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**DOCKET**

**09-AFC-8**

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August 18, 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 California Unions for Reliable Energy's Motion to Strike Portions of Genesis Solar, LLC Reply to the Third Opening Brief of CURE – Evidentiary Hearing Day 3 Topics.

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

**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

**CALIFORNIA UNIONS FOR RELIABLE ENERGY'S  
MOTION TO STRIKE PORTIONS OF  
GENESIS SOLAR, LLC REPLY TO THE THIRD OPENING BRIEF OF  
CURE – EVIDENTIARY HEARING DAY 3 TOPICS**

August 18, 2010

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Pursuant to Title 20, California Code of Regulations, Section 1716.5, California Unions for Reliable Energy (“CURE”) files this motion to strike portions of Genesis Solar, LLC Reply to the Third Opening Brief of CURE – Evidentiary Hearing Day 3 Topics (“Genesis Reply Brief”) for the Genesis Solar Energy Project (“Project”).

## **I. INTRODUCTION AND BACKGROUND**

On August 3, 2010, CURE filed its Third Opening Brief regarding issues related to cultural resources in which CURE showed that the Revised Staff Assessment’s (“RSA”) method for determining the baseline for cultural resources does not satisfy CEQA. Specifically, CURE explained that the widely followed CEQA standard practice for establishing the environmental baseline for cultural resources includes a Phase I archaeological survey (or “inventory”) and a Phase II test excavation. However, the RSA did not establish an accurate environmental setting for determining impacts to cultural resources because test excavations were not conducted for the Project. Rather, all of the information regarding the Project’s baseline environmental setting, including the location and boundaries of archaeological sites, was derived from visual examination of the ground surface.

Importantly, as CURE noted in its brief, Staff admitted that it is not always possible to determine the size and nature of archaeological sites based solely on visual examinations of the ground surface. For example, Staff agreed that it cannot be determined whether or not burials are present within sites based solely on visual examination of the ground surface. Staff also agreed that test excavations are

required to determine whether burials are present within a site. According to Staff, the potential for human burials is very high. Because test excavations were not conducted, however, Staff could not assess the Project's potential to significantly impact buried cultural resources, including human burials. Consequently, Staff also could not design mitigation that would reduce impacts to a level below significant. In short, without baseline data acquired through test excavations, Staff could not identify the significance values of the resources and therefore could not identify appropriate mitigation.

In its brief, CURE also explained that there is no valid reason why Staff departed from standard CEQA practice. Staff stated that it did not require the Applicant to perform test excavations because of the tight timeframe and the large Project site size. However, as CURE explained, the record clearly shows that test excavations for the identified 27 archaeological sites were feasible. Nothing in the record shows otherwise. Consequently, there is no excuse for Staff's failure to determine the Project's environmental baseline, either by directly contracting for the excavations or requiring the Applicant to conduct the excavations.

On August 11, 2010, Genesis Solar, LLC ("Applicant") filed the Genesis Reply Brief in response to CURE's Third Opening Brief. In its brief, the Applicant argued that test excavations are not required to adequately analyze the Project's significant impacts to cultural resources. To support its argument, the Applicant provided a list of EIRs for projects "where resources were recorded and no Phase II work conducted." (Genesis Reply Brief, p. 7.) The Applicant then went on to discuss the

cited EIRs in an effort to rebut CURE's showing that test excavations are necessary to satisfy CEQA. However, the EIRs are not in the record for this proceeding and are inapplicable to the facts here. Therefore, the Commission cannot rely on the EIRs for its environmental review of the Project, and those portions of the Applicant's brief that cite and discuss the EIRs should be stricken.

## **II. ARGUMENT**

The Commission cannot rely on the EIRs or the Applicant's discussion of the EIRs for its environmental review of the Project for two reasons: (1) the EIRs are not in the record for this proceeding; and (2) the Applicant's application of the EIRs to this case is misleading.

First, there is nothing in the record for this proceeding related to the EIRs and the EIRs were not provided to the parties for review. The Hearing Officer closed the record for cultural resources on July 21, 2010. The Applicant had more than sufficient time to enter the EIRs into the record prior to July 21, 2010. CURE raised concerns about the absence of test excavations in its written testimony on June 25, 2010. Thus, the Applicant had a month to enter evidence into the record before the record was closed on July 21, 2010. Instead, the Applicant waited until its reply brief to do so.

Had the Applicant introduced the EIRs into the record at the appropriate time, other parties would have had a reasonable opportunity to review the information and respond. However, because the Applicant provided a list of EIRs only in its post-evidentiary hearing reply brief, the Applicant denied parties any

opportunity to review the documents. Not only was there no time to review and respond to the EIRs, but only one of the EIRs is readily available for review. In fact, CURE attempted to review the EIRs, but could only locate the Magnolia Power Plant project document because the Commission was lead agency for the project and therefore the document was posted on the Commission's website. However, CURE was unable to find the other EIRs within counties' jurisdictions on-line, and thus CURE would have had to submit Public Records Act requests for those documents. If the Applicant wanted to rely on the EIRs in its brief, the Applicant should have submitted them into evidence at the appropriate time. The Applicant did not. Thus, the EIRs and the Applicant's discussion of them should be stricken.

Second, the Applicant's application of the EIRs to the facts of this case is misleading. In its brief the Applicant stated,

In some of the EIRs cited, the CEQA-lead agency was very comfortable with using the extent of the surface manifestation as site boundaries and never required Phase II work. On others, academic research excavations in sites made 40 or 50 years ago were judged to be adequate even when a search for site boundaries was not conducted.

(Genesis Reply Brief, pp. 7-8.) However, CURE reviewed the Magnolia Power Plant project staff assessment, the only document in the Applicant's list that CURE was able to locate, and was frankly shocked to read the following:

The applicant intends to locate the project on ***four acres of a 23-acre site at the existing Magnolia Power Station*** in Burbank, California, an incorporated city in Los Angeles County, at 164 West Magnolia Boulevard. The site is bounded by Magnolia Blvd. on the north, Lake Avenue on the west, Olive Avenue on the south, and the Western Burbank Flood Control Channel, railway switching yards and Interstate 5 to the east of the proposed project.

The Burbank Water and Power Department currently operates and maintains ***existing gas-fired combustion turbine units and gas-fired steam units on this 23-acre site***. No new offsite transmission lines, natural gas, water supply or wastewater pipelines are required. The ***MPP will occupy about four acres made available by demolition of Magnolia Generating Units 1 and 2***, which have been decommissioned.

(Magnolia Power Project Final Staff Assessment, pp. 1-2, emphasis added); and

The proposed Magnolia Power Plant (MPP) site is located near the southeastern end of the San Fernando Valley in the City of Burbank, Los Angeles County, California. Three temporary off-site laydown/parking areas will also be located in Burbank within two miles of the MPP site. The proposed project area is an ***urban industrial environment***. The MPP site is developed and is a ***total built environment***. Two of the three proposed use areas are also ***paved lots***. The third is unpaved and may represent ***fill***. ***No ground disturbance*** is planned for the laydown/parking areas.

(Magnolia Power Project Final Staff Assessment, p. 3.3-4 (emphasis added).)

It is telling that the Applicant neglected to include these facts in its brief and nothing short of absurd to draw any link between cultural resource analyses for the Project and the Magnolia Power Plant project. Whereas the Magnolia Power Plant project is located on four acres of what was an existing power plant in an urban industrial area, the Project is proposed to be located on approximately 1,800 acres of relatively undisturbed desert land, along the edge of a dry lake. The two project sites are so dissimilar that the Applicant's reliance on the Magnolia Power Plant project to support its argument is questionable, at best. Thus, the Commission should not rely on the Applicant's listed EIRs or the Applicant's discussion of the EIRs.

### III. CONCLUSION

Because the EIRs cited by the Applicant are not in the record for this proceeding and the Applicant's application of the EIRs to this case is misleading, CURE moves to strike those portions of the Genesis Reply Brief that cite and discuss the EIRs.

Dated: August 18, 2010

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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Attorneys for the CALIFORNIA UNIONS  
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## PROOF OF SERVICE

I, Bonnie Heeley, declare that on August 18, 2010 I served and filed copies of the attached **CALIFORNIA UNIONS FOR RELIABLE ENERGY'S MOTION TO STRIKE PORTIONS OF GENESIS SOLAR, LLC REPLY TO THE THIRD OPENING BRIEF OF CURE – EVIDENTIARY HEARING DAY 3 TOPICS**.

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](http://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 18, 2010.

\_\_\_\_\_/s/\_\_\_\_\_  
Bonnie Heeley

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