STATE OF CALIFORNIA – THE RESOURCES AGEN GRAY DAVIS, Governor
COLORADO RIVER BOARD OF CALIFORNIA
770 FAIRMONT AVENUE, SUITE 100
GLENDALE, CA 91203-1035
(818) 543-4676
(818) 543-4685 FAX

September 11, 2003

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Mr. Terrence O'Brien
Deputy Director
Systems Assessment & Facility Siting Division
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5112

Re: Blythe Energy Project Phase II

Dear Mr. O'Brien:

The Colorado River Board of California (CRB) appreciates the opportunity to provide comments relating to the proposed use of water by the Blythe Energy Project Phase II (BEP II) (AFC 02-AFC-1, Rev.1). Reference is made to your letter dated August 6, 2003 in which you asked that the CRB provide you with responses to your questions relating to the use of water by BEP II. The following responses are keyed to your numbered questions:

1. The current status of the Colorado River water supply is a bleak one. Generally, the Colorado River basin is experiencing a fourth year of drought and little, if any, surplus water is anticipated in the near future. For example, the Coachella Valley Water District's (Coachella) supply was reduced on April 28th of this year from 338,820 acre-feet to 238,500 acre-feet for this calendar year (Enclosure 1). The Metropolitan Water District of Southern California (Metropolitan) requested 1,250,000 acre-feet for this calendar year. Metropolitan's supply was reduced to 713,500 acre-feet on January 1st and to 592,500 acre-feet on April 28th for this calendar year (Enclosure 2). Contractors have been informed by the U.S. Bureau of Reclamation (Reclamation) that they must limit their use to the amounts of water approved for diversion (Enclosure 3). In addition, contractors have been asked to implement immediate conservation programs to reduce demands. Coachella has had to execute leases with farmers in the Palo Verde Valley, served by the Palo Verde Irrigation District, this year for a six-month period, beginning on June 20th, in return for compensation of $750 per acre (Enclosure 4). Coachella considers this to be a severe impact. The 40,000 acre-feet of water anticipated to be saved is being used by Coachella to meet its agricultural water demands. Metropolitan has relied on its other sources of water to meet its demands.

2. The fact that BEP II would pump groundwater from a depth deeper than the U.S. Bureau of Reclamation/U.S. Geological Survey (USGS) established accounting surface constitutes a presumption that such water is considered to be Colorado River water for accounting purposes in the eyes of Reclamation and the CRB. The implication is that pumped water would be replaced with water from the Colorado River.

The U.S. Supreme Court was very clear in its Decree of 1964 when it defined consumptive use as: "Consumptive use from the mainstream within a state shall include all consumptive uses of water of the mainstream, including water drawn from the mainstream by underground pumping, and including but not limited to, consumptive uses made by persons, by agencies of that state, and by the United States for the benefit of Indian reservations and other federal establishments within the state." Further in its Decree the Court stated "... mainstream water shall be released or delivered to water users (including but not limited to, public and municipal corporations and other public agencies) in Arizona, California, and Nevada only pursuant to valid contracts therefore made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act." Therefore, if the water pumped from the underground aquifer is replaced with Colorado River water, a valid water contract from the Secretary of the Interior is required for its authorized use.

3. The U.S. Supreme Court at the time of its Decree, in 1964, recognized that there were many users along the Colorado River who were using Colorado River water that predated the 1928 Boulder Canyon Project Act. Therefore, in 1979 with the support of the States of Arizona, California, and Nevada, the Court issued its Supplemental Decree which granted those users a present perfected right (PPR), subject to a contract with Department of the Interior (DOI), for the authorized use of Colorado River water up to their historic use.

In recognition that the demand for this scarce resource would surpass available supplies in the near future, Reclamation initiated a process to encourage efficient use of Colorado River water and eliminate the unauthorized uses of Colorado River water. In June 1964 and March 1985, Reclamation notified property owners along the River about the need for a contract from DOI if they were pumping Colorado River water (Enclosure 5). In May 1994, Reclamation issued for public review and comment, a draft rule entitled "Regulations for Administrating Entitlements to Colorado River Water in the Lower Colorado River Basin". Due to the complexity of the rule and the hydrologic conditions on the River at that time, activity on the rule ceased, however, the issue of unauthorized users was still in the forefront of discussions among the states, especially California (Enclosure 6).

Recognizing the limitation on the amount of Colorado River water available for use and the fact that entities in California were diverting water from the Colorado River without a contractual entitlement or present perfected right or with an insufficient right, Congress, at the urging of California, on November 14, 1986, enacted the Lower Colorado Water Supply Act of 1986. This Act authorized and appropriated funds for Reclamation to construct the Lower Colorado Water Supply Project ("Project"). The Project consists of well field facilities in the Sand Hills along the All-American Canal in southeastern Imperial County. As authorized by Congress, the Project is to "...supply water for domestic, municipal, industrial, and recreational purposes only." Water for agricultural uses is not available under the Act. The Act limits the eligible Project beneficiaries "to persons or Federal or non-Federal governmental agencies whose lands or interests in lands are located adjacent to

the Colorado River in the State of California, who do not hold rights to Colorado River water or whose rights are insufficient to meet their present or anticipated future needs as determined by the Secretary."

4. Authorized users of Colorado River water have been impacted by the unauthorized use of Colorado River water. Unauthorized use of Colorado River water reduces the amount of water otherwise available to authorized users in an amount equal to the magnitude of the unauthorized use. Contractors' Colorado River supplies were reduced this year due to unauthorized use as the U.S. Supreme Court's 1964 Decree in *Arizona v. California* enjoins the Secretary of the Interior from delivering more than the collective amount authorized by the Decree, 4.4 million acre-feet under a normal condition, to entities holding contracts or present perfected rights (Enclosure 7). Reclamation maintains records of the amounts of water ordered and approved for diversion, as well as the amounts of water used by each contractor and present perfected right holder as required by the Decree. The impacts of unauthorized use have been determined by Reclamation calculating the reduction in approved diversions that must occur to offset unauthorized use.

5. Unauthorized water use results in less water being available to contract holders. Coachella and Metropolitan are being impacted this year, and the amounts of water which they are being permitted to divert have been reduced by the magnitude of the unauthorized use. Based on the $300 per acre-foot cost to Coachella of leasing farmland in the Palo Verde Valley to permit irrigation of that land to cease this year, the impact is extremely severe.

6. Impacts to authorized users of Colorado River water resulting from unauthorized use have been quantified at over 6,600 acre-feet this year in California. The manner of quantification is Reclamation's calculation of the reduction in approved diversions that must occur. However, this is not the full extent of what the impact could be in future years. The USGS in its preparation of the "accounting surface" maps identified over 2,600 wells adjacent to the River in California that may be pumping Colorado River water.

7. The Colorado River Board has taken an active role in mitigating the impacts of unauthorized users in California with the creation and construction of the Lower Colorado Water Supply Project (Project). This Project is capable of meeting the consumptive use requirements of 10,000 acre-feet annually.

   The City of Needles (Needles) has agreed to be the contract administrator for all non-federal project beneficiaries in Imperial, Riverside, and San Bernardino Counties. The Bureau of Land Management has contracted for 1,150 acre-feet per year from the Project to meet its current and future use.

   In September 2001, the CRB notified all the owners of record along the Colorado River in California, whose property was located within the accounting surface identified by the

USGS, of the availability of water from the Project. The CRB continues to receive applications for Project water. After undergoing review by the CRB for Project eligibility, the applications are forwarded to Reclamation for further processing, after which they are sent to Needles for issuance of a subcontract. Needles is in the process of contacting the approved applicants and offering them a subcontract for Project water.

8. A water conservation offset program could be used to mitigate impacts of unauthorized use on the condition that it be acceptable to Reclamation and junior water right holders. Such an offset program must not be illusory, such as an agreement to fallow land which has not been irrigated for decades. An agreement similar to that implemented by Coachella this year is acceptable as it is resulting in a reduction in water use in the Palo Verde Valley, and not impacting water supplies of other contractors and present perfected rights holders.

9. For a water conservation offset program to be acceptable mitigation, actual water conservation would be necessary in an amount sufficient to offset the BEP II water use. Verification would be necessary to ensure that the amount of water unused for other reasons in the service area is not being credited against the water conservation offset program. As you are aware, the Palo Verde Irrigation District takes the position that BEP II is not an unauthorized water user since the Project is located within the District's service area and the District's contract with the United States covers potable and irrigation water use on the Lower Palo Verde Mesa. Other water contract holders along the Colorado River do not share that position.

Again, the CRB appreciates the opportunity to provide input relating to proposed water use by the BEP II. I look forward to continuing to work with you toward defining an acceptable water supply source for BEP II.

Sincerely,

Gerald R. Zimmerman
Executive Director

enclosures

c: Mr. Robert W. Johnson