

STATE OF CALIFORNIA
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
REPLY BRIEF ON SCOPING ORDER**

January 22, 2010

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I. INTRODUCTION

California Unions for Reliable Energy (“CURE”) strongly urges the Committee not to adopt the language proposed by Genesis Solar, LLC in its brief in support of a scoping order in this proceeding. Genesis’ requests are thinly veiled attempts to characterize multi-faceted and highly-factual issues as simple legal issues. Genesis’ requests combine conclusions regarding highly-factual issues with complex legal principles, such that a Committee order adopting Genesis’ proposed statements would, in effect, resolve issues that need to be evaluated based on testimony and evidentiary hearings. Genesis’ requests are, in some cases, not based on any briefing or citations to any authority. Finally, Genesis’ proposed legal conclusions are live, contested issues in *other* Energy Commission proceedings which involve different facts, different Committee members and different parties who have not been provided notice of the Scoping Order in this proceeding.

The Committee should seriously scrutinize the questions posed in its Scoping Order and examine how the questions posed relate to both highly-factual issues and complex legal principles that will have long-term ramifications on the state’s precious environmental resources and on the state’s economic well-being for future generations. When modestly priced measures are available to reduce consumption of water and preserve water for other economic uses, the Committee needs to think long and hard before saying these measures need not be employed.

California is in the midst of a water crisis. In 2009, the Governor called a special session of the Legislature to address this water crisis. As a result, a

comprehensive plan was devised to ensure a reliable water supply for future generations. The Legislature adopted four bills and proposed an \$11.14 billion bond to address the water crisis. Yet, one would never know by reading Genesis' brief that our state was in the midst of this crisis. California's water issues are not narrow technical questions; how water is defined, how uses are defined, how much water exists, how water basins operate, and how state policies are applied, among numerous other questions, are *critical*.

Genesis' attempt to narrowly construe important public policies which are designed to preserve water in the state is fundamentally at odds with the direction state water policy must go and is going. That is the context in which the questions in the Scoping Order must be answered.

II. DISCUSSION

In the Scoping Order, the Committee stated that it "cannot and will not resolve questions of fact until evidentiary hearings," but that it can fashion an Order that articulates "law and policies at a sufficiently general level that would avoid application of law or policy to the facts of this case."¹ However, throughout Genesis' brief, Genesis proposes that the Committee issue an Order setting forth statements that are clearly not limited to law and policies. These purported "statements of law" are inaccurate, overbroad and would resolve questions of fact that the Committee agreed are not proper for resolution until evidentiary hearings

¹ Scoping Order at 2.

are convened. For the purposes of this rebuttal brief, CURE will refer to Genesis' proposed findings as "statements of law" and respond accordingly.

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

Genesis proposes that the Committee issue an Order directing Staff to apply the Energy Commission's 2003 Integrated Energy Policy Report water policy ("2003 IEPR Water Policy") in the following manner:

1. The 2003 IEPR Water Policy is consistent with Board Policy and therefore there is no reason for Staff to wait or require consultation with the Board.
2. With respect to the quality of water that may be used for Power Plant Cooling Purposes, Fresh Water is defined as any water that has a TDS less than 1000 mg/L.
3. The 2003 IEPR Water Policy is only applicable to Fresh Water used for Power Plant Cooling Purposes and not other uses including but not limited to construction, dust suppression, process water, and steam cycle make-up.
4. A project that is not using Fresh Water for Power Plant Cooling Purposes complies with the 2003 IEPR and Board Policies.
5. If a Project complies with the 2003 IEPR and Board Policies, there is no reason for the Commission Staff to evaluate other cooling methods or other water supplies unless there are unmitigable significant impacts identified under the California Environmental Quality Act ("CEQA") associated with the use of groundwater.

Genesis' proposed statements of law should be wholly rejected.

First, the Committee should reject Genesis' proposed statement of law that "the 2003 IEPR Water Policy is consistent with Board Policy and therefore there is no reason for Staff to wait or require consultation with the Board." While the Committee may find that the 2003 IEPR Water Policy is consistent with Board

Policy, the Committee cannot find that “therefore there is no reason for Staff to wait or require consultation with the Board.” As a preliminary matter, Genesis’ proposed language is not an articulation of law and certainly should not be an articulation of Commission policy. If the 2003 IEPR Water Policy is consistent with Board Policy, then the Commission and Staff must be permitted to consult with the Board to ensure consistency in the *application* of those policies. Moreover, Genesis’ proposed statement is illegal under CEQA. One of the fundamental principles of CEQA is that lead agencies not conduct environmental review in a vacuum but, instead, consult with all responsible agencies, trustee agencies, and public agencies that have jurisdiction with respect to the proposed activity.² Genesis’ first proposed statement of law should be rejected.

Second, the Committee should reject Genesis’ proposed statement of law that “with respect to the quality of water that may be used for Power Plant Cooling Purposes, Fresh Water is defined as any water that has a TDS less than 1000 mg/L.” The State Board’s *Water Quality Control Policy on the Use and Disposal of Inland Waters Used for Powerplant Cooling* (State Board Res. No. 75-58) (“Policy 75-58”) contains two definitions, neither of which are the same as Genesis’ proposed new definition for “fresh water.” Policy 75-58 defines “fresh inland waters” 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.”³ Policy 75-58 defines “brackish waters” as “includ[ing] all waters with a salinity

² See, *i.e.*, Pub. Res. Code § 21080.3, 21080.1, 21080.5(d)(2)(C), 21104; Cal. Code Regs. § 15006(g), (i), (k), 15022.

³ Policy 75-58 at 2.

range of 1,000 to 30,000 mg/l and a chloride concentration range of 250 to 12,000 mg/l.”⁴ Genesis leaps to the conclusion that the definition of brackish means any water that has a TDS less than 1000 mg/L *without citing any authority and without providing any scientific documentation* regarding this extremely important factual issue.⁵ And this *is* a critical factual issue. Is water with a *salinity* range below 1,000 to 30,000 mg/L the same as water that has a *TDS* less than 1000 mg/L? Is water with a *chloride* concentration range of 250 to 12,000 mg/L the same as water that has a *TDS* less than 1000 mg/L? When the two are combined, i.e. water with a salinity range below 1,000 to 30,000 mg/L and a chloride concentration range of 250 to 12,000 mg/L, is that water the same as water that has a TDS less than 1000 mg/L? This is *exactly* the type of issue that warrants scientific evidence, input from other agencies and hearings. It certainly is not a mere *legal* conclusion that “Fresh Water is defined as any water that has a TDS less than 1000 mg/L.”

Furthermore, the State Board explained in a January 20, 2010 letter to the Executive Director of the Energy Commission that groundwater is regulated by State Board’s *Adoption of Policy Entitled “Sources of Drinking Water”* (State Board Res. No. 88-63) (“Policy 88-63”).⁶ According to Policy 88-63, “[a]ll surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply...”⁷ The relevant exception is where the water

⁴ Policy 75-58 at 2.

⁵ Genesis Brief at 4 and 9.

⁶ Attachment A.

⁷ Policy 88-63 at 1.

has a TDS exceeding 3,000 mg/L (5,000 uS/cm, electrical conductivity) and the water is not reasonably expected by regional boards to supply a public water system.⁸ Again, this is a question of fact that warrants scientific evidence, input from other agencies and hearings.

Third, the Committee should reject Genesis' proposed statement of law that "the 2003 IEPR Water Policy is only applicable to Fresh Water used for Power Plant Cooling Purposes and not other uses including but not limited to construction, dust suppression, process water, and steam cycle make-up." Genesis cites *no authority* for its one sentence argument in its brief that the policy does not apply to these power plant uses.⁹ After extensive briefing, hearings and deliberations in the 2003 IEPR, the Commission did not include a definition of "use," a definition of "cooling," or a definition of "purposes" in the 2003 IEPR. In the 2003 IEPR, the Commission also did not include exclusions from its policy. Genesis' proposed terms, i.e. "process water" and "steam cycle make-up," are similarly imprecise and undefined. Thus, any further refinement of the Commission's 2003 IEPR Water Policy must be based on clear definitions that are made known to the public and vetted through a public process before the full Commission. Alternatively, the Commission could seek clarification from the State Board which ultimately sets water policy in the state.

Fourth, the Commission should reject Genesis' proposed statement of law that a "project that is not using Fresh Water for Power Plant Cooling Purposes complies with the 2003 IEPR and Board Policies." Genesis' proposal is dramatically

⁸ Policy 88-63 at 2.

⁹ Genesis Brief at 8.

overbroad. The 2003 IEPR is a lengthy document containing numerous policies, some of which may apply in any given case. The Power Plant Water Use and Waste Water Discharge section of the 2003 IEPR itself sets forth several principles, some of which have not been briefed. No determination can be made at this time that a project that is not using fresh water for power plant cooling purposes necessarily does or does not comply with all of these principles. Similarly, “Board Policies” are numerous and complex and have not all been briefed. Compliance with such “Board Policies” must be evaluated on a case by case basis by the State Board and by the Commission, not by this Committee in this particular proceeding only.

Fifth, the Commission should reject Genesis’ proposed statement of law that “if a Project complies with the 2003 IEPR and Board Policies, there is no reason for the Commission Staff to evaluate other cooling methods or other water supplies unless there are unmitigable significant impacts identified under the California Environmental Quality Act (‘CEQA’) associated with the use of groundwater.” Genesis’ statement violates CEQA. CEQA Guidelines Section 15126.6 explains that the Commission is required to analyze alternatives, like mitigation measures, that would avoid or lessen a significant impact. Genesis improperly attempts to create a hierarchy of analysis under CEQA where none exists. Specifically, Genesis attempts to restrict the Commission’s consideration of alternatives, a.k.a. other cooling methods or other water supplies, to only those situations where a significant impact cannot otherwise be mitigated. CEQA prohibits this approach.

CEQA Guidelines Section 15126.6 requires the Commission to consider alternatives when a project would result in a significant impact. The alternatives analysis is not disposed of if a significant impact can be mitigated, as suggested by Genesis. Instead, CEQA requires an analysis as follows:

(a) Alternatives to the Proposed Project. An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives....

(b) Purpose. Because an EIR must identify ways to mitigate or avoid the significant effects that a project may have on the environment (Public Resources Code Section 21002.1), the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.

(c) Selection of a range of reasonable alternatives. The range of potential alternatives to the proposed project shall include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects....¹⁰

Thus, Genesis' effort to summarily preclude evaluating other cooling methods or other water supplies unless there are unmitigable significant impacts directly contradicts CEQA. An evaluation of other cooling methods or other water supplies is precisely what is required when a proposed project may result in a potentially significant impact under CEQA.

¹⁰ Cal. Code Regs. §15126.6(a)-(c).

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

Genesis proposes that the Committee issue an Order directing Staff as follows:

1. The Accounting Surface Methodology is not an applicable LORS and therefore should not be applied to the GSEP’s use of groundwater.
2. Because the Accounting Surface Methodology is not a LORS applicable to the GSEP, Staff need not obtain evidence or correspondence from the Bureau to complete its analysis.
3. Since the Accounting Surface Methodology is not applicable to the GSEP’s use of groundwater, it should not be used as a threshold for determining significant direct, indirect or cumulative impacts under CEQA or NEPA.

Genesis’ proposed statements of law should be wholly rejected.

First, the Committee should reject Genesis proposed statement of law that the “Accounting Surface Methodology is not an applicable LORS and therefore should not be applied to the GSEP’s use of groundwater.” Whether or not the Accounting Surface Methodology constitutes LORS under the Warren-Alquist Act, the Commission must determine whether the Genesis Project complies with the Boulder Canyon Project Act and the Consolidated Decree of the U.S. Supreme Court in *Arizona v. California*, 547 U.S. 150 (2006), such that the Project would not be unlawfully using Colorado River water through the Project’s groundwater pumping. The Commission must also determine whether the Project’s groundwater pumping would result in a potentially significant impact on Colorado River water under CEQA.

The Accounting Surface Methodology is Reclamation's current method for determining unlawful use and would be available for the Commission to determine whether a significant impact exists. Whether this methodology is the best method for making these determinations is squarely a question of fact. A Committee finding that the Accounting Surface Methodology should not be applied to the GSEP's use of groundwater would take away a tool for conducting the required analysis in this proceeding; a tool that Reclamation developed based on years of experience in analyzing this issue and that the agency currently uses to conduct its evaluation. A Committee finding that the Accounting Surface Methodology should not be applied to the GSEP's use of groundwater would only make the Commission's decision making more difficult. Staff would be required to come up with a new tool, presumably in a matter of weeks, in order to process Genesis' application and then apply the new tool to determine impacts and compliance with LORS in presumably even less time in order keep this proceeding on schedule.

Second, the Committee should reject Genesis' proposed statement of law that "because the Accounting Surface Methodology is not a LORS applicable to the GSEP, Staff need not obtain evidence or correspondence from the Bureau to complete its analysis." As a preliminary matter, like Genesis' proposal that Staff need not consult with the State Board, Genesis' proposal that Staff need not obtain evidence or correspondence from the Bureau of Reclamation is not an articulation of law and certainly should not be an articulation of Commission policy. The

Commission and Staff must be permitted to consult with Reclamation to determine consistency with federal LORS.

Moreover, Genesis' proposed statement is illegal under CEQA. One of CEQA's fundamental principles is that lead agencies not conduct environmental review in a vacuum but, instead, consult with all responsible agencies, trustee agencies, and public agencies that have jurisdiction with respect to the proposed activity.¹¹ A Committee order directing Staff not to obtain evidence or correspondence from the Bureau to complete its analysis would cripple the agency's ability to do its job.

Third, the Commission should reject Genesis' proposed statement of law that "since the Accounting Surface Methodology is not applicable to the GSEP's use of groundwater, it should not be used as a threshold for determining significant direct, indirect or cumulative impacts under CEQA or NEPA." Again, Genesis is making the Commission's work more difficult than it is already. A Committee finding that the Accounting Surface Methodology should not be used as a threshold for determining significant impacts under CEQA would only make the Commission's decision making more difficult and even more time-consuming. Staff would be required to come up with a new tool – quickly – in order to process Genesis' application and then apply the new tool to determine impacts and compliance with LORS in order keep this proceeding on schedule. The Committee should not cripple

¹¹ See, *i.e.*, Pub. Res. Code § 21080.3, 21080.1, 21080.5(d)(2)(C), 21104; Cal. Code Regs. § 15006(g), (i), (k), 15022.

Staff or the Commission by taking away a tool for determining compliance with LORS and for analyzing impacts under CEQA.

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

Genesis improperly contends that both CEQA and NEPA require that for a Project to be considered in a cumulative impact analysis under CEQA, it must have filed an application to a lead agency that has been deemed complete and environmental review must have begun. However, CEQA, NEPA, and BLM's Handbook do not use such a restrictive legal definition. Instead, the statutes and agency policies set forth varied indicia for making a factual determination regarding which projects to include in a cumulative impact analysis.

In an effort to circumvent Staff applying the law to the facts, Genesis proposes that the parties adopt what it claims is a "stipulation of the legal standard for evaluating significant impacts."¹² However, Genesis asks for a stipulation that would apply the legal and policy standards to the *facts* in this case.

Determining which projects to include in cumulative impact analyses under CEQA and NEPA is a question of fact. As acknowledged by Genesis' citations to case law, the issue of what projects to include in a cumulative impact analysis is one that has been the subject of litigation in the state and federal courts for decades. CURE cannot agree to, and the Commission cannot sanction, any stipulation regarding the facts until it has completed its collection and evaluation of data on which other projects are "closely related...reasonably foreseeable probable future

¹² Genesis Brief at 15-16.

projects,”¹³ “reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions,”¹⁴ and for each of those projects, “the nature of each environmental resource being examined, the location of the project and its type,”¹⁵ taking into consideration the “geographic scope of the area affected by the cumulative effect...”¹⁶

As Genesis points out in its brief, the Commission must also consider reasonably foreseeable future actions “for which there are existing decisions, funding, formal proposals, or which are highly probably, based on known opportunities or trends,” as set forth in BLM’s Handbook. Thus, CURE and the Commission must evaluate BLM’s planning documents for the area around the proposed Genesis project as a concentrated spot for solar development, including documents developed in the Solar Energy Programmatic Development EIS planning process, and the Desert Area Renewable Action Plan, among other state and federal plans. Projects that may be included in a cumulative impact analysis include a number of photovoltaic projects that are planned for the immediate area that will not be before the Energy Commission and projects where no application has been filed, but power purchase agreements have been executed, to name a few – all questions of fact.

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

¹⁴ 40 C.F.R. §1508.7.

¹⁵ Cal. Code Regs. § 15130(b)(2).

¹⁶ Cal. Code Regs. § 15130(b)(3).

To limit the scope of projects that should be included in the cumulative impact analysis at this time would be premature and improper.

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

Genesis requests that the Committee order Staff to (1) refrain from analyzing whether the Project should not use groundwater for cooling because it would interfere with future energy development along the I-10 corridor and (2) “strictly evaluate the [Project] by limiting consideration of future development to those projects that would qualify under the legally established principles articulated [by Genesis] for inclusion in a cumulative impact analysis under NEPA and CEQA.”¹⁷ Genesis’ request should be denied.

Genesis admits that energy infrastructure planning rests with the California Energy Commission, the California Public Utilities Commission (“CPUC”), the utilities and the California Independent Systems Operator (“ISO”). In fact, the Commission’s Renewable Energy Transmission Initiative (“RETI”) process, the ISO Transmission Planning Process, and the CPUC’s transmission planning process all identify the Genesis Project area as a major growth area for solar development. Despite this major planning, Genesis requests that the Committee order Staff to stick its head in the sand.

¹⁷ Genesis Brief at 16.

The Commission has a responsibility to stay informed about energy infrastructure planning, and the Staff's responsibility is to keep the Commission informed consistent with the Commission's statutory mandates. Staff cannot be isolated from the Commission's responsibilities; Staff exists to provide the Commission with recommendations.

Moreover, the issue presented by the Committee in the Scoping Order is the Commission's policy on conserving water for use by projects that are not yet identified. In that regard, Genesis disregards the Commission's statutory mandate 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.¹⁸ Requiring the Staff to stick its head in the sand on these issues is not consistent with state law, policy or common sense.

III. CONCLUSION

CURE respectfully requests that the Committee reject Genesis' proposed statements of law as thinly veiled conclusions of fact, as lacking in evidentiary support, as inconsistent with state law, as hindering the data gathering phase of this proceeding, and as impeding the state's effort to process its application. CURE

¹⁸ Public Res. Code § 21000(a), 21001(a), (d); Cal. Code Reg. § 15065, § 15126.2; Public Res. Code §§ 25008, 25525; California Constitution, Art. X, Sec. 2.

urges the Committee to direct Staff to continue gathering the facts necessary to apply the policies in this proceeding forthwith.

Dated: January 22, 2009

Respectfully submitted,

/s/

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Arnold Schwarzenegger
Governor

January 20, 2010

Ms. Melissa Jones
Executive Director
California Energy Commission
1516 Ninth Street
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Dear Ms. Jones:

STATE POLICIES FOR WATER QUALITY CONTROL AND THEIR APPLICABILITY TO POWER PLANT LICENSING

Thank you for your letter of November 23, 2009, in which you seek the State Water Resources Control Board's (State Water Board) assistance with applications for renewable energy projects currently pending before the California Energy Commission (Commission). As these projects would develop new sources of renewable energy and qualify for federal financial assistance, the Governor's Office and the Commission have placed a high priority on their timely review. To that end, I will ensure that State Water Board management staff is available to consult with Commission staff on water supply issues for these projects as needed.

State Water Board management staff will also coordinate with the management staff at the affected regional water quality control boards (regional water boards) on water quality issues to help ensure that the affected regional water boards continue to timely process the applicants' reports of waste discharge. In addition, my staff is available to discuss other methods for streamlining the Commission's review of these projects, including ensuring consistent approaches for regional water boards' adoption of waste discharge requirements, assessing appropriate waste discharge fees for regional water board oversight activities, and coordinating monitoring, inspection, and enforcement activities.

You have asked whether State Water Board policies support the use of supply water with a total dissolved solids (TDS) range of 1,000 to 3,000 mg/l for these projects, and, if so, which factors should be considered by the Commission in determining whether the use of such waters should be allowed for each project. State policy for water quality control does allow, under some circumstances, the use of supply water with TDS ranging from 1,000 to 3,000 mg/l to supply renewable energy projects. As discussed in greater detail below, the State Water Board's policies and state law identify multiple factors that should be considered when evaluating alternate sources of supply water for these projects.

Your questions relate to the interaction between certain provisions of State Water Board Resolution 75-58 ("Water Quality Control Policy on the Use and Disposal of Inland Waters Used for Powerplant Cooling") and State Water Board Resolution 88-63 ("Sources of Drinking

California Environmental Protection Agency

Water"). As official state policies for water quality control, State Water Board Resolutions 75-58 and 88-63 are binding on all state agencies unless the Legislature provides otherwise. (Wat. Code, § 13146.)

When it adopted State Water Board Resolution 75-58 in 1975, the State Water Board recognized that new power plants were being considered for non-coastal sites, and expressed a concern about the limited availability of inland waters for powerplant cooling. The board stated that Resolution 75-58's purpose is to "provide consistent statewide water quality principles and guidance for adoption of waste discharge requirements, and implementation actions for powerplants which depend upon inland waters for cooling." (State Water Board Resolution 75-58, p.1.) Further, the board anticipated that the policy "should be particularly useful in guiding planning of new power generating facilities so as to protect beneficial uses of the State's water resources and to keep the consumptive use of freshwater for powerplant cooling to that minimally essential for the welfare of the citizens of the State." (*Ibid.*)

The provisions in Resolution 75-58 that are most relevant to your questions about sources of water for the pending renewable energy projects are the following three "Principles:"

1. It is the Board's position that from a water quantity and quality standpoint the source of powerplant cooling water should come from the following sources in this order of priority depending on site specifics such as environmental, technical and economic feasibility consideration: (1) wastewater being discharged to the ocean, (2) ocean, (3) brackish water from natural sources or irrigation return flow, (4) inland wastewaters of low TDS, and (5) other inland waters.
2. Where the Board has jurisdiction, use of fresh inland waters for powerplant cooling will be approved by the Board only when it is demonstrated that the use of other water supply sources or other methods of cooling would be environmentally undesirable or economically unsound.
7. The State Board encourages water supply agencies and power generating utilities and agencies to study the feasibility of using wastewater for powerplant cooling. The State Board encourages the use of wastewater for powerplant cooling where it is appropriate. Furthermore, Section 25601(d) of the Warren-Alquist Energy Resources Conservation and Development Act directs the Commission to study, "expanded use of wastewater as cooling water and other advances in powerplant cooling" and Section 462 of the Waste Water Reuse Law directs the Department of Water Resources to "...conduct studies and investigations on the availability and quality of waste water and uses of reclaimed waste water for beneficial purposes including, but not limited to... and cooling for thermal electric powerplants."

(State Water Board Resolution 75-58, pp. 4-5.)

In State Water Board Resolution 88-63, the board determined that, with specified categorical exceptions, "[a]ll surface and ground waters of the State are considered to be suitable, or

potentially suitable, for municipal or domestic water supply” (State Water Board Resolution 88-63, p. 1.) The relevant categorical exceptions is where the water has TDS exceeding 3,000 mg/L and the water is not reasonably expected by regional boards to supply a public water system. (*Ibid.*)

More specifically, your questions relate to Resolution 75-58’s definitions of “brackish waters” and “fresh inland waters” and Resolution 88-63’s treatment of “sources of drinking water.” “Brackish waters” is defined by Resolution 75-58 as “waters with a salinity range of 1,000 to 30,000 mg/L and a chloride range of 250 to 12,000 mg/l.” (State Water Board Resolution 75-58, p. 2.) “Fresh inland waters” is defined by Resolution 75-58 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.” (*Ibid.*) As a general matter, that means “fresh inland waters” for purposes of Resolution 75-58 does not extend to groundwater, which typically does not provide fish or wildlife habitat. On the other hand, State Water Board Resolution 88-63 generally provides that all surface waters and ground waters with a TDS of 3,000 mg/L or less shall be considered to be suitable for municipal or domestic water supply.

The Commission’s primary issue revolves around whether brackish waters with a TDS of between 1,000 and 3,000 mg/L should be considered to be fresh inland waters in the context of Resolution 75-58’s Principle No. 2. The answer is typically yes for surface waters and no for ground waters. Due to the State Water Board’s subsequent adoption of Resolution 88-63, which establishes the threshold of 3,000 mg/L TDS for suitability, or potential suitability, for domestic or municipal water supply, surface waters that support fish and wildlife habitat and have TDS concentrations of 3,000 mg/L or less should be considered to be “fresh inland waters” for the purposes of Resolution 75-58’s Principle No. 2. As a result, such waters should only be used for these renewable energy projects upon a demonstration that the use of other water supplies or other methods of cooling would be “environmentally undesirable” or “economically unsound.” With respect to ground waters, they would not be considered “fresh inland waters” because they do not provide habitat for fish and wildlife.

Neither “environmentally undesirable” nor “economically unsound” is defined in Resolution 75-58. It appears that the State Water Board has not had occasion to formally interpret or apply either phrase since it adopted Resolution 75-58. If recycled water is available, and its use would not cause greater significant adverse effects on the environment than the use of fresh inland waters would cause, then it is unlikely that the State Water Board would find that the use of the recycled water is “environmentally undesirable.” Water Code section 13550, which was enacted in 1977, helps to inform how the phrase “economically unsound” should be applied. Section 13550 contains a legislative declaration that the use of potable¹ domestic water for nonpotable uses, including industrial use, is a waste or unreasonable use of the water if the State Water Board determines that, among other things, recycled water of an adequate quality is available at a cost that is comparable to, or less than, the cost of supplying the potable water. Therefore, if recycled water is available for these projects at roughly the same or lower cost, then the use of fresh inland waters should clearly be considered to be “economically unsound.”

In its 2003 Integrated Energy Policy Report, the Commission stated that it interprets “economically unsound” in this context as “economically or otherwise infeasible.” To the extent

¹ “Potable water” in Water Code section 13550 refers to both surface water and ground water.

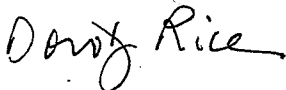
that the Commission determines that it is appropriate to require project applicants to incur substantially increased, but economically feasible, costs in order to use recycled water in lieu of fresh inland waters, such a result would not be compelled by the terms of Water Code section 13550. As the State Water Board has not yet defined "economically unsound," it is not possible to determine whether such a result would be required by Principle No. 2 of Resolution 75-58. Nonetheless, it would be consistent with Principle No. 7 of Resolution 75-58, which encourages the use of recycled water for powerplant cooling.

As you point out, Principle No. 1 of Resolution 75-58 lists brackish water as generally a higher priority for powerplant cooling than inland wastewaters of low TDS and other inland waters. This priority scheme is, however, explicitly dependent on site-specific considerations, including environmental considerations. One of the underlying bases for Resolution 75-58 is that "[t]he loss of inland waters through evaporation in powerplant cooling facilities may be considered an unreasonable use of inland waters when general shortages occur." (State Water Board Resolution 75-58, p. 3, Basis 4.) Thus, in a water short area with available recycled water, site-specific environmental considerations may dictate that the use of recycled water should take precedence over the use of brackish water.

Finally, the State Water Board understands that the Commission and other state and federal agencies are working on a longer-term plan for future renewable energy projects. The State Water Board would welcome the opportunity to assist with such a planning effort by identifying the existing and anticipated future sources of recycled water that may be available for future energy projects. Such a mapping approach may be used by the Commission and potential project applicants in siting future power plants in closer proximity to such sources of recycled water, thereby minimizing additional demands on the state's limited potable water supplies.

I hope that this answers the questions you have posed. Please do not hesitate to contact Jonathan Bishop, State Water Board Chief Deputy Director, at (916) 341-5820 to discuss these or any other issues.

Sincerely,



Dorothy Rice
Executive Director

Declaration of Service

I Bonnie Heeley declare that on January 22, 2010, I served and filed copies of the attached **CALIFORNIA UNIONS FOR RELIABLE ENERGY REPLY BRIEF ON SCOPING ORDER** dated January 22, 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 22, 2010.

_____/s/_____
 Bonnie Heeley

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