STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 09-AFC-8
	)	
Application for Certification for	)	
the Genesis Solar Energy Project	)	

Reply Brief of Commission Staff in Response to Committee Order Granting Genesis Solar, LLC Motion for Scoping Order, Hearing, and Order Scheduling Time for Filing Briefs

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On January 19th, 2010, in the proceeding for the Application for Certification for the Genesis Solar Energy Project (Genesis project), parties filed responses to the January 8, 2010 Committee Order Granting Genesis Solar, LLC Motion for Scoping Order, Hearing, and Order Scheduling Time for Filing Briefs (Order). The Order was issued by the committee assigned to the Genesis project (Committee), and directs parties to file opening and reply briefs responding to a series of questions about the legal standards governing the Energy Commission's review of the project's proposed use of groundwater for cooling. In addition to addressing the issues raised in the January 19th filings, our response also reflects our initial reaction to the January 20, 2010 letter of the State Water Resources Control Board providing guidance on this issue. Staff appreciates the opportunity to work with the parties and the Committee to facilitate early resolution of important issues raised by the Genesis project. We believe that all of the January 19th filings, as well as the State Board letter, demonstrate the difficulties associated with an expedited schedule for a project proposing to use groundwater for cooling. We look forward to discussing these difficulties and identifying possible solutions at the January 26, 2010 Committee hearing.

I. IEPR Water Policy

A. The State Board Letter Indicates that Application of the 2003 IEPR Water Policy to Groundwater Resources May Be Inappropriate, but Supports Staff's Ultimate Conclusion that Many Factors, Including State Board Resolution 88-63, Should be Considered in Determining a Project's Conformity with State Water Policy.

The applicant for the Genesis project (applicant) claims that "the use of [water with a salinity of greater than 1,000 mg/L total dissolved solids or TDS] . . . avoids the use of fresh water and is consistent with the plain language and intent of both CEC 2003 IEPR Policy and Board Policy 75-58." (*Genesis Brief in Support of Committee Scoping Order*, p.4.) In support of its conclusion that a simple numerical standard should apply, the applicant takes an unreasonably narrow view of the governing provisions protecting the state's water resources.

Staff, on the other hand, believes that a variety of factors must be considered in determining whether water is fresh for purposes of the 2003 IEPR water policy. However, the recent State Water Resources Control Board (Water Board) letter (Water Board Letter) states that, for purposes of Principle 2, "fresh inland waters" do not include groundwater, unless the groundwater provides habitat for fish or wildlife. (*Water Board Letter*, p. 3.)[1] Since the language of Principle 2 is virtually identical to that adopted by the Energy Commission in the 2003 IEPR water policy, consistent interpretations would result in a conclusion that the IEPR policy would not apply to any project the Energy Commission has licensed since its adoption or to any pending projects for which review has been completed, as none have proposed the use of surface water.[2] Moreover, the Water Board Letter indicates that the 1,000 TDS level referenced by the applicant is applicable to surface water, and that the applicable standard for groundwater is 3,000 TDS. (*Water Board Letter*, p. 3.) Not only would the Genesis project pump groundwater with TDS levels below 3,000 mg/L, but staff is also examining that pumping's potential impact on seeps, springs, and plant communities, as well as associated impacts to wildlife dependent on these resources.

Staff believes that the full implications of the Water Board letter will become apparent only upon further discussion between staff, the Water Board, the parties, and ultimately the Energy Commission, in conjunction with review of specific projects. However, our initial reaction is that application of the principles identified in the letter would likely lead to the same conclusion that staff identified in our *Response to Committee Order*. Our belief is based on the fact that the Water Board Letter stresses that "the priority scheme

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[1] Principle 2 states that, "[w]here the Board has jurisdiction, use of fresh inland water s for powerplant cooling will be approved by the Board only when it is demonstrated that that the use of other water sources or other methods of cooling would be environmentally undesirable or economically unsound."

[2] The one possible exception to that is the CPV Sentinel project, in which staff found that the project's use of groundwater could have an effect on habitat for sensitive species. Due to difficulties associated with air quality, there is no Commission decision on the project yet.

[contained in resolution 75-58] is. . . explicitly dependent on site-specific considerations, including environmental considerations." (*Water Board Letter*, p. 4.) This is consistent with staff's belief that the conformity of a project's proposed use of groundwater for cooling with state water supply requires consideration of a number of site-specific and other relevant factors.

The provisions governing state water policy begin with the state Constitution, which states that "the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." (Cal. Const., art. X, § 2.) The Water Board has developed policies to implement the Constitutional provision, one of which is Resolution 75-58, which was discussed by the applicant and staff in their initial filings. This and other Water Board policies should be interpreted in light of the Constitutional prohibition against waste and unreasonable use.

In its filing, the applicant fails to acknowledge the importance of key directives and principles of Resolution 75-58. For example, the applicant ignores the Water Board's statement that the "reasonableness of the use when compared with other present and future needs for the water sources" should be considered in determining whether a use is reasonable. (*Resolution 75-58*, p. 4.) Such a comparison does not support use of a simple numerical test to determine consistency with Resolution 75-58. The applicant also fails to reference the Water Board's statement that "[t]he loss of inland waters through evaporation in powerplant cooling facilities may be considered an unreasonable use of inlands waters when general shortages occur." (*Id*. at p. 3.) This statement recognizing the importance of general shortages also underscores the need to consider current conditions at the time of licensing.

Thus, even if Principle 2 of Resolution 75-58 does not apply to this project, other portions of Resolution 75-58 do apply, and indicate a strong policy interest in the conservation and protection of inlands waters (defined as all waters within the territorial limits of California exclusive of the waters of the Pacific Ocean outside of enclosed bays, estuaries, and coastal lagoons when licensing thermal powerplants. These policy interests require thoughtful evaluation of the specific circumstances of this project in determining conformity with state water policy.

More troubling is the applicant's characterization of staff's consideration of Water Board Resolution 88-63 as inappropriate (*Genesis Brief in Support of Committee Scoping Order*, p. 5.) As the Water Board Letter points out, Resolution 88-63 is binding on all state agencies unless the Legislature provides otherwise. (*Water Board Letter*, p. 2., Wat. Code, § 13146.) This resolution states that that all surface water and groundwater is considered suitable or potentially suitable for municipal or domestic use if the TDS levels are 3,000 mg/L or less. (*State Board Resolution 88-63*, p. 2.) This policy is echoed on pages 2-3 in the *Water Quality Control Plan Colorado River Basin – Region 7.* However, the applicant contends that the purpose of Resolution 88-63 is to protect against groundwater degradation, and should therefore not be considered in assessing the appropriateness of a proposed water use. (*Genesis Opening Brief*, p. 5.) Staff notes that the applicant provided no citations to supports its contention. In addition, rather than harmonize Resolution 75-58 and Resolution 88-63 and their use of the phrase "suitable . . . for domestic or municipal supplies," the applicant has provided an interpretation that creates unnecessary conflict between the two policies. This is contrary to standard rules of statutory construction. (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d. 781.) Most disturbing is the fact that the applicant's interpretation leads to a conclusion that the use of water that is protected against degradation should not be evaluated for conformity to state water policy. Surely the state's interest in protecting certain bodies of water as potential municipal or domestic supplies is a factor that the Energy Commission should consider in assessing the reasonableness of the use of that water for power plant cooling.

B. <u>The Applicant's Reliance on a Simple Numerical Standard is Unsupported by Past Commission Decisions, as Well as the State Board Letter.</u>

In its Opening Brief, the applicant cites an Energy Commission decision that was adopted several years prior to the adoption of the 2003 IEPR water policy. Staff believes it is appropriate to focus on decisions adopted since the December 2003 IEPR adoption date. Not only is the 2003 IEPR water policy the Energy Commission's own determination about how to apply state water policy in siting cases, but concerns about water use have changed over the years, as our state's population has grown, and water sources have become increasingly scarce. Staff believes that water uses that may have been appropriate in past decades may no longer be so.

As noted in our *Response to Committee Order*, the vast majority of projects expected to use significant amounts of water that have been licensed since December of 2003 will use recycled water. Only two others have been licensed, and one other license is

pending. In all three latter cases, many factors other than the TDS levels of the water -- the availability of a water offset or conservation program, other completing uses, the feasibility of alternative sources or technologies -- have been considered. Although the level of TDS in groundwater that is minimally acceptable may change in the future as a result of the Water Board letter, staff believes that the Energy Commission's consideration of a variety of factors in addition to TDS levels is appropriate. The analyses of these projects are site specific, project specific, reflect current conditions, and demonstrate the fundamental principle that water in our state is a precious resource that must be used wisely. Moreover, the two decisions are not precedent decisions. (Gov. Code., § 11425.6 .) The Energy Commission's approach of avoiding a rigid interpretation of its water policy is soundly based on the regulatory framework governing protection of the state's water resources, and is supported by the principles articulated in the Water Board Letter.

C. Staff's Position in the Beacon Solar Energy Project Final Staff Assessment is Not Determinative of Water Policy Issues in the Genesis Project Case.

The applicant contrasts staff's position in the Beacon Solar Energy project case with staff's position in the Genesis project case. As the applicant points out, staff previously rejected a simplistic threshold of 1,000 mg/L TDS in determining whether water is fresh. (*Genesis Opening Brief*, p. 7-8, referencing staff's position in the Blythe I and Blythe II proceedings). Yet staff appears to use such a threshold in its FSA for the Beacon Solar Energy. The reasons for the difference are multi-faceted. In the Beacon case, staff consulted with the Lahontan Regional Water Quality Control Board (RWQCB) and requested guidance in identifying a basin-specific water quality target for an alternative water supply for the project to protect fresh or potable groundwater. Although staff was aware that Resolution 88-63 identifies all water bodies with TDS concentrations of 3,000 mg/L or lower as potential drinking water supplies, the Lahontan RWQCB indicated that Title 22 drinking water TDS standards of 1,000 mg/L would be a reasonable water quality concentration to use for this purpose. Staff gives great weight on guidance from the Water Board and RWQCBs, but did not intend for this water quality target to represent a precedent or threshold for water quality in future cases. Our concern about water supply issues in that case led us to request more specific guidance from the SWRCB on how the state water policy should be applied to future projects. We have now received the Water Board Letter, which will likely lead to evolution of our approach in this and other future cases. As a result, staff believes that the Energy Commission would be unwise to rely on a simple numeric standard in determining conformity with state water policy.

At the time that the Beacon Solar Energy project AFC was filed (March 2008), there was only one other solar project under review – the Ivanpah Solar Electric Generating Station. Since that time, eight other solar energy projects have been proposed, many of them quite large, and all of them located in the desert. Staff does not believe that water use by solar projects should be subject to a different standard of review than water use for gas-fired plants that use substantial amounts of water. Although only two of the ten solar energy projects currently before the Energy Commission propose to use groundwater for cooling, the Energy Commission cannot afford to ignore the serious implications associated with the potential cumulative effect of solar energy development on the state's water supply. Groundwater is a scarce resource in the region, and these cases call for staff to make recommendations to the Commission for guidance on the use of water for cooling for solar thermal projects.

In addition, staff's recent coordination with the Water Board indicates that a more protective approach than is reflected in the Beacon FSA is required. Not only has the Water Board stated that Principle 2 of Policy 75-58 is inapplicable to groundwater, it also stated that "all. . .groundwater with a TDS of 3,000 mg/L or less shall be considered to be suitable for municipal or domestic water supply." (*Water Board Letter*, p. 3.) Staff believes that this statement cannot be ignored in assessing a project's conformity with state water policy. Moreover, the Water Board letter supports staff's conclusion that site-specific considerations play an important role in the Energy Commission's decision. (*Id*. at p. 4.)

In sum, the large number of solar applications and increased coordination with the Water Board support a return to staff's approach in past projects. Factors to be considered in assessing compliance with state water policy should include guidance from the Water Board and Regional Boards, TDS levels, the quantity and quality of water available to meet current and projected needs (including environmental needs), the feasibility of alternative water sources or cooling technologies, the availability of water conservation or recharge programs, and the location of the project on federal or private land.

D. <u>The Committee Should Not Issue an Order Limiting Consideration of the Reasonableness of Water Use to Water Used for Cooling.</u>

In the Genesis Opening Brief, the applicant for the first time requests that the Committee include in any order it issues a finding that the 2003 IEPR water policy applies only to cooling and not to other use of water. (*Genesis Opening Brief*, p. 8.) Staff

recommends that the Committee reject this request. Although the IEPR water policy explicitly refers to use of water for cooling, at the time that the policy was adopted, cooling was the only reason large quantities of water were needed for a power plant project before the Energy Commission. Given that the purpose of the policy (and the purpose of other state water policies discussed in this brief) is to protect and conserve the state's water resources, there is no logical reason to treat water used for other purposes differently than water used for cooling. Rather, the issue is the amount of water used, the quality of water used, whether there are competing uses, and whether there are feasible alternatives. These are factual determinations that should be made after evidentiary hearings. Staff notes that there are cooling technologies that do not use water, whereas there may be no other alternatives to the use of water for activities identified in the Genesis Opening Brief.

E. The Order Requested by the Applicant is Unnecessary and Unwise.

The applicant requests that the Committee issue a five-part Order limiting staff's review of the Generis project's proposal to use groundwater for cooling. The first part would be a finding that, the 2003 IEPR water policy is consistent with Policy 75-58 and that there is no need for staff to consult with the Water Board. Staff believes that an order limiting coordination between sister agencies is unwise and would create an indefensible approach to public policy, as well as being contrary to state law. (Cal. Code Regs., tit. 20 §§ 1742, 1744.) As a practical matter, staff notes that staff and the Water Board have already consulted, resulting in the Water Board Letter identified above. The second part would be a finding that for power plant cooling purposes, fresh water is that which has TDS levels of 1000 mg/L or less. As noted above, staff has rejected and continues to reject a simple numerical standard. Staff's position is supported by the regulatory framework governing the protection and conservation of state waters, and by the Water Board Letter. The third part would be a finding that 2003 IEPR water policy should be limited to water used for cooling. As discussed above, staff believes that a finding about a project's conformity with a policy designed to conserve and protect water should be based on the amount of water used, the quality of the water, whether there are competing uses, and whether there are feasible alternatives. The fourth part would be a finding that a project using water with TDS levels of 1000 mg/L or more for cooling complies with the 2003 IEPR water policy and Water Board Policies. Staff believes that compliance with state water policy is, in part, a factual determination that can be made only after the Committee considers the factors identified above. The Water Board Letter supports consideration of site-specific factors and further indicates that while the 1000 mg/L TDS standard may be one of the factors

that apply to a determination about the suitability of surface water use, it does not apply to groundwater use. The fifth part would be a finding that if a project complies with the 2003 IEPR water policy and other Water Board policies, there is no need to evaluate alternative cooling methods or water source, unless significant unmitigable impacts are identified under CEQA. Staff agrees with this statement, with the caveat that the impacts do not need to be unmitigable for staff to examine other cooling technologies or water sources. That is, once staff finds that a project will cause significant impacts, staff is required to examine all reasonable mitigation measures and alternatives. The applicant's order would result in the staff considering alternative cooling technologies or water sources only after determining that other mitigation options are infeasible. This is contrary to CEQA. (Cal. Code Regs., tit. 14, § 15126.4.)

II. Accounting Surface Methodology

A. Interagency Concerns Show Probable Use of Accounting Surface Methodology on Genesis Pumping of Groundwater, Potentially Impacting the Project's Reliability.

The issue before the Committee is not whether the Accounting Surface Methodology currently regulates the Genesis project's use of groundwater, but whether it yields relevant information on the project's long-term reliability.

Contrary to the claims made by the applicant, staff inquiries did not re-open a "soundly resolved" issue. Staff inquiries have centered on reliability questions and potential cumulative impacts posed by a thirty-year project that may draw on groundwater that would be replaced by water flowing from the Colorado River. In fact, the initial interagency consultation with the U.S. Bureau of Reclamation ("BOR") and the Colorado River Board of California was conducted at the request of the U.S. Bureau of Land Management ("BLM"), the federal lead agency in the joint environmental review. It would have been, to borrow the applicant's words, "inexplicable and inexcusable" to ignore a lead agency's concerns about potential use of Colorado River water, or the relevant expertise of state and federal agencies charged with overseeing use of the resource.

This interagency consultation, along with subsequent communication, has made it clear that Genesis project pumping could eventually dip below the accounting surface, impacting Colorado River water. That scenario would risk a shutdown of the project by BOR. (*Staff Response to Committee Order*, pp. 7-8.) Genesis did not pursue the option of contracting for the water in advance, creating an additional risk that no water would be

available. (*Ibid*.) Given the project's potential effect on Colorado River Water and the risk of shutdown, staff's concern about long-term reliability is entirely justified. In any event, staff has a responsibility to investigate all potentially significant impacts of the Genesis project, including any impact on the lower Colorado River. Any Committee determinations about the project's impacts should result from careful consideration of the facts regarding the accounting surface and all reasonably foreseeable consequences.

Furthermore, as also described in the Staff Response, BOR is actively working on a regulation to extend the accounting surface to include the Chuckwalla Valley Basin, where the Genesis project would be located. The anticipated regulation could apply even before Genesis would begin operations. (*Staff Response to Committee Order*, p. 7.)

Staff requests that the Committee *deny* all three parts of the applicant's request for an order regarding the accounting surface. First, the applicant asked the Committee to find that the Accounting Surface Methodology is an applicable law, ordinance, standard, or regulation, and should not be applied to the Genesis project's use of groundwater. While the Methodology is not currently codified into a regulation, there is considerable relevant law about use of the River (e.g., *Arizona v. California* (2006) 547 U.S. 150 (decreeing perfected rights to Colorado River water and enjoining unauthorized diversions) and it is premature to exclude the Methodology entirely from staff review. Also, staff must nevertheless review use of Colorado River water regardless for the project's long-term reliability and for cumulative impacts.

Second, ordering staff *not to* obtain evidence or correspondence from BOR for the purposes of analysis would be contrary to public policy, contrary to developing a full environmental assessment of the project, and would raise questions of legal sufficiency of the environmental review. To preclude input from an interested federal agency violates the Warren-Alquist Act (Pub. Resources Code § 25519, subd. (g) and (k) ("commission shall transmit a copy of the application to each federal... agency having jurisdiction or special interest in matters pertinent to the proposed site and related facilities … [and] to any governmental agency not specifically mentioned in this act, but which it finds has any information or interest in the proposed site and related facilities, and shall invite the comments and recommendations of each agency.") Energy Commission regulations (Cal. Code Regs., tit. 20, § 1714.5 (commission staff shall give due deference to agencies' comments and recommendations regarding conformance with applicable laws, ordinances, and standards under agencies' jurisdiction); CEQA (Pub. Resources Code §§ 21104 (lead agency shall consult with trustee agencies that have jurisdiction over natural resources affected by a project) and 21092.1 (consultations

required with addition of new information)); as well as CEQA guidelines (Cal. Code Regs., tit. 14, § 15086 (lead agency shall consult with trustee agencies). Additionally, such an order would undermine the purposes of CEQA guideline 15223 (lead agency must consult with joint federal agency as soon as possible); and undermine regulations implementing NEPA that call for cooperation between agencies. (See, e.g., 40 C.F.R. § 1501.7 (scoping process includes state agencies).) Consulting with an agency that has a special interest in the effect of a project on the Colorado River is entirely in keeping with the directives of the Warren-Alquist Act, the Commission's regulations, and CEQA.

The third part, which would order staff to disregard the Accounting Surface as a threshold for significant impacts, is premature, as staff has not completed its analysis of the long-term effects of groundwater pumping, and is also awaiting input from BOR about the current applicability of the accounting surface to the project. Because the accounting surface represents water supply for thousands of users, the project's effect on that supply is within the scope of potential impacts for the staff to assess and the Committee to consider in its proposed decision . Finally, staff has a broad concern that a project component involving the complexity of issues associated with Colorado River water introduces an unavoidable consumption of time which may conflict with ARRA (American Recovery and Reinvestment Act) deadlines.

III. Cumulative Impacts Analysis under CEQA and NEPA

A. Applicant Fails to Find Solid Law to Support Its Assertions Regarding Cumulative Effects Analysis Under CEQA.

Staff agrees with the applicant that cumulative impacts analysis must include projects that have "progressed far enough to be under environmental review." (*Genesis Brief in Support of Committee Scoping Order*, p. 20.) Staff disagrees that the law allows an interpretation of "under environmental review" to require particular agency hurdles to be met before including a future project, as applicant requests. The key question is whether there is sufficient information about reasonably foreseeable projects to inform the analysis of cumulative effects. Responding to the question requires investigation and the consideration of facts before deciding whether a particular project is reasonably foreseeable.

Applicant relies on *Lake County Energy Council v. County of Lake* ((1st Dist. 1977) 70 Cal.App.3d 851 ("*Lake County*")), a case older than, and distinguished by, the relevant

case, *San Franciscans for Reasonable Growth v. City & County of San Francisco*. ((1st Dist. 1984) 151 Cal.App.3d 61 ("*SFRG*"). In *SFRG*, the same court "readily" distinguished *Lake County* on factual grounds. (*Id*. at p. 76.) The physical elements in S*FRG* were "sufficiently quantified" to make analysis of future impacts useful; the city's future projects were not remote and were propelled by eager developers. (*Ibid*.) The court stated:

> This independence and individualized potential approval [of projects] makes it all the more important that they be cumulatively considered because, unlike the development of geothermal resources [in *Lake County*], which involves a fairly unified and concerted coordination of individual projects (e.g., wells, pipelines, production units, storage facilities), the development of downtown San Francisco generally occurs bit by bit. No one project may appear to cause a significant amount of adverse effects. However, without a mechanism for addressing the cumulative effects of individual projects, there could never be any awareness of or control over the speed and manner of downtown development. Without such control, piecemeal development would inevitably cause havoc in virtually every aspect of the urban environment.

(*Ibid*.) The dramatic rush for California desert land in order to create large-scale solar plants is much more akin to the situation in *SFRG* than to the geothermal wells in *Lake County*. The Commission and BLM are reviewing applications for two other water consumptive, large thermal projects in the region, and BLM is reviewing an application for a large solar photovoltaic project. In addition to these filed applications, BLM is also reviewing numerous Plans of Development for other projects proposed for the Eastern Riverside County region. There is similar independence of applicants, separate potential approval of projects, the danger of piecemeal handling by agencies, as well as economic and political pressure for fast growth.

Interpreting *Lake County*, applicant leaps to the unwarranted conclusion that a complete application must be filed before an agency may consider the project. The basis for excluding projects in the *Lake County* case was not the lack of a complete application, but the court finding "no" reliable data was available for the evaluation of exploratory geothermal wells there; also, the nature of the resource in that case was not clear. (*Lake County*, *supra*, at p. 856.) Here, there is considerable data available about solar projects along the I-10 corridor (see *Staff Response*, pp. 11-12), and the nature of the resource, groundwater, is abundantly clear and extremely important to the state.

In short, applicant bypassed *San Franciscans for Reasonable Growth*, as well as *Terminal Plaza Corp. v. City and County of San Francisco* ((1st Dist. 1986) 177 Cal.App.3d 892, 905 ("inability" of the agency to identify impacts does not "relieve it of the responsibility" to include the impacts in the analysis, as specifically as possible)) and *City of Antioch v. City Council of the City of Pittsburg* (1st Dist. 1986) 187 Cal.App.3d 1325, 1337 (agency must examine foreseeable but unspecific development).) These cases indicate that the analysis of cumulative impacts should be based on the amount of information about potential future projects as well as the likelihood of their implementation. Such factual issues do not turn on arbitrary rules of what has been filed, but depend on the collection of relevant data and thoughtful analysis of what is reasonably foreseeable for purposes of sufficiently informing the ultimate decision of the cumulative impacts of the proposed project should it be approved.

B. Applicant Fails to Find Solid Law to Support Its Assertions Regarding Cumulative Effects Analysis Under NEPA.

NEPA imposes a broader standard—it requires consideration of all relevant planning documents, even a single memorandum. (See *Staff Response*, pp. 12-14.)

Applicant again relies on weak case law. *Montana Ecosystems Defense Council v. ESPY* is an unpublished, generally uncitable, two-page opinion. ((9th Cir. 1994) 15 F.3d 1087.) Moreover, the facts in *Montana Ecosystems* support staff's criteria for determining probable future projects more than the applicant's proposed standards. The BLM "has a goal" of solar development in the desert and is "actively preparing to make a decision on one or more alternative means of accomplishing that goal" with effects that can be "meaningfully evaluated." (*Ibid*, quoting 40 C.F.R. § 1508.23.) Nothing in the cited case suggests certain regulatory hurdles be met, or that staff's criteria are inappropriate.

The subsequent Ninth Circuit case cited by applicant likewise tends to support staff's view of what constitutes a probable future project more than the applicant's proposed standard. (*Lands Council v. Powell* (9th Cir. 2004) 379 F.3d 744.) There, the court said that the agency is "*required* to analyze the cumulative effects of *projects it is already proposing*." (*Id*. at p. 746; emphasis added.) The BLM is proposing all the projects on its Plan of Development list, at least; it is studying the area along Interstate 10 for solar projects (see Solar Energy Programmatic Development EIS, at http://solareis.anl.gov/; the Commission and other agencies are part of the statewide initiative known as RETI to help identify transmission projects to carry the electricity created by these solar

plants. (See also, *Staff Response*, p. 12.) Speculation in *Lands Council* amounted to projects "not yet proposed" that are "more remote in time." (*Lands Council v. Powell*, *supra*, 379 F.3d at 746.) Again, deciding what projects are too speculative to analyze requires careful inquiry, gathering of facts, and support either to include or not to include a project in the Staff Assessment. The very same case goes on to *fault* the federal agency for using outdated evidence in its cumulative effects analysis (*Id*. at pp. 748-749) and even considers going outside the administrative record to look at potential toxic effects. (*Id*. at 746-748) The court decided not to do so, not because it was improper speculation, but because the court was enjoining the project on other grounds.

Regarding the BLM Handbook, the words quoted by applicant support looking at a wide variety of planning documents, as NEPA requires, not limiting review, as the applicant contends. Reasonably foreseeable future actions include "decisions, funding, formal proposals, or… [anything that is] highly probable, *based on known opportunities or trends*." (*Genesis Brief in Support of Committee Scoping Order*, p. 15; emphasis added.) Few, if any, projects have received more publicity and anticipation, become more "known," or signaled a likely "trend" than solar projects in the California desert. The Handbook suggests that it "*may* be helpful to ask" about permit applications, funding, or whether a Notice of Intent has been filed. (*Ibid*; emphasis added.) Yet again the applicant leaps from these suggestions to assertions that only a filed Notice of Intent evidences the probability of a project. Nothing in case law, statutes, or regulations presents such a brightline threshold for probability in a cumulative effects analysis. There is no legal support for creating such a standard where none exists.

Staff does not disagree with BLM's use of a Plan of Development list (as opposed to a list of applications for Rights of Way) as a way to start the examination of what constitutes a probable future project. However, given that this is a starting point, and not a requirement for inclusion in a cumulative impacts analysis, staff still finds the proposed stipulations to be flawed.

Applicant glossed over the crucial distinctions between CEQA and NEPA for assessment of what future projects should be analyzed, and avoided definitive U.S. EPA guidance of more than 100 pages for all federal agencies on this important question. (See *Staff Response*, pp. 13-14.) Most importantly, applicant disregarded mandates to favor environmental protection that form the bedrock of CEQA and NEPA. (See, e.g., Pub. Res. Code § 21000(g) (intent of Legislature that all agencies give major consideration to preventing environmental damage); 42 U.S.C. § 4331(b) (federal agencies must use all practicable means to attain widest range of beneficial uses of the

environment without degradation).) Those mandates become *more* important, not less, when reviewing novel projects moving at unprecedented speed.

IV. Water Policy on Projects Not Yet Identified

Applicant's original question was "Does the Commission have a policy of conserving water for use by projects that are not yet identified?," but in its brief, the applicant attacks Commission authority to plan for the state's energy infrastructure. To elaborate on the answer to the actual question, while there is no separate and specific policy to conserve water for unidentified projects, the Commission is still bound not only to explore all probable cumulative effects under CEQA and NEPA, but is also bound by the state's water policies, as explained above, as well as the state Constitution, Article X, requiring reasonable use of California waters. "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served." (Cal. Const., art. X, § 2; see also *Katz v. Walkinshaw* (1903) 141 Cal. 116 (groundwater subject to reasonable use).)

V. Conclusion

Staff respectfully asks the Committee to deny applicant's request to adopt applicant's proposed order. The applicant's proposal to use water for cooling raises issues that are difficult to resolve, and makes the success of an expedited schedule highly doubtful.

Staff looks forward to discussing these issues with the parties and the Committee at the hearing, and moving forward with its review under a Committee schedule that reflects the legal requirements for review of this project.

Date: January 22, 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 12/22/09)

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DECLARATION OF SERVICE

I, Robin Mayer, declare that on January 22, 2010, I served and filed copies of the attached:

Response of Commission Staff to Committee Order Granting Genesis Solar, LLC Motion for Scoping Order, Hearing, and Order Scheduling Time for Filing Briefs

dated January 22, 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].

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:

(*Check all that Apply*)

FOR SERVICE TO ALL OTHER PARTIES:

__X__ sent electronically to all email addresses on the Proof of Service list;

__X__ by personal delivery or by depositing in the United States mail at Sacramento, with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses NOT marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

__X__ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (***preferred method***);

OR

_____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 09-AFC-8
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

I declare under penalty of perjury that the foregoing is true and correct.

/S/
ROBIN MAYER