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Energy Resources Conservation
and Development Commission

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In the Matter of:

The Application for Certification for the
Genesis Solar Energy Project

Docket No. 09-AFC-8

CALIFORNIA UNIONS FOR RELIABLE ENERGY
OPENING BRIEF ON SCOPING ORDER

January 19, 2010

Tanya A. Gulesserian
Loulana A. Miles
Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
(650) 589-1660 Voice
(650) 589-5062 Facsimile
tgulesserian@adamsbroadwell.com

Attorneys for the CALIFORNIA UNIONS
FOR RELIABLE ENERGY

I. INTRODUCTION

California Unions for Reliable Energy (“CURE”) files this opening brief pursuant to the Committee’s January 7, 2010 Order Granting Genesis Solar, LLC’s Motion For Scoping Order, Hearing and Order Scheduling Time For Filing Briefs And Notice (“Order”). In that Order, the Committee directed the parties to file briefs responding to the following four questions:

1. What is the Commission’s Policy on use of water for power plant cooling purposes?
2. What is the legal affect of the US Bureau of Reclamation’s Accounting Surface Methodology on groundwater pumping in the Chuckwalla Valley Groundwater Basin?
3. What is the legal standard for including future projects in the cumulative impact analysis under the California Environmental Quality Act (“CEQA”) and the National Environmental Policy Act (“NEPA”)?
4. Does the Commission have a policy of conserving water for use by projects that are not yet identified?

The Commission’s policy on use of water for power plant cooling purposes is guided by CEQA, the Warren-Alquist Act, the California constitution, and numerous other laws, ordinances, regulations and standards regarding water use in California. Ultimately, the application of these policies to any particular project is highly fact dependent and is one of

the main functions of the data request, staff assessment and evidentiary hearing process.

Similarly, the legal affect of the U.S. Bureau of Reclamation's Accounting Surface Methodology on groundwater pumping in the Chuckwalla Valley Groundwater Basin is derived from the Commission's requirement to comply with CEQA and the Warren-Alquist Act. The Boulder Canyon Project Act and the Consolidated Decree of the U.S. Supreme Court in *Arizona v. California*, 547 U.S. 150 (2006), which constitute LORS, require that the Secretary of the Interior ensure that all use of Colorado River water is covered by an entitlement and is accurately accounted for in order to prevent unlawful use of the water. This accounting requirement includes accounting for underground pumping of water that is replaced by water drawn from the Colorado River, which is, according to the U.S. Bureau of Reclamation, the largest amount of water being unlawfully used from the lower Colorado River. Reclamation's accounting surface methodology is the current method for making this determination. Thus, if the Genesis proposal to pump groundwater in the Chuckwalla Valley Groundwater Basin for the Project would pump water that is replaced by water drawn from the Colorado River, then Reclamation's surface methodology on groundwater pumping would apply.

With respect to the legal standard for including future projects in the cumulative impact analysis under CEQA and NEPA, both statutes similarly

require an analysis of other closely related past, present, and reasonably foreseeable future projects regardless of what agency or person undertakes those projects. CEQA further refines the definition as including projects that are closely related and probable and provides that factors to consider include the nature of each environmental resource being examined, the location of the project and its type. Which projects constitute closely related, probable, future projects are questions of fact, as are the nature of the resources being examined, the location of the project, and its type.

Finally, the Commission's policy on conserving water for use by projects that are not yet identified is the same as its policy on conserving water for any future unidentified use or for future generations. The Commission is required to comply with its statutory responsibilities to conserve, protect, develop and maintain a high-quality environment, including its water resources, for the people of this state now and in the future.

II. DISCUSSION

1. The Commission's Policy On Use of Water for Power Plant Cooling Purposes

The Commission's statutory mandate and policy is to comply with CEQA and the Warren-Alquist Act. Under CEQA, the Commission must determine whether the use of water for power plant cooling purposes would result in significant direct, indirect or cumulative impacts.¹ If the

¹ Public Res. Code § 21100(b)(1), § 21083.

Commission identifies a significant impact associated with the use of water for power plant cooling, the Commission must require mitigation measures sufficient to minimize, reduce, or avoid the impact or to rectify or compensate for that impact.² The Commission’s analyses must be conducted in light of the Legislature’s intent to maintain “a quality environment for the people of this state now and in the future,”³ to “[d]evelop and maintain a high-quality environment now and in the future,”⁴ and to ensure the “long-term protection of the environment,”⁵ among others.⁶

The Warren-Alquist Act requires that the Commission determine the project’s conformity with other laws, ordinances, regulations and standards (“LORS”), among others. (Public Res. Code §§ 25523(d)(1); 25525.) The Warren-Alquist Act also sets forth the policy of the state and the intent of the legislature to “promote all feasible means of energy and water conservation and all feasible uses of alternative energy and water supply sources.” (Pub. Resources Code § 25008.)

Article X, section 2 of the California constitution, which constitutes LORS, prohibits the waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of water. The State Water Resources Control Board’s *Water Quality Control Policy on the Use and Disposal of*

² CEQA Guidelines, § 21002; § 21081; Cal. Code Reg. §15370.

³ Public Res. Code § 21000(a).

⁴ Public Res. Code § 21001(a).

⁵ Public Res. Code § 21001(d).

⁶ *See also* Cal. Code Reg. § 15065, § 15126.2;

Inland Waters Used for Powerplant Cooling (State Board Res. No. 75-58)

(“Policy 75-58” or “Policy”), which also constitutes LORS, was adopted to prevent violations of the State constitution. Policy 75-58 establishes that the “loss of inland waters through evaporation in powerplant cooling facilities may be considered an unreasonable use of inland waters when general shortages occur.”⁷ “Inland waters” is defined as “all waters within the territorial limits of California,” exclusive of the Pacific Ocean.⁸ Policy 75-58 prohibits the use of fresh inland waters for powerplant cooling unless other sources or other methods of cooling would be environmentally undesirable or economically unsound.⁹ Policy 75-58 requires that power plant cooling water should, in order of priority, come from wastewater being discharged to the ocean, ocean water, brackish water from natural sources or irrigation return flow, inland waste waters of low total dissolved solids, and other inland waters. “Fresh inland waters” are defined as “those inland waters which are suitable for use as a source of domestic, municipal, or agricultural water supply and which provide habitat for fish and wildlife.”¹⁰ Whether water is suitable for a particular purpose in any particular case is a question of fact.

California’s Waste Water Reuse Law,¹¹ which also constitutes LORS, precludes the use of potable domestic water for nonpotable uses if suitable

⁷ Policy at 3.

⁸ Policy at 2.

⁹ Policy at 4.

¹⁰ Policy at 2.

¹¹ Water Code, § 13550 et seq.

recycled water is available. In particular, section 13552.6 of the Water Code finds that the use of potable domestic water in cooling towers is a waste or unreasonable use of water if suitable recycled water is available. Whether water is potable in any particular case is a question of fact.

Finally, Water Code Section 13146 requires *all* state agencies, including the CEC, to comply with all State Board Water Quality Control Policies, including Resolution 75-58, “unless otherwise directed or authorized by statute.”

In 2003, to harmonize and clarify California’s water laws and policies, the California Energy Commission established a policy regarding the use of fresh water for power plant cooling. The Energy Commission’s 2003 Integrated Energy Policy Report states that the Commission will approve the use of fresh water for power plant cooling “only where alternative water supply sources and alternative cooling technologies are shown to be ‘environmentally undesirable’ or ‘economically unsound.’”¹² Again, the quality of the water in any particular case is a question of fact, and whether alternative cooling technologies are economically unsound is a question of fact that depends on an analysis of the project in question.

¹² 2003 Integrated Energy Policy Report, California Energy Commission, December 2003, Docket No. 02-IEP-1, Pub. No. 100-03-019, available at <http://www.energy.ca.gov/reports/100-03-019F.PDF>.

In sum, the Commission’s policies on the use of water for power plant cooling are clear. However, the *characterization* of water quality on a particular project site is not. Water quality is highly localized. Whether using any particular water source is “environmentally undesirable” depends on the specific environmental impacts of using particular water sources. Groundwater quality can vary within a region and even within a single project site. The issue is highly fact dependent and is one of the main functions of the data request, staff assessment and evidentiary hearing process.

In addition, whether alternative water supplies and alternative cooling technologies are “economically unsound” depend on the specific economics of each project. The cost of each alternative cooling option and the comparative cost of alternatives to the total cost of the project, among other relevant issues, are highly fact specific and have, in recent cases, been the source of data requests, staff assessments and workshops.

2. Legal Affect of the U.S. Bureau of Reclamation’s Accounting Surface Methodology on Groundwater Pumping in the Chuckwalla Valley Groundwater Basin

The Warren-Alquist Act requires that the Commission determine the project’s conformity with LORS and promote all feasible means of water conservation.¹³ (Public Res. Code §§ 25525, 25008.) The Boulder Canyon Project Act, which constitutes LORS, requires any user of the lower Colorado

¹³ Public Res. Code §§ 25525, 25008.

River water in the lower basin to have a contract with the U.S. Bureau of Reclamation.¹⁴ This requirement, which was confirmed in the Consolidated Decree of the U.S. Supreme Court in *Arizona v. California*, 547 U.S. 150 (2006), applies to all diversions from the Colorado River, including those made through wells that draw water from the Colorado River aquifer. The Consolidated Decree requires the Secretary of the Interior to provide detailed and accurate records of diversions, return flows, and consumptive use of water diverted from the mainstream of the lower Colorado River.¹⁵ In other words, the Secretary of the Interior must ensure that all use of Colorado River water is covered by an entitlement and is accurately accounted for in order to prevent unlawful use of the water.

According to Reclamation, the largest amount of water being unlawfully used from the lower Colorado River occurs via underground pumping for domestic and agricultural use from wells located on the floodplain.¹⁶ To enable Reclamation to properly account for the use of the lower Colorado River, and to ensure existing and future use is consistent with Federal Law, Reclamation developed procedures for making determinations of unlawful use of lower Colorado River water.¹⁷ The procedures include Reclamation's "Accounting Surface" methodology that the agency uses to

¹⁴ 43 U.S.C. § 617d.

¹⁵ Consolidated Decree, Section V.

¹⁶ See Bureau of Reclamation, Lower Colorado Region, Environmental Assessment (EA LC-08-002) for Regulating the Use of the Lower Colorado River Water without an Entitlement.

¹⁷ The draft rule was published in the Federal Register on July 16, 2008 (73 Fed. Reg. 40916).

determine which wells are pumping Colorado River water. According to Reclamation, well pumps subject to the methodology are those that pump water that originates from the Colorado River or pump water that may be replaced in the underlying aquifer by Colorado River water.¹⁸ The method to identify wells that pump water that is replaced by water drawn from the Colorado River relies on the “river aquifer” and an “accounting surface” within the river aquifer.¹⁹ The “river aquifer” extends outward from the Colorado River until encountering a geologic barrier to groundwater flow and encompasses the water bearing materials from which water can move to and from the lower Colorado River. The “accounting surface” was developed with a groundwater model and represents the elevation and extent of the river aquifer that is in hydraulic connection with the lower Colorado River.

The Warren-Alquist Act requires that the Commission determine the project’s conformity with LORS and promote all feasible means of water conservation.²⁰ This includes determining the Project’s conformity with all federal LORS, including the Boulder Canyon Project Act and the Consent Decree, as implemented by the Secretary of the Interior. The law set forth in the Boulder Canyon Project Act requires a contract to use Colorado River water and the standard set forth in the Consent Decree requires the Secretary of the Interior to provide complete, detailed, and accurate

¹⁸ *Id.*, p. 4.

¹⁹ *Id.*, p. 5.

²⁰ Public Res. Code §§ 25525, 25008.

accounting of diversions of water from the mainstream, return flow of such water to the stream, consumptive use of such water. Reclamation's accounting surface methodology is the current method for determining whether wells unlawfully pump water that is replaced by water drawn from the Colorado River.

If the Genesis proposal to pump groundwater in the Chuckwalla Valley Groundwater Basin for the Project would pump water that is replaced by water drawn from the Colorado River, then Reclamation's surface methodology on groundwater pumping would apply. The issue is highly fact dependent and is one of the main functions of the data request, staff assessment and evidentiary hearing process.

3. Legal Standard for Including Future Projects in the Cumulative Impact Analysis under CEQA and NEPA

The legal standard for including future projects in the cumulative impact analysis under CEQA and NEPA is set forth in those statutes and regulations. Under CEQA, a cumulative impact analysis must consider "other closely related past, present, and reasonably foreseeable probable future projects."²¹ Similarly, under NEPA, a cumulative impact analysis must consider "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."²²

²¹ 14 Cal. Code Regs. § 15355(b); *see also* Public Res. Code § 21083 (b)(2).

²² 40 C.F.R. §1508.7.

CEQA Guidelines section 15130(b)(1) provides agencies two separate methods for identifying past, present, and probable future projects.

The following elements are necessary to an adequate discussion of significant cumulative impacts:

(1) Either:

(A) A list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or

(B) A summary of projections contained in an adopted general plan or related planning document, or in a prior environmental document which has been adopted or certified, which described or evaluated regional or areawide conditions contributing to the cumulative impact. Any such planning document shall be referenced and made available to the public at a location specified by the lead agency.

(2) When utilizing a list, as suggested in paragraph (1) of subdivision (b), factors to consider when determining whether to include a related project should include the nature of each environmental resource being examined, the location of the project and its type. Location may be important, for example, when water quality impacts are at issue since projects outside the watershed would probably not contribute to a cumulative effect. Project type may be important, for example, when the impact is specialized, such as a particular air pollutant or mode of traffic.

(3) Lead agencies should define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used.

(4) A summary of the expected environmental effects to be produced by those projects with specific reference to additional information stating where that information is available, and

(5) A reasonable analysis of the cumulative impacts of the relevant projects. An EIR shall examine reasonable, feasible options for

mitigating or avoiding the project's contribution to any significant cumulative effects.²³

Potential probable future projects and the underlying facts regarding the nature of the resources being examined are questions of fact. To the extent that the application of these legal standards requires the application of facts, further refinement of which projects to include in a cumulative impact analysis is premature.

4. Commission Policy on Conserving Water for Use by Projects That Are Not Yet Identified

The Commission's policy on conserving water for use by projects that are not yet identified is the same as its policy on conserving water for any future unidentified use or for future generations. The Commission's statutory mandate and policy is to comply with CEQA and the Warren-Alquist Act. CEQA requires the Commission to determine whether the use of water for power plant cooling purposes would result in a significant impact. The Commission evaluates the potential impact in light of the Legislature's intent to maintain "a quality environment for the people of this state now and in the future,"²⁴ to "[d]evelop and maintain a high-quality environment now and in the future,"²⁵ and to ensure the "long-term protection of the environment,"²⁶ among others.²⁷

²³ 14 Cal. Code Regs. § 15130(b).

²⁴ Public Res. Code § 21000(a).

²⁵ Public Res. Code § 21001(a).

²⁶ Public Res. Code § 21001(d).

The Warren-Alquist Act requires that the Commission determine the project's conformity with LORS and promote all feasible means of water conservation and all feasible uses of alternative water supply sources.²⁸ The California constitution and numerous other state and federal LORS prohibit unreasonable use of water.

III. CONCLUSION

CURE appreciates the opportunity to brief these important water policies and looks forward to continuing to gather the facts necessary to apply the policies in this proceeding.

Dated: January 19, 2009

Respectfully submitted,

_____/s/_____
Tanya A. Gulesserian
Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
(650) 589-1660 Voice
(650) 589-5062 Facsimile
tgulesserian@adamsbroadwell.com

Attorneys for the CALIFORNIA
UNIONS FOR RELIABLE ENERGY

²⁷ See also Cal. Code Reg. § 15065, § 15126.2;

²⁸ Public Res. Code §§ 25008, 25525.

Declaration of Service

I Bonnie Heeley declare that on January 19, 2010, I served and filed copies of the attached **CALIFORNIA UNIONS FOR RELIABLE ENERGY OPENING BRIEF ON SCOPING ORDER** dated January 19, 2010. The original document, filed with the Docket Office, 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 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 Office via email and U.S. mail.

I declare under penalty of perjury that the foregoing is true and correct.
Executed at South San Francisco, CA on January 19, 2010.

_____/s/_____
Bonnie Heeley

CALIFORNIA ENERGY COMMISSION Attn: Docket No. 09-AFC-8 1516 Ninth Street MS 4 Sacramento, CA 95814-5512 docket@energy.state.ca.us	Ryan O'Keefe, Vice President Genesis Solar LLC 700 Universe Boulevard Juno Beach, Florida 33408 Ryan.okeefe@nexteraenergy.com	Scott Busa/Project Director Meg Russell/Project Manager Duane McCloud/Lead Engineer NextEra Energy 700 Universe Boulevard Juno Beach, FL 33409 Scott.busa@nexteraenergy.com Meg.Russell@nexteraenergy.com Daune.mccloud@nexteraenergy.com
Mike Pappalardo Permitting Manager 3368 Videra Drive Eugene, OR 97405 Mike.pappalardo@nexteraenergy.com	Diane Fellman/Director West Region Regulatory Affairs 234 Van Ness Avenue San Francisco, CA 94102 Diane.fellman@nexteraenergy.com	Tricia Bernhardt/Project Manager Tetra Tech, EC 143 Union Boulevard, Suite 1010 Lakewood, CO 80228 Tricia.bernhardt@tteci.com
Christo Nitoff/Project Engineer Worly Parsons 2330 E. Bidwell St., Ste 150 Folsom, CA 95630 Christo.Nitoff@worleyparsons.com	Scott Galati Galati & Blek, LLP 455 Capitol Mall, Suite 350 Sacramento, CA 95814 sgalati@gb-llp.com	California ISO e-recipient@caiso.com VIA EMAIL ONLY

Allison Shaffer/Project Mgr. Bureau of Land Management Palm Springs South Coast Field Office 1201 Bird Center Drive Palm Springs, CA 92262 Allison Shaffer@blm.gov	Julia Levin Commissioner/Presiding Member California Energy Commission 1516 Ninth Street Sacramento, CA 95814 jlevin@energy.state.ca.us	James D. Boyd Vice Chair/Presiding Member California Energy Commission 1516 Ninth Street Sacramento, CA 95814 jboyd@energy.state.ca.us
Kenneth Celli, Hearing Officer California Energy Commission 1516 Ninth Street Sacramento, CA 95814 kcelli@energy.state.ca.us	Mike Monasmith Siting Project Manager California Energy Commission 1516 Ninth Street Sacramento, CA 95814 mmonasmi@energy.state.ca.us	Caryn Holmes, Staff Counsel California Energy Commission 1516 Ninth Street Sacramento, CA 95814 cholmes@energy.state.ca.us
Robin Mayer, Staff Counsel California Energy Commission 1516 Ninth Street Sacramento, CA 95814 rmayer@energy.state.ca.us	Public Adviser's Office California Energy Commission 1516 Ninth Street Sacramento, CA 95814 publicadviser@energy.state.ca.us	Tanya A. Gulesserian Marc D. Joseph Loulana A. Miles Adams Broadwell Joseph & Cardozo 601 Gateway Boulevard, Suite 1000 South San Francisco, CA 94080 tgulesserian@adamsbroadwell.com lmiles@adamsbroadwell.com
Michael E. Boyd, President Californians for Renewable Energy, Inc. (CARE) 5439 Soquel Drive Soquel, CA 95073-2659 michaelboyd@sbcglobal.net	Alfredo Figueroa 424 North Carlton Blythe, CA 92225 LaCunaDeAtzlan@aol.com	