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April 24, 2013

Mr. Oscar Biondi
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 98512-2000

Re: Reply to Lozeau Drury, LLP Comments Submitted on the Final EIR and Draft Final Water Quality Certification, Eagle Mountain Pumped Storage Project

Dear Mr. Biondi:

As you are aware, multiple parties have now commented on the draft Final Water Quality Certification (WQC) for the Eagle Mountain Pumped Storage Project. Most of those comments appear to us to be restatements of comments previously submitted by these same parties on the draft EIR in 2010 and on the draft WQC in July 2012, and we believe that the State Board has considered those comments and provided detailed responses as a part of the CEQA process in development of its draft Final EIR.

One party, the law firm of Lozeau Drury, LLP, has not commented on any previous aspects of this WQC application, and has submitted two letters in recent weeks to the State Board regarding the draft Final EIR (March 27, 2013) and the draft Final WQC (April 10, 2013). While these letters have been submitted far outside of the EIR process and are not required to be considered by the Board, they are now part of the administrative record for the Project, and because they contain erroneous information about the Project and the State's environmental review, we feel compelled to address the primary issues raised. We have requested that Abbott and Kindermann provide feedback regarding some of the legal claims made in those letters. Technical issues are addressed below.

1) Environmental Baseline for Greenhouse Gas (GHG) Analysis in the EIR

The March 27, 2013 letter commenting on the draft Final EIR claims to have discovered a flaw in the State Board's assessment of GHG emissions attributable to the Project, in that it is predicated upon "an illegal baseline" (page 1, paragraph 2, and repeated in the April 10, 2013 letter, page 2 and pages 6 to 12). The claim is explained to be based upon use of energy generation baseline conditions in the future, rather than existing energy generation conditions in California (item 2., pages 4 through 7, citing an assortment of selected

statements from the State's DEIR and draft FEIR, FERC's EIS and Eagle Crest Energy Company's website). This claim is simply incorrect.

The assessment of GHG emissions is contained in chapter 3.15 of the Draft Final EIR, pp. 3.15-8 through 3.15-18, and as is explained in detail, is based upon the current energy generation portfolio and market dispatch conditions in California. On that basis, and with an intent to be very conservative, the State Board's analysis assumes no renewable energy power contributing to pump-back operations, and that all power will be derived from the least-cost available power source. At this time, and for the reasonably foreseeable future, that marginal source of power is from natural gas-fired combined-cycle power plants. (FEIR, pages 3.15-11 through 3.15-14).

It is clearly explained in the Final EIR (page 3.15-18) that:

This analysis is based upon existing generation sources and conditions in California, and does not assume that cleaner generation sources would be available for the proposed Project's pump-back power in the future. Although it is not possible to accurately predict the energy generation mix in California over the next 50 years, it can be reasonably assumed that sources of generation will become cleaner (i.e., lower greenhouse gas emissions) over decades to come, and the total emissions associated with pump-back power would likely decrease over the proposed 50-year life of the proposed Project, potentially resulting in a greater level of emissions offset than the amounts presented in Table 3.15.2.

The analysis and conclusions are based upon current baseline conditions, and as explained in the EIR, the analysis would have had a much more favorable result if it had been based upon a future baseline under which a greater percentage of renewable energy resources (wind and solar) would be expected to contribute to the Project's pump-back power demands.

GHG Emissions Calculations

The letter indicates that the FEIR uses arbitrary numbers to calculate GHG emissions in Table 3.15-2, (2,883 GWh instead of 5,744 GWh and 2,278 GWh instead of 4,308 GWh). (April 10 letter, Page 11). This is incorrect, and Table 3.15-2 does not present arbitrary numbers to calculate GHG emissions. The emissions are based on factors explained in the notes below Table 3.15-2. As explained, 2,278 GWh of annual generation for the proposed Project is based on 1,300 MW total generation capacity for 20% of the annual hours. The calculation is $1,300 \text{ MW} * 20\% * 8760 \text{ hours} = 2,278 \text{ GWh}$ annually. The notes also indicate that the pump-back efficiency is 79%, resulting in more GWh/year required for the pump-back power. Dividing 2,278 GWh of annual generation by 79% results in a pump-back power requirement of 2,883 GWh/year.

The comment also incorrectly asserts that if a higher use is assumed (4,208 GWh per year) then the project would result in significant air emissions. Greater use would not be a determining factor in generating more air emissions. The relationship is linear, so that the more peak hours the Project operates, the more GHG emissions would be saved (by reducing the reliance on inefficient fossil-fueled power plants).

In summary, the Lozeau Drury LLP calculations showing the Project could produce substantial GHG emissions use the wrong efficiency factor and only reports a severe worst case emissions scenario that is not a reasonably foreseeable condition. Even with the reduced efficiency used in their calculations, the most likely case would be for the Project to result in reductions of GHG emissions.

2) Other Issues

- On page 12, paragraph 3 a comment is made that the USFWS wants to defer project approval until more data is gathered. This is a misinterpretation and is incorrect. The USFWS issued a biological opinion on the project on April 12, 2012.
- A claim is made on page 13 that Coachella Valley Milkvetch occurs in the project area. This is incorrect, as discussed in detail in Section 12.14 subsection 8 of the FEIR. Specifically, Coachella Valley Milkvetch (*Astragalus lentiginosus* var. *coachellae*) is a variety of *A. lentiginosus* known primarily from the Coachella Valley (Bureau of Land Management [BLM] and California Department of Fish and Game [California DFG], 2002; CNPS, 2011; Consortium of California Herbaria, 2011). A population was also allegedly found in the aeolian areas of Chuckwalla Valley, along State Route-177 (BLM and California DFG, 2002; Consortium of California Herbaria, 2011). However, it is likely that this record was mistakenly identified and is actually a population of *Astragalus lentiginosus* var. *variabilis* instead. During spring 2008 surveys for the project, all of the plants found in the aforementioned population keyed to *A. l.* var. *variabilis*. In 2009, A.E. Karl and USFWS conducted thorough investigations of this taxonomic issue that included discussions with species experts, reviews of relevant unpublished literature, and re-keying of herbarium specimens by herbaria botanists in three herbaria where samples from Desert Center were filed. As a result, it was determined that the populations of *A. lentiginosus* at Desert Center were var. *variabilis*, not var. *coachellae*; USFWS concurred (Englehardt, 2009a). Therefore, Coachella Valley milkvetch is not expected to be found on the project due both to lack of habitat and lack of verified populations. It also was not seen on the spring 2009 or 2010 project surveys nor on several previous surveys in the area (BLM and Imperial Irrigation District, 2003; Karl, 2002, 2004a, 2005, and 2007 field notes; Environmental Planning Group, 2004; Blythe Energy, 2004).

- A claim is made on page 10, paragraph 2, that the FEIR fails to disclose all special status plants detected in previous surveys. This is incorrect - see Sections 12.14 and Appendix A (Section 10) of the FEIR for a complete list.
- A suggestion is made on page 16, paragraph 3 that ECE should enter into an agreement with Riverside County regarding groundwater drawdown. This is inappropriate and unnecessary. Groundwater use and monitoring are already specified by the State Water Board (the agency with regulatory authority over California groundwater) in the FEIR and in the draft Final Water Quality Certification.
- A comment is made on page 18, paragraph 2 suggesting that the applicant should conduct tests to analyze potential for reservoir water to contain metals. See draft Final EIR, page 2-15 for results of samples taken in the mine site. See also Mitigation Measure SW-1 which specifically addresses this issue.
- On page 18, last paragraph, design details of the brine ponds are requested. Design details of the project are considered to be classified by the Federal Energy Regulatory Commission (FERC) and therefore cannot be released to the public, but have been available to and reviewed by State Water Board staff. Requirements and standards for addressing potential impacts from the brine ponds are found in Mitigation Measure GW-6.
- On page 19, paragraph 2, it is suggested that the State issue a Report of Waste Discharge through the Regional Board. Since the proposed project is a Federal hydropower project, jurisdiction falls to the State Water Resources Control Board rather than the regional Board. The State Board has consulted the Regional Board for applicable standards throughout the environmental review process and in development of the draft Final WQC.
- Concern is expressed on page 19, paragraph 3 that habitat compensation may not meet CDFW¹'s guidelines. The CDFW has issued a consistency determination for the biological opinion on the project which specified how habitat compensation will be calculated.
- The concern regarding construction emissions noted on page 20 is addressed in the draft Final EIR in Section 12.10.

¹ The California Department of Fish and Game (CDFG) officially changed its title beginning January 1, 2013 to California Department of Fish and Wildlife (CDFW).

- Concerns regarding unexploded ordinance (UXO) stated on pages 23 through 25 are addressed in Section 3-16 of the draft Final EIR. The potential to encounter UXO is fully disclosed and mitigation is prescribed. Specifically:

“Impact 3.16-1 Hazardous Materials during Construction. Due to the proximity of the transmission line to the World War II-era camps, and the recent history of military training on the Central Project Area, any unexploded ordinance (UXO) found on-site could be hazardous to workers on-site. This impact is considered potentially significant and subject to the mitigation program (MM HM-1). The Project Contractor and Environmental Coordinator will implement a UXO Identification, Training, and Reporting Plan (UXO Plan) to properly train all site workers in the recognition, avoidance and reporting of military waste debris and ordnance.”

This impact is found to be less than significant with implementation of mitigation measure HM-1, which provides that:

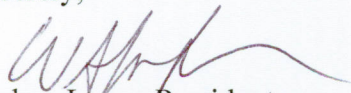
MM HM-1. UXO Plan. The Licensee, in consultation with the Licensee's Environmental Coordinator, shall implement a UXO Identification, Training and Reporting Plan (UXO Plan) to properly train all site workers in the recognition, avoidance and reporting of military waste debris and ordnance. Implementation shall include: (1) a description of the training program outline and materials, and the qualifications of the trainers; (2) identification of available trained experts that will respond to notification of discovery of any ordnance (unexploded or not); (3) a work plan to recover and remove discovered ordnance; and (4) work stoppage until site is determined clear by the Environmental Coordinator.

Verification: The UXO Plan shall be implemented no less than 60 days prior to the initiation of construction activities at the site.

Conclusion

Thank you for your consideration of our feedback on these comments. We look forward to continuing to work with the Water Board in completion of the WQC. Please do not hesitate to contact our Project Director, Dr. Jeff Harvey at (916) 799-6065, or me at (310) 450-9090, if you have any questions or need additional information.

Sincerely,


Stephen Lowe, President

Attachments

cc: Dr. Jeffrey Harvey, Project Director
Mr. William W. Abbott, Esq., Counsel