Project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:

(1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100-65700.

(2) An activity undertaken by a person which is supported in whole or in part through public agency contacts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

(c) The term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term "project" does not mean each separate governmental approval.

⁸ RPMPD dated 3/31/2000; page 10.

⁹ Orders restoring water waste discharge levels to originally approved levels for a wastewater treatment plant were not exempt from compliance with the California Environmental Quality Act (CEQA), Public Resources Code, Section 21000 *et seq.*, providing for the applicability of Water Code Section 13370 *et seq.*

¹⁰ The California Environmental Quality Act (CEQA) (Pub. Resources Code, §21000 *et seq.*) must be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. Since the act applies only to projects of a discretionary, rather than a ministerial, character (Pub. Resources Code, §21080), doubts whether a project is discretionary or

The following CEQA elements are missing:

- Mandatory Findings of Significance as required by Public Resources Code Section 15065;¹¹
- Regional Water Issues were not studied for Consideration and Discussion of Significant Environmental Impacts as required by Public Resources Code Section 15126.2;¹²
- Growth Inducement Study as required by Public Resources Code Section 15126.2 and acknowledged as missing by the Energy Commission Staff Brief that states¹³ “The RPMPD Is Incorrect in Stating that All Impacts, Including Growth-Inducing Impacts Associated with the Importation of SWP Water, Have Been Analyzed in Pre-existing Environmental Documents.”
- Cumulative Impacts Study for regional water management for the various entities proposing to participate in water use at George Air Force Base¹⁴ and beyond¹⁵ as required by Public Resources Code Section 15130.¹⁶

ministerial should be resolved in favor of a finding that it is discretionary. Further, where a project is of a hybrid discretionary ministerial character, CEQA applies even if the project is largely ministerial. *Friends of Westwood, Inc. v City of Los Angeles* (1987, 2d Dist) 191 Cal App 3d 259, 235 Cal Rptr 788.

¹¹ Title 14. California Code of Regulations, Chapter 3. Guidelines for Implementation of the California Environmental Quality Act Section,15065. Mandatory Findings of Significance

¹² Title 14. California Code of Regulations, Chapter 3. Guidelines for Implementation of the California Environmental Quality Act Section,15126.2 Consideration and Discussion of Significant Environmental Impacts.

¹³ Staff "Brief" on the Revised Presiding Member's Proposed Decision, April 13, 2000.

¹⁴ SEC. 10. Notwithstanding Section 21090 of the Public Resources Code and Section 15180 of the State CEQA Guidelines (Chapter 3 (commencing with Section 15000) of Title 14 of the California Code of Regulations), **each project that implements the redevelopment plans adopted, amended, or merged pursuant to Sections 33459 and 33477 of the Health and Safety Code, or adopted pursuant to Section 33670.9 of the Health and Safety Code, shall be subject to the provisions of the California Environmental Quality Act** (Division 13 (commencing with Section 21000) of the Public Resources Code)

- Neither regional nor local EIRs have studied the cumulative or growth inducing impacts of the consumptive use of 4,000 acre feet of water. The HDPP project's consumptive use was not studied and cannot be reported as to Cumulative or Growth Inducing Impacts in the RPMPD. The EIRs for the Mojave Water Agency RWMP and the Berrenda Mesa Water Acquisition also did not study the impacts¹⁷. The Table 11-1 of the RWMP EIR is conclusive on the point: no city, or the County of San Bernardino has studied the environmental impacts associated with construction of the power plant; or a power "project" that would potentially use over 10% of the net available water available for growth.

For the Energy Commission to continue its review of HDPP's proposal and the RPMPD is an abuse of discretion. Unless modified, the RPMPD cannot adequately alert the public and responsible agencies to the environmental consequences (especially the impact of 100 % consumptive use of scarce water in overdrafted basins) of the HDPP

¹⁵ Hearing Transcript October 7th 1999, page[s] 166-172
"CREATE [sic] A WATER TREATMENT FACILITY THAT WILL ULTIMATELY BECOME AVAILABLE TO THE GENERAL PUBLIC FOR USE AS WE BUILD AND GROW AT GEORGE AIR FORCE BASE AND BEYOND"

Terry Caldwell
Mayor of the City of Victorville
Chairman of the Southern California International Airport Authority
Vice Chairman of the Victor Valley Economic Development Authority

¹⁶ Title 14. California Code of Regulations, Chapter 3. Guidelines for Implementation of the California Environmental Quality Act Section, Section 15130 Consideration and Discussion of Cumulative Impacts.

¹⁷ The fundamental objective of the California Environmental Quality Act (Pub. Resources Code, §21000 et seq.) (CEQA) is to ensure that environmental considerations play a significant role in governmental decision making. To facilitate CEQA's informational role, the environmental impact report must contain facts and analysis, not just the agency's bare conclusions and opinions, so as to enable the decision makers and the public to make an independent, reasoned judgement about a proposed project. Public participation is an essential part of the CEQA process, and a project must be open for public discussion and agency modification during the CEQA process. Concerned Citizens of Costa Mesa, Inc. v 32nd Dist. Agricultural Assn. (1986) 42 Cal 3d 929, 231 Cal Rptr 748, 727 P2d 1029.

proposed facility.¹⁸ The Court said in San Joaquin Raptor/Wildlife Rescue Center V. County of Stanislaus, the misleading nature of the discussion of the environmental setting led to finding an abuse of discretion.

In City of Santee V. County of San Diego, the Court was concerned about the public's understanding of the true scope of the project, which involved changes to the EIR immediately prior to certification. It is Intervenor's position that Energy Commission cannot cure the deficiency in the RPMPD by making changes/clarifications to its environmental review documents immediately prior to certification without violating CEQA.¹⁹

IV. ARGUMENT

The WATER issue was the most highly contested area in these proceedings. The total Water Supply Plan contemplated by HDPP and a single "Will Serve Letter" are mandated as a matter of CEQA law. Using DOCUMENTS, Staff prepared and argued points in a Brief dated April 13, 2000. Since Intervenor was denied an opportunity to Brief the topic, the following arguments are offered to support Intervenor's Position.

- 1. CEQA requires a "project's contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact. The lead agency shall identify facts and**

¹⁸ San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus, 27 Cal. App. 4th 713 (1994).

¹⁹ City of Santee v. County of San Diego, 214 Cal. App. 3d 1439 (1989).

analysis supporting its conclusion that the contribution will be rendered less than cumulatively considerable".

Allowing HDPP to use imported State Water Project (SWP) water for its cooling towers is 100% consumptive use which “...**gives HDPP twice the amount of water** at a reduced rate than all other producers in the Basin and thus creates an inequity of Mitigation required of all water producers under the Judgment on the Physical Solution and as required in the RWMP.”²⁰ Several public commenters echo this Intervenor's concerns.²¹ Certainly HDPP could use SWP if a full and proper CEQA analysis was prepared and HDPP participated equitably in the mitigation to cure the overdraft as required by the Judgment to Physically cure the overdraft. This method would require HDPP to place one-acre foot in the ground for recharge for each acre-foot of water it evaporates into the atmosphere.

1. No **"Will Serve Letter"**, providing for a continuous and un-interruptable source of water for the Power Project has been provided, nor could there be, because no CEQA analysis has been conducted for the PROJECT to provide water to HDPP. The mandatory findings, including the study of Growth Inducing and Cumulative Impacts can be clearly seen in Chapter 11 of the RWMP EIR. This outdated Program EIR which itself requires an update every five years does not study the issues of water regulated by the RPMPD.

²⁰ (Ledford's "Brief on Reopened Hearings and Revised Comments", March 7, 2000, p. 20; see also 1/27/00 RT 24.)

²¹ (See, e.g., 1/27/00 RT 51-56; 2/18/00 RT 78, 90-92.).

The authority is clearly stated by our legislature in that "The fundamental objective of the California Environmental Quality Act (Pub. Resources Code, §21000 et seq.) (CEQA) is to ensure that environmental considerations play a significant role in governmental decision making. To facilitate CEQA's informational role, the environmental impact report must contain facts and analysis, not just the agency's bare conclusions and opinions, so as to enable the decision makers and the public to make an independent, reasoned judgement about a proposed project. Public participation is an essential part of the CEQA process, and a project must be open for public discussion and agency modification during the CEQA process. Concerned Citizens of Costa Mesa, Inc. v 32nd Dist. Agricultural Assn. (1986) 42 Cal 3d 929, 231 Cal Rptr 748, 727 P2d 1029.

2. A Cumulative Impacts study is mandated by Public Resources Code Section § 21156.²²
2. A CEQA-required analysis has not been conducted by the Water Agency[s] that intend to provide water to the HDPP. So there is no updated Regional Study of the MWA Water Management Plan that incorporates the HDPP's 100% direct consumptive use of SWP Water for Cooling Towers, and there is no analysis of "Cumulative Impacts" and

²² "It is the intent of the Legislature in enacting this chapter that a master environmental impact report shall evaluate the cumulative impacts, growth inducing impacts, and irreversible significant effects on the environment of subsequent projects to the greatest extent feasible. The Legislature further intends that the environmental review of subsequent projects be substantially reduced to the extent that the project impacts

"Growth Inducing Impacts". Instead these Water Agencies intend to use the RPMPD as their CEQA document and then to approve the contracts for these water facilities²³. This use of the RPMPD is a means to circumvent the law.

3. As lead agency, the Energy Commission is required to find that a project may have significant effect on the environment when to achieve short-term goals, long-term environmental goals are dis-advantaged; project effects are individually limited but cumulatively considerable.²⁴

The Pipelines, Wells and Treatment Facilities planned to serve HDPP is only a portion of the Water Supply project. These facilities are oversized for the purpose of providing water service to the redevelopment of George Air Force Base. The oversized facilities will provide more water than the

have been reviewed and appropriate mitigation measures are set forth in a certified master environmental impact report."

²³ Hearing Transcript October 7th 1999: page 313 and 333: MR. HILL for Victor Valley Water District: "My agency's will serve letter with respect to this agreement is contingent upon the Energy Commission approving a project, **because your process has to meet the CEQA requirement before we can issue a will serve letter**".

Mr. Norm Cauoette for the Mojave Water Agency: "**And one of the reasons for that is our ordinance requires a CEQA analysis.** After a discussion between our staffs and agency legal counsel and CEC legal counsel, it was determined the best thing for us to do was to wait for conclusion of this process, **utilize the CEQA equivalent document that would be developed as a result of the CEC permit process**"

²⁴ California Code of Regulations Title 14 Chapter 3 Guidelines for Implementation of California Environmental Quality Act at Section 15065.

Mandatory Findings of Significance mandates a lead agency **shall find that a project may have a significant effect on the environment** and thereby require an EIR to be prepared for the project where any of the following conditions occur:

- (a)The project has the potential to substantially degrade the quality of the environment, . . . "
- (b)The project has the potential to achieve short-term environmental goals to the **disadvantage of long-term environmental goals, such as the failure to participate in the curing of the overdraft.**
- (c)The project has possible environmental effects which are individually limited but **cumulatively considerable, such as the failure to participate in the curing of the overdraft.**
- (d)The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly, *such as the failure to participate in the curing of the overdraft*

project needs. The long-term environmental impact and the cumulative impact and have not been studied under CEQA.

The RPMPD fails to discuss the HDPP's water plan's disadvantage to the High Desert's "Long-term" environmental goals, the cumulative effects of the continued overdraft as acknowledged by the Courts and the direct or indirect adverse effects on human beings.

4. The use of nonrenewable resources during the initial and continued phases of the project "**may be irreversible since a large commitment of such resources makes removal or nonuse thereafter unlikely**"²⁵.

This would certainly include the use of "entitlement" water for a Power Project at the expense of "curing" the overdraft.

5. Growth-Inducing Impacts have not been analyzed.²⁶ The CEC Legal Staff "Brief" on the RPMPD dated April 13th 2000, clearly demonstrates that the

25 California Code of Regulations, Title 14 Chapter 3. Guidelines for Implementation of the California Environmental Quality Act Section, 15126.2(a) describes the Significant Irreversible Environmental Changes Which would be Caused by the Proposed Project should it be Implemented. These include Primary impacts and, particularly, secondary impacts (such as highway improvement which provides access to a previously inaccessible area) generally commit future generations to similar uses. Also irreversible damage can result from environmental accidents associated with the project. Irretrievable commitments of resources should be evaluated to assure that such current consumption is justified

26 Public Resources Code Section 15126.2 at paragraph (d) discusses the requirement of the Growth-Inducing Impact of the Proposed Project. This section requires discussion on the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment.

RPMPD is "Incorrect", in the statement that that "All Impacts . . . have been analyzed"

Staff's Brief states: "The RPMPD Is **Incorrect** in Stating that All Impacts, Including Growth-Inducing Impacts Associated with the Importation of SWP Water, Have Been Analyzed in Pre-existing Environmental Documents."

Neither the Growth Inducing nor Cumulative Impacts has been studied by the Energy Commission to analyze the 100% consumptive use of water and its Regional Significance. There are no underlying CEQA documents prepared in the Regional Vicinity of the proposed HDPP. CEC Legal Staff Comments are compelling:

"The RPMPD cites environmental documents provided by Tom Dodson & Associates, and docketed on March 17, 2000. The RPMPD states that these documents are part of the administrative record and that that they include an analysis of all impacts associated with the importation of SWP water into the basin. (RPMPD, p. 226, Findings and Conclusions 20, p. 32) However, **staff finds nothing in these documents that this Commission could rely upon to address growth-inducing impacts potentially caused by the HDPP.**"

And;

". . . , the Draft EIR for the transfer of the Berrenda Mesa SWP water entitlement simply states that it is based on an assumption that utility acquisition of water entitlement **does not induce growth, as growth is dictated by local land use plans and ongoing growth in Southern California.** (p. 6-2) **Staff believes that a thorough analysis of growth-inducing effects requires more than merely stating that growth will occur in any event. We encourage the Commission not to rely on this document as evidence that growth-inducing effects associated with access to additional water sources provided by the HDPP have been analyzed.**"²⁷

²⁷

Staff Comments on RPMPD dated March 7, 2000

Further Authority is found in Title 14. California Code of Regulations, Chapter 3. Guidelines for Implementation of the California Environmental Quality Act Section, 15130. Provides a Discussion of Cumulative Impacts, beginning in paragraph (a) An EIR shall discuss cumulative impacts of a project shall be discussed when they are significant the project's incremental effect is cumulatively considerable, as defined in section 15065(c).²⁸

- (1) As defined in Section 15355, a cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR **together with other projects causing related impacts.**

The Act mandates that the following elements are necessary to an adequate discussion of significant cumulative impacts:

- (1) Either:
 - (A) A list of past, present, and reasonably anticipated probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or
 - (B) A summary of projections contained in an adopted general plan or related planning document, or in a prior environmental document which has been adopted or certified, which described or evaluated is designed to evaluate regional or areawide conditions contributing to

²⁸ Section: 15065. Mandatory Findings of Significance: A lead agency shall find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project where any of the following conditions occur:

- (a) The project has the potential to substantially degrade the quality of the environment
- (b) The project has the potential to achieve short-term environmental goals to the disadvantage of long-term environmental goals.
- (c) The project has possible environmental effects, which are individually limited but cumulatively considerable.
- (d) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.

the cumulative impact. Any such planning document shall be referenced and made available to the public at a location specified by the lead agency.²⁹

An EIR shall discuss cumulative impacts of a project which shall be discussed when they are significant to the project's incremental effect is cumulatively considerable, as defined in Section 15065(c). As defined in Section 15355, a cumulative impact consists of an impact, which is created **as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts.**

- (2) When the combined cumulative impact associated with the project's incremental effect and the effects of other projects is not significant, the EIR shall briefly indicate why the cumulative impact is not significant and is not discussed in further detail in the EIR. A lead agency shall **identify facts and analysis supporting the lead agency's conclusion that the cumulative impact is less than significant.**
- (3) An EIR may determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable and thus is not significant. **A project's contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact. The lead agency shall identify facts and analysis supporting its conclusion that the contribution will be rendered less than cumulatively considerable.**
- (5) The discussion of cumulative impacts shall reflect the severity of the impacts and their likelihood of occurrence, . . ."

²⁹ Note: Authority cited: Sections 21083 and 21087, Public Resources Code. Reference: Sections 21083(b), 21093, 21094, and 21100, Public Resources Code; Whitman v. Board of Supervisors (1979) 88 Cal.App.3d 397; San Franciscans for Reasonable Growth v. City and County of San Francisco (1984) 151 Cal.App.3d 61; Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692; Laurel Heights Homeowners Association v. Regents of the University of California (1988) 47 Cal.3d 376; Sierra Club v. Gilroy (1990) 220 Cal.App.3d 30; Citizens to Preserve the Ojai v. County of Ventura (1985) 176 Cal.App.3d 421; Concerned Citizens of South Cent. Los Angeles v. Los Angeles Unified Sch. Dist. (1994) 24 Cal.App.4th 826; Las Virgenes Homeowners Fed'n v. County of Los Angeles (1986) 177 Cal.App.3d 300; San Joaquin Raptor/Wildlife Rescue Ctr v. County of Stanislaus (1994) 27 Cal. App.4th 713; and Fort Mojave Indian Tribe v. Cal. Dept. Of Health Services (1995) 38 Cal.App.4th 1574.

VI. CONCLUSION

Intervenor's Motion to Set Aside the RPMPD and not certify the HDPP is based on the undisputed record in this case that:

1. Certification should be put on indefinite hold until the California Supreme Court has ruled on the Adjudication of the Water Resources of the High Desert, and;
2. The project cannot be certified at this time because there has been an abuse of discretion by the Committee, by failing to provide CEQA Compliance, in that:
 - a. There is no **"Will Serve Letter"** to contractually provide for a continuous and uninterrupted flow of water to the plant during its operational lifetime.
 - b. Without a Will Serve Letter the plant will be **unreliable (not unreliable in a market sense, but unreliable in the ability to produce electricity).**
 - c. The evidence in the case demonstrates that MWA does not have enough water to cure the overdraft with its current entitlements. Thus even with a contract to provide water for project wet cooling, the contract water cannot be supplied if no SWP Water is available.
 - d. There is no CEQA analysis of the Cumulative and or Growth Inducing Impacts associated with the over sizing of the pipelines and the water treatment facilities which will be used for "other", purposes than the HDPP's use for cooling. CEQA mandates this analysis; the CEC is not allowed to study their proposed power projects in a vacuum.
 - e. Applicant cannot be afforded a contractual right outside the operation of the "Adjudication" wherein all local water producers are mandated to "cure" the critical and severe overdraft in the basin by purchasing replacement water two-acre feet of water for each acre-foot consumed. This project attempts to circumvent the mandate of the Physical solution.
 - f. The ability of HDPP to use SWP water for 100% consumptive use is contrary to the Physical Solution. If allowed, 100% consumptive use gives HDPP an unfair advantage over all other water producers in the High Desert. The RPMPD favors the applicant at a cost to local citizens, taxpayers and water producers, and;

- g. The use of State Project Water is a Property right of the citizens who paid for it. The 100% consumptive use in a critical and severely overdrafted water basin is contrary to Article X Section 2 of the California Constitution.
3. In the Alternative, the HDPP could be certified with the environmentally preferred method of cooling in this arid desert region - **using Dry Cooling.**

Section 21080.5. Certified Regulatory Programs, which mandate:

". . . an activity[*such as wet cooling*] **will not be approved or adopted as proposed** if there are **feasible alternatives**[*such as Dry Cooling*] or feasible mitigation measures[*such as buying "Replacement Water"*] available which would **substantially lessen any significant adverse effect, which the activity may** have on the environment.

This Commission defined it clearly in Sutter:

"The change to the use of an air cooled condenser rather than wet-cooling towers results in significantly reduced environmental impacts."

**IV. SETTING ASIDE THE RPMPD AND RE-OPENING THE
RECORD WOULD BE
THE MOST FAIR AND EFFICIENT WAY TO CORRECT
THE PREJUDICIAL PROCEDURAL ERRORS**

Intervenor, and the public, were prejudiced by the introduction of unserved DOCUMENTS into the administrative record.

Procedurally, public comment or parts of the administrative record are not sufficient, in and of themselves, to support a finding.

By some method, DOCUMENTS became a part of the RPMPD, although the DOCUMENTS were never introduced as evidence in the siting case. And by some method, DOCUMENTS that were not evidence support a finding in the RPMPD. Intervenor, as a party to the proceeding was not afforded the opportunity to examine the DOCUMENTS, cross-examine the sponsor of the DOCUMENTS and did not have the opportunity to argue the facts found in the DOCUMENTS that support Intervenor's position in the matter before the Energy Commission.

Intervenor believes the Energy Commission committed legal error in violation of the Warren-Alquist Act and the California Environmental Quality Act when it utilized unserved not properly-docketed DOCUMENTS, issued an incomplete and inaccurate RPMPD. Such errors are a prejudicial abuse of discretion because the Energy Commission is not proceeding in the manner required by law. (Public Resources Code §21168.5.)

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STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

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

I Kathie Mergal declare that on _____, I deposited copies of the attached **Motion to Set Aside the Revised Presiding Members Proposed Decision**, 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:

California Energy Commission
Docket Unit
1516 Ninth Street, MS 4
Sacramento, CA 95814

In addition to the documents sent to the Commission Docket Unit, individual copies of all documents were sent to:

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Interested Organizations

Southern California Edison

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

Kathie Mergal