

**State of California  
Energy Resources Conservation  
and Development Commission**

<b>DOCKET</b> 09-AFC-8	
DATE	AUG 11 2010
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In the Matter of:	)	Docket 09-AFC-08
	)	
Application for Certification of the	)	<b>Staff's Reply Brief</b> for
Genesis Solar Energy Project,	)	Issues Raised at July 21
Genesis Solar, LLC	)	Evidentiary Hearings
_____	)	

**INTRODUCTION**

At the conclusion of the July 21, 2010 evidentiary hearing for the Genesis Solar Energy Project ("Genesis"), the Committee gave parties the option to file reply briefs in response to opening briefs filed on August 3, 2010. Staff and the applicant reached agreement on staff's proposed Conditions of Certification for Cultural Resources. Therefore, staff's reply will focus on issues raised in CURE's opening brief on Cultural Resources. Staff submits the following reply brief:

**I**

**THE CULTURAL RESOURCE INFORMATION AVAILABLE TO STAFF IS SUFFICIENT TO ADEQUATELY ASSESS THE POTENTIAL IMPACTS AND DEVELOP APPROPRIATE MITIGATION FOR THE PROJECT.**

CURE argues three main points in its opening brief. 1) The Revised Staff Assessment, (RSA) failed to establish an accurate environmental baseline. 2) Staff did not adequately analyze significant impacts to cultural resources. 3) Staff did not adequately mitigate significant impacts.

Although CURE asserted there was need for additional subsurface data, staff was able to determine the proposed Genesis Solar Energy Project (GSEP) would have a significant direct impact on 27 historically significant archaeological resources and significant indirect impact on 248 contributors to a historically significant cultural landscape. (RSA p. C.3-1) Staff's analysis was also able to identify:

- Direct impacts to 6 prehistoric-to-historic-period Native American archaeological sites;

- Direct impacts to 6 and indirect impacts to 248 prehistoric-to-historic-period Native American archaeological sites which are potential contributing elements to the prehistoric and ethnographic cultural landscape (historic district), herein referred to as the Prehistoric Trails Network Cultural Landscape (PTNCL);
- Direct impacts to 15 historic-period archaeological sites that are potential contributing elements to a historic-period cultural landscape (historic district), herein referred to as the World War II Desert Training Center California-Arizona Maneuver Area Cultural Landscape (DTCCL); and
- Direct and cumulative impacts to the PTNCL and the DTCCL, resulting from the GSEP's impacts to contributors to these register-eligible resources. (RSA p. C.3-1)

Because of staff's proactive work in analyzing the project impacts, the project applicant reconfigured elements of the project to *avoid* 55 resources. (RSA p. C.3-77, Exhibit 441 Revised Conditions of Certification CUL-10 and CUL-11) Staff was also able to estimate the project would cumulatively impact 17,000 sites within the southwest desert region. (RSA p. C.3-1) Clearly, staff performed a rigorous environmental assessment to make its quantitative conclusions and propose mitigation through 18 comprehensive Conditions of Certification.

**a) The RSA Establishes an Accurate Environmental Baseline**

CURE asserts that the RSA did not establish a proper baseline to assess impacts.

Section 15125 of the California Environmental Quality Act, (CEQA) Guidelines states:

An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. (Cal. Code Regs., tit. 14 § 15125)

Staff set forth the local and regional environmental description in the Revised Staff Assessment to establish an appropriate baseline for Cultural Resources. (RSA p. C.3-6 to C.3-9) Staff made a reasonable good faith effort to identify the resources and to establish an estimated environmental baseline. CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project; the fact that additional studies might be helpful does not mean that they are required. (*Gray v. County of Madera*, (2008) 167 Cal. App.4th 1099) A subsurface geoarchaeological study was performed by the applicant, providing some data of subsurface conditions. (Exhibit 35)

CURE specifically claims that staff did not evaluate ethnographic resources, but staff spent considerable time discussing ethnographic resources in the RSA even though assessment of such resources are the domain of the Bureau of Land Management, (BLM) through the section 106 consultation and programmatic agreement. (RSA pp. 5, C.3-23 to C.3-24, C.3-36 to C.3-37, C.3-47 to C.3-55. July 21, 2010, Transcripts p.149: 16-25, p150: 1-25, p151: 1-25, p152: 1-25, p153: 1-12)

While the BLM must formally consult, government to government, with the federally recognized Native American tribes that have traditional cultural ties to the area in which the project is located, the Energy Commission provides information and sends notices of all public events regarding the project to all Native American groups and individuals with an interest in development in the area, whether federally recognized or not. (RSA C.3-48)

Resources with possible ethnographic impacts staff identified include specific sites as McCoy Springs and general site/feature types identified by interveners such as rock art, trails, springs, and associated features were used to identify places of potential high sensitivity. These sites were analyzed and assumed to be significant by staff. Mitigation was proposed based on assumed significance. (RSA C.3-52, C.3-59, C.3-76, C.3-84)

#### **b) Staff Adequately Analyzed Significant Impacts to Cultural Resources**

CURE believes that more upfront subsurface investigation should have been completed prior to certification because such standard practice is needed to determine the impacts of the proposed project. While staff agrees more upfront data can be useful, it is not necessary to adequately assess potential impacts and develop mitigation as required by CEQA. In this case a compressed testing/data recovery strategy was agreed to in advance by the California State Historic Preservation Officer (SHPO), BLM and the Energy Commission. (RSA C.3-80)

Under this approach, staff did not evaluate the historical significance of each individual resource, but, rather, assumed that all of the known resources were eligible for the National Register of Historic Places, (NRHP) and the California Register of Historical Resources, (CRHR), with the exception of any resources for which staff had sufficient information in hand to determine the resource's ineligibility for either register. Additionally, staff assumed that the project's impacts to all assumed register-eligible resources would have to be mitigated by means of avoidance or data recovery. (RSA C.3-80) Post certification studies and investigation is perfectly acceptable under CEQA, to refine and target mitigation. (See *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453)

CEQA states:

As part of the determination made pursuant to Section 21080.1, the lead agency shall determine whether the project may have a significant effect on archaeological resources. If the lead agency determines that the project may have a significant effect on unique archaeological resources, the environmental impact report shall address the issue of those resources. (Pub. Resources Code § 21083.2(a))

CEQA does not dictate how an agency assesses whether a project will cause significant impacts on cultural resources. Destructive excavation involved in testing is not required by CEQA. Staff takes the position that, when a site will be obliterated by a bull dozer in the future, it is reasonable to assume the site will be significantly impacted and plan accordingly. (RSA C.3-178, Conditions of Certification CUL-1 through CUL-18)

CURE infers that the goal of any initial study and research would be to locate and identify unknown buried resources, but that is not the case. No amount of up front study will identify the full archaeological "environment" because archaeology is an imperfect science. Unanticipated discoveries, including burials, are common and standard language exists for dealing with these unanticipated discoveries in most archaeological work plans. CEQA acknowledges unanticipated discoveries, "a lead agency may make provisions for archaeological sites accidentally discovered during construction. These provisions may include an immediate evaluation of the find." (Pub. Resources Code § 21083.2(i)) CUL-8 and CUL-9 are specifically intended to address this common cultural resources issue. (RSA C.3-188)

Staff's impacts assessment included detailed geological and culturally specific argument as to why the majority of the site footprint and much of the linear corridor are not expected to contain buried cultural resources of any type (RSA p. C.3-13 to C.3-35). A subsurface geoarchaeological study was performed by the applicant, providing some data of subsurface conditions. (Exhibit 35) Staff's reasoning is specific to ancient cultures of the Colorado Desert and the geology around Dry Ford Lake. CURE's discussion of the Playa Vista project is irrelevant to the issue at hand.

Finally, contrary to CURE's claim, CEQA does not require the agency to determine the exact boundaries of the resource prior to designing mitigation. (Cal. Code Regs., tit. 14 §15064.5) In daily practice, the boundaries of few archaeological sites are perfectly determined in three dimensions after testing. CURE's suggestion that the profession is capable of this, and everyone achieves it, is misleading.

### **c) Staff's Conditions of Certification Adequately Mitigate Significant Impacts**

CURE's two primary contentions are that staff bypassed *avoidance*, going directly to the less preferable mitigation of data recovery, and that staff only mitigated impacts for the value of scientific research. This is incorrect. The Revised Staff Assessment explains that scientific research was not the only value being considered in evaluations of significance and proposed mitigation. For example, Table 8 (p. C.3-67) is a list of sites that were primarily considered for ethnographic (non-scientific) impacts. Proposed mitigation in CUL-1 and CUL-16 address ethnographic impacts to sites and is not data recovery.

CURE ignores the upfront work performed by staff and the applicant to ensure the project avoids 55 resources (RSA p. C.3-77, Exhibit 441 Revised Conditions of Certification CUL-10 and CUL-11) Further, CUL-13 is a mitigation strategy that requires and enforces avoidance. To address the potential for discovering unknown buried resources staff recommends CUL-8 and CUL-9.

CEQA does not dictate the specifics of mitigation to agencies, but allows feasible measures and performance standards. (Cal. Code Regs., tit. 14 § 15126.4(a)(1)(B) In Condition of Certification CUL-3, staff has emphasized the "performance standards" portion of the mitigation options that CEQA allows. Further, staff's CUL-10 (7) requires the applicant to plan for the possibility of discovery of buried components at specific sites. CURE does not adequately identify what is insufficient about these mitigation strategies.

For mitigation of impacts to ethnographic resources or spiritual resources, staff proposed Condition of Certification, CUL-1 and CUL-16 to address potential impacts to these resources as currently identified. (Transcripts July 21, 2010, p. 150: 15-21, p. 151: 2-7) Under Section 106 of the National Historic Preservation Act (16 U.S.C. 470f), BLM must perform a government-to-government consultation with Native Americans. As a result of this process additional ethnographic resources may be discovered which may be impacted by the project. The BLM's Programmatic Agreement is the appropriate mechanism to address impacts to ethnographic resources and to develop mitigation. The applicant would be subject to any mitigation in the Programmatic Agreement and the mitigation required by staff through Conditions of Certification, CUL-1 and CUL-16. (Transcripts July 21, 2010, p. 151: 2-25, p. 152: 1-25, p. 153: 1-12). It should be noted that at this time, no specific formally identified traditional cultural property has been mentioned in or near Genesis by Native American groups and, therefore, no impacts have been identified. (Transcripts July 21, 2010, p. 152: 1-25)

## II

### CONCLUSION

CEQA requires the EIR performed on a potential project to “reflect a good faith effort at full disclosure”, does not “mandate perfection or the EIR to be exhaustive” and “will be judged in light of what was reasonably feasible. (*City of Long Beach v. Los Angeles Unified School District*, (2009) 176 Cal. 889.) While some projects may have more subsurface work prior to certification, such work is not a blanket requirement. As part of the process selected for this project, a compressed testing/data recovery strategy was developed. Under this process staff assumed all of the known resources were eligible for the NRHP and the CRHR. Sufficient information and data were available for staff to assess impacts and conclude that the project would have a direct impact on 27 historically significant archaeological resources and a significant indirect impact on 248 contributors to a historically significant cultural landscape. (RSA p. C.3-1)

Based on these impacts and accounting for the possibility of uncovering buried resources from unknown sites, staff developed extensive mitigation through Conditions of Certification 1-18. These conditions include a mixture of reports, mitigation refinement, data recovery, avoidance and performance measures.

Dated: Aug. 11, 2010

Respectfully submitted,



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APPLICATION FOR CERTIFICATION FOR THE  
*GENESIS SOLAR ENERGY PROJECT*

Docket No. 09-AFC-8

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(Revised 8/5/10)

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**DECLARATION OF SERVICE**

I, Scott McDonald, declare that on August 11, 2010, I served and filed copies of the attached Staff's Reply Brief for Issues Raised at July 21 Evidentiary Hearings, dated August 11, 2010. 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: [[http://www.energy.ca.gov/sitingcases/genesis\\_solar](http://www.energy.ca.gov/sitingcases/genesis_solar)].

The documents have 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, in the following manner:

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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

  
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Scott McDonald