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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'S
COMMENTS ON THE
PRESIDING MEMBER'S PROPOSED DECISION**

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I. INTRODUCTION

California Unions for Reliable Energy (“CURE”) has reviewed the Presiding Member’s Proposed Decision (“PMPD”) for the Genesis Solar Energy Project (“Project” or “Genesis Project”). The PMPD concludes that although the Project would result in significant impacts to the environment, even with proposed mitigation measures, the benefits of the Project outweigh those impacts. Specifically, according to the PMPD, the Project’s significant unmitigated cumulative impacts to cultural resources, visual resources and land use are outweighed by “economic, legal, social, technological, or other benefits of the project.”¹ For the remaining resource areas, the PMPD finds that proposed mitigation will reduce the Project’s impacts to a less than significant level.

The PMPD’s conclusions are flawed for several reasons. First, the Project’s impact on the Colorado River remains significant and unmitigated. Staff concluded that the Project would result in a significant impact to the Colorado River because “the reduction in outflow from the CVGB to the PVMGB” from Project groundwater use “will be made up at least in part by inflow from the Colorado River.”² As shown below, Soil&Water-15 and -19 do not reduce the Project’s impact on the Colorado River to below a less than significant level. Second, the Commission failed to analyze the Project’s impacts on human burials and ethnographic resources and therefore the Commission cannot make required findings pursuant to CEQA. Third, the PMPD’s finding that downstream transmission facilities need not be analyzed is inconsistent with other cases currently before the Commission and the Commission’s long history of requiring environmental review of downstream transmission facilities, as required by CEQA. Fourth, the Project’s impacts to workers, the public and the environment from the Project’s use of heat transfer fluid (“HTF”) were not adequately analyzed. Finally, the PMPD’s conclusion that the Project’s impacts to special-status plants will be reduced to a level below significant is not supported by the record and the impacts remain significant and unmitigated.

CURE submits these CEQA comments on the PMPD and requests that the Commission provide responses to these comments in accordance with CEQA’s requirement that the Commission provide public notice, a 30-day public comment period and responses to comments on the environmental review document for the Project.³

¹ PMPD, Override Findings, pp. 1-9.

² Exh. 402, p. 31 (emphasis added).

³ CURE also incorporates herein CURE’s post hearing First Opening Brief (Attachment 1), Second Opening Brief (Attachment 2), Third Opening Brief (Attachment 3), First Reply Brief (Attachment 4), Second Reply Brief (Attachment 5), Letter to Commissioners in Response to Genesis Solar, LLC’s Supplemental Reply Brief (Attachment 6), and Motion to Strike Portions of Genesis Solar, LLC’s Reply to the Third Opening Brief of CURE – Evidentiary Hearing Day 3 Topics (Attachment 6), in

II. CEQA REQUIRES THAT THE COMMISSION PROVIDE PUBLIC NOTICE, A 30-DAY PUBLIC COMMENT PERIOD AND RESPONSES TO COMMENTS

CEQA requires the Commission to provide public notice of the availability of its environmental review document, an opportunity for public comment on the environmental assessment, and responses to public comments. Specifically, Public Resources Code section 21092 requires the Commission to provide public notice that specifies the period during which comments will be received.⁴ Public Resources Code section 21091(a) provides that the Commission's public review period may not be less than 30 days. Public Resources Code section 21091(d) requires the Commission to consider comments it receives on the draft assessment and prepare a written response. The Commission is not exempt from any of these mandatory CEQA requirements.

Under Public Resources Code section 21080.5, a certified regulatory program is "exempt from Chapters 3 (commencing with Section 21100), Chapter 4 (commencing with Section 21150), and Section 21167, except as provided in Article 2 (commencing with Section 21157) of Chapter 4.5."⁵ However, the regulatory program must require that approval of a project be preceded by the preparation of written environmental documentation that:

- 1) Includes a description of the proposed activity and mitigation measures to minimize any significant adverse environmental impacts; and
- 2) Is available for a reasonable time for review and comment by other public agencies and the general public.⁶

Furthermore, a regulatory program is ***not exempt*** from any other procedural and substantive requirements of CEQA, if such requirements are found outside of Chapters 3 and 4 of the Act, outside of section 21167 of the Public Resources Code or within section 21080.5 itself.⁷ In fact, the CEQA Guidelines themselves provide that "[a] certified regulatory program [under section 21080.5] remains subject to other provisions of CEQA..."⁸

order to ensure a complete record regarding CURE's comments on the Project and the Commission's environmental review document – whatever that may be – under CEQA.

⁴ Pub. Resources Code § 21092(a), (b)(1).

⁵ Pub. Resources Code §21080.5(c); *Environmental Protection Information Center, Inc. v. Johnson* (1st Dist. 1985) 170 Cal.App.3d 604, 616-618.

⁶ Pub. Resources Code § 21080.5(a), (d)(3).

⁷ *Environmental Protection Information Center, Inc. v. Johnson* (1st Dist. 1985) 170 Cal.App.3d 604, 616-618.

⁸ 14 Cal. Code Reg. § 15250.

When certifying the California Energy Commission's regulatory program as "functionally equivalent" under section 21080.5, the Secretary of the Resources Agency confirmed "that the program continues to meet the criteria for certification under Public Resources Code section 21080.5."⁹ Therefore, the Commission may "continue to process any...application for certification...under its current regulatory program without preparing an environmental impact report."¹⁰ The secretary did not use language exempting the program from CEQA, only from preparing an environmental impact report. "Under the maxim *expressio unius est exclusio alterius*, exemptions specified in the statute prevent additional exemptions from being implied or presumed, absent clear legislative intent to the contrary."¹¹

The courts have been clear that certified regulatory agencies are not exempt from other requirements of CEQA.¹² In *Ultramar v. South Coast Air Quality Management District*, the court considered whether the air quality management district was required to comply with section 21091(a) of the Public Resources Code, which provides that "[t]he public review period for a draft [EIR] may not be less than 30 days."¹³ In finding that the 30-day public comment period applies to public review of the air district's environmental assessment ("EA") under its certified regulatory program, the court stated that "[t]he fact that this section refers to EIR's, rather than EA's, is of no consequence."¹⁴ The court noted that the Supreme Court emphasized that "[t]he foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'"¹⁵ Section 21091, which specifies a public review period of not less than 30 days, is a part of chapter 2.5¹⁶ and, thus, certified regulatory agencies are not exempt from its mandate.

In this case, the Commission has not yet satisfied CEQA's procedural requirements described above. The Staff Assessment/Draft Environmental Impact Statement ("SA/DEIS") was released on March 26, 2010. The Commission provided a 30-day public comment period for the SA/DEIS and responded to public comments. However, a Revised Staff Assessment ("RSA") was released on June 11, 2010, the cultural resources section for the RSA was released on June 17, 2010 and

⁹ Letter from Mary D. Nichols, Secretary for Resources, to Mr. William J. Keese, Chairman, California Energy Commission, Subject: Review of the Energy Commission's Certified Program for Siting Power Plants (December 29, 2000).

¹⁰ *Id.*

¹¹ *Environmental Protection Information Center, Inc. v. Johnson* (1st Dist. 1985) 170 Cal.App.3d 604, 617.

¹² *Id.*

¹³ *Ultramar v. South Coast Air Quality Management District* (2nd Dist. 1993) 17 Cal.App.4th 689, 698-699.

¹⁴ *Id.*

¹⁵ *Id.* at pp. 699-700, citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390.

¹⁶ *Id.* at 700.

a Supplemental Staff Assessment (“SSA”) was released on July 2, 2010, all of which contained significant new information requiring circulation for a 30-day public review and comment period.¹⁷ For example, the RSA contained new analyses and mitigation measures for the Project’s significant impacts to numerous special-status species based on the Applicant’s spring 2010 survey results. The revised cultural resources section contained 17 new conditions of certification. The SSA provided a new impact analysis for the Colorado River Substation expansion requiring additional mitigation to reduce the Project’s impacts on biological resources to less than significant levels. Yet, the Commission provided only a 27-day public comment period for the RSA and did not notice *any* public comment period for the cultural resources section of the RSA or for the SSA. Therefore, the RSA and subsequently released cultural resources section of the RSA and the SSA cannot be considered the draft environmental review document for purposes of CEQA.

The Commission issued the PMPD on August 19, 2010. The PMPD contains significant new information requiring circulation for a 30-day public review and comment period and responses to comments.¹⁸ For example, the PMPD concludes that the Project would result in significant, unmitigated impacts to cultural resources that were not identified in the SA/DEIS or RSA. Accordingly, the Commission properly noticed a 30-day public review and comment period for the PMPD. Now, in order to fulfill its obligations under CEQA, the Commission must provide responses to comments on the PMPD.¹⁹

III. THE PROJECT’S IMPACT ON THE COLORADO RIVER REMAINS SIGNIFICANT AND UNMITIGATED

The RSA states, “water in the Colorado River is fully appropriated and any diversion of water from the Colorado River would be a significant impact.”²⁰ Accordingly, Staff concluded that proposed Project groundwater pumping would result in a significant impact to the Colorado River because “the reduction in outflow from the CVGB to the PVMGB” that results from Project groundwater use “will be made up at least in part by inflow from the Colorado River”²¹ and “all groundwater production at the site would be considered Colorado River water.”²²

Staff’s conclusions are in accord with the Bureau of Land Management’s Final Environmental Impact Statement (“FEIS”) for the Project.

¹⁷ Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5.

¹⁸ CEQA Guidelines, § 15088.5.

¹⁹ CEQA Guidelines, § 15088.5(d).

²⁰ Exh. 400, p. C.9-68 (emphasis added).

²¹ Exh. 402, p. 31 (emphasis added).

²² Exh. 400, p. C.9-68 (emphasis added).

The FEIS states:

[b]ecause water within the [CVGB] is tributary to the Colorado River System, it is subject to the U.S. Supreme Court's Consolidated Decree (regarding Arizona v. California). Studies have estimated the flow to the Colorado River Basin as being between about 400 to 1,200 ac-ft/yr...The USGS identifies the CCGB[sic] as part of the Colorado River Basin/System in USGS SIR 2008-5113. The basin is subject to the Colorado River Compact of 1922, and the Boulder Canyon act of 1928, and Consolidated Decree (547 U.S. 150 [2006]).

Groundwater contained in the CVGB discharges across the eastern basin boundary, located between the McCoy Mountains and the Mule/Palo Verde Mountains, about 8 miles southeast of the GSEP...where it enters into the [PVMGB]. Groundwater contained in the PVMGB is hydrologically contiguous with groundwater contained in the Palo Verde Valley Groundwater Basin (PVVGB), which flanks the Colorado River. Therefore, under current/natural conditions, groundwater underlying the GSEP site flows in a southeasterly direction, into the PVVGB, and eventually influences the hydrology of the Colorado River. Downstream water right holders include California, Arizona, and Mexico.²³

Also:

[g]iven the location of the GSEP and the anticipated annual GSEP water requirements, ***the GSEP would impact the PVMGB and the Colorado River Basin.***²⁴ The Colorado River Basin is defined under the Colorado River Compact of 1922 (affirmed by 547 U.S. 150 [2006]) as, '...all of the drainage area of the Colorado River System,' where the term 'Colorado River System' is defined as the Colorado River and its tributaries..Finally, tributaries to the Colorado River were defined as, 'all stream systems the waters of which naturally drain into the mainstream of the Colorado River below Lee Ferry.'²⁵

Further:

[t]he U.S. Geological Survey has indicated that the CVGB lies within a basin tributary to the Colorado River and that wells drawing groundwater within those groundwater basins could be considered to be withdrawing water from the Colorado River Aquifer (Wilson et al., 1994). The USGS developed an accounting surface for determination of whether water was being drawn from the mainstream of the Colorado River. The accounting surface for the GSEP

²³ Genesis Solar Energy Project PA/FEIS, pp. 3.20-3-4.

²⁴ Genesis Solar Energy Project PA/FEIS, p. 4.19-2 (emphasis added).

²⁵ Genesis Solar Energy Project PA/FEIS, p. 4.19-2.

site ranged from 248 to 252 feet mean sea level (msl). Consequently, the GSEP has the potential to divert Colorado River water without an entitlement to the water, and all groundwater production at the site should be considered Colorado River water.²⁶

The FEIS later states, in its evaluation of the dry cooling alternative, that

[w]ater in the Colorado River is fully appropriated and ***the Colorado River would be impacted***. The U.S. Geological Survey has indicated that the PVMGB and CVGB lie within a basin tributary to the Colorado River and that wells drawing groundwater could be considered to be withdrawing water from the Colorado River Aquifer (Wison et al., 1994). Consequently, the GSEP has the potential to divert Colorado River water without any entitlement to the water, and ***all groundwater production at the site would be considered Colorado River water***.²⁷

In short, both Energy Commission Staff and the BLM concluded that proposed Project pumping would use Colorado River water, resulting in an impact to the River.

The Applicant disagrees and contends that the Project would not impact the Colorado River. Notably, the ***Bureau of Reclamation***, the water master for the Colorado River, stated that the ***Applicant's conclusion that the Project would not impact the Colorado River (or require an entitlement) is unjustified***.²⁸

After negotiations with the Applicant, Staff agreed to disagree about the Project's impact on the Colorado River and consented to renaming the impact on the Colorado River—now, “impacts to the PVMGB”—in an effort to avoid the Colorado River entitlement issue.²⁹ Staff subsequently revised Soil&Water-15 and Soil&Water-19.

For example, Soil&Water-15 is now entitled “Mitigation for Impacts to the Palo Verde Mesa Groundwater Basin” rather than “Mitigation of Colorado River Impacts” and instead of requiring the Applicant to “mitigate project impacts to flows in the Colorado River,” Staff is now requiring the Applicant “to mitigate project impacts that result in depletion of the PVMGB groundwater budget.” Staff also changed Soil&Water-19, originally called “Estimation of Colorado River Impacts” to “Estimation of Impacts to PVMGB.” Previously, Soil&Water-19 allowed the

²⁶ Genesis Solar Energy Project PA/FEIS, p. 4.19-2 (emphasis added).

²⁷ Genesis Solar Energy Project PA/FEIS, p. 4.19-17 (emphasis added).

²⁸ See Attachment 8, Email from William Greer of Bureau of Reclamation to William Bruninga of Bureau of Reclamation, re: Review of “Groundwater Resources Investigation, Genesis Solar Energy Project, Riverside County, California” by Worley Parsons, April, 9 2010.

²⁹ July 13, 2010 Tr., pp. 5-6, 10-13.

Applicant “to refine the estimates of the amount of subsurface water flowing from the Colorado River due to project pumping used for determining” the amount of water for mitigation in accordance with Soil&Water-15. Under the new Soil&Water-19, the Applicant must “conduct an analysis of the Project’s effect on the PVMGB groundwater budget including an estimate of the decrease in underflow from the CVGB to PVMGB.”³⁰

Importantly, however, Staff’s conclusion that the Project would significantly impact the Colorado River because “the reduction in outflow from the CVGB to the PVMGB” that results from Project groundwater use “will be made up at least in part by inflow from the Colorado River,” remains unchanged.³¹

The PMPD states that:

[b]ased on the connection between the CVGB and the Colorado River...the evidence suggests that wells drawing groundwater from the CVGB could result in impacts to the river and the adjacent PVMGB (which is located between the project site and the river). Specifically, water supplies in the Colorado River are fully appropriated, with the existing appropriations encompassing all consumptive uses (including applicable groundwater pumping) pursuant to related Supreme Court decrees.³²

The PMPD acknowledges that the “Applicant and Staff agreed that the project will decrease the amount of groundwater underflow from the CVGB to the PVMGB.”³³

The PMPD finds that Conditions of Certification Soil&Water-15 and Soil&Water-19 would reduce the Project’s impacts on the Colorado River (or, as Staff now calls it, “impacts to the PVMGB”) to less than significant levels.³⁴ However, the record shows that Soil&Water-15 and -19 are not feasible, effective mitigation measures that would reduce the Project’s impact on the Colorado River to a less than significant level.

Soil&Water-15 requires the Applicant to offset depletion of the PVMGB groundwater budget (which Staff concluded would induce flows from the Colorado River) through various water conservation projects which may include paying for irrigation improvements in Palo Verde Irrigation District (“PVID”), paying for conversion to cultivation of crops with lower crop water demand in the PVID, using tertiary treated water, implementing water conservation programs in the CVGB, PVMGB or Colorado River flood plain communities, and/or participating in BLM’s

³⁰ Exh. 443.

³¹ Exh. 402, p. 31; Staff’s Opening Brief, p. 9 (emphasis added).

³² PMPD, Soil and Water, p. 9.

³³ PMPD, Soil and Water, p. 10.

³⁴ *Id.*

tamarisk removal program.³⁵ However, as CURE explained in its First Reply Brief, the record shows that two of the water conservation projects included in the condition are not feasible, effective mitigation measures pursuant to CEQA.³⁶

The Metropolitan Water District (“MWD”) submitted comments on the SA/DEIS which stated that payment for irrigation improvements in PVID and BLM’s tamarisk removal program are **not** available to the Applicant to mitigate impacts to Colorado River water resources. Rather, the Applicant would have to obtain Colorado River water through a re-entitlement from MWD. Thus, MWD stated that Soil&Water-15 should be revised accordingly. However, MWD’s comments were ignored. Consequently, the PMPD’s finding that Soil&Water-15 would reduce the Project’s impacts on the PVMGB (and therefore the Colorado River) to less than significant is contradicted by evidence in the record.

Furthermore, there is no evidence in the record that the remaining measures in Soil&Water-15 are feasible or that they would be effective in reducing the Project’s significant impacts on the PVMGB and Colorado River to a less than significant level. For example, a condition that requires the Applicant to pay for water conservation projects without any evidence that water is actually available does not assure actual mitigation of impacts.³⁷ Thus, the Commission cannot make required findings under CEQA. Specifically, the Commission cannot find that “changes or alterations have been required in, or incorporated into, the project that would avoid or substantially lessen the effect...” of the Project’s significant impact on the PVMGB and Colorado River.³⁸

Likewise, Soil&Water-19 does not provide feasible, effective mitigation to reduce the Project’s impact on the Colorado River to a level below significant, and thus the Commission cannot rely on Soil&Water-19 for its required findings. In fact, Soil&Water-19 does not address the Colorado River at all. Where the original condition of certification would have measured how much Colorado River water the Project would draw,³⁹ the new Soil&Water-19 ignores the Colorado River altogether and instead focuses only the amount of decreased outflow from the CVGB to PVMGB as a result of proposed Project pumping.⁴⁰

³⁵ Exh. 443, pp. C.9-2-3.

³⁶ Pub. Resources Code §§ 21002.1(a), 21100(b)(3); 14 Cal. Code Regs. § 15370; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727.

³⁷ *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d at 728.

³⁸ Pub. Resources Code § 21081(1); 14 Cal. Code Regs. § 15091(a).

³⁹ See Exh. 443 (“SOIL&WATER-19 The Project owner may choose to refine the estimates of **the amount of subsurface water flowing from the Colorado River due to project pumping use...**”).

⁴⁰ Exh. 443.

Again, Staff and the BLM agree that because the Colorado River is fully appropriated under federal law, the Project would impact the Colorado River.⁴¹ Specifically, “water in the Colorado River is fully appropriated and any diversion of water from the Colorado River would be a significant impact.”⁴² “[T]he reduction in outflow from the CVGB to the PVMGB” that results from Project groundwater use “will be made up at least in part by inflow from the Colorado River.”⁴³ Thus, both Staff and the BLM consider all groundwater production at the site to be Colorado River water.⁴⁴ Despite these findings, Staff agreed to disregard the Project’s use of Colorado River water and eliminated the modeling prescribed in the original Soil&Water-19 that would have showed how much Colorado River mainstream water the Project groundwater pumping would draw.

An important point here is that the Project would significantly impact the Colorado River because it is fully appropriated under federal law. There is simply no way that Soil&Water-15 and -19 can mitigate this impact—neither the modeling of the decreased flow from the CVGB to the PVMGB proposed in Soil&Water-19 nor paying for water conservation projects as proposed in Soil&Water-15 will reduce this impact. In order to mitigate the Project’s significant impact on the Colorado River, the Commission must require that the Colorado River water impacted by the Project be accounted for pursuant to federal law.⁴⁵ And in order to account for the Colorado River water drawn by Project pumping, modeling must be conducted to show how much Colorado River water the Project’s groundwater pumping would draw. This is the only way to ensure that water from the fully appropriated Colorado River is not being used unlawfully.

If the Commission does not require the Applicant to determine how much Colorado River water is drawn by Project groundwater pumping as mitigation for the Project’s significant impact on the Colorado River, all Project pumping could be required to cease. According to the Bureau of Reclamation, the United States Supreme Court Consolidated Decree *Arizona v. California* 547 U.S. 150,

indicates that consumptive use includes not only use of water from the Mainstream but also includes water withdrawn from the mainstream by underground pumping.

Therefore, under the Decree, someone who diverts water from the Mainstream by underground pumping without authorization from the United

⁴¹ Genesis Solar Energy Project PA/FEIS, p. 4.19-2.

⁴² Exh. 400, p. C.9-68 (emphasis added).

⁴³ Exh. 402, p. 31; Staff’s Opening Brief, p. 9.

⁴⁴ Exh. 400, p. C.9-68; Genesis Solar Energy Project PA/FEIS, p. 4.19-17.

⁴⁵ *Arizona v. California*, 547 U.S. 150.

States could be viewed as being in contempt of the Supreme Court, and that may provide a legal avenue to pursue termination of such pumping.⁴⁶

Therefore, mitigation for the Project's significant impact on the Colorado River must include accounting for all Colorado River water drawn by the Project through a legal entitlement for the water, as required by the United States Supreme Court Decree.

IV. THE COMMISSION MUST MAKE A FINDING PURSUANT TO PUBLIC RESOURCES CODE SECTION 21081 REGARDING THE PROJECT'S SIGNIFICANT IMPACTS ON CULTURAL RESOURCES AND THE COMMISSION CANNOT MAKE ITS FINDING UNTIL AN ADEQUATE ANALYSIS OF THE PROJECT'S IMPACTS ON CULTURAL RESOURCES IS CONDUCTED, INCLUDING AN ANALYSIS OF THE PROJECT'S IMPACTS ON HUMAN BURIALS

A. CEQA Requires the Commission to Make a Finding Regarding the Project's Significant Impacts on Cultural Resources

The PMPD states that “[n]otwithstanding the implementation of the Conditions of Certification below, the project may still have significant direct and indirect unmitigated environmental impacts on cultural resources.”⁴⁷ The PMPD also finds that the Project may have significant unmitigated cumulative impacts on cultural resources. The PMPD finds that the Project's significant unmitigated cumulative impacts on cultural resources, visual resources and land use are outweighed by the Project's benefits and the PMPD overrides the remaining impacts. However, the PMPD does not make a finding of law regarding the Project's significant unmitigated direct and indirect impacts on cultural resources.⁴⁸

Public Resources Code section 21081 requires the Commission to find, with respect to each significant impact, either:

- (1) Measures have been required to mitigate or avoid the Project's significant impacts on the environment;
- (2) Those measures are within the responsibility and jurisdiction of another public agency; or

⁴⁶ See Attachment 9, Email from Steve Hvinden of the Bureau of Reclamation to Lorri Gray of the Bureau of Reclamation re: Genesis solar project question, January 15, 2010.

⁴⁷ PMPD, Cultural Resources, p. 27 (emphasis added).

⁴⁸ PMPD, Override Findings, p. 9.

- (3) Specific economic, legal, social, technological, or other factors make the measures infeasible and the benefits of the Project outweigh the Project's significant impacts on the environment.

Pursuant to Public Resources Code section 21081, the PMPD must include a finding of law regarding the Project's significant unmitigated direct and indirect impacts on cultural resources.⁴⁹

B. The Commission Cannot Override the Project's Significant Impacts to Cultural Resources Without an Adequate Impact Analysis

The Commission cannot make a finding of overriding considerations until it performs an adequate analysis of the Project's impacts on cultural resources. As CURE explained in its Second Reply Brief, before the Commission can make a finding of overriding considerations, each of the Project's significant impacts must be disclosed and analyzed and all feasible mitigation must be required.⁵⁰ Staff undisputedly completely failed to analyze the Project's impacts on ethnographic resources and buried cultural resources, including human burials. Until these analyses are performed and the Commission is adequately informed of the Project's environmental effects, the Commission cannot find that all feasible mitigation has been required, nor can the Commission find that the Project's significant direct impacts on cultural resources are outweighed by the Project's benefits.⁵¹

In addition, the PMPD must include a discussion of the Project's impacts on human burials. CEQA requires that each of the Project's significant impacts be disclosed and analyzed and all feasible mitigation must be required.⁵² Despite testimony by CURE and Staff regarding the high likelihood of the presence of human burials on the Project site,⁵³ Staff's admission that it did not analyze the Project's impacts on human cemeteries,⁵⁴ and considerable briefing dedicated to the Project's impacts on human burials, the PMPD does not mention human burials at all—not once. There is no reason why, despite substantial evidence showing that the Project would significantly impact human burials, the PMPD fails to address the issue.

⁴⁹ Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5.

⁵⁰ CURE's Second Reply Brief, p. 11; *San Bernardino Valley Audobon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738; *Woodward Park Homeowners Association, Inc. v. City of Fresno* (2007) 160 Cal.App.4th 683.

⁵¹ *San Bernardino Valley Audobon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738; *Woodward Park Homeowners Association, Inc. v. City of Fresno* (2007) 160 Cal.App.4th 683, 718.

⁵² CURE's Second Reply Brief, p. 11; *San Bernardino Valley Audobon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738; *Woodward Park Homeowners Association, Inc. v. City of Fresno* (2007) 160 Cal.App.4th 683.

⁵³ July 21, 2010 Tr., pp. 210-211, 260.

⁵⁴ July 21, 2010 Tr., p. 179.

C. The Conditions of Certification Fail to Satisfy CEQA and Standard Archaeological Practice

The PMPD's conditions of certification do not comply with CEQA, the Secretary of the Interior's Standards and Guidelines,⁵⁵ and accepted archaeological practice, including standard archaeological practice acknowledged by Commission Staff.

First, the conditions fail to consider the potential for "unique" cultural resources as defined by CEQA.⁵⁶ The CEQA Guidelines clearly state that:

If an archaeological site does not meet the criteria defined in subdivision (a) [i.e., California Register of Historic Resources eligibility], but does meet the definition of a unique archeological resource in Section 21083.2 of the Public Resources Code, the site shall be treated in accordance with the provisions of section 21083.2. The time and cost limitations described in Public Resources Code Section 21083.2 (c-f) do not apply to surveys and site evaluation activities intended to determine whether the project location contains unique archaeological resources.⁵⁷

CEQA compliance requires appropriate efforts to identify, evaluate and treat unique cultural resources. The current conditions completely fail to acknowledge or provide a means for complying with the requirement to conduct "evaluation activities intended to determine whether the project location contains unique archaeological resources."⁵⁸ The conditions must be revised accordingly.

Second, the PMPD's conditions fail to meet existing and widely followed standard archeological practice. Standard archaeological practice is identified and outlined in a variety of sources and guidelines including (but not limited to): (1) the *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation* ("SOI Guidelines");⁵⁹ (2) BLM Manual Section 8110, *Identifying and Evaluating Cultural Resources*;⁶⁰ (3) the Caltrans *Standard Environmental Reference* (Volume 2, Chapter 5 "Prehistoric Archaeological Sites: Identification, Evaluation, and Treatment");⁶¹ and (4) the Office of Historic Preservation's *California Archaeological Resource Identification and Data Acquisition Program: Sparse Lithic Scatters* ("CARIDAP").⁶² Each of these sources acknowledges that the

⁵⁵ 48 Fed. Reg. 44716, available at http://www.nps.gov/history/local-law/arch_stnds_0.htm.

⁵⁶ Pub. Resources Code § 21083.2.

⁵⁷ CEQA Guidelines 15064.5(c)(3).

⁵⁸ *Id.*

⁵⁹ 48 Fed. Reg. 44716, available at http://www.nps.gov/history/local-law/arch_stnds_0.htm.

⁶⁰ Available at:

http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.23101.File.dat/8110.pdf.

⁶¹ Available at <http://www.dot.ca.gov/ser/vol2/chap5.htm>.

⁶² Available at <http://www.parks.ca.gov/pages/1069/files/caridap.pdf>.

evaluation or determination of significance/eligibility phase is distinct from mitigation or treatment, and is required prior to the establishment of final treatment or mitigation plans. For example, regarding the information needed to evaluate properties, the SOI Guidelines state:

Generally, at least the following will be needed:

1. Adequately developed historic contexts, including identified property types...
2. Sufficient information about the appearance, condition and associative values of the property to be evaluated to:
 - a. Classify it as to property type;
 - b. Compare its features or characteristics with those expected for its property type; and
 - c. Define the physical extent of the property and accurately locate the property.⁶³

The SOI Guidelines further state that, “[e]valuation of the significance of a property should be completed **before** registration is considered and **before** preservation treatments are selected.”⁶⁴

Further, with respect to significance values and eligibility criteria, the SOI Guidelines state that:

Many properties having archaeological components have associative values as well as research values. Examples include Native American sacred areas and historic sites such as battlefields...Depending upon the property type and the range of values represented by the property, it may be necessary to recover information that relates to an aspect of the property’s significance other than specified research questions. It is possible that conflicts may arise between the optimal realizations of research goals and other issues such as the recognition/protection of other types of associative values. The research design for the archaeological documentation should provide for methods and procedures to resolve such conflicts, and for the close coordination of the archaeological research with the appropriate ethnographic, social or technological research.⁶⁵

⁶³ http://www.nps.gov/history/local-law/arch_stnds_3.htm (emphasis added).

⁶⁴ See Standard III, Evaluation Results in A List or Inventory of Significant Properties That is Consulted In Assigning Registration and Treatment Priorities, available at: http://www.nps.gov/history/local-law/arch_stnds_3.htm (emphasis added).

⁶⁵ http://www.nps.gov/history/local-law/arch_stnds_7.htm.

Commission Staff formally acknowledged these standard practices and principles. The “Staff Assessment of Cultural Resources and Native American Values” for the Calico Solar Project states:

it is common professional practice in cultural resource management to conduct at least some degree of subsurface sampling of archaeological sites that may be directly and permanently affected by a proposed project (even for sparse lithic scatters).⁶⁶

Staff’s statement speaks to the *minimum* requirements for evaluating cultural resources identified in the SOI Guidelines for the identification of property types. “Sparse lithic scatters,” noted by Staff, are a site type that is defined in the Office of Historic Preservation’s CARIDAP assessment and treatment protocol. The defining characteristics of this class of site include: (1) a low surface artifact density; (2) a restricted range of types of artifacts present; and (3) the absence of a subsurface archaeological deposit. Absent subsurface excavations and testing, it is impossible to determine whether a site has or lacks a subsurface deposit, except in the most extraordinary of circumstances (e.g., artifacts found on the surface of solid bedrock.) For example, it is impossible to identify “even...sparse lithic scatters” without subsurface testing. Hence the requirement in the SOI Guidelines for the collection of adequate information to accurately classify property types during the evaluation process, prior to the establishment or treatment and mitigation measures.⁶⁷

In short, under SOI Guidelines and CEQA, and as acknowledged by Commission Staff, mitigation measures can only be developed *after* the evaluation of a historical resource has occurred. Evaluative procedures are required to accurately identify a specific resource’s property type, based in part on its associative values. Thus, the PMPD’s conditions must be revised to cure deficiencies with respect to State law, regulatory compliance and standard professional archaeological practice.

V. THE COMMISSION MUST ANALYZE SIGNIFICANT IMPACTS ASSOCIATED WITH DOWNSTREAM TRANSMISSION FACILITIES

CEQA requires the Commission to analyze the “whole of the project,” including those “crucial elements” of a project without which the project could not go

⁶⁶ Calico Solar Project “Staff Assessment of Cultural Resources and Native American Values” p. C.2-96.

⁶⁷ See Standard III, Evaluation Results in A List or Inventory of Significant Properties That is Consulted In Assigning Registration and Treatment Priorities, available at http://www.nps.gov/history/local-law/arch_stnds_3.htm.

forward.⁶⁸ Because the Project depends on the transmission upgrades identified in the Transition Cluster Phase II Interconnection Study Report (“Phase II Study”), the Commission must analyze potentially significant impacts from the upgrades.

The PMPD finds that it is speculative to identify all downstream transmission facility upgrades required for the Project and if upgrades are required, the California Public Utilities Commission (“CPUC”) will perform the CEQA review.⁶⁹ Thus, according to the PMPD, the Project “would not require additional downstream transmission facilities (other than those proposed by the Applicant) that require CEQA review.”⁷⁰ The PMPD’s conclusions are internally inconsistent, and are inconsistent with the Commission’s decision for the Blythe Solar Power Project (09-AFC-6) and the Commission’s long history of requiring an evaluation of downstream transmission facilities, as required by CEQA.

A. The PMPD is Internally Inconsistent

On one hand, the PMPD states that it is speculative to identify downstream facilities required for the Project because 1) the Phase II Study identified downstream transmission facilities required for a cluster of projects, and 2) the Commission need not analyze downstream facilities because the CPUC would conduct the analyses.⁷¹ However, the PMPD recognizes that:

Staff’s expert testified that in order to maintain system reliability, mitigation in the form of upgrades to or replacement of 16 circuit breakers would be necessary. Other mitigation would include looping the Colorado River substation connection to the Devers substation number two 500-kV transmission line into the Red Bluff substation. The record indicates that the as yet unbuilt Colorado River substation will have to be expanded but ***the expansion has been fully analyzed for environmental impacts in Exhibit 403.*** Finally, the Phase II Study requires upgrades to four 230-kV Lines that come out of the Devers substation to the west. (Ex. 400, p. D.5-7; 7/21/10 RT 43:12-45:18.) However, the ***Staff witness made clear in his testimony that these four 230 kV lines were upgrades not directly related to the GSEP interconnection.*** (7.21.10 RT 45.)⁷²

Certainly, if Staff was able to point out that some upgrades identified in the Phase II Study are not required for the Project, it is not speculative to identify which downstream facilities are required for the Project. Moreover, the record shows that

⁶⁸ *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70; *San Joaquin Raptor v. County of Stanislaus* (1994) 27 Cal.App.4th 713; *Tuolumne County Citizens for Responsible Growth v. City of Sonoma* (2007) 155 Cal.App.4th 1214.

⁶⁹ PMPD, TSE, p. 7.

⁷⁰ *Id.*

⁷¹ PMPD, TSE, p. 7.

⁷² PMPD, TSE, p. 5 (emphasis added).

Staff's expert witness testified that he did not have any information to conclude that the Project would not require any of the other downstream facilities identified in the Phase II Study.⁷³ Thus, the record in this case shows that Staff was able to identify those downstream facilities that are (or are not) necessary for the Project—it is not speculative.

Further, Staff analyzed one of the identified upgrades, the Colorado River Substation expansion in the SSA that was not noticed and circulated for public comment. The PMPD's remark that the Commission need not analyze downstream transmission facilities because it is speculative to identify downstream facilities required for the Project and because the CPUC will conduct the analyses, is incorrect and misleading. It is unclear why Staff chose to analyze only the Colorado River Substation expansion and not the proposed Red Bluff Substation when the Project would require "looping the Colorado River substation connection to the Devers substation...into the Red Bluff substation." In any event, just as Staff analyzed the Colorado River Substation expansion, the other downstream facilities identified in the Phase II Study must be analyzed.

B. The PMPD is Inconsistent with the PMPD for the Blythe Solar Power Project and Decades of Commission Practice

The Phase II Study included the Blythe Solar Power Project ("BSPP"). According to the PMPD for BSPP:

The Phase II Study identified ***six mitigation measures required to allow for the reliable operation and delivery of power from the BSPP***. Where the mitigation had the potential for significant environmental impacts ***staff has provided an environmental analysis*** in Appendix A and Appendix B of Staff's Transmission System Engineering Testimony, Ex. 217. Facilities identified in Appendices A and B may require license or approval from the CPUC and/or the Bureau of Land Management.⁷⁴

Likewise, the Staff Final Transmission System Engineering Analysis and Attachments for the BSPP stated, "[t]he project interconnection to the grid would require additional downstream transmission facilities (other than those proposed by the applicant) that ***require [CEQA] review***. The ***CEQA review*** of the downstream transmission facilities has been ***included as attachment to this document***."⁷⁵

The Committee's and Staff's conclusions in BSPP are consistent with the Commission's historical practice of evaluating environmental impacts from

⁷³ July 21, 2010 Tr., pp. 46-47.

⁷⁴ PMPD for Blythe Solar Power Project, p. 92 (emphasis added).

⁷⁵ Staff Final Transmission System Engineering Analysis and Attachments, p. D.5-1 (emphasis added).

downstream changes in the transmission system. For example, the Sunrise Texaco Combined Cycle project (98-AFC-4) Final Staff Assessment (“FSA”) stated “[a]ny **new transmission facilities** such as the power plant substation, the outlet line, and, or downstream facilities, **required for connection to the grid are considered part of the project and are subject to the full AFC review process.**”⁷⁶ Similarly, the FSA for the Donald Von Raesfeld Power Plant Project (02-AFC-3) stated, “**Staff evaluated** the proposed power plant switchyard, outline line, termination and **downstream facilities** identified by the applicant...”⁷⁷

There is nothing new here. Just as Staff and the Committee concluded in the BSPP proceeding, the Phase II Study identified “six mitigation measures required to allow for the reliable operation and delivery of power from the” Project.⁷⁸ Also, just like the BSPP proceeding, the “downstream transmission facilities (other than those proposed by the applicant)...require [CEQA] review.”⁷⁹ Further, just like the Sunrise Texaco project, any transmission upgrades required for this Project’s connection to the grid require CEQA review. And like the Donald Von Raesfeld project, the Commission must analyze downstream facilities associated with this Project.

VI. THE PMPD FAILS TO ADEQUATELY ANALYZE IMPACTS FROM THE PROJECT’S USE OF HTF

CEQA requires the Commission to disclose and analyze all of a project’s potentially significant adverse environmental impacts.⁸⁰ Identification of a project’s significant environmental effects is one of the primary purposes of an environmental review document 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.⁸¹ To date, significant impacts associated with the Project’s use of HTF have not been adequately analyzed.

⁷⁶ Sunrise Texaco Combined Cycle project (98-AFC-4) Final Staff Assessment, Part II, p. 66 (emphasis added).

⁷⁷ Donald Von Raesfeld Power Plant Project Final Staff Assessment, p. 5.5-1 (emphasis added).

⁷⁸ PMPD for Blythe Solar Power Project, p. 92 (emphasis added).

⁷⁹ Staff Final Transmission System Engineering Analysis and Attachments, p. D.5-1.

⁸⁰ Pub. Resources Code, § 21100(b)(1).

⁸¹ *Id.*, §§ 21002, 21002.1(a).

A. The Commission Must Analyze Significant Impacts from Reasonably Foreseeable HTF Spills

The PMPD states that:

Staff accepted Applicant's estimated annual average of 750 cubic yards of spilled HTF which, we officially note, is equal to 151,500 gallons. (Ex. 400, pp. C.3-14 through C.3-15.) This amount is greater than the sum of all spilled HTF over the lifetime of SEGS, as contained in the reports submitted by CURE. We find Staff's analysis based upon an estimated 750 cubic yards of contaminated soil per year is an adequate baseline.⁸²

The PMPD's analysis is flawed for two reasons.

First, The PMPD confuses spilled HTF with HTF-contaminated soil. Specifically, the PMPD incorrectly attempts to equate gallons of spilled HTF with cubic yards of HTF-contaminated soil. The PMPD states

...Thus, most of the spills at the SEGS facilities over the last 20 years were substantially less than one cubic yard. The worst spill in the operation history of SEGS amounted to 30,000 gallons (about 150 cubic yards) of HTF on July 27, 2007 (Exh. 517, p. 2; 520). The second largest spill occurred eight years before that on May 22, 1999 which amounted to 21,000 (about 104 cubic yards). (Ex. 520) ...

...Staff accepted Applicant's estimated annual average of 750 cubic yards of spilled HTF which, we officially note, is equal to 151,000 gallons. (Ex. 400, pp. C.3-14 through C.3-15). This amount is greater than the sum of all spilled HTF over the lifetime of SEGS, as contained in the reports submitted by CURE. We find that Staff's analysis based upon an estimated 750 cubic yards of contaminated soil per year is an adequate baseline.⁸³

The PMPD's assumptions and calculations are incorrect and unsupported. There is nothing in the record that supports the PMPD's assumption that there is a one-to-one correlation between spilled HTF and HTF-contaminated soil. On the contrary, the record shows that a 30,000-gallon HTF spill (which, according to the PMPD is equal to 150 cubic yards) produced 6,558 cubic yards of HTF-contaminated soil.⁸⁴ Therefore, the PMPD's analysis is incorrect and unsupported.

Second, the PMPD's conclusion— that 750 cubic yards of contaminated soil per year is an adequate baseline – refers to the incorrect legal issue involved. The

⁸² PMPD, Waste Management, p. 10.

⁸³ PMPD, Waste Management, pp. 8-9.

⁸⁴ Exh. 517, p. 2; Exh. 520.

issue is whether Staff should have limited its analysis of foreseeable impacts from only 750 cubic yards of contaminated soil. The baseline, on the other hand, is zero cubic yards of HTF-contaminated soil since there is currently no HTF use on the proposed Project site.

As CURE explained in its First Opening Brief, substantial evidence shows that just one HTF spill could generate almost ten times the amount of contaminated soil analyzed in the RSA.⁸⁵ Thus, there is no valid basis for limiting the assessment of potential impacts from undisclosed-sized spills that result in 750 cubic yards of contaminated soil per year. Potentially significant impacts from reasonably foreseeable spills remain unanalyzed.

B. The Commission Must Analyze Significant Impacts from Free-Standing HTF

The PMPD states that:

CURE argues for separate analysis of spilled solid ‘free standing’ HTF apart from the analysis of spilled HTF in its liquid state, claiming, without citation to the record, that the two are ‘different in composition.’ (CURE Op. Brief, p. 13). We see no evidence of a change in the composition of spilled Therminol VP1 between its liquid and solid state.

Also, the PMPD states:

in the absence of evidence on point, we can assume that the two forms of HTF are the same composition. We see no reason to separately analyze spilled liquid HTF and spilled solid HTF.⁸⁶

The PMPD ignores the fact that, by definition, a “liquid” is different from a “solid.” According to Merriam-Webster, “liquid” is defined as “a fluid (as water) that has no independent shape but has a definite volume and does not expand indefinitely and that is only slightly compressible,” and “solid” is defined as “a substance that does not flow perceptibly under moderate stress, has a definite capacity for resisting forces (as compression or tension) which tend to deform it, and under ordinary conditions retains a definite size and shape.” Clearly, a liquid is different from a solid. This is elementary chemistry.

Citing to the Revised Staff Assessment, CURE explained in its brief that HTF may not remain liquid when spilled because at temperatures below 54 degrees, HTF crystallizes.⁸⁷ Also, spilled liquid HTF presents completely different potential

⁸⁵ CURE’s First Opening Brief, p. 12.

⁸⁶ PMPD, Waste Management, p. 10.

⁸⁷ CURE’s Opening Brief, p. 13 (citing Exh. 400, p. C.9-54).

impacts to the environment and therefore HTF in a different composition, i.e. liquid, is regulated differently by the State of California.⁸⁸ The record shows that at the SEGS facilities, when spilled, HTF forms wax-like piles that are scooped up or vacuumed.⁸⁹ In some instances, these piles may remain on the soil for days.⁹⁰ Thus, the Commission must analyze impacts from solid HTF that may remain on the ground for days.

C. The Commission Must Analyze Significant Impacts from Benzene in Soil and Groundwater

CURE provided extensive testimony and briefing regarding the Project's impacts from benzene as a HTF degradation product. Specifically, CURE's expert provided substantial evidence that, when spilled, workers, the public and the environment may be exposed to benzene, a known potent carcinogen. Workers may be exposed to benzene in soil as they tend to HTF spills and contaminated soils.⁹¹ Also, benzene is highly mobile in soil and does not typically adsorb to soil.⁹² As a result, releases of benzene from the degradation of spilled HTF would potentially move to groundwater.⁹³

The PMPD states that issues raised by CURE regarding worker exposure to benzene are covered in Waste Management and Public Health and Safety sections.⁹⁴ However, the Public Health and Safety section and the Waste Management sections of the PMPD only address toxic emissions of benzene in the air; ***the sections do not address benzene in soil or groundwater***, as raised by CURE in its testimony and briefing.⁹⁵ To date, the Commission has provided no analysis whatsoever for the Project's significant impacts from benzene in soil and groundwater.

VII. THE PROJECT'S IMPACTS ON SPECIAL-STATUS PLANTS REMAIN SIGNIFICANT AND UNMITIGATED

The PMPD concludes that BIO-19 would reduce the Project's impacts to special-status plants to less than significant levels.⁹⁶ The PMPD's conclusion is unsupported and fails to address CURE's extensive testimony and briefing on this issue.

⁸⁸ Health and Safety Code § 25203, 25113(a), 25123.3(a)(2), (b).

⁸⁹ Exh. 517, p. 3.

⁹⁰ Exh. 520.

⁹¹ Exh. 517, p.4.

⁹² Exh. 517, p. 5.

⁹³ Exh. 517, p. 5.

⁹⁴ PMPD, Worker Safety, p. 4.

⁹⁵ PMPD, Public Health and Safety, pp. 5-6; PMPD, Waste Management, pp. 10-11.

⁹⁶ PMPD, Biology, pp. 26, 47.

In its Third Opening Brief, CURE demonstrated that the record does not support a finding that BIO-19 would be feasible or effective in reducing the Project's impacts to special-status plants to less than significant levels, as required by CEQA.⁹⁷ First, CURE pointed out that Staff admitted:

Avoidance, minimization and compensation measures such as those described in staff's proposed Conditions of Certification BIO-19 ***could potentially*** reduce these impacts to less than significant levels. However, implementation of the avoidance measures described in these conditions of certification would ***require site specific information about the location of proposed project features in relation to sensitive plant species. Staff does not currently have the project-specific information*** and therefore ***cannot address the feasibility of implementing effective avoidance measures as a means of reducing significant impacts.***⁹⁸

Further, CURE showed that BIO-19 does not commit the Applicant to do anything to reduce the Project's impacts on special-status plants to less than significant levels. First, BIO-19 does not require the Applicant to conduct late-season surveys at a time when special-status plants would be identified.⁹⁹ Second, BIO-19 does not require avoidance of rare plants if a species is located within the permanent Project disturbance area, if avoidance would cause disturbance in areas not previously surveyed, or if avoidance would create "other restrictions."¹⁰⁰ Third, substantial evidence shows that Staff's proposed mitigation to acquire compensation lands or provide restoration/enhancement of special plants is not feasible.¹⁰¹ Finally, there is no evidence in the record that optional funding or implementing a future study would mitigate the Project's significant impacts to special-status plants. In short, the record clearly shows that BIO-19 does not provide feasible, effective mitigation. Thus, the Project's impacts on special-status plants remain significant and unmitigated.

VIII. CONCLUSION

The PMPD's conclusions that the Project's significant unmitigated cumulative impacts to cultural resources, visual resources and land use are outweighed by the benefits of the Project and that for the remaining resource areas, proposed mitigation will reduce the Project's impacts to a less than significant level, are unsupported. Rather: (1) the Project's impact on the Colorado River remains significant and unmitigated; (2) the Commission failed to analyze the Project's impacts on human burials and ethnographic resources and therefore the

⁹⁷ CURE's Third Opening Brief, pp. 13-15.

⁹⁸ Exh. 400, p. C.2-126 (emphasis added).

⁹⁹ Exh. 445, p. 4.

¹⁰⁰ Exh. 445, pp. 6-8.

¹⁰¹ July 12, 2010 Tr., pp. 182-184, 193.

Commission cannot make required findings pursuant to CEQA; (3) the PMPD's finding that downstream transmission facilities need not be analyzed is inconsistent with other cases currently before the Commission and the Commission's long history of requiring environmental review of downstream transmission facilities, as required by CEQA; (4) the Project's impacts to workers, the public and the environment from the Project's use of HTF were not adequately analyzed; and (5) the PMPD's conclusion that the Project's impacts to special-status plants will be reduced to a level below significant is not supported by the record and the impacts remain significant and unmitigated.

Dated: September 20, 2010

Respectfully submitted,

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PROOF OF SERVICE

I, Valerie Stevenson, declare that on September 20, 2010 I served and filed copies of the attached **CALIFORNIA UNIONS FOR RELIABLE ENERGY'S COMMENTS ON THE PMPD**.

The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at

www.energy.ca.gov/sitingcases/genesis. 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 Unit electronically to all email addresses on the Proof of Service list and by either depositing in the U.S. Mail at South San Francisco, CA with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred," via personal service or via overnight mail as indicated.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on September 20, 2010.

/s/

Valerie Stevenson

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STATE OF CALIFORNIA
California Energy Commission

In the Matter of:

The Application for Certification
for the GENESIS SOLAR ENERGY
PROJECT

Docket No. 09-AFC-8

FIRST OPENING BRIEF
OF
CALIFORNIA UNIONS FOR RELIABLE ENERGY

July 26, 2010

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I. INTRODUCTION

In its review and approval of the Genesis Solar Energy Project (“Project”), the Commission must fulfill the requirements of the Warren-Alquist Act and CEQA. The Warren-Alquist Act requires a finding that a project complies with all LORS. CEQA requires that all potential environmental impacts be analyzed and that all significant impacts be mitigated, including impacts from mitigation measures themselves. The proposed Project fails on both counts. The Commission’s approval of the Project would violate the Warren-Alquist Act. Further, the environmental review is inadequate and cannot be relied on by the Commission in approving the Project.

The Commission cannot approve the Project as proposed because there are significant unanalyzed and unmitigated impacts to biological resources and violations of LORS. In some instances, the RSA failed to meet the basic requirements of CEQA. For example, because the RSA failed to establish an accurate baseline for Couch’s spadefoot toad, the RSA also failed to adequately analyze and mitigate the Project’s significant impacts to spadefoot toads. The RSA also failed to show that proposed mitigation for the federal and State listed desert tortoise, as well as numerous other special-status species would be effective and feasible. Consequently, if the Commission approved the Project, the Commission would violate CEQA, the federal Endangered Species Act and the California Endangered Species Act. In addition, the RSA completely failed to analyze potentially significant impacts to biological resources from implementation of proposed mitigation including the creation of ephemeral ponds and the use of all-terrain fire engines.

The Project will also result in unanalyzed and unmitigated significant impacts from spills of heat transfer fluid (“HTF”), or Therminol VP-1, and violations of LORS related to hazardous materials and waste management. HTF is a hazardous material that poses acute and chronic health hazards. Exposure of HTF to people, wildlife and the environment may occur from spills measuring from hundreds to thousands of gallons and that may present HTF in a liquid or crystallized form. The RSA only analyzed HTF in its liquid form and only analyzed 750 cubic yards of soil contamination and handling as a consequence of a spill. Even that analysis failed to recognize that the Applicant’s procedures result in placing hazardous waste in an unlined land treatment unit, which is prohibited by State law.

Finally, the Project will result in potentially significant impacts from the presence of unexploded ordnance (“UXO”) on the Project site which have not been adequately analyzed or mitigated. If a UXO survey is not required for the Project, workers and the public will face significant safety risks.

It is the Commission’s obligation to satisfy the requirements of the Warren-Alquist Act and CEQA. The RSA does not meet even the most basic requirements of CEQA. Further, the proposed Project violates federal and State law. The Commission cannot approve the Project.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

The Commission itself must determine whether the proposed Project complies with “other applicable local, regional, and state, . . . standards, ordinances, or laws,” and whether the proposed project is consistent with Federal standards, ordinances, or laws. (Pub. Res. Code § 25523(d); 20 Cal. Code Regs. § 1752(a).) The Commission may not certify any project that does not comply with applicable LORS unless the Commission finds both (1) that the project “is required for public convenience and necessity” and (2) that “there are not more prudent and feasible means of achieving public convenience and necessity.” (Pub. Res. Code § 25525; 20 Cal. Code Regs. § 1752(k).)

The Commission also serves as lead agency for purposes of CEQA. (Pub. Res. Code § 25519(c).) Under CEQA, the Commission may not certify the Project unless it specifically finds either (1) that changes or alterations have been incorporated into the Project that “mitigate or avoid” any significant effect on the environment, or (2) that mitigation measures or alternatives to lessen these impacts are infeasible, and specific overriding benefits of the Project outweigh its significant environmental effects. (Pub. Res. Code § 21081; 20 Cal. Code Regs. § 1755.) These findings must be supported by substantial evidence in the record. (Pub. Res. Code § 21081.5; 14 Cal. Code Regs. §§ 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23.)

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.” (20 Cal. Code Reg. § 1748(d).) Commission Staff must review the application, assess the environmental impacts and determine whether mitigation is required, and set forth this analysis in a report written to inform the public and the Commission of the Project’s environmental consequences. (20 Cal. Code Reg. §§ 1744(b), 1742.5(a)-(b).) Staff’s analysis must reflect the “independent judgment” of the Commission. (14 Cal. Code Regs. § 15084(e).) Before approving a project, the Commission must conclude that Staff’s report has been completed in compliance with CEQA, that the Commission has reviewed and considered the information in the report prior to approving the project, and that Staff’s report reflects the Commission’s independent judgment and analysis. (14 Cal. Code Regs. § 15090(a); see Pub. Res. Code § 21082.1(c)(3).)

The Commission must determine whether sufficient substantial evidence is in the record to support its findings and conclusions. (Pub. Res. Code §§ 21080, 21081.5.) “Substantial evidence” is defined as:

[F]act, a reasonable assumption predicated upon fact, or expert opinion supported by fact. Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous...

(*Id.* § 21080(e).) California courts have made clear that “substantial evidence” is not synonymous with “any” evidence. (*Newman v. State Personnel Board* (1992) 10 Cal.App.4th 41, 47.) As defined by the courts, substantial evidence means evidence of “ponderable legal

significance, reasonable in nature, credible and of solid value.” (*Lucas Valley Homeowners Ass’n v. County of Marin* (1991) 233 Cal.App.3d 130, 156-7.)

This requirement also applies to expert opinions. Expert opinion does not constitute substantial evidence when it is “based on speculation and conjecture, and accordingly...not supported by substantial evidence in light of the whole record.” (*See, e.g., Friends of the Old Trees v. Department of Forestry and Fire Protection* (1997) 52 Cal.App.4th 1383, 1399, fn. 10; *Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Commission* (1976) 55 Cal.App.3d 525, 532.) It does not include argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous. (*Id.*) Additionally, “opinion testimony of expert witnesses does not constitute substantial evidence when it is based upon conclusions or assumptions not supported by evidence in the record.” (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr.* (1998) 62 Cal.App.4th 1123, 1137.) These requirements ensure that members of the public and interested agencies will have an opportunity to review and comment on significant impacts and proposed mitigation and identify any shortcomings. This public and agency review has been called “the strongest assurance” of the adequacy of an environmental review document under CEQA. (*Sundstrom v. Mendocino County* (1988) 202 Cal.App.3d 296, 308.)

Once substantial evidence of a potential impact is presented to the lead agency, the burden shifts to the agency to investigate the potential significance of the impact. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 385 (EIR inadequate for failing to investigate substantial evidence of Project’s potential to impact protected steelhead trout).)

In this case, there is insufficient evidence to support the required findings and, therefore, the Commission cannot certify the Project without additional specific analysis and mitigation.

III. BIOLOGICAL RESOURCES: THE BASELINE IS INACCURATE AND THE PROJECT WILL RESULT IN SIGNIFICANT UNANALYZED AND UNMITIGATED IMPACTS AND VIOLATIONS OF LORS

The Project will impact approximately 1,800 acres of land that is habitat for numerous species including the desert tortoise, a species that is listed as threatened under the state and federal Endangered Species Acts. The Project area also provides habitat for golden eagle, a fully protected species, and Couch’s spadefoot toad, a species of special concern. In addition, the Project contains Mojave fringe-toed lizard (species of special concern) habitat. Other species, including (among others) desert kit fox (fully protected species), American badger (species of special concern), northern harrier (species of special concern), loggerhead shrike (species of special concern), Le Conte’s thrasher (state watch list), and California horned lark (state watch list), use the Project site. (Exh. 400, pp. C.2-34-46.) The Applicant proposes to destroy all of this habitat.

The Project’s use of desert tortoise habitat, as well as the proposed relocation of tortoises living there, triggers the “incidental take” provisions of the California Endangered Species Act (“CESA”). “Take” means “hunt, pursue, catch, capture, or kill a protected species.” (Fish and

Game Code § 86.) “Take” is only permitted if the take is incidental to otherwise lawful activities and the “impacts” are minimized and “fully mitigated.” (*Id.*, § 2081(b).) Impacts of taking include “all impacts on the species that result from any act that would cause the proposed taking,” including impacts to habitat. (*Id.*)

No incidental take permit may be issued if the issuance of the permit “would jeopardize the continued existence of the species.” (*Id.*, § 2081(c).) The department is required to find that projects will not put species at risk of extinction based on “the best scientific and other information that is reasonably available” and shall include “consideration of the species’ capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities.” (*Id.*)

The Federal Endangered Species Act (“FESA”) also prohibits “take” of threatened and endangered species. (16 U.S.C. § 1538.) “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” (16 U.S.C. § 1532(19).) “Harm” includes “the destruction or adverse modification of habitat resulting in potential injury to a species, including injury from impairment of essential behavioral patterns, such as breeding, feeding or sheltering.” (50 C.F.R. § 17.3.)

For species that do not have special protection under CESA or FESA, CEQA requires an agency to determine whether a Project will cause a significant impact because it will “substantially reduce the number or restrict the range of an endangered, rare, or threatened species.” (14 Cal. Code Reg. § 16065(a)(1).) CEQA requires that a lead agency describe the physical environmental conditions in the vicinity of the project, as they exist at the time environmental review commences. (14 Cal. Code Reg. § 15125(a).) The description of the environmental setting constitutes the baseline physical conditions by which a lead agency must assess the significance of a project’s impacts. (*Id.*) CEQA then requires an analysis of direct, indirect, and cumulative impacts. (Pub. Res. Code §§ 21083, 21065, 21065.3.) CEQA also prohibits agencies from approving projects “if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.” (Pub. Res. Code §§ 21002, 21081.) CEQA requires agencies to “avoid or minimize environmental damage where feasible.” (14 Cal. Code. Reg. § 15021(a).)

A. The RSA’s Failure to Establish an Accurate Environmental Baseline Precludes an Adequate Analysis and Formulation of Adequate Mitigation for Couch’s Spadefoot Toad

1. The RSA Failed to Establish an Accurate Environmental Baseline

The environmental setting, or baseline, refers to the conditions on the ground and is a starting point to measure whether a proposed project may cause a significant environmental impact. CEQA defines “baseline” as the physical environment as it exists at the time CEQA review is commenced. (14 Cal. Code Reg. § 15125(a); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453.) “An EIR must focus on

impacts to the existing environment, not hypothetical situations.” (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.)

If the description of the environmental setting of the project site and surrounding area is inaccurate, incomplete or misleading, the EIR does not comply with CEQA...Without accurate and complete information pertaining to the setting of the project and surrounding uses, it cannot be found that the FEIR adequately investigated and discussed the environmental impacts of the development project.

(*Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 87, quoting and citing *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, (1994) 27 Cal.App.4th 713, 721-722, 729.)

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. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.) 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.” (*County of Amador, supra*, 76 Cal.App.4th at 952.) 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, ***baseline determination is the first rather than the last step in the environmental review process.*** (*Save Our Peninsula Committee v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.)

The RSA’s baseline method for Couch’s spadefoot toads blatantly violates the requirements of CEQA. The RSA could not establish an accurate environmental setting for determining impacts to Couch’s spadefoot toad “because the [Applicant’s] surveys were not conducted during the appropriate season (i.e., after summer rains).” (Exh. 400, p. C.2-39.) Consequently, as Staff points out, “[w]ithout species-specific survey results and with limited occurrence information, it is difficult to assess the potential for indirect impacts to Couch’s spadefoot toads”. (Exh. 400, p. C.2-86.) Thus, as a Condition of Certification, the RSA requires surveys to identify potential spadefoot toad breeding habitat (i.e., to establish the baseline environmental setting). (Exh. 400, p. C.2-276.) The Applicant has indicated that surveys related to Couch’s spadefoot toad have been scheduled for summer or early fall 2010. (Exh. 58, p. 17.) By deferring establishment of the baseline environmental setting for Couch’s spadefoot toad until after Project approval, the RSA failed to satisfy CEQA’s requirement that the baseline be determined as the ***first*** step in the environmental review process. Consequently, if the Commission approves the Project as proposed, the Commission will violate CEQA as a matter of law.

2. The RSA Failed to Adequately Analyze and Mitigate Significant Impacts

“The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context.” (*Cadiz Land Co., supra*, 83

Cal.App.4th at p. 92.) CEQA guidelines require “a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences . . . [t]he courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.” (*County of Amador, supra*, 76 Cal.App.4th at 954, quoting CEQA Guidelines § 15151; *see also Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Commrs.* (2001) 91 Cal.App.4th 1344, 1367.) Although the RSA attempted 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.

By relying upon unsupported assumptions regarding presence or absence of Couch’s spadefoot toad habitat, the RSA failed to adequately “investigate and discuss” the Project’s environmental impacts to spadefoot toads that are actually present on the ground. Further, without the required information regarding baseline conditions, it is impossible to determine whether the analysis of project impacts to unsurveyed disturbance areas reflects the severity and significance of such impacts. Specifically, the RSA’s assumptions may underestimate significant impacts to spadefoot toads. Consequently, the RSA’s claimed effectiveness of proposed mitigation for the Couch’s spadefoot toad is unsupported, unknown and unknowable.

Only “where substantial evidence supports the approving agency’s conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy.” (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027 (*SOCA*), citing *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 407.) The RSA’s conclusions regarding the effectiveness of mitigation measures in reducing impacts to Couch’s spadefoot toads in unsurveyed areas are unsupported. Absent data indicating the presence or absence of Couch’s spadefoot toad habitat, it is impossible for the Commission to determine whether proposed mitigation measures will be adequate to reduce impacts to less than significant levels.

Staff’s conclusion is similar to a city’s conclusions concerning mitigation measures that were supposed to address unidentified cumulative impacts to water supply struck down by the court in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 729-730 (*Kings County*). In that case, the EIR neither listed the projects considered in the cumulative impacts analysis nor provided information and analysis regarding these projects’ cumulative impacts to water supply. Instead, the court observed, the EIR “merely assumes whatever impacts such projects may have will be mitigated by existing and planned water conservation efforts of governmental agencies in the area.” (*Id.* at p. 729.) The court rejected this approach because:

Absent some data indicating the volume of ground water used by all such projects, it is impossible to evaluate whether the impacts associated with their use of ground water are significant and whether such impacts will indeed be mitigated by the water conservation efforts upon which the EIR relies.

(*Id.* at pp. 729-730.) Likewise here, without survey data showing the amount of Couch’s spadefoot toad habitat present on the Project site, it is impossible to determine the extent of the

Project's impacts on Couch's spadefoot toad and whether such impacts will actually be mitigated by Staff's proposed mitigation.

Appropriately timed surveys for spadefoot toads have not been conducted. (Exh. 400, p. C.2-39.) Without reliable data, an accurate impact assessment cannot be conducted, and without an accurate impact assessment, the Commission cannot conclude that Staff's proposed mitigation to avoid impacts to spadefoot toad breeding ponds would reduce Project impacts to less than significant levels. This is reflected in the RSA's discussion of impacts associated with the Colorado River Substation expansion where Staff states,

Avoidance, minimization and compensation measures such as those described in staff's proposed Conditions of Certification BIO-19 *could potentially reduce* these impacts to less than significant levels. However, implementation of the avoidance measures described in these conditions of certification would *require site specific information* about the location of proposed project features in relation to sensitive plant species. Staff does not currently have the project-specific information and therefore *cannot address the feasibility of implementing effective avoidance measures as a means of reducing significant impacts.*

(Exh. 400, p. C.2-126, emphasis added.)

Further, the Commission's ability to make required findings depends upon an impact analysis that is based upon surveys and mitigation measures tailored to actual impacts. One of the three possible findings that a lead agency may make regarding an identified impact is "that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect. . . ." (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).) Such a finding must be supported by substantial evidence in the record. (Pub. Res. Code § 21081.5; 14 Cal. Code Reg. § 15091(b).) "Substantial evidence" is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (14 Cal. Code Reg. § 15384(a).) Where an agency's finding concerning the effectiveness of a mitigation measure is not supported by substantial evidence or defies common sense, courts have declined to defer to the agency's finding. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1117.)

In this case, the record does not contain substantial evidence that could support a finding "that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect[s]" on Couch's spadefoot toad. Because the Commission does not have evidence of the severity and significance of these effects, it cannot find that, through implementation of the proposed mitigation measures, the effects would be avoided or substantially lessened. This is a violation of the Commission's most fundamental obligations under CEQA.

B. The RSA Failed to Demonstrate that the Proposed Compensatory Mitigation for Impacts to Special-Status Species and Their Habitat will be Feasible, Effective and Capable of Implementation

CEQA requires the Commission to formulate mitigation measures to address identified impacts that are defined, feasible, effective, and capable of implementation. (14 Cal. Code Reg. § 15126.4(a)(1)(B); *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1259, 1262.) The CESA and ESA also require formulating effective mitigation that can be implemented. Under CESA, the CDFG may issue an incidental take permit that authorizes “take” of specified endangered or threatened plants or animals during the course of an otherwise lawful activity, so long as the holder of the permit “fully” mitigates the impacts. (Fish & Game Code §§ 2080, 2081(b)(2).) The measures required to fully mitigate impacts to species “shall be capable of successful implementation.” (*Id.* at § 2081(b)(2).) Under the federal ESA,

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical. . . .

(ESA § 7(a)(2); 16 U.S.C. § 1536(a)(2).) Section 9 of the federal ESA prohibits “take” (e.g., harm, harassment, pursuit, injury, kill) of federally listed wildlife. “Harm” includes habitat modification or degradation that kills or injures listed wildlife. Take incidental to otherwise lawful activities can be authorized, after consultation with the U.S. Fish and Wildlife Service (“USFWS”) under section 7. (ESA § 7(o)(2); 16 U.S.C. § 1536(o)(2).) The “Incidental Take Statement” issued by the USFWS specifies, among other things, those reasonable and prudent measures that the [agency] considers necessary or appropriate to minimize such impact.” (ESA § 7(b)(4); 16 U.S.C. § 1536(b)(4).)

The RSA’s proposed mitigation requiring the acquisition of approximately 1,800 acres of land in the Colorado Desert Recovery Unit to compensate for the loss of habitat for numerous special-status species including, among others, the desert tortoise (listed as threatened under both CESA and ESA), golden eagle, special-status and migratory birds, desert kit fox, American badger, and special-status bats, is infeasible, ineffective and incapable of implementation. The record does not contain substantial evidence showing that the proposed acquisition of compensation lands can be implemented or will be feasible or effective.

Rather, substantial evidence shows that in light of the surge of immense solar power projects throughout the Mojave Desert area (Exh. 400, Biological Resources, Figure 2), it is simply unrealistic to expect that the Applicant will be able to acquire almost 2,000 acres of equivalent or better habitat to compensate for the destruction of habitat to numerous species that this Project will cause. For example, according to the RSA, over 200,000 acres of desert tortoise habitat would be lost to proposed future projects which will require compensatory mitigation. (Exh. 400, p. C.2-143.) Further, compensation land for the Project has not been identified. (July 12, 2010 Tr., p. 213.) There is *no* evidence in the record that this substantial amount of

privately-owned acreage of equivalent or better habitat function and value for all of the impacted species is available for purchase. In light of the current wave of renewable energy projects being proposed within the Colorado Desert Recovery Unit, it is questionable that this vast amount of suitable habitat acreage can be acquired.

Proposing mitigation that requires the acquisition of suitable habitat for several species without determining whether such habitat is available and without limiting physical changes to the environment prior to habitat acquisition is a form of improper deferral of mitigation. Proposing mitigation without more of an effort to ensure the mitigation is adequate and will be implemented as advertised is a form of improper deferral of mitigation. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275, citing *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396-1397.) The details of mitigation may only be deferred until after Project approval in limited circumstances. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670-671, quoting *Endangered Habitats League Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793.) Deferral is permissible only where the adopted mitigation: (1) commits the agency to a **realistic performance standard or criterion** that will **ensure the mitigation of the significant effect**; and (2) disallows the occurrence of physical changes to the environment unless the performance standard is or will be satisfied. (See Remy et al., *Guide to the California Environmental Quality Act* (11th ed. 2007), p. 551.)

The RSA's proposed compensation land scheme does not satisfy either of the above requirements. First, the proposal is unrealistic because it demands the availability of close to 2,000 acres of habitat for numerous species equal to or better in quality than that of the Project site. As discussed above, given the immense number of acres slated for other projects in the region that will also require compensation lands, it is unrealistic to simply assume that there is enough suitable habitat available for all of the proposed projects.

The compensation land proposal is also unrealistic and fails to ensure that significant impacts will be mitigated because Staff assumes, without any substantial evidence, that whatever land is acquired will contain suitable habitat for all of the impacted species. While Staff's conditions do call for suitable desert tortoise habitat, the conditions do not require that compensation lands provide suitable habitat for the many other species for which the compensation lands will allegedly provide mitigation. (Exh. 400, p. C.2-232.) When asked, for example, if the RSA requires that compensation lands be provided for roosting and foraging habitat for bats, Staff replied, "[t]here's no specific requirement" and Staff goes on to assume, without any support, that "the lands that are acquired will provide benefits to many other species in addition to desert tortoise." (July 12, 2010 Tr., p. 213.)

In fact, at the evidentiary hearing Staff admitted that "***in a perfect world***, all those things will integrate...The applicant will acquire land that has the adequate desert tortoise habitat, desert washes, and also provides suitable habitat for these species we're concerned about." (*Id.*, p. 214, emphasis added.) "In a perfect world" many things could happen, like the Project could be built without causing any adverse effects to the environment. Unfortunately, this is not a perfect world – the Project will significantly impact numerous special-status species and Staff failed to provide substantial evidence that its proposal for the acquisition of lands will in fact mitigate those impacts. Thus, Staff's proposed conditions are unrealistic and fail to ensure the Project's significant impacts to several special-status species will be mitigated.

Further, Staff's proposal does not include a "no net loss" performance standard and does not include back-up provisions that would require alternative mitigation in the event habitat acquisition is not feasible. It also allows physical development to proceed before the Applicant has demonstrated that suitable habitat can be acquired as mitigation for Project impacts. (RSA, p. C.2-238.) Because there are numerous pending applications for immense solar thermal projects in the California Desert Conservation Area, and these proposed projects will also impact desert tortoise habitat, Staff must specifically address the feasibility of acquiring the desert tortoise compensatory habitat required to mitigate the impacts to numerous species caused by this Project. (Exh. 400, p. C.2-144.)

Without substantial evidence concerning the effectiveness of the proposed compensation land mitigation, the Commission cannot make required findings. Because the record does not contain substantial evidence supporting the conclusion that mitigation through the acquisition of vast acreages of compensation land is feasible and is capable of implementation, the Commission cannot find "that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect..." (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).) Wishing does not make it so, and does not make it legal.

C. The RSA Failed to Analyze and Mitigate for Potentially Significant Impacts From the Whole of the Project

Before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases and components of a project. (*Laurel Heights Improvement Assn.*, *supra*, 47 Cal.3d at p. 396-97.) CEQA requires that all potential impacts be analyzed and all significant impacts be mitigated, ***including impacts from mitigation measures themselves***. Where mitigation measures would, themselves, cause significant environmental impacts, CEQA requires an evaluation of those secondary (indirect) impacts. (14 Cal. Code Reg. § 15064(d).) The RSA failed to analyze significant impacts from proposed mitigation measures and therefore failed to analyze and mitigate for potentially significant impacts from the whole of the Project.

1. The RSA Failed to Analyze Potentially Significant Impacts to Biological Resources from the Creation of Couch's Spadefoot Toad Breeding Habitats

To mitigate for significant impacts to Couch's spadefoot toad, the RSA proposes creating "additional breeding habitats (ephemeral pond)." (Exh. 400, p. C.2-277.) Staff acknowledged at the evidentiary hearing that biological resources would be impacted by the creation of ephemeral ponds:

Ms. Koss: What biological resources would be impacted by pond construction?

Dr. Sanders: Well, anything.

(July 12, 2010 Tr., p. 209.) Despite Staff's admission that creating ponds would impact biological resources, the record contains ***no analysis*** of potentially significant impacts from the creation of ponds. Rather, Staff assumes that an analysis will be conducted in the future. According to Staff, "And you would need to assess – before you just dug, you'd need to assess potential impacts to sensitive resources potentially at the ponds." (*Id.*) Staff's failure to analyze

potentially significant impacts from creating ephemeral ponds blatantly violates CEQA's requirement that all potentially significant impacts be analyzed. Consequently, if the Commission permits the Project as proposed, the Commission would violate CEQA as a matter of law.

2. The RSA Failed to Analyze Potentially Significant Impacts to Biological Resources from the Use of All-Terrain Fire Engines

Condition of Certification Worker Safety-6 requires the Applicant to provide two all-terrain fire engines for emergency personnel to enter the site in the event the access to the plant is unavailable. (Exh. 433.) According to the Applicant, these fire engines would be in the possession of the Riverside Fire County Department and would not be housed on the Project site. (July 12, 2010 Tr., p. 404.) Thus, in the event of an emergency where the main access to the Project is blocked, the all-terrain fire engines would have to access the site via other points. To date there are no routes planned for alternative access for the fire engines. (*Id.*, pp. 410-411.) However, the Applicant relayed that "the fire department told us that they could actually drive over or through anything that they so chose to do." (*Id.*, p. 405.)

Despite the fact that all-terrain fire engines may "drive over or through anything that they so chose to," the record contains *no analysis* of potentially significant impacts to biological resources from fire engines driving through habitat for numerous species. Staff's failure to analyze potentially significant impacts from the all-terrain fire engines blatantly violates CEQA's requirement to analyze all potentially significant impacts. Therefore, if the Commission approves the Project as proposed, the Commission will violate CEQA as a matter of law.

IV. HAZARDOUS MATERIALS AND WASTE MANAGEMENT: THE PROJECT WILL RESULT IN UNANALYZED AND UNMITIGATED SIGNIFICANT IMPACTS FROM HTF SPILLS AND VIOLATIONS OF LORS

The Project will result in unanalyzed and unmitigated significant impacts from spills of heat transfer fluid ("HTF"), or Therminol VP-1, and violations of LORS related to hazardous materials and waste management.

The Project will circulate approximately 4 million gallons of HTF through a piping system to generate high pressure steam. (Exh. 400, p. C.13-14.) HTF is a mixture of 73.5% diphenyl ether and 26.5% biphenyl. (Exh. 400, p. C.4-8.) HTF is regulated as a hazardous material by the State due to the constituent biphenyl, an "extremely hazardous waste." (Exh. 400, p. C.13-14; 22 Cal. Code Reg., Chap 11, App. X, #299.) The listing of a chemical in Appendix X creates a regulatory presumption that a waste containing that chemical, i.e. HTF contaminated soil, is hazardous unless determined otherwise, pursuant to specified procedures. (Exh. 400, p. C.13-14.)

The materials safety data sheet for Therminol VP-1 states that biphenyl is a hazardous chemical that causes health effects from chronic exposure, including:

- headache, fatigue, nausea, indigestion, abdominal pain, tremor, central and peripheral nerve damage and liver injury.

(Exh. 1, Appendix H, Appendix A.) HTF is highly flammable and fires have occurred at other solar generating stations that use it. (Exh. 400, p. C.4-8.) “The components of HTF are reported to biodegrade relatively rapidly in the environment, have slight toxicity to tested terrestrial species, higher toxicity to tested aquatic species, and a potential to bio-accumulate.” (Exh. 1, Appendix H, p. 21.) Therefore, spills of HTF may result in significant impacts to humans, wildlife and the environment.

A. The Project Will Result in Unanalyzed and Unmitigated Significant Adverse Impacts From HTF Spills

As a preliminary matter, the RSA is inconsistent regarding the amount of HTF that would be used by the Project. In the Hazardous Materials section, Staff analyzed 2 million gallons of HTF “contained in the pipes and heat exchanger.” (Exh. 400, p. C.4-8.) In the Waste Management section, however, Staff stated that approximately 4 million gallons (2 million gallons within each of the Project’s two units) of HTF will be utilized at any one time “in the piping and necessary expansion tanks.” (Exh. 400, p. C.13-14.) According to the RSA, “no other HTF would be stored on site.” (*Id.*) Since the record shows that each of the Project’s two units will contain 2 million gallons of HTF, potentially significant impacts associated with 4 million gallons of HTF should have been analyzed in both the Hazardous Materials and Waste Management sections of the RSA.

The RSA failed to evaluate reasonably foreseeable potentially significant impacts from HTF spills and failed to evaluate several other potentially significant impacts from HTF spills, including those related to spills and subsequent handling and Project activities related to free-standing HTF and benzene, an HTF degradation product. Potential spills of HTF may be much larger and different in composition than potential spills that were analyzed in the RSA, resulting in significant unmitigated impacts both on-site and off-site to people, wildlife, and the environment from potential and likely exposure to toxic levels of contamination.

1. The RSA Failed to Analyze Significant Impacts From Reasonably Foreseeable HTF Spills

The RSA limited its evaluation of impacts to the annual treatment of an estimated 750 cubic yards of HTF-contaminated soil at the Project’s Land Treatment Unit (“LTU”). (Exh. 400, pp. C.13-14-15.) The RSA’s analysis was specifically based on similar facilities operated by the Applicant – the SEGS facilities – for its assumptions. (Exh. 400, pp. C.4-8, C.13-14.) However, HTF spills at the SEGS facilities operated by the Applicant have been on the order of thousands of gallons of HTF and thousands of cubic yards of HTF-contaminated soil. (Exh. 517, p. 1; Exh. 520.) For example, a July 27, 2007 **HTF spill of 30,000 gallons** (more than the capacity of a backyard swimming pool) **generated 6,558 cubic yards** of HTF-contaminated soil. (Exh. 517, p. 2; Exh. 520.) It follows that it would only require a spill of 3,430 gallons to create the 750 cubic yards of contaminated soil that Staff analyzed. Given the substantial evidence showing just one HTF spill could generate almost ten times the amount of contaminated soil analyzed in the RSA,

there is no valid basis for limiting the assessment of potential impacts from undisclosed-sized spills that result in 750 cubic yards of contaminated soil per year. Furthermore, the Applicant could not provide any support for its assumption that HTF spills would result in 750 cubic yards of contaminated soil per year. (July 12, 2010 Tr., p. 338.) Potentially significant impacts from reasonably foreseeable spills have not been analyzed.

2. The RSA Failed to Analyze and Adequately Mitigate Significant Impacts From Free-Standing HTF

Staff failed to analyze potentially significant impacts associated with free-standing HTF. Staff's analysis stated that "Therminol can be expected to remain liquid if a spill occurs." (Exh. 400, p. C.4-8.) However, the RSA conceded that HTF may not remain liquid when spilled. The RSA stated that at temperatures below 54 degrees, HTF crystallizes. (Exh. 400, p. C.9-54.) The Applicant stated that after an HTF spill occurs, HTF would "start to cool immediately." (July 12, 2010 Tr., p. 347.)

CURE's consultant independently investigated HTF in order to evaluate potentially significant impacts, feasible mitigation and compliance with LORS. Public records show that massive volumes of spilled HTF may be recovered from the ground surface and recycled. (Exh. 520.) In addition, at the evidentiary hearing, the Applicant stated that free-standing HTF would be recycled. (*Id.*, p. 346.) "At the SEGS facilities, when spilled, the HTF forms wax-like piles of free standing liquids on the ground surface. The piles are scooped up or are vacuumed in cleanup efforts documented at the SEGS facilities." (Exh. 517, p. 3.) In some instances, these piles may remain on the soil for days. For example, after a 1,000-gallon HTF spill occurred at a SEGS facility on February 27, 2007, HTF-contaminated "soil removal was temporarily suspended on 28 February due to high winds." (Exh. 520.)

Staff admittedly did not analyze significant impacts from free-standing HTF. (July 12, 2010 Tr., p. 363.) Instead, the RSA analyzed HTF spills only as liquid. Staff's analysis states that "Therminol can be expected to remain liquid if a spill occurs." (Exh. 400, p. C.4-8.) "HTF spills typically spread laterally on the bare ground and soak down to a relatively shallow depth. The contaminated soil is regulated as a hazardous material." (Exh. 400, p. C.13-14.) This analysis fails to describe any process related to free-standing or crystallized HTF and, thus, fails to consider significant impacts from HTF that is different in composition than liquid HTF.

Because the RSA failed to analyze potentially significant impacts from free-standing HTF, the RSA lacks mitigation for impacts that may occur. Spilled HTF at the Project will require a response that was not described or analyzed in the RSA. The RSA failed to include any provisions for the Project's handling of free-standing HTF atop the ground surface. (July 12, 2010 Tr., p. 363.) The RSA contains no description of the potential volume of crystallized HTF that may be generated, no description of the duration of HTF exposure in the environment, and no description of the process for handling the substance. Instead, the RSA only considered the need to annually treat an estimated 750 cubic yards of contaminated soil at the Land Treatment Unit ("LTU") that would result from spilled HTF. (Exh. 400, pp. C.13-14-15.)

Similarly, the Project documents, including the Report of Waste Discharge, did not describe or include provisions for handling spilled free-standing HTF. (Exh. 1, Appendix H.) The Project Applicant provided no design specifications for, much less an explanation of, treatment technologies for free-standing HTF.

HTF spills may result in potentially significant impacts and require clear procedures and mitigation for on-site clean-up and/or recycling or that may occur as part of the Project but has never been described or analyzed. Thus, the RSA failed to inform the public and the decisionmakers about the Project and its potential impacts and fails to mitigate those impacts.

3. The RSA Failed to Analyze and Adequately Mitigate Significant Impacts From Benzene as an HTF Degradation Product

The RSA identified benzene as a degradation product of Therminol VP-1. (Exh. 400, p. C.5-13.) Benzene is a known, human carcinogen. (Exh. 517, p. 4.) Benzene moves rapidly through the soil and would potentially contaminate groundwater. (Exh. 517, p. 5.) However, Staff admittedly did not analyze potentially significant impacts to workers, the public or the environment from benzene in soil and groundwater. (July 12, 2010 Tr., pp. 367-368.) And alarmingly, at the evidentiary hearing, Staff stated that it was “not an HTF expert” and had “limited knowledge” of benzene. (July 12, 2010 Tr., p. 359.) Indeed, Staff knows very little about benzene. When asked how quickly benzene would volatilize, Staff replied, “[b]enzene is going to be one of the more volatile components of the breakdown products. So it will volatilize very quickly.” (July 12, 2010 Tr., p. 365-366.) In fact, benzene has relatively low volatility. (Exh. 400, Soil & Water Resources, Appendix B, p. 16.)

CURE’s expert provided substantial evidence that, when HTF is spilled, workers, the public and the environment may be exposed to benzene, a known potent carcinogen. First, workers may be exposed to benzene in soil as they tend to HTF spills and contaminated soils in the LTU. (Exh. 517, p. 4.) The RSA failed to analyze this significant impact. (July 12, 2010 Tr., pp. 367-368.) Moreover, the RSA’s worker safety conditions of certification do not provide specific provisions to protect workers from benzene. (Exh. 517, p. 4.)

Second, benzene is highly mobile in soil and does not typically adsorb to soil. (Exh. 517, p. 5.) Consequently, releases of benzene from the degradation of spilled HTF would potentially move to groundwater. (*Id.*) Groundwater provides the only water resource in the Chuckwalla Valley. (Exh. 400, p. C.9-22.) Designated and beneficial uses of groundwater in the basin include domestic, municipal, agricultural and industrial use. (*Id.*) Thus, benzene could significantly impact the designated beneficial uses of groundwater. The RSA failed to analyze benzene as a groundwater contaminant. (July 12, 2010 Tr., pp. 367-368.)

Staff completely failed to analyze potentially significant impacts to workers, the public and the environment from the presence of benzene in soil and groundwater. In fact, when asked whether benzene in soil or groundwater was analyzed in the RSA, Hazardous Materials Staff stated, “[n]ot in the Public Health or Haz Mat Section. And I think you understand the reason why. Because once it hits the ground, it’s a waste and it has to be dealt with in the Waste Management section.” (July 12, 2010 Tr., p. 367.) Yet, when Waste Management Staff was

asked if he analyzed benzene in soil and groundwater, he stated, “I did not.” (July 12, 2010 Tr., pp. 367-368.) The RSA failed to adequately analyze potentially significant impacts to workers, the public and the environment from HTF spills. Thus, the Commission cannot find that all impacts from HTF spills have been analyzed and mitigated based on this record.

In addition, the mitigation proposed for significant impacts associated with HTF-contaminated soil does not address benzene. The RSA identifies EPA Method 8015 as the test method to be used to analyze HTF-contaminated soil. (Exh. 400, p. C.13-30.) However, in the Abengoa proceeding, the Lahontan RWQCB required analysis using EPA Method 1625B for HTF and Method 8260 for benzene. (Exh. 517, p. 4.) Thus, the RSA should require EPA Method 8260 for soil testing for benzene.

Benzene is known to move rapidly through the soil. The Report of Waste Discharge (“ROWD”) states that soil samples will be collected at a depth of one foot below the compacted soil base at the LTU. (Exh. 1, Appendix H, p. 8.) The samples will be analyzed using EPA Method 8015 to determine whether HTF is migrating below the 5-foot treatment zone underlying the unit. (*Id.*) If concentrations above the laboratory detection limit are found below the 5-foot treatment zone, the Applicant must report the release. (*Id.*) However, EPA Method 8015 is not the appropriate method to test for the presence of benzene. (Exh. 517, p. 4.) Rather, EPA Method 8260 must be used to monitor for benzene, a degradation product of HTF that is known to rapidly move through soil. (Exh. 517, p. 5.)

Furthermore, because benzene does not typically adsorb to soil, releases of benzene would potentially move to groundwater. (*Id.*) The ROWD states that groundwater samples will be analyzed for biphenyl and diphenyl oxide, but does not provide for benzene testing. (Exh. 1, App. H, Table 1.) The RSA should require groundwater monitoring for benzene.

Potentially significant impacts to soil and groundwater from benzene as a degradation product of spilled HTF has never been described or analyzed. Thus, the RSA failed to inform the public and the decisionmakers about the Project and its potential impacts and fails to mitigate those impacts.

B. The RSA’s Mitigation Measures for HTF Spills Do Not Mitigate Significant Impacts and Violate LORS

1. Hazardous Materials Conditions Fail to Mitigate Significant Impacts

The RSA requires that the Applicant prepare various plans for the handling of hazardous materials, including a spill prevention control and countermeasures plan, an operation of waste management plan, a hazardous materials management plan and a health and safety plan. (Exh. 400, pp. C.4-20-21.) However, the RSA does not require that those plans address reasonably foreseeable spills of HTF similar to those at the SEGS facilities (e.g., a 30,000-gallon spill). When asked what HTF spill volume will be addressed by these plans, the Applicant could not provide a volume. (July 12, 2010 Tr., p. 338.) Thus, Hazardous Materials Conditions of Certification fail to mitigate the reasonably foreseeable potential impacts from spills.

Further, according to Haz-4, the project owner shall place an adequate number of isolation valves in the HTF pipe system so as to be able to isolate a solar panel loop in the event of a leak. (Exh. 400, p. C.4-20.) There is no evidence that this measure addresses significant impacts. First, in the Hazardous Materials section, Staff incorrectly analyzed 2 million gallons of HTF used by the Project, even though approximately 4 million gallons of HTF will be utilized at any one time. (Exh. 400, pp. C.4-8, 4.13-14.) Second, although Staff testified that the “isolation valve” measure “would not allow fewer isolation valves than could allow more than 1,250 gallons of heat transfer fluid to leak out from any continuous loop system,” Staff failed to provide the maximum spill volume for the entire Project. Obviously, the Project contains more than one loop. (Exh. 1, p. 3-21.) Furthermore, there are numerous other components of the HTF system from which HTF may leak including the HTF heater, the HTF expansion tanks, the HTF ullage/flash system, and HTF piping headers. (Exh. 1, p. 3-6.) Thus, the record provides no evidence that installing additional isolation valves mitigates significant impacts from HTF spills.

2. Waste Management Conditions Fail to Mitigate Significant Impacts and Violate LORS

The handling of HTF contaminated soil in the RSA and Condition of Certification Waste-10 fail to mitigate significant impacts from HTF spills and violate LORS. Like the Hazardous Waste conditions, the measures reveal how little Staff understood about HTF use in the Project and potential impacts from HTF spills.

Section 25203 of the Health and Safety Code prohibits any person from disposing of a hazardous waste except at a hazardous waste facility. “Disposal” means either of the following:

- (1) The discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste so that the waste or any constituent of the waste is or may be emitted into the air or discharged into or on any land or waters, including groundwaters, or may otherwise enter the environment.
- (2) The abandonment of any waste.

(Health and Safety Code §25113(a).) If a leak occurs, section 25123.3 of the California Health and Safety Code sets forth the requirements for temporarily staging waste. Temporary waste staging is appropriate for hazardous waste only if, among other criteria:

- The hazardous waste being accumulated does not contain free liquids; and
- The hazardous waste is accumulated on an impermeable surface, such as high density polyethylene (HDPE) of at least 20 mills that is supported by a foundation, or high density polyethylene of at least 60 mills that is not supported by a foundation, among other requirements.

(Health and Safety Code § 25123.3(a)(2), (b).) If any of the requirements are not met, then the Project must be regulated as a hazardous waste storage facility under Health and Safety Code Section 25200 et seq.

The staging area of the Project's LTU does **not** meet the requirements for a temporary staging area under Section 25123.3(a)(2) of the Health and Safety Code. Specifically, the hazardous waste being accumulated (1) contains free liquids, and (2) is not "accumulated on an impermeable surface, such as high density polyethylene (HDPE) of at least 20 mills that is supported by a foundation, or high density polyethylene of at least 60 mills that is not supported by a foundation."

According to the record, spills of HTF "will be moved to a staging area in the LTU where it will be placed on plastic sheeting pending receipt of analytical results and characterization of the waste material" (Exh. 1, Appendix H, p. 21.) Condition of Certification Waste-10 states:

The project owner shall submit to the CPM and DTSC for approval an assessment of whether the HTF contaminated soil is considered hazardous or non-hazardous under state regulations. HTF-contaminated soil that exceeds the hazardous waste levels must be disposed of in accordance with California Health and Safety Code (HSC) Section 25203. HTF contaminated soil that does not exceed the hazardous waste levels may be discharged into the land treatment unit (LTU). For discharges into the LTU, the project owner shall comply with the Waste Discharge Requirements contained in the Soil & Water Resources section of this document.

(Exh. 400, p. C.13-20.)

Waste-10 contains inconsistent directives and permits the Applicant to stage large volumes of contaminated soil in violation of Section 25123.3 of the California Health and Safety Code. According to Waste-10, for discharges into the LTU, the project owner shall comply with the Waste Discharge Requirements contained within the Soil & Water Resources section of the RSA. (*Id.*) The Soil & Water Resources section states:

A staging area is located **in the LTU** for storage of HTF-impacted soils while they are being characterized. Soil characterized as hazardous will be removed from the site; therefore, no additional liner system is required in the LTU to cater for the hazardous waste.

Spills of HTF will be cleaned up within 48 hours and affected soil will be moved to a staging area **in the LTU** where it will be placed on plastic sheeting pending receipt of analytical results and characterization of the waste material.

If the soil is characterized as a hazardous waste, the impacted soils will be transported from the site by a licensed hazardous waste hauler for disposal at a licensed hazardous waste landfill.

(Exh. 400, Soil & Water, Appendix B, pp. 15-16.) At the evidentiary hearing, the Applicant confirmed that the staging area "is an integral part of" the LTU. (July 12, 2010 Tr., p. 342.) This is alarming considering that the HTF spill that occurred at SEGS in 2007 resulted in 6,408 cubic yards of contaminated soil that, after being temporarily stored onsite, had to be transported offsite to an approved disposal facility. (Exh. 520.)

The procedure of removing contaminated soils and temporarily staging the soils in the LTU violates LORS. Spills of HTF will generate free liquids at temperatures above approximately 54 degrees Fahrenheit. (Exh. 400, p. C.4-8; Exh. 517, p. 7.) The RSA states that “Therminol can therefore be expected to remain liquid if a spill occurs.” (*Id.*) Since the hazardous waste being accumulated contains free liquid, the LTU does not comply with the requirements for temporary waste staging. (Health and Safety Code § 25123.3(a)(2).)

Additionally, “[t]he LTU will not incorporate a liner containment system or LCRS, but will be constructed with a prepared base consisting of 2 feet of compacted, low permeability, lime-treated material.” (Exh. 400, Soil & Water, Appendix B, p. 15.) Since the hazardous waste is not being accumulated on an impermeable surface, the LTU does not comply with the requirements for temporary waste staging. (Health and Safety Code § 25123.3(a)(2).)

As conditioned, the RSA allows HTF contaminated soils to be placed in the LTU without testing and later found to exceed hazardous waste levels, thereby resulting in improper staging of hazardous waste. This violates California hazardous waste regulations.

V. HAZARDOUS MATERIALS AND WASTE MANAGEMENT: THE PROJECT WILL RESULT IN UNANALYZED AND UNMITIGATED SIGNIFICANT IMPACTS FROM UNEXPLODED ORDNANCE

Substantial evidence shows the potential for UXO on the Project site. However, the RSA fails to adequately analyze and mitigate potentially significant impacts to the public and workers from the presence of UXO.

The RSA’s complete analysis of potentially significant impacts from the presence of UXO on the Project site is as follows:

the project area was within General Patton’s World War II (WWII) Desert Training Center, California-Arizona Maneuver Area region (1942-1944). The region surrounding the Project Area was considered a suitable location for training troops that would be deployed in the North Africa Campaign. After 2 years in operation and the training of one million troops, the desert training camps were closed in 1944. Military trash scatter including ration containers, military-issue utensils, and one 50-caliber cartridge were identified during the Tetra Teach site visits. (GSEP 2009a, Appendix E). There is potential for unexploded ordnance (UXO) at the project site.

(Exh. 400, p. C.13-12.) The RSA’s limited analysis fails to capture the extent of military maneuvers conducted in the Project vicinity.

The Phase I Environmental Site Assessment (“ESA”) conducted for the Project recommended a UXO survey, stating, “[d]ue to the use of the Subject Property for military maneuvers, the potential exists for the presence of UXO. Prior to construction, it may be a prudent safety measure to conduct a stand-alone UXO screening of the Subject property.” (Exh. 1, Appendix F, p. 6-1.) CURE submitted evidence that the Project area is located in the vicinity

of an area identified as a “gunnery range” on a map of the Desert Training Center/California Maneuver Area (“CAMA”). (Exh. 521; Exh. 522.) CURE also submitted evidence that several military exercises, with an emphasis on small unit training, were conducted in Chuckwalla Valley. (Exh. 517, p. 9.) A WWII-era map of the CAMA shows that the Headquarters of the Army Ground Forces was located approximately 8 miles west of the Project. (*Id.*; Exh. 521; Exh. 522.) During field maneuvers, divisions defended positions opposing forces by placing numerous obstructions, including minefields. (Exh. 517, p. 9.) Palen Pass, located approximately two miles north of the Project site, was the site of the largest maneuvers during the CAMA period. (*Id.*) Fortifications were constructed throughout the area of Palen Pass and bomb craters and cartridge cases can still be found in the area. (*Id.*)

Despite the Phase I ESA recommendation, the evidence provided by CURE showing the intensity of the military maneuvers in the vicinity of the Project, and Staff’s acknowledgement of the potential for UXO on the Project site, the RSA does not require a preconstruction UXO survey. And despite the Applicant’s knowledge of the Phase I recommendation and the Applicant’s recognition that the gunnery range and army headquarters were located in the “general project area,” the Applicant does not intend to conduct a stand-alone UXO survey. (July 12, 2010 Tr., pp. 350-351.)

Condition of Certification Waste-5 merely provides for the development of a plan to train construction workers to identify UXO. (Exh. 400, p. C.13-28.) Waste-5 is not sufficient mitigation to reduce impacts from UXO to construction worker safety to a level below significance. (Exh. 517, p. 9.) The RSA should include a condition of certification that would require a UXO survey for the Project area. The survey should be conducted by trained and credentialed UXO professionals and must be consistent with BLM and Army Corps of Engineers Guidance. (Exh. 517, p. 9.))

VI. CONCLUSION

The Commission cannot approve the Project as proposed. As it stands, the RSA does not satisfy fundamental requirements of CEQA. The RSA failed to adequately analyze and mitigate the Project’s significant impacts on numerous species, including among others, the desert tortoise, Couch’s spadefoot toad, desert kit fox, American badger, migratory birds, the golden eagle, and special-status bats. The RSA also failed to adequately analyze and mitigate significant impacts from the Project’s use of HTF. Finally, the RSA failed to adequately analyze and mitigate significant impacts from the presence of unexploded ordnance (“UXO”) on the Project site. Further, if the Commission approves the Project as proposed, the Commission will violate federal and State law.

Dated: July 26, 2010

Respectfully submitted

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PROOF OF SERVICE

I, Bonnie Heeley, declare that on July 26, 2010 I served and filed copies of the attached **First Opening Brief of California Unions for Reliable Energy**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at www.energy.ca.gov/sitingcases/genesis. 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 Unit electronically to all email addresses on the Proof of Service list and by either depositing in the U.S. Mail at South San Francisco, CA with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred," via personal service or via overnight mail as indicated.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on July 26, 2010.

_____/s/_____
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STATE OF CALIFORNIA
California Energy Commission

In the Matter of:

The Application for Certification
for the GENESIS SOLAR ENERGY
PROJECT

Docket No. 09-AFC-8

SECOND OPENING BRIEF
OF
CALIFORNIA UNIONS FOR RELIABLE ENERGY

July 27, 2010

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I. INTRODUCTION

In its review and approval of the Genesis Solar Energy Project (“Project”), the Commission must fulfill the requirements of the Warren-Alquist Act and CEQA. The Warren-Alquist Act requires a finding that a project complies with all LORS. CEQA requires that all potential environmental impacts be analyzed and that all significant impacts be mitigated, including impacts from mitigation measures themselves. The proposed Project fails on both counts. The Commission’s approval of the Project would violate the Warren-Alquist Act. Further, the environmental review is inadequate and cannot be relied on by the Commission in approving the Project.

The Commission cannot approve the Project if the Project relies on groundwater pumped from onsite wells without requiring the Applicant to obtain a legal entitlement to pump lower Colorado River mainstream water. Pumping lower Colorado River mainstream water without an entitlement violates LORS. The Commission must require the Applicant to obtain an entitlement in order to ensure that Project pumping is lawful.

The Commission cannot approve the Project since the RSA does not include a Water Supply Assessment (“WSA”), as required by State law. Both the Water Code and CEQA require the Commission to prepare and include a WSA in the environmental review document. Therefore, should the Commission approve the Project absent a WSA, the Commission would violate the Water Code, CEQA and the Warren-Alquist Act.

The Commission cannot approve the Project because there are significant unanalyzed and unmitigated impacts from installation of the Project’s western solar array on downstream and downwind vegetation. Specifically, the hydrological effects of the western portion of the installation will result in significant impacts to vegetation south of the Project that have not been adequately analyzed and mitigated. Staff’s conclusions regarding offsite impacts to vegetation and its proposed mitigation for those impacts are unsupported. In addition, the Project’s western solar array will cause erosion and soil mobilization resulting in significant impacts to downwind vegetation that have not been disclosed, adequately analyzed or mitigated. The RSA failed to adequately analyze and mitigate significant impacts to downstream and downwind vegetation, and therefore failed to satisfy the basic requirements of CEQA.

II. SOIL AND WATER RESOURCES: THE PROJECT’S PROPOSED USE OF COLORADO RIVER MAINSTREAM WATER VIOLATES LORS AND WILL RESULT IN SIGNIFICANT UNMITIGATED IMPACTS

Genesis Solar, LLC’s (“Applicant”) Application for Certification (“AFC”) states that the Project is located in the Chuckwalla Valley Groundwater Basin (“CVGB”). (Exh. 1, p. 5.4-1.) The AFC also states that the Project would use groundwater from onsite wells during construction and for operation of the power plant. (Exh. 1, p. 5.4-10.) Staff concluded that wells extracting water in the CVGB are extracting water from the Colorado River. (Exh. 402, p. 28.) The U.S. Geological Survey (“USGS”), the Colorado River Board and the Metropolitan Water District concur that the CVGB is hydraulically connected to the Colorado River and wells extracting water in the CVGB are considered to be extracting water from the Colorado River.

(Exh. 400, pp. C.9-47-48; Exh. 546, p. 2; Exh. 532.) Staff finds that the Project's groundwater pumping will result in a significant impact by inducing flow from the Colorado River. (Exh. 400, pp. C.9-47-48, 75, 117; Exh. 402, p. 31.) The RSA allows the Project to use groundwater for construction and operation provided that the Project replaces the Colorado River water pumped by the Project, but the RSA does not require the Applicant to obtain an entitlement to Colorado River water. (Exh.400, pp. C.9-48, 117-119.) Using Colorado River water without an entitlement is illegal. Under the Warren-Alquist Act, the Commission must find that using Colorado River water without an entitlement violates LORS, even with the RSA's replacement scheme. Further, if *the Commission permits* the Project as proposed, *the Commission* is also subject to suit in federal court. Finally, in any event, the RSA fails to adequately mitigate the Project's significant impacts caused by inducing flow from the Colorado River, as required by CEQA. A discussion of the LORS violations follows, however a discussion of the RSA's failure to adequately mitigate significant impacts will be presented in a future brief.

A. The Project's Proposed Use of Lower Colorado River Mainstream Water Without an Entitlement is Illegal

The Project proposes to pump groundwater from wells located in the CVGB. (Exh. 1, pp. 5.4-1, 5.4-10.) Substantial evidence shows a hydraulic connection between the CVGB, the PVMGB and the adjudicated Colorado River. (Exh. 400, pp. C.9-47-48; Exh. 402, pp. 26-31; Exh. 532, p. 3; Exh. 546, p. 2.) The CVGB outflows to the Palo Verde Mesa Groundwater Basin ("PVMGB"). (Exh. 400, p. C.9-22; Exh.48.) Staff concluded that a "reduction in the outflow from the CVGB to the PVMGB will be made up at least in part by inflow from the Colorado River." (Exh. 402, p. 31.) The USGS determined that the CVGB and PVMGB lie within a groundwater basin tributary to the Colorado River. (Exh. 400, p. C.9-47.) The USGS indicated that the CVGB and PVMGB are hydraulically connected to the Colorado River. (Exh. 400, p. C.9-47; Exh. 546, p. 2.) USGS determined that wells drawing groundwater within the CVGB and PVMGB are considered to be pumping Colorado River water. (Exh. 400, p. C.9-47.) The Metropolitan Water District agrees that the Project proposes to pump groundwater from a groundwater basin that is hydrologically connected to the Colorado River. (Exh. 532, p. 3.) The Colorado River Board also concurs that the Project is located within an area considered to be hydraulically connected to the Colorado River, and consequently, groundwater pumped from wells located on the Project site would be replaced by Colorado River water. (Exh. 546, p. 2.) Thus, the Staff and every expert agency agree: pumping groundwater for the Project is pumping Colorado River water.

The Applicant did not provide *any* evidence of the amount of water in the CVGB originating from storage, natural recharge, or the Colorado River. (Exh. 400, p. C.9-47.) Yet, the Applicant is adamant that the Project would not pump Colorado River water. (Exh. 60, pp. 6-13.) The Applicant attempts to muddle the record with California water law arguments without providing *any* authority for its argument. (Exh. 60, pp. 7-8.) The Applicant states, without providing any citations, that "under California water law, a landowner may pump groundwater from beneath their own lands for use on their property. No other LORS regarding use of this groundwater apply to this project." (Exh. 60, p. 8.) The Applicant also relies on the Blythe Energy Project cases to claim that "groundwater use does not constitute a LORS issue, and does not pose a significant environmental impact." (Exh. 60, p. 8.) The Applicant is simply

wrong. In reality, the situation is as clear as day—Staff determined that the Project’s proposed groundwater pumping would induce flow from the Colorado River (Exh. 402, p. 31), and the law requires the Applicant to obtain an entitlement to pump lower Colorado River mainstream water. (*Arizona v. California* (2006) 547 U.S. 150, 156; 43 U.S.C. § 617(d); Exh. 541, p. 1; Exh. 419, pp. 40916, 40921, Exh. 532, p. 3.) “An entitlement is an authorization for an individual or entity to put Colorado River water to beneficial use pursuant to: (1) a right decreed by the United States Supreme Court; (2) a contract with the United States under Section 5 of the BCPA; or (3) a reservation of water by the Secretary.” (Exh. 535, p. 2.)

Based on substantial evidence in the record, Staff correctly concluded that “all groundwater production at the [Project] site could be considered Colorado River water.” (Exh. 400, p. C.9-48.) As a result, Staff determined that the Project’s groundwater pumping would result in a significant impact by inducing flow from the Colorado River. (Exh. 400, pp. C.9-75, 117; Exh. 402, p. 31.) Staff, however, failed to find that the Project’s use of lower Colorado River mainstream water without an entitlement would violate LORS. (Exh. 400, p. C.9-79.)

The “Law of the River” mandates that wells that draw water from the mainstream of the lower Colorado River by underground pumping *must* have an entitlement. The “Law of the River” is a body of laws, regulations and contracts that control use of Colorado River water including (but not limited to):

- *Kansas v. Colorado* (1907) 206 U.S. 46 (U.S. Supreme Court adopts the doctrine of equitable apportionment of benefits for rivers flowing between states);
- *Wyoming v. Colorado* (1922) 259 U.S. 419 (U.S. Supreme Court rules that the doctrine of prior appropriation can be applied between states where each of the states adheres to that doctrine);
- 1922 Colorado River Compact (70 Cong. Rec. 324) (1928) (apportioned 7.5 million acre-feet per year of Colorado River water to both the upper and lower basins of the Colorado River);
- 1928 Boulder Canyon Project Act (43 U.S.C. § 617) (authorized the apportionment of 7.5 million acre-feet per year of Colorado River water to the lower basin states and directed the Secretary of the Interior to function as the sole contracting authority for lower Colorado River water);
- California Limitation Act of 1929 (Ch. 16, 48th Session; Statutes and Amendments to the Codes, 1929, pp. 38-39) (California agrees to limit its use of Colorado River to 4.4 million acre-feet per year);
- *Arizona v. California* (1931) 283 U.S. 423 (U.S. Supreme Court holds that the Boulder Canyon Project Act is a valid exercise of congressional authority);
- 1931 California Seven Party Agreement (Exh. 540) (allocated 4.4 million acre-feet per year of Colorado River water among seven California agencies);
- 1944 Treaty on the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande;
- Colorado River Storage Project Act of 1956 (43 U.S.C. 620 et seq.);
- *Arizona v. California* (1964) 376 U.S. 340 (enjoined the Secretary of the Interior from delivering water outside the framework of apportionments defined by the

law and mandated the preparation of annual reports accounting the uses of water in the lower basin);

- Colorado River Basin Project Act of 1968 (43 U.S.C. 1552 et seq.);
- Minute 242 to the 1944 Treaty;
- Colorado River Basin Salinity Control Act of 1974 (43 U.S.C. 1571 et seq.);
- Regulations providing for Offstream Storage of Colorado River Water and Development and Release of Intentionally Created Unused Apportionment in the Lower Division States;
- Quantification Settlement Agreement of 2003;
- Colorado River Water Delivery Agreement of 2003;
- *Arizona v. California* (547 U.S. 150) (U.S. Supreme Court Consolidated Decree consolidating *Arizona v. California* (1964) 376 U.S. 340, amended February 28, 1966 (383 U.S. 268), supplemented January 9, 1979 (439 U.S. 419), April 16, 1984 (466 U.S. 144) and October 10, 2000 (531 U.S. 1.));
- Agreement Concerning Colorado River Management and Operations (2007); and
- Record of Decision on Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007).

Pursuant to the “Law of the River,” any diversion or consumptive use of lower Colorado River mainstream water without an entitlement is illegal. (*Arizona v. California* (2006) 547 U.S. 150, 156; 43 U.S.C. § 617(d); Exh. 541, p. 1; Exh. 419, pp. 40916, 40921.) Consumptive use of the mainstream includes “water drawn from the mainstream by underground pumping.” (*Arizona v. California*, 547 U.S. at 153; Exh. 541, p. 3.) The Consolidated Decree also requires the United States to account for all lower Colorado River mainstream water use. (*Arizona v. California*, 547 U.S. at 164; Exh. 541, pp. 1, 3.)

The Project proposes to pump groundwater in the CVGB which has been determined to be hydraulically connected to the PVMGB and to the adjudicated and fully apportioned Colorado River. (Exh. 400, pp. C.9-22, 47-48; Exh. 402, pp. 26-31; Exh. 546, p. 2.) Thus, “wells extracting water in the [CVGB] and [PVMGB] are extracting water from the ‘river aquifer’.” (Exh. 402, p. 28.) Consequently, unless and until substantial evidence shows that the Project will not pump lower Colorado River mainstream water, the “Law of the River” requires the Project to obtain an entitlement to pump groundwater from onsite wells. (*Arizona v. California*, 547 U.S. at 156; 43 U.S.C. § 617(d).) The record does not contain substantial evidence that shows that the Project will not pump lower Colorado River mainstream water. The Applicant did not provide evidence of the amount of water in the CVGB originating from storage, natural recharge, or the Colorado River. (Exh. 400, p. C.9-47.) There is also no evidence in the record that indicates that the Applicant has such an entitlement (or that the Applicant intends to obtain one). Thus, the Project’s proposed use of lower Colorado River mainstream water is illegal.

Staff failed to find that the Project’s proposed use of lower Colorado River mainstream water violates LORS. Rather, Staff states that “there is no LORS in effect regarding withdrawal of groundwater that is connected to the Colorado River.” (Exh. 402, p. 31.) Although Staff recognizes that “[i]n cases where water is drawn from the river aquifer, an entitlement is required from the USBR,” Staff concludes that the Project will only require an entitlement if the U.S.

Bureau of Reclamation adopts the accounting surface rule. (Exh. 400, p. C.9-80.) Existing federal law clearly contradicts Staff's conclusion.

Staff ignores the "Law of the River," the body of laws and regulations outlined above that requires an entitlement for any diversion or consumptive use of lower Colorado River mainstream water. (*Arizona v. California*, 547 U.S. at 156; 43 U.S.C. § 617(d).) Staff's justification for not finding a LORS violation—the absence of the accounting surface rule which is merely a tool used to evaluate facts—does not negate federal law.

The accounting-surface method was developed in the 1990s by the U.S. Geological Survey, in cooperation with the Bureau of Reclamation, to identify wells outside the flood plain of the lower Colorado River that yield water that will be replaced by water from the river. This method was needed to identify which wells require an entitlement for diversion of water from the Colorado River and need to be included in accounting for consumptive use of Colorado River water as outlined in the Consolidated Decree of the United States Supreme Court in *Arizona v. California*.

(Exh. 541, p. 1.) The accounting surface method is just a tool used by the Bureau of Reclamation to satisfy federal law requiring the United States to account for all consumptive use of Colorado River water. (Exh. 535, p. 2; *Arizona v. California*, 547 U.S. at 164; Exh. 541, pp. 1, 3.) However, the absence of a rule adopting this particular tool as a regulation is irrelevant because it does not nullify existing federal law that requires lower Colorado River mainstream water users to have an entitlement. (*Arizona v. California* (2006) 547 U.S. 150, 156; 43 U.S.C. § 617(d); Exh. 541, p. 1; Exh. 419, pp. 40916, 40921.) Nor does it nullify existing federal law which establishes that consumptive use of the mainstream includes "water drawn from the mainstream by underground pumping." (*Arizona v. California*, 547 U.S. at 153; Exh. 541, p. 3.) Thus, Staff's argument fails. The Commission must require the Applicant to obtain an entitlement to Colorado River water for proposed Project groundwater pumping. Anything less is a violation of the law.

B. The Commission Itself Would Violate the Law if it Authorizes the Project's Use of Lower Colorado River Mainstream Water Without an Entitlement

If the Commission permits the Project as proposed, authorizing the Project's use of lower Colorado River mainstream water without an entitlement, the Commission itself will violate federal law. *Arizona v. California* enjoins the State of California "[f]rom diverting or **purporting to authorize** the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in [California]" and "[f]rom consuming or **purporting to authorize** the consumptive use of water from the mainstream in excess of the quantities permitted under" the Decree. (*Arizona v. California*, 547 U.S. at 159-160 (emphasis added).)

There is nothing in the record that indicates that the Applicant is authorized by the United States to use Colorado River mainstream water. Moreover, California was apportioned 4.4 million acre-feet of Colorado River water per year. (*Id.* at 156.) Other entities in California are already using all of California's apportionment of Colorado River water. (Exh. 532, p. 4.) Thus,

the Commission cannot authorize the Project's use of Colorado River water as it would exceed the 4.4 million acre-feet allotted to California by the Decree.

The Commission is prohibited by federal law from approving the Project's proposed groundwater pumping unless the record shows that the Applicant has a legal entitlement to Colorado River water. It does not. Consequently, if the Commission approves the Project as currently proposed, the Commission is subject to suit in federal court.

III. SOIL AND WATER RESOURCES: FAILURE TO PREPARE A WATER SUPPLY ASSESSMENT VIOLATES LORS AND CEQA

The Commission failed to include a water supply assessment ("WSA") for the Project, as required by State law. (See *Center for Biological Diversity v. County of San Bernardino* (May 25, 2010, D056652, D056648) __ Cal.App.4th __ (hereafter *Center for Biological Diversity*).) A WSA must be prepared for any project that meets the definition of "project" under Section 10912 of the Water Code. Subsection 10912(a)(5) defines a "project" as an industrial plant occupying more than 40 acres of land. Interpreting subsection 10912(a)(5), the court in *Center for Biological Diversity* required preparation of a WSA for a composting facility. It rejected the applicant's assertion that section 10912 only applies to "large scale buildings located on large square footage or plots of land." (*Center for Biological Diversity, supra*, __ Cal.App.4th.) The open-air composting facility qualified as a project because ***it met the acreage threshold***, even if the structures on the site were small. (*Id.*)

When a WSA is required for a project, an agency must assess the project's water demand and supply. This information must be specific enough to "assist local governments in deciding whether to approve the projects." (*O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 576.) In *Center for Biological Diversity*, the court found that the information about the availability of water for the proposed composting facility was "pure speculation." (*Center for Biological Diversity, supra*, __ Cal.App.4th.) There was no indication that the County had determined a water source was actually available. (*Id.*)

The proposed Project is an industrial solar energy plant on approximately 1,880 acres. (Exh. 400, pp. B.1-1-5.) Thus, it meets the definition of a project under the plain language of the Water Code. A WSA must be prepared before the Project is approved. The Water Code requires the Commission to include the WSA in the environmental review document. (Wat. Code, § 10911, subd. (b).) CEQA also requires compliance with the Water Code. (Pub. Resources Code, § 21151.9.)

The Project's proposed water demand and supply must be discussed in a WSA. (Wat. Code, § 10910.) Determining a project's water demand is essential to an adequate analysis of a project's impacts. (*Id.*) In addition, determining a project's water supply allows the agency to assess what water supply entitlements, water rights or water service contracts are necessary for the project to receive the water. (*Id.* at § 10910, subd. (d).)

A. The Project's Water Demand

The Water Code's requirements for a WSA compel specific information regarding the amount of water the Project will need for: (1) construction; (2) maintenance (i.e. mirror washing); and (3) fire control. While the RSA provides general information about how much water the Project may need for construction, the RSA completely fails to provide *any* specific water amount for the Project's mirror washing during Project operation and fire control needs. (Exh. 400, p. C.9-5.)

The RSA must accurately describe the amount of water the Project will need for operation. The record does not contain any evidence, discussion, or information regarding the amount of water required for mirror washing during operation or for fire control. Thus, the RSA's determination that the Project will require 1,605 acre-feet/year ("AFY") of water for a wet-cooled project and 202 AFY of water for a dry-cooled project is not supported by substantial evidence. (Exh. 400, pp. C.9-7, 66.)

B. The Project's Water Supply

The RSA states that groundwater will be pumped from onsite wells to satisfy the Project's water demand. (Exh. 400, p. C.9-5.) However, the RSA fails to provide any evidence that onsite wells are a reliable water source for the Project. As discussed above, the Applicant must obtain a legal entitlement to pump groundwater from onsite wells because Project pumping will induce flow from the Colorado River. (Exh. 400, pp. C.9-48, 75, 117; Exh. 402, p. 31; *Arizona v. California* (2006) 547 U.S. 150, 156; 43 U.S.C. § 617(d).) There is no evidence that the Applicant has an entitlement to pump Colorado River water. Thus, the availability of water for Project construction and operation is speculative. A WSA must identify existing water supply entitlements, water rights or water service contracts relevant to the identified water supply. A WSA must also describe what additional entitlements are necessary for the proposed Project to obtain the water.

The Commission must require preparation of a WSA for the Project as the Commission has prepared for the Imperial Valley Solar Project. If the Commission approves the Project without preparation of a WSA, the Commission will violate State law.

IV. SOIL AND WATER RESOURCES: THE PROJECT WILL RESULT IN UNANALYZED AND UNMITIGATED SIGNIFICANT OFFSITE IMPACTS ON VEGETATION

CEQA requires that significant environmental impacts of a proposed project be adequately investigated and discussed. (*Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 92.) CEQA guidelines require "a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences . . . [t]he courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955, quoting CEQA Guidelines §

15151; *see also Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Commrs.* (2001) 91 Cal.App.4th 1344, 1367.)

Commission Staff must assess the environmental impacts of the Project and determine whether mitigation is required, and set forth this analysis in a report written to inform the public and the Commission of the Project's environmental consequences. (20 Cal. Code Reg. §§ 1744(b), 1742.5(a)-(b).) Staff's analysis must reflect the "independent judgment" of the Commission. (14 Cal. Code Regs. § 15084(e).) Before approving a project, the Commission must conclude that Staff's report has been completed in compliance with CEQA, that the Commission has reviewed and considered the information in the report prior to approving the project, and that Staff's report reflects the Commission's independent judgment and analysis. (14 Cal. Code Regs. § 15090(a); *see Pub. Res. Code* § 21082.1(c)(3).)

The Commission must determine whether sufficient substantial evidence is in the record to support its findings and conclusions. (*Pub. Res. Code* §§ 21080, 21081.5.)

"Substantial evidence" is defined as:

[F]act, a reasonable assumption predicated upon fact, or expert opinion supported by fact. Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous...

(*Id.* § 21080(e).) California courts have made clear that "substantial evidence" is not synonymous with "any" evidence. (*Newman v. State Personnel Board* (1992) 10 Cal.App.4th 41, 47.) As defined by the courts, substantial evidence means evidence of "ponderable legal significance, reasonable in nature, credible and of solid value." (*Lucas Valley Homeowners Ass'n v. County of Marin* (1991) 233 Cal.App.3d 130, 156-7.)

This requirement also applies to expert opinions. Expert opinion does not constitute substantial evidence when it is "based on speculation and conjecture, and accordingly...not supported by substantial evidence in light of the whole record." (*See, e.g., Friends of the Old Trees v. Department of Forestry and Fire Protection* (1997) 52 Cal.App.4th 1383, 1399, fn. 10; *Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Commission* (1976) 55 Cal.App.3d 525, 532.) It does not include argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous. (*Id.*) Additionally, "opinion testimony of expert witnesses does not constitute substantial evidence when it is based upon conclusions or assumptions not supported by evidence in the record." (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr.* (1998) 62 Cal.App.4th 1123, 1137.) These requirements ensure that members of the public and interested agencies will have an opportunity to review and comment on significant impacts and proposed mitigation and identify any shortcomings. This public and agency review has been called "the strongest assurance" of the adequacy of an environmental review document under CEQA. (*Sundstrom v. Mendocino County* (1988) 202 Cal.App.3d 296, 308.)

Installation of the Project's western solar array will result in unanalyzed and unmitigated significant impacts to offsite vegetation. Specifically, the hydrological effects of the western

portion of the installation will result in significant impacts to vegetation south of the Project that have not been adequately analyzed and mitigated. Staff's conclusions regarding offsite impacts to vegetation and its proposed mitigation for those impacts are unsupported. In addition, the Project's western solar array will cause erosion and soil mobilization resulting in significant impacts to downwind vegetation that have not been disclosed, adequately analyzed or mitigated. Since the RSA failed to adequately analyze and mitigate significant impacts to downstream and downwind vegetation, the RSA failed to satisfy the basic requirements of CEQA described above.

A. The Project Will Cause Hydrological Impacts to Downstream Vegetation that Have Not Been Adequately Analyzed or Mitigated

The Project proposes to divert water flow channels using a series of dissipaters. (Exh. 402, p. 25.) According to the RSA, water flow diversion "will change both the extent and physical characteristics of the existing floodplain within the Project site and downstream of the Project site." (Exh. 400, p. C.9-56.) Specifically, "[c]ertain downstream areas will receive more flow than under existing conditions, while other areas may no longer receive any surface flow beyond what may be the result of direct precipitation." (*Id.*, p. C.9-58.) Staff therefore assumes that "all 21 acres of the ephemeral washes occurring downstream of the Project boundaries would be adversely affected by the proposed Project." (*Id.*, p. C.2-72.) As mitigation for significant impacts to washes and vegetation downstream of the Project, the RSA proposed offsite mitigation at a ratio of 0.5:1, half the ratio proposed for impacts to onsite washes and vegetation. (*Id.*) Staff's theory for providing half of the mitigation for offsite washes and vegetation is that,

while the wash-dependent vegetation downslope of altered drainages would eventually be lost, that loss would be slow and gradual. Staff anticipates that wash-dependent vegetation downstream of the Project deprived of flows would continue to provide habitat for years and possibly decades after the Project is constructed, although eventually it would die (if deprived of flows) or be indirectly affected by erosion and sedimentation along reaches below the stormwater channel discharge points.

(*Id.*, pp. C.2-72-73.) Staff provided ***no analysis*** to support its significance finding and ***no substantial evidence*** to support its finding that the proposed mitigation will reduce impacts to a level below significance. Consequently, the Project's impacts to downstream vegetation remain significant and unmitigated.

According to the RSA, "the drainage report does not provide sufficient information to establish the post-Project flooding conditions or to determine the potential impacts to vegetation downstream." Rather than conduct an independent investigation and analysis of the extent of the proposed Project's potentially significant impacts on downstream vegetation, Staff merely assumed that the Project would significantly impact downstream vegetation. (*Id.*, p. C.2-72.) While CURE agrees that the Project will significantly impact downstream vegetation, Staff's failure to adequately investigate and discuss the Project's environmental impacts in order to sufficiently inform decisionmakers and the public of the Project's consequences is in and of itself a violation of CEQA. (*Cadiz Land Co., Inc.*, *supra*, 83 Cal.App.4th at 92; *County of Amador*,

supra, 76 Cal.App.4th at 954; *Berkeley Keep Jets Over the Bay Com.*, *supra*, 91 Cal.App.4th at 1367.)

Moreover, it is impossible to determine whether Staff's assumption regarding significant impacts to downstream vegetation reflects the severity and significance of such impacts. Specifically, the RSA's assumptions may underestimate significant impacts to downstream vegetation. Consequently, the RSA's claimed effectiveness of proposed mitigation for downstream vegetation is unsupported, unknown and unknowable.

Only "where substantial evidence supports the approving agency's conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy." (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027 (*SOCA*), citing *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 407.) The RSA's conclusions regarding the effectiveness of mitigation measures in reducing impacts to downstream vegetation are unsupported.

Absent substantial evidence showing that Staff's proposed mitigation will be effective, the Commission cannot find that the proposed mitigation will be adequate to reduce the Project's impacts to downstream vegetation to less than significant levels. The Commission's ability to make required findings depends upon an impact analysis and mitigation measures tailored to actual impacts. One of the three possible findings that a lead agency may make regarding an identified impact is "that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect. . . ." (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).) Such a finding must be supported by substantial evidence in the record. (Pub. Res. Code § 21081.5; 14 Cal. Code Reg. § 15091(b).) Where an agency's finding concerning the effectiveness of a mitigation measure is not supported by substantial evidence or defies common sense, courts have declined to defer to the agency's finding. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1117.)

In this case, the record does not contain substantial evidence that could support a finding "that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect[s]" on downstream vegetation. The record merely shows that Staff "expects" (without any supporting evidence) "that while the wash-dependent vegetation downslope of altered drainages would eventually be lost, that loss would be slow and gradual," thereby requiring half of mitigation proposed for onsite vegetation. (Exh. 400, p. C.2-72.) Equally unconvincing is Staff's statement (again, without any supporting evidence) that it "**anticipates** that the wash-dependent vegetation downstream of the Project deprived of flows would continue to provide habitat for years and possible decades after the Project is constructed." (*Id.*, pp. C.2-72-73, emphasis added.) Staff's unsupported assumptions are pure speculation and do not constitute substantial evidence.

On the contrary, CURE provided substantial evidence that the Project would result in significant impacts to downstream vegetation that were not adequately analyzed (Exh. 509, pp. 1-2). Dr. Okin testified that extensive research shows that water diversions cause significant decreases in plant density (specifically Sonoran creosote bush scrub) and increases in mortality of vegetation because the vegetation communities rely on overland flow for survival. (*Id.*) If the

flow is diverted, vegetation downstream of the Project will experience reduced growth and shrub mortality. (*Id.*, p. 2.)

Staff responded to Dr. Okin's testimony (yet again, without any supporting evidence) that "[w]hile we do not expect the system to perfectly mimic natural conditions we expect the revised [drainage] plan to reduce impacts to less than significant levels." (Exh. 402, p. 25.) Staff's unsupported assumptions and idealistic expectations are pure speculation and do not constitute substantial evidence.

The Applicant also responded to Dr. Okin's testimony. The Applicant's rebuttal to Dr. Okin stated in full:

We disagree with the Opening Testimony of Greg Okin and provide the following rebuttal as it relates to "Hydrological impacts on vegetation south of the Project".

In the testimony of Mr. Okin, it is stated that "it is my opinion that the Project's diversion of flow from small ephemeral channels would result in significant offsite impacts to vegetation that have not been adequately addressed by the RSA". Presumably this opinion is based on the cited reference with the written testimony of Mr. Okin.

We feel the cited reference is a study that is not specifically relevant to the facts surrounding the Genesis project and therefore we feel that the opinion of Mr. Okin should not be considered.

The discharge from the drainage channels, as previously submitted and addressed in the RSA and demonstrated in the FLO 2D modeling, has been designed to spread the storm flows to adequately mitigate impacts to offsite vegetation.

(Exh. 63, p. 2, emphasis added.) The Applicant provided no substantive evidence to rebut Dr. Okin's showing that the Project will result in significant impacts to downstream vegetation. Furthermore, at the evidentiary hearing Dr. Okin explained very clearly why the cited study is directly applicable to the Project. Specifically, the study was conducted along the flank of the nearby Coxcomb Mountains where the climate, soils and vegetation are similar to that of the Project site. (July 13, 2010 Tr., p. 64.) Both locations "are on varnished alluvial fans with significant pavements, and both have linear disturbance to surface... hydrology, which will cut out sheet flow, and sheet flow appears to be what's necessary for sustenance of vegetation." (*Id.*, pp. 64-65.) Clearly, the study *is* "specifically relevant to the facts surrounding the Genesis project." The Applicant's simple remark carries no weight.

Substantial evidence shows that the Project will significantly impact downstream vegetation. Neither the Applicant nor Staff provided substantial evidence that shows otherwise. Moreover, Staff's assumptions that half of the mitigation proposed for onsite vegetation impacts will effectively mitigate offsite vegetation are baseless. Thus, the Commission does not have substantial evidence to support a finding that the proposed measures will effectively mitigate significant impacts to downstream vegetation.

B. The Project Will Cause Significant Impacts to Downwind Vegetation from Erosion and Soil Mobilization that Have Not Been Adequately Analyzed or Mitigated

The Project will require mass grading of approximately 1,800 acres of land. (Exh. 400, p. C.9-44.) The eastern portion of the Project's solar array will be located on an aeolian surface, while the geomorphic surface of the western portion of the solar array will be located on an alluvial surface. (Exh. 400, Soil & Water, Figure 6.) Although Staff conceded that "the fine sand and dust beneath the gravel surface is vulnerable to wind erosion following mechanical disturbance of grading," Staff concluded that "[t]here should not be a downwind impact from eroded sand (indeed, a major focus of the RSA has been on the potential for the project to cut off sand supplies to downwind habitat areas which are sand-dependent.)" (Exh. 402, p. 25.) It appears that Staff failed to distinguish the very different geomorphic surfaces of the Project site when it concluded that the Project would not result in downwind effects on vegetation.

The Applicant also seems to have overlooked the important differences related to the geomorphic surfaces on the Project site. At the evidentiary hearing, the Applicant asked Dr. Okin, "[c]an you explain to me how simultaneously the project can create a sand shadow but also create sand leaving the site?" (July 13, 2010 Tr., p. 69.) Dr. Okin explained that

the reason is because the project straddles two geomorphic surfaces. The geomorphic surface on the...east is an active aeolian land surface. And the concern on the active aeolian surface is whether or not the project will limit sand movement, which is required for the fringe-toed lizard. On the west side of the project...the geomorphic surface is an alluvial surface with various degrees of pavement development...Those surfaces on the western side, the alluvial surfaces, are incredibly stable if undisturbed. However, they're very easily disturbed. In fact...there's a study that's currently in press around Las Vegas showing that the most delicate area for dust emission is actually the alluvial surface...because the pavement actually protects a huge amount of material underneath that is wind erodible. So it's possible on the east wide where you have an active aeolian surface that you might cut off the aeolian sediment transport. On the west side you have the potential of actually creating a new aeolian source where there wasn't one."

(*Id.*, pp. 69-70.) Thus, Staff's analysis of the potential for the portion of the Project that will sit on an aeolian surface "to cut off sand supplies to downwind habitat" is unrelated to the analysis of the potential for another (much larger) part of the Project that will be located on a very different geomorphic surface to cause significant impacts to downwind vegetation from increased aeolian activity. More importantly, Staff's skirt of the issue does not constitute substantial evidence.

CURE, on the other hand, provided substantial evidence that the Project would indeed cause significant impacts to downwind vegetation. Dr. Okin testified that "even minor disturbances" of desert pavements "such as that caused by a single vehicle pass, leads to significant decreases in...the wind speed at which particle movement is initiated and increases the total amount of aeolian flux observed." (Exh. 509, p. 3.) The Project proposes substantially more disturbance than a single vehicle pass—the Project will mass grade approximately 1,800 acres. According to Dr. Okin, the Project's "large-scale disturbance that is to occur on the Qal

and Qsr geomorphic surfaces in the western portion of the Project will lead to extensive new aeolian activity. Given the predominant southwestern wind direction, this will mean that a plume of sand, eroded from the disturbed area, will begin to extend from the southern edge of the Project.” (*Id.*, p. 4.) Dr. Okin published three studies which show that this type of sand plume significantly impacts downstream vegetation. Specifically, the windblown sand can

abrade, damage, and/or kill offsite vegetation, and the removal of fine-particles during transport (i.e. “winnowing”) leaves the deposited soil with lower water-holding capacity, cation-exchange capacity, and lower levels of critical nutrient elements...The result is a downwind area with reduced vegetation cover, reduced soil fertility, shifting sands, and lower probability of establishment of new vegetation.

(*Id.*) Substantial evidence shows that the Project’s proposed western solar array will cause significant impacts to downwind vegetation. Staff’s conclusion that “[t]here should not be a downwind impact from eroded sand” is unsupported and contradicted by substantial evidence in the record.

Not only did the RSA fail to adequately disclose and analyze the Project’s significant impacts to downwind vegetation, but the record contains no evidence that Staff’s proposed mitigation for erosion control and dust suppression will reduce impacts to downwind vegetation to a level below significant.

Staff concludes that two conditions of certification (Soil & Water-1 and -14) will mitigate potential impacts related to wind erosion. Specifically, Staff purports that a not-yet-developed Drainage Erosion and Sedimentation Control Plan will identify soil treatments including “chemical based dust palliatives, soil bonding, and weighting agents” to control erosion. (Exh. 402, pp. 25-26.) In addition, Staff states that the Applicant will be required to develop a closure and decommissioning plan that will address long-term impacts from erosion. (*Id.*, p. 26.) The record contains no evidence that these plans will in fact mitigate the Project’s significant impacts to downwind vegetation, or that long-term significant impacts are even mitigable.

Staff also argues that the solar arrays “will *to some extent* act as wind fences” and the Applicant’s proposal to construct a wind fence “*should* intercept the vast majority of sand being eroded from the graded areas and prevent it from passing downwind.” (Exh. 400, p. 25, emphasis added.) There is no evidence in the record that these measures will mitigate the Project’s significant impacts to downwind vegetation.

On the contrary, CURE provided evidence that the RSA’s proposed mitigation for erosion and fugitive dust emissions, including windbreaks, vegetation and chemical dust suppressants or soil stabilizers, will not reduce impacts to downwind vegetation to a level below significant. First, substantial evidence shows that windbreaks do not significantly reduce wind in their lee because, as the distance from the windbreak increases, the effect of the windbreak decreases, becoming minimal at a distance of about five times the height of the windbreak. (Exh. 509, p. 6.) Second, substantial evidence provided by Dr. Okin’s own research in the Mojave Desert illustrates that vegetation is highly unlikely to reduce wind erosion of disturbed areas. (*Id.*) In Dr. Okin’s study, soils were disturbed for agricultural purposes and, after agriculture was abandoned on the fields, vegetation grew back to cover several times that found

prior to disturbance. (*Id.*) However, the fields with significant vegetation cover remained the source for blowing sand plumes downwind. (*Id.*) Thus, substantial evidence shows that, even if permanent vegetation recovers on disturbed areas, it is highly unlikely that wind erosion will be reduced in the decades following the Project. (*Id.*) Furthermore, substantial evidence shows that vegetation recovery in the California desert takes up to 3,000 years. (*Id.*; July 13, 2010 Tr., p. 67.) Finally, substantial evidence shows that chemical dust suppressants will not effectively limit wind erosion. At the evidentiary hearing, Dr. Okin testified that even with soil compaction and soil stabilizers, the Project site “will almost certainly...have more aeolian activity” with Project implementation because soil stabilizers only last one or two years and only have an efficacy rate of 80 to 90 percent. (July 13, 2010 Tr., pp. 71-73.) The result is for one or two years there would be

an improvement over the disturbed state, but it’s not an improvement over the original state. The original state – these alluvial surfaces, if undisturbed, produce no dust; in fact, they’re a sink for dust. But that means when you disturb it, there’s a mantle of dust underneath. So you disturb it, now it’s no longer protected, it becomes a massive dust source.

(*Id.*, p. 74.) Consequently, “when you go from the undisturbed surface to the disturbed surface, you go from basically something with zero flux to something with very high flux to go up several orders of magnitude.” (*Id.*) So, for example, if aeolian activity increases two orders of magnitude as a result of the Project, even if a soil stabilizer was 90 percent effective, “you are still one order of magnitude above what you were before.” (*Id.*, pp. 75-76.)

Staff failed to support its conclusion that the Project would not result in downwind impacts to vegetation from eroded sand. Staff also failed to support its conclusion that proposed mitigation for erosion control and dust suppression will reduce impacts to downwind vegetation to a level below significant. Conversely, CURE provided substantial evidence that the Project will cause significant impacts to downwind vegetation and Staff’s proposed mitigation for erosion control and dust suppression will not reduce the impacts to a level below significant. Consequently, the Commission cannot find “that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect. . . .” (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).

V. CONCLUSION

The Commission cannot approve the Project as proposed. Federal law prohibits the Commission from approving the Project without first requiring the Applicant to obtain an entitlement to Colorado River water. If the Commission fails to require an entitlement, it is subject to suit in federal court. The Commission will also violate State law if it approves the Project without first requiring the preparation of a Water Supply Assessment for the Project. Finally, the Commission does not have substantial evidence to support a finding that the Project’s impacts on downstream and downwind vegetation will be mitigated to a less than significant level.

Dated: July 27, 2010

Respectfully submitted

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PROOF OF SERVICE

I, Bonnie Heeley, declare that on July 27, 2010 I served and filed copies of the attached **Second Opening Brief of California Unions for Reliable Energy**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at www.energy.ca.gov/sitingcases/genesis. 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 Unit electronically to all email addresses on the Proof of Service list and by either depositing in the U.S. Mail at South San Francisco, CA with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred," via personal service or via overnight mail as indicated.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on July 27, 2010.

_____/s/_____
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STATE OF CALIFORNIA
California Energy Commission

In the Matter of:

The Application for Certification
for the GENESIS SOLAR ENERGY
PROJECT

Docket No. 09-AFC-8

THIRD OPENING BRIEF
OF
CALIFORNIA UNIONS FOR RELIABLE ENERGY

August 3, 2010

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I. INTRODUCTION

The Commission cannot approve the Project as proposed because the Revised Staff Assessment (“RSA”) does not meet the most basic requirements of CEQA. The RSA failed to establish an accurate baseline, adequately analyze, or mitigate the Project’s significant impacts to cultural resources and special-status plants. Further, there is no evidence that Staff’s proposed mitigation for significant impacts to cultural resources and special-status plants will be effective and feasible. Consequently, if the Commission approved the Project as proposed, the Commission would violate CEQA.

II. CULTURAL RESOURCES: THE BASELINE IS FLAWED AND THE PROJECT WILL RESULT IN SIGNIFICANT UNANALYZED AND UNMITIGATED IMPACTS

As Staff aptly stated, “cultural resources are a nonrenewable resource.... Once you’ve destroyed cultural resources, they’re gone forever.” (July 21, 2010 Tr., p. 147.) Staff concluded that the Project would directly impact 27 historically significant archaeological resources and indirectly impact 248 contributors to a historically significant cultural landscape. (Exh. 401, p. C.3-1.) However, the Project could directly and indirectly affect countless more cultural resources which Staff failed to identify and analyze. For example, as Staff acknowledged, “the impacts to ethnographic resources have not yet been evaluated. Consequently, Staff does not know if these resources are significant, or if any mitigation is needed or appropriate.” (*Id.*, pp. C.3-2-3.)

When considered cumulatively, the Project would contribute to the potential destruction of “more than 800 sites within the I-10 corridor and 17,000 sites within the southern California desert region.” (July 21, 2010 Tr., p. 147.) According to Staff, “at some point, cultural resources in the southern California desert region will be in danger of...extinction, as they will be all gone.” (*Id.*, p. 149.)

Despite the threatened extinction of this nonrenewable resource, the record shows that Staff did not adequately analyze or mitigate the Project’s potentially significant impacts to cultural resources. At the evidentiary hearing, Staff admitted that test excavations are necessary to determine significant impacts, yet test excavations were not conducted for the Project. (*Id.*, pp. p. 165, 216.) Staff also admitted that data recovery only mitigates the scientific value of cultural resources; “data recovery does not mitigate the loss of other kinds of values that would be part of these resources, spiritual values, cultural values.” (*Id.*, p. 148.) Thus, Staff’s proposed data recovery mitigation will not mitigate the Project’s significant impacts to any cultural resource value other than scientific value. Staff admittedly did not adequately analyze or mitigate the Project’s significant impacts to cultural resources. Given Staff’s candid admissions, the Commission cannot approve the Project without violating CEQA.

A. The RSA's Failure to Establish an Accurate Environmental Baseline Precludes an Adequate Analysis and Formulation of Mitigation

1. The RSA Failed to Establish an Accurate Environmental Baseline

The environmental setting, or baseline, refers to the conditions on the ground and is a starting point to measure whether a proposed project may cause a significant environmental impact. CEQA defines "baseline" as the physical environment as it exists at the time CEQA review is commenced. (14 Cal. Code Reg. §15125(a); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453.) "An EIR must focus on impacts to the existing environment, not hypothetical situations." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.)

If the description of the environmental setting of the project site and surrounding area is inaccurate, incomplete or misleading, the EIR does not comply with CEQA...Without accurate and complete information pertaining to the setting of the project and surrounding uses, it cannot be found that the FEIR adequately investigated and discussed the environmental impacts of the development project.

(*Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 87, quoting and citing *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722, 729.)

Describing the environmental setting is a prerequisite 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. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.) 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." (*County of Amador, supra*, 76 Cal.App.4th at 952.) 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, **baseline determination is the first rather than the last step in the environmental review process.** (*Save Our Peninsula Committee v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.)

The RSA's method for determining the baseline of cultural resources fails to satisfy CEQA. The widely followed CEQA standard practice for establishing the environmental baseline for cultural resources includes a Phase I archaeological survey (or "inventory") and a Phase II test excavation. (Exh. 512, p. 2.) The RSA could not establish an accurate environmental setting for determining impacts to cultural resources because the Applicant did not perform **any** test excavations to determine if subsurface deposits are present on the Project site. (July 21, 2010 Tr., pp. 165, 216.)

All of the information regarding the Project's baseline environmental setting, including the location and boundaries of archaeological sites, was derived from visual examination of the ground surface. (*Id.*, pp. 169, 182.) But, Staff admitted that it is not always possible to

determine the size and nature of archaeological sites based solely on visual examinations of the ground surface. (*Id.*) For example, Staff agreed that it cannot be determined whether or not burials are present within sites based solely on visual examination of the ground surface. (*Id.*, pp. 169-170.) Staff also agreed that test excavations are required to determine whether burials are present within a site. (*Id.*, p. 170, 250.) However, no excavations were conducted to determine whether the Project site contains human cemeteries. (*Id.*, p. 169.)

Because test excavations were not conducted, Staff did not (and could not) assess the Project's potential to significantly impact buried cultural resources, including human burials. (*Id.*, pp. 177-179.) Consequently, Staff also could not design mitigation that would reduce impacts to a level below significant. Mitigation measures will vary depending on the nature and significance values of the specific resource. (Exh. 512, p. 2.) A prehistoric village containing a cemetery, for example, will likely be determined significant based both on its religious importance to Native Americans and its potential to yield scientific information about the past. (*Id.*) In contrast, a prehistoric tool-making workshop may be identified solely due to its potential to provide archaeological information. (*Id.*) Without baseline data acquired through test excavations, Staff could not identify the significance values of the resources and therefore could not apply appropriate mitigation.

Importantly, there is ***no valid reason*** why Staff departed from standard CEQA practice. Staff stated that it did not require the Applicant to perform test excavations because of the tight timeframe and the large Project site size. (July 21, 2010 Tr., p. 197.) However, according to Dr. Whitley, there is nothing extraordinary about the Project that precluded test excavations. In fact, Dr. Whitley's firm recently conducted test excavations involving 85 archaeological sites (as opposed to Genesis' 27 sites) in six weeks. (Exh. 512, p. 3.) Conducting test excavations for the Project would have been feasible. There is ***no*** evidence in the record that shows otherwise. Consequently, there is no excuse for Staff's failure to determine the Project's environmental baseline, either by directly contracting for the excavations or requiring the Applicant to conduct the excavations.

Further, the RSA's method for determining the baseline for cultural resources may very well lead to catastrophic results. "It's exactly the same approach that was used at the Playa Vista Project under the Army Corps of Engineers that resulted in the unearthing of over 380 human burials, at a cost in excess of \$12 million, unanticipated cost, and a delay of years, if not a decade or more." (July 21, 2010 Tr., p. 251.) According to Dr. Whitley, in the last 25 years of his 35-year career as an archaeologist in California, he has not seen one project "move ahead without test excavation, where final determinations of adverse effect could be specified, and appropriate mitigation measure presented and provided." (*Id.*, p. 254.) On the other hand, during the first 10 years of Dr. Whitley's career, it was common practice to approve a project prior to performing test excavations. (*Id.*) But, "city halls were picketed, burials were flying all over the place. It was a recipe for a catastrophe.... ***That's why every CEQA agency I've worked in in the last 25 years, we want to see test excavation data before we've got a draft EIR.***" (*Id.*, pp. 254-255 (emphasis added).)

By failing to establish the environmental setting for cultural resources, the RSA violated CEQA's basic requirement that the environmental baseline be determined at the first step in the

environmental review process. (*Save Our Peninsula Committee v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.) Consequently, if the Commission approves the Project as proposed, the Commission will violate CEQA as a matter of law.

2. Staff's "Worst-Case Scenario" Approach to Impact Analysis and Mitigation is a Red Herring

a. Staff Did Not Adequately Analyze Significant Impacts to Cultural Resources

CEQA requires the Commission to identify the Project's environmental impacts and provide mitigation measures for each adverse impact. (14 Cal. Code Regs. § 15126.4(a)(1).) Under CEQA, "a project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment." (Pub. Res. Code § 21084.1.) Specifically, "[w]ith respect to archaeological resources, adverse impacts consist of destruction of the significant characteristics, attributes, qualities, that make those resources eligible for the listing in the California Register of Historical Resources, or alternatively under Section 106 in the National Register." (July 21, 2010 Tr., p. 250.)

According to California law, there are four criteria that make a resource historically significant: (1) the resource is associated with events that have made a significant contribution to the broad patterns of our history; (2) the resource is associated with the lives of persons significant in our past; (3) the resource embodies the distinctive characteristics of a type, period or method of construction, or represents the work of a master, or possesses high artistic values; or (4) the resource has yielded, or may be likely to yield, information important to history or prehistory. (Pub. Res. Code § 5024.1.) Historical resources must also possess sufficient integrity of location, design, setting, materials, workmanship, feeling and association to convey their historical significance. (14 Cal. Code Regs. § 4852(c).)

"To determine what the qualities of the resources are that make them significant, test excavations are required." (July 21, 2010 Tr., p. 250.) Because test excavations were not performed, the qualities or characteristics that make these sites significant were not identified. (*Id.*) Rather, according to Staff, Staff assumed significance of resources as a "procedural maneuver" by which it delayed

some of the process of evaluation until after the project is certified and the mitigation is going in effect. So the mitigation ends up incorporating part of the evaluation phase. And to do this, we initially – just a blanket assumption that of the identified sites that would probably be impacted were assumed eligible, and that all of the impacts to these sites were assumed significant, and the mitigation that would be provided would determine which were eligible and what data recovery would be needed. And we would end up in the same place. *We just wouldn't be doing the evaluation prior to certification.*

(*Id.*, pp. 197-198, emphasis added.)

Staff's "procedural maneuver" failed to account for the possibility that impacts would be greater than anticipated. In other words, Staff did not really assume the "worst-case scenario." Rather, Staff assumed that 27 resources directly impacted by the Project would be significant only for a single significance value—scientific research importance. However, scientific research importance is not the only criterion that makes a resource significant. Staff's proposed mitigation measures—data recovery—reflect Staff's unsupported assumption that research importance is the only potential value that the sites may contain, and that data recovery is adequate in every case to mitigate the sites' destruction.

The illusion that Staff assumed the "worst-case scenario" was put to rest at the evidentiary hearing.

Hearing Officer Celli: I just want to be clear that you heard the testimony that they are assuming that all of the...archaeological or cultural resources on the site are significant.

Dr. Whitley: Yes. No, I understand completely. And the point here, the assumption of significance is fully appropriate under one circumstance, and that's preservation in place. Otherwise, if you're going to data recovery, you're not simply assuming significance. You're arguing that the sites are only significant due to one value or characteristic, and that's research importance...what hasn't been established, is if the sites are also significant due to other attributes, traits, characteristics, not the least of which is human cemeteries.

(*Id.*, p. 259.) Thus, Staff's "procedural maneuver" completely failed to account for the possibility that the resources would be significant for reasons other than scientific value – such as, importantly, for the potential that the site contains human cemeteries.

The evidentiary hearing also revealed that impacts will likely be greater than Staff assumed and that data recovery will not mitigate all significant impacts to cultural resources. For example, according to Staff, "it's important to understand that we haven't excavated a lot of sites along villages around these edges...And so when you identify potential habitation site in this region, the idea that there might be burials is very high, and so we must assume that that's the case." (*Id.*, pp. 210-211.) But, Staff admittedly did not analyze the Projects' potentially significant impacts to human cemeteries. (*Id.*, pp. 177-179.)

In addition, Staff appears to believe that because the Project is located on BLM land, Staff need not analyze the cultural importance of ethnographic (or spiritual) resources. (*Id.*, p. 151.)

Staff Counsel Babula: So this impact assessment and mitigation development for spiritual resources is really within the responsibility and jurisdiction of another agency, the BLM, and not the Commission...

Dr. Bagwell: Correct.

(*Id.*, pp. 151-152.) Although CEQA does not specifically require the Commission to consult with Native Americans, as the National Historic Preservation Act does, CEQA does require the Commission to identify the Project's significant environmental impacts and discuss mitigation measures for each adverse impact. (14 Cal. Code Regs. § 15126.4(a)(1).) Thus, Staff was required to conduct an analysis of the Project's potentially significant impacts to ethnographic resources. Staff did not. Instead, Staff proposed a condition of certification (CUL-16) that requires the Applicant to hire an ethnographer, prior to the start of construction, to consult with Native Americans "to determine what indirect GSEP impacts they identify for the McCoy Spring National Register Archaeological District and for four petroglyph sites..." (Exh. 441, p. 23.) The timing here is backwards. CEQA requires that the Commission determine the Project's indirect impacts on ethnographic resources *before* it makes a decision, not after. This is CEQA 101.

Pursuant to CEQA, an "EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context." (*Cadiz Land Co.*, *supra*, 83 Cal.App.4th at p. 92.) CEQA guidelines require "a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences . . . [t]he courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (*County of Amador*, *supra*, 76 Cal.App.4th at 954, quoting CEQA Guidelines § 15151; *see also Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Commrs.* (2001) 91 Cal.App.4th 1344, 1367.)

To satisfy CEQA's requirements, Staff should have (and could have) consulted with Native Americans. The record shows that Native Americans are concerned about the Project's impacts, that Native Americans are actively participating in the Energy Commission's approval process for the Project, and that Native Americans are willing to consult with Staff. (July 21, 2010 Tr., pp. 97-99, 106-116; Exh. 600; Exh. 605; Exh. 606; Exh. 609; Exh. 615.) Yet Staff did not consult.

Staff did not assume the "worst-case scenario" here. Staff merely assumed *some* impacts were significant based on *one* significance criterion. Staff also completely failed to analyze the Project's impacts on ethnographic resources even though it was feasible to do so. Substantial evidence shows that the Project's impacts on cultural resources will be greater than Staff anticipated. In addition, Staff's "procedural maneuver" to delay evaluation of the Project's significant impacts until after the Project is certified violates CEQA. Thus, the Commission cannot approve the Project before it conducts all of the analysis required by CEQA.

b. Staff Did Not Adequately Mitigate Significant Impacts

CEQA requires the Commission to formulate mitigation measures sufficient to minimize the Project's significant adverse environmental impacts. (Pub. Res. Code, §§ 21002.1(a), 21100(b)(3).) Mitigation measures must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact. (14 Cal. Code Regs., §

15370.) A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727.)

Staff proposed data recovery to mitigate the Project's impacts to cultural resources. (July 21, 2010 Tr., p. 180; Exh. 441, pp. 16-21.) However, Staff admitted that data recovery only mitigates for the loss of scientific value of cultural resources. (*Id.*, pp. 148, 174-175, 251.) According to Staff, "data recovery doesn't mitigate the loss of other kinds of values that would be part of these resources, spiritual values, cultural values." (*Id.*, p. 148.) CURE agrees. For example, "[i]f the value was religious or sacred, then I don't think any Native American or Native American tribal group would agree that excavating out the burials, removing them from their resting place, and taking them somewhere else would be mitigation. They would consider that, I believe, a form of destruction." (*Id.*, p. 262.) It appears that Staff understands this concept.

Ms. Koss: How does data recovery mitigate the destruction of a sacred site when the...recovery itself destroys the sacred site?

Dr. Bagwell: I would say data recovery is probably not going to necessarily mitigate that particular kind of impact...And I'm not sure there is any kind of mitigation for it.

Ms. Koss: Avoidance, I suppose.

Hearing Officer Celli: The record should reflect that the witness is nodding in the affirmative.

Ms. Koss: Would you think that data recovery really only mitigates impacts that involve potential loss of scientific information?

Dr. Bagwell: I think that's how it's intended.

(*Id.*, pp. 174-175.) Unfortunately, Staff's proposed mitigation does not reflect its understanding because Staff's mitigation proposal goes straight to data recovery.

Similarly, it appears that Staff is aware of CEQA's explicit preference for preservation in place for mitigation of archaeological sites and admitted that data recovery does not satisfy CEQA's preference. (*Id.*, pp. 180-181.) Again, however, Staff's mitigation approach goes straight to data recovery without requiring avoidance. (*Id.*, p. 180.)

Staff stated that conditions of certification do not have to require the Applicant to avoid sites because "[t]hey volunteered to do that...Yes, avoidance has happened. Yes, I feel we're satisfying CEQA in that sense." (*Id.*, p. 181.) However, Staff then admitted that the size of the sites could have been significantly underestimated because formal site boundaries were not provided. (*Id.*, pp. 183-184.) Obviously, if sites' boundaries are not determined, it's impossible to avoid the sites.

At the evidentiary hearing, Staff could not recall how far the Project would be built from sites that Staff claims would be avoided.

Dr. Bagwell: ...there was no clear distinction between those site boundaries, whether they overlapped, whether they were subsumed. But...I think the point is moot, because they changed the project area to entirely avoid that location.

Ms. Koss: How far from that location will the project be built?

Dr. Bagwell: ...Perhaps a mile, half a mile...

Ms. Koss: Okay, the reason I asked is no test excavations have been performed, so a mile, half mile, we don't know.

Dr. Bagwell: It's true. I am concerned about those particular sites having buried deposits.

(*Id.*, pp. 184-185.) In reality, the Project's ground disturbing activities may occur 30 meters from these sites. (Exh. 441, p. 21.) Given the absence of formal boundaries for these sites, the complete lack of test excavations, and the proximity of the Project's ground disturbing activities to these sites, there is no evidence to support Staff's assumption that these sites will be avoided. This is precisely the reason why Staff is "concerned about those particular sites having buried deposits."

Also, at the evidentiary hearing, CURE asked Staff how it could determine whether the Project would directly impact archaeological sites if site locations are not accurately mapped. (*Id.*, p. 187.) The following ensued:

Dr. Bagwell: It's difficult.

Ms. Koss: And therefore, you wouldn't be able to avoid those sites whose boundaries have not been determined, is that correct?

Dr. Bagwell: Yes.

Ms. Koss: Would it then be fair to say that ***what these sites contain has not yet been determined and we don't accurately know how much archaeology will be destroyed by the project?***

Dr. Bagwell: It depends on which sites you're referring to. But in a broad way, ***I would agree.***

(*Id.*, pp. 187-188 (emphasis added).) If Staff has not determined the size or boundaries of the archaeological sites, what the archaeological sites on the Project site contain, or how much archaeology will be destroyed by the Project, Staff simply cannot conclude that sites will be avoided or that the Project's significant impacts will be fully mitigated. Staff's conclusions are unsupported and do not constitute substantial evidence.

Even after Staff admitted that: (1) the archaeological sites on the Project site were not accurately mapped; (2) it is difficult to determine whether the Project would directly impact archaeological sites; (3) those sites whose boundaries have not been determined could not be avoided; (4) what these sites contain has not yet been determined; and (5) how much archaeology will be destroyed by the Project is unknown, Staff counsel was still unconvinced that Staff's approach failed to satisfy CEQA.

Staff Counsel Babula: ...so assuming that the known sites are significant and treating them accordingly, and having mitigation beyond avoidance, which they already did, but why wouldn't that work?

Dr. Whitley: "Well, because they're not avoiding the sites that are in the impact area, the area of direct impact...They're not preserving any of the sites within the project direct impact area. They're preserving none of those 27 sites. The procedure that's proposed is straight to data recovery...But that isn't a procedure that allows them to decide, okay, we need to redesign project, because we've got 400 human burials here."

Staff Counsel Babula: Okay, but for those sites, they will be doing data recovery, so there is some form of mitigation?

Dr. Whitley: There's mitigation for one value of those sites, which frankly is the most innocuous, the cheapest, and the most expedient. This is a path to make it easy. It is not based on an analysis of the values that these sites may have.

(*Id.*, pp. 255-256.)

Staff and CURE agree that test excavations are necessary to determine significant impacts, yet test excavations were not conducted for the Project. Staff and CURE also agree that data recovery only mitigates the scientific value of cultural resources, and data recovery will not mitigate the loss of other kinds of values that would be part of these resources, such as spiritual values. The evidentiary hearing made it abundantly clear that Staff did not adequately analyze the Project's significant impacts to cultural resources and that Staff's proposed data recovery mitigation will not mitigate the Project's significant impacts to any cultural resource value other than scientific value. Staff admittedly did not adequately analyze or mitigate the Project's significant impacts to cultural resources. Consequently, if the Commission approves the Project as proposed, it will violate CEQA.

III. BIOLOGICAL RESOURCES: THE BASELINE IS INACCURATE AND THE PROJECT WILL RESULT IN SIGNIFICANT UNANALYZED AND UNMITIGATED IMPACTS TO SPECIAL STATUS PLANTS

The proposed Project site is located in a "uniquely 'tropical' warm desert climate...which contributes to the presence of a number of rare and endemic plants and vegetation communities...not found elsewhere in California." (Exh. 400, pp. C.2-99-100.) According to Staff, some of these plants have "a very high risk of extinction due to extreme rarity, very steep declines, or other factors. They're termed 'critically imperiled.'" (July 12, 2010 Tr., p. 182.)

CEQA requires an agency to determine whether a Project will cause a significant impact because it will “substantially reduce the number or restrict the range of an endangered, rare, or threatened species.” (14 Cal. Code Reg. §16065(a)(1).) CEQA requires that a lead agency describe the physical environmental conditions in the vicinity of the project, as they exist at the time environmental review commences. (14 Cal. Code Reg. § 15125(a).) The description of the environmental setting constitutes the baseline physical conditions by which a lead agency must assess the significance of a project’s impacts. (*Id.*) CEQA then requires an analysis of direct, indirect, and cumulative impacts. (Pub. Res. Code §§ 21083, 21065, 21065.3.) CEQA also prohibits agencies from approving projects “if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.” (Pub. Res. Code §§ 21002, 21081.) CEQA requires agencies to “avoid or minimize environmental damage where feasible.” (14 Cal. Code. Reg. § 15021(a).)

A. The RSA’s Failure to Establish an Accurate Environmental Baseline Precludes an Adequate Analysis and Formulation of Adequate Mitigation for Special-Status Plants

1. The RSA Failed to Establish an Accurate Environmental Baseline

CEQA requires a baseline determination to be the first rather than the last step in the environmental review process. (*Save Our Peninsula Committee, supra*, 87 Cal.App.4th at 125.) The RSA’s method for determining the baseline for special-status plants blatantly violates the requirements of CEQA. The RSA could not establish an accurate environmental setting for determining impacts to special-status plants because the Applicant did not perform a late-season survey and there are late season plants that could not be detected during spring surveys. (Exh. 400, p. C.2-2.) For example, “Abram’s spurge is a late-summer, early-fall blooming plant species and was therefore not targeted or detectable during field surveys which were performed during March and April 2009.” (*Id.*, p. C.2-29.) Also, as an example, flat-seeded spurge was not observed during spring surveys; “however, the surveys were not timed to detect this species” and according to the RSA, “its potential to occur cannot be dismissed.” (*Id.*, pp. C.2-30-31.) Because late-season surveys have not yet been conducted, Staff could not possibly assess the potential for significant impacts to several special-status plant species.

Recognizing the gap in its analysis, Staff proposes late-season botanical surveys “prior to the start of construction or by the end of 2010” to identify special-status plants on the Project site (i.e., to establish the baseline environmental setting). (Exh. 445, p. 3.) That is, Staff proposed to approve the Project then analyze the impacts. By deferring establishment of the baseline environmental setting for special-status plants until after Project approval, the Commission would not satisfy CEQA’s requirement that the baseline be determined as the *first* step in the environmental review process. Consequently, if the Commission approves the Project as proposed, the Commission will violate CEQA as a matter of law. The polite way to say this is, “putting the cart before the horse.”

2. The RSA Failed to Adequately Analyze and Mitigate Significant Impacts

“The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context.” (*Cadiz Land Co.*, *supra*, 83 Cal.App.4th at p. 92.) Although the RSA attempted to analyze the impacts and formulate mitigation measures for special-status plants, this analysis may bear little resemblance to the analysis and mitigation that will be required after significant impacts to special-status plants are actually identified through an adequate survey effort.

The RSA totally failed to adequately “investigate and discuss” the Project’s environmental impacts to special-status plants that are actually present on the ground. Without the required information regarding baseline conditions, it is impossible to determine whether the analysis of project impacts to unsurveyed disturbance areas reflects the severity and significance of such impacts. Specifically, the RSA’s assumptions may underestimate significant impacts to special-status plants. Consequently, the RSA’s claimed effectiveness of proposed mitigation for the special-status plants is unsupported, unknown and unknowable.

Only “where substantial evidence supports the approving agency’s conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy.” (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027 (*SOCA*), citing *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 407.) The RSA’s conclusions regarding the effectiveness of mitigation measures in reducing impacts to special-status plants in inadequately surveyed areas are unsupported. Absent data indicating the presence or absence of special-status plants, it is impossible for the Commission to determine whether proposed mitigation measures will be adequate to reduce impacts to less than significant levels. This makes it impossible for the Commission to make the findings required by section 1755 of its regulations.

Staff’s conclusion is similar to a city’s conclusions concerning mitigation measures that were supposed to address unidentified cumulative impacts to water supply but were struck down by the court in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 729-730 (*Kings County*). In that case, the EIR neither listed the projects considered in the cumulative impacts analysis nor provided information and analysis regarding these projects’ cumulative impacts to water supply. Instead, the court observed, the EIR “merely assumes whatever impacts such projects may have will be mitigated by existing and planned water conservation efforts of governmental agencies in the area.” (*Id.* at p. 729.) The court rejected this approach because:

Absent some data indicating the volume of ground water used by all such projects, it is impossible to evaluate whether the impacts associated with their use of ground water are significant and whether such impacts will indeed be mitigated by the water conservation efforts upon which the EIR relies.

(*Id.* at pp. 729-730.) Likewise here, without survey data showing the amount of special-status plants present on the Project site, it is impossible to determine the extent of the Project’s impacts on special-status plants and whether such impacts will actually be mitigated by Staff’s proposed mitigation.

Appropriately timed surveys for special-status plants have not been completed. (Exh. 400, p. C.2-101.) Without reliable data, an accurate impact assessment cannot be conducted, and without an accurate impact assessment, the Commission cannot conclude that Staff's proposed mitigation to avoid impacts to special-status plants would reduce Project impacts to less than significant levels. This is reflected in the RSA's discussion of impacts associated with the Colorado River Substation expansion component of the Project, where Staff states,

Avoidance, minimization and compensation measures such as those described in staff's proposed Conditions of Certification BIO-19 *could potentially* reduce these impacts to less than significant levels. However, implementation of the avoidance measures described in these conditions of certification would *require site specific information about the location of proposed project features in relation to sensitive plant species*. Staff does not currently have the project-specific information and therefore *cannot address the feasibility of implementing effective avoidance measures as a means of reducing significant impacts*.

(*Id.*, p. C.2-126, emphasis added.) If the absence of specific information about the location of plant species led Staff to conclude that its proposed mitigation for special-status plants (BIO-19) may not effectively mitigate significant impacts associated with the Colorado River Substation expansion, Staff must come to the same conclusion for the Project power plant site and linears for which Staff also lacks specific information regarding the location of plant species.

Further, the Commission's ability to make required findings depends upon an impact analysis that is based upon surveys and mitigation measures tailored to actual impacts. One of the three possible findings that a lead agency may make regarding an identified impact is "that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect. . . ." (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).) Such a finding must be supported by substantial evidence in the record. (Pub. Res. Code § 21081.5; 14 Cal. Code Reg. § 15091(b).) "Substantial evidence" is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (14 Cal. Code Reg. § 15384(a).) Where an agency's finding concerning the effectiveness of a mitigation measure is not supported by substantial evidence or defies common sense, courts have declined to defer to the agency's finding. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1117.)

In this case, the record contains *no* evidence that could support a finding "that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect[s]" on special-status plants. Because the Commission does not have information regarding the severity and significance of these effects, it cannot find that, through implementation of the proposed mitigation measures, the effects would be avoided or substantially lessened. This is a violation of the Commission's most fundamental obligations under CEQA.

3. The RSA Failed to Demonstrate that the Proposed Mitigation for Impacts to Special-Status Plants will be Feasible or Effective

CEQA requires the Commission to formulate feasible, effective mitigation measures sufficient to minimize the Project's significant adverse environmental impacts. (Pub. Res. Code, §§ 21002.1(a), 21100(b)(3); 14 Cal. Code Regs., § 15370; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727.) Also, pursuant to CEQA, the Commission cannot approve the Project unless it specifically finds either (1) that changes or alterations have been incorporated into the Project that "mitigate or avoid" any significant effect on the environment, or (2) that mitigation measures or alternatives to lessen these impacts are infeasible, and specific overriding benefits of the Project outweigh its significant environmental effects. (Pub. Res. Code § 21081; 20 Cal. Code Regs. § 1755.) These findings must be supported by substantial evidence in the record. (Pub. Res. Code § 21081.5; 14 Cal. Code Regs. §§ 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23.)

The RSA lacks effective, feasible mitigation for the Project's significant impacts to special-status plants. Condition of Certification BIO-19 provides a "roadmap" for the Applicant to conduct late-season botanical surveys and what to do if special-status plants are identified through the survey effort. The 21-page roadmap boils down to this:

(1) "***If possible***, conduct surveys...at the appropriate time to capture the characteristics necessary to identify the taxon" (Exh. 445, p. 4, emphasis added.); then

(2) If a California Natural Diversity Database ("CNDDDB") Rank 1 plant (i.e., critically imperiled), CNDDDB Rank 2 plant (i.e., imperiled), or CNDDDB Rank 3 plant "with local or regional significance" is identified, avoid the plant, ***if feasible. Avoidance is NOT required if the species is located within the permanent Project disturbance area.*** Further, avoidance need not occur if "avoidance would cause disturbance to areas not previously surveyed for biological resources...or would create...other restrictions" (*Id.*, pp. 6-8, emphasis added.); but

(3) If avoidance is not feasible (i.e., if a special-status plant occurs within the permanent Project disturbance area, would cause disturbance to areas not previously surveyed, or would create "other restrictions"), the Applicant shall provide compensatory mitigation, ***if "opportunities for acquisition or restoration/enhancement exist"*** (*Id.*, p. 8, emphasis added.); but

(4) "In the event there are no opportunities for mitigation through acquisition or restoration/enhancement, a Study of Distribution and Status for the affected special-status plant species ***may*** be implemented or funded...The objective of this study would be to better understand the full distribution of the affected species, the degree and immediacy of threats to occurrences, and ownership and management opportunities, with the primary goal of future preservation, protection, or recovery of the affected species within California." (*Id.*, p. 17, emphasis added.)

The 21-page condition is a roadmap to nowhere. The 21-page condition was a laborious exercise in futility because it does not actually commit the Applicant to ***any*** effective, feasible mitigation

whatsoever. Rather, the condition is a series of loopholes that, in the end, will fail to mitigate for “the rarest of the rare.” (July 12, 2010 Tr., p. 184.)

First, the condition does not even require the Applicant to conduct late-season surveys at a time when special-status plants would be identified. (*Id.*, p. 4.) That alone is enough to render the entire condition meaningless.

Second, the condition purports to require avoidance of certain plants (*See* Exh. 445, p. 6, “Mitigation for CNNDDB Rank 1 Plants (Critically Imperiled) - Avoidance Required” and p. 7, “Mitigation for CNDDDB Rank 2 Plants (Imperiled) – Avoidance on Linears Required”), but in reality there is no requirement for avoidance. Avoidance is **not** required if a species is located within the permanent Project disturbance area, if avoidance would cause disturbance in areas not previously surveyed, or if avoidance would create “other restrictions.” (Exh. 445, pp. 6-8.) Thus, it appears that avoidance could be infeasible in any and every case.

Third, the record includes **no** evidence that there is an opportunity to acquire compensation lands or provide restoration/enhancement of special-status plants. On the contrary, substantial evidence shows that that possibility is highly unlikely. These species are “the rarest of the rare.” (July 12, 2010 Tr., p. 184.) “[T]he Rank 1 plants are plants that are down from fewer than six viable occurrences statewide...By comparison, desert tortoise...is known from over 250 occurrences statewide.” (*Id.* p. 182.) Thus, according to Staff, “the reason that we are pushing for avoidance is because with five or fewer occurrences statewide, that means that **the opportunities for mitigation off site are going to be pretty limited. They’re going to be very limited. The chances that...one of those five is going to be available for purchase...it’s pretty slim.**” (*Id.*, p. 183, emphasis added.) The possibility of acquiring compensation lands for such rare plants becomes even slimmer considering that these plants, if found in the Chuckwalla Valley, are “going to be subject to hits from many new proposed renewable energy projects, because this valley is disproportionately affected by renewable energy development. This area and the Palo Verde Mesa are going to be hit hard.” (July 12, 2010 Tr., p. 193.) Substantial evidence shows that Staff’s proposed mitigation to acquire compensation lands or provide restoration/enhancement of special status plants is not feasible.

Furthermore, proposing mitigation that requires the acquisition of compensation lands containing a very rare species without determining whether such land is even available is a form of improper deferral of mitigation because it fails to ensure the mitigation is adequate and will be implemented. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275, citing *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396-1397.) The details of mitigation may only be deferred until after Project approval in limited circumstances. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670-671, quoting *Endangered Habitats League Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793.) Deferral is permissible only where, among other things, the adopted mitigation commits the agency to a **realistic** performance standard or criterion that will **ensure** the mitigation of the significant effect. (*See* Remy et al., *Guide to the California Environmental Quality Act* (11th ed. 2007), p. 551.) As described above, Staff’s proposed compensation land scheme does not satisfy this requirement.

Finally, under the proposed condition, if all else fails (i.e., avoidance, acquisition, and restoration/enhancement), and substantial evidence shows that it will, the condition provides that the Applicant *may* fund or implement a study to promote the future preservation, protection or recovery of a plant species. The study, *if performed*, can be completed up to 30 months *after* the start of Project construction. (Exh. 445, p. 20.) This final step of BIO-19 is just as meaningless as the first, second and third steps. By stating that the Applicant “may” fund or implement a study, the condition does not require the Applicant to do anything. Further, even if the condition actually committed the Applicant to some action, there is *no* evidence in the record that funding or implementing a *future study* would mitigate the *Project’s* significant impacts to special-status plants. It is nothing short of ridiculous to assume that optional funding for something akin to graduate student research performed years after plants are destroyed will adequately mitigate the Project’s impacts.

In short, BIO-19 fails to provide any mitigation whatsoever for the Project’s significant impacts to extremely rare plants. There is *nothing* in the record that shows otherwise. Without substantial evidence concerning the feasibility and effectiveness of the proposed mitigation for special-status plants, the Commission cannot find “that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect...” (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).) Thus, if the Commission approves the Project as proposed, the Commission will violate CEQA and its own regulations.

IV. CONCLUSION

The Commission cannot approve the Project as proposed. As it stands, the RSA does not satisfy fundamental requirements of CEQA. The RSA failed to adequately analyze and mitigate the Project’s significant impacts to cultural resources. The RSA also failed to adequately analyze and mitigate significant impacts to special-status plants. Thus, pursuant to CEQA, the Commission cannot approve the Project as proposed.

Dated: August 3, 2010

Respectfully submitted

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PROOF OF SERVICE

I, Bonnie Heeley, declare that on August 3, 2010 I served and filed copies of the attached **THIRD OPENING BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at www.energy.ca.gov/sitingcases/genesis. 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 Unit electronically to all email addresses on the Proof of Service list and by either depositing in the U.S. Mail at South San Francisco, CA with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred," via personal service or via overnight mail as indicated.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on August 3, 2010.

_____/s/_____
Bonnie Heeley

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STATE OF CALIFORNIA
California Energy Commission

In the Matter of:

The Application for Certification
for the GENESIS SOLAR ENERGY
PROJECT

Docket No. 09-AFC-8

FIRST REPLY BRIEF
OF
CALIFORNIA UNIONS FOR RELIABLE ENERGY

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I. INTRODUCTION

This reply brief responds to issues related to the Colorado River raised in Genesis Solar, LLC's ("Applicant") and Staff's opening briefs.

The Applicant incorrectly claims that a legal entitlement to pump Colorado River water is not required for the Project because the accounting surface methodology is not LORS. Staff also asserts that the Project does not need an entitlement, but for a different reason—because Staff treated its determination that the Project will be pumping Colorado River water purely as a CEQA issue and substituted CEQA mitigation for an entitlement. Both are wrong.

The Applicant confuses the accounting surface methodology, which is just an administrative tool, with the actual federal Law of the River, which requires an entitlement for any pumping of Colorado River water. Staff simply fails to apply federal law that requires an entitlement for extracting Colorado River water to its determination, confusing federal law with CEQA. In addition, there is no evidence in the record that Staff's proposed CEQA mitigation would be feasible and effective in reducing the Project's significant impact on the Colorado River to a less than significant level. The Commission must require the Applicant to obtain an entitlement prior to groundwater pumping for the proposed Project.

II. FEDERAL LAW, NOT THE ACCOUNTING SURFACE METHODOLOGY, REQUIRES THE APPLICANT TO OBTAIN AN ENTITLEMENT FOR PROPOSED PROJECT PUMPING

The Applicant mischaracterizes a critical issue in this case, using Colorado River water, in an effort to just make the issue go away. The Applicant argues that a legal entitlement is not required for proposed Project pumping because the accounting surface methodology is not LORS. The Applicant misses the mark entirely. If the Commission falls prey to the Applicant's erroneous depiction of this issue and fails to require the Applicant to obtain an entitlement, the Commission will not only violate the Warren-Alquist Act, but will also be subject to suit in federal court.

The Applicant incorrectly asserts that "a threshold question" in determining whether the Project requires an entitlement for proposed groundwater pumping is whether the accounting surface methodology is LORS. (Genesis Solar LLC's Opening Brief—Evidentiary Hearing Day 1 and Day 2 Topics, p. 5.) Whether or not the accounting surface methodology is LORS (and CURE does not dispute that it is not) is entirely irrelevant. Rather, what is applicable to this case is existing federal law that requires all use of lower Colorado River mainstream water be covered by an entitlement and be accurately accounted for in order to prevent unlawful use of the water. (*Arizona v. California* (2006) 547 U.S. 150; 43 U.S.C. § 617(d).)

As CURE explained in its Second Opening Brief, the accounting surface methodology is just a tool used to analyze facts in order to satisfy federal law requiring the United States to account for all consumptive use of Colorado River water. (CURE Second Opening Brief, p. 5; Exh. 535, p. 2; *Arizona v. California*, 547 U.S. at 164; Exh. 541, pp. 1, 3.) The record shows that

Staff relied on the U.S. Geological Survey's ("USGS") use of the accounting surface methodology, not as LORS but as a tool, when Staff determined that the Project will be pumping from the Colorado River aquifer. (Exh. 402, pp. 26-28.) The use of the accounting surface methodology as a tool to evaluate facts does not in any way change federal law. Thus, federal law, not the accounting surface methodology, requires the Applicant to obtain an entitlement prior to groundwater pumping.

A. Staff Properly Relied on USGS' Use of the Accounting Surface Methodology to Determine that the Project Will Be Pumping Colorado River Water

To enable the U.S. Bureau of Reclamation ("Reclamation") to properly account for the use of the lower Colorado River, and to ensure existing and future use is consistent with federal law, Reclamation and USGS developed the accounting surface methodology to make determinations of unlawful use of lower Colorado River water. (Exh. 541, pp. 1-2; Exh. 419, p. 40916.) Well pumps subject to the methodology are those that pump water that originates from the Colorado River or pump water that may be replaced in the underlying aquifer by Colorado River water. (Exh. 541, pp. 4-5.) The method to identify wells that pump water that is replaced by water drawn from the Colorado River relies on the "river aquifer" and an "accounting surface" within the river aquifer. (*Id.*, pp. 4-6.) The "river aquifer" extends outward from the Colorado River until encountering a geologic barrier to groundwater flow and encompasses the water bearing materials from which water can move to and from the lower Colorado River. (*Id.*, p. 6.) The "accounting surface" was developed with a groundwater model and represents the elevation and extent of the river aquifer that is hydraulically connected to the lower Colorado River. (*Id.*, pp. 4-6.)

This Committee agreed with CURE that the accounting surface methodology's applicability to the Project is a question of fact. (Exh. 533, p. 3.) Here, the accounting surface method is directly applicable to the Project, not as LORS, but as a tool to factually determine whether the Project will be pumping from the Colorado River. The BLM lands proposed as the Project site are currently located in the accounting surface area designated by USGS Water Investigations Report. (Exh. 541, p. 2.) This report indicates that the aquifer underlying lands located within the accounting surface is considered to be hydraulically connected to the Colorado River. (*Id.*) Groundwater withdrawn from wells located within the accounting surface would be replaced by Colorado River water in part or in total. (*Id.*) Indeed, Staff relied on USGS' use of the accounting surface methodology in its extensive analysis of the proposed Project when Staff factually determined that "wells extracting water in the Chuckwalla Valley Groundwater Basin and Palo Verde Mesa Groundwater Basin are extracting water from the 'river aquifer.'" (Exh. 402, pp. 26-28.)

Staff's Rebuttal Testimony is of utmost importance here. Staff's testimony explains why the accounting surface methodology is directly applicable to the Project as a means to factually determine that proposed Project pumping would extract water from the Colorado River. The passage is as follows:

The legal framework for apportionment of waters of the Colorado River was originally set forth in the Colorado River Compact of 1922. Water in the lower Colorado River is apportioned among the States of California, Arizona, and Nevada by the Boulder Canyon Project Act of December 21, 1928 (U.S. Congress, 1948, p. A213-A225) and was confirmed in 2006 in the Consolidated Decree (U.S. Supreme Court, 2006) after the Blythe II Commission hearing. The Consolidated Decree is specific about the responsibility of the Secretary of the Interior to account for consumptive use of water from the mainstream. Consumptive use is defined to include ‘water drawn from the mainstream by underground pumping.’ In 2008, the USGS (Wiele et al., 2008) prepared a report titled ‘Update of the Accounting Surface Along the Lower Colorado River.’ As part of that analysis they clearly demonstrated that the ‘river aquifer’ as stated in the 2006 Supreme Court decree extends into the tributary washes of the Colorado River as diagrammed here: [diagram].

The USGS (Wiele et al., 2008) report went on to state that:

‘Ground water in the river aquifer beneath the flood plain is considered to be Colorado River water regardless of water levels. Water pumped from wells on the flood plain is presumed to be river water and is accounted for as Colorado River water.’

The USGS (Wiele et al., 2008) later stated:

‘The accounting surface extends outward from the edges of the flood plain or a reservoir to the subsurface boundary of the river aquifer.’

That concept is clearly indicated in the above figure and in Figure 6 below. The concept of distance from the Colorado River had no bearing on whether the underlying groundwater was indicated as part of the ‘river aquifer.’

The USGS characterized the ‘river aquifer’ as:

‘The river aquifer consists of permeable, partly saturated sediments and sedimentary rocks that are hydraulically connected to the Colorado River so that water can move between the river and the aquifer in response to withdrawal of water from the aquifer or differences in water-level elevations between the river and the aquifer. The subsurface limit of the river aquifer is the nearly impermeable bedrock of the bottom and sides of the basins that underlie the Colorado River valley and adjacent tributary valleys, which is a barrier to the ground-water flow.’

Again, the USGS (Wiele et al., 2008) reference Figure 6 below as identifying areas encompassed by the ‘river aquifer.’ Consequently, any well in the Palo Verde Groundwater Basin is considered to be taking Colorado River water regardless of water level and **wells extracting water in the Chuckwalla Valley Groundwater Basin and Palo Verde Mesa Groundwater Basin are extracting water from the ‘river aquifer.’**

(Exh. 402, pp. 26-28.(emphasis added).) Staff’s testimony clearly explains how and why the accounting surface methodology is directly applicable to the Project, not as LORS, but as a tool to factually determine that the Project will be pumping Colorado River water. Thus, the Applicant’s argument is irrelevant.

B. When Federal Law is Applied to the Facts of this Case, the Applicant Must Obtain an Entitlement for Proposed Project Pumping

In its Second Opening Brief, CURE laid out the body of federal laws, regulations and contracts that make up the “Law of the River.” (CURE Second Opening Brief, pp. 3-4.) CURE explained that the “Law of the River” mandates that wells that draw water from the mainstream of the lower Colorado River must have an entitlement. (*Id.*, pp. 3-5.) Specifically, the Boulder Canyon Project Act, a federal LORS, requires any user of the lower Colorado River water in the lower basin to have a contract with Reclamation. (43 U.S.C. § 617(d).) This requirement, which was confirmed in the Consolidated Decree of the U.S. Supreme Court in *Arizona v. California* (2006) 547 U.S. 150, applies to all diversions from the lower Colorado River, including those made through wells that draw water from the Colorado River aquifer. The Consolidated Decree requires the Secretary of the Interior to provide detailed and accurate records of diversions, return flows, and consumptive use of water diverted from the mainstream of the lower Colorado River. (*Arizona v. California*, 547 U.S. at 164-165.) In other words, the Secretary of the Interior must ensure that all use of Colorado River water is covered by an entitlement and is accurately accounted for in order to prevent unlawful use of the water.

According to Reclamation, “[s]ince 1994, the accounting surface methodology has been and continues to be the primary tool” used to determine whether wells pump water that is replaced by water drawn from the Colorado River. (Exh. 535, p. 2.) Staff properly relied on USGS’ use of the accounting surface methodology when Staff concluded that “wells extracting water in the Chuckwalla Valley Groundwater Basin and Palo Verde Mesa Groundwater Basin are extracting water from the ‘river aquifer.’” (Exh. 402, pp. 26-28.)

The record shows that the proposed pumping for the Project will be extracting water from the Colorado River. Therefore, pursuant to the “Law of the River,” the Commission must require the Applicant to obtain an entitlement for proposed Project pumping. Whether or not the accounting surface methodology was codified as regulation (the effect of which would provide users with increased certainty in complying with federal law), the Commission must determine whether the Project complies with federal law such that the Project would not be unlawfully using Colorado River water through the Project’s groundwater pumping. Substantial evidence shows that the Project will be extracting Colorado River water, and federal law (not the accounting surface methodology) demands that the Applicant obtain an entitlement to do so.

III. THE COMMISSION'S OBLIGATIONS UNDER CEQA ARE DISTINCT FROM ITS OBLIGATIONS UNDER THE WARREN-ALQUIST ACT AND FEDERAL LAW

The Commission must comply with three separate laws as they relate to the adjudicated and fully apportioned Colorado River. First, CEQA requires the Commission to analyze the Project's direct, indirect and cumulative impacts on the Colorado River and provide mitigation for significant impacts where feasible. (Pub. Res. Code §§ 21083, 21065, 21065.3; 14 Cal. Code Regs. § 15021(a).) Second, separate and distinct from the requirements of CEQA is the Commission's obligation under the Warren-Alquist Act to determine whether the proposed Project complies with all LORS, including the "Law of the River," the body of laws, regulations and contracts which require that wells that draw water from the mainstream of the lower Colorado River, including through underground pumping, have an entitlement. (Pub. Res. Code § 25523(d); 20 Cal. Code Regs. § 1752(a); *Arizona v. California*, 547 U.S. 150; 43 U.S.C. § 617(d).) Finally, the Commission must act in accordance with the Consolidated Decree, *Arizona v. California*, issued by the U.S. Supreme Court, which prohibits the Commission from "purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in [California]" and from "purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under" the Consolidated Decree. (*Arizona v. California*, 547 U.S. at 159-160.)

The Commission must comply with CEQA, the Warren-Alquist Act **and** *Arizona v. California*. Staff mistakenly blurs the Commission's duties under CEQA and the Warren-Alquist Act, and completely ignores *Arizona v. California*'s clear prohibition of a state's purported authorization of the diversion or use of Colorado River water that has not been authorized by the United States and is not permitted under federal law.

A. The Commission Cannot Choose Between Complying with CEQA and Complying with the Warren-Alquist Act

Based on substantial evidence in the record, Staff correctly concluded that the Project's proposed groundwater pumping would result in a significant impact by inducing flow from the Colorado River. (Exh. 400, pp. C.9-75, 117; Exh. 402, p. 31.) Specifically, "staff has relied on reports from the USGS indicating that the Project is proposing to extract groundwater from a tributary to the Colorado River. The Project thus is potentially impacting the Colorado River which is fully entitled." (Exh. 400, p. C.9-95.) So far, so good. However, Staff errs when it then says, "**Staff is treating this as a water resources impact (as opposed to requiring an entitlement)...**" (*Id.*, emphasis added.)

Staff appears to believe that the Commission has a choice to either: (1) comply with CEQA by analyzing and providing mitigation for the Project's significant impacts; **or** (2) comply with the Warren-Alquist Act by ensuring that the Project complies with all LORS, including federal law that requires that wells that draw water from the mainstream of the lower Colorado River have an entitlement. There is no choice here. The Commission must comply with CEQA **and** the Warren-Alquist Act. Thus, the Commission must analyze and provide mitigation for the

Project's significant impact to the Colorado River, as Staff claims it has done,¹ *and* require the Applicant to obtain an entitlement in order to find that the Project complies with all LORS.

B. Staff's Proposed Offsets for Significant Impacts Under CEQA are Not a Substitute for an Entitlement

Staff correctly concluded that proposed Project groundwater pumping would result in a significant impact by inducing flow from the Colorado River. (Exh. 400, pp. C.9-75, 95, 117; Exh. 402, p. 31.) The only remaining questions are how much of the Project's water use will be offset and which method the Applicant will use to provide the offsets. Initially, Staff proposed to mitigate Project impacts to the Colorado River by offsetting the amount of Colorado River water used by the Project with water conservation projects such as paying for irrigation improvements in Palo Verde Irrigation District, using tertiary treated water, and participating in BLM's tamarisk removal program. (Exh. 443, pp. C.9-2-3.) Although Staff's conclusion that the Project will significantly impact the Colorado River remains unchanged, after negotiations with the Applicant, Staff altered its conditions of certification proposed to mitigate significant impacts to the Colorado River. (July 13, 2010 Tr., p. 13.)

Now, for example, Staff has labeled Condition of Certification Soil & Water-15 "Mitigation of Impacts to the Palo Verde Mesa Groundwater Basin" rather than "Mitigation of Colorado River Impacts" and instead of requiring the Applicant to "mitigate project impacts to flows in the Colorado River," Staff is now requiring the Applicant "to mitigate project impacts that result in depletion of the PVMGB groundwater budget."

Staff also changed Condition of Certification Soil & Water-19, originally called "Estimation of Colorado River Impacts" to "Estimation of Impacts to PVMGB." (Exh. 443, p. C.9-4.) Previously, Soil & Water-19 allowed the Applicant "to refine the estimates of the amount of subsurface water flowing from the Colorado River due to project pumping used for determining the appropriate volume of water for mitigation in accordance with Soil & Water-15." (*Id.*) Under the new Soil & Water-19, the Applicant must "conduct an analysis of the Project's effect on the PVMGB groundwater budget including an estimate of the decrease in underflow from the CVGB to the PVMGB" which will "be used to assess the volume of water requiring mitigation under Soil & Water-15." (*Id.*, pp. C.9-4-5.)

These changes merely alter the point at which the mitigation is measured. Rather than measuring the mitigation required to address the significant impact on the Colorado River, the mitigation will be measured at the point where the CVGB and PVMGB meet. As a result, the changed condition will only require the Applicant to offset a portion of the Project's groundwater use that affects the PVMGB. Specifically, the Applicant will attempt to offset only a portion of the Project's groundwater use after the Project has already impacted the Colorado River with water conservation projects, such as paying for irrigation improvements in Palo Verde Irrigation District, using tertiary treated water, and participating in BLM's tamarisk removal program. (Exh. 443, pp. C.9-2-4.) In other words, there will still be a significant unmitigated impact on

¹ Although Staff analyzed and provided mitigation for the Project's significant impact to the Colorado River, there is no substantial evidence showing that the proposed mitigation would be feasible and effective in reducing the Project's impact to a less than significant level. CURE addresses this in a subsequent section of this brief.

the Colorado River. Furthermore, mitigation for significant impacts to the Colorado River will not be measured any further to reduce the requirement that the Applicant must offset all of its proposed groundwater use. Finally, and most importantly, the changed condition does not change Staff's findings regarding significant impacts under CEQA and neither the original conditions nor the new conditions satisfy federal law.

Staff and the Applicant can label the mitigation however they wish, but the facts remain the same. The Project proposes to pump groundwater from wells located in the Chuckwalla Valley Groundwater Basin. (Exh. 1, pp. 5.4-1, 5.4-10.) Undisputed evidence shows a hydraulic connection between the CVGB, the PVMGB and the adjudicated Colorado River. (Exh. 400, pp. C.9-47-48; Exh. 402, pp. 26-31; Exh. 532, p. 3; Exh. 546, p. 2.) The CVGB outflows to the PVMGB. (Exh. 400, p. C.9-22; Exh. 48.) Staff concluded that a "reduction in the outflow from the CVGB to the PVMGB will be made up at least in part by inflow from the Colorado River." (Exh. 402, p. 31.) The USGS determined that the CVGB and PVMGB lie within a groundwater basin tributary to the Colorado River. (Exh. 400, p. C.9-47.) The USGS indicated that the CVGB and PVMGB are hydraulically connected to the Colorado River. (Exh. 400, p. C.9-47; Exh. 546, p. 2.) USGS determined that wells drawing groundwater within the CVGB and PVMGB are considered to be pumping Colorado River water. (Exh. 400, p. C.9-47.) The Metropolitan Water District agrees that the Project proposes to pump groundwater from a groundwater basin that is hydrologically connected to the Colorado River. (Exh. 532, p. 3.) The Colorado River Board also concurs that the Project is located within an area considered to be hydraulically connected to the Colorado River, and consequently, groundwater pumped from wells located on the Project site would be replaced by Colorado River water. (Exh. 546, p. 2.) Staff's and Applicant's newfangled conditions of certification do not alter these facts in any way. The Project will still be extracting Colorado River water and therefore the Applicant is still required to obtain an entitlement.

The Commission should not be fooled by the Applicant's and Staff's last-ditch attempt to avoid a very sticky situation. Because Staff and the Applicant disagreed about the Project's significant impact on the Colorado River, they essentially agreed to ignore the issue. (July 13, 2010 Tr., pp. 5-6, 10-13.) According to the Applicant,

rather than discuss the fight of what happens between Chuckwalla and the river, we would just take the number at that boundary between the Chuckwalla Valley and the Palo Verde Mesa Groundwater Basin...and then we would offset that number...I think, Ms. Holmes, correct me if I'm wrong, but one of the values is we did not want to get caught up in future adjudication of the Colorado River. Staff has agreed we don't need an entitlement for this activity to pump in the Chuckwalla Valley, it was an impact driven, and we didn't want to have the record confused so that at a later date someone would believe that we admitted or agreed to needing a Colorado River entitlement. (*Id.*, pp. 11-12.)

Staff and the Applicant have agreed to look the other way to avoid “the fight.” The Commission does not have that luxury. The evidence shows that the Project would pump groundwater that is hydraulically connected to the Colorado River. The federal Law of the River requires the Applicant to obtain an entitlement before it pumps, and prohibits the Commission from authorizing pumping without an entitlement.

Further, Staff analyzed the Colorado River issue from a purely CEQA perspective. (Exh. 400, p. C.9-95.) In its opening brief, Staff states,

Staff and the applicant have agreed that the project owner will offset any impacts on the Palo Verde Mesa Groundwater Basin that are caused by project pumping, and while staff and the applicant disagree as to whether these impacts ultimately affect the Colorado River, staff is confident that these offsets are sufficient to ensure that the project will cause no significant water supply impacts.

(Staff’s Opening Brief, p. 8.) Staff’s claim that the proposed offsets will mitigate water supply impacts does not equate to compliance with LORS. Federal law does not provide that if significant impacts to the Colorado River are mitigated through an offset scheme, then no entitlement is required. Rather, the law is clear that wells that draw water from the mainstream of the lower Colorado River, including through underground pumping, must have an entitlement. (*Arizona v. California*, 547 U.S. 150; 43 U.S.C. § 617(d).) Staff determined that proposed Project groundwater pumping would result in a significant impact by inducing flow from the Colorado River, and therefore an entitlement is required. Offsets are not a substitute for compliance with federal law. Staff’s CEQA offset scheme is beside the point.

C. Staff Completely Ignored *Arizona v. California*’s Prohibition on Authorizing the Diversion or Use of Colorado River Water

Arizona v. California enjoins the State of California “[f]rom diverting or purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in [California]” and “[f]rom consuming or purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under” the Consolidated Decree. (*Arizona v. California*, 547 U.S. at 159-160.) ***Staff completely failed to recognize this provision of the law.***

The evidence in the record shows that proposed Project groundwater pumping would extract water from the Colorado River aquifer. (Exh. 400, pp. C.9-22, 47-48; Exh. 402, pp. 26-31; Exh. 532, p. 3; Exh. 546, p. 2.) There is no evidence in the record that the Applicant has authorization from the United States to pump Colorado River water. Thus, the Commission’s approval of the Project would be illegal. Furthermore, other entities in California are already using all of California’s apportionment of Colorado River water as set out in the Consolidated Decree. (Exh. 532, p. 4.) The law prohibits the Commission from authorizing the Project’s use of Colorado River water because it would exceed California’s allotment.

Federal law prohibits the Commission from permitting the Project as proposed. If the Commission approves the Project, it will be subject to suit in federal court.

IV. STAFF'S PROPOSED CONDITIONS OF CERTIFICATION FAIL TO ADEQUATELY MITIGATE SIGNIFICANT IMPACTS TO THE COLORADO RIVER

CEQA requires the Commission to formulate mitigation measures sufficient to minimize the Project's significant adverse environmental impacts. (Pub. Res. Code, §§ 21002.1(a), 21100(b)(3).) Mitigation measures must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact. (14 Cal. Code Regs., § 15370.) A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727.) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors. (14 Cal. Code Regs., § 15364.) Moreover, mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments. (*Id.*, § 15126.4(a)(2).) Finally, CEQA does not allow deferring the formulation of mitigation measures; nor does CEQA permit the delegation of mitigation of significant impacts to responsible agencies or the Applicant. (*Id.*, § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; *City of Marina v. Board of Trustees of the California State University*, (2006) 39 Cal.4th 341, 366.)

The record does not contain substantial evidence showing that the revised condition of certification Soil&Water-15 would be effective, feasible mitigation for the Project's significant impacts to the Colorado River. Condition of Certification Soil&Water-15 requires the Applicant to offset the depletion of the PVMGB groundwater budget (which would induce flows from the Colorado River) through various water conservation projects which may include paying for irrigation improvements in Palo Verde Irrigation District ("PVID"), paying for conversion to cultivation of crops with lower crop water demand in the PVID, using tertiary treated water, implementing water conservation programs in the CVGB, PVMGB or Colorado River flood plain communities, and/or participating in BLM's tamarisk removal program. (Exh. 443, pp. C.9-2-3.) Staff asserts that it "is confident that these offsets are sufficient to ensure that the project will cause no significant water supply impacts." (Staff's Opening Brief, p. 8.) The record, however, shows otherwise.

Substantial evidence shows that two of the water conservation projects proposed by Staff are not feasible. The Metropolitan Water District's Staff Assessment/Draft Environmental Impact Statement comment letter stated,

...the California contractors have agreed in the 1931 Seven Party Agreement to prioritize the delivery of California's Colorado River water among themselves. Under this priority agreement, the following mitigation alternatives identified in SOIL&WATER-15 are no longer available to Proponents to mitigate impacts to Colorado River water resources: 'payment for irrigation improvements in Palo Verde Irrigation District...and/or BLM's Tamarisk Removal Program.' Instead, proponents would have to obtain Colorado River water for the Project from the existing junior priority holder, Metropolitan, which has the

authority to sell water for power plant use. Mitigation measure SOIL&WATER-15 should be revised accordingly.

(Exh. 532.) Despite Metropolitan Water District's clear direction to revise the condition to incorporate feasible mitigation, Staff did not. Consequently, conservation measures included in Soil & Water-15 are not feasible and fail to satisfy CEQA.

Further, one of the three possible findings that a lead agency may make regarding an identified impact is "that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect. . . ." (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).) Such a finding ***must be supported by substantial evidence in the record***. (Pub. Res. Code § 21081.5; 14 Cal. Code Reg. § 15091(b).) "Substantial evidence" is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (14 Cal. Code Reg. § 15384(a).) Where an agency's finding concerning the effectiveness of a mitigation measure is not supported by substantial evidence or defies common sense, courts have declined to defer to the agency's finding. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1117.)

There is ***no*** evidence in this record that the remaining measures in Soil & Water-15 (converting to cultivation of crops with lower crop water demand in the PVID, using tertiary treated water, and implementing water conservation programs in the CVGB, PVMGB or Colorado River flow plain communities) are feasible or that they would be effective in reducing the Project's significant impacts on the Colorado River to a less than significant level. Although "staff is confident that these offsets are sufficient to ensure that the project will cause no significant water supply impacts," Staff's confidence is mere speculation. (Staff's Opening Brief, p. 8.)

Case law is directly on point here. In *Kings County Farm Bureau v. City of Hanford*, the lead agency relied on a "mitigation agreement" with the water district by which the project applicant agreed to pay the district to purchase water supplies to make up for amounts used by the project. (221 Cal. App. 3d 692, 728.) However, the record contained no evidence that water supplies would be available for purchase. (*Id.*) Consequently, the court held that the applicant's promise to purchase water supplies failed to mitigate significant impacts to groundwater. (*Id.*) Similarly, here, a condition that requires the Applicant to pay for water conservation projects without any evidence that water is actually available does not assure actual mitigation of impacts. Thus, the Commission cannot find "that changes or alterations have been required in, or incorporated into, the project that would avoid or substantially lessen the effect..." of the Project's significant impact on the Colorado River. (Pub. Res. Code § 21081(a); 14 Cal. Code Reg. § 15091(a).) Therefore, if the Commission approves the Project as proposed, the Commission will violate CEQA.

V. CONCLUSION

Federal law, not the accounting surface methodology, requires the Applicant to obtain an entitlement for proposed Project groundwater pumping. CEQA mitigation is not a substitute for a federally mandated entitlement. Furthermore, there is no evidence in the record that Staff's

proposed offset scheme would be feasible or effective in reducing the Project's significant impact on the Colorado River to a less than significant level. Finally, federal law prohibits the Commission from approving the Project without authorization from Reclamation. In sum, the Commission must require the Applicant to obtain an entitlement for proposed Project groundwater pumping, or it will be subject to suit in federal court.

Dated: August 2, 2010

Respectfully Submitted,

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PROOF OF SERVICE

I, Bonnie Heeley, declare that on August 2, 2010 I served and filed copies of the attached **FIRST REPLY BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at www.energy.ca.gov/sitingcases/genesis. 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 Unit electronically to all email addresses on the Proof of Service list and by either depositing in the U.S. Mail at South San Francisco, CA with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred," via personal service or via overnight mail as indicated.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on August 2, 2010.

_____/s/_____
Bonnie Heeley

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STATE OF CALIFORNIA
California Energy Commission

In the Matter of:

The Application for Certification
for the GENESIS SOLAR ENERGY
PROJECT

Docket No. 09-AFC-8

SECOND REPLY BRIEF
OF
CALIFORNIA UNIONS FOR RELIABLE ENERGY

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I. INTRODUCTION

This reply brief responds to issues related to cultural resources raised in Genesis Solar, LLC's ("Applicant") and Staff's opening briefs. This brief also addresses issues related to the Transition Cluster Phase II Interconnection Study Report (Exh. 405).

The Genesis Solar Energy Project ("Project") is proposed to be built on approximately 1,800 acres of relatively undisturbed desert public land where significant prehistoric remains exist. As one Native American elder stated, the Project is proposed to be built in "the most Sacred area of the North American Continent." (Exh. 614, p. 2.)

Staff's opening brief paints an eye-opening picture of what will happen if the 13 projects proposed to be built along the I-10 corridor (including this Project) are approved—48,056 acres of desert lands (39 percent of the total I-10 corridor) would be disturbed and at least 816 cultural resource sites would be destroyed. (Staff's Opening Brief for Issues Raised at July 21 Evidentiary Hearings ("Staff Opening Brief"), p. 3.) On a broader scale, if the projects proposed to be built within the Southern California Desert Region (including this Project) are approved, 1,000,000 acres (over 1,560 square miles) of desert lands would be disturbed and at least 17,000 cultural resource sites would be destroyed. (Staff Opening Brief, p. 4.) The Commission cannot take this lightly.

Staff's opening brief also paints another picture—one where the only effect of the destruction of at least 17,000 cultural resource sites is the *loss of scientific information*. Staff's portrait could not be more troubling and misleading. Not once does Staff mention that any of these 17,000 sites could be considered sacred to Native Americans. Staff totally ignores the *spiritual values* that may be contained in these resources. Staff's complete disregard for Native American values is highly insensitive to Native Americans, particularly to those who have vigorously opposed this Project.

The failure to consider Native American values of these resources appears to be a theme in this proceeding, as it is also reflected in Staff's approach to analyzing and mitigating the Project's significant impacts to cultural resources. Despite Native Americans' expressions of overwhelming concern for the Project's impacts to sacred sites, Native Americans' active participation in the Energy Commission's licensing process for this Project, and Native Americans' clear willingness to consult with Staff, Staff completely failed to analyze the Project's impacts to ethnographic (or spiritual) resources.

Furthermore, in the absence of test excavations, Staff assumed that 27 resources directly impacted by the Project would be significant only for a single significance value—scientific research importance. However, scientific research importance is not the only criterion that makes a resource significant. For example, burial sites contain religious and sacred values, in addition to scientific importance. Staff's proposed mitigation, data recovery, also assumes that scientific research importance is the only potential value that the sites may contain, and that mere data recovery is adequate in every case to mitigate the sites' destruction. Importantly, at evidentiary hearings, Staff admitted that data recovery does not mitigate the loss of other values

that would be part of these resources, such as spiritual values. Staff also admitted that it did not know if its other proposed measures would effectively mitigate the destruction of sacred burial sites.

The Applicant's brief also completely ignores the crux of the issue here—that Staff only analyzed and mitigated for the loss of the scientific value of cultural resources. Instead, the Applicant goes on tirelessly about the inadequacies of “Dr. Whitley’s opinion.” In a nutshell, the Applicant argues that Dr. Whitley’s opinion does not show that Staff failed to accurately establish a baseline or adequately analyze and mitigate the Project’s significant impacts to cultural resources.

The fact of the matter is that the evidentiary hearing made it quite clear that Dr. Whitley and Staff agree that: (1) test excavations (which were not conducted for the Project) are standard practice for establishing a baseline and analyzing impacts to cultural resources; (2) surface evidence alone is insufficient to establish archaeological site size and significance; (3) archaeological sites’ size could have been underestimated and therefore any avoidance already undertaken may be inadequate; (4) the probability of the archaeological sites containing human remains is high; (5) test excavations are necessary to determine whether burials are present within a site; (6) Staff did not analyze the Project’s significant impacts to buried cultural resources, including human burials; (7) what the archaeological sites contain has not yet been determined and therefore we don’t accurately know how much archaeology will be destroyed by the Project; and (8) data recovery only mitigates for the loss of scientific value of cultural resources—not spiritual, cultural, or sacred values. In other words, Dr. Whitley and Staff agree that in the absence of test excavations, Staff could not and did not establish an accurate baseline or adequately analyze and mitigate the Project’s significant impacts to cultural resources.

It is encouraging that Staff and CURE now agree that the Project’s significant impacts to cultural resources have not been adequately analyzed or mitigated, but more still needs to occur for the Commission to satisfy its obligations under CEQA. It is time for the Commission to take the next step here. The Commission should require the Applicant to perform test excavations, or require Staff to directly contract for test excavations. In the alternative, because the BLM is requiring the Applicant to conduct test excavations for the National Historic Preservation Act section 106 process (*see* Exh. 515, pp. 26-27), the Commission should require Staff to complete its impact analysis and identification of mitigation measures after data from the Applicant’s test excavations for the BLM is available.

II. IT IS INDISPUTABLE THAT STAFF FAILED TO ANALYZE SIGNIFICANT IMPACTS TO HUMAN BURIALS

The Applicant is the only party that contends that “there is not a high likelihood of discovering human remains within the disturbance area.” (Genesis Opening Brief, p. 5.) Staff and CURE agree that there is a high likelihood that burials are present on the Project site. At the evidentiary hearing, Staff testified to this issue.

Ms. Michael: Since this area was used mostly as temporary camps, and according to the site descriptions. Are temporary camps used generally for burial sites? You just

mentioned that burial sites might be along the lake. But I just wondered if temporary camps are used for that purpose as well?

Dr. Bagwell: First of all, it's important to understand that we haven't excavated a lot of sites along the edges of these lakes. And so we're not sure if there were actually permanent long-term villages around these edges. Also, keep in mind that we're talking about the last 10,000 years. And during that time, the environment has changed a great deal, and those lakes had water in them some of those times. Getting the resolution about when that level of water was available, we can talk maybe several hundreds of years, but being able to get down to a five-year period when there was enough water for people to live there full-time, and then they would have potentially considered burying people there, we just don't know. And so when you identify potential habitation site in this region, ***the idea that there might be burials is very high, and so we must assume that that's the case.***

(July 21, 2010 Tr., pp. 210-211.)

Similarly, CURE's witness Dr. Whitley testified that

...we're dealing with a bunch of sites along a dry lake bed. And one thing that you should be clear about, these dry lake beds are dry today. They are seasonally moist. They periodically refill with water. There was a circumstance in the 1940s where Lake Mojave in the Mojave Desert held water for over two years. It's been documented and published by Robert Heizer, a famous California archaeologist. There were locations where Native Americans went and settled and created villages. We have sites in the project area that give me every indication...these are major villages. And the ***likelihood of them having burials in them, frankly, is very high...***

(*Id.*, p. 260.)

Despite substantial evidence showing a high likelihood that the archaeological sites contain human burials, Staff ***admittedly did not analyze*** the Project's significant impacts to human cemeteries.

Ms. Koss: Were potential impacts to human cemeteries analyzed?

Ms. Bastian: Okay. I was incorrect in saying they were analyzed...They're not analyzed...

(*Id.*, p. 178.)

Ms. Koss: Did you determine whether the site, the Genesis site, does or does not contain burials?

Dr. Bagwell: No.

(*Id.*, p. 179.) This is **indisputable evidence** that Staff did not analyze the Project's significant impacts to human burials. Consequently, Staff's analysis does not comply with CEQA's basic requirement that each significant environmental impact be identified and analyzed. (14 Cal. Code Regs. § 15126.4(a)(1).) Therefore, if the Commission approves the Project, the Commission will violate CEQA.

III. VISUAL EXAMINATION OF THE GROUND SURFACE WAS NOT SUFFICIENT TO ESTABLISH THE BASELINE OR DETERMINE SIGNIFICANT IMPACTS TO CULTURAL RESOURCES

The first step in the environmental review process is to establish the environmental setting, or baseline. (*Save Our Peninsula Committee v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.) Subsequently, an EIR must identify and describe a project's significant direct and indirect environmental impacts. (Pub. Res. Code § 21100(b)(1); 14 Cal. Code Regs. § 15126.2(a).) An impact analysis must be prepared with a sufficient degree of analysis to provide decisionmakers with the information needed to draw intelligent conclusions concerning a project's impacts. (14 Cal. Code Regs. § 15151.) Disagreements with the adequacy of an EIR's impact analysis will be resolved in favor of the lead agency if substantial evidence in the record supports the approach used. (*Laurel Heights Improvement Ass'n., v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 409.)

The Applicant insists that test excavations were not necessary for Staff to establish the baseline or adequately analyze the Project's significant impacts to cultural resources. Rather, the Applicant claims that its visual examination of the ground surface alone was "more than sufficient." (Genesis Solar, LLC Opening Brief – Evidentiary Hearing Day 3 Topics ("Genesis Opening Brief"), p. 2.) CEQA and its implementing guidelines, case law and the record here show otherwise. In actuality, Staff's method for determining the baseline and Staff's impact analysis fall way short of CEQA's most basic requirements.

First, the record shows that Staff and CURE agree that conducting test excavations is standard practice. (July 21, 2010 Tr., p. 183.; Exh. 512, p. 2.) However, test excavations were not conducted for the Project to determine if subsurface deposits are present on the site. (July 21, 2010 Tr., pp. 165, 216.) The record shows that Staff and CURE agree that surface evidence alone can be deceptive with respect to archaeological site size and significance. (*Id.*, p. 182.) Thus, Staff and CURE agree that archaeological sites' size could have been underestimated. (*Id.*, p. 183.) The Applicant recognizes that if it had conducted "a testing program, we might have a better handle on site boundaries." (*Id.*, p. 215.) The record shows that both CURE and Staff are concerned that the archaeological sites on the Project site have buried deposits and that the probability of the archaeological sites containing human remains is high. (*Id.*, pp. 185, 261.) The record shows that Staff and CURE agree that test excavations are necessary to determine whether burials are present within a site. (*Id.*, pp. 169-170.) Staff did not analyze the Project's significant impacts to buried cultural resources, including human burials. (*Id.*, pp. 177-179.) The record shows that Staff and CURE agree that what the archaeological sites contain has not yet been determined and therefore we don't accurately know how much archaeology will be destroyed by the Project. (*Id.*, pp. 187-188.) Simply put, the record shows that in the absence of

test excavations, Staff could not and did not establish an accurate baseline or adequately analyze the Project's significant impacts to cultural resources.

Second, case law is clear that if the environmental baseline is "inaccurate, incomplete or misleading," it necessarily follows that "it **cannot** be found that the" environmental review document "adequately investigated and discussed the environmental impacts of the development project." (*Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 87 (emphasis added).) Here, Staff's baseline method is nothing short of inaccurate, incomplete and misleading. Staff admitted that it is not always possible to determine the size and nature of archaeological sites based solely on visual examination of the ground surface. (July 21, 2010 Tr., pp. 169, 182.) Yet, Staff did not conduct or require the Applicant to conduct any investigations other than pedestrian surveys to establish the baseline. (*Id.*) Rather, all of the information regarding the Project's baseline, including the location and boundaries of archaeological sites, was derived from visual examination of the ground surface only. (*Id.*) Consequently, Staff (admittedly) could not assess the Project's potentially significant impacts to buried resources, including human burials. (*Id.*, pp. 169-170.) Given Staff's candid admissions, Staff misled decisionmakers and the public when it asserted that the Project's significant impacts to cultural resources were fully analyzed and mitigated to a less than significant level. Staff's conclusions are unsupported and contradicted by its own testimony. Staff's conclusions do not constitute substantial evidence.

Third, CEQA Guidelines provide that an EIR **must** evaluate environmental impacts to the extent that it is reasonably feasible to do so. (14 Cal. Code Regs. § 15151.) There is **nothing** in the record that shows that test excavations could not have been conducted, either by the Applicant or by the Commission directly contracting for the excavations, in order for Staff to adequately analyze the Project's impacts. On the contrary, **undisputed evidence** shows that test excavations were feasible. Dr. Whitley testified that his firm conducted test excavations involving 85 archaeological sites in six weeks. (Exh. 512, p. 3.) Staff determined that the Project site contains at least 27 archaeological sites and according to the Applicant, it conducted fieldwork for the Project for three years. (Genesis Opening Brief, p. 6.) Staff's reason for departing from standard CEQA practice was a tight timeframe and the large Project site size. (July 21, 2010 Tr., p. 197.) But, if **85 sites** were tested in **six weeks**, certainly **27 sites** could have been tested in **three years**. The record clearly shows that test excavations were "reasonably feasible." There is **no** evidence to support Staff's approach here. Staff was required to investigate and evaluate the Project's potentially significant impacts to cultural resources, including buried resources. (14 Cal. Code Regs. § 15151.) Staff did not. Thus, Staff's analysis does not satisfy CEQA.

Finally, when there is a standard, accepted methodology used to analyze a significant impact, an EIR **must** evaluate the impact unless a reasoned basis for not doing so is provided. (*Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm'rs* (2001) 91 Cal.App.4th 1344, 1370.) Staff and CURE agree that conducting test excavations is standard practice for determining a project's impacts. (July 21, 2010 Tr., p. 182; Exh. 512, p. 2.) Again, the only reason provided for Staff's departure from this standard practice was a tight timeline and the large Project site size. (July 21, 2010 Tr., p. 197.) And again, the record shows that these reasons carry no weight. Test excavations could easily have been conducted during the

Applicant's three years of fieldwork. There is *nothing* in the record that provides a valid basis for Staff's deviation from the standard practice of test excavations. Consequently, Staff was required to analyze the Project's significant impacts to cultural resources, including burials, based on the standard practice of test excavations. Staff did not.

In sum, substantial evidence shows that: (1) test excavations are standard practice for evaluating impacts; (2) absent test excavations, Staff could not establish an accurate baseline or adequately analyze the Project's significant impacts to buried cultural resources; and (3) test excavations were feasible. Staff was therefore required to conduct an impact analysis of buried cultural resources, including human burials. Staff did not. Therefore, if the Commission approves the Project as proposed, the Commission will violate CEQA.

IV. BLM'S SECTION 106 CONSULTATION IS NOT A SUBSTITUTE FOR STAFF'S CEQA ANALYSIS OF SIGNIFICANT IMPACTS TO ETHNOGRAPHIC RESOURCES

Staff admittedly did not analyze the Project's potentially significant impacts to ethnographic resources. (Exh. 401, pp. C.3-2-3.) The Applicant suggests that BLM's National Historic Preservation Act ("NHPA") section 106 consultation process is a substitute for Staff's CEQA analysis. (Genesis Opening Brief, p. 2.) The Applicant is wrong. There are three reasons why Staff must analyze the Project's potentially significant impacts to ethnographic resources.

First, as lead agency under CEQA, the Commission must independently review and analyze a project's potential adverse environmental impacts and include its independent judgment in an environmental review document. (Pub. Res. Code § 21082.1(c); *Plastic Pipe and Fittings Assn. v. California Building Standards Comm'n* (2004) 124 Cal.App.4th 1390.) CEQA Guidelines specifically require a lead agency to subject information submitted by others to the lead agency's own review and analysis before using that information in an environmental review document. (14 Cal. Code Regs. § 15084(e).) Furthermore, when certifying an environmental review document, the lead agency must make a specific finding that the document reflects its independent judgment. (Pub. Res. Code § 21082.1(c).)

Second, the Commission's regulations require the Commission 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." (20 Cal. Code Regs. § 1742.5(b) and (c).) The regulations require "a complete consideration of significant environmental issues in the proceeding." (*Id.* at § 1742.5(d).) The Energy Commission's regulations also require the Commission to base its decisions only on evidence in its record. (*Id.* at § 1751(a).) As a result, the Commission cannot merely rely on an analysis of the significance of impacts or the efficacy of mitigation conducted by the BLM. It must make its own determination based on evidence in its own record.

Finally, site significance (and hence the potential for significant adverse impacts) is defined differently under CEQA and the NHPA. The identification and analysis of significant impacts is more stringent under CEQA than under the NHPA. Specifically, sites are significant

under the NHPA if they are determined to be eligible for listing on the National Register of Historic Places (“NRHP”). (36 C.F.R. § 800.5.) NRHP eligible sites are also significant under CEQA. However, under CEQA, sites are also significant if they are listed in any historical registry. (14 Cal. Code Regs. § 15064.5(a).) Thus, the potential for significant adverse impacts, the need to design mitigation measures and the obligation to determine the effectiveness of mitigation is greater under CEQA. Unless the Commission conducts an independent analysis of significant impacts pursuant to CEQA, the Commission cannot “ensure a complete assessment of significant environmental issues,” as required by the Commission’s regulations. (20 Cal. Code Regs., § 1742.) Further, the Commission’s decision will not be supported by substantial evidence in the record.

BLM’s section 106 consultation process is not a substitute for Staff’s CEQA analysis. CEQA and the Commission’s own regulations require Staff to analyze the Project’s impacts to ethnographic resources. Staff admittedly did not conduct the required analysis and did not provide a valid reason why it failed to do so. On the contrary, as CURE explained in its opening brief, Staff should have consulted with Native Americans who have expressed concerns about the Project’s impacts on cultural resources and who are willing to consult with Staff. (CURE Third Opening Brief, p. 6.)

V. PROPOSED MITIGATION AND “AVOIDANCE” ALREADY UNDERTAKEN WOULD NOT REDUCE THE PROJECT’S SIGNIFICANT IMPACTS TO CULTURAL RESOURCES TO LESS THAN SIGNIFICANT LEVELS

In its opening brief, the Applicant asserts that Staff’s proposed conditions of certification and “avoidance” the Applicant has already undertaken will adequately mitigate the Project’s significant impacts to cultural resources. (Genesis Opening Brief, p. 4.) Nothing could be further from the truth. In reality, there are likely numerous unidentified resources that would be significantly impacted by the Project that would not be avoided and would not be mitigated by Staff’s proposed mitigation.

A. Significant Impacts Would Be Greater Than Staff Assumed

Substantial evidence shows that the Project’s impacts on cultural resources would be greater than Staff assumed. Staff assumed that 27 resources directly impacted by the Project would be significant. However, because text excavations were not performed, Staff could not analyze the Project’s potential to significantly impact buried cultural resources, including human burials. (July 21, 2010 Tr., pp. 177-179.) Staff and CURE agree that because the Project is located adjacent to a dry lake, the probability of the archaeological sites containing human remains is high. (*Id.*, p. 261.) The Applicant also recognized “that there was a high potential for cultural resources in the area, as it was and is a dry lake.” (*Id.*, p. 214.) Staff’s assumption that 27 resources would be directly impacted by the Project does not account for the likely presence of burials. Thus, there are likely numerous unidentified buried resources that would be significantly impacted by the Project.

In addition, despite Native Americans’ explicit concerns about the Project, Staff admittedly did not analyze the Project’s potentially significant impacts to ethnographic

resources. (Exh. 401, pp. C.3-2-3; July 20, 2010 Tr., pp. 97-99, 106-116; Exh. 600; Exh. 605; Exh. 606; Exh. 609; Exh. 615.) Had Staff consulted with Native Americans, it could have analyzed the Project's impacts to ethnographic resources. Instead, in clear violation of CEQA, Staff deferred analysis of ethnographic resources until after Project approval. (14 Cal. Code Regs. § 15126.4(a)(1); *see* Exh. 441, p. 23, Cul-16 ("prior to the start of construction, the project owner shall have the PE consult with local Native American groups to determine what indirect GSEP impacts they identify for the McCoy Spring National Register Archaeological District for four petroglyph sites...and to determine what mitigation they recommend").)

Staff completely failed to analyze the Project's impacts on buried resources and ethnographic resources. Consequently, Staff could not design mitigation that would reduce impacts to these resources to a level below significant. As explained in CURE's opening brief, mitigation measures vary depending on the nature and significance values of the specific resource. (CURE Third Opening Brief, p. 3.) Because, absent test excavations, Staff could not evaluate significance values of resources, Staff could not design appropriate mitigation to reduce impacts to a level below significant.

B. Without Knowing Site Boundaries, There Is No Assurance Resources Would Be Avoided

Absent tests excavations, there is no assurance that buried resources impacted by the Project would be avoided. As CURE explained in its opening brief, Staff and CURE agree that the size of sites could have been significantly underestimated because formal site boundaries were not determined. (CURE Third Opening Brief, p. 7.) The Applicant also appears to understand the importance of test excavations for determining site boundaries.

Mr. Galati: Mr. Farmer...I guess the crux of the issue is, have we moved far enough away from what we think is the extent of the site? What's your opinion on that?

Mr. Farmer: There have been some good points made, as far as that goes. And, you know, I do understand that *if we had had a testing program, we might have a better handle on site boundaries...*

(July 21, 2010 Tr., p. 215.) Staff and CURE agree that because site boundaries were not determined, it is impossible to know whether resources would actually be avoided. (*Id.*, p. 187.) Thus, the Applicant's list of "63 sites that were located within the original project ROW [that] have been avoided by reconfiguring the project APE" is misleading. (Genesis Opening Brief, p. 4.) The Applicant's list does not change the fact that because test excavations were not performed, site boundaries were not determined. Consequently, it is impossible to know with reasonable certainty if resources would be avoided.

C. Staff Failed To Propose Any Measures That Would Mitigate The Project's Direct Impacts To A Less than Significant Level

Staff proposed data recovery to mitigate the Project's significant direct impacts to cultural resources. However, substantial evidence shows that data recovery would not reduce the Project's impacts to cultural resources to a less than significant level.

CEQA's preference for avoidance of cultural resources was not proffered without reason. "Preservation in place is the preferred manner of mitigating impacts to archaeological sites" because "[p]reservation in place maintains the relationship between artifacts and the archaeological context" and "[p]reservation may also avoid conflict with religious or cultural values of groups associated with the site." (14 Cal. Code Regs. § 15126.4(b)(3)(A).) Data recovery, on the other hand, only mitigates for the loss of scientific value of cultural resources. (July 21, 2010, pp. 148, 174-175, 251.) This too was settled at the evidentiary hearing.

Hearing Officer Celli: ...it seemed to me that an artifact is going to do better in a drawer in some museum than it is out in the wild being rained on and earthquaked and ridden over by off-road vehicles or whatever. And I just – is that the case or do I have that wrong?

Dr. Bagwell: ...archaeology sites are not just the artifacts. They are this larger thing that has to do with the physical relationships between the artifacts and the features and the eco facts...And so the information that's contained within them is not just what you would learn from studying, for example, a piece of pottery, but where the pottery is found, where it's found in relation to other pieces of pottery. And so to a certain extent, leaving it in place preserves that contextual information...Along the edge of the lake shore, there's far more potential for buried sites. And so to a certain degree, they're protected, but then again they're potentially larger in three dimensions. So it's going to be a tradeoff. And when you're talking about direct effects, then sometimes gathering as much information as you can is one kind of...mitigation. It's better than finding out nothing about it and just bulldozing it. But *professionally speaking, we prefer to preserve. And the only way to do that with archaeology is to avoid it.*

(Id., pp. 209-210.) It appears that data recovery is merely one step above "just bulldozing" resources. And despite Staff's clear understanding that avoidance is the only way to truly preserve resources' values, its mitigation strategy goes straight to data recovery without any chance for avoidance. (Id., p. 180.) What is left is "gathering as much information as you can" to mitigate for the loss of the scientific value of cultural resources. But in no way would data recovery mitigate the loss of resources' other values, including Native American religious or sacred values. (Id., p. 148.) From a religious or sacred perspective, data recovery is not mitigation at all – rather, it is a form of destruction. (Id., p. 262.)

The Applicant asserts that a "compressed Phase II – Phase III protocol that calls for immediate data recovery in the event that any Phase II activities identify buried deposits" is the solution here. (Genesis Opening Brief, p. 5.) But the combined Phase II testing and Phase III

data recovery approach is precisely the problem. The approach goes straight to data recovery without any opportunity for avoidance. As explained by the Applicant,

What you do is, in essence, a testing program through the site to see where you do gather data, to where you can find out more about the conditions. And then you go back based upon that information you've given, and meet with the CPM to discuss exactly specifically *where you're going to dig* and why, and what you hope to see.

(*Id.*, p. 220 (emphasis added).) There is no opportunity here for avoidance. So, what happens when a human cemetery is unearthed? The burials, like any other resource on the Project site, would be excavated. In other words, the burials would be destroyed. (*Id.*, p. 262.)

Although Staff understands that data recovery would not mitigate the loss of any significance criterion other than scientific value, Staff claimed that other proposed measures would adequately mitigate impacts to the destruction of burial sites. If truth be told, there is *no* evidence that other proposed measures would mitigate the Project's impacts to burials.

Ms. Koss: ...would it be fair to say that the assumption of research significance and the plan to mitigate impacts by data recovery really only properly pertains to one of the potential significance criteria that the sites may hold?

Dr. Bagwell: True, but that was why we were suggesting a number of different types of mitigation. Not just the data recovery, particularly, for example, parts of Cul 1 and Cul 16.

Ms. Koss: And *would Cul 1 and Cul 16 mitigate for the destruction of burial sites?*

Dr. Bagwell: Potentially, but *I don't know*. When you are talking about mitigation of damage to something sacred, you would have to ask the people who that thing is sacred to. I certainly wouldn't want anybody to excavate a major cemetery, if we could avoid it.

(*Id.*, p. 175.)

Staff appears to be confused here. Staff: (1) stated that "the idea that there might be burials is very high, and so we must assume that's the case" (*Id.*, pp. 210-211); (2) agreed with CURE that data recovery would not mitigate the Project's significant impacts to buried resources, including human burials (*Id.*, pp. 174-175); (3) does not know if other proposed measures would reduce significant impacts to human burials to a level below significant (*Id.*, p. 175); and (4) clearly believes that the excavation of burials is wrong. (*Id.*) Yet, Staff provided *no* means to achieve avoidance. Instead, Staff's approach goes straight to data recovery (i.e. destruction). Notably, this whole mess could easily have been avoided had test excavations been conducted as the first step in Staff's environmental review process, as is the standard practice. Unfortunately, that is not the case. The result is that there are no measures that would mitigate the Project's direct impacts to cultural resources to a less than significant level.

VI. THE COMMISSION CANNOT MAKE A FINDING OF OVERRIDING CONSIDERATIONS WITHOUT AN ADEQUATE IMPACT ANALYSIS

“...[S]taff supports a finding of overriding considerations based on extensive mitigation and data collection that Genesis would be subject to” and “the direct impacts to cultural resources on the Genesis site that would be mitigated to levels of less than significant...” (*Id.*, p. 158.) Staff has skipped two steps here. The Commission cannot make a finding of overriding considerations unless and until each of the Project’s significant impacts has been disclosed and analyzed, and until the Commission has required all feasible mitigation, including avoidance. (*San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738; *Woodward Park Homeowners Association, Inc. v. City of Fresno* (2007) 160 Cal.App.4th 683.)

“There is a sort of grand design in CEQA: Projects which significantly affect the environment *can* go forward, but only after the elected decision makers have their noses rubbed in those environmental effects, and vote to go forward anyway.” (*Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 530 (emphasis in original).) An EIR that fails to adequately inform decision makers presents an unsound basis for a statement of overriding considerations and exposes the lead agency to legal challenge under CEQA. (*See San Bernardino Valley Audubon Society, Inc, supra*, 155 Cal.App.3d 738 (statement invalidated for the same reasons that EIR was found invalid); *Woodward Park Homeowners Association, Inc., supra*, 160 Cal.App.4th 683.) As discussed above and in CURE’s opening brief, Staff completely failed to analyze the Project’s significant impacts to ethnographic and buried cultural resources. Consequently, Staff failed to adequately inform the Commission of the Project’s environmental impacts. In other words, the Commission has not had “their noses rubbed in” the Project’s environmental effects. Therefore, an override finding by the Commission would be premature at this point.

Further, a statement of overriding considerations cannot mislead the reader “about the relative magnitude of the impacts and benefits the agency has considered.” (*Woodward Park Homeowners Association, Inc. v. City of Fresno* (2007) 160 Cal. App.4th 683, 718.) Because Staff failed to adequately analyze the Project’s impacts to cultural resources, a statement of overriding considerations based on Staff’s analysis would not fairly portray the Project’s impacts. Because it would otherwise mislead the public, the Commission cannot proceed with an override finding until the Project’s significant impacts are adequately disclosed and analyzed.

The Commission cannot go forward with an override of the Project’s significant impacts to cultural resources until it has dealt with each and every significant impact to cultural resources. The Commission has not.

VII. STAFF FAILED TO ANALYZE POTENTIALLY SIGNIFICANT IMPACTS FROM TRANSMISSION NETWORK UPGRADES THAT ARE NECESSARY FOR PROJECT OPERATION

The Transition Cluster Phase II Interconnection Study Report identified the following transmission project upgrades that would be required for Project operation: (1) loop the Colorado

River – Devers 500 kV transmission line into Red Bluff Substation; (2) Colorado River Substation expansion; (3) upgrade Mira Loma – Vista No.2 220 kV T/L drops at Vista Substation; (4) develop a SPS for N-2 of Devers-Red Bluff 500 kV T/Ls; and (5) develop a SPS for N-1 of Colorado River AA-Bank. (Exh. 405.) However, Staff’s assessment only analyzed potentially significant impacts from the Colorado River Substation expansion. Staff’s failure to evaluate the potentially significant impacts from the remaining upgrades violates CEQA’s requirement that Staff analyze the “whole of the project.”

Under CEQA, the definition of “project” is “given a broad interpretation in order to maximize protection of the environment.” (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1180 (internal quotation omitted); see also, *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 381-83; *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 796-97; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 277-81.) A “project” is “the whole of an action” directly undertaken, supported or authorized by a public agency “which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (Pub. Res. Code § 21065; 14 Cal. Code Regs. § 15378(a).) Under CEQA, “the term ‘project’ refers to the underlying activity and not the governmental approval process.” (*California Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4th 1225, 1241, (quoting *Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1171-72.) (14 Cal. Code Regs. § 15378(c) (“The term ‘project’ refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term ‘project’ does not mean each separate governmental approval.”).)

Recently, the First District Court of Appeal in *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70 (“*CBE v. Richmond*”) described CEQA’s statutory and regulatory requirements and existing case law regarding whether a lead agency unlawfully segmented its environmental review of a project under CEQA. The Court of Appeal explained that “[t]here is no dispute that CEQA forbids ‘piecemeal’ review of the significant environmental impacts of a project.” (*Id.* at p. 98, citing *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358 (“*Berkeley Jets*”).) Rather, CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences.” (*Id.*, citing *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.) Thus, CEQA defines “project” broadly as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment” (*Id.*, citing 14 Cal. Code Regs. § 15378(a).) The court explained that the question of which acts constitute the “whole of an action” for purposes of CEQA is “one of law which we review de novo based on the undisputed facts in the record.” (*Id.*, citing *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1224 (“*Tuolumne County*”).)

The Court of Appeal first looked to the California Supreme Court’s decision in *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376 that set aside an EIR for failing to analyze the impacts of a reasonably foreseeable second phase of a multi-phased project. The EIR in that case analyzed a university plan to move its school to a

new building, of which only about one-third was initially available to UCSF. The EIR failed to analyze the environmental effects of the eventual occupation of the remainder of the building once that space became available. The California Supreme Court established a test that requires an analysis of the environmental impacts of a future expansion or other action if: (1) “it is a reasonably foreseeable consequence of the initial project;” and (2) “the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.” (*CBE v. Richmond* at p. 19, citing *Laurel Heights*, 47 Cal.3d at 390.)

In *CBE v. Richmond*, the Court summarized existing case law requiring environmental review of related projects.

Some courts have concluded a proposed project is part of a larger project for CEQA purposes if the proposed project is a crucial functional element of the larger project such that, without it, the larger project could not proceed. For example, in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, the court concluded the description of a residential development project in an EIR was inadequate because it failed to include expansion of the sewer system, even though the developer recognized sewer expansion would be necessary for the project to proceed. (*Id.* at pp. 729-731.) Because the construction of additional sewer capacity was a “required” or “crucial element[]” without which the proposed development project could not go forward, the EIR for the project had to consider the environmental impacts from such construction. (*Id.* at pp. 731-732.)

More recently, in *Tuolumne County, supra*, 155 Cal.App.4th 1214, the court held that a proposed Lowe’s home improvement center and a planned realignment of the adjacent Old Wards Ferry Road were improperly segmented as two separate projects in light of the dispositive fact that the road realignment was included by the City of Sonoma as a condition of approval for the Lowe’s project. (*Id.* at p. 1220.) The court held that this was really one project, not two, because “[t]heir independence was brought to an end when the road realignment was added as a condition to the approval of the home improvement center project. [Citation.]” (*Id.* at 1231.)

(*Id.* at p. 20.)

The court also noted other decisions which did not require combined environmental review of separate projects. In *National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505, the court found that an EIR for a landfill was not inadequate for failing to discuss impacts from materials recovery facilities (“MRFs”) needed to process solid waste before transport to the landfill because the MRFs were not “crucial elements” without which the landfill project could go forward, and the exact location of the MRFs were not yet known. (*Id.* at p. 1519.) In *Christward Ministry v. County of San Diego* (1993) 13 Cal.App.4th 31, the court found that even though there were a number of separate waste management projects occurring at the same time, there was “no record reflecting a contemplated larger project . . .” that should have been considered in an EIR for a landfill expansion. (*Id.* at p. 46.) Furthermore,

the court noted that the other projects were addressed in the cumulative impacts analysis of the EIR. (*Id.* at p. 47.) Finally, in *Berkeley Jets*, the court rejected an argument that an EIR for an airport development plan should have included long-range plans for potential runway expansions, because the potential runway expansions were unnecessary for completion of the airport plan. (*Berkeley Jets, supra*, 91 Cal.App.4th at pp. 1361-1362.) The court noted, the airport plan “does not depend on a new runway and would be built whether or not runway capacity is ever expanded.” (*Id.* at p. 1362.) Because the runway expansion was not a crucial element of the airport plan or a reasonably foreseeable consequence of the airport plan, the court concluded the EIR’s project description was adequate and did not violate the policy against piecemealing. (*Id.*)

The court in *CBE v. Richmond* concluded that the facts in CBE’s case presented a similar scenario to that considered in *National Parks, Christward Ministry*, and *Berkeley Jets*. The court found that a hydrogen pipeline to supply excess hydrogen from the refinery to consumers was not part of the refinery project because the two projects “are not interdependent.” (*CBE v. Richmond* at p.101.) According to the Court,

Because Chevron’s efforts to process a larger percentage of California fuel at the Refinery does not ‘depend on’ construction of the hydrogen pipeline, the City’s treatment of the hydrogen pipeline as a separate project does not constitute illegal piecemealing. (See *Berkeley Jets, supra*, 91 Cal.App.4th at p. 1362.)

(*Id.*)

The facts here are easily distinguished from *CBE v. Richmond* and instead present a similar scenario to those considered in *San Joaquin Raptor v. County of Stanislaus* (1994) 27 Cal.App.4th 713 and *Tuolumne County Citizens for Responsible Growth v. City of Sonora* (2007) 155 Cal.App.4th 1214. Here, the Project *is* dependent on the transmission upgrades identified in the Transition Cluster Phase II Interconnection Study Report.

Ms. Belenky: And so when you’re talking about what’s needed here, in the Phase 2 study that it discusses, you’re also talking about the cluster as a whole?

Mr. Hesters: Exactly.

Ms. Belenky: ...have you, yourself, or has the staff considered what this particular project needs in order to go forward?

Mr. Hesters: ...As a whole, the cluster needs these upgrades. It isn’t therefore assigned to any particular project.

Ms. Belenky: But each project needs them as much as any project needs them, would that be fair to say?

Mr. Hesters: I don’t have any information to state otherwise at this point...

(July 21, 2010 Tr., pp. 46-47.) Therefore, Staff was required to analyze all of the transmission system upgrades identified in the Transition Cluster Phase II Interconnection Study Report. Staff did not. Consequently, Staff's assessment does not satisfy CEQA's requirement that the "whole of the project" be analyzed.

The Applicant argues that the Commission is not required to analyze impacts from the downstream transmission upgrades identified in the Transition Cluster Phase II Interconnection Study Report because the upgrades would occur regardless of the Project. (July 13, 2010 Tr., pp. 150-153.) The Applicant misses the mark here. The issue is not whether the upgrades could proceed without the power plant, but ***whether the power plant can proceed without the transmission upgrades***. It cannot. Consequently, the impacts caused by downstream upgrades must be analyzed as part of the "whole of the project."

VIII. CONCLUSION

The Commission's approval of the Project as proposed would contribute to the loss of at least 17,000 cultural resource sites in the California desert. As lead agency under CEQA, the Commission has been entrusted with the duty to identify, analyze and mitigate the Project's significant impacts to irreplaceable cultural resources. Importantly, the Commission's duty includes consideration of the sacredness to Native Americans that these resources may hold. Staff and the Applicant seemingly discount Native American values that would be destroyed by the Project. The Commission cannot.

Dated: August 11, 2010

Respectfully Submitted,

/s/

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PROOF OF SERVICE

I, Bonnie Heeley, declare that on August 11, 2010 I served and filed copies of the attached **SECOND REPLY BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at www.energy.ca.gov/sitingcases/genesis. 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 Unit electronically to all email addresses on the Proof of Service list and by either depositing in the U.S. Mail at South San Francisco, CA with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred," via personal service or via overnight mail as indicated.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on August 11, 2010.

_____/s/_____
Bonnie Heeley

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Re: Genesis Solar, LLC Supplemental Reply Brief

Dear Commissioner Boyd, Commission Weisenmiller and Hearing Officer Celli:

We want to briefly respond to the hyperbolic accusations of Applicant's counsel in its Supplemental Reply to CURE's Reply Brief. Whether it is because he recognizes that the Project faces substantial legal obstacles or counsel's mere exhaustion and confusion from handling too many cases simultaneously, the Supplemental Reply contains over-the-top claims that cannot be allowed to remain unanswered.

In CURE's Second Reply Brief we explained that CEQA requires the Commission to evaluate all of the downstream facilities identified in the Transition Cluster Phase II Interconnection Study Report ("Phase II Study") as part of "the

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whole of the project.” The Supplemental Reply accuses CURE of “violat[ing] the Committee’s Order” and “sandbagging.” As the Commission’s obligation to evaluate the whole of the project is the most fundamental tenet of CEQA law, no experienced CEQA practitioner could be surprised by the argument. Indeed, the Commission’s obligation to evaluate environmental impacts from downstream changes in the transmission system is so obvious and well accepted it has been the Commission’s practice for decades. Applicant’s counsel surely knows this, since it has routinely occurred in several of his prior cases. For example, the Sunrise Texaco Combined Cycle project (98-AFC-4) Final Staff Assessment (“FSA”) stated “[a]ny new transmission facilities such as the power plant substation, the outlet line, and, or downstream facilities, required for connection to the grid are considered part of the project and are subject to the full AFC review process.” (Part II, p. 66.) Similarly, the FSA for the Donald Von Raesfeld Power Plant Project (02-AFC-3) stated, “Staff evaluated the proposed power plant switchyard, outline line, termination and downstream facilities identified by the applicant...” (p. 5.5-1.) More recently, the Staff Final Transmission System Engineering Analysis and Attachments for the Blythe Solar Energy Project (09-AFC-6) stated, “[t]he project interconnection to the grid would require additional downstream transmission facilities (other than those proposed by the applicant) that require [CEQA] review. The CEQA review of the downstream transmission facilities has been included as attachment to this document.” (p. D.5-1.)

Moreover, at the evidentiary hearing the Hearing Officer authorized discussion of the Phase II Study in our reply brief, to which the Applicant’s counsel had no objection. (July 21, 2010 Tr., pp. 55-58.) In fact, the Hearing Officer stated that parties should even be allowed to reopen the record “based upon subsequently found information” in the Phase II Study. (*Id.*, p. 57.) Thus, CURE could have moved to reopen the record to provide testimony related to the Phase II Study, which would have delayed the proceeding, but in the spirit of compromise we briefed the issue instead.

CURE’s discussion of the Commission’s obligation to evaluate the environmental impacts of the downstream facilities identified in the Phase II Study was not a “last minute attempt to further instill confusion into the process.” Rather, it was an unremarkable recitation of basic CEQA law at the precise time

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authorized by the Hearing Officer. Histrionic accusations won't change that law. Nor will they, we trust, distract the Committee from faithfully applying that law.

Sincerely,

/s/

Rachael E. Koss

REK:BH

cc: Docket
POS List

STATE OF CALIFORNIA
California Energy Commission

In the Matter of:

The Application for Certification
for the GENESIS SOLAR ENERGY
PROJECT

Docket No. 09-AFC-8

**CALIFORNIA UNIONS FOR RELIABLE ENERGY'S
MOTION TO STRIKE PORTIONS OF
GENESIS SOLAR, LLC REPLY TO THE THIRD OPENING BRIEF OF
CURE – EVIDENTIARY HEARING DAY 3 TOPICS**

August 18, 2010

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Pursuant to Title 20, California Code of Regulations, Section 1716.5, California Unions for Reliable Energy (“CURE”) files this motion to strike portions of Genesis Solar, LLC Reply to the Third Opening Brief of CURE – Evidentiary Hearing Day 3 Topics (“Genesis Reply Brief”) for the Genesis Solar Energy Project (“Project”).

I. INTRODUCTION AND BACKGROUND

On August 3, 2010, CURE filed its Third Opening Brief regarding issues related to cultural resources in which CURE showed that the Revised Staff Assessment’s (“RSA”) method for determining the baseline for cultural resources does not satisfy CEQA. Specifically, CURE explained that the widely followed CEQA standard practice for establishing the environmental baseline for cultural resources includes a Phase I archaeological survey (or “inventory”) and a Phase II test excavation. However, the RSA did not establish an accurate environmental setting for determining impacts to cultural resources because test excavations were not conducted for the Project. Rather, all of the information regarding the Project’s baseline environmental setting, including the location and boundaries of archaeological sites, was derived from visual examination of the ground surface.

Importantly, as CURE noted in its brief, Staff admitted that it is not always possible to determine the size and nature of archaeological sites based solely on visual examinations of the ground surface. For example, Staff agreed that it cannot be determined whether or not burials are present within sites based solely on visual examination of the ground surface. Staff also agreed that test excavations are

required to determine whether burials are present within a site. According to Staff, the potential for human burials is very high. Because test excavations were not conducted, however, Staff could not assess the Project's potential to significantly impact buried cultural resources, including human burials. Consequently, Staff also could not design mitigation that would reduce impacts to a level below significant. In short, without baseline data acquired through test excavations, Staff could not identify the significance values of the resources and therefore could not identify appropriate mitigation.

In its brief, CURE also explained that there is no valid reason why Staff departed from standard CEQA practice. Staff stated that it did not require the Applicant to perform test excavations because of the tight timeframe and the large Project site size. However, as CURE explained, the record clearly shows that test excavations for the identified 27 archaeological sites were feasible. Nothing in the record shows otherwise. Consequently, there is no excuse for Staff's failure to determine the Project's environmental baseline, either by directly contracting for the excavations or requiring the Applicant to conduct the excavations.

On August 11, 2010, Genesis Solar, LLC ("Applicant") filed the Genesis Reply Brief in response to CURE's Third Opening Brief. In its brief, the Applicant argued that test excavations are not required to adequately analyze the Project's significant impacts to cultural resources. To support its argument, the Applicant provided a list of EIRs for projects "where resources were recorded and no Phase II work conducted." (Genesis Reply Brief, p. 7.) The Applicant then went on to discuss the

cited EIRs in an effort to rebut CURE's showing that test excavations are necessary to satisfy CEQA. However, the EIRs are not in the record for this proceeding and are inapplicable to the facts here. Therefore, the Commission cannot rely on the EIRs for its environmental review of the Project, and those portions of the Applicant's brief that cite and discuss the EIRs should be stricken.

II. ARGUMENT

The Commission cannot rely on the EIRs or the Applicant's discussion of the EIRs for its environmental review of the Project for two reasons: (1) the EIRs are not in the record for this proceeding; and (2) the Applicant's application of the EIRs to this case is misleading.

First, there is nothing in the record for this proceeding related to the EIRs and the EIRs were not provided to the parties for review. The Hearing Officer closed the record for cultural resources on July 21, 2010. The Applicant had more than sufficient time to enter the EIRs into the record prior to July 21, 2010. CURE raised concerns about the absence of test excavations in its written testimony on June 25, 2010. Thus, the Applicant had a month to enter evidence into the record before the record was closed on July 21, 2010. Instead, the Applicant waited until its reply brief to do so.

Had the Applicant introduced the EIRs into the record at the appropriate time, other parties would have had a reasonable opportunity to review the information and respond. However, because the Applicant provided a list of EIRs only in its post-evidentiary hearing reply brief, the Applicant denied parties any

opportunity to review the documents. Not only was there no time to review and respond to the EIRs, but only one of the EIRs is readily available for review. In fact, CURE attempted to review the EIRs, but could only locate the Magnolia Power Plant project document because the Commission was lead agency for the project and therefore the document was posted on the Commission's website. However, CURE was unable to find the other EIRs within counties' jurisdictions on-line, and thus CURE would have had to submit Public Records Act requests for those documents. If the Applicant wanted to rely on the EIRs in its brief, the Applicant should have submitted them into evidence at the appropriate time. The Applicant did not. Thus, the EIRs and the Applicant's discussion of them should be stricken.

Second, the Applicant's application of the EIRs to the facts of this case is misleading. In its brief the Applicant stated,

In some of the EIRs cited, the CEQA-lead agency was very comfortable with using the extent of the surface manifestation as site boundaries and never required Phase II work. On others, academic research excavations in sites made 40 or 50 years ago were judged to be adequate even when a search for site boundaries was not conducted.

(Genesis Reply Brief, pp. 7-8.) However, CURE reviewed the Magnolia Power Plant project staff assessment, the only document in the Applicant's list that CURE was able to locate, and was frankly shocked to read the following:

The applicant intends to locate the project on ***four acres of a 23-acre site at the existing Magnolia Power Station*** in Burbank, California, an incorporated city in Los Angeles County, at 164 West Magnolia Boulevard. The site is bounded by Magnolia Blvd. on the north, Lake Avenue on the west, Olive Avenue on the south, and the Western Burbank Flood Control Channel, railway switching yards and Interstate 5 to the east of the proposed project.

The Burbank Water and Power Department currently operates and maintains ***existing gas-fired combustion turbine units and gas-fired steam units on this 23-acre site***. No new offsite transmission lines, natural gas, water supply or wastewater pipelines are required. The ***MPP will occupy about four acres made available by demolition of Magnolia Generating Units 1 and 2***, which have been decommissioned.

(Magnolia Power Project Final Staff Assessment, pp. 1-2, emphasis added); and

The proposed Magnolia Power Plant (MPP) site is located near the southeastern end of the San Fernando Valley in the City of Burbank, Los Angeles County, California. Three temporary off-site laydown/parking areas will also be located in Burbank within two miles of the MPP site. The proposed project area is an ***urban industrial environment***. The MPP site is developed and is a ***total built environment***. Two of the three proposed use areas are also ***paved lots***. The third is unpaved and may represent ***fill***. ***No ground disturbance*** is planned for the laydown/parking areas.

(Magnolia Power Project Final Staff Assessment, p. 3.3-4 (emphasis added).)

It is telling that the Applicant neglected to include these facts in its brief and nothing short of absurd to draw any link between cultural resource analyses for the Project and the Magnolia Power Plant project. Whereas the Magnolia Power Plant project is located on four acres of what was an existing power plant in an urban industrial area, the Project is proposed to be located on approximately 1,800 acres of relatively undisturbed desert land, along the edge of a dry lake. The two project sites are so dissimilar that the Applicant's reliance on the Magnolia Power Plant project to support its argument is questionable, at best. Thus, the Commission should not rely on the Applicant's listed EIRs or the Applicant's discussion of the EIRs.

III. CONCLUSION

Because the EIRs cited by the Applicant are not in the record for this proceeding and the Applicant's application of the EIRs to this case is misleading, CURE moves to strike those portions of the Genesis Reply Brief that cite and discuss the EIRs.

Dated: August 18, 2010

Respectfully submitted,

_____/s/_____
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Attorneys for the CALIFORNIA UNIONS
FOR RELIABLE ENERGY

PROOF OF SERVICE

I, Bonnie Heeley, declare that on August 18, 2010 I served and filed copies of the attached **CALIFORNIA UNIONS FOR RELIABLE ENERGY'S MOTION TO STRIKE PORTIONS OF GENESIS SOLAR, LLC REPLY TO THE THIRD OPENING BRIEF OF CURE – EVIDENTIARY HEARING DAY 3 TOPICS.**

The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at www.energy.ca.gov/sitingcases/genesis. 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 Unit electronically to all email addresses on the Proof of Service list and by either depositing in the U.S. Mail at South San Francisco, CA with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred," via personal service or via overnight mail as indicated.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on August 18, 2010.

_____/s/_____
Bonnie Heeley

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From: Greer, William (Bill)
To: Bruninga, William M;
cc: Scott, Joshua M;
Subject: Review of "Groundwater Resources Investigation, Genesis Solar Energy Project, Riverside County, California" by WorleyParsons
Date: Friday, April 09, 2010 5:26:00 PM

Here are my review comments regarding the WorleyParsons investigation:

1. The project description, including the discussion of water demand, was clear and thorough, as were the hydrogeologic characterization and the presentation of water budget data. The selection of MODFLOW and the technique of superposition modeling was appropriate for the assessment of project pumping impacts.
2. The groundwater model may have a conceptual flaw which may render it incapable of accurately predicting changes in water table. The model represents the aquifer with 13 horizontal layers, with each layer homogeneous in its hydraulic properties. Layers 3 through 9 compose a continuous low-conductivity confining unit about 300 feet thick above the lower Bouse and fanglomerate, the proposed pumping zone. The continuous confining unit virtually guarantees that the model will predict very little, if any, drawdown of the water table after 33 years of pumping. This characterization may not be valid. While clay or other low-conductivity materials exist in most of the existing logged boreholes, they seem to occur at significantly different depths (see Figures 7 and 8), which suggests they may not be laterally continuous. Indeed, the log of at least one well (#14) does not show any confining bed material above the pumping zone. Further, assuming Figures 10 and 11 show contours of the water table, the water table dropped some 20 feet in the prison area, apparently due to pumping at about 3000 gpm over the 12 year period from 1981 to 1992 (Table 3-4). Assuming the wells that accomplished this pumping were screened in the lower Bouse and below (as at least wells #35, #37 and #38 were), this magnitude of drawdown seems unlikely, if there is a laterally continuous confining bed. If the laterally continuous confining unit is not present in the aquifer, as this evidence suggests, then the model's predictions of insignificant drawdown of the water table over the life of the project may be erroneous.
3. The calibration of the model may be inadequate. The model was calibrated by adjusting its hydraulic properties so that it would replicate, as closely as possible, the drawdowns which occurred over about a 10-day period in observation wells close to a single pumping well. This calibration shows only that the model will somewhat accurately predict the response of the aquifer to pumping very close to the pumped well over a very short pumping period. The calibration seems inadequate to provide confidence that the model will predict reliable drawdowns at remote locations (such as Palen Lake and other pumping wells in the general area) or even closer locations over a long period of time (33 years).
4. The sentence beginning "The Accounting Surface is defined by..." at the top of page 8 seems unclear and could be misleading. It could be revised to the following: "The Accounting Surface is defined by groundwater levels that would occur beyond the flood plain in the aquifer that is hydraulically connected to the Colorado River, if the river were the only source of water for the aquifer."
5. The statement beginning at the bottom of page 66 and continuing on the top of page 67 is incorrect and the conclusion drawn (that "the Project would not have an impact on flows ... or require a future entitlement") is unjustified. The depletion study (Wiele and others, 2008) was not intended to be "An alternative to the Accounting Surface method." Rather, it's purpose was to "further understand temporal effects of pumping wells on the Colorado River" and to "assess timing over which wells at great distance would deplete water in the Colorado River."

Bill Greer
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Yuma Area Office
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Hvinden, Steven C

From: Gray, Lorri J
Sent: Monday, January 18, 2010 5:52 AM
To: Hvinden, Steven C
Subject: RE: Genesis solar project question

Thanks Steve

From: Hvinden, Steven C
Sent: Friday, January 15, 2010 12:15 PM
To: Gray, Lorri J
Subject: RE: Genesis solar project question

Lorri,

I think that the Consolidated Decree provides a possible approach that stands by itself, without a rule.

Under Article III of the Consolidated Decree, "The States of Arizona, California, and Nevada and...., and all other users of water from the mainstream in said States... are enjoined...from diverting or purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in the respective States." (underlining added from emphasis)

The Decree also indicates that consumptive use includes not only use of water from the Mainstream but also includes water withdrawn from the mainstream by underground pumping.

Therefore, under the Decree, someone who diverts water from the Mainstream by underground pumping without authorization from the United States could be viewed as being in contempt of the Supreme Court, and that may provide a legal avenue to pursue termination of such pumping.

-----Original Message-----

From: Gray, Lorri J
Sent: Tuesday, January 12, 2010 4:09 PM
To: Hvinden, Steven C
Subject: FW: Genesis solar project question

Steve - Give me your thoughts and I will get back to them.

Thanks

-----Original Message-----

From: Jerry Zimmerman [mailto:grzimmerman@crb.ca.gov]
Sent: Monday, January 11, 2010 2:21 PM
To: 'Robin Mayer'
Cc: Gray, Lorri J
Subject: RE: Genesis solar project question

Although I have my opinion, this question would best be answered by the "water master" and regulator for the Colorado River, Reclamation.

Thanks,
 Jerry

Gerald R. Zimmerman
Executive Director
Colorado River Board of California
770 Fairmont Ave., Suite 100
Glendale, CA 91203

Phone: (818) 500-1625 ext. 308
Facsimile: (818) 543-4685
Mobile: (818) 400-8988

-----Original Message-----

From: Robin Mayer [mailto:rmayer@energy.state.ca.us]
Sent: Monday, January 11, 2010 10:09 AM
To: grzimmerman@crb.ca.gov
Subject: RE: Genesis solar project question

Thank you Jerry. I have one other important question, and please re-direct me if necessary, about the accounting surface regulation. Without such a regulation, does the BOR still have authority to cut off water use if pumping reaches CO River water? I had assumed the Law of the River would still apply and perhaps limit that use, even without a regulation. Many thanks for your input. Best, Robin

Robin Mayer
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>>> "Jerry Zimmerman" <gzimmerman@crb.ca.gov> 1/11/2010 9:51 AM >>>
I believe that a more correct statement would be that if the water surface level were to dip below Reclamation's accounting surface, a contract to use Colorado River would be required. Without such a contract, the wells providing the water supply for the Project could be shut down by Reclamation.

I hope that this is helpful. If you have further questions, please contact me.

Thanks,
Jerry

-----Original Message-----

From: Robin Mayer [mailto:rmayer@energy.state.ca.us]
Sent: Thursday, January 07, 2010 12:42 PM
To: gzimmerman@crb.ca.gov
Subject: Genesis solar project question

Dear Gerry, I am staff counsel for the Energy Commission, working on the Genesis solar project. I just wanted to confirm your statement in our conference call on November 20 that pumping for that project (projected at 1644 afy) would likely result in dipping into CO River water over the life of the project (30 years) and perhaps trigger a shutdown of the project.

We are responding to an applicant motion requesting how the accounting surface's impact on the project will be considered, also about their determination of cumulative impacts.

Thanks for your help. Best, Robin

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