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August 3, 2010

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

**DOCKET**  
**09-AFC-8**

DATE AUG 03 2010

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

Dear Docket Clerk:

Enclosed are an original and copy of Third Opening Brief of California  
Unions for Reliable Energy.

Please docket the original, conform the copy and return the copy in the  
envelope provided.

Thank you for your assistance.

Sincerely,

/s/

Rachael E. Koss

REK:bh  
Enclosures

**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.4<sup>th</sup> 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.4<sup>th</sup> 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.4<sup>th</sup> 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](http://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/\_\_\_\_\_  
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