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August 2, 2010

California Energy Commission
Attn Docket No. 09-AFC-8
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: Genesis Solar Energy Project; 09-AFC-8

Dear Docket Clerk:

Enclosed are an original and copy of First Reply Brief of California Unions for Reliable Energy.

Please docket the original, conform the copy and return the copy in the envelope provided.

Thank you for your assistance.

Sincerely,

/s/

Rachael E. Koss

REK:bh
Enclosures

DOCKET	
09-AFC-8	
DATE	<u>AUG 02 2010</u>
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**STATE OF CALIFORNIA
California Energy Commission**

In the Matter of:

The Application for Certification
for the GENESIS SOLAR ENERGY
PROJECT

Docket No. 09-AFC-8

**FIRST REPLY BRIEF
OF
CALIFORNIA UNIONS FOR RELIABLE ENERGY**

August 2, 2010

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I. INTRODUCTION

This reply brief responds to issues related to the Colorado River raised in Genesis Solar, LLC's ("Applicant") and Staff's opening briefs.

The Applicant incorrectly claims that a legal entitlement to pump Colorado River water is not required for the Project because the accounting surface methodology is not LORS. Staff also asserts that the Project does not need an entitlement, but for a different reason—because Staff treated its determination that the Project will be pumping Colorado River water purely as a CEQA issue and substituted CEQA mitigation for an entitlement. Both are wrong.

The Applicant confuses the accounting surface methodology, which is just an administrative tool, with the actual federal Law of the River, which requires an entitlement for any pumping of Colorado River water. Staff simply fails to apply federal law that requires an entitlement for extracting Colorado River water to its determination, confusing federal law with CEQA. In addition, there is no evidence in the record that Staff's proposed CEQA mitigation would be feasible and effective in reducing the Project's significant impact on the Colorado River to a less than significant level. The Commission must require the Applicant to obtain an entitlement prior to groundwater pumping for the proposed Project.

II. FEDERAL LAW, NOT THE ACCOUNTING SURFACE METHODOLOGY, REQUIRES THE APPLICANT TO OBTAIN AN ENTITLEMENT FOR PROPOSED PROJECT PUMPING

The Applicant mischaracterizes a critical issue in this case, using Colorado River water, in an effort to just make the issue go away. The Applicant argues that a legal entitlement is not required for proposed Project pumping because the accounting surface methodology is not LORS. The Applicant misses the mark entirely. If the Commission falls prey to the Applicant's erroneous depiction of this issue and fails to require the Applicant to obtain an entitlement, the Commission will not only violate the Warren-Alquist Act, but will also be subject to suit in federal court.

The Applicant incorrectly asserts that "a threshold question" in determining whether the Project requires an entitlement for proposed groundwater pumping is whether the accounting surface methodology is LORS. (Genesis Solar LLC's Opening Brief—Evidentiary Hearing Day 1 and Day 2 Topics, p. 5.) Whether or not the accounting surface methodology is LORS (and CURE does not dispute that it is not) is entirely irrelevant. Rather, what is applicable to this case is existing federal law that requires all use of lower Colorado River mainstream water be covered by an entitlement and be accurately accounted for in order to prevent unlawful use of the water. (*Arizona v. California* (2006) 547 U.S. 150; 43 U.S.C. § 617(d).)

As CURE explained in its Second Opening Brief, the accounting surface methodology is just a tool used to analyze facts in order to satisfy federal law requiring the United States to account for all consumptive use of Colorado River water. (CURE Second Opening Brief, p. 5; Exh. 535, p. 2; *Arizona v. California*, 547 U.S. at 164; Exh. 541, pp. 1, 3.) The record shows that

Staff relied on the U.S. Geological Survey's ("USGS") use of the accounting surface methodology, not as LORS but as a tool, when Staff determined that the Project will be pumping from the Colorado River aquifer. (Exh. 402, pp. 26-28.) The use of the accounting surface methodology as a tool to evaluate facts does not in any way change federal law. Thus, federal law, not the accounting surface methodology, requires the Applicant to obtain an entitlement prior to groundwater pumping.

A. Staff Properly Relied on USGS' Use of the Accounting Surface Methodology to Determine that the Project Will Be Pumping Colorado River Water

To enable the U.S. Bureau of Reclamation ("Reclamation") to properly account for the use of the lower Colorado River, and to ensure existing and future use is consistent with federal law, Reclamation and USGS developed the accounting surface methodology to make determinations of unlawful use of lower Colorado River water. (Exh. 541, pp. 1-2; Exh. 419, p. 40916.) Well pumps subject to the methodology are those that pump water that originates from the Colorado River or pump water that may be replaced in the underlying aquifer by Colorado River water. (Exh. 541, pp. 4-5.) The method to identify wells that pump water that is replaced by water drawn from the Colorado River relies on the "river aquifer" and an "accounting surface" within the river aquifer. (*Id.*, pp. 4-6.) The "river aquifer" extends outward from the Colorado River until encountering a geologic barrier to groundwater flow and encompasses the water bearing materials from which water can move to and from the lower Colorado River. (*Id.*, p. 6.) The "accounting surface" was developed with a groundwater model and represents the elevation and extent of the river aquifer that is hydraulically connected to the lower Colorado River. (*Id.*, pp. 4-6.)

This Committee agreed with CURE that the accounting surface methodology's applicability to the Project is a question of fact. (Exh. 533, p. 3.) Here, the accounting surface method is directly applicable to the Project, not as LORS, but as a tool to factually determine whether the Project will be pumping from the Colorado River. The BLM lands proposed as the Project site are currently located in the accounting surface area designated by USGS Water Investigations Report. (Exh. 541, p. 2.) This report indicates that the aquifer underlying lands located within the accounting surface is considered to be hydraulically connected to the Colorado River. (*Id.*) Groundwater withdrawn from wells located within the accounting surface would be replaced by Colorado River water in part or in total. (*Id.*) Indeed, Staff relied on USGS' use of the accounting surface methodology in its extensive analysis of the proposed Project when Staff factually determined that "wells extracting water in the Chuckwalla Valley Groundwater Basin and Palo Verde Mesa Groundwater Basin are extracting water from the 'river aquifer.'" (Exh. 402, pp. 26-28.)

Staff's Rebuttal Testimony is of utmost importance here. Staff's testimony explains why the accounting surface methodology is directly applicable to the Project as a means to factually determine that proposed Project pumping would extract water from the Colorado River. The passage is as follows:

The legal framework for apportionment of waters of the Colorado River was originally set forth in the Colorado River Compact of 1922. Water in the lower Colorado River is apportioned among the States of California, Arizona, and Nevada by the Boulder Canyon Project Act of December 21, 1928 (U.S. Congress, 1948, p. A213-A225) and was confirmed in 2006 in the Consolidated (U.S. Supreme Court, 2006) after the Blythe II Commission hearing. The Consolidated Decree is specific about the responsibility of the Secretary of the Interior to account for consumptive use of water from the mainstream. Consumptive use is defined to include ‘water drawn from the mainstream by underground pumping.’ In 2008, the USGS (Wiele et al., 2008) prepared a report titled ‘Update of the Accounting Surface Along the Lower Colorado River.’ As part of that analysis they clearly demonstrated that the ‘river aquifer’ as stated in the 2006 Supreme Court decree extends into the tributary washes of the Colorado River as diagrammed here: [diagram].

The USGS (Wiele et al., 2008) report went on to state that:

‘Ground water in the river aquifer beneath the flood plain is considered to be Colorado River water regardless of water levels. Water pumped from wells on the flood plain is presumed to be river water and is accounted for as Colorado River water.’

The USGS (Wiele et al., 2008) later stated:

‘The accounting surface extends outward from the edges of the flood plain or a reservoir to the subsurface boundary of the river aquifer.’

That concept is clearly indicated in the above figure and in Figure 6 below. The concept of distance from the Colorado River had no bearing on whether the underlying groundwater was indicated as part of the ‘river aquifer.’

The USGS characterized the ‘river aquifer’ as:

‘The river aquifer consists of permeable, partly saturated sediments and sedimentary rocks that are hydraulically connected to the Colorado River so that water can move between the river and the aquifer in response to withdrawal of water from the aquifer or differences in water-level elevations between the river and the aquifer. The subsurface limit of the river aquifer is the nearly impermeable bedrock of the bottom and sides of the basins that underlie the Colorado River valley and adjacent tributary valleys, which is a barrier to the ground-water flow.’

Again, the USGS (Wiele et al., 2008) reference Figure 6 below as identifying areas encompassed by the ‘river aquifer.’ Consequently, any well in the Palo Verde Groundwater Basin is considered to be taking Colorado River water regardless of water level and **wells extracting water in the Chuckwalla Valley Groundwater Basin and Palo Verde Mesa Groundwater Basin are extracting water from the ‘river aquifer.’**

(Exh. 402, pp. 26-28.(emphasis added).) Staff’s testimony clearly explains how and why the accounting surface methodology is directly applicable to the Project, not as LORS, but as a tool to factually determine that the Project will be pumping Colorado River water. Thus, the Applicant’s argument is irrelevant.

B. When Federal Law is Applied to the Facts of this Case, the Applicant Must Obtain an Entitlement for Proposed Project Pumping

In its Second Opening Brief, CURE laid out the body of federal laws, regulations and contracts that make up the “Law of the River.” (CURE Second Opening Brief, pp. 3-4.) CURE explained that the “Law of the River” mandates that wells that draw water from the mainstream of the lower Colorado River must have an entitlement. (*Id.*, pp. 3-5.) Specifically, the Boulder Canyon Project Act, a federal LORS, requires any user of the lower Colorado River water in the lower basin to have a contract with Reclamation. (43 U.S.C. § 617(d).) This requirement, which was confirmed in the Consolidated Decree of the U.S. Supreme Court in *Arizona v. California* (2006) 547 U.S. 150, applies to all diversions from the lower Colorado River, including those made through wells that draw water from the Colorado River aquifer. The Consolidated Decree requires the Secretary of the Interior to provide detailed and accurate records of diversions, return flows, and consumptive use of water diverted from the mainstream of the lower Colorado River. (*Arizona v. California*, 547 U.S. at 164-165.) In other words, the Secretary of the Interior must ensure that all use of Colorado River water is covered by an entitlement and is accurately accounted for in order to prevent unlawful use of the water.

According to Reclamation, “[s]ince 1994, the accounting surface methodology has been and continues to be the primary tool” used to determine whether wells pump water that is replaced by water drawn from the Colorado River. (Exh. 535, p. 2.) Staff properly relied on USGS’ use of the accounting surface methodology when Staff concluded that “wells extracting water in the Chuckwalla Valley Groundwater Basin and Palo Verde Mesa Groundwater Basin are extracting water from the ‘river aquifer.’” (Exh. 402, pp. 26-28.)

The record shows that the proposed pumping for the Project will be extracting water from the Colorado River. Therefore, pursuant to the “Law of the River,” the Commission must require the Applicant to obtain an entitlement for proposed Project pumping. Whether or not the accounting surface methodology was codified as regulation (the effect of which would provide users with increased certainty in complying with federal law), the Commission must determine whether the Project complies with federal law such that the Project would not be unlawfully using Colorado River water through the Project’s groundwater pumping. Substantial evidence shows that the Project will be extracting Colorado River water, and federal law (not the accounting surface methodology) demands that the Applicant obtain an entitlement to do so.

III. THE COMMISSION'S OBLIGATIONS UNDER CEQA ARE DISTINCT FROM ITS OBLIGATIONS UNDER THE WARREN-ALQUIST ACT AND FEDERAL LAW

The Commission must comply with three separate laws as they relate to the adjudicated and fully apportioned Colorado River. First, CEQA requires the Commission to analyze the Project's direct, indirect and cumulative impacts on the Colorado River and provide mitigation for significant impacts where feasible. (Pub. Res. Code §§ 21083, 21065, 21065.3; 14 Cal. Code Regs. § 15021(a).) Second, separate and distinct from the requirements of CEQA is the Commission's obligation under the Warren-Alquist Act to determine whether the proposed Project complies with all LORS, including the "Law of the River," the body of laws, regulations and contracts which require that wells that draw water from the mainstream of the lower Colorado River, including through underground pumping, have an entitlement. (Pub. Res. Code § 25523(d); 20 Cal. Code Regs. § 1752(a); *Arizona v. California*, 547 U.S. 150; 43 U.S.C. § 617(d).) Finally, the Commission must act in accordance with the Consolidated Decree, *Arizona v. California*, issued by the U.S. Supreme Court, which prohibits the Commission from "purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in [California]" and from "purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under" the Consolidated Decree. (*Arizona v. California*, 547 U.S. at 159-160.)

The Commission must comply with CEQA, the Warren-Alquist Act *and* *Arizona v. California*. Staff mistakenly blurs the Commission's duties under CEQA and the Warren-Alquist Act, and completely ignores *Arizona v. California*'s clear prohibition of a state's purported authorization of the diversion or use of Colorado River water that has not been authorized by the United States and is not permitted under federal law.

A. The Commission Cannot Choose Between Complying with CEQA and Complying with the Warren-Alquist Act

Based on substantial evidence in the record, Staff correctly concluded that the Project's proposed groundwater pumping would result in a significant impact by inducing flow from the Colorado River. (Exh. 400, pp. C.9-75, 117; Exh. 402, p. 31.) Specifically, "staff has relied on reports from the USGS indicating that the Project is proposing to extract groundwater from a tributary to the Colorado River. The Project thus is potentially impacting the Colorado River which is fully entitled." (Exh. 400, p. C.9-95.) So far, so good. However, Staff errs when it then says, "**Staff is treating this as a water resources impact (as opposed to requiring an entitlement)...**" (*Id.*, emphasis added.)

Staff appears to believe that the Commission has a choice to either: (1) comply with CEQA by analyzing and providing mitigation for the Project's significant impacts; *or* (2) comply with the Warren-Alquist Act by ensuring that the Project complies with all LORS, including federal law that requires that wells that draw water from the mainstream of the lower Colorado River have an entitlement. There is no choice here. The Commission must comply with CEQA *and* the Warren-Alquist Act. Thus, the Commission must analyze and provide mitigation for the

Project's significant impact to the Colorado River, as Staff claims it has done,¹ *and* require the Applicant to obtain an entitlement in order to find that the Project complies with all LORS.

B. Staff's Proposed Offsets for Significant Impacts Under CEQA are Not a Substitute for an Entitlement

Staff correctly concluded that proposed Project groundwater pumping would result in a significant impact by inducing flow from the Colorado River. (Exh. 400, pp. C.9-75, 95, 117; Exh. 402, p. 31.) The only remaining questions are how much of the Project's water use will be offset and which method the Applicant will use to provide the offsets. Initially, Staff proposed to mitigate Project impacts to the Colorado River by offsetting the amount of Colorado River water used by the Project with water conservation projects such as paying for irrigation improvements in Palo Verde Irrigation District, using tertiary treated water, and participating in BLM's tamarisk removal program. (Exh. 443, pp. C.9-2-3.) Although Staff's conclusion that the Project will significantly impact the Colorado River remains unchanged, after negotiations with the Applicant, Staff altered its conditions of certification proposed to mitigate significant impacts to the Colorado River. (July 13, 2010 Tr., p. 13.)

Now, for example, Staff has labeled Condition of Certification Soil & Water-15 "Mitigation of Impacts to the Palo Verde Mesa Groundwater Basin" rather than "Mitigation of Colorado River Impacts" and instead of requiring the Applicant to "mitigate project impacts to flows in the Colorado River," Staff is now requiring the Applicant "to mitigate project impacts that result in depletion of the PVMGB groundwater budget."

Staff also changed Condition of Certification Soil & Water-19, originally called "Estimation of Colorado River Impacts" to "Estimation of Impacts to PVMGB." (Exh. 443, p. C.9-4.) Previously, Soil & Water-19 allowed the Applicant "to refine the estimates of the amount of subsurface water flowing from the Colorado River due to project pumping used for determining the appropriate volume of water for mitigation in accordance with Soil & Water-15." (*Id.*) Under the new Soil & Water-19, the Applicant must "conduct an analysis of the Project's effect on the PVMGB groundwater budget including an estimate of the decrease in underflow from the CVGB to the PVMGB" which will "be used to assess the volume of water requiring mitigation under Soil & Water-15." (*Id.*, pp. C.9-4-5.)

These changes merely alter the point at which the mitigation is measured. Rather than measuring the mitigation required to address the significant impact on the Colorado River, the mitigation will be measured at the point where the CVGB and PVMGB meet. As a result, the changed condition will only require the Applicant to offset a portion of the Project's groundwater use that affects the PVMGB. Specifically, the Applicant will attempt to offset only a portion of the Project's groundwater use after the Project has already impacted the Colorado River with water conservation projects, such as paying for irrigation improvements in Palo Verde Irrigation District, using tertiary treated water, and participating in BLM's tamarisk removal program. (Exh. 443, pp. C.9-2-4.) In other words, there will still be a significant unmitigated impact on

¹ Although Staff analyzed and provided mitigation for the Project's significant impact to the Colorado River, there is no substantial evidence showing that the proposed mitigation would be feasible and effective in reducing the Project's impact to a less than significant level. CURE addresses this in a subsequent section of this brief.

the Colorado River. Furthermore, mitigation for significant impacts to the Colorado River will not be measured any further to reduce the requirement that the Applicant must offset all of its proposed groundwater use. Finally, and most importantly, the changed condition does not change Staff's findings regarding significant impacts under CEQA and neither the original conditions nor the new conditions satisfy federal law.

Staff and the Applicant can label the mitigation however they wish, but the facts remain the same. The Project proposes to pump groundwater from wells located in the Chuckwalla Valley Groundwater Basin. (Exh. 1, pp. 5.4-1, 5.4-10.) Undisputed evidence shows a hydraulic connection between the CVGB, the PVMGB and the adjudicated Colorado River. (Exh. 400, pp. C.9-47-48; Exh. 402, pp. 26-31; Exh. 532, p. 3; Exh. 546, p. 2.) The CVGB outflows to the PVMGB. (Exh. 400, p. C.9-22; Exh. 48.) Staff concluded that a "reduction in the outflow from the CVGB to the PVMGB will be made up at least in part by inflow from the Colorado River." (Exh. 402, p. 31.) The USGS determined that the CVGB and PVMGB lie within a groundwater basin tributary to the Colorado River. (Exh. 400, p. C.9-47.) The USGS indicated that the CVGB and PVMGB are hydraulically connected to the Colorado River. (Exh. 400, p. C.9-47; Exh. 546, p. 2.) USGS determined that wells drawing groundwater within the CVGB and PVMGB are considered to be pumping Colorado River water. (Exh. 400, p. C.9-47.) The Metropolitan Water District agrees that the Project proposes to pump groundwater from a groundwater basin that is hydrologically connected to the Colorado River. (Exh. 532, p. 3.) The Colorado River Board also concurs that the Project is located within an area considered to be hydraulically connected to the Colorado River, and consequently, groundwater pumped from wells located on the Project site would be replaced by Colorado River water. (Exh. 546, p. 2.) Staff's and Applicant's newfangled conditions of certification do not alter these facts in any way. The Project will still be extracting Colorado River water and therefore the Applicant is still required to obtain an entitlement.

The Commission should not be fooled by the Applicant's and Staff's last-ditch attempt to avoid a very sticky situation. Because Staff and the Applicant disagreed about the Project's significant impact on the Colorado River, they essentially agreed to ignore the issue. (July 13, 2010 Tr., pp. 5-6, 10-13.) According to the Applicant,

rather than discuss the fight of what happens between Chuckwalla and the river, we would just take the number at that boundary between the Chuckwalla Valley and the Palo Verde Mesa Groundwater Basin...and then we would offset that number...I think, Ms. Holmes, correct me if I'm wrong, but one of the values is we did not want to get caught up in future adjudication of the Colorado River. Staff has agreed we don't need an entitlement for this activity to pump in the Chuckwalla Valley, it was an impact driven, and we didn't want to have the record confused so that at a later date someone would believe that we admitted or agreed to needing a Colorado River entitlement. (*Id.*, pp. 11-12.)

Staff and the Applicant have agreed to look the other way to avoid “the fight.” The Commission does not have that luxury. The evidence shows that the Project would pump groundwater that is hydraulically connected to the Colorado River. The federal Law of the River requires the Applicant to obtain an entitlement before it pumps, and prohibits the Commission from authorizing pumping without an entitlement.

Further, Staff analyzed the Colorado River issue from a purely CEQA perspective. (Exh. 400, p. C.9-95.) In its opening brief, Staff states,

Staff and the applicant have agreed that the project owner will offset any impacts on the Palo Verde Mesa Groundwater Basin that are caused by project pumping, and while staff and the applicant disagree as to whether these impacts ultimately affect the Colorado River, staff is confident that these offsets are sufficient to ensure that the project will cause no significant water supply impacts.

(Staff’s Opening Brief, p. 8.) Staff’s claim that the proposed offsets will mitigate water supply impacts does not equate to compliance with LORS. Federal law does not provide that if significant impacts to the Colorado River are mitigated through an offset scheme, then no entitlement is required. Rather, the law is clear that wells that draw water from the mainstream of the lower Colorado River, including through underground pumping, must have an entitlement. (*Arizona v. California*, 547 U.S. 150; 43 U.S.C. § 617(d).) Staff determined that proposed Project groundwater pumping would result in a significant impact by inducing flow from the Colorado River, and therefore an entitlement is required. Offsets are not a substitute for compliance with federal law. Staff’s CEQA offset scheme is beside the point.

C. Staff Completely Ignored *Arizona v. California*’s Prohibition on Authorizing the Diversion or Use of Colorado River Water

Arizona v. California enjoins the State of California “[f]rom diverting or purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in [California]” and “[f]rom consuming or purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under” the Consolidated Decree. (*Arizona v. California*, 547 U.S. at 159-160.) ***Staff completely failed to recognize this provision of the law.***

The evidence in the record shows that proposed Project groundwater pumping would extract water from the Colorado River aquifer. (Exh. 400, pp. C.9-22, 47-48; Exh. 402, pp. 26-31; Exh. 532, p. 3; Exh. 546, p. 2.) There is no evidence in the record that the Applicant has authorization from the United States to pump Colorado River water. Thus, the Commission’s approval of the Project would be illegal. Furthermore, other entities in California are already using all of California’s apportionment of Colorado River water as set out in the Consolidated Decree. (Exh. 532, p. 4.) The law prohibits the Commission from authorizing the Project’s use of Colorado River water because it would exceed California’s allotment.

Federal law prohibits the Commission from permitting the Project as proposed. If the Commission approves the Project, it will be subject to suit in federal court.

IV. STAFF’S PROPOSED CONDITIONS OF CERTIFICATION FAIL TO ADEQUATELY MITIGATE SIGNIFICANT IMPACTS TO THE COLORADO RIVER

CEQA requires the Commission to formulate mitigation measures sufficient to minimize the Project’s significant adverse environmental impacts. (Pub. Res. Code, §§ 21002.1(a), 21100(b)(3).) Mitigation measures must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact. (14 Cal. Code Regs., § 15370.) A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727.) “Feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors. (14 Cal. Code Regs., § 15364.) Moreover, mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments. (*Id.*, § 15126.4(a)(2).) Finally, CEQA does not allow deferring the formulation of mitigation measures; nor does CEQA permit the delegation of mitigation of significant impacts to responsible agencies or the Applicant. (*Id.*, § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; *City of Marina v. Board of Trustees of the California State University*, (2006) 39 Cal.4th 341, 366.)

The record does not contain substantial evidence showing that the revised condition of certification Soil&Water-15 would be effective, feasible mitigation for the Project’s significant impacts to the Colorado River. Condition of Certification Soil&Water-15 requires the Applicant to offset the depletion of the PVMGB groundwater budget (which would induce flows from the Colorado River) through various water conservation projects which may include paying for irrigation improvements in Palo Verde Irrigation District (“PVID”), paying for conversion to cultivation of crops with lower crop water demand in the PVID, using tertiary treated water, implementing water conservation programs in the CVGB, PVMGB or Colorado River flood plain communities, and/or participating in BLM’s tamarisk removal program. (Exh. 443, pp. C.9-2-3.) Staff asserts that it “is confident that these offsets are sufficient to ensure that the project will cause no significant water supply impacts.” (Staff’s Opening Brief, p. 8.) The record, however, shows otherwise.

Substantial evidence shows that two of the water conservation projects proposed by Staff are not feasible. The Metropolitan Water District’s Staff Assessment/Draft Environmental Impact Statement comment letter stated,

...the California contractors have agreed in the 1931 Seven Party Agreement to prioritize the delivery of California’s Colorado River water among themselves. Under this priority agreement, the following mitigation alternatives identified in SOIL&WATER-15 are no longer available to Proponents to mitigate impacts to Colorado River water resources: ‘payment for irrigation improvements in Palo Verde Irrigation District...and/or BLM’s Tamarisk Removal Program.’ Instead, proponents would have to obtain Colorado River water for the Project from the existing junior priority holder, Metropolitan, which has the

authority to sell water for power plant use. Mitigation measure SOIL&WATER-15 should be revised accordingly.

(Exh. 532.) Despite Metropolitan Water District's clear direction to revise the condition to incorporate feasible mitigation, Staff did not. Consequently, conservation measures included in Soil & Water-15 are not feasible and fail to satisfy CEQA.

Further, one of the three possible findings that a lead agency may make regarding an identified impact is "that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect. . . ." (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).) Such a finding ***must be supported by substantial evidence in the record***. (Pub. Res. Code § 21081.5; 14 Cal. Code Reg. § 15091(b).) "Substantial evidence" is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (14 Cal. Code Reg. § 15384(a).) Where an agency's finding concerning the effectiveness of a mitigation measure is not supported by substantial evidence or defies common sense, courts have declined to defer to the agency's finding. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1117.)

There is ***no*** evidence in this record that the remaining measures in Soil & Water-15 (converting to cultivation of crops with lower crop water demand in the PVID, using tertiary treated water, and implementing water conservation programs in the CVGB, PVMGB or Colorado River flow plain communities) are feasible or that they would be effective in reducing the Project's significant impacts on the Colorado River to a less than significant level. Although "staff is confident that these offsets are sufficient to ensure that the project will cause no significant water supply impacts," Staff's confidence is mere speculation. (Staff's Opening Brief, p. 8.)

Case law is directly on point here. In *Kings County Farm Bureau v. City of Hanford*, the lead agency relied on a "mitigation agreement" with the water district by which the project applicant agreed to pay the district to purchase water supplies to make up for amounts used by the project. (221 Cal. App. 3d 692, 728.) However, the record contained no evidence that water supplies would be available for purchase. (*Id.*) Consequently, the court held that the applicant's promise to purchase water supplies failed to mitigate significant impacts to groundwater. (*Id.*) Similarly, here, a condition that requires the Applicant to pay for water conservation projects without any evidence that water is actually available does not assure actual mitigation of impacts. Thus, the Commission cannot find "that changes or alterations have been required in, or incorporated into, the project that would avoid or substantially lessen the effect..." of the Project's significant impact on the Colorado River. (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).) Therefore, if the Commission approves the Project as proposed, the Commission will violate CEQA.

V. CONCLUSION

Federal law, not the accounting surface methodology, requires the Applicant to obtain an entitlement for proposed Project groundwater pumping. CEQA mitigation is not a substitute for a federally mandated entitlement. Furthermore, there is no evidence in the record that Staff's

proposed offset scheme would be feasible or effective in reducing the Project's significant impact on the Colorado River to a less than significant level. Finally, federal law prohibits the Commission from approving the Project without authorization from Reclamation. In sum, the Commission must require the Applicant to obtain an entitlement for proposed Project groundwater pumping, or it will be subject to suit in federal court.

Dated: August 2, 2010

Respectfully Submitted,

/s/

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PROOF OF SERVICE

I, Bonnie Heeley, declare that on August 2, 2010 I served and filed copies of the attached **FIRST REPLY BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at www.energy.ca.gov/sitingcases/genesis. The document has been sent to both the other parties in this proceeding as shown on the Proof of Service list and to the Commission’s Docket Unit electronically to all email addresses on the Proof of Service list and by either depositing in the U.S. Mail at South San Francisco, CA with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked “email preferred,” via personal service or via overnight mail as indicated.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on August 2, 2010.

_____/s/_____
Bonnie Heeley

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