

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062
rkoss@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

DOCKET
09-AFC-8

DATE MAY 13 2010

RECD. MAY 13 2010

DANIEL L. CARDOZO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
JASON W. HOLDER
MARC D. JOSEPH
ELIZABETH KLEBANER
RACHAEL E. KOSS
LOULENA A. MILES
ROBYN C. PURCHIA

FELLOW
AARON G. EZROJ

OF COUNSEL
THOMAS R. ADAMS
ANN BROADWELL
GLORIA D. SMITH

May 13, 2010

California Energy Commission
Attn Docket No. 09-AFC-8
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: Genesis Solar Energy Project; 09-AFC-8

Dear Docket Clerk:

Enclosed are an original and one copy of **Comments of the California Unions for Reliable Energy on Staff Assessment/Draft Environmental Impact Statement**. Please docket the original, conform the copy and return the copy in the envelope provided.

Thank you for your assistance.

Sincerely,

/s/

Rachael E. Koss

REK:bh
Enclosures

2364-058a

COMMENTS
of the
CALIFORNIA UNIONS FOR RELIABLE ENERGY
on
Staff Assessment/Draft Environmental Impact Statement
Genesis Solar Energy Project
Application for Certification (09-AFC-8)

May 13, 2010

Tanya A. Gulesserian
Rachael E. Koss
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
T: 650/589-1660 F: 650/589-5062
tgulesserian@adamsbroadwell.com
rkoss@adamsbroadwell.com

Attorneys for California Unions for
Reliable Energy

TABLE OF CONTENTS

I.	THE SA/DEIS MUST BE REVISED AND RECIRCULATED FOR PUBLIC COMMENT	1
II.	THE SA/DEIS MUST PROVIDE SUFFICIENT DETAIL TO ANALYZE THE PROJECT'S IMPACTS	4
III.	THE SA/DEIS MUST ESTABLISH AN ACCURATE ENVIRONMENTAL SETTING.....	9
A.	The SA/DEIS Fails to Set Forth the Baseline for Rare Plants.....	10
B.	The SA/DEIS Fails to Set Forth a Baseline for Golden Eagles.....	10
C.	The SA/DEIS Fails to Set Forth the Baseline for Couch's Spadefoot Toad	11
IV.	THE SA/DEIS MUST DISCLOSE AND ANALYZE ALL POTENTIALLY SIGNIFICANT IMPACTS.....	12
A.	The SA/DEIS Must Disclose and Analyze All Potentially Significant Impacts to Biological Resources	13
B.	The SA/DEIS Must Disclose and Analyze All Potentially Significant Impacts to Cultural Resources	14
C.	The SA/DEIS Must Disclose and Analyze All Potentially Significant Impacts to Water Resources	15
D.	The SA/DEIS Must Disclose and Analyze All Potentially Significant Impacts Associated with New Roads.....	16
E.	The SA/DEIS Must Disclose and Analyze All Potentially Significant Impacts Associated with Transmission System Engineering	17
V.	THE SA/DEIS MUST INCORPORATE EFFECTIVE MEASURES TO MITIGATE ENVIRONMENTAL IMPACTS TO LESS THAN SIGNIFICANT	17
A.	Mitigation Measures for Impacts to Biological Resources Are Deferred	18

B.	Mitigation Measures for Impacts to Biological Resources May Not Be Feasible	20
C.	Mitigation Measures for Impacts to Biological Resources Are Vague and Uncertain	22
D.	The Mitigation Measures for Impacts from Heat Transfer Fluid Are Vague and Uncertain	25
E.	Mitigation Measures for Impacts to Water Resources Are Deferred	25
F.	Mitigation Measures for Impacts to Water Resources Are Vague and Uncertain	26
VI.	CONCLUSION.....	27

On behalf of California Unions for Reliable Energy (“CURE”), this letter provides comments on the Staff Assessment/Draft Environmental Impact Statement (“SA/DEIS”) for the Genesis Solar Energy Project (“Project”). In light of the Applicant’s failure to provide an enormous amount of information necessary for Staff’s analysis of the Project, Staff has clearly made tremendous efforts to identify and attempt to create mitigation for significant environmental impacts posed by the Project. We agree with many of Staff’s analyses and conclusions. In particular, we agree with Staff’s finding that the Project’s proposed use of groundwater for power plant cooling is inconsistent with applicable laws, ordinances, regulations, and standards (“LORS”), and that dry cooling is feasible for this Project and would rectify the inconsistency.

However, as explained more fully below, because the Applicant neglected to provide Staff with sufficient information, the SA/DEIS does not satisfy the requirements of the California Environmental Quality Act (“CEQA”)¹ or the Warren-Alquist Act.² Moreover, the anticipated process for preparing a Revised Staff Assessment that is not circulated for public review, and only provides the parties four working days to prepare testimony, would fail to provide meaningful review as required by these statutes and their implementing regulations. Accordingly, an adequate, revised SA/DEIS must be prepared and circulated for public review and comment.

I. THE SA/DEIS MUST BE REVISED AND RECIRCULATED FOR PUBLIC COMMENT

In the approval process for an application for certification of a power plant project, the Energy Commission acts as lead agency under CEQA.³ In all essential respects, its process is functionally equivalent to that of all other CEQA proceedings.⁴ Specifically, the SA/DEIS is the functional equivalent to a draft environmental impact report (“EIR”),⁵ the draft environmental document prepared by Staff to inform decision-makers and the public of a project’s environmental impacts.

¹ Pub. Resources Code, § 21000 et seq.

² *Id.*, § 25500 et seq.

³ *Id.*, § 25519(c).

⁴ *Id.*, § 21080.5.

⁵ See Memorandum of Understanding Between the U.S. Department of the Interior, Bureau of Land Management California Desert District and the California Energy Commission Staff, Concerning Joint Environmental Review For Solar Thermal Power Plant Projects, p. 4, available at http://www.energy.ca.gov/siting/solar/BLM_CEC_MOU.PDF (“[t]he assessments provided by the Parties must be sufficient to meet all federal and state requirements for NEPA and CEQA and shall be included as part of the joint Preliminary Staff Assessment/Draft Environmental Impact Statement and the joint Final Staff Assessment/Final Environmental Impact Statement.”)

CEQA has two basic purposes. Unfortunately, the SA/DEIS falls short of satisfying either of them. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.⁶ The SA/DEIS, like an EIR, is the “heart” of this requirement.⁷ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”⁸ CEQA mandates that an EIR, or EIR equivalent, be prepared “with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences.”⁹ Further, in preparing an environmental document, “an agency must use its best efforts to find out and disclose all that it reasonably can.”¹⁰ Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.¹¹

The SA/DEIS could not have satisfied these purposes because the Applicant failed to provide Staff with the information necessary to draft a CEQA-compliant document. Although Staff states in the SA/DEIS that the report “contains all analyses normally contained in an [EIR],”¹² this statement is incorrect. The SA/DEIS simply does not contain the information and analyses required by CEQA and its implementing guidelines.¹³ Because the Applicant neglected to provide Staff with sufficient information, Staff issued a SA/DEIS that is incomplete with respect to potentially significant impacts and mitigation measures for several resource areas.

Further, the SA/DEIS’ deficiencies violate the Energy Commission’s own regulations for power plant site certification (“Regulations”).¹⁴ The Commission’s regulations state that the Applicant “shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility.”¹⁵ The Regulations require Staff to “present the results of its environmental assessments in a report” which “shall be written to inform interested persons and the commission of the environmental consequences of the proposal.”¹⁶ Staff shall “ensure a complete consideration of

⁶ 14 Cal. Code Regs. (“CEQA Guidelines”), § 15002(a)(1).)

⁷ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

⁸ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795.

⁹ CEQA Guidelines, § 15151.

¹⁰ *Id.*, § 15144.

¹¹ *Id.*, § 15002(a)(2) and (3). See also *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Ass’n v. Regents of the University of California* (1988) 47 Cal.3d 376, 400.

¹² SA/DEIS, p. 1-1.

¹³ Pub. Resources Code, § 21100; CEQA Guidelines, §§ 15120(c), 15122-15131.

¹⁴ Cal. Code Regs., §§1001-2557.

¹⁵ 20 Cal. Code Reg., § 1748(d).

¹⁶ *Id.*, § 1742.5(b) and (c).

significant environmental issues in the proceeding.”¹⁷ As shown below, the SA/DEIS lacks a considerable amount of information regarding potentially significant impacts and mitigation measures for several resource areas. Thus, the SA/DEIS has not completely considered all “significant environmental issues” related to the Project, nor does the SA/DEIS notify the public or decision-makers of the “environmental consequences” of the Project.

It appears that Staff’s goal is to include additional and new analyses and mitigation measures in a Revised Staff Assessment (“Revised SA”). As set forth in the current schedule for this proceeding, the Revised SA would not be circulated for public review and comment, or provide a process for responding to comments, all of which is required by CEQA. Instead, the current schedule provides for no public comment and only provides the parties four working days to prepare testimony prior to evidentiary hearings, a process that clearly fails to provide meaningful review as required by CEQA, the Warren-Alquist Act and their implementing regulations.

CEQA requires renote and recirculation of an EIR, or EIR equivalent, for public review and comment when significant new information is added to the EIR following public review but before certification.¹⁸ The CEQA Guidelines clarify that new information is significant if “the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect.”¹⁹

Here, the Revised SA will contain many new analyses and mitigation measures for significant, unresolved issues. Indeed, that is the very purpose of the Revised SA. For example, the Revised SA will include wholly new mitigation measures for cultural resources, never seen before by the public. In addition, the Revised SA will contain never before disclosed mitigation measures for admittedly significant impacts from the Applicant’s proposal to pump groundwater for power plant cooling, including significant impacts to the adjudicated Colorado River. The Revised SA will also recommend undisclosed measures to reconcile inconsistencies between the Project’s proposed use of groundwater for cooling and LORS. The Revised SA will also provide a new analysis, based on an as of yet unprepared report from the Applicant, of potentially significant impacts to the golden eagle, a California fully protected species and federal sensitive species. In addition, the Revised SA will provide a new analysis, based on recently submitted survey results from the Applicant, of potentially significant impacts to desert tortoise. The Revised SA may also include numerous new analyses and/or mitigation measures as a result of forthcoming information from the Applicant regarding impacts to the

¹⁷ *Id.*, § 1742.5(d).

¹⁸ Pub. Resources Code, § 21092.1.

¹⁹ CEQA Guidelines, § 15088.5.

Mojave fringe-toed lizard, special status plants, and desert tortoise, as discussed at the April 20, 2010, May 5, 2010, and May 10, 2010 staff assessment workshops. The addition of this significant new information, which has not yet been analyzed and disclosed in a report by Staff, requires that the Revised SA be recirculated for public review and comment.

The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it.²⁰ Consequently, the plan to include numerous additional analyses and mitigation measures in the Revised SA without renoticing and recirculating the revised document for public review and comment violates CEQA. The SA/DEIS must be revised to inform the public and decision makers of the Project's significant impacts, and to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures. Thus, Staff, after receiving the necessary information from the Applicant, must draft and circulate a complete SA/DEIS for public review and comment. The Committee must revise the schedule to incorporate this legally mandated procedure.

II. THE SA/DEIS MUST PROVIDE SUFFICIENT DETAIL TO ANALYZE THE PROJECT'S IMPACTS

The SA/DEIS must provide sufficient information to allow decision-makers and the public to understand the environmental consequences of the Project.²¹ Because the Applicant failed to meet its burden to provide Staff with necessary information, the SA/DEIS falls short of CEQA's requirements. Instead, Staff was compelled to release an incomplete SA/DEIS, with the intention of providing additional information and analyses in a Revised SA. In turn, the public was denied an adequate opportunity to evaluate the environmental impacts of the Project and proposed mitigation measures to reduce significant impacts.

Preparing an environmental review document and considering comments on it from the public enables the agencies that will consider the project to have the information necessary to weigh competing policies and interests.²² Further, if significant new information is added to an environmental review document, the lead agency must recirculate the document for further review and comment.²³

The following statements contained in the SA/DEIS demonstrate that, because the Applicant failed to meet its "burden of presenting sufficient substantial

²⁰ *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 Cal.App3d 813, 822.

²¹ *Napa Citizens for Honest Gov't v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 356.

²² *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576.

²³ Pub Resources Code, § 21092.1; CEQA Guidelines, § 15088.5.

evidence to support the findings and conclusions required for certification of the site and related facility,”²⁴ the SA/DEIS is deficient under CEQA:

- “Within the technical areas of Air Quality and Transmission System Engineering, ***additional information is necessary and required***...These are outstanding issues that will be resolved through the course of the [SA] Workshops and subsequent filings, and will be reflected in a Supplemental Staff Assessment (SSA).”²⁵
- “Staff will need to receive/review a [FDOC] from the [MDAQMD]...***This analysis will likely require revisions*** to both staff and MDAQMD-recommended conditions of certification.”²⁶
- “The ***data compilation*** for the cumulative analysis [for cultural resources] ***is also ongoing***, and that analysis will be included in the SSA.”²⁷
- “***BLM is compiling information*** on its consultation with Native Americans, required by NHPA Sec. 106. An account of this consultation will be included in the SSA.”²⁸
- “Final ***completion of staff’s analysis*** of the proposed project ***is subject to the following***:
 - Submittal of a Water Conservation Plan.
 - Submittal of the following to the [CRWQCB] and County of Riverside for review and comment and to the Energy Commission for approval:
 - Engineering design detail and groundwater monitoring plans for the proposed wastewater evaporation ponds;
 - Engineering design detail and groundwater monitoring plans for the proposed [HTF] bioremediation units;

²⁴ 20 Cal. Code Reg. § 1748(d).

²⁵ SA/DEIS, p. 1-19 (emphasis added).

²⁶ *Id.*, p. 1-21 (emphasis added).

²⁷ *Id.* (emphasis added).

²⁸ *Id.* (emphasis added).

- Characterization of the anticipated waste streams proposed to be discharged into the evaporation ponds and bioremediation units;
 - A description of the frequency and chemical analysis of waste and a plan that describes actions that will be taken in case of a detectable release;
 - A closure plan for the evaporation ponds and bioremediation units; and
 - Demonstration that the proposed project would be in compliance with Order 2009-0009-DWQ Storm Water requirements that take effect July 1, 2010.
- “Submittal of the applicant’s final, 100 percent engineering and design for GSEP’s storm water diversion channel(s) will need to be reviewed for final comment and approval by the Energy Commission.”²⁹
 - “The **applicant will need to provide environmental information** for downstream congestion management improvements in order for staff to finalize their analysis on proposed, necessary transmission improvements.”³⁰
 - “One segment of the proposed Project linears **was not included** in spring 2009 surveys, and the Applicant has proposed surveys of this area in 2010. In addition to the species included on the target list for 2009 surveys, staff has identified additional species to include in the spring 2010 survey.”³¹
 - “While staff considers the direct and indirect impacts of the Genesis Project to be less than significant, **information** from golden eagle nest surveys in nearby mountains **could change this conclusion.**”³²
 - “Staff currently has **insufficient information to fully assess** the indirect and cumulative impacts to groundwater-dependent vegetation.”³³

²⁹ *Id.*, pp. 21-22.

³⁰ *Id.*, p. 22 (emphasis added).

³¹ *Id.*, p. C.2-3 (emphasis added).

³² *Id.*, p. C.2-5 (emphasis added).

³³ *Id.*, p. C.2-7 (emphasis added).

- “[A]dditional special-status species *surveys need to be conducted* in 2010.” These include:
 - “protocol-level surveys for desert tortoise and special-status plant species within the northern portion of the transmission line route”
 - “summer/early fall 2010 focused botanical surveys”
 - “surveys for potential breeding habitat along other portions of the linear facilities” for Couch’s spadefoot toad.³⁴
- Couch’s spadefoot toad “*surveys were not conducted* during the proper season.”³⁵
- “[T]he drainage report *does not provide sufficient information* to establish the post-Project flooding conditions or to determine the potential impacts to vegetation downstream.”³⁶
- “The extent of the Project impact to fluvial sand transport is *unknown*, but is expected to contribute at least incrementally to loss of Mojave fringe-toed lizard habitat.”³⁷
- “Staff has identified areas along the linear route...that *need further study* to determine whether these areas are capable of sustaining surface water and therefore provide breeding habitat” for Couch’s spadefoot toad.³⁸
- “Without species-specific survey results and with limited occurrence information, it is *difficult to assess* the potential for direct and indirect impacts to Couch’s spadefoot toads.”³⁹
- “Habitat surveys in 2010 would be required to identify potential spadefoot toad breeding habitat along the linear alignment. Staff will work with the Applicant to develop the appropriate survey methods...”⁴⁰

³⁴ *Id.*, p. C.2-6 (emphasis added).

³⁵ *Id.*, p. C.2-36 (emphasis added).

³⁶ *Id.*, p. C.2-66 (emphasis added).

³⁷ *Id.*, p. C.2-69 (emphasis added).

³⁸ *Id.*, p. C.2-78 (emphasis added).

³⁹ *Id.* (emphasis added).

⁴⁰ *Id.*, pp. C.2-78-79 (emphasis added).

- “The ***lack of Project-specific data*** on golden eagle could be remedied by conducting surveys this spring...”⁴¹
- “[T]he ***calculations and assumptions*** used to evaluate potential impacts to groundwater levels are ***imprecise and have limitations*** and uncertainties associated with them. Given this ***uncertainty***, the magnitude of potential impacts that could occur to groundwater dependent plant communities cannot be determined precisely.”⁴²
- “The ***Applicant did not provide an analysis*** of the proportion of water originating from storage, from natural recharge and/or the Colorado Rive underflow.”⁴³
- “Additional ***requirements for mitigation of*** potential groundwater quality ***impacts*** will also be included as part of the waste discharge requirements for the surface impoundment... These requirements ***will be included in the Supplemental Staff Assessment*** after all relevant information is reviewed by the CRBRWQCB and staff.”⁴⁴
- “Channel profiles and flow analyses to determine flow depth and velocity ***were not provided*** in support of this impact analysis. In general, the preliminary plans were incomplete with regard to fully providing a sound drainage concept.”⁴⁵
- “The applicant has prepared a Draft Channel Maintenance Plan which addresses some of the potential issues associated with long term operation of the channels. However, the plan ***does not adequately address the issue*** of the collection of offsite flows or the use of soil cement along areas subject to inflows from offsite watersheds.”⁴⁶
- “Conditions to require implementation of waste discharge requirements for LTU and surface impoundments are ***currently in development*** and will be included in the SA/FEIS.”⁴⁷
- “The Project owner ***shall provide a revised*** Drainage Report...”⁴⁸
- “The Project owner ***shall provide a revised*** FLO-2D analysis...”⁴⁹

⁴¹ *Id.*, p. C.2-82 (emphasis added).

⁴² *Id.*, p. C.2-98 (emphasis added).

⁴³ *Id.*, p. C.9-46 (emphasis added).

⁴⁴ *Id.*, p. C.9-53 (emphasis added).

⁴⁵ *Id.*, p. C.9-57 (emphasis added).

⁴⁶ *Id.*, p. C.9-59 (emphasis added).

⁴⁷ *Id.*, p. C.9-100 (emphasis added).

⁴⁸ *Id.* (emphasis added).

- “The activities proposed for *mitigation will be outlined in a* Water Supply *Plan...*”⁵⁰
- “SOIL&WATER-18 *Pending agreement* on the actions needed to bring the project into compliance with the water policy.”⁵¹

Clearly, the SA/DEIS lacks a tremendous amount of information that is necessary to analyze the Project’s potentially significant impacts. Thus, the SA/DEIS does not satisfy CEQA. Once the Applicant satisfies its burden to provide Staff with the pertinent information regarding its proposed Project, a revised SA/DEIS containing additional analyses and mitigation measures must be drafted and circulated for public review and comment.

III. THE SA/DEIS MUST ESTABLISH AN ACCURATE ENVIRONMENTAL SETTING

The baseline refers to the existing environmental setting and is a starting point to measure whether a proposed project may cause a significant environmental impact.⁵² CEQA defines “baseline” as the physical environment as it exists at the time CEQA review is commenced.⁵³

Describing the environmental setting is critical to an accurate, meaningful evaluation of environmental impacts. The importance of having a stable, finite, fixed environmental setting for purposes of an environmental analysis was recognized decades ago.⁵⁴ Today, the courts are clear that, “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”⁵⁵ In fact, it is

a central concept of CEQA, widely accepted by the courts, that the significance of a project’s impacts cannot be measured unless the EIR first establishes the actual physical conditions on the property. In other words,

⁴⁹ *Id.*, p. C.9-101 (emphasis added).

⁵⁰ *Id.*, p. C.9-108 emphasis added).

⁵¹ *Id.*, p. C.9-110 (emphasis added).

⁵² See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management District* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 (“*Fat*”), citing Remy, et al., Guide to the Calif. Environmental Quality Act (1999) p. 165.

⁵³ CEQA Guidelines, §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

⁵⁴ *County of Inyo*, supra, 71 Cal.App.3d 185.

⁵⁵ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

baseline determination is the first rather than the last step in the environmental review process.⁵⁶

The SA/DEIS' baseline method, in some instances, blatantly violates the requirements of CEQA. By relying upon incomplete data, the SA/DEIS did not adequately establish the environmental setting for biological resources in the Project area, a necessary prerequisite to conducting an adequate impact analysis under CEQA.

A. The SA/DEIS Fails to Set Forth the Baseline for Rare Plants.

The SA/DEIS failed to establish an accurate environmental setting for determining impacts to several rare plant species, including glandular ditaxis, Abram's spurge, lobed ground cherry, and flat-seeded spurge. The SA/DEIS explains that the Applicant's rare plant survey effort does not provide an adequate basis for determining impacts to rare plants on the Project's impact area.⁵⁷ The SA/DEIS makes clear that the Applicant *failed to conduct surveys for these rare plant species during the appropriate time of year*.⁵⁸ Therefore, the Applicant must complete late-summer/early-fall floristic surveys in order to establish the environmental baseline for the Project site.

Although the SA/DEIS attempts to analyze the impacts and formulate mitigation measures for these species, this analysis may bear little resemblance to the analysis and mitigation that will be required after significant impacts to rare plants are actually identified through an adequate survey effort. Hence, the SA/DEIS fails to provide an adequate description of the environmental setting, analysis and identification of mitigation for these rare plants. Once the Applicant submits the results of the late-summer/early-fall rare plant surveys and all parties have an opportunity to review this analysis, the SA/DEIS must be revised and recirculated for public review and comment.

B. The SA/DEIS Fails to Set Forth a Baseline for Golden Eagles.

The SA/DEIS also failed to describe the environmental setting for determining impacts to the golden eagle because the Applicant neglected to provide sufficient information to enable Staff to determine consistency with LORS or potentially significant impacts under CEQA. The SA/DEIS acknowledges that the Project may "take" golden eagles, requiring a permit from the U.S. Fish and Wildlife Service ("USFWS"), pursuant to the Bald and Golden Eagle Protection Act. However, the SA/DEIS finds that the Applicant *failed to conduct focused spring surveys* for golden eagle nest sites or breeding pairs *and failed to assess whether*

⁵⁶ *Save Our Peninsula Committee*, 87 Cal.App.4th at 125.

⁵⁷ SA/DEIS, p. C.2-88.

⁵⁸ *Id.* (emphasis added).

the Project site is used by wintering golden eagles. Therefore, the SA/DEIS does not make a finding regarding consistency with the Bald and Golden Eagle Protection Act, as required by the Warren-Alquist Act.⁵⁹

USFWS recommends that the Applicant conduct nest surveys for the golden eagle in the spring of 2010.⁶⁰ Since these surveys would only now be occurring, the SA/DEIS does not include an adequate analysis of potentially significant impacts to golden eagles or an adequate analysis of compliance with LORS. Since the Applicant also failed to assess whether the Project site is used by wintering golden eagles, this information also must be provided in order to establish an accurate baseline.

Although the SA/DEIS attempts to analyze the impacts and formulate mitigation measures for the golden eagle, this analysis may bear little resemblance to the analysis and mitigation that will be required after significant impacts to golden eagles are actually identified through an adequate survey effort. Hence, the SA/DEIS fails to provide an adequate description of the environmental setting, analysis and identification of mitigation for the golden eagle. Once the Applicant submits the results of its surveys and all parties have an opportunity to review this analysis, the SA/DEIS must be revised and recirculated for public review and comment.

C. The SA/DEIS Fails to Set Forth the Baseline for Couch's Spadefoot Toad.

Finally, the SA/DEIS did not establish an accurate environmental setting for determining impacts to Couch's spadefoot toad because the Applicant failed to provide sufficient information on Couch's spadefoot toads to enable Staff to determine consistency with LORS or potentially significant impacts under CEQA. The SA/DEIS states that the Applicant's ***surveys for Couch's spadefoot toads "were not conducted during the proper season*** (i.e., after summer rains).⁶¹ Thus, the SA/DEIS requires additional surveys to identify potential spadefoot toad breeding habitat.⁶²

Although the SA/DEIS attempts to analyze the impacts and formulate mitigation measures for Couch's spadefoot toad, this analysis may bear little resemblance to the analysis and mitigation that will be required after significant impacts to Couch's spadefoot toads are actually identified through an adequate survey effort. Hence, the SA/DEIS fails to provide an adequate description of the environmental setting, analysis and identification of mitigation for Couch's

⁵⁹ SA/DEIS, p. C.2-5.

⁶⁰ *Id.*, p. C.2-81.

⁶¹ *Id.*, p. C.2-36 (emphasis added).

⁶² *Id.*, p. C.2-78.

spadefoot toad. Once the Applicant submits the results of the surveys and all parties have an opportunity to review this analysis, the SA/DEIS must be revised and recirculated for public review and comment.

In sum, without adequate pre-Project site surveys, the SA/DEIS does not and cannot contain accurate or reliable analyses of the Project's potentially significant impacts to biological resources. Surveys for glandular ditaxis, Abram's spurge, lobed ground cherry, flat-seeded spurge, golden eagle, and Couch's spadefoot toad are required in order to establish a baseline for these existing biological resources in the Project area and to enable an adequate analysis of impacts on these resources. Surveys must be conducted prior to the approval of the Project so that the public and decision-makers will have an accurate picture of the biological resources that will be impacted. Only after these surveys are complete can the SA/DEIS be revised to include an adequate description of the environmental setting, analyses and identification of mitigation measures for glandular ditaxis, Abram's spurge, lobed ground cherry, flat-seeded spurge, golden eagle, and Couch's spadefoot toad.

IV. THE SA/DEIS MUST DISCLOSE AND ANALYZE ALL POTENTIALLY SIGNIFICANT IMPACTS

CEQA requires the SA/DEIS to disclose and analyze all of a project's potentially significant adverse environmental impacts.⁶³ Identification of a project's significant environmental effects is one of the primary purposes of an EIR and is necessary to implement the stated public policy that agencies should not approve projects if there are feasible mitigation measures or project alternatives available to reduce or avoid significant environmental impacts.⁶⁴ In addition, the Commission's Regulations require that Staff give "complete consideration of significant environmental issues in the proceeding."⁶⁵ Because the Applicant failed to provide necessary information, however, Staff could not effectively evaluate the Project's impacts in the SA/DEIS. Several analyses pertaining to biological resources, cultural resources, and water resources are admittedly incomplete. In addition, the SA/DEIS failed to provide complete analyses of impacts related to worker safety and transmission system engineering. Thus, the SA/DEIS does not satisfy CEQA or the Commission's Regulations. After the Applicant provides the outstanding information, the SA/DEIS should be revised to address the impacts, and recirculated for public review and comment.

⁶³ Pub. Resources Code, § 21100(b)(1).

⁶⁴ *Id.*, §§ 21002, 21002.1(a).

⁶⁵ *Id.*, § 1742.5(d).

A. The SA/DEIS Must Disclose and Analyze All Potentially Significant Impacts to Biological Resources

Staff recognizes that although it attempted to analyze impacts to the golden eagle, results from upcoming surveys may alter its analysis.⁶⁶ As explained above, the SA/DEIS acknowledges that the Project may “take” golden eagles, requiring a permit from the USFWS, pursuant to the Bald and Golden Eagle Protection Act. However, the SA/DEIS finds that the Applicant failed to conduct focused spring surveys for golden eagle nest sites or breeding pairs and failed to assess whether the Project site is used by wintering golden eagles. Therefore, the SA/DEIS does not make a finding regarding consistency with the Bald and Golden Eagle Protection Act, as required by the Warren-Alquist Act.⁶⁷ Similarly, the SA/DEIS does not include an adequate analysis of potentially significant impacts to golden eagles, as required by CEQA. Although the SA/DEIS attempts to analyze the impacts (and formulate mitigation measures) for the golden eagle, this analysis may bear little resemblance to the analysis (and mitigation) that will be required after significant impacts to golden eagles are actually identified through an adequate survey effort. Hence, the SA/DEIS fails to provide an adequate analysis and identification of mitigation for the golden eagle.

The SA/DEIS also failed to adequately analyze impacts to special-status plants. As explained above, the SA/DEIS concludes that the Applicant’s rare plant survey effort does not provide an adequate basis for determining impacts to rare plants on the Project’s impact area.⁶⁸ The SA/DEIS makes clear that the Applicant failed to conduct surveys for these rare plant species during the appropriate time of year.⁶⁹ Therefore, the Applicant must complete late-summer/early-fall floristic surveys in order to establish the environmental baseline for the Project site. Although the SA/DEIS attempts to analyze the impacts and formulate mitigation measures for these species, this analysis may bear little resemblance to the analysis and mitigation that will be required after significant impacts to rare plants are actually identified through an adequate survey effort. Hence, the SA/DEIS fails to provide an adequate analysis and identification of mitigation for rare plants.

Finally, the SA/DEIS did not provide an adequate analysis of impacts to Couch’s spadefoot toad. As explained above, the SA/DEIS states that the Applicant’s surveys for Couch’s spadefoot toads “were not conducted during the proper season (i.e., after summer rains).”⁷⁰ Thus, the SA/DEIS requires additional surveys to identify potential spadefoot toad breeding habitat.⁷¹ Although the

⁶⁶ *Id.*, p. C.2-5.

⁶⁷ SA/DEIS, p. C.2-5.

⁶⁸ SA/DEIS, p. C.2-88.

⁶⁹ *Id.*

⁷⁰ *Id.*, p. C.2-36.

⁷¹ *Id.*, p. C.2-78.

SA/DEIS attempts to analyze the impacts and formulate mitigation measures for Couch's spadefoot toad, this analysis may bear little resemblance to the analysis and mitigation that will be required after significant impacts to Couch's spadefoot toad are actually identified through an adequate survey effort. In fact, condition of certification BIO-27 requires the Applicant, as part of the Couch's Spadefoot Toad Protection and Mitigation Plan, to perform an impact assessment after it conducts its surveys.⁷² BIO-27 requires that the analysis include an assessment of impacts from habitat disturbance and noise from construction, noise from operation of the Project, increased traffic and vehicle access, changes in flow levels and patterns to breeding ponds, and increased risk of predation.⁷³ However, CEQA requires that Staff include the analysis outlined in BIO-27 in the Revised SA, not in a mitigation plan that will be provided by the Applicant after Project approval. Thus, the SA/DEIS failed to provide an adequate analysis and identification of mitigation for Couch's spadefoot toad.

Once the Applicant submits the results of the surveys and all parties have an opportunity to review this analysis, the SA/DEIS must be revised and recirculated for public review and comment.

B. The SA/DEIS Must Disclose and Analyze All Potentially Significant Impacts to Cultural Resources

The SA/DEIS acknowledges that McCoy Spring may be a traditional cultural property, and therefore the Project may have a significant impact on "the integrity of association, setting, and feeling of this resource."⁷⁴ However, the SA/DEIS does not include an *analysis* of the Project's potentially significant impacts to McCoy Spring. Rather, the SA/DEIS states that a determination on the issue will be included in a supplemental staff assessment, along with any necessary mitigation measures, because possible impacts must be considered from the perspective of Native Americans.⁷⁵

CURE is sensitive to the fact that further information could be obtained from Native Americans. However, information already exists that enables Staff to conduct the analysis and conclude that the impact will be significant.⁷⁶ Furthermore, the SA/DEIS states that an ethnographer could formally evaluate McCoy Spring for its eligibility for listing as a traditional cultural property.⁷⁷ Thus, the analysis can and must be performed, and included in a Revised SA that is circulated for public review and comment.

⁷² *Id.*, p. C.2-202-203.

⁷³ *Id.*, p. C.2-203.

⁷⁴ *Id.*, p. C.3-121.

⁷⁵ *Id.*

⁷⁶ CARE Comments on NOI to Prepare Environmental Review of the Genesis Solar Energy Project, 09-AFC-8, p. 11.

⁷⁷ SA/DEIS, p. C.3-121.

The SA/DEIS also entirely fails to address cumulative impacts to cultural resources. The SA/DEIS states that it did not include a cumulative impact analysis for cultural resources because the data compilation is incomplete.⁷⁸ The SA/DEIS fails to comply with the requirements of CEQA.

As the court stated in *Communities for a Better Environment v. California Resources Agency*,

a cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.⁷⁹

The SA/DEIS must be revised to include an analysis of cumulative impacts to cultural resources, and recirculated for public review and comment. A cumulative impact analysis is particularly critical considering the numerous solar power plant projects proposed on culturally rich sites along the I-10 corridor.

C. The SA/DEIS Must Disclose and Analyze All Potentially Significant Impacts to Water Resources

The SA/DEIS concludes that the Project's proposed groundwater pumping may be illegal and will significantly impact the adjudicated Colorado River. The SA/DEIS concludes, "the Project has the potential to divert Colorado River water without any entitlement to the water, and all groundwater production at the site could be considered Colorado River water."⁸⁰

The Project clearly requires an entitlement prior to any groundwater pumping. However, the SA/DEIS does not identify whether the Project has obtained such an entitlement. Therefore, there is no information regarding whether the Project's proposal to pump groundwater is a reliable water source.

With respect to significant impacts, the SA/DEIS proposes that the Applicant replace 51,920 acre feet of water that will be pumped from the Colorado River over the life of the Project. However, the SA/DEIS does not identify a replacement water source. The SA/DEIS' proposal for replacement of 51,920 acre feet of water from the

⁷⁸ *Id.*, p. C.3-124

⁷⁹ *Communities for a Better Environment v. California Resources Agency*, (2002) 103 Cal.App.4th 98, 114.

⁸⁰ *Id.*, p. C.9-47.

Colorado River without identifying a replacement water source fails to satisfy the requirements of CEQA. CEQA requires that the SA/DEIS include an analysis of potential environmental impacts associated with replacing 51,920 acre feet of water. Where mitigation measures would, themselves, cause significant environmental impacts, CEQA requires an evaluation of those secondary (indirect) impacts.⁸¹ Furthermore, before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases and components of a project.⁸²

The SA/DEIS must identify the Applicant's entitlement to Colorado River water for the Project in order to confirm whether groundwater pumping is a reliable source of water for the Project. The SA/DEIS must also fully describe and evaluate all potentially significant impacts associated with the Project's replacement of 51,920 acre feet of water taken from the Colorado River. Any Revised SA that contains this missing information must be circulated for public review and comment.

D. The SA/DEIS Must Disclose and Analyze All Potentially Significant Impacts Associated with New Roads

The SA/DEIS concludes that, in order to ensure access to the Project site for emergency vehicles, the Applicant must provide a second access route to the site.⁸³ Staff assessment workshops conducted on May 5, 2010 and May 11, 2010 clarified that the Applicant would need to construct an additional road for a second access route. However, the SA/DEIS does not contain an assessment of potentially significant impacts associated with the construction or operation of an additional access road.

Where mitigation measures would, themselves, cause significant environmental impacts, CEQA requires an evaluation of those secondary (indirect) impacts.⁸⁴ Here, because the location of the second access road is not definitive, it is unclear whether the second access road will be situated in the proposed Project footprint and whether the location was surveyed for wildlife and plant species. Thus, after the Applicant proposes a second access road route, the SA/DEIS must be revised with Staff's analysis of any associated potentially significant impacts and recirculated for public review and comment.

⁸¹ CEQA Guidelines § 15064(d).

⁸² *Laurel Heights Improvement Assn. v. Regents of University of California*, *supra*, 47 Cal.3d at p. 396-97 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school's occupancy of a new medical research facility).

⁸³ SA/DEIS, p. C.14-29.

⁸⁴ CEQA Guidelines § 15064(d).

E. The SA/DEIS Must Disclose and Analyze All Potentially Significant Impacts Associated with Transmission System Engineering

Staff states that “[t]he Phase I Interconnection Study (Phase I Study) does not provide a meaningful forecast of the transmission reliability impacts of the [Project].”⁸⁵ According to the SA/DEIS, the Phase II Study Interconnection Study will not be completed until September, 2010,⁸⁶ and therefore an analysis of potentially significant impacts associated with any downstream transmission facilities identified in the study will be conducted by the California Public Utilities Commission.⁸⁷ CEQA requires that the SA/DEIS include environmental review of the “whole of the action” which has the potential to result in a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.⁸⁸ The “whole of the action” may include facilities not licensed by the Energy Commission. The SA/DEIS fails to analyze the Project’s potentially significant impacts associated with any downstream transmission facilities. Therefore, after the Phase II Study is completed, the SA/DEIS must be revised to include this analysis, and be circulated for public review and comment.

V. THE SA/DEIS MUST INCORPORATE EFFECTIVE MEASURES TO MITIGATE ENVIRONMENTAL IMPACTS TO LESS THAN SIGNIFICANT

CEQA requires an environmental review document to describe mitigation measures sufficient to minimize the significant adverse environmental impacts.⁸⁹ Also, mitigation measures must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact.⁹⁰ Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified.⁹¹

A public agency may not rely on mitigation measures of uncertain efficacy or feasibility.⁹² “Feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic,

⁸⁵ SA/DEIS, p. D.5-1.

⁸⁶ *Id.*; At the April 26, 2010 status conference, the Applicant stated that the Phase II Study would be completed on June 30, 2010.

⁸⁷ SA/DEIS, p. D.5-7.

⁸⁸ CEQA Guidelines, § 15378.

⁸⁹ Pub. Resources Code, §§ 21002.1(a), 21100(b)(3).

⁹⁰ CEQA Guidelines, § 15370.

⁹¹ *Id.*, § 15126.4(a)(2).

⁹² *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).

environmental, legal, social, and technological factors.⁹³ Moreover, mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments.⁹⁴ Finally, CEQA does not allow deferring the formulation of mitigation measures to post-approval studies;⁹⁵ nor does CEQA permit the delegation of mitigation of significant impacts to responsible agencies or the Applicant.⁹⁶

As shown below, the SA/DEIS lacks effective, feasible mitigation for numerous impacts it identifies as significant. By deferring the development of specific mitigation measures, the SA/DEIS has effectively precluded public input into the “efficacy” or “feasibility” of those measures. Thus, additional mitigation measures must be included in a Revised SA that is circulated to the public and provides a meaningful opportunity for public review and comment.

A. Mitigation Measures for Impacts to Biological Resources Are Deferred

We agree with Staff that the Project “would have significant impacts to biological resources.”⁹⁷ However, the SA/DEIS improperly defers the development of mitigation measures to future plans that will identify measures to mitigate these significant impacts. The following conditions of certification are examples of improper deferral of mitigation that deprive the public of any opportunity to review and submit comments on feasibility:

- BIO-7 requires the Applicant to submit a biological resources mitigation implementation and monitoring plan at least 30 days prior to any ground disturbance activities.⁹⁸ “The BRMIMP shall incorporate avoidance and minimization measures described in final versions of the Desert Tortoise Relocation Translocation Plan, the Raven Management Plan, the Closure, Conceptual Restoration Plan, the Burrowing Owl Mitigation and Monitoring Plan, and the Weed Management Plan,”⁹⁹ none of which are complete to date.
- BIO-10 requires the Applicant to develop a final Desert Tortoise Relocation/Translocation Plan, which is currently incomplete.¹⁰⁰
- BIO-13 requires the Applicant to implement a Raven Management Plan, which is currently incomplete.¹⁰¹

⁹³ CEQA Guidelines, § 15364.

⁹⁴ *Id.*, § 15126.4(a)(2).

⁹⁵ *Id.*, § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309.

⁹⁶ *City of Marina v. Board of Trustees of the California State University*, (2006) 39 Cal.4th 341, 366.

⁹⁷ SA/DEIS, p. C.2-1.

⁹⁸ *Id.*, p. C.2-165.

⁹⁹ *Id.*

¹⁰⁰ *Id.*, p. C.2-174.

- BIO-14 requires the Applicant to develop a Weed Management Plan, which is currently incomplete.¹⁰²
- BIO-15 states that “[i]f active nests are detected during” pre-construction nest surveys, a “monitoring plan shall be developed.”¹⁰³
- BIO-16 requires the Applicant to prepare and implement an Avian Protection Plan to monitor death and injury of birds from collisions, heat, and bright light.¹⁰⁴ This plan has not been prepared.
- BIO-18(3) states that “[i]f pre-construction surveys indicate the presence of burrowing owls within the Project Disturbance Area, the project owner shall prepare and implement a Burrowing Owl Mitigation Plan....”¹⁰⁵ This plan has not been prepared.
- BIO-19 requires the Applicant to prepare a Special-Status Plant Mitigation Plan after late summer/fall 2010 surveys are complete.¹⁰⁶ This plan has not been prepared.
- BIO-23 requires the Applicant to implement a final Decommissioning and Closure Plan to restore the Project site’s topography and hydrology and to establish native plant communities.¹⁰⁷ This plan is incomplete.
- BIO-25 requires the Applicant to prepare and implement a Draft Groundwater-Dependent Vegetation Monitoring Plan “to monitor the Project effects of groundwater pumping on groundwater-dependent vegetation...and to ensure that the Project has a less than significant effect on groundwater-dependent ecosystems.”¹⁰⁸ This plan has not been prepared.
- BIO-26 requires the Applicant to implement “remedial action” if the Project causes a decline in “spring water tables” and “plant vigor in groundwater dependent vegetation.”¹⁰⁹ However, the “remedial action” is yet to be defined.

¹⁰¹ *Id.*, p. C.2-181.

¹⁰² *Id.*, p. C.2-181.

¹⁰³ *Id.*, p. C.2-182.

¹⁰⁴ *Id.*, p. C.2-183.

¹⁰⁵ *Id.*, p. C.2-185.

¹⁰⁶ *Id.*, pp. C.2-187-191.

¹⁰⁷ *Id.*, p. C.2-198.

¹⁰⁸ *Id.*, p. C.2-199.

¹⁰⁹ *Id.*, p. C.2-202.

- BIO-27 requires the Applicant to prepare and implement a Couch's Spadefoot Toad Protection and Mitigation Plan, which shall include habitat survey results from the summer 2010 surveys, an impact assessment, and avoidance and minimization measures. The Plan shall also include plans to create additional breeding habitats for Couch's spadefoot toad if complete avoidance of habitat is not possible.¹¹⁰ This plan has not been prepared.

The SA/DEIS illegally defers identification of each of the above-listed mitigation measures until after certification of the Project. Before the Commission approves the Project, the Commission is required to make findings under CEQA and the Commission's regulations. Specifically, the Commission must find that either: (1) changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen each identified significant impact; (2) such changes or alterations are within the jurisdiction of another public agency and such changes have been adopted by such other agency or can and should be adopted by such other agency; or (3) specific economic, legal, social, technological, or other considerations make infeasible identified mitigation measures or project alternatives. These findings must be based on substantial evidence.¹¹¹

Until the above-listed mitigation measures are identified and evaluated, the Energy Commission lacks substantial evidence to make a finding that each of the mitigation measures listed above will reduce the particular impacts to a less than significant level. The Commission will also not know if it must consider making findings of overriding considerations.¹¹² Thus, these plans and measures must be developed now, during the environmental review process, and be included in the Revised SA that is circulated for public review and comment.

B. Mitigation Measures for Impacts to Biological Resources May Not Be Feasible

Several of the mitigation measures identified in the SA/DEIS may not be feasible, which renders them unenforceable. Therefore, many of the significant impacts to biological resources remain unmitigated. For example, BIO-20 requires the Applicant to acquire compensation lands to mitigate for the direct and indirect impacts to Mojave fringe-toed lizard habitat. The compensation lands must be, among other things, "within the Chuckwalla Valley with potential to contribute to Mojave fringe-toed lizard habitat connectivity and build linkages between known populations of Mojave fringe-toed lizards and preserve lands with suitable habitat."¹¹³ However, there is no evidence that qualifying lands exist. Thus, the

¹¹⁰ *Id.*, p. C.2-203.

¹¹¹ Pub. Resources Code, § 21081; CEQA Guidelines, § 15091(a).

¹¹² CEQA Guidelines, § 15093.

¹¹³ SA/DEIS, p. C.2-191.

mitigation measure may not be “capable of being accomplished in a successful manner...”¹¹⁴ The compensation lands must be identified now in order to ensure that significant impacts to Mojave fringe-toed lizards are adequately mitigated.

Similarly, BIO-19(3) requires the Applicant to acquire compensation lands to mitigate for potential impacts to four special-status plant species, including Abram’s spurge, glandular ditaxis, flat-seeded spurge, and lobed ground cherry. The lands must include 114 acres of playa and sand drift over playa habitat, 56 acres of dune habitat, and 182 acres of desert wash habitat (including at least 16 acres of microphyll woodland habitat).¹¹⁵ Further, the lands must “contain occupied habitat for an occurrence anywhere in the species’ range in California,” “contain unoccupied habitat that is in the immediate watershed of an extant occurrence in California and considered to have a high potential for occurrence,” or “provide watershed protection to extant and protected occurrences on federal land regardless of the habitat acquired lands support.”¹¹⁶ The lands must also “provide habitat for the special-status plant that is of similar or better quality than that impacted, contain or abut land that contains occurrences that are stable, recovering, or likely to recover, and be adequately sized and buffered to support self-sustaining special-status plant populations.”¹¹⁷ However, there is no evidence that qualifying lands exist. Thus, the mitigation measure may not be “capable of being accomplished in a successful manner...”¹¹⁸ The compensation lands must be identified now in order to ensure that significant impacts to special-status plants are adequately mitigated.

In addition, BIO-26 requires the Applicant to implement “remedial action” if the Project causes a decline in spring water tables and a decline in the vigor of groundwater dependent vegetation. However, the “remedial action” is yet to be defined. The SA/DEIS states that the “Applicant may choose the most feasible method” to “restore the spring groundwater tables to a level necessary to sustain ecological functioning in the affected plant communities.”¹¹⁹ ***The SA/DEIS fails to provide any evidence that any action can be taken to adequately mitigate significant impacts to groundwater dependent vegetation.*** Thus, as written, BIO-26 is not a feasible mitigation measure.

Finally, BIO-27 attempts to mitigate significant impacts to Couch’s spadefoot toad by requiring the Applicant to “create additional breeding habitats” if the breeding pond south of I-10 cannot be avoided.¹²⁰ However, there is no evidence that breeding ponds for Couch’s spadefoot toad can be created successfully. The measure fails to provide any guidance for the successful creation of breeding

¹¹⁴ Pub. Resources Code, § 21061.1.

¹¹⁵ SA/DEIS, p. C.2-189.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Pub. Resources Code, § 21061.1.

¹¹⁹ SA/DEIS, p. C.2-202.

¹²⁰ *Id.*, pp. C.2-203-204.

habitats for Couch's spadefoot toad. BIO-27 must be revised to include success criteria. In addition, the Applicant should be required to monitor the created breeding habitats to ensure success. As it stands, BIO-27 is not a feasible mitigation measure.

C. Mitigation Measures for Impacts to Biological Resources Are Vague and Uncertain

Several of the mitigation measures required by the SA/DEIS are worded ambiguously, which renders them unenforceable as a practical matter. For example, BIO-8(9) requires the Applicant to use “[a] continuous low-pressure technique...for steam blows, *to the extent possible*, in order to reduce noise levels in sensitive habitat...”¹²¹ (emphasis added.) BIO-8(9) is vague and uncertain. There is no evidence that the measure will in fact reduce impacts to biological resources to a less than significant level.

Similarly, BIO-19 requires that avoidance and minimization measures be implemented to preserve special-status plant occurrences, including the use of existing roads “*wherever possible*” and the requirement to “*minimize*” ground-disturbing activities.¹²² These measures are vague and uncertain. There is no evidence that the measures will in fact reduce impacts to biological resources to a less than significant level. The SA/DEIS must therefore be revised to include specific, enforceable mitigation measures. Until then, impacts to special-status plants remain significant.

BIO-21 is also vague and uncertain. To reduce significant impacts to birds and other wildlife from evaporation ponds, BIO-21 requires the Applicant to monitor the ponds. “Surveys shall be of *sufficient duration and intensity* to provide an accurate assessment of bird and wildlife use of the ponds during all seasons.”¹²³ (emphasis added.) This measure is completely vague. The SA/DEIS must define “sufficient duration and intensity” and provide evidence that the surveys will provide an “accurate assessment of bird and wildlife use of the ponds.” As it stands, BIO-21 is unenforceable. Thus, impacts to biological resources from evaporation ponds remain significant and unmitigated.

Additionally, BIO-23 requires the Applicant to implement a Decommissioning and Closure Plan (which has yet to be fully developed).¹²⁴ The SA/DEIS states that the goal of the Decommissioning and Closure Plan is “restore the site’s topography and hydrology to a *relatively natural condition* and to establish native plant

¹²¹ *Id.*, p. C.2-168.

¹²² *Id.*, p. C.2-188.

¹²³ *Id.*, p. C.2-193.

¹²⁴ *Id.*, p. C.2-198.

communities.”¹²⁵ (emphasis added.) This measure is vague and uncertain. The measure provides no indication as to what “relatively natural condition” means. Thus, the success of the measure is uncertain. There is no certainty that the measure will accomplish the goal of reducing significant impacts to below a level of significance. Further, there is no certainty that the measure can be carried out at all.

BIO-15 is also vague and uncertain. To mitigate for significant impacts to birds from construction noise, the SA/DEIS requires preconstruction surveys for nesting birds.¹²⁶ However, the SA/DEIS fails to describe the survey methods to be used. Locating bird nests can be extremely difficult due to the tendency of many species to construct well-concealed or camouflaged nests. Most studies that involve locating bird nests employ a variety of techniques – beyond simply searching for nests. These further feasible mitigation measures include efforts focused on observing bird behavior. Often, the results of these observations are sufficient to infer nesting, or not, without having to locate the actual nest. For example, a bird carrying food or nesting material can be a strong cue that a nest is located nearby or under construction. Any nest searching must be performed by a qualified biologist, because some techniques have the potential to reduce nest success if not conducted appropriately.¹²⁷ Specifically, studies indicate that humans can alert predators to a nest’s location, or cause disturbance that result in nest abandonment.¹²⁸

For these reasons, the SA/DEIS should provide information on the specific methods that will be used to conduct the pre-construction nesting bird surveys. For example, the SA/DEIS should clarify whether additional survey effort should be devoted to instances in which nesting cues (e.g., carrying food, territorial behavior) are observed, but a nest cannot be located. Also, the SA/DEIS should describe how well-concealed or camouflaged nests will be located and not adversely affected by Project activities. In addition, the SA/DEIS should discuss the methods that will be used to minimize surveyor-induced predation, nest disturbance, and abandonment. This information is crucial to evaluating whether the proposed mitigation will reduce noise impacts to a less than significant level. Because the SA/DEIS fails to include this information, the proposed mitigation is uncertain, and impacts to biological resources from Project noise remain significant.

Finally, Condition BIO-18 of the SA/DEIS is vague and uncertain. BIO-18 requires preconstruction surveys for burrowing owls in accordance with California Burrowing Owl Consortium (“CBOC”) guidelines.¹²⁹ At the May 5, 2010 SA/DEIS

¹²⁵ *Id.*

¹²⁶ *Id.*, p. C.2-182.

¹²⁷ Gotmark F. 1992. The effects of investigator disturbance on nesting birds. *Current Ornithology* 9: 63-104.

¹²⁸ Martin T.E., and G.R. Geupel. 1993. Nest-Monitoring Plots: Methods for Locating Nests and Monitoring Success. *J. Field Ornithol.* 64(4):507-519.

¹²⁹ SA/DEIS., p. C.2-184.

workshop, Staff indicated that these surveys could be conducted concurrent with desert tortoise clearance surveys. However, CBOC survey protocol calls for four distinct survey phases entailing multiple site visits. Survey visits designed to detect owls must be conducted during the hours around sunrise or sunset. Staff needs to clarify the extent to which the Applicant will be required to conform to CBOC guidelines. If the Applicant will not be held responsible for conducting all four phases called for in the CBOC guidelines, the SA/DEIS should specify the survey techniques expected of the Applicant, including the time of day surveys will be permitted.

Further, the ability to effectively survey for multiple species concurrently depends on the habits of the target species. Average burrowing owl flushing distance was reported to be 102 feet from observers on foot.¹³⁰ Effective detection of birds generally involves experience and the ability to incorporate several different visual and aural cues of presence. Often, burrowing owls are detected when flushed from the burrow or perch site. Assuming observers are carefully scanning the ground for desert tortoises and burrows, it is questionable that they will be able to detect owls that flush from a distance potentially more than 100 feet away (i.e., how can a surveyor look down and 100 feet ahead at the same time?). The SA/DEIS should not assume that surveys for multiple species can effectively be conducted concurrently. Instead, the SA/DEIS must demonstrate that such surveys can be done concurrently, or the SA/DEIS must require that such surveys be conducted independently.

The SA/DEIS' preconstruction survey requirement entails a Burrowing Owl Mitigation Plan if owls are detected within the Project area. Owls were detected during the Applicant's 2007 and 2009 surveys.¹³¹ CBOC guidelines call for mitigation for burrows occupied within the past three years. As a result, the SA/DEIS must require the Burrowing Owl Mitigation Plan to be prepared prior to construction for public review and comment.

BIO-18 also requires the Applicant to "[d]escribe monitoring and management of the relocated burrowing owl site, and provide a reporting plan."¹³² However, the condition does not establish any success criteria or triggers for remedial actions. Without success criteria or triggers for remedial actions, a monitoring report is relatively pointless. Few studies have quantitatively studied the long-term effects of burrowing owl translocation, and those that have provide mixed results. Consequently, the rates of survival and reproduction of burrowing

¹³⁰ Klute D.S., L.W. Ayers, M.T. Green, W.H. Howe, S.L. Jones, J.A. Shaffer, S.R. Sheffield, T.S. Zimmerman. 2003. Status assessment and conservation plan for the western Burrowing Owl in the United States. Bio Tech Pub FWS/BTP-R6001-2003. Washington: US Fish and Wildlife.

¹³¹ 2009 Winter Avian Point Count and Burrowing Owl Surveys Report, Genesis Solar Energy Project, Riverside, CA, April 2010, pp. 4-6.

¹³² SA/DEIS, p. C.2-185.

owls relocated to artificial burrows, as well as the long-term use of artificial burrows and the ability to maintain populations are unknown.¹³³ Burrowing owl mitigation guidelines issued by CDFG recommend that the project sponsor provide funding for long-term management and monitoring of the protected lands. The monitoring plan should include success criteria, remedial measures, and an annual report to CDFG.¹³⁴ The SA/DEIS must be revised to incorporate these guidelines into the conditions of certification.

In sum, identification and analysis of feasible mitigation measures to reduce impacts to biological resources to a less than significant level must occur now, and be included in the Revised SA that is circulated for public review and comment so that the public has a meaningful opportunity to evaluate and comment on the proposed mitigation. As proposed, Project impacts on numerous biological resources remain significant and unmitigated.

D. The Mitigation Measures for Impacts from Heat Transfer Fluid Are Vague and Uncertain

The mitigation measures for impacts from HTF spills are completely inadequate to address HTF that sits on top of the soil, to address off-site consequences of HTF spills and to address consistency with LORS, among others. For example, HAZ-4 requires that the Applicant place an “adequate number” of isolation valves in the heat transfer fluid pipe loops to ensure that heat transfer fluid leaks do not pose a significant risk.¹³⁵ However, the source of such spills is the valves themselves. Thus, the SA/DEIS fails to provide any analysis to substantiate that this measure would in any way mitigate impacts from HTF spills. Thus, significant impacts from heat transfer fluid leaks remain significant and unmitigated.

E. Mitigation Measures for Impacts to Water Resources Are Deferred

The SA/DEIS concludes that evaporation ponds will cause potentially significant impacts to groundwater quality.¹³⁶ However, the SA/DEIS does not provide mitigation for the potentially significant impacts. SOILS&WATER-6 states that “conditions to require implementation of waste discharge requirements for LTU and surface impoundments are currently in development...”¹³⁷ The SA/DEIS should include specific measures to reduce the significant impacts identified by

¹³³ *Id.*

¹³⁴ State of California, Department of Fish and Game. 2005. Staff Report on Burrowing Owl Mitigation. Available at: http://www.dfg.ca.gov/hcpb/species/stds_gdl/bird_sg/burowlmit.pdf.

¹³⁵ SA/DEIS, p. C.4-21.

¹³⁶ *Id.*, p. C.9-2.

¹³⁷ *Id.*, p. C.9-100.

Staff. Measures to reduce significant impacts from the evaporation ponds must be included in the Revised SA that is circulated for public review and comment. Only by doing so will the public be afforded its right under CEQA to review and comment on proposed mitigation measures for the Project.

F. Mitigation Measures for Impacts to Water Resources Are Vague and Uncertain

Because the Project proposes to use groundwater for power plant cooling, the SA/DEIS correctly concludes that the Project does not comply with the State’s water policies.¹³⁸ Specifically, the Project’s proposal to use groundwater fails to “use the least amount of water available”¹³⁹ because the Applicant does not propose to use dry cooling even though dry cooling is feasible. The SA/DEIS attempts to reconcile the Project’s inconsistency with LORS with Condition of Certification SOIL&WATER-18 which states *in full*:

SOIL&WATER-18 Pending agreement on the actions needed to bring the project into compliance with the water policy.¹⁴⁰

Clearly, this condition is *meaningless*. It provides no information to the public that would enable any meaningful review of the proposed condition.

The SA/DEIS alludes to future discussions between Staff and the Applicant regarding a panoply of suggestions to bring the Project into compliance with LORS, none of which are analyzed or required in the SA/DEIS. For example, the SA/DEIS suggests dry cooling, hybrid cooling, a ZLD system, project design changes to increase water use efficiency, payment for irrigation improvements, purchase of water rights in the Colorado River, funding of Tamarisk removal, and “other water conserving activities.”¹⁴¹ However, most of these suggestions would fail to ensure that the Project will use the least amount of the worst available water, since dry cooling is feasible for the Project. And, importantly, future discussions – after release of the SA/DEIS – regarding major Project changes and/or mitigation measures mandate that the SA/DEIS be revised and recirculated for public review and comment.

The SA/DEIS also concludes that the Project’s proposed groundwater pumping may be illegal and will significantly impact the adjudicated Colorado River. The SA/DEIS states, “the Project has the potential to divert Colorado River

¹³⁸ *Id.*, p. C.9-116.

¹³⁹ *Id.*, p. C.9-88.

¹⁴⁰ *Id.*, p. C.9-110.

¹⁴¹ *Id.*, p. C.9-89.

water without any entitlement to the water, and all groundwater production at the site could be considered Colorado River water.”¹⁴²

The Project clearly requires an entitlement prior to any groundwater pumping. However, the SA/DEIS does not identify whether the Project has obtained such an entitlement. Therefore, there is no information regarding whether the Project’s proposal to pump groundwater is a reliable water source.

With respect to significant impacts, the SA/DEIS proposes that the Applicant replace 51,920 acre-feet of water that will be pumped from the Colorado River over the life of the Project. However, the Applicant has not identified the water source that will replace 51,920 acre feet of water taken from the Colorado River. The SA/DEIS essentially proposes to replace 51,920 acre feet of Colorado River with nonexistent water. The SA/DEIS’ proposal for replacement of 51,920 acre-feet of water from the Colorado River without identifying a replacement water source is vague and uncertain. Thus, impacts to the Colorado River remain significant and unmitigated.

VI. CONCLUSION

We commend Staff for its efforts in identifying many potentially significant impacts posed by the Project, as well as proposing important and necessary mitigation measures for those impacts. However, as it stands, the Applicant failed to meet its burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility. Consequently, the SA/DEIS does not satisfy the requirements of CEQA or the Warren-Alquist Act, and impacts remain significant and unmitigated. Accordingly, an adequate, revised staff assessment must be prepared and circulated for public review and comment.

Sincerely,

/s/

Tanya A. Gulesserian
Rachael E. Koss

REK:bh

¹⁴² *Id.*, p. C.9-47.

Declaration of Service

I Bonnie Heeley declare that on May 13, 2010, I served and filed copies of the attached **COMMENTS OF THE CALIFORNIA UNIONS FOR RELIABLE ENERGY ON STAFF ASSESSMENT/DRAFT ENVIRONMENTAL IMPACT STATEMENT** dated May 13,2010. 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 May 13, 2010.

_____/s/
Bonnie Heeley

<p>CALIFORNIA ENERGY COMMISSION Attn: Docket No. 09-AFC-8 1516 Ninth Street MS 4 Sacramento, CA 95814-5512 docket@energy.state.ca.us</p>	<p>Ryan O’Keefe, Vice President Genesis Solar LLC 700 Universe Boulevard Juno Beach, Florida 33408 Ryan.okeefe@nexteraenergy.com EMAIL ONLY</p>	<p>Scott Busa/Project Director Meg Russell/Project Mgr Duane McCloud/Lead Engr NextEra Energy 700 Universe Boulevard Juno Beach, FL 33408 Scott.busa@nexteraenergy.com Meg.Russell@nexteraenergy.com Daune.mccloud@nexteraenergy.com</p> <p>Matt Handel/Vice Pres. Matt.Handel@nexteraenergy.com VIA EMAIL ONLY</p> <p>Kenny Stein, Environmental Srvs Mgr Kenneth.Stein@nexteraenergy.com VIA EMAIL ONLY</p>
<p>Mike Pappalardo Permitting Manager 3368 Videra Drive Eugene, OR 97405 Mike.pappalardo@nexteraenergy.com</p>	<p>James Kimura, Project Engineer Worley Parsons 2330 East Bidwell St., #150 Folsom, CA 95630 James.Kimura@WorleyParsons.com</p>	<p>Tricia Bernhardt/Project Manager Tetra Tech, EC 143 Union Blvd, Suite 1010 Lakewood, CO 80228 Tricia.bernhardt@tteci.com</p>
<p>Kerry Hattevik, dDector West Region Regulatory Affairs 829 Arlington Boulevard El Cerrito, CA 94530 Kerry.hattevik@nexteraenergy.com</p>	<p>Scott Galati Galati & Blek, LLP 455 Capitol Mall, Suite 350 Sacramento, CA 95814 sgalati@gb-llp.com</p>	<p>California ISO e-recipient@caiso.com VIA EMAIL ONLY</p>

<p>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</p>	<p>James D. Boyd Commissioner/Presiding Member California Energy Commission 1516 Ninth Street Sacramento, CA 95814 jboyd@energy.state.ca.us</p>	<p>Robert Weisenmiller Commissioner/Associate Member California Energy Commission 1516 Ninth Street Sacramento, CA 95814 rweisenm@energy.state.ca.us</p>
<p>Kenneth Celli, Hearing Officer California Energy Commission 1516 Ninth Street Sacramento, CA 95814 kcelli@energy.state.ca.us</p>	<p>Mike Monasmith Siting Project Manager California Energy Commission 1516 Ninth Street Sacramento, CA 95814 mmonasmi@energy.state.ca.us</p>	<p>Caryn Holmes, Staff Counsel California Energy Commission 1516 Ninth Street Sacramento, CA 95814 cholmes@energy.state.ca.us</p>
<p>Robin Mayer, Staff Counsel California Energy Commission 1516 Ninth Street Sacramento, CA 95814 rmayer@energy.state.ca.us</p>	<p>Jennifer Jennings Public Adviser's Office California Energy Commission 1516 Ninth Street Sacramento, CA 95814 publicadviser@energy.state.ca.us</p>	<p>Tanya A. Gulesserian Marc D. Joseph Rachael E. Koss Adams Broadwell Joseph & Cardozo 601 Gateway Boulevard, Suite 1000 South San Francisco, CA 94080 tgulesserian@adamsbroadwell.com rkoss@adamsbroadwell.com</p>
<p>Michael E. Boyd, President Californians for Renewable Energy, Inc. (CARE) 5439 Soquel Drive Soquel, CA 95073-2659 michaelboyd@sbcglobal.net</p>	<p>Alfredo Figueroa 424 North Carlton Blythe, CA 92225 lacunadeaztlan@aol.com</p>	<p>Tom Budlong 3216 Mandeville Cyn Rd. Los Angeles, CA 90049-1016 tombudlong@roadrunner.com</p>