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Subject: **GENESIS SOLAR, LLC REPLY TO THE OPENING BRIEF OF
INTERVENOR CBD – EVIDENTIARY HEARING DAY 3 TOPICS
GENESIS SOLAR ENERGY PROJECT
DOCKET NO. (09-AFC-8)**

Enclosed for filing with the California Energy Commission is the original of **GENESIS SOLAR, LLC REPLY TO THE OPENING BRIEF OF INTERVENOR CBD – EVIDENTIARY HEARING DAY 3 TOPICS**, for the Genesis Solar Energy Project (09-AFC-8).

Sincerely,



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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

Application for Certification for the
Genesis Solar Energy Project

DOCKET NO. 09-AFC-8

**GENESIS SOLAR, LLC REPLY TO
THE OPENING BRIEF OF
INTERVENOR CBD – EVIDENTIARY
HEARING DAY 3 TOPICS**

In accordance with the Committee direction at the evidentiary hearings held on July 12, 13 and 21, 2010 Genesis Solar, LLC (Genesis) submits this Reply Brief in response to the Opening Brief of the Center for Biological Diversity (CBD).

I.

INTRODUCTION

CBD's Opening Brief is devoted largely to criticism of the Revised Staff Assessment (RSA)¹ by alleging that it fails to properly describe the environmental baseline and perform adequate analysis. Each of these specific contentions will be addressed separately in this Reply Brief. However, it is important for the Committee to understand that CBD's criticisms fail to acknowledge a fundamental point that is unique to the Commission Certification Process and is quite unlike the permitting processes undertaken by other California Agencies. Unlike other California Agencies, the Commission operates under a Certified Regulatory Program and therefore while the principles of the California Environmental Quality Act (CEQA) are certainly applicable, the typical Environmental Impact Report (EIR) process is not. This point is important because CBD fails to make this distinction and therefore criticizes the RSA and its Supplements as an inadequate EIR. The RSA is not an EIR. It is Staff's independent analysis conducted in accordance with the Commission's Siting Regulations and includes an environmental analysis that is guided by the principles of CEQA.

¹ Exhibit 400; referenced as RSA hereinafter

Ultimately, it is the Commission Decision that must comply with the principles of CEQA, the Warren Alquist Act and the Commission's Siting Regulations. This is important because the Commission Decision is not based solely on the RSA and its Supplements² but is based on the entire evidentiary record. While Genesis does not believe any of CBD's assertions that the RSA and its Supplements fail to properly implement the principles of CEQA, if the Committee needs additional support for its Decision, it can and should look to the tremendous amount of analysis, data and expert opinion conducted by Genesis and included in the evidentiary record.

Again, while volume alone is not determinative, the Committee should not discount that the evidentiary record contains tens of thousands of pages of data, information, and analysis. If none of that was relevant, Genesis would have objected to providing much of it.

CBD also contends in its Opening Brief that Genesis has the burden of proof, which is correct. However, the Commission's Siting Regulations also place a burden on CBD to produce evidence as well.

The proponent of any additional condition, modification, or other provision relating to the manner in which the proposed facility should be designed, sited, and operated in order to protect environmental quality and ensure public health and safety shall have the burden of making a reasonable showing to support the need for and feasibility of the condition, modification, or provision.³

CBD correctly cites provisions from the seminal case of *Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal. 3d 376 for the correct proposition that the Committee cannot comply with CEQA by simply relying on bare conclusions not supported by analysis or data. However, CBD fails to cite a single accurate example where the Committee lacks sufficient information that it could rely only to support its conclusions. As CBD correctly points out at page 2 of its Opening Brief:

The environmental review documents "must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project."

That is the correct standard. However, there is more case law on point that demonstrates what the courts expect when it comes to an agency making a good faith effort at disclosure and analysis and guide us in determining how much detail is sufficient. For example, "CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project, [t]he fact that additional studies might be helpful does not mean that

² Exhibits 400, 401, 403, 440 and 444; referenced hereinafter as RSA and its Supplements

³ 20 CCR Section 1748 (e)

they are required.”⁴ A study, required by an agency, which “takes place over two winters could conflict with the requirement that EIR’s for private projects be prepared and certified within one year.”⁵ CEQA requires the EIR performed on a potential project to “reflect a good faith effort at full disclosure”, does not “mandate perfection or the EIR to be exhaustive” and “will be judged in light of what was reasonably feasible.”⁶ The Committee should apply these principles to CBD’s allegations of incompleteness, inadequacy of environmental baseline and insufficiency of analysis.

For the reasons outlined below, it is clear that the Committee has sufficient detail in this voluminous evidentiary record to understand and meaningfully consider the issues raised by the proposed project. As the case law cited above illustrates the law not only allows but encourages the Committee to use just plain common sense. When using that common sense, keep in mind that CBD fails on many occasions to point to any evidence in the record satisfying its burden to demonstrate that the GSEP should not be approved at its current location or should be modified.

II.

APPROVAL OF THE PROJECT WOULD NOT VIOLATE CEQA

A. The Project Description in the RSA is Complete and Accurate

1. The Project Objectives Are Clearly Identified

CBD contends that the Commission has stated its Objectives for the GSEP and that those objectives can be met without approval of the GSEP. Not appearing to be cognizant of the CEC process and regulations, CBD has misconstrued the purpose of stating Project Objectives under CEQA. CEQA Guideline Section 15124 (b) states that an EIR must include:

A statement of the objectives sought by the proposed project. A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include the underlying purpose of the project.

GSEP included its Project Objectives in Section 2 of the AFC, Exhibit 1. Staff used these objectives to evaluate alternative sites and configurations as discussed in the RSA and its Supplements. CBD claims that other sites could achieve the GSEP objectives, but has presented no evidence during hearing to support that assertion, and on that basis alone, the Committee should reject CBD’s contentions. The evidence in the record clearly shows that the GSEP site will achieve the Project Objectives and that

⁴ *Gray v. County of Madera*, (2008) 167 Cal. App.4th 1099, 1115. (Quoting *Associated of Irrigated Residents v. County of Madera*, (2003) 107 Cal.App.4th 1383)

⁵ *Id.* at p. 1125 (See also, Public Resources Code 21100.2, 21151.5; CEQA Guidelines 15108)

⁶ *City of Long Beach v. Los Angeles Unified School District*, (2009) 176 Cal.App.4th 889, 898

other alternative sites were appropriately considered. CBD contends that other BLM ROW applications should be viewed as alternatives to the GSEP. This clearly contradicts its other contentions that all ROW applications are viable, non speculative projects that must be considered in the cumulative impact analysis. The Committee should reject CBD's contentions that the Project Objectives are not clearly defined or that CEQA requires the Commission to seek its own alternatives to meet those objectives. While BLM does consider the Objectives of the Agency under NEPA and the FLPMA when issuing ROW Grants and performing Plan Amendments, CEQA instructs that the objectives of the GSEP are the appropriate objectives for the Committee to consider when evaluating whether or not a reasonable range of alternatives was considered.

2. The Environmental Setting or "Baseline" Information Accurately Reflects Existing Physical Conditions

CBD criticizes the RSA and its Supplements for failing to adequately describe the environmental baseline. CBD's contentions are unfounded. The baseline information collected by Genesis and provided to Staff is sufficient to support an analysis of the GSEP site as part of the larger, surrounding landscape and associated habitats, as well as the regional populations of special-status species that could be affected by the project. Comprehensive biological resource surveys designed to meet all applicable CEC, CDFG, BLM, and USFWS requirements and data needs were conducted in March, April, May, June, October, November, and December 2009 and March 2010.⁷ Survey methods were reviewed and agreed to by the CEC, BLM, USFWS, and CDFG prior to conducting surveys. Detailed survey methods and results are located in the *Genesis Solar Energy Project Biological Resources Technical Report* (Tetra Tech and Karl 2009) and *Fall 2009 and Spring 2010 Biological Resources Technical Report* (Tetra Tech and Karl 2010).⁸

At the time of the Spring 2009 field surveys, the Facility Footprint had not been finalized, so the Survey Area included the requested 4,640-acre ROW, plus Zone of Influence (ZOI) surveys extending out one mile from the boundary of the requested ROW. Additionally, three proposed Linear Facilities routes and ZOIs were also surveyed. In October 2009, surveys were conducted of a revised transmission line route south of I-10. In Spring 2010, additional surveys were conducted where the route was refined to avoid potentially sensitive biological and cultural resources, in response to agency and public comments. Condition of Certification **BIO-19** requires additional surveys for late-blooming plants, which are planned for Summer and Fall 2010 (the agencies did not request Fall surveys in 2009 when survey protocols were reviewed and approved).

In support of the Staff's properly supported baseline, the following field surveys were conducted in the Project Area and vicinity between Winter 2007 and Spring 2010.

⁷ Exhibit 1 Appendix C (March, April, May, June, 2009) and Exhibit 58 (October, November, December 2009 and March 2010); see also Exhibit 56

⁸ Id. and Exhibit 11, Biological Resources

- Biological reconnaissance survey (2007, Exhibit 1, Appendix C)
- Floristic (i.e., complete plant species inventory) and habitat surveys March and April 2009 (Exhibit 1, Appendix C); October, March and April 2010 (Exhibit 56 and 58) Special-status plant surveys, March and April 2009 (Exhibit 1, Appendix C); October, March and April 2010 (Exhibit 56 and 58)
- Cactus/yucca/tree stratified sampling (2009, Exhibit 1, Appendix C) and complete censuses 2010 (Exhibit 58)
- Special-status wildlife surveys March and April 2009 (Exhibit 1 Appendix C), October, March and April 2010 (Exhibit 56 and 58)
- Avian point count surveys March and April 2009 (Exhibit 1, Appendix C), and December 2009 (Exhibit 45)
- Burrowing owl surveys March, April and May 2009 (Exhibit 1, Appendix C), and December 2009 (Exhibit 45)
- Protocol desert tortoise surveys March and April 2009 (Exhibit 1, Appendix C), October 2009, March and April 2010 (Exhibit 58)
- Wildlife inventory March, April and June 2009 (Exhibit 1, Appendix C); October, March and April 2010 (Exhibit 58)
- Jurisdictional waters survey 2009 (Exhibits 23 and 44)
- Desert tortoise habitat delineation survey 2010 (Exhibit 42)
- Aeolian sand transport study 2010 (Exhibit 35)

Additional baseline data was provided in December 2009 (Exhibit 11) in response to Staff's data requests

- Desert Tortoise – Data were provided from intensive, protocol surveys in 2009 and 2010 (see above). A complete analysis of the importance of the area to desert tortoises (CBD at Page 5) -- individuals, the local population, and the species -- was provided in Genesis Solar, LLC's, response to Staff's data requests (Exhibit 11).
- Mojave Fringe-toed Lizard – Data were provided from intensive surveys in 2009 and 2010 (see above). Recognizing the importance of sand dune habitat to Mojave fringe-toed lizard (CBD at Page 5), Genesis Solar, LLC, re-configured their project to avoid this habitat (Exhibit 62). In addition to avoidance, potential indirect effects on the adjacent sand dune habitat were fully analyzed in Exhibit 35. Following additional information requested by Staff that was provided in Exhibit 67 and 68, Staff agreed with this analysis by adopting the Revision to Condition of Certification BIO-20 (Exhibit 435).
- Golden Eagles – Two helicopter surveys were performed by qualified raptor specialists in Spring 2010 per USFWS guidelines. The results of these surveys, contained in Exhibits 59 and 65, were factored into Staff's analysis in the supplement to the RSA (Exhibits 403 and 435, revision to BIO-28).

- Insects – a desktop review prior to field surveys did not reveal any known special-status insects in the Project vicinity. Furthermore, the CEC, CDFG, USFWS, and BLM reviewed and agreed to biological resources survey methodologies and no surveys were required for insects.⁹
- Couch’s Spade-Foot Toad – The RSA (Exhibit 400) established mitigation for Couch’s spadefoot toad based on earlier documentation of spadefoot toad in the borrow pit that crosses the transmission line. As set forth in the testimony, the 2009 and 2010 surveys searched for evidence of ponding, as well as artificial impoundments that could serve as breeding ponds.¹⁰ Genesis’ identification and analysis of potential breeding habitat and Staff’s analysis and proposed mitigation will ensure that any impacts to the toad are mitigated to a less than significant level. Nevertheless, Genesis has agreed to conduct an additional survey in summer 2010 as part of Condition of Certification **BIO-27**.¹¹

B. The RSA Accurately Discloses and Analyzes the Project’s Impacts

1. Environmental Review of Impacts to Biological Resources is Complete and Adequate (Direct and Indirect Impacts)

a. Habitat Impacts Are Adequately Addressed

CBD contends that habitat impacts have been identified but not fully mitigated and that habitat fragmentation is a significant impact at Genesis. CBD has presented no evidence for either proposition. The evidence does show that the Project will not block any wildlife movement corridors or create any habitat islands.¹² The location of the project with respect to populations and movements of special-status and other protected or managed species was fully analyzed in Genesis Solar, LLC’s, response to Staff’s data requests (2009), , and Genesis Solar, LLC’s, rebuttal testimony.¹³ Genesis reconfigured the Plant Site as well as re-routed the linear facilities around the sand dunes in order to avoid direct impacts and substantially reduce indirect impacts to sand dunes and dune-associated species (e.g., Mojave fringe-toed lizard).¹⁴ Indirect impacts were fully analyzed in Worley Parsons (2010) and Genesis Solar, LLC, (2010b); this analysis was acceptable to Staff.¹⁵

CBD contends at Page 6 of its Opening Brief that the effects on the sand dune community have not been adequately addressed. In fact, the requirements for mitigation for downwind impacts to sand dunes were withdrawn because survey data

⁹ Exhibit 63, Biological Resources rebuttal testimony, p. 9

¹⁰ Id. at p. 4

¹¹ 7/12/10 RT 324

¹² Exhibit 17

¹³ Exhibits 11 and 63

¹⁴ Exhibit 11, Alternatives, re-route transmission line; Exhibit 62 remove “toe” of facility footprint

¹⁵ Exhibit 435

showed that this area 1) was not an expansive area of windblown sand, and 2) was not occupied by Mojave fringe-toed lizards.¹⁶ Because this area is not sand dunes or occupied by MFTL, no mitigation is required for impacts to sand dunes and the requirement for off-site mitigation was withdrawn by Staff.¹⁷

CBD also erroneously contends that potential impacts to biological resources due to the access road were not adequately assessed.¹⁸

- Road kills were addressed by establishing speed limits that are based on existing speed limits for similar paved roads through areas where a premium is placed on wildlife values, Mojave National Preserve and Joshua Tree National Park.¹⁹
- While CBD has correctly identified that roads are an important negative factor where tortoises are present, very few, if any, tortoises will be affected by the project's access road, over the life of the project, due to the lack of desert tortoises in the area of the linear route.
- Along with other mitigation measures to minimize the attraction of ravens to the project, any road kills (e.g., rabbit, rodent) will be removed promptly; special-status species road kill will be reported to the resource agencies, as required in Condition of Certification **BIO-8**.
- **BIO-8** also specifies that personnel working on the project "shall be confined to existing routes of travel to and from the Project site, and cross country vehicle and equipment use outside designated work areas shall be prohibited." This is part of the Worker Environmental Awareness Program (**BIO-6**). (CBD at Page 6 of its Opening Brief discusses workers using the area recreationally, with OHVs.)
- There will be a new road into the area. The Applicant is willing to install a security gate on the access road if authorized to do so by the BLM. However, it is questionable whether access by OHV recreationists into the wilderness area would increase due to the new access road. There are currently three routes to the wilderness in the immediate project vicinity, two from Wiley Well rest stop area and one further west. While the wilderness boundaries are signed, they are completely open to access. There is no reason to believe that a fourth road would result in increased ingress into the wilderness. BLM has reported no particular issues with illegal trespass from the existing roads and Genesis did not observe unusual access on the ROW during many days of surveys over two years.

Genesis proposed compensation for habitat and vegetation community disturbance that is adequate and consistent with NECO, the BLM Resource Plan governing the Project Area. Genesis has agreed to compensate for impacts at a ratio of 1:1 for disturbance to creosote bush scrub, although protocol surveys indicate that tortoises do not currently occupy any area within the Project footprint. Additionally,

¹⁶ Exhibit 68

¹⁷ BIO-20, Revision within Exhibit 435

¹⁸ CBD cites to 7/12/10 RT 240 to support its contention. The Committee should read that portion of the transcript and the following pages as nowhere does Staff contend it did not evaluate the access road

¹⁹ 7/12/10 RT 141-142; see also Exhibit 60

Genesis is compensating for impacts at a ratio of 3:1 for Stabilized and Partially Stabilized Sand Dunes, and 3:1 for Playa communities. Also, potential indirect impacts to downstream washes deemed jurisdictional by CFGG will be compensated at a 0.5:1 ratio.

CBD is also unclear about a “perimeter road.” As explained in detail by Mr. Duane McCloud and Mr. Scott Busa at the evidentiary hearings, there is no perimeter road outside the fenced disturbance area.²⁰ There is a portion of the access road that will travel on the outside of the perimeter fence for approximately one-half mile until it meets the secondary gate and then the main access gate.²¹ This disturbance was evaluated by Staff as permanently disturbed land and included in the mitigation requirements.²²

CBD also discusses indirect impacts from ravens and weed introductions, couching these in terms of “edge” effects, rather than the indirect effects that they are. Conditions of Certification **BIO-13** and **BIO-14** have fully addressed indirect impacts from increased raven activity and invasive weeds. These plans will be finalized and implemented to prevent, control, monitor, and adaptively manage impacts from ravens and weeds.

There is simply no evidence in the record that supports CBD’s contention that the GSEP mitigation is not sufficient or that habitat impacts have not been fully evaluated.

b. Impacts to Birds and Impacts of “Mitigation”

CBD also contends that the RSA dismissed impacts to birds from the solar facility. This, also, is untrue. Staff did refer to the only existing reference on impacts to birds from solar facilities. The reference for the facility is a different technology located in an area with different nearby attractants for birds. Staff did not dismiss this study, but took into consideration that there may be unknown impacts to birds and is requiring the implementation of an Avian Protection Plan (APP), Condition of Certification **BIO-16**, to address these potential impacts, despite the fact that over the 20 year operational history of the existing SEGS facilities, avian mortality due to impacts with facility structures has never been a problem. The APP will include monitoring, reporting, and adaptive management measures to address any potential impacts. Additionally, the evaporation ponds will be netted,²³ reducing the attractiveness of the ponds to resident and migratory birds.

²⁰ 7/12/10 RT 399-404

²¹ Ibid.

²² Exhibit 435 (Revised Conditions of Certification)

²³ 7/12/10 RT 147

c. Plants

i. Fall Plant Surveys

CBD contends that the Committee cannot approve the GSEP because late blooming fall plant surveys were not conducted. CBD cites to the case of *Berkeley Keep Jets Over the Bay Committee v. Bd. Of Port Commissioners* (2001) 91 Cal. App. 4th 1344 to support its contention. In that case, the lead agency did not perform a health risk assessment prior to approving an EIR for expansion of an international airport. The agency just assumed the health risks would be significant without attempting to quantify those risks. In the GSEP, Staff has assumed the presence of certain species of plants because late season (summer/fall) plant surveys will be conducted for the entire project site this fall after the Commission renders a Decision on the GSEP. To that assumption of presence, the only party to have a burden (Genesis) does not object.

The *Berkeley* and GSEP fact patterns are not the same. Clearly, the Staff assumption in the GSEP is an overestimate of the potential impacts for the GSEP. Conversely, the Port in the *Berkeley* case did not quantify the health impacts and did not assume a worst case scenario. For public health impacts, a worst case scenario assumption is meaningless unless the public is provided specific information like increases in cancer risk for member within a certain distance from the activities. The Port, without informing the public what risks they could face under a worst case scenario, then made a finding of override essentially, without informing the public how the expansion of the airport could affect them. Clearly, this case can be distinguished from the GSEP. For GSEP, Staff's analysis in the RSA and its Supplements, along with the proposed mitigation measures that were refined prior to evidentiary hearings (Condition of Certification **BIO-19**),²⁴ demonstrate that Staff has fully analyzed the potential impacts to summer/fall plants, based on the assumption that they would be present everywhere on the site. That is a worst case scenario, and in direct opposition to the analysis contained in the *Berkeley* case that CBD relies on.

Using a worst-case approach has been sanctioned by the courts. In *Laurel Heights Improvement Association of San Francisco, Inc. v. The Regents of the University of California*, (1993) 6 Cal.App.4th 1112, 1137-1138, the proposed project by UCSF resulted in an EIR in which the Regents were unable to provide a complete analysis on the air quality impacts due the fact that there was no accepted methodology or standard for measuring cumulative toxic emission impacts. An experimental study was eventually performed to address public comment on the incomplete nature of the assessment and, even so, the EIR was eventually adopted

²⁴ Exhibit 445

despite there being “incomplete data” on the emissions. However, the EIR did not adopt the experimental study results related to projected emissions, but rather used a “worst case” approach to the unknown impact. The Supreme Court upheld this approach in the EIR, stating:

Finally, the Regents did not rely upon the study in deciding whether to approve the project; rather, they conservatively adopted a worst case approach to this unknown impact. Therefore, public comment on this study would not further the purposes of CEQA. (*Id.* at 1138)

Once the proponent of a project has assumed the worst case scenario approach to an unknown impact (as was done in *Laurel Heights*), the Supreme Court supports the proposition that CEQA has been satisfied, as further comment or study would not further its purposes.

Furthermore, the Committee should also recognize that adoption of Condition of Certification **BIO-19** is not only feasible but fully complies with the principle that CEQA permits a “lead agency to defer specifically detailing mitigation measures as long as the lead agency commits itself to mitigation and to specific performance standards” which are able to remedy the environmental issue.²⁵ (emphasis added). In conjunction, the Committee should also consider *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603 at 622-623, where the court stated:

A mitigation measure is feasible if it is “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” (CEQA, §21061.1.) Under this definition, concerns about whether a specific mitigation measure “will actually work as advertised,” whether it “can be carried out,” and whether its “success . . . is uncertain” go to the *feasibility* of the mitigation measure, not to whether its formulation has been improperly deferred. Similarly, concerns about whether it is “realistically foreseeable that [a mitigation] measure will actually be carried out as outlined” do not raise an issue of improper deferral. If the agency has identified one or more mitigation measures and has committed to mitigating the impact those measures address, then the principles forbidding deferral of mitigation are not implicated.

²⁵ *Gray v. County of Madera*, 167 Cal. App.4th 1099, at 1119

Condition of Certification **BIO-19** meets the standards outlined in *California Native Plant Society*. Specifically, **BIO-19** allows Genesis to survey the site to reduce the amount of acreage for which it would be required to mitigate. Rather than mitigate for the entire disturbance area, as would be required if Genesis did not perform additional surveys, Genesis must acquire mitigation land to mitigate for those areas where protected late season plants actually are located and where the GSEP cannot avoid impacting them. The performance standards are clear and the mitigation is certain. The only use of the surveys will be to refine the quantity of mitigation necessary, if any.

ii. **Restoration and Revegetation**

In its criticism, CBD fails to distinguish that the Conditions of Certification require a Revegetation Plan for areas that are only temporarily disturbed during construction and the Decommissioning Plan which will be implemented by BLM to address the condition of the site at the end of the useful life of the GSEP. With respect to the Revegetation Plan, it is appropriate for it to only address temporarily disturbed areas. With respect to the Decommissioning Plan, the Committee should note that the Conditions of Certification required the GSEP to “fully mitigate” the entire permanently disturbed footprint by acquiring habitat compensation land for animal and plant species as well as for waters of the state. These lands must be acquired and conserved “in perpetuity.” Therefore, for CEQA purposes, there is no need for the GSEP to reclaim the GSEP site or engage in future revegetation activities because the biological impacts have been fully mitigated. The Conditions of Certification do require the GSEP to comply with federal law in the submittal of a Decommissioning Plan which will be implemented by BLM and will address BLM’s requirements relating to how the GSEP site will be left when the GSEP will no longer operate.

While Genesis has prepared Drafts of these plans in response to Staff Data Requests, they are only Drafts. Neither CEQA nor the Warren Alquist Act requires these plans to be in final form prior to a Decision. These Plans are part of the mitigation and will be prepared pursuant to strict performance standards included in the Conditions of Certification.

The Draft Decommissioning Plan addresses procedures that will take place at the end of the project’s 30-year operation. At this time, it would be inappropriate and ineffective to produce a detailed revegetation plan for facility closure that BLM may ultimately decide that it does not want the site to be revegetated. At the time of actual decommissioning, an appropriate Plan will be created and implemented using the available, current techniques and technology and in accordance with BLM direction.

2. Fire Threats are Adequately Identified and Analyzed

CBD claims that the Committee will have failed to comply with CEQA if it does not evaluate the biological impacts related to the contribution of two all terrain fire engines to the Riverside County Fire Department (RCFD). It is clear from the record that the probability of the need for the RCFD to actually use the all terrain vehicles to provide emergency response to the GSEP is extremely low and based on the testimony of Duane McCloud that such an occurrence has not happened in the history of the SEGS or Harper Lake Projects.²⁶ Further, to assume that if such a response was required, it would result in significant impacts to biological resources is even more speculative and remote. In addition, the route that emergency vehicles might take to the power plant site under this highly unlikely scenario would depend on the nature and location of the emergency and, therefore, it is impossible in any event to either qualitatively or quantitatively evaluate what the relatively minor impacts would be. Given the very conservative mitigation measures being imposed on the project for potential impacts to desert tortoise habitat (e.g., 1:1 mitigation for the entire project footprint despite poor quality tortoise habitat and no indication that tortoises currently occupy the site), such mitigation measures would surely cover any minor impacts that might result from an emergency response incident.

In addition, CBD claims that Staff failed to analyze the potential for the GSEP to cause wildfires. This argument fails to acknowledge all of the fire prevention measures incorporated into the design of the GSEP. Section 3.4.11 of Exhibit 1 details all of the systems that the GSEP has incorporated into the design to prevent fires from starting or spreading. Staff evaluated these components and design criteria and concluded that these measures would reduce the risk of fire but certain conditions would be needed to ensure that the RCFD could respond properly. Genesis has agreed to those conditions.²⁷ Since the GSEP is incorporating appropriate measures into the design to reduce the risk of fire and provides funding to the RCFD so that it can respond properly to a fire, the Committee can use this evidence to properly conclude that the risk to fires occurring at the site and spreading off-site are properly mitigated.

3. Cumulative Impacts for all Resource Areas are either Less than Significant or Mitigated to Less than Significant

In its Opening Brief, CBD criticizes Staff's evaluation of cumulative impacts but provides no specifics where Staff's detailed cumulative analysis for every resource area falls short. CBD claims that since there will be other large scale renewable energy development in California's vast desert, this fact alone somehow results in cumulative impacts. However, CBD provides no evidence to support its contention. CBD declares that projects should not push species into extinction but provides no evidence that the GSEP contributes to this effect. For land use, CBD claims that the mere redesignation by BLM of the land classification for appropriate use by the GSEP under the proposed

²⁶ 7/12/10 RT 406

²⁷ 7/12/10 RT 395

amendment of the CDCA is a cumulative land use impact, but fails to explain why and, more importantly, to point to any evidence in the record that would support such a conclusion. The Committee should treat these arguments as speculative rhetoric because they fail to demonstrate or articulate with any specificity in the evidentiary record why the Staff and Genesis testimony related to cumulative impacts is unsupported or should not be adopted.

4. The GSEP will not cause Growth Inducing Impacts to the Region

CBD also contends that the GSEP will cause growth-inducing impacts. There simply is no evidence in the record that GSEP will induce growth in the area as CBD suggests. CBD attempts to cite to acknowledgement by Genesis of growth inducing impacts because Genesis requested a modification to Condition of Certification **WORKER SAFETY-6**. This condition requires Genesis to maintain the two all terrain fire engines for the life of the project because there would not be a secondary access road to the GSEP. Genesis simply requested that if in the future a secondary access road is provided by someone else, it should be relieved of the requirement to continue to maintain the all terrain fire engines as they would no longer be needed to respond solely to the GSEP. This is not an acknowledgement that the GSEP would cause growth and to read it as such is a stretch, to say the least.

The Commission has long held that power plants do not cause growth, but in fact are built in response to growth that has or will occur elsewhere. Specifically, CBD claims that installing the access road to the site would cause growth. There is absolutely no evidence in the record that BLM would amend its CDCA in the future to allow development in and around the GSEP. Unlike the cases cited by CBD, the GSEP does not remove any barrier to development in this remote section of the California desert. Construction of the access road alone does not make it any easier for a future energy project to construct near the GSEP.

C. The Alternatives Analysis in the RSA Meet CEQA's Requirements

CBD claims that the RSA did not evaluate a reasonable range of alternatives. Staff evaluated 25 alternatives and carried three forward for additional analysis.²⁸ Specifically, CBD criticizes Staff's rejection of the Gabrych Road Alternative, claiming that Staff has no basis for determining the Alternative would not meet the Project Objectives. First, the Gabrych Road Alternative site was fully evaluated by Staff. Second, this analysis showed that for some of the environmental areas this Alternative would result in greater environmental impacts than the GSEP. Third, the Staff properly concluded that the Gabrych Road Alternative Site would have difficulty in achieving the Project Objectives with respect to construction and operation timeline.

The GSEP has a contract to deliver power pursuant to a Power Purchase Agreement with PG&E. A stated Project Objective is to obtain ARRA funding and to begin construction in 2010. Since the Gabrych Road Alternative site has no transmission

²⁸ Exhibit 400, Page B.2-1

interconnection or studies to indicate whether the local transmission grid can accommodate interconnection, and involves multiple property owners, it is clear that pursuing this Alternative would interject uncertainty into the Project Objectives concerning timing and feasibility. CBD's claims that the Committee cannot rely on the Project Objectives and assign them the proper weight without a detailed cost analysis is not correct. The Committee can determine feasibility, not just on cost, but on the physical impossibility for Genesis to meet the timeline if the Committee were to reject the GSEP and require Genesis to negotiate with multiple property owners, start a lengthy transmission interconnection process and file a new AFC.

Staff did evaluate the Dry Cooling Alternative²⁹ which, after all the evidence was submitted, was agreed to by Genesis.³⁰

D. The Project Will Not Cause Significant Adverse Impacts Because Potential Impacts Will be Avoided, Minimized or Mitigated to a Less than Significant Level

Genesis reiterates the discussion above as the evidentiary record proves that with the incorporation of the Conditions of Certification stipulated to between Staff and Genesis, the GSEP will not result in significant environmental impacts.

CBD claims that the costs relied on by the Staff are too low for land acquisition. While interesting, CBD's claims are simply not relevant. None of the Conditions of Certification specify the actual cost of mitigation lands although estimates are provided simply for clarification and for the purpose of establishing the amount of any security bond that may be posted by Genesis prior to land acquisition. The performance standards set forth in the Conditions of Certification for acquisition of land ensure that the land is acquired, not that a specified amount is funded. While Staff introduced Exhibit 439³¹ at hearing over CBD objection, it is not relevant to any decision or finding the Commission need make and therefore, CBD's objection to it is similarly not relevant.

E. No CEQA Override will be Needed as The Commission has Substantial Evidence in every Resource Area to Determine that all Impacts will be mitigated to a Less than Significant Level Under CEQA

For the reasons outlined in its Opening Brief and Reply Briefs, Genesis believes the Committee need not make any finding of overriding considerations as there are no unmitigated significant impacts. If the Committee disagrees, Genesis believes that the

²⁹ Exhibit 400 (RSA), p. B.1-27

³⁰ 7/12/10 RT 6

³¹ 7/21/10 RT 84

testimony of Terry O'Brien and Mike Monasmith provides the evidentiary support necessary to support such findings.³²

III.

THE PROJECT IS CONSISTENT WITH FEDERAL AND STATE ENVIRONMENTAL LAWS AND EXISTING LAND USE PLANS

CBD has made no showing and certainly has presented no evidence that the GSEP would violate any state or federal law. CBD's claims that approval of the GSEP would violate CEQA have been addressed above in this Reply Brief. CBD also claims that the GSEP *may* violate other state laws because it claims that Staff failed to properly analyze impacts to plants and birds. As discussed above, the Staff properly and fully analyzed these impacts and CBD provided no evidence that the GSEP would not comply with any state law.

Similarly, CBD provides no evidence of noncompliance to support its claims that (1) GSEP violates NEPA because of alleged deficiencies in BLM's environmental review and (2) that approval of the BLM ROW for GSEP *may* violate the legislation that authorizes BLM to issue a ROW grant to GSEP.

V.

CONCLUSION

CBD has failed to present any evidence that the GSEP will not comply with applicable LORS or will result in significant unmitigated impacts. While CBD claims that they have intervened to "ensure the conservation of rare and imperiled species," they failed to produce any evidence at the evidentiary hearing that would support a finding by the Committee that the GSEP will not achieve avoidance and minimization of impacts and provide adequate mitigation for those impacts under CEQA and applicable LORS. It is easy to say you fear a potential result, but without substantiation of those fears, the position of CBD is mere speculation without proper consideration of the investigation and thorough assessment undertaken by Genesis and Staff, respectively, to ensure the conservation and enhancement of all affected species. Accordingly, Genesis requests that the Committee make the appropriate findings in accordance with the evidence and the arguments herein and approve the GSEP.

Dated: August 11, 2010

/original signed/

Scott A Galati
Counsel to Genesis Solar, LLC

³² Exhibit 437 and 7/21/10 RT 157, Respectively



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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**APPLICATION FOR CERTIFICATION FOR THE
GENESIS SOLAR ENERGY PROJECT**

Docket No. 09-AFC-8

**PROOF OF SERVICE
(Revised 8/5/10)**

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DECLARATION OF SERVICE

I, Ashley Garner, declare that on August 11, 2010, I served and filed copies of the attached: **GENESIS SOLAR, LLC REPLY TO THE OPENING BRIEF OF INTERVENOR CBD – EVIDENTIARY HEARING DAY 3 TOPICS** dated **August 11, 2010**. 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: [http://www.energy.ca.gov/sitingcases/genesis_solar].

The documents have 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, in the following manner:
(Check all that Apply)

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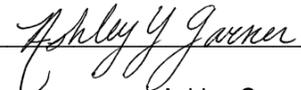
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CALIFORNIA ENERGY COMMISSION

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1516 Ninth Street, MS-4
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.



Ashley Garner