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STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

In the Matter of:

Application for Certification  
For the Genesis Solar Energy Project

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) Docket No. 09-AFC-8  
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Staff's Opening Brief

for Issues Raised at July 12 and July 13 Evidentiary Hearings

DATED: July 26, 2010

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## INTRODUCTION

At the conclusion of the July 12 and 13 evidentiary hearings for the Genesis Solar Energy Project (“Genesis”), Hearing Officer Kenneth Celli directed parties to file briefs in response to three issues of interest to the Genesis Committee:

- 1) Staff finding of cumulatively considerable impacts for Visual Resources;
- 2) Staff findings of unmitigable impacts for Land Use and Visual Resources; and
- 3) Premise that Colorado River water be purchased from junior rights holders.

Staff appreciates the opportunity to brief these issues and addresses all three here. Factual background will be included as appropriate for each issue.

## DISCUSSION

### I. LESS THAN SIGNIFICANT INDIVIDUAL IMPACTS IN VISUAL RESOURCES MAY NEVERTHELESS CREATE IMPACTS THAT ARE CUMULATIVELY CONSIDERABLE

#### A. Staff Findings for Cumulative Impacts on Visual Resources

Primarily because of its distance from the Interstate-10 (I-10) freeway, its relatively flat array, and with staff’s proposed mitigation measures, the individual impact of the Genesis project on Visual Resources would be less than significant. (Exhibit 400, Revised Staff Assessment (“RSA”), C.12-1, C.12-15 et seq.)

However, the desert’s visual resource is “unique” and “highly valued” landscape of which the project site forms a small part. (RSA, C.12-36.) Three national parks and numerous wilderness areas lie within the California Desert Conservation Area (CDCA). (*Ibid.*) To fully appreciate the views and the potential impacts, the Committee would best examine Visual Resources Figures 2, 3, 8a, 8b, 9a, 9b, 9c, 10a, and 10b (RSA, C.12). These key observation points were proffered by the applicant. (Evidentiary Hearing Transcript, p. 431; see also p. 435, applicant objected only to staff’s observation points 4a and 4b.)

Cumulative impacts could mean a “substantial decline in the overall number and extent of scenically intact, undisturbed desert landscapes, and a substantially more urbanized character in the overall southern California desert landscape.” (*Ibid.*) This is intertwined with the sheer number and scale of planned development, discussed below.

#### B. Cumulatively Considerable is a Distinct Standard

The California Environmental Quality Act (CEQA) requires that lead agencies consider all significant effects on the environment of the proposed project. (Pub. Res. Code § 21100(a).) Additionally, the discussion shall include brief explanations for why a particular effect is not significant. (§ 21100(d).) A significant effect on the environment means a “substantial, or *potentially* substantial, adverse change in the environment.” (§ 21068; emphasis added.)

During Evidentiary Hearings, applicant witness Mr. Merlyn Paulson mischaracterized cumulative impacts by saying “it is not logical that there would be less than significant impacts” then “somehow for there to be considerable impacts in the viewshed.” (Evidentiary Hearing Transcript at p. 429 (July 12, 2010).) While the witness expressed a common misconception regarding cumulative impacts, the law makes it clear his characterization is wrong.

Cumulative impacts are different and held to a different standard. CEQA Guidelines define cumulative impacts as “two or more individual effects which, when considered together are considerable, or which compound or increase other environmental impacts.” (Cal. Code Regs., tit. 14, § 15355.) The whole of cumulative analysis is greater than the sum of its parts. Individual impacts may be minor, but staff must consider them to see if the impacts will add up to be “collectively significant” over time or exacerbate other environmental impacts. (§ 15355, subd. (b); see *City of Long Beach v. Los Angeles Unified School Dist.* (2nd Dist., 2009) 176 Cal.App.4th 889, 905 (“*Long Beach*”).)

The Fifth District case *Kings County Farm Bureau v. City of Hanford* explicitly rejects the ratio theory of cumulative impacts. ((1990) 221 Cal.App.3d 692, 720-721 (“*Kings County*”).) The case addressed the stubborn problem of air pollution in the San Joaquin Valley. The court stated the familiar misunderstanding:

Appellants contend under the theory advanced in the EIR whenever an agency determines impacts specific to a particular project are not significant, corresponding cumulative impacts cannot be considered significant because the “incremental effects” of the individual project cannot be “considerable.” They contend in assessing significance the EIR focuses upon the ratio between the project's impacts and the overall problem, contrary to the intent of CEQA. GWF contends the cumulative impacts analysis properly focuses upon the individual project's effects rather than the combined effects.

(“*Kings County*” at p. 720.) The court disagreed, saying to interpret CEQA guidelines to “afford the fullest protection of the environment,” and citing a commentator that “one of the most important” lessons is that environmental damage often “occurs incrementally from a variety of small sources.... Perhaps the best example is air pollution, where thousands of relatively small sources of pollution cause a serious environmental health problem.” (*Ibid.*, internal quotations omitted.) The more intense the development, as in *San Franciscans for Reasonable Growth*, the more likely it is that “piecemeal development” will “inevitably cause havoc.” (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 77.)

The *Kings County* court found that the simple comparison of the small impact against the big problem avoided analyzing “the severity of the problem” and allows “approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling.” (*Kings County, supra*, 221 Cal.App.3d at 721.) Instead, the court concluded the proper standard is that of “collectively significant.” (*Ibid.*) Therefore, individual impacts that are less than significant may still add up to create a cumulatively considerable impact.

Visually, Genesis is a single project quite a distance from the freeway. But simply by being built across some 1800 acres and requiring transmission lines that will stretch for miles, it cumulatively contributes to the solar development that will change the look of Chuckwalla Valley for decades to come.

### C. Agency Has Discretion to Set Geographic Scope of Cumulative Impacts

Cumulative impacts analysis must include “closely related past, present, and reasonably foreseeable probable future projects.” (Pub. Resources Code § 15355, subd. (b).) Courts review an agency’s decision of which projects in cumulative analysis to include under the abuse of discretion standard. (*Long Beach, supra*, 176 Cal.App.4th at p. 906.) “The primary determination is whether it was reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately.” (*Ibid.*, internal quotations omitted.) Agencies must cast a wide enough net to capture reasonably foreseeable projects; an “underinclusive” approach can be “misleading.” (*Bakersfield Citizens for Local Control v. City of Bakersfield* (5th Dist. 2004) 124 Cal.App.4th 1184, 1218; *San Franciscans for Reasonable Growth, supra*, 151 Cal.App.3d at 74 (City’s “unreasonably narrow” view of cumulative impacts was abuse of discretion).)

Moreover, staff has a duty to use best or at least reasonable efforts to “discover, disclose, and discuss related projects which are under the administrative jurisdictions of other city, state, and federal agencies.” (*San Franciscans for Reasonable Growth, supra*, 151 Cal.App.3d at 74, fn. 13.) Staff relied heavily on BLM, as the key federal agency, as well as other agency planning documents when selecting probable future projects. (RSA, B.3 Tables 1a, 1b, 2 and 3).

In considering which upcoming projects are appropriate to analyze, the lead agency may either list probable future projects, or use existing projections from regional planning documents. (CEQA Guidelines, §15130, subd. (b)(1).) When selecting projects for a list, factors include the “nature of the environmental resource being examined, the location of the project and its type.” (§ 15130, subd. (b)(2).) It is especially appropriate to take a wide approach to visual resources when the landscape is practically untouched and mountain trails offer sweeping views. (RSA, Visual Resource Figures 2, 3, 8a, 8b, 9a, 9b, 9c, 10a, and 10b ).

Thus, projects under construction, approved projects not yet under construction, projects that are undergoing environmental review (*San Franciscans for Reasonable Growth, supra*, 151 Cal.App.3d at 73-74). and projects where the applicant has devoted “significant time and financial resources” to prepare for review (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127-1128) should be considered as probable future projects for the purposes of cumulative impacts analysis. It is hard to imagine what could be a more significant outlay of time and resources by an applicant than applying to the Energy Commission and the BLM for the right to develop a solar plant. The BLM process automatically weeds out purely speculative projects by requiring a Plan of Development once an application is submitted. (RSA, B.3-2.) Developing all the required CEQA and NEPA documents is an “especially time consuming and costly process,” (*Ibid.*) and while it’s likely not every project will be built, the Committee should find that staff appropriately favored inclusion rather than exclusion when selecting which projects in the desert are indeed probable.

## II. POLICY CONSIDERATIONS MAY PROPERLY OVERRIDE STAFF'S FINDING OF UNMITIGABLE IMPACTS IN LAND USE AND VISUAL RESOURCES

### A. Staff Finds Unmitigable, Cumulative Impacts for Land Use

While staff did not find that Genesis alone would cause significant impacts to land use, staff concluded that in combination with other proposed solar projects along Interstate 10, as well as anticipated renewable development in the area impacting hundreds of thousands of acres in the desert, that Genesis would add a cumulatively considerable impact in reducing scenic values in wilderness areas and making fewer recreational resources available in the region. (Exhibit 400, Revised Staff Assessment ("RSA"), C.6-1-6-2.) When staff considered the various feasible alternatives for the Genesis project, those alternatives did not change this conclusion. (*Id.* at C.6-2.)

As with visual resources, discussed above, a less than significant impact may nonetheless be cumulatively considerable when combined with other projects, especially, in this case, reasonably foreseeable development. As staff notes, the massive amount of renewable development intended for the region, where solar and wind values are high, could affect as many as one million acres. (RSA, C.6-30-C.6-31; see Cumulative Tables 1a, 1b, 2, and 3, B.3-5-B.3-13.) In short, the grand scale of planned renewable development will inevitably displace certain activities, including recreation and the availability of open space. (C.6-35-C.6-36.)

### B. CEQA Allows Well-Considered Benefits to Override Unmitigable Impacts

Before approving a project for which an environmental impact report is required, an agency must find either the project's significant environmental impacts have been mitigated, or there are no feasible mitigation measures or alternatives and the unmitigated impacts are outweighed by the project's benefits. (*L.A. Unified School Dist. v. City of Los Angeles* (2d Dist., 1997) 58 Cal.App.4th 1019, 1023, citing Pub. Resources Code, § 21081; *Chaparral Greens v. City of Chula Vista* (4th Dist., 1996) 50 Cal.App.4th 1134, 1142-1143, citing Pub. Resources Code §§ 21002, 21002.1, 21081 and CEQA Guidelines (Cal. Code of Regs., tit. 14) §§ 15090-15093; *Assn. of Irrigated Residents v. County of Madera* (5th Dist. 2003) 107 Cal.App.4th 1383, 1390.)

When adopting a statement of overriding considerations, the agency must make an "informed decision." (*A Local & Regional Monitor v. City of Los Angeles* (2d Dist. 1993) 12 Cal.App.4th 1773, 1807.) Significantly, the agency may consider non-environmental benefits, including economic, legal, social, technological, or "other" benefits when balancing benefits against impacts. (Pub. Resources Code § 21081, subd. (b); *City of Marina v. Bd. of Trustees of Cal. State Univ.* (2006) 39 Cal.4th 341, 368 ("*City of Marina*").) By allowing economic or the catchall "other" benefits to possibly override an impact, the Legislature clearly delegated to agencies a crucial yet flexible policy function.

As this section of the Public Resources Code was originally passed in 1976 (Stats. 1976, c. 1312, § 9), the Legislature probably did not contemplate a scenario in which an agency would have to balance "environment versus environment," or unmitigable environmental impacts of a specific project against large-scale environmental goals, such as the reduction of global warming. That is precisely the Commission's challenge today.

Recent case law has served as a check, with warnings that an agency must find the mitigation truly infeasible (*City of Marina, supra*, at p. 368-369) and all the alternatives that might mitigate those impacts, also infeasible (*Uphold Our Heritage v. Town of Woodside* (1st Dist. 2007) 147 Cal.App.4th 587, 603), before adopting a statement of overriding benefits.

Disposing of the second and simpler issue first, feasible alternatives to the Genesis project, including the adopted alternative of dry-cooling, do not relieve the unmitigable cumulative effects under Land Use. (RSA C.6-26). None of the alternatives would improve the cumulative impacts under Visual Resources (RSA C.12-1), although dry-cooling would slightly improve the individual impact. (*Ibid.*) The “No Project” alternative is the only alternative that would relieve impacts, but this is not a feasible choice to meet project objectives or the Commission objectives to construct a utility-scale solar energy project; provide clean, renewable electricity to support California’s Renewable Portfolio Standard program; contribute to the state’s 33 percent renewable energy target; and help reduce greenhouse gas emissions. (RSA, B.2-10.)

Finding the mitigation infeasible, and thus truly “unmitigable,” is a more complex and practical quest. CEQA defines “feasible” as capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors. (Pub. Resources Code, § 21061.1.) Feasibility must be evaluated “within the context of the proposed project.” (*Center for Biological Diversity v. County of San Bernardino* (May 25, 2010, D056652, D056648) 185 Cal.App.4th 866, \_\_\_ (4th Dist. 2010) [2010 WL 2539847, p. 8].)

The California Supreme Court exhaustively examined this process in *City of Marina*. (*Supra*, 39 Cal.4th 341.) In that case, the Court found California State University trustees abused their discretion under CEQA by finding certain mitigation infeasible for expansion of the CSU Monterey campus at the decommissioned Fort Ord, when in the Court’s view, at least one of those measures was feasible. In the nearly unanimous opinion (with a single concurrence), Justice Wedeger wrote:

CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible. Such a rule, even were it not wholly inconsistent with the relevant statute... would tend to displace the fundamental obligation of each public agency to mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.

(*City of Marina, supra*, 39 Cal.4th 341, 368 (internal quotations and citations omitted).) Finding certain measures legally and economically feasible, the Court rejected the Trustees’ statement of overriding considerations and thus rejected the environmental impact statement. (*Ibid.*) Regardless, the Court acknowledged the agency’s discretionary powers under CEQA, and thus an agency’s decision favoring benefits is “not lightly to be overturned.” (*Id.*, at p. 376.) The Court also allowed the Trustees to revisit their determination. (*Id.* at p. 369; see also *Cal. Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 1002 (interpreting *City of Marina*



and noting the Court's express permission to Trustees to find other reasons why mitigation was infeasible.)

Here, the unmitigable impacts in Land Use and in Visual Resources grow from their cumulative impacts. Two factors contribute to the infeasibility of mitigating these impacts; relating to quantity, the massive scale of foreseeable projects, and to quality, the natural landscape, that for the good of the planet or not, will become a quasi-industrial zone.

The grand scale of planned renewable development will impact hundreds of thousands of acres. It is assumed that each project will amply mitigate for its individual impacts, but, for example, painting in colors that contrast less with the landscape still leaves the industrial components in place. Thousands of industrial components may blend in, and perhaps be aesthetically pleasing in their own right, but they will still affect the views and the recreational activities that are often enriched by those views.

The second factor is the pristine environment. The BLM's governing law recognizes scenic values as worth protecting, and that they are part of a multiple use classification that "takes into account the long-term needs of future generations." (Federal Land Policy and Management Act, 43 U.S. C. section 103, subds. (a), (c).) The California Desert Conservation Area (CDCA) recognizes that scenic values are a primary reason to protect the landscape. (RSA, C.12-7.) Almost any change affecting those scenic values results in an unmitigable impact. Regardless of how much mitigation takes place, the projects entail a mass conversion from multi-use, open space to industrial use.

Thus, either factor contributes to the infeasibility of mitigation, and combined, they are a formidable obstacle, resisting a successful outcome in a reasonable period of time as CEQA requires. (Pub. Resources Code, § 21061.1.)

Returning then to the statement of overriding considerations itself, a Fifth District Court of Appeal case is instructive. The court described those considerations as "larger" and "more general" reasons for approving a project, such as the need to create new jobs, and valid as long as the reasons are supported by substantial evidence. (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (5th Dist. 2007) 150 Cal.App.4th 683, 717.) Like the environmental impact statement, the statement of overriding considerations must make "good-faith effort" to inform the public. (*Id.* at p. 718.) Considerations may be based on policy, but they must have a foundation in the record. (*Ibid.*) And of course, those statement's purposes are undermined if its conclusions are based on misrepresentations. In that unfortunate case, the override minimized the alternatives as providing limited economic growth, while the impact statement described grander alternatives that implied a higher environmental cost. (*Ibid.*) The result was that the statement of considerations failed to serve its "mandated purpose as an informational document." (*Ibid.*)

#### C. State Goals to Create Reliable Sources of Renewable Energy Properly Override Unmitigable Impacts from the Genesis Project

The record in the Genesis project amply supports a finding of overriding considerations. Terry O'Brien, Deputy Director of the Siting, Transmission and Environmental Protection Division,

states the Genesis project will help California meet its renewable portfolio standard of 33 percent in 2020, as well as AB 32 greenhouse gas emission reductions. (Exhibit 437, Memorandum to Committee (July 12, 2010).) Mr. O'Brien cautions that a statement of overriding considerations for the Genesis project is not a blanket endorsement of all solar projects, but that the project's close access to major transmission lines makes such a statement especially appropriate. (*Ibid.*) Additionally, this is a rare situation in which a project's benefits will encompass multiple factors envisioned by the Legislature. (Pub. Resources Code § 21081, subd. (b).) The project will create thousands of construction jobs and dozens of permanent jobs. (Exhibit 403, Supplement to the RSA, C.8-8, Table 4, and C.8-11, Table 5.) By proving industrial-scale renewable energy can work and by helping California meet ambitious deadlines for cutting greenhouse gases, the project will cause a host of legal and social benefits. (Exhibit 437). Solar technology is more likely to advance and to improve efficiency, with the ability to "compare the characteristics of the various solar technologies. (*Id.* at p. 2.) Finally, the "other" benefits facilitated by the project include less air pollution, fewer greenhouse gas impacts, and reliability of electricity supply during hot summer months.

Staff urges the Committee to consider Mr. O'Brien's testimony and adopt a statement of overriding considerations that acknowledge the impacts of the Genesis project while pursuing the larger goals of cutting greenhouse gases, reducing global warming, and promoting renewable energy.

### III. OFFSETS BY GENESIS PROJECT WILL MAKE UP FOR ANY POTENTIAL IMPACTS TO COLORADO RIVER

#### A. Actual Use of Colorado River Water by Genesis Project Never Determined

In *Arizona v. California*, the U.S. Supreme Court Consolidated Decree defined consumptive use of Colorado River water as "diversion from the stream" minus return flow, including water drawn from the mainstream by underground pumping. ((2006) 547 U.S. 150, 153.) California water users may only receive Colorado River water pursuant to valid contracts made with the Secretary of the Interior. (*Id.* at p. 156.)

Commenting on the Genesis project, the Colorado River Board of California provided a letter to the Energy Commission indicating as follows:

The BLM lands proposed for the Genesis Solar Energy Project are currently located within the "Accounting Surface" area designated by U.S. Geological Survey Water Investigation Reports (i.e., WRI 94-4005 and WRI 00-4085). These reports indicates that the aquifer underlying lands located within the "Accounting Surface" is considered too [sic] be hydraulically connected to the Colorado River, and groundwater withdrawn from wells located within the "Accounting Surface" would be replaced by Colorado River water, in part or in total. This means that if it is determined that these wells are, in fact, pumping Colorado River water, a contract with the Secretary of the Interior would be required before such a diversion and use is deemed to be a legally authorized use of this water supply.

(Letter from Gerald Zimmerman, Acting Executive Director, Colorado River Board of California, to Mike Monasmith, CEC Project Manager (July 2, 2010); CURE Exhibit 546.)

The operative word in the above paragraph is “if.” Staff indicated in both its written testimony (RSA, C.-9.95) and during workshops that the U.S. Bureau of Reclamation has not determined that project wells would pump Colorado River water. Thus, neither the Colorado River Board nor the Energy Commission staff is recommending that the project owner obtain an entitlement to use Colorado River water.

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. (Evidentiary Hearing Transcript (July 13, 2010), pp. 49-50) (note statement at top of page 50 should be attributed to Energy Commission witness Michael Donovan, not applicant witness Michael Tietze).

#### B. Offsets to Palo Verde Mesa Groundwater Basin More than Make Up for Potential Impacts to the Colorado River

Water supply -- along with biological resources -- has been one of the more hotly contested issues in the Genesis proceeding. The applicant's recent decision to utilize air-cooled condensers rather than a wet cooling system for condensing steam has dramatically reduced the extent of impacts associated with project water supply. Staff applauds the applicant for this decision, and also expresses its gratitude to the applicant and other parties for their willingness to work cooperatively in addressing concerns about the residual effects associated with relatively small amount of water needed for other aspects of project operation.

The project will require the use of approximately 2600 acre-feet of water for the three-year construction process. (RSA, p. C.9-67). Most of that water is used for site preparation and dust suppression. (*Id.* At C.9-5) During operations, the applicant originally proposed to use 1,604 acre-feet per year (afy), most of which was for cooling. The decision to use dry cooling instead of wet cooling would reduce this amount to 202 afy. (*Id.* at C.9-67)

Staff analyzes water supply impacts for projects that propose to use groundwater by examining such issues as : 1) impacts to basin balance; 2) impacts to other groundwater users, such as near-by wells or groundwater dependent vegetation, due to changes in groundwater levels; 3) impacts to other hydrologically connected water systems; 4) subsidence; and 5) impacts to water quality. In this case, most of the attention was focused on the first three of these issues.

Staff conducted an analysis of the impacts of project water use, and determined that there were potential impacts to other groundwater users, a small risk of subsidence, and potential impacts to the Colorado River (which is hydrologically connected to the Chuckwalla Groundwater Basin from which project water would be pumped). Staff concluded that the other impacts were insignificant, and also concluded that Conditions of Certification agreed to by the applicant

would effectively reduce impacts to other groundwater users and subsidence risks to levels that were not significant.

However, significant dispute remained regarding potential impacts to the Colorado River. Staff asserted that hydrological conditions supported a finding that the project's pumping of groundwater reduced the amount of water flowing from the Chuckwalla Groundwater Basin (where the project is located) to the neighboring Palo Verde Mesa Groundwater Basin. This in turn affects water levels in the Palo Verde Valley Groundwater Basin and the Colorado River, which are hydrologically connected to the Palo Verde Mesa Groundwater Basin. Staff has long asserted that *any* impacts to surface water or ground water that is threatened by overuse should be mitigated. This position has been supported in several Energy Commission decisions as well. The applicant asserted both that there was no impact to the Colorado River (Exhibit 60, Soil & Water Resources, p. 7) and that there could be a very small impact (*Id.*, p. 20). The applicant's decision to utilize air cooled condensers lessened the reduction in flow between Chuckwalla Groundwater Basin and other portions of the Colorado river system, but did not eliminate impacts altogether.

Staff proposed Conditions of Certification to address the impact to the Colorado River. The Conditions would have required the applicant to offset the entire amount of water it pumped by conserving an equal amount of Colorado River water. (RSA, p. C.9-117 et seq.) Staff conceded that not all of the water pumped by the project would have an effect on the Colorado River, but in the absence of a modeling analysis to identify that amount, could not agree to a lesser offset. However, staff also provided the applicant with the opportunity to conduct a refined modeling effort and more precisely identify the amount of Colorado River water impacted by the project and offset only that amount. (RSA, p. C.9-122 et seq.).

On the second day of evidentiary hearings, the Committee allowed the parties to enter into public discussions about potential resolution of this and other issues. As a result of those discussions, as well as a visual demonstration of how the basins were connected during the Evidentiary Hearing, staff and the applicant agreed to not litigate the extent to which the Genesis project would have an effect on Colorado River water and instead focus on the effect in the Palo Verde Mesa Groundwater Basin. Staff agrees with the applicant that the effect on the Palo Verde Mesa Groundwater Basin is necessarily greater than any project effect on the Colorado River and that, if the applicant offsets the project impacts on water in the Palo Verde Mesa Groundwater Basin, there will be no effect on the Colorado River.

These agreements resulted in modification of the two Conditions of Certification related to offsetting water use impacts -- **SOIL&WATER-15**, and **SOIL&WATER-19**. These modifications, which are provided in Exhibit 443, change the point at which the impact is measured from the Colorado River to the boundary between the Chuckwalla Groundwater Basin and the Palo Verde Mesa Groundwater Basin, add an additional option for offsetting the water use, identify the way in which recharge is to be simulated in the modeling effort, and specifically extend mitigation to address the latency effects that follow the cessation of pumping.

Conditions of Certification **SOIL&WATER-15** and **SOIL&WATER-19** will ensure that the project's use of groundwater will not have an adverse impact on the Colorado River. Staff urges

the Committee to include those conditions, as modified in Exhibit 443, in the Presiding Member's proposed Decision.

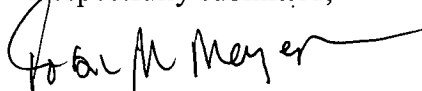
### CONCLUSION

The Genesis Project has not been without considerable issues, as the more than fifteen workshops and several rounds of last-minute negotiations make clear. It's been a complex process, with several agencies contributing their time and expertise to environmental review along with intensive efforts by staff. Nevertheless, the applicant also contributed to the process in significant ways; first by taking pains to site the plant to avoid as many biological and cultural resources as possible; by adjusting the design during the AFC process to again avoid additional specific impacts; by being willing to negotiate; and most importantly by consenting to use dry-cooling technology.

Staff stands by its findings of cumulative, unmitigable impacts in Land Use and Visual Resources, but also recommends that the Committee find overriding considerations to be valid, and to adopt an appropriate statement declaring those considerations outweigh the few unmitigable impacts. Lastly, staff recommends that the Committee adopt the Soil and Water Conditions of Certification and approve the feasible alternative of the project's use of dry-cooling technology.

Date: July 26, 2010

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