

SCOPING ORDER STATUS CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for Certification) Docket No.
for the Genesis Solar Energy) 09-AFC-8
Project)
_____)

CALIFORNIA ENERGY COMMISSION
HEARING ROOM B
1516 NINTH STREET
SACRAMENTO, CALIFORNIA

TUESDAY, JANUARY 26, 2010

1:37 p.m.

Reported by:
Peter Petty
Peters Shorthand Reporting Corp.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

Kenneth Celli, Commissioner and Presiding Member

SITING COMMITTEE MEMBERS AND ADVISORS PRESENT

James D. Boyd, Vice-Chair and Presiding Member

Sarah Michael, Advisor to Commissioner Boyd

Robert Weisenmiller, Commissioner and Asso. Member

Susannah Churchill, Advisor to Commissioner
Weisenmiller

STAFF AND CONSULTANTS PRESENT

Caryn Holmes, Staff Counsel

Robin Mayer, Staff Counsel

Michael Monosmith, Project Manager

APPLICANT

Scott Galati, Galati & Beck, representing Nextera
Energy

Scott Busa, Director with Project Development for
Nextera Energy

Matthew Handel, Vice-President, Nextera Energy

INTERVENORS

Tanya Gulesserian, Adams, Broadwell, Joseph &
Cardozo, representing CURE

ALSO PRESENT

Allison Shaffer, Bureau of Land Management

Holly Roberts, Bureau of Land Management, Palm
Springs Field Office

I N D E X

	Page
Proceedings	1
Introductions	1
Background	4
Comments from the Parties on Issue One	
Applicant	6
CEC Staff	11
Intervenor	17
Questions from CEC Commissioners on Issue One	24
Comments from the Parties on Issue Two	
Applicant	30
CEC Staff	35
Intervenor	36
Questions from CEC Commissioners on Issue Two	39
Comments from the Parties on Issue Three	
Applicant	61
CEC Staff	66
Intervenor	71
Questions from CEC Commissioners on Issue Three	73
Comments from the Parties on Issue Four	
Applicant	95
CEC Staff	96
Intervenor	97
Questions from CEC Commissioners on Issue Four	98
Public Comment	102
Adjournment	103
Reporter's Certificate	104

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

1:37 p.m.

PRESIDING COMMISSIONER BOYD: It's
already Tuesday, January 26th; my, my. Excuse me.

This is Scoping Order Status Conference
and it's being conducted by the Committee of the
Commission regarding the Genesis Solar Energy
Project.

I want to welcome a new Commissioner to
this Committee. The last time we got together on
this subject, we had a different Commissioner who
has since left the Commission.

Before we get into the details and
before I turn it over to our Hearing Officer, I
think we should go through the introductions. So
I'm Jim Boyd, the Presiding Member of this
Committee.

On the other end of the table we have
Commissioner Robert Weisenmiller, who is the
Associate Member and has been here, what, five-six
days now; something like that, yeah. Anyway, but
Robert's somebody I've known for a long time. To
his right is his advisor, Susannah Churchill.

To my left is my advisor, Sarah Michael.

And, in the middle here, we have Ken

1 Celli, the Hearing Officer.

2 And I guess it's appropriate now to ask
3 the parties to introduce themselves. We'll start
4 with the Applicant, Mr. Galati.

5 MR. GALATI: My name is Scott Galati and
6 I'm representing Nextera.

7 MR. BUSA: And my name is Scott Busa.
8 I'm a Director with Project Development for
9 Nextera Energy.

10 MR. HANDEL: Matt Handel, Vice-President
11 at Nextera Energy.

12 PRESIDING COMMISSIONER BOYD: And the
13 Staff?

14 MR. MONOSMITH: Hi, Mike Monosmith,
15 Genesis Project Manager here at the Commission.

16 MS. MAYER: Robin Mayer, Staff Counsel.

17 MS. HOLMES: Caryn Holmes, Staff
18 Counsel.

19 PRESIDING COMMISSIONER BOYD: And
20 Intervenors?

21 MS. GULESSERIAN: Good afternoon, Tanya
22 Gulesserian with California Unions for Reliable
23 Energy.

24 PRESIDING COMMISSIONER BOYD: I don't
25 see Michael Boyd here. Do we have a phone

1 connection to that? I didn't even ask.

2 HEARING OFFICER CELLI: He did not call
3 in.

4 PRESIDING COMMISSIONER BOYD: All right.
5 So we have no one on the phone?

6 HEARING OFFICER CELLI: Right. We have
7 people on the phone, but they're no public members
8 and no Intervenors.

9 PRESIDING COMMISSIONER BOYD: Okay.
10 Well, with that then I will turn the proceedings
11 over to our Hearing Officer, Ken Celli.

12 HEARING OFFICER CELLI: Thank you,
13 Commissioner.

14 Just to see who else is in the room, is
15 there anyone here from the Bureau of Land
16 Management?

17 MS. SHAFFER: On the phone, Allison
18 Shaffer, BLM Palm Springs office.

19 HEARING OFFICER CELLI: Hi Allison.

20 MS. SHAFFER: Good afternoon, everyone.

21 HEARING OFFICER CELLI: Anyone from the
22 U.S. FWS or the Bureau of Reclamation or any other
23 federal agencies on the phone or present?

24 Seeing none, any elected officials or
25 representatives from the State of California

1 present? I don't see any.

2 Mojave Desert Air Quality Management
3 District? Riverside County? The City of Blythe?
4 Or any other boards or agencies?

5 Hearing none, the Scoping Order Status
6 Conference is sponsored by the Energy Commission
7 to inform the Committee, the parties, and the
8 community about the project's progress to date and
9 to discuss legal issues raised by the parties'
10 briefs.

11 Notice of this Scoping Order was issued
12 -- rather, notice of this Scoping Order Hearing
13 was issued on January 7th, 2009, served on all
14 parties, and posted on the Energy Commission
15 website. The Scoping Order Hearing was requested
16 by the Applicant at the Informational Hearing on
17 December 20th, 2009, to discuss soil and water
18 issues affecting the design of the project, and by
19 way of a motion which was granted by the Committee
20 in the January 7th, 2009, Order.

21 The Order required the parties to brief
22 the following questions:

23 What is the Commission's policy on the
24 use of water for power plant cooling purposes;
25 what is the legal effect of the U.S. Bureau of

1 Reclamation's Accounting Surface Methodology on
2 groundwater pumping in the Chuckawalla Valley
3 Groundwater Basin; what is the legal standard for
4 including future projects in the cumulative impact
5 analysis under the California Environmental
6 Quality Act and the National Environmental Policy
7 Act; and does the Commission have a policy of
8 conserving water use by projects that are not yet
9 identified.

10 Briefs were filed by the Applicant and
11 Genesis Solar LLC, Energy Commission staff, and
12 Intervenor CURE.

13 We would proceed as follows: The
14 Applicant is the movant, so the Applicant will go
15 first. I would like to proceed one question at a
16 time in the order that we received them. After
17 the Applicant goes, then we'll hear from Staff,
18 followed by CURE.

19 The Committee has read the parties'
20 briefs so there really is no need to restate every
21 single word in your brief, please. And in the
22 interest of time we ask that the parties get
23 quickly to the heart of the matter if you could,
24 please.

25 Following the conference, the Committee

1 will hearing public comment, and after the close
2 of the hearing the Committee will issue a written
3 Decision.

4 So with that, Applicant, please.

5 MR. GALATI: First of all I'd like to
6 thank the Committee. It's not lost on this
7 Applicant that over the holidays this Committee
8 convened very quickly to be able to resolve these
9 issues, and we thank you very much for that as
10 well as we thank Staff and CURE for participating
11 so we can get to a resolution.

12 I guess I'd start out by why we are
13 here. We are here to answer very specific
14 questions.

15 And I wanted to clear something up, I
16 think there's some confusion in the briefs. We
17 are not asking the Energy Commission Committee to
18 tell us today whether the Genesis Project can use
19 the water. We're not asking the Committee to tell
20 us anything or to adjudicate any single fact.
21 What we're asking the Committee to do is to
22 articulate what the legal standards are and define
23 the terms in the legal standard so that we can
24 very specifically apply that legal standard to the
25 facts of the case. I just wanted to make sure

1 that that was really clear.

2 Second is the reason that we're here is
3 Staff has said that these issues are so
4 complicated that it would be difficult to move
5 through the process and receive their funding. I
6 would, I would ask you to consider that the answer
7 to these questions really affect every project,
8 whether the project is dry cooling or not, because
9 every project is using ground water to some
10 extent. And so the definition of a policy and how
11 that water should be used, the quality of that
12 water, how cumulative impacts analysis should be
13 done, whether the accounting surface affects
14 everybody's use, I think these are -- it's
15 important that we all understand that, from our
16 perspective, these are not things unique to the
17 Genesis Project that should affect our timing.

18 The first question that was asked is
19 just to articulate exactly what the Commission's
20 water policy is. And I want to make a big
21 distinction between the Energy Commission's
22 requirement under CEQA to identify impacts and
23 when I'm talking about the policy I'm not talking
24 about that at all. I'm only talking about is
25 there a policy that you would apply as a LORS that

1 the Committee would have to make a finding that
2 you comply with. The Environmental Impact
3 Analysis, both direct, indirect, and cumulative
4 impacts, we absolutely agree that that is a
5 separate analysis and it's fact-based. We are
6 asking for some guidance on the law on what to
7 include in a Cumulative Impact Analysis so that
8 we're all on the same page.

9 But the first question here is what does
10 the Commission's policy say. I can tell you that
11 we actually put in our brief a requested order. I
12 think that we answered the question. The policy
13 uses some terms and those terms are defined.
14 Since the time we wrote our original brief there
15 was a State Water Resources Control Board letter
16 that was written in response to Staff's request.

17 The fundamental issue is what is fresh
18 water, because if you're not using fresh water
19 then you comply with the policy. That's how we
20 interpret the policy. The policy says if you are
21 using fresh water -- we're only going to prove
22 that under certain circumstances, primarily the
23 showing of alternative technologies,
24 environmentally unsound and economically
25 infeasible standards. But if you are not using

1 fresh water like, for example, reclaim water,
2 there would be no need to go to that second step.

3 We believe that the definition of fresh
4 water, at least as the Commission has applied it,
5 is identified in the Blythe One and Blythe Two
6 Projects. We believe that it is very clear in
7 Policy 7558, and we also believe that Staff relied
8 on that in the Beacon Project in which they were
9 all basing fresh water is not brackish water.
10 Brackish water is 1,000 TDS or higher.

11 Since that time, the Water Board
12 recently issued a letter that 7558, which we
13 believe is based on the Commission policy --
14 excuse me, the Commission policy is based on, is
15 that 7558 doesn't apply to ground water at all.

16 So you're left with sort of a choice.
17 Do you rely on the Water Board's letter? If you
18 do, then the project that is using ground water
19 complies with 7558 and, I would assert, complies
20 with your policy. If you do not rely on the Water
21 Board letter, then I would urge you, as I put in
22 our brief, to rely on the precedential decisions.
23 And when I say precedential decision, you didn't
24 adopt it under the Government Code.

25 But there's a very simple thing that we

1 do as lawyers. Wouldn't it be great if we found a
2 project that was a power plant that was using
3 ground water in the desert for cooling, and we did
4 that twice, we litigated those issues in front of
5 the Commission both before the IEPR policy and
6 after the IEPR policy, and the result was that
7 that project complied and the 1,000 TDS and
8 Staff's 3,000 TDS was rejected.

9 So I'm reminded of the analogy,
10 Commissioner Weisenmiller, that you said on
11 Friday. If an Applicant wants to get through the
12 process and there's a choice between a door and a
13 wall, choose a door. We thought we chose a door.
14 We are using water that would be greater than
15 1,000 TDS. We thought we chose that door. It
16 appears that that door is shifting and we don't
17 think that's fair and we want you to articulate
18 what it is. And we believe that adopting the
19 plain language of 7558 or relying on the State
20 Water Board letter that it doesn't apply at all
21 are the only two fair results.

22 Implicit in that question is the policy
23 that you adopted in 2003 deals with power plant
24 cooling. So we need some guidance and Staff needs
25 some guidance. Does that policy also apply to

1 non-cooling purposes? And I would submit to you
2 that it doesn't and I can quote several examples
3 of projects that are using very high quality water
4 for their makeup, high quality water for
5 construction, high quality water for irrigation
6 purposes, high quality water to augment when they
7 have -- augmenting their dry cooling.

8 So, again, I think that portion of your
9 decision would affect all projects, whether
10 they're dry cooled or not.

11 Is that -- trying to keep it as brief as
12 possible.

13 HEARING OFFICER CELLI: Thank you.

14 MR. GALATI: Those are our primary main
15 points and, rather than refute everything that
16 Staff says or CURE, I think that it would be
17 helpful to hear from them and then open it up to
18 questions on that point.

19 HEARING OFFICER CELLI: Thank you,
20 Mr. Galati. Staff, please.

21 MS. HOLMES: Thank you. It's on when
22 it's red? Okay, thank you.

23 What I'd like to talk about here is the
24 analysis that the Commission needs to undertake in
25 order to assess whether or not this project is, in

1 fact, consistent with State Water Policy. As
2 Commissioner Boyd knows, who's been sitting on a
3 number of cases and has been involved in a number
4 of discussions in the past regarding water use, we
5 begin with the State Constitution which prohibits
6 waste and unreasonable use, and encourages
7 conservation. That's the basis of the State Water
8 Policy.

9 That policy has been interpreted and
10 implemented by the State Board, by regional
11 boards, and by this Commission in a number of
12 policies, policy decisions, and resolutions basin
13 plans, other types of planning documents. It has
14 also been implemented by the Legislature, which
15 has passed a number of statutes which encourage
16 conservation and discourage waste and unreasonable
17 use of water.

18 Staff has always been concerned about
19 the use of water, particularly in a desert. Our
20 concern is heightened as we enter our third year
21 of drought. Staff has never used a simplistic
22 single-number test for determining whether water
23 use is reasonable or not. This Commission has
24 never used a simplistic numerical test to
25 determine whether water use is reasonable or not.

1 I will not go through the past Commission cases
2 that were identified in our brief, but I believe
3 that a review of those cases will demonstrate that
4 the Commission has always considered a
5 multiplicity of factors in assessing the, excuse
6 me, the reasonableness of water use.

7 In this case we were faced with almost a
8 dozen solar projects that have come in in the last
9 year and we notice that most of them either
10 proposed to use recycled water for cooling or they
11 proposed to use dry cooling. Our concern was
12 heightened by the fact that it seems that the
13 various policies that the State Board has been
14 interpreted differently by different regional
15 boards, and we wanted to seek some clear guidance
16 as to how we should apply them in light of the
17 number of cases that we have coming before us at
18 this time.

19 We sought information and guidance from
20 the State Board last fall. We received a letter
21 last week. That letter supports the Commission's
22 approach of considering a variety of factors in
23 reaching a determination about the reasonableness
24 of water use. Somewhat surprisingly, at least to
25 me, the letter also stated that the language that

1 appears as the IEPR water policy was intended,
2 when that language was adopted by the Board, to
3 apply only to surface water. Ground water, said
4 the Board, is covered by a different resolution,
5 Resolution 8863, which directs regional boards to
6 identify ground and surface water quality --
7 excuse me, quantities if the TDS levels are below
8 3,000 milligrams per liter as potential municipal
9 supplies.

10 If one were to incorporate the Board's
11 guidance into the Commission's IEPR policy, you
12 would have two alternatives. One is to determine
13 the project's proposed, whether the project's
14 proposed use of ground water is compatible with
15 State Water Policy by looking at Resolution 8863,
16 other portions of Resolution 7558 that reference
17 water generally, and other laws and policies that
18 both the legislature and the State Board have
19 adopted. The other alternative is to find that
20 Resolutions 7558 and 8863 are irrelevant to the
21 Commission's decision, and that the Commission
22 shouldn't concern itself with the use of ground
23 water in any quantity or any quality.

24 I believe that the Applicant has adopted
25 the latter position; Staff has adopted the former

1 position. We believe that our position, in which
2 the Commission considers a variety of factors in
3 assessing reasonableness of use, is consistent
4 with State Water Policy all the way from the
5 Constitution up to the letter that we received
6 from the State Board last week. We recommend that
7 the Committee not grant the Applicant's order but
8 instead direct Staff to undertake an analysis
9 that's been consistent with past practices in
10 which we look at is there a conservation or offset
11 program. In the Blythe case, in the Panoche case,
12 in the Starwood case, and the Sentinel case there
13 were water conservation and water offset programs.

14 We would ask you to look at the quantity
15 of water that's being used. In this case the
16 water, the amount of water that's being used will
17 use ten times as much water on a per-megawatt hour
18 basis as a project which uses dry cooling. We
19 would ask you to look at the quality of water
20 that's being used. Although I think this issue is
21 something in flux, my understanding is that the
22 Applicant is proposing to use water that's between
23 1,000 and 1,500 milligrams per liter TDS. That's
24 well below the 3,000 milligrams per liter level
25 specified in Resolution 8863. We would ask you to

1 look at competing uses, are there other projects
2 out there that may need to use water, are there
3 seeps and springs that support habitat for fish
4 and wildlife, are there wells that may be affected
5 by this project.

6 We would ask you to look at the
7 feasibility of alternatives, and I would point out
8 to you that with regard to Mr. Galati's last
9 comment on this issue we would not need to
10 undertake an analysis of the feasibility of
11 alternatives if we were only considering the use
12 of water for dust suppression and for mirror
13 washing, those kinds of uses. We know that there
14 is an alternative available for cooling. We are
15 not aware of any alternatives that are available
16 for those other uses. So to the extent that this,
17 that this current proposal is extending the
18 schedule, it is important due to the fact that we
19 do know that we would need to do an alternatives
20 analysis to determine whether alternative cooling
21 technologies are feasible. We would not need to
22 do that. That could be cut out of the analytical
23 process if this project were to be using dry
24 cooling.

25 And finally we look at the policy

1 guidance from both the regional and the State
2 Boards. As I said, we received a letter last week
3 from the State Board and I believe that it
4 supports the Commission's past practice and the
5 Staff's past practice of considering a variety of
6 factors in assessing reasonableness of use. These
7 are factual determinations that need to be made at
8 the end of evidentiary hearings.

9 A schedule that accommodates this
10 analysis will not be as quick as one which, as one
11 which, as which -- excuse me, let me start over.
12 A schedule that accommodates this analysis will
13 not be as quick as one which does not, but it's
14 the nature of the project and its potential
15 effects that dictate the longer schedule that's
16 necessary for the Commission to consider the
17 issues it needs to consider in reaching a
18 determination about the project's use of water.

19 HEARING OFFICER CELLI: Thank you. Any
20 questions, Commissioner?

21 PRESIDING COMMISSIONER BOYD: Not yet.

22 HEARING OFFICER CELLI: Okay. And let's
23 hear from CURE, please.

24 MS. GULESSERIAN: Thank you. I want to
25 back up, start by backing up. The issues here

1 today are strikingly similar to the Water Board's
2 at the turn of the last century, standing from Los
3 Angeles' need for water in a semi-arid area. In
4 the latter half of the last century so much ground
5 water had been pumped to meet growth needs that
6 Owens Valley springs and seeps dried up and
7 disappeared, and ground water dependent vegetation
8 began to die.

9 It wasn't until 1997 that an agreement
10 was reached to rewater the lower Owens River by
11 2003 in order to mitigate the extensive damage
12 that had occurred due to ground water pumping in
13 the region. That deadline was not met and it took
14 another lawsuit in order to begin the flow of
15 water to the river to mitigate those impacts.

16 It's undisputed that even today the
17 significant impacts from that ground water pumping
18 remain in the region and that even with the
19 agreement and rewatering of the river, the amount
20 of pumping continues at a higher rate than the
21 aquifer in that region is recharged.

22 Today, in 2010, the United States and
23 the State of California are taking actions to
24 reduce pollution that is responsible for global
25 warming. One of these actions involves the

1 development of renewable energy. But in doing so
2 we cannot forget that drought and water shortages
3 are due, in part, to global warming, and drought
4 and water shortages are predicted to increase over
5 the coming decades.

6 So, in permitting renewable energy
7 projects exacerbating drought and water shortages,
8 it would be a mistake to exacerbate drought and
9 water shortages and forget the reason why we are
10 here permitting renewable energy development in
11 the first place. As Benjamin Franklin once said,
12 when the well is dry we learn the worth of water.
13 CURE urges the Committee to realize the worth of
14 water now, before the seeps dry up, the wells, the
15 rivers, and the springs run dry, and before ground
16 water dependent vegetation begins to disappear in
17 this region.

18 We have the benefit of technologically
19 feasible measures to conserve water and to
20 preserve water for other economic uses and for our
21 natural environment for future generations. This
22 is the context in which the questions posed by the
23 Committee should be considered.

24 To address the first issue that is
25 before the Committee regarding the Commission's

1 policy on the use of water for power plant
2 cooling, CURE believes that there are a number of
3 state policies, laws, and regulations governing
4 the use of water that comprise the Commission's
5 current policy on the use of water for power plant
6 cooling. The California Constitution prevents the
7 unreasonable -- prohibits the waste, unreasonable
8 use, or unreasonable method of use, or method of
9 diversion of water. The Warren-Alquist Act,
10 Section 2500(H) promotes all feasible means of
11 water conservation and all feasible means, all
12 feasible uses of alternative water supply sources.
13 That is part of the Commission's policy. It is a
14 broad policy that applies to any water that is
15 proposed for use at a power plant.

16 The State Board's policy 7558 similarly
17 has broad language that we believe the Commission,
18 by law, complies with. It's a broad language set
19 forth in that policy, sets forth factors that are
20 considered in determining the unreasonable or
21 reasonableness of a particular use of water. It
22 compares the proposed use to other present and
23 future needs for the water source, and it views
24 that proposed water source in the context of
25 alternative water sources that could be used for

1 the purpose, for that purpose.

2 There's language in the state policy in
3 bases two, for example, that with respect to
4 inland waters -- this is not inland fresh waters,
5 inland waters are all waters of the state, that
6 there are limited supply of these waters, and that
7 basin planning has shown that there are no new
8 available water sources in certain water basins.
9 These are factors that the Commission would
10 consider in applying as policy to particular
11 projects.

12 With respect to ground water, the State
13 Board has recently clarified that its definition
14 of fresh inland waters in principle to, of its
15 policy does not apply to ground water unless that
16 water also provides habitat for fish and wildlife.
17 So to a certain extent Policy 7558 has been
18 narrowed with respect to ground water to a certain
19 extent. Other provisions of the policy that speak
20 to inland waters still apply and still promote
21 water conservation in the State of California.

22 The State Board has also clarified that
23 Policy 8863 specifically speaks to both surface
24 and ground water, in that surface and ground
25 waters of the state are considered to be suitable

1 or potentially suitable for municipal or domestic
2 water supplies. There are exceptions. Based on
3 tedious content, based on reasonable expectations
4 that the water may be used for municipal water
5 supplies, those factors that are even in Policy
6 8863 would be added to the policies and the
7 factors that are set forth in 7558 and the
8 Commission's own policy.

9 With respect to surface waters, Policy
10 7558 again has broad language on water
11 conservation. It also sets forth an additional
12 demonstration that Applicants must meet when fresh
13 inland waters are proposed for power plant
14 cooling. We do not believe this narrows the
15 analysis of all the other factors that are set
16 forth in the Commission's policies and state water
17 laws in the State Constitution. We believe it is
18 an added demonstration that must be met when fresh
19 inland water is proposed for cooling purposes.
20 And we are all familiar with that added
21 demonstration that must be met because it is set
22 forth in both the 2003 IEPR and Policy 7558, which
23 states that the use of fresh inland waters for
24 power plant cooling will only be approved when
25 it's demonstrated that the only alternative water

1 supply source and alternative cooling technologies
2 are shown to be environmentally undesirable or
3 economically unsound. Excuse me. We do not
4 believe this is a limitation on the analysis that
5 must be conducted for either fresh water or
6 surface ground water in any circumstance.

7 We agree with Staff regarding its
8 articulation of the factors that the Commission
9 considers in evaluating the use of water for
10 cooling purposes. We do believe, however, that
11 the alternatives analysis that is required under
12 the Warren-Alquist Act and CEQA would need to be
13 applied even when ground water that exceeds a
14 particular TDS level is proposed for power plant
15 cooling.

16 I think I'm trying to understand a point
17 that was just made by Caryn Holmes regarding that
18 they would not need to undertake a feasibility of
19 alternatives analysis, it was for construction.
20 And based on the language of the Warren-Alquist
21 Act that, and CEQA that the Commission considers
22 all feasible means of water conservation and all
23 feasible uses of alternative water supplies, that
24 a limitation that would not require an analysis of
25 ground water for construction would not be

1 correct.

2 Those are my initial comments on the
3 first question presented. Thank you.

4 HEARING OFFICER CELLI: Thank you.
5 Commission Boyd, did you have any questions of any
6 of the parties on this first issue?

7 PRESIDING COMMISSIONER BOYD: Question
8 for the Applicant. Although this is not a matter
9 of law, I'm kind of curious to hear from you again
10 why you did not incorporate dry cooling.

11 MR. GALATI: Economically it is clearly
12 better to not do dry cooling and so what we did is
13 we chose an alternative way that we believed to
14 comply with that water policy, similar to
15 Applicants who have choosed to reclaim water and,
16 I believe, similar to Applicants who chose other
17 brackish waters.

18 So I will tell you it is not uncommon to
19 be in a pre-filing meeting and hear directly,
20 directly in pre-filing meetings that the way to
21 comply with the policy is to dry cool, reclaim
22 water, or find degraded ground water. We found
23 degraded ground water. And from our perspective
24 is it was never a choice to dry cool or don't get
25 your permit. The policy doesn't say that and

1 Staff has never applied that, and the Commission
2 has never consistently applied that.

3 So we're here now, but that's the
4 reason.

5 PRESIDING COMMISSIONER BOYD: Okay. One
6 reason for the question, you're in the
7 neighborhood of projects, all of whom are using
8 dry cooling.

9 MR. GALATI: That is correct. And,
10 Commissioner Boyd, you know I represent a couple
11 of those projects and I can tell you that people
12 choose to comply with that policy in which, the
13 ways they think they comply with that policy. I
14 think that you would have, I think it would be a
15 much more stark contrast if the Applicant were
16 trying to use water of 100 TDS or potable water
17 for cooling compared to a dry cooled plant. But
18 there are projects here at the Energy Commission
19 that have been approved in the past, as well as
20 using reclaimed water. That's another way to
21 comply.

22 So I think that's the best I can do to
23 answer your question.

24 PRESIDING COMMISSIONER BOYD: Yeah, I
25 know it's not a matter of law, but it's just a

1 matter of fact that I wanted to understand. Thank
2 you.

3 HEARING OFFICER CELLI: Sorry. I had
4 some questions. I wanted to hear what is the
5 Applicant's take on the letter from the State
6 Water Board where they say that the priorities of
7 7558 do not include ground water.

8 MR. GALATI: Well, at the risk of
9 besides, you know, making the dias angry, I have
10 held that for a very long time and argued that in
11 the 2003 IEPR proceedings. And if the Water Board
12 had seen fit to write that letter then, maybe we
13 could have clarified in the IEPR what that meant.

14 So I'll answer your question this way,
15 is if you rely on the letter then our use of
16 ground water complies with that policy. I also
17 will tell you that I believe that 7558 is the
18 Water Board's interpretation of waste and
19 unreasonable use under the Constitution. If you
20 do not rely on that letter and believe that it is
21 the opinion of an Executive Director and it is not
22 the law, then I would urge you to read 7558. And
23 7558 very specifically sets forth the hierarchy of
24 water that is fresh water and water that is not
25 fresh water. And this Applicant chose to use

1 water that is not fresh water and, therefore,
2 would comply with the policy because it is using
3 brackish water.

4 So from my perspective, the analysis is
5 relatively simple. We are either using fresh
6 water subject to the policy, or we are not. If we
7 are using fresh water subject to the policy, then
8 there needs to be a standard that's clear so we
9 understand what fresh water is. We proposed that
10 standard. We thought it was based on past cases
11 and past applications.

12 If the Water Board -- but I disagree
13 with Ms. Holmes wholeheartedly that this letter
14 supports increasing TDS 3,000 for ground water.
15 It clearly says if you're going to possibly raise
16 the standard for brackish water, that that applies
17 to surface waters only. So in my mind the choice
18 is this: it either does not apply and therefore we
19 complied with that policy; or it does apply and
20 you should use 1,000 as the standard.

21 But I'd also like to just expand upon
22 we're talking about this policy and we're talking
23 about Article II of the Constitution. Everything
24 that Staff brought up and, in fact, everything
25 that CURE brought up is an appropriate CEQA

1 analysis. We're not saying don't do the analysis
2 to see if there's impacts, don't do the analysis
3 to see if it's a bad use of water because you hurt
4 a neighbor, don't use this impact because it's a
5 drought condition and, therefore, we're
6 contributing to something bad. That is an
7 appropriate level of inquiry under CEQA. But to
8 say the policy prohibits this use, you can't veer
9 away from the plain language of the policy.

10 That's all we're asking to do, is to
11 articulate that policy. We believe that under
12 that policy if we're not using fresh water there
13 is no requirement under that policy to do the
14 detailed, economically infeasible, environmentally
15 unsound analysis that Staff is talking about. And
16 if they feel the need to do a dry cooling
17 analysis, it should be only upon evaluating our
18 project and determining that there are significant
19 impacts to ground water, that you would then look
20 at feasible alternatives to reduce those impacts.

21 HEARING OFFICER CELLI: Staff, your
22 response, please?

23 MS. HOLMES: Staff believes that the
24 State Board letter does, in fact, support
25 Commission practice on the Staff position. The

1 State Board letter says that principle two applies
2 to surface water. Principle two is what the
3 Commission took verbatim and incorporated into the
4 2003 IEPR as its water policy.

5 So you're left with two alternatives.
6 If you're going to treat the State Board letter
7 interpretation consistent with your interpretation
8 of the policy, you're left with two alternatives.
9 You can say that you look elsewhere in state law,
10 Water Board resolutions, the Constitution, for
11 what is State Water Policy and what to evaluate
12 when you're determining whether a project's use of
13 water is reasonable. Or you can take the
14 Applicant's position, which is 7558 and 8863 don't
15 apply. In fact, if you take their position
16 literally, that means that there is no State Water
17 Policy that you need to consider when you're
18 evaluating this project's ground water use.

19 There is no reason to distinguish
20 between fresh and brackish, as Mr. Galati
21 indicated. His interpretation would result
22 logically in a conclusion that this Commission
23 should not be looking at ground water use at all,
24 and I don't think that's a position that this
25 Commission wants to adopt.

1 I'd also like to point out that it is
2 very difficult to understand how the Commission
3 could determine whether a use is waste or
4 unreasonable without looking at site-specific
5 factors. How do you determine whether use is
6 unreasonable unless you know what the, unless you
7 know how much water is out there relative to other
8 users? How do you know whether you can, whether
9 or not it's waste or unreasonable use without
10 knowing what the competing uses are? I don't
11 understand how the Commission can make that
12 determination. I don't think that such an
13 approach is consistent with the Commission's past
14 interpretation of State Water Policy, and I don't
15 think it's consistent with the State Board's
16 letter.

17 HEARING OFFICER CELLI: CURE?

18 MS. GULESSERIAN: I don't have anything
19 to add. I agree with what Staff just said.

20 HEARING OFFICER CELLI: Very good. Then
21 let's move on to the next question, which was
22 having to do with the accounting surface
23 methodology.

24 MR. GALATI: If you notice, our brief
25 deals with whether the accounting surface should

1 be applied to this project as what the Commission
2 normally calls a LORS. But the Commission needs
3 to make two findings: does the project have any
4 impacts under CEQA and are they mitigated or
5 alternatives available; or two, does the project
6 comply with all the laws, ordinances, regulations,
7 and standards.

8 And so I assert to you that this issue
9 has been put to bed soundly twice and I'm confused
10 as to why we're doing it again. In 2001 -- well,
11 as the decision points out, so that I'm not
12 introducing facts into this record, but as the
13 decision of 2001 Blythe and Blythe Two point out,
14 the Bureau of Reclamation has, under the Supreme
15 Court decree and under its authorizing statutes to
16 regulate Colorado River water, has sought to
17 develop a policy to regulate water that really is
18 Colorado River water but might be pumping from a
19 well. So it's a very simple question and maybe a
20 complex answer.

21 The simple question is if you drill a
22 well right on the bank of the Colorado River, are
23 you using California ground water or are you using
24 Colorado River water. And the Supreme Court said
25 that the Bureau has the right to regulate. If

1 they can prove that there is a main stream or
2 there's a replacement, you're actually pumping
3 water from the main stream of the Colorado River.

4 So the Bureau adopted a methodology
5 called the accounting surface, and the accounting
6 surface attempted to do that. But the accounting
7 surface went very far outside of the flood plain
8 of the Colorado River and went as much as 90 miles
9 away from the Colorado River, and what happened is
10 they don't have the ability to regulate that. And
11 so they actually proposed it as a law, they
12 proposed to adopt 43 CFR 415, and this was a
13 culmination of 20 years of trying to wrangle with
14 how to regulate those people that, quite honestly,
15 were putting their wells hundreds of feet from the
16 Colorado River, not 90 miles from the Colorado
17 River. And what happened is that regulation did
18 not have enough support and they withdrew it.

19 So in 2001 that regulation wasn't even
20 proposed, but the accounting surface methodology
21 was exactly the same as it is today. And the
22 Commission hear testimony on that point from the
23 Bureau, they heard testimony from the Colorado
24 River Board, they heard testimony and written
25 documentation from MWD, Palo Verde Irrigation

1 District, Coachella Valley Irrigation District,
2 from experts in the field, and what they
3 ultimately concluded was that the accounting
4 surface was not a LORS that they were going to
5 apply because it was not a law.

6 What the Applicant did in that
7 particular case, being much, much closer to the
8 river, had decided to adopt a water conservation
9 offset program which the Bureau said if we ever
10 adopt this law in the future, that will give you
11 some protection. That is the only reason that
12 that water conservation offset program was
13 proposed, both in Blythe One and Blythe Two, and
14 let's be very clear about that. It wasn't to
15 mitigate impacts and it wasn't to comply with this
16 policy. It was to provide some kind of protection
17 should that policy ever be proposed. And it was
18 proposed, and it was withdrawn.

19 I think that this is very similar to two
20 things: applying the law from one place to another
21 when they don't have any jurisdiction. This is
22 California ground water. Staff says that they're
23 concerned that some day there would be law that
24 then stops the project from using the water.
25 Well, that would stop every project from using

1 water, whether it's dry cooled or not. That
2 analysis is exactly the same for every single
3 project and shouldn't be a reason to delay the
4 Genesis Project.

5 Second, I would articulate to you that
6 that would be a taking and while I don't want to
7 get into the Constitutional provisions of that, I
8 don't believe that you can take private property
9 right that way.

10 The Commission's Staff is trying to
11 protect us from the future policy. I don't think
12 that's their job, I don't think that we need that.
13 Applicant's take risks the way they take risk and
14 it just simply is not a law or any methodology
15 that's been approved that you should apply to the
16 project. And I urge you to read the record in
17 Blythe One and Blythe Two where it was litigated
18 twice and very thoroughly, and both times the
19 conclusion was that the accounting surface, even
20 though that project was far closer and arguably in
21 the Colorado River flood plain, did not apply.

22 So we urge you to say it doesn't apply.
23 We also urge you to say because it doesn't apply
24 it shouldn't form some basis, some fictitious
25 basis for accumulative impact. Accumulative

1 impact analysis, the significance threshold should
2 be something different. Thank you.

3 HEARING OFFICER CELLI: Staff, please?

4 MS. MAYER: Good afternoon,
5 Commissioners.

6 For Staff the issue is not whether
7 there's a current regulation promulgated by the
8 BOR. The issue is one of reliability. Section
9 1743 of Commission Regulations requires Staff to
10 review reliability over the life of the proposed
11 project, which in this case is 30 years. The
12 regulation says "Staff shall consult with other
13 agencies with special expertise or interest in
14 reliability matters," in this case the BOR.
15 "Staff may recommend additional measures which are
16 economically and technically feasible to ensure
17 reliable operation, and those results shall be
18 presented and considered at evidentiary hearings
19 pursuant to Section 7248."

20 What happened here is that the BLM, the
21 U.S. BOR, and the Colorado River -- California
22 Colorado River Board all expressed concern in an
23 interagency meeting that this much water pumping
24 would eventually reach Colorado, reach water to be
25 replaced, it would be replaced by Colorado River

1 water. The BOR was very blunt and to the point
2 and said it would be, if such a thing happened and
3 the water was taken illegally it would be forced
4 to shut down the project.

5 BOR, and as an aside, the regulation,
6 though not effective now, is definitely in the
7 BOR's plans. They plan within the next two years
8 to specifically apply the accounting surface
9 methodology to wells proposed to be used by
10 Genesis.

11 Last, regardless of the stake of BOR
12 regulations, Staff simply can't ignore potentially
13 significant impacts on the resource with regard to
14 accumulative effects. Right now this methodology,
15 the USGS Geological Survey, the accounting surface
16 methodology is the best description we have about
17 the interaction between the aquifer water and the
18 Colorado River water. The Applicant is not only
19 asking to ignore the methodology, but is asking us
20 to not communicate with BOR about the methodology,
21 and Staff respectfully requested me to deny this
22 order as inappropriate.

23 HEARING OFFICER CELLI: Ms. Gulesserian?

24 MS. GULESSERIAN: Mr. Galati has posed a
25 question on whether the accounting surface

1 methodology constitutes LORS. And the question
2 posed by the Committee is different. It is the
3 legal effect of Reclamation's accounting surface
4 methodology on ground water pumping in the region.
5 This is a different question.

6 Whether or not the accounting surface
7 methodology constitutes LORS under the Warren-
8 Alquist Act, the Commission must determine whether
9 the project complies with all federal laws, with
10 the Boulder Canyon Project Act, the Consolidated
11 Decree of the U.S. Supreme Court in Arizona vs.
12 California, such a project would not be unlawfully
13 using Colorado River water through the project's
14 ground water pumping.

15 The Applicant stated just now that
16 Reclamation doesn't have the ability to regulate
17 that pumping and it's effects on the Colorado
18 River. I have reviewed the U.S. Supreme Court
19 Decree and the Boulder Canyon Project Act, and
20 believe that Reclamation does have jurisdiction.
21 I've looked in the briefs to find a cite for what
22 was just said, but there is no jurisdiction to
23 regulate that ground pumping and I don't see any
24 authority for that statement.

25 Regardless, the Commission must

1 determine whether the project would unlawfully use
2 Colorado River water under federal statutes and
3 the Consent Decree. The Commission must also
4 determine whether the project's ground water
5 pumping would result in potentially significant
6 impact on the Colorado River water under the
7 California Environmental Quality Act. And finally
8 the Commission must also ensure that over the 30-
9 year license the project, pumping 1,644 acre feet
10 per year -- it's an estimate -- pumping would not
11 result in significant impacts or require a
12 contract with Reclamation such that the wells
13 could be shut down or, hence, whether the proposed
14 ground water pumping is an unreliable source of
15 water.

16 The methodology is Reclamation's current
17 method for determining unlawful use and it is
18 based, it is a tool that has been based on years
19 of experience at the Reclamation, at Reclamation
20 for evaluating this particular impact, whether you
21 believe the impact is under CEQA or whether the
22 impact is a violation of the, any federal laws or
23 the Consent Decree. It is a tool used for
24 analyzing the particular impact.

25 We would urge you to deny the

1 Applicant's request that the legal effect of the
2 accounting methodology is that it does not apply.
3 And we'd also urge you to deny their request that
4 the threshold for doing an analysis of the impact
5 should be something different. That is a factual
6 issue that would be the proper subject of
7 testimony and evidentiary hearings. Thank you.

8 HEARING OFFICER CELLI: Thank you. So
9 first, Commissioner Boyd, do you have any
10 questions of any of the parties?

11 HEARING OFFICER CELLI: I'll hold my
12 questions. I have lots of questions.

13 HEARING OFFICER CELLI: Commissioner
14 Weisenmiller?

15 MR. WEISENMILLER: I'll hold my
16 questions, too.

17 HEARING OFFICER CELLI: And so I have
18 several questions, too. First question, so do I
19 understand, Applicant, that it's your position
20 that the federal, there is no federal jurisdiction
21 over California ground water whatsoever?

22 MR. GALATI: Yes.

23 HEARING OFFICER CELLI: Okay. And,
24 Staff, is that your position?

25 MS. MAYER: No.

1 HEARING OFFICER CELLI: Okay. Your
2 microphone, ma'am.

3 MS. MAYER: Sorry. This particular
4 question focused on the accounting surface
5 methodology, but the law of the river is
6 extensively discussed in Blythe Two and the PSA.
7 And we have asked the BOR for specific
8 determination about whether it does have
9 jurisdiction absent this regulation. We have not
10 heard specifically back yet, but I would say it's
11 extremely likely.

12 HEARING OFFICER CELLI: That they do
13 have jurisdiction?

14 MS. MAYER: That they have jurisdiction,
15 based on law of the river, based on the case law.

16 HEARING OFFICER CELLI: Okay. And,
17 CURE, what's your position on that question?

18 MS. GULESSERIAN: That (indiscernible)
19 about that jurisdiction? That Reclamation does
20 have jurisdiction over water that is being --
21 actually I can, let me just look for some
22 (indiscernible).

23 HEARING OFFICER CELLI: Let me ask you
24 this. Is it that --

25 MS. GULESSERIAN: Yes.

1 HEARING OFFICER CELLI: -- the
2 jurisdiction -- okay. A reach of the jurisdiction
3 is that surface waters of the river can be, are
4 being essentially pumped into the ground water by
5 the ground water users -- this is what I'm trying
6 to figure out here -- such that there is no
7 jurisdiction but this is how they acquire
8 jurisdiction. Maybe I'm not saying this very
9 well.

10 In other words, I think all parties
11 agree that the federal government has jurisdiction
12 on the rivers and streams of the United States.
13 And there's some question as to whether that
14 jurisdiction reaches the ground water. And what I
15 want to know, if there's any other means by which
16 the jurisdiction can get to that ground water
17 besides the pumping of the Colorado River in this
18 instance.

19 MS. GULESSERIAN: A lot of --

20 MS. MAYER: Sorry.

21 MS. GULESSERIAN: No.

22 HEARING OFFICER CELLI: Okay.

23 MS. GULESSERIAN: Where our concern is
24 when it touches Colorado River water or it touches
25 water that would be replaced by Colorado River

1 water.

2 HEARING OFFICER CELLI: Thank you. I
3 just needed some clarification on that. Yeah, I
4 just want to e-mail if Caryn had any--

5 MS. GULESSERIAN: Yes, just a
6 clarification that it would be applicable to
7 pumping water that originates from the Colorado
8 River or pumping water that may be replaced in the
9 underlying aquifer by Colorado River water, such
10 that the pumping on the project site draws in
11 water from the Colorado River through the aquifer.
12 That would also be an unlawful use.

13 PRESIDING COMMISSIONER BOYD: Are there
14 hydrologic studies that make that point in this
15 area?

16 MS. GULESSERIAN: That would be a
17 question of fact that is under evaluation.

18 MS. MAYER: Again, I would say that BOR
19 was pretty blunt that it could happen over the
20 life of the project; not immediately, but over the
21 life of the project.

22 MS. HOLMES: I think that the answer to
23 that question is that is what the accounting
24 surface is. That is USGS's conclusion as a result
25 of a number of years of study and efforts to

1 identify at what point do you start running into
2 water that will replace Colorado River water. And
3 so that is what the accounting surface is.

4 HEARING OFFICER CELLI: Please,
5 Mr. Galati.

6 MR. GALATI: Thank you. When I said no,
7 it is because water that is being replaced is not
8 California ground water. When it becomes
9 California ground water, that is going to regulate
10 it under California ground water law.

11 The citation for do they have the
12 ability to regulate is absolutely correct. They
13 do have the ability to regulate when you are
14 pumping water that is either replaced by or part
15 of the main stream of the Colorado River. But the
16 evidence, unless there's evidence brought
17 different, again look at Blythe One and Blythe
18 Two, that the Bureau throughout the entire time
19 it's had that authority has regulated one well in
20 the entire valley. So you guys have been to
21 Blythe, you've seen the Palo Verde Irrigation
22 District and you've seen the number of wells out
23 there. There are thousands of wells out there and
24 they have never regulated it. In fact, what they
25 did is propose a regulation to allow them to

1 extend by some method beyond what is clearly being
2 replaced by. That is the accounting surface.

3 I will also point out that this
4 accounting surface that everybody believed is such
5 a great model is the exact same model that we
6 proposed to model our ground water impacts forward
7 to the Energy Commission that was unacceptable
8 because it was two-dimensional, not appropriate,
9 and we had to go out and drill wells so that we
10 could get data so Staff could evaluate impacts.
11 The accounting surface is a simplistic methodology
12 by which the Bureau sought to extend its
13 regulation outside of its normal boundaries, and
14 until adopted is not applicable.

15 The Forest Service has no jurisdiction
16 over this land. We're not asking them, we're not
17 violating the law by not coordinating with the
18 Forest Service.

19 The project is in the Mojave Desert. We
20 don't coordinate with the South Coast Air Quality
21 Management District. It is the same thing.

22 Now, if you look at Blythe One and
23 Blythe Two, and those projects were pumping 3,000
24 acre feet, there is a very detailed analysis about
25 how long it would take to take a molecule of water

1 and pump it over eight miles so that those were
2 hydrologically connected. It is an undisputed
3 fact that this project is at least 15 miles
4 farther away from the river.

5 So this idea that this is so, we're so
6 nervous about pumping Colorado River water is
7 something that is not relevant to this project or
8 any of the projects in the Chuckawalla Valley
9 Basin. There is no legal effect for this
10 accounting surface, both as a LORS, and it would
11 make no sense to use it as a standard for
12 cumulative impacts.

13 HEARING OFFICER CELLI: Can I ask this?
14 And this is a question to all the parties.

15 If it's just a methodology, we use all
16 sorts of methodologies here, you know. You want
17 to make an economic analysis of alternatives, the
18 parties are free to use whatever accounting
19 methods they want to use, and parties are free to
20 bring in their experts and use methodologies
21 according to proof and really according to the
22 credibility of your witness in a tried and true,
23 tested nature of whatever methodology is being
24 used. And I'm not sure, but I believe there's no
25 law requiring any kind of methodology when it

1 comes to proving that whatever these issues may
2 be.

3 And so as I was reading the briefs and
4 reading the law, it seemed to me that this is just
5 a method of proof, really. It's just a model.
6 It's probably one of many models, but it's just a
7 model. And I think that you've made the point
8 clearly. I'm sure the parties agree this is not a
9 law, we don't have to treat it as such.

10 But the question of whether it would
11 apply -- and, Mr. Galati, your brief included
12 diagrams of what would have been the accounting
13 surface attached to the proposed legislation with
14 the Federal Register, and clearly that
15 established, that map would have -- I believe that
16 the map establishes that the Genesis property is
17 squarely within their proposed accounting surface,
18 I think we say.

19 MR. GALATI: That is correct. What was
20 proposed and withdrawn.

21 HEARING OFFICER CELLI: Right. And so
22 it's not a law but it's a tool of proof if I
23 understand its use correctly. Would you agree
24 with that?

25 MR. GALATI: Actually, I would agree

1 with that. And if I could address something that
2 you might be getting at, and that is I asked for
3 Staff not to require, or not to be required to go
4 out and coordinate. Because remember what they
5 told us on December 10th when I brought this issue
6 up to you, the project is going to be delayed
7 because I've got to go out and I have to go
8 coordinate with the Bureau about their
9 jurisdiction and that could take some time. And,
10 in fact, I have to coordinate with the State Water
11 Resources Control Board, and that's going to take
12 some time. And if these guys were only dry
13 cooling, I wouldn't have to do that.

14 So I included in every one of my orders
15 asking you, directing Staff that if they're going
16 to -- they don't need to coordinate, it's there.
17 But if they want to coordinate, they shouldn't
18 single this project out as that coordination
19 causes this project to slow down. If the
20 accounting surface applies to this project, the
21 accounting surface applies to every project in the
22 Chuckawalla Valley Basin. If the State Water
23 Resources Control Board, 8863 applies, then it
24 applies to everybody who is using ground water.

25 So my primary point here is that Staff

1 has singled Genesis out not because of the
2 accounting surface, not because of the State Water
3 Resources Control Board policy, but because they
4 want them to dry cool. But there is no additional
5 analysis that is placed upon Staff for the
6 accounting surface or for the policy, because this
7 project is proposing to use brackish water. And
8 so I wanted to face that squarely and make sure
9 that Staff knows that, and that the Committee can
10 order Staff to treat this project like every other
11 and evaluate it quickly instead of looking for
12 reasons for it to be delayed. Because the
13 accounting surface, if it applies, which we do not
14 believe it applies, or if they're going to use it
15 (indiscernible) analysis, then they're going to
16 use it as accumulative impact analysis for
17 everybody.

18 HEARING OFFICER CELLI: Thank you.
19 Staff, please.

20 MS. MAYER: Staff is not picking on
21 Genesis. First of all, if you're going to use ten
22 times the amount of water than the dry cool
23 projects are, you can expect some concern. Second
24 of all, the other projects did apply to BOR before
25 potentially they needed it, the use of the water,

1 which Genesis did not. Third of all, BOR, BLM --

2 HEARING OFFICER CELLI: Can I ask about
3 that?

4 MS. MAYER: I'm sorry. Yes, sir.

5 HEARING OFFICER CELLI: I'm sorry to
6 interrupt, but if I don't ask the question, I
7 won't remember it.

8 MS. MAYER: Sure.

9 HEARING OFFICER CELLI: Okay. They're
10 using ten times more water by virtue of not using
11 dry cooling.

12 MS. MAYER: Yes, sir.

13 HEARING OFFICER CELLI: And then the
14 other projects have applied for contracts with the
15 BOR, but Genesis has not.

16 MS. MAYER: Kind of as an insurance
17 policy.

18 HEARING OFFICER CELLI: And the idea is
19 that they, in the event that BOR determines that
20 they are seeping water out of the ground that
21 rightfully is Colorado River water, then they're
22 doing it illegally without a contract, or if they
23 don't have a contract they're doing it illegally;
24 if they have a contract, it's legal.

25 MS. MAYER: Yeah, and there's a limited

1 amount of -- under this particular set aside of
2 10,000 acre feet, there's about 5,000 that isn't
3 contracted, but there's a lot of people in line.
4 So it's awful a risk that even if they decide at
5 the last minute to get a contract then it will be
6 too late. So that's another reliability issue,
7 and the fact that Genesis did not apply, you know,
8 also raises an eyebrow.

9 HEARING OFFICER CELLI: Let's hear from
10 CURE, please, Ms. Gulesserian.

11 MS. GULESSERIAN: Did you have a
12 specific question you wanted me to answer?

13 HEARING OFFICER CELLI: Well, I'm
14 really, I'm just trying to hear, have all the
15 parties weigh in on what everyone thinks we're
16 talking about before we get to the next question.

17 MS. GULESSERIAN: Sure. We agree that
18 it is a tool for analyzing compliance with federal
19 laws, cases, the Consent Decree, state laws, and
20 it's a tool that could be used by the Commission
21 in determining reliability as well, due to the
22 facts just mentioned.

23 I do not have an expert here to rebut
24 the statements regarding the effectiveness of the
25 methodology, so I would reserve the questions of

1 fact.

2 HEARING OFFICER CELLI: And I appreciate
3 that. That really raises --

4 MS. GULESSERIAN: But for the future. I
5 just don't have the people here to address those
6 issues.

7 HEARING OFFICER CELLI: I was --

8 MS. GULESSERIAN: So yeah, we would urge
9 you to deny it with Applicant's request here.

10 HEARING OFFICER CELLI: It does sound
11 like it's a SAP-specific question. It's a proof
12 problem. What methodology are you going to use to
13 prove whether this is so or not? Or, what are the
14 odds that that molecule from the Colorado River is
15 going to get past Blythe One, Two, and I guess
16 Blythe, the new solar Blythe, before it gets to
17 Genesis? I imagine that its got to travel; they
18 don't jump. But that would be according to proof
19 and I'm concerned at this early date that this,
20 how this isn't a fact issue and becomes a legal
21 issue.

22 MR. GALATI: That's a fair question.
23 That's not what Staff said. Staff said we can't
24 pump ground water without an entitlement from the
25 Colorado River water, approved by the Bureau of

1 Reclamation. That's not correct. If Staff wants
2 to go through the analysis and have us go through
3 the analysis and put proof that we don't impact
4 the Colorado River, that's a CEQA question, fully
5 open, fully on the table. If Staff wants to use
6 the accounting surface methodology to use that,
7 they're free to do so.

8 What I'm asking you for is -- because
9 remember what we're responding to. We're
10 responding to Staff telling us both at the site
11 visit informational hearing and in subsequent
12 workshops that this project is so complex that it
13 cannot be processed in time for ERA funding. And
14 when you boil it down and you break it down, this
15 project has the same issues as every other
16 project. Whether you're using 300 acre feet or
17 1,500 acre feet, you should evaluate whether that
18 water is Colorado River water or causes
19 significant impact. But to call it a LORS, say
20 that we don't have a contract -- and to clarify
21 because I do represent the other two Applicants.

22 Those Applicants do not need that
23 contract and it's not a contract for use of the
24 water. There's been water that's been set aside
25 and should that policy come into place, and if the

1 Water Board, the River Board grants those
2 applications, which has not been done, if they
3 will allow it without a policy, then they might be
4 protected. Blythe Two and Blythe One chose to
5 protect itself with a water conservation offset
6 program. Genesis believes that such a taking,
7 such a protection is not necessary.

8 HEARING OFFICER CELLI: Anything further
9 from any of the parties before we move forward?
10 Commissioner Boyd, a question?

11 PRESIDING COMMISSIONER BOYD: I have no
12 further questions.

13 HEARING OFFICER CELLI: Chairman
14 Weisenmiller?

15 MR. WEISENMILLER: Excuse me. The one
16 question I wanted to make sure, it seems like
17 you're focusing very much on the LORS and more or
18 less stipulating that in the CEQA context, you
19 know, these issues will have to be addressed
20 there. And obviously, in the CEQA context, using
21 much more water and not getting into the quality
22 mainly to, you know, more detailed CEQA analysis.

23 So part of my question is just in terms
24 of scheduling. If we really aren't addressing
25 stuff in this context, how much more complicated

1 is it going to be in the CEQA context and how much
2 more time-consuming might it be at that stage?
3 And that's obviously for all three.

4 MR. GALATI: You bet, I'll take a stab
5 at that first. I don't believe it is as well, and
6 as representing the others I can tell you that the
7 data request on cumulative impacts are exactly the
8 same.

9 So what's happening is each Applicant is
10 doing their own cumulative model, coming up with
11 their own cumulative model. Staff is identifying
12 that cumulative model and reviewing it, and
13 ultimately will probably choose one and do a
14 cumulative impact. And what's happening here is
15 it isn't the amount of water that fix the result,
16 but it's not the amount of water that's causing
17 the analysis to be done. It's a matter of simply
18 inputting the number that goes into the model. It
19 would be -- and, Commissioner Boyd, I always pick
20 on you because I know air quality very well. It
21 would be like air quality emissions and trying to
22 calculate whether you have impacts.

23 Once the model is set up, putting in a
24 scenario where there is X pounds and you see what
25 happens versus putting in what's X plus one and

1 you see what happens. The work is putting the
2 model together and we are in no way, shape, or
3 form saying that Staff should not evaluate every
4 drop of water we're going to use, both in a
5 direct, indirect, and cumulative impact analysis.

6 But the question is why would that take
7 any longer than if they did it for a dry cool
8 plant that's using 300 acre feet or 600 acre feet
9 of water? It makes no sense to me.

10 So again it's another reason that causes
11 us to question why is Staff saying that our
12 project is so complex. I think it's because it
13 wants to dry cool and time's on their side. And
14 if they can't get their Staff assessment done,
15 that is a technique that is often used to get
16 agreement. A Staff assessment is not for
17 agreement. If they have a difference of opinion,
18 they should put it out. But they shouldn't use a
19 LORS that doesn't apply, they shouldn't change the
20 policy that's been applied here at the Commission
21 by suddenly raising the TDS to 3,000, and they
22 shouldn't come up with a cumulative impact
23 analysis that includes fictitious projects to
24 over-estimate the impacts. That's what this is
25 really about and we want that guidance to make

1 sure we're treated like everybody else.

2 MR. WEISENMILLER: Actually, I have seem
3 to have a follow-up. I thought first I'd let the
4 other parties respond.

5 HEARING OFFICER CELLI: Before I let
6 parties respond, I just want to know if you have
7 any follow-up.

8 MR. WEISENMILLER: Well, okay. The
9 obvious question for you, Scott, in terms of
10 saying yeah, you crank the model and if you put in
11 a different factor, you know, you just crank the
12 model. But I would assume in terms of looking at
13 mitigation impacts that as you could do something
14 larger the mitigation, parts of it, could be much
15 more complicated.

16 MR. GALATI: Yes, I guess it would be
17 more complicated if we had impacts that, for
18 example, required offsets or something like that,
19 if there was a fouling (phonetic) program, things
20 like that could come out of the analysis.

21 We have done the analysis, we submitted
22 in our AFC, there's both a direct/indirect
23 complete model, and we didn't believe that we had
24 those impacts that needed mitigation.

25 HEARING OFFICER CELLI: So now let's

1 hear from Staff, and I wanted to hear, among other
2 things, your response to the "what difference does
3 it make if you're doing the same amount of, you
4 know, the same analysis for projects using less
5 water if it's all the same water."

6 MS. HOLMES: Are you, is your question
7 specifically limited to the second topic in your
8 order, the accounting surface, or is it more
9 general?

10 HEARING OFFICER CELLI: Whatever you
11 want. Let's hear it. I think we should hear in
12 general terms.

13 MS. HOLMES: Oh, I think that, I think
14 that Commissioner Weisenmiller made a very
15 accurate point and it was one that I was planning
16 to make. I'm not sure I can be quite as
17 articulate as he was about it.

18 But I have been involved in a number of
19 cases that have involved complicated ground water
20 issues and my experience is that when what's at
21 stake is whether or not a project may be required
22 to used an alternative water source or an
23 alternative cooling technology, the issue becomes
24 very contentious, it takes a very long time to
25 resolve if it's not litigated, and sometimes it

1 takes extensive litigation.

2 So if there is, if there is a chance or
3 likelihood that the result of the analysis would
4 be that there is a significant impact or a LORS
5 nonconformity issue, that I think there tends to
6 be more litigation about that particular outcome.

7 As I said at the beginning, what we have
8 noted here is that we are all aware of an
9 alternative cooling technology. Staff is not
10 aware of any alternative technologies for dust
11 suppression or for washing the mirrors. So my
12 suspicion is that this is an issue because of the
13 fact that the Applicant is concerned that the
14 results of the Staff analysis will indicate that
15 there are significant impacts, that there are LORS
16 nonconformity. If that were to be the case when
17 Staff had completed its analysis, we would be
18 looking at alternatives. And that provides an
19 incentive, if you will, for them and for us to
20 have to focus very closely on every single detail
21 that goes into the analysis, both on the Staff
22 side and on the Applicant's side. That takes
23 time. I have never worked on a case that had
24 contested water issues that didn't take far in
25 excess of the one-year licensing process. That's

1 called (indiscernible) act.

2 Now, more generally speaking, I think
3 there's another issue as well that's related, and
4 that's the fact that if we find that there is a
5 LORS nonconformity or a significant adverse
6 impact, we're required to look at alternatives.
7 And if there is an alternative to cooling water,
8 use of ground water for cooling, then we have to
9 conduct that analysis. We haven't conducted that
10 analysis. That will take time.

11 If, however, the project has proposed to
12 use water in such a way or for such purposes that
13 there are no feasible alternatives, that analysis
14 becomes much quicker and doesn't take as much
15 time.

16 HEARING OFFICER CELLI: Ms. Mayer?

17 MS. MAYER: I just want to add one note,
18 and that is because of the amount of the water
19 there's, we have been investigating the likelihood
20 of a site-built water pumping affecting seeps and
21 springs and, henceforth, affecting biology of
22 particular plants. And we've been, we've had two
23 or three workshops on these issues alone. So the
24 amount of water definitely has a stronger impact
25 on the biological aspect than -- it's something,

1 you know, we can't ignore, it just takes a good,
2 consideration and investigation.

3 HEARING OFFICER CELLI: Thank you.
4 Ms. Gulesserian, anything?

5 MS. GULESSERIAN: Yes, thank you. I
6 would like to just add I agree with everything
7 that Ms. Holmes stated and I was also going to
8 speak to that the amount of water that you, that
9 is proposed to be used, the greater the amount of
10 water, the greater the indirect or secondary
11 affects are and, in this case, those impacts
12 include impacts on biology and seeps and springs
13 in the area.

14 My second point is just about the broad
15 question of what difference does it make what
16 numbers you plug into your modeling. And I am
17 just stunned sitting here today because I have
18 repeatedly requested in various proceedings that
19 the assumptions used for an Applicant's particular
20 modeling don't seem to be representative of actual
21 conditions, and I had requested an Applicant, just
22 generally, to plug in some different numbers
23 because -- that represent more realistic
24 assumptions for the methodology. And time and
25 time again I've been told it's not just a matter

1 of plugging in the numbers, it is a long analysis
2 that needs to be done in order for us to redo our
3 modeling for this project.

4 So, you know, I don't know where I am
5 today. I'm hearing that it's actually an easy
6 thing to do, but I will note that, you know, in
7 further data requests.

8 HEARING OFFICER CELLI: I think we were
9 mostly just talking about Staff time, really.
10 That's the question, is how long, you know, how
11 much time. But, Commissioner Boyd, any further
12 questions on this, or for these parties now?

13 PRESIDING COMMISSIONER BOYD: No. No,
14 thank you.

15 HEARING OFFICER CELLI: Commissioner
16 Weisenmiller?

17 MR. WEISENMILLER: No.

18 HEARING OFFICER CELLI: Anything else
19 from any of the parties on the issue of the
20 accounting surface before we move on to cumulative
21 impacts?

22 None. Then let's move into cumulative
23 impacts.

24 MR. GALATI: Again, I'm trying to point
25 out to the Commission that we asked for some

1 significant guidance, we asked Staff. They won,
2 the first half hour of the workshop. What do we
3 use as a significant threshold for cumulative
4 impact? Would it be one foot of draw down, would
5 it be 25 feet of draw down, would it be you affect
6 a seep and spring that's a certain flow? What
7 would be the significant threshold above which you
8 have an impact and below which you don't? Day
9 one. I've never received an answer.

10 Then we start to see that when it comes
11 to cumulative impacts that Staff is worried about
12 future projects that are not yet planned nor
13 identified. And I start to get concerned that a
14 cumulative impact analysis might take to place
15 what would the I-10 corridor look like if all the
16 interconnection requests were approved, even
17 though we know there was, at one point in time,
18 50,000 megawatts of interconnection requests and
19 lots of right-of-way grant applications, and
20 things that are not real projects. And we all
21 know that.

22 And so we asked this question so that we
23 can -- and we researched the law to determine that
24 there has to be a certain amount. I think
25 actually we agree on the general parameters.

1 Things that are too speculative shouldn't be
2 included in a cumulative impact analysis, and
3 things that are specific enough certainly should.
4 And so what we tried to do was to tell you where
5 it is, where the breaking point is, and we believe
6 the breaking point is that someone must have filed
7 a complete enough an application so that you can
8 meaningful do the analysis.

9 With just a right-of-way grant
10 application, for example, there's no understanding
11 of what that project may look like, how much water
12 it might be using, what -- for a cumulative
13 impacts analysis on biology or any other area,
14 unless you know more about the project -- and the
15 case law is pretty clear both in CEQA and NEPA
16 that you are not required and, in fact, I think
17 that misinforms the public to try to over-estimate
18 impacts of that nature.

19 So what we said is if there -- there
20 needs to be a specific application. We think for
21 the Energy Commission that's an AFC and that it's
22 data adequate, that it can be included in the
23 analysis. We said when it, for BLM land they're
24 not only has to be a right-of-way grant
25 application, but a POD, and a Plan of Development,

1 which is specific enough so that an evaluation can
2 take forward, go forward.

3 And then for non-Energy Commission or
4 non-BLM lands, we believe there should be a
5 completed application for somewhere, for somebody
6 so that you can go get that application and do a
7 meaningful analysis.

8 The second part of the test is, has to
9 do with obtaining environmental information and I
10 think the case law is pretty clear. Staff
11 continues to say that we are asking that you must
12 have passed regulatory hurdles. We're not. We're
13 saying you must start the environmental process.
14 That would be the day that you started with the
15 Energy Commission and you were data adequate,
16 there's enough information to be able to conclude
17 that. At BLM, we believe, that --

18 HEARING OFFICER CELLI: I'm sorry, let
19 me -- somebody is speaking on a phone. I'm going
20 to ask you to please mute your phone while we get
21 through the parties' discussion and then we'll
22 have a public comment period later.

23 I'm sorry, Mr. Galati, go ahead.

24 MR. GALATI: And in using the BLM
25 handbook we originally proposed that a Notice of

1 Intent had to be filed. We then got comments from
2 BLM where they said, you know, sometimes an
3 Applicant has started enough environmental studies
4 that they should be included in cumulative impact
5 analysis. So in our reply brief we modified our
6 stipulation and our request for order to say if
7 BLM were to, based on information they have, know
8 that an NLI is imminent, that they're actually
9 about ready to start the environmental review,
10 that makes sense to include them as well.

11 And then we used the CEQA determination
12 of projects that have -- I incorrectly called it a
13 Notice of Determination, it's actually a Notice of
14 Preparation of an environmental document that
15 signifies something has been done and there's
16 enough information so that you can start gathering
17 information.

18 Our purpose here is to get on the same
19 level playing field. And these are not questions
20 of fact, it's a question of fact which project to
21 include, but it's not a question of fact of what
22 standard that project has to meet. There's
23 already a standard. It says it's got to be a
24 foreseeable, probable project. We're to avoid
25 speculative projects.

1 In addition, Staff had told us that
2 their primary concern is that in the future, some
3 day, there might be people who want to use this
4 water for other power plant development, and they
5 pointed to ready study, they pointed to BLM
6 planning. We would say that those things are not
7 yet specific enough to include in an analysis. I
8 can't tell you where those projects are going to
9 be, I can't tell you how much water they're going
10 to use. I have no idea how much land BLM will
11 allow to be developed. So how can you do a
12 meaningful analysis?

13 We wanted you to put some standards on
14 this so that the Staff would be forced to take
15 into account the projects that would qualify under
16 the law.

17 HEARING OFFICER CELLI: Thank you.
18 Staff, please.

19 MS. HOLMES: Thank you. Excuse me. I
20 wanted to respond one issue.

21 It seems to me that Mr. Galati addressed
22 two issues. One had to do with significant
23 thresholds and the other had to do with which
24 projects get included in cumulative impacts
25 analysis. Ms. Mayer will be addressing the

1 latter, but I wanted to correct the record with
2 respect to the former.

3 And that is that Staff has never refused
4 to indicate what its position is regarding
5 significant thresholds for water use. It's been
6 clear in a number of cases, including cases
7 Mr. Galati has worked on, Staff has traditionally
8 and the Commission has held, and the Commission
9 has adopted, a five foot draw down for wells and
10 any impact on seeps or springs that support
11 important biological resources. Those have been
12 Staff thresholds for more than a dozen years.

13 There has been some discussion in some
14 cases about the fact that the five foot criteria
15 or threshold for wells may not be appropriate in
16 certain ground water basins, but we have not yet
17 come up to a case where that has been true, so we
18 haven't had to reevaluate that.

19 So I just wanted to correct that before
20 Ms. Mayer gets into the discussion about which
21 projects are reasonably foreseeable for purposes
22 of CEQA.

23 HEARING OFFICER CELLI: Thank you.

24 MS. MAYER: Thank you. (Indiscernible)
25 the two problems here. One is what future

1 projects to include. A project that's too
2 speculative is not going to have enough
3 information to analyze. But, before you get to
4 that point, you have to know what projects are too
5 speculative to analyze and you have to know what
6 the plans are and what those projects might be and
7 what information is out there. And that's a
8 factual determination.

9 What future projects are probable in
10 their consideration for impacts is a factual
11 determination. The proposed stipulations, I
12 believe, it incurs substantial legal risk under
13 CEQA and NEPA. You need and don't even form a
14 sturdy floor, much less a ceiling for what should
15 be included. CEQA guidelines for what constitutes
16 a probable future project require investigation of
17 facts. The lead agency either compiles its own
18 list under its own, you know, does the
19 investigation and compiles its own list, or uses
20 regional planning documents, or both, CEQA
21 guideline 15130.

22 In the past Staff has used both methods,
23 especially for evaluating cumulative air impacts.
24 And there's nothing in case law to contradict
25 that. Indeed, case law encourages a wide view of

1 what a future project should be merited for
2 consideration in the analysis, not a narrow view
3 at all. In San Franciscans for Reasonable Growth
4 the court found it more practical and reasonable
5 (indiscernible) projects that have not surpassed
6 all regulatory hurdles. And despite what
7 Mr. Galati says, if you're asking for an NLI to be
8 published and the application to be complete, I
9 mean that's a regulatory hurdle.

10 What's under environmental review does
11 not, in case law does not mean any particular
12 agency requirement. In Gray vs. County of Madera
13 the court said any future project where the
14 Applicant has, where the Applicant has devoted
15 "significant time and financial resources to
16 prepare for regulatory review should be considered
17 as probable." And then, further, in Terminal
18 Plaza vs. City and County of San Francisco the
19 "inability of an agency to identify impacts does
20 not relieve it of the responsibility to include
21 the impacts in the analysis as specifically as
22 possible."

23 So those are just some of the framework
24 for CEQA. In other words, you need to go out, you
25 need to find out what's there, and you need to

1 include anything that's practical in your analysis
2 as a foreseeable, reasonably foreseeable future
3 project. It is a question of reason. It's not a
4 broadline threshold; maybe that's frustrating, but
5 it isn't.

6 Addressing NEPA just for a second, first
7 of all is a joint EIS that's going to be reviewed
8 by BLM, it's going to be reviewed by the
9 solicitor's office of the Department of Interior.
10 Last of all, any EIS is reviewed by the U.S. EPA.
11 So what constitutes appropriate cumulative effects
12 analysis ultimately is really going to be the call
13 of the federal agency. But just as a notation, in
14 my research it was very clear that NEPA, the NEPA
15 process for cumulative analysis always uses
16 planning documents. It's very broad,
17 understandably, considering the impact of a
18 federal project. And that even in a Ninth Circuit
19 decision, Native Ecosystems Council vs. Stombeck
20 (phonetic), even included a memo as a planning
21 document that foresaw, reasonably foresaw a
22 project.

23 So the plan documents that are currently
24 available, I mean, again, it doesn't mean that the
25 project should be in the (indiscernible) analysis

1 but that does mean that the staff has to at least
2 consider it. Current plan documents include a BLM
3 plan development list, which is a step beyond
4 applications as got noted, the Department of
5 Energy and BLM Development and Program
6 (indiscernible) EIS for projects in the Genesis
7 area, the Commission's and other agencies' Desert
8 Renewable Energy Conservation Plan to concentrate
9 solar development, and most feasible, at least
10 environmentally sensitive parts of the desert, and
11 the Renewable Energy Transmission Initiative to
12 facilitate transmission of renewable energy.

13 So Staff ostensibly and, I believe,
14 legally, appropriately is looking at these
15 documents to find other projects. Ultimately what
16 becomes a reasonably foreseeable future project is
17 a question of fact.

18 HEARING OFFICER CELLI: CURE, anything?

19 MS. GULESSERIAN: The issue is the legal
20 standard for including future projects in the
21 cumulative impact under CEQA and NEPA, and we've
22 stated that the legal standards are set forth in
23 the statutes and the case law, and in agency
24 guidance that the parties have included in their
25 briefing.

1 Examples of the standards are closely
2 related, reasonable, foreseeable, probable future
3 projects, reasonably foreseeable future actions
4 regardless of what agency undertakes those other
5 actions. For each of those projects the nature of
6 each environmental resource being examined, the
7 location of the project and its type must be
8 considered. And the geographic scope of the area
9 affected by the cumulative effect. Those are just
10 a few examples of what factors must be considered
11 in determining what is a reasonably foreseeable
12 future project that needs to be analyzed in the
13 cumulative impact analysis.

14 The Commission is required to conduct
15 reasonable efforts to discover, disclose, and
16 discuss past, present, and future projects
17 regardless of whether they require environmental
18 review under CEQA.

19 HEARING OFFICER CELLI: I'm sorry. I
20 want to make sure -- she's on the record? Okay,
21 sorry for interrupting. Go ahead.

22 MS. GULESSERIAN: No problem. And this
23 speaks to what Staff mentioned, is that what is
24 excluded will be projects that are speculative.
25 What is speculative is a question of fact. Where

1 preparation of an environmental document is almost
2 always evidence of foreseeability, the case law
3 does not require the preparation of an
4 environmental document to be, to make a project
5 foreseeable.

6 Again, what the Applicant has requested
7 in their presentation regarding different specific
8 timing we believe are all questions of fact that
9 we would be addressing in the future. Thank you.

10 HEARING OFFICER CELLI: So getting back
11 to the question of -- what is it that you think
12 Staff is looking at that they should not? What is
13 it that they are requesting that is inappropriate?

14 MR. GALATI: Don't know. They wouldn't
15 tell me, number one. Number two, they failed to
16 articulate for you how they'd do it. They told
17 you they won't do speculative and they told you
18 they'd do foreseeable. But, look, the law is made
19 up of elements and without the definition of the
20 elements it doesn't mean anything. It doesn't
21 mean anything to say the word reasonably
22 foreseeable.

23 HEARING OFFICER CELLI: Sure, but you
24 read the cases and the cases say --

25 MR. GALATI: Okay. So let's look at BLM

1 Handbook, because that's a handbook to say here's
2 how you do it.

3 HEARING OFFICER CELLI: It says "you may
4 consider."

5 MR. GALATI: That's right, it does.
6 Says "you may consider." So what we're asking for
7 is to stop a fight later because Staff believes
8 something is reasonably foreseeable and we get in
9 a long fight. Let's decide on what the standard
10 is going to be now so this Applicant knows, and
11 every Applicant knows, how will Staff measure
12 reasonably foreseeable.

13 It's not just fact-specific; there's
14 guidance that needs to be done on that. You can't
15 just say I think it's feasible, reasonably
16 foreseeable. That's not fair. What is fair is to
17 say these are the factors that I would use to
18 determine when a project is reasonably foreseeable
19 and probable, and these are the factors that if
20 they're not there, they won't be.

21 We took a shot at giving you some. If
22 we want to come up with different ones, great, but
23 the idea that we can sit here, all these smart
24 people, and can't say how we're going to look at
25 it, that's what I find frustrating and it's

1 setting us up for a fight, and it's setting up
2 every Applicant for a fight based on what Staff
3 selects and what they don't select. They ought to
4 be able to tell you.

5 HEARING OFFICER CELLI: So your concern
6 is that you don't, you suspect that there may be
7 some projects that will be considered that are
8 speculative or not foreseeable or something that
9 doesn't comport with the kinds of factors that
10 have been given in the cases?

11 MR. GALATI: Yeah, that is my suspicion.

12 HEARING OFFICER CELLI: It's the
13 suspicion that we can't go beyond that. Let's
14 hear from Staff.

15 MR. GALATI: We had seen a list and that
16 list has some project and had just right-of-way
17 grant applications. We saw a list on a project
18 that BLM knows has been withdrawn.

19 So, yeah, we've seen what we believe
20 Staff taking that suspicion and given us some
21 reason to believe in that.

22 HEARING OFFICER CELLI: And the basis
23 for your suspicion is that there was a project on
24 it that was withdrawn and --

25 MR. GALATI: And Staff's going to

1 include it in their cumulative impact analysis.

2 MS. MAYER: No, BLM dropped it and BLM
3 told us they were dropping it from the POD list.

4 HEARING OFFICER CELLI: So that's one,
5 and then what was the other?

6 MR. GALATI: I'm sorry?

7 HEARING OFFICER CELLI: I'm sorry, there
8 was one project where you said it was dropped that
9 was included.

10 MR. GALATI: And there was a project
11 that has not filed a Plan of Development, just a
12 right-of-way grant application.

13 HEARING OFFICER CELLI: Okay.

14 MR. GALATI: There are also projects on
15 the list that we have seen that filed their Plan
16 of Development and have done nothing else.

17 HEARING OFFICER CELLI: Okay, but --

18 MR. GALATI: So at some point there
19 needs to be a clear cutoff. We chose one.

20 HEARING OFFICER CELLI: Under NEPA,
21 though, the POD is an adequate basis.

22 MR. GALATI: Not if it's not complete.
23 Why would it be a minimum POD that requires
24 hundreds of pages of updating before you can begin
25 the environmental review?

1 HEARING OFFICER CELLI: Wow, that's a --
2 but I'm just suggesting that perhaps the list is
3 enough and if you're asking Staff to make a
4 further analysis and determine the seriousness of
5 each project on that list, that that sets them
6 back.

7 MR. GALATI: They have to do that for
8 everybody.

9 HEARING OFFICER CELLI: Right, that's
10 true.

11 MR. GALATI: Right?

12 HEARING OFFICER CELLI: But the law
13 seems to favor a more complete analysis, not a
14 less complete analysis.

15 MR. GALATI: The law, the law favors an
16 accurate analysis. You can --

17 HEARING OFFICER CELLI: Well,
18 foreseeability and reasonableness --

19 MR. GALATI: Yes. And so we propose
20 some guidance there to determine what's reasonable
21 and what's foreseeable. I think that's fair.

22 HEARING OFFICER CELLI: Let's hear from
23 Staff.

24 MS. MAYER: I think we have. I mean,
25 it's the case law may be frustrating but that's

1 the way it is. We would be remiss if we didn't at
2 least consider all these trends and, by your own
3 case that you quoted, solar development that's in
4 the area, we would be remiss not to at least
5 examine it for a probable future project.

6 Whether a project has enough specifics
7 that it really, truly can be analyzed is a
8 different question. And, obviously, if it doesn't
9 have enough specifics -- for example, you don't
10 know how much water it's going to use -- it's
11 probably too speculative. But we can't do that in
12 a vacuum. I can't just draw a line for you, Staff
13 cannot just draw a line for you today, even on the
14 POD list. That's one reason why BLM is working
15 with us to give us that list that they have
16 thoroughly vetted and taken time to do, to go
17 through and say okay, what projects are truly, you
18 know, realistically going to happen here.

19 And I believe, and for the most part,
20 that we are following that list. So we're not
21 going wildly outside that, but the law says, the
22 case law says, is really clear, that we need to
23 look at planning documents. The Staff cannot just
24 pretend those planning documents don't exist,
25 especially when you have an problematic

1 Environmental Impact Statement for the area. I
2 mean, it simply has to be looked at.

3 MR. GALATI: Not at all disagreeing with
4 looking at those things that are adopted, that are
5 out there, but if Staff is looking at a plan that
6 is not public, that is not out there, that has a
7 number of megawatts and is making estimates of how
8 much water would be used, we think that that's not
9 appropriate.

10 HEARING OFFICER CELLI: And I, you know,
11 I would just say -- and I'm going to give
12 Ms. Gulesserian a chance in a second -- but I do
13 believe that there appears to be enough case law
14 out there that it gives enough guidance for the
15 parties to be governed by this, and you have Staff
16 counsel, you have management overseeing what Staff
17 is doing. And I don't, we have no facts before us
18 that say that there's any sort of deviation from
19 what Staff normally does.

20 So the main concern I have is that this
21 is a factual question and it's a fight that may
22 have to happen, as you say. This may be a fight
23 coming down the pipe but it's so, it's such a
24 factually driven question that it's awfully early
25 in the process to start looking at what is or is

1 not allowable in the discretion of Staff to be
2 considered as a project. I mean, it seems to me
3 the projects will fall in and fall out, and that's
4 something that you, as an advocate, will have to
5 point out and present to the Committee.

6 But I just question whether it's worth
7 the time and trouble now, at this point, to get
8 into starting to slice those kinds of hairs this
9 early in the game when we haven't taken in any
10 evidence. I think it's an evidentiary question.

11 MR. GALATI: Maybe if we had some
12 assurance from Staff that doing such a cumulative
13 impact for the Genesis project would not delay it
14 and would not be a reason that this project
15 shouldn't be processed in time for our funding,
16 not this reason alone.

17 HEARING OFFICER CELLI: You know, let's
18 do this. I want to hear from CURE because they
19 didn't get a chance to weigh in and then we'll
20 look and see what it is that you think that Staff
21 is doing right now, just by way of sort of
22 settlement, if we can have a little conference
23 here and see what it is that maybe the parties can
24 have a meeting of the minds, after we hear from
25 Ms. Gulesserian on her, on this issue.

1 So please, go ahead.

2 MS. GULESSERIAN: CURE agrees with Staff
3 that it's squarely of question of fact. I do not
4 know if CURE, as an Intervenor, is privy to the
5 list that has been generated, which I didn't see
6 attached to any brief. But I admit that I am
7 catching up on all the filings.

8 But what is not on the list would be a
9 question of fact that I'm not prepared to discuss
10 questions of fact today or a potential
11 stipulations, but that we could be prepared to do
12 at some point in the future.

13 Thank you very much.

14 HEARING OFFICER CELLI: Thank you.

15 MS. MAYER: I don't, I don't think that
16 there's any -- excuse me. I don't think there's
17 any particular -- cumulative impacts is going to
18 be, obviously, a part of every solar project's
19 analysis. With luck it will be somewhat
20 repetitive so that Staff gets faster as Staff goes
21 along, you know. But not discounting the fact
22 that there is considerably more water involved
23 with this one.

24 HEARING OFFICER CELLI: Commissioner?

25 PRESIDING COMMISSIONER BOYD: Well, you

1 began to answer, I believe, the question I was
2 going to ask. And that is will Staff apply
3 basically the same analysis to all the projects in
4 this same area, and we've kind of identified those
5 projects today. This project is bookended by
6 other projects.

7 MS. MAYER: Yes, geographical scope
8 means even it -- that's a question of, obviously
9 to be determined as well. But if it's in the same
10 area, I don't see any need for a different
11 analysis because we're talking about what future
12 projects are really going to happen within a
13 certain geographical area. And that, either a
14 project is, you know, progressing along and has
15 some impacts that can be analyzed, or it hasn't.
16 And that, really is that to really come outside
17 the vacuum of Genesis or any other particular
18 project, it's whether those projects have enough
19 data to analyze.

20 PRESIDING COMMISSIONER BOYD: Okay. So
21 it's kind of like first project to the trough is
22 going to have to endure the time it takes to do a
23 cumulative analysis. The others may benefit from
24 them, and I assume the analysis is the same for
25 all regardless of the amount of water that project

1 in question is going to be using.

2 MS. MAYER: Well, excepting for larger
3 impacts on seeps and springs and, you know, larger
4 impacts that may affect Colorado River water or
5 just the ground water in general, yes. It is
6 somewhat a, you know, it does have some arrows in
7 the back for being first.

8 PRESIDING COMMISSIONER BOYD: By the
9 same token, the first project to the trough
10 hypothetically may, you know, will begin, will use
11 some more water but may not be that project which
12 pushes the area off the cliff in terms of there
13 being an eventual problem. And yet, you know,
14 where do you draw the line.

15 MS. HOLMES: Well, I think that that, I
16 mean I think that that is one of the reasons that
17 we want to do a comprehensive cumulative impacts
18 analysis is that we don't want to identify a
19 single project as causing a cumulative impact or
20 causing an impact that is cumulatively
21 considerable. That's the whole purpose of the
22 cumulative impact analysis is to determine whether
23 incremental effects of projects together cause a
24 problem, not to target a single project.

25 PRESIDING COMMISSIONER BOYD: And yet

1 it's the subsequent projects that may really cause
2 the problem.

3 MS. HOLMES: Well, I think that we will,
4 the way that the Staff would proceed would be to
5 identify contributions by this and other projects
6 which are before the Commission in light of the
7 impacts associated with other projects, some of
8 which I believe are not before the Commission, and
9 try to come up with some sort of mechanism so that
10 any mitigation measure that's proposed is
11 reasonable and represents a project's fair share.
12 I don't think Staff, in fact, believes that it
13 would be wrong as a matter of law to require
14 mitigation from a single project for a cumulative
15 impact that's been created by a whole series of
16 other projects.

17 PRESIDING COMMISSIONER BOYD: I've not
18 been challenged for drifting into the next
19 question yet, but it does kind of.

20 MR. GALATI: If I might add, because I
21 think it might be able to bring this to closure,
22 is Staff had originally listed cumulative impacts
23 as a reason why the Genesis project would be
24 difficult to handle EIR funding. If that is no
25 longer the case, and the cumulative impacts

1 analysis would be similar, and while we might not
2 agree on what project's in and what project's out,
3 but as long as it's not a reason for Genesis alone
4 to be delayed, we are comfortable proceeding and
5 we might be bringing to you another time of why a
6 project should be in or should be not.

7 It is on the list because it was listed
8 by Staff as a reason for Genesis, not other
9 projects, Genesis, to be delayed.

10 MS. HOLMES: Well, I think that to the
11 extent that Mr. Galati is talking about which
12 projects would be included, I would agree. But I
13 would also go back to the point that Commissioner
14 Weisenmiller made earlier. To the extent that
15 this project's contribution to cumulative impacts
16 is more considerable than others because it's
17 using ten times as much water, then I suspect that
18 that will become the subject of more focused, more
19 intense, more complicated analysis and litigation,
20 and that would incur additional time.

21 So if the question is just which
22 projects to include, I agree that that should not
23 take time such that the EIR funding deadline would
24 present a problem. But to the extent that the
25 impacts, the cumulative impacts associated with

1 this project may be greater or the project's
2 contribution may be greater than other projects, I
3 think that does contribute to our concerns about
4 schedule.

5 HEARING OFFICER CELLI: Ms. Gulesserian,
6 did you want to weigh in?

7 MS. GULESSERIAN: I have nothing to add.
8 Thank you.

9 MR. BUSA: Mr. Celli, if I could just
10 make one comment and doing this because Scott's
11 representing some of these other projects, too.
12 But we keep hearing Genesis is using ten times as
13 much water as other projects. If you just took
14 the two Southern Millennium projects, added their
15 water use together, that's 900 acre feet a year.
16 We're proposing less than double that. So I just
17 wanted to set the record straight on this ten
18 times. We're really proposing 1,600 acre feet
19 and, as an example, the two of those projects are
20 proposing 900 acre feet for their dry cool
21 projects.

22 HEARING OFFICER CELLI: Now I'm getting
23 confused. Let's talk about where is this ten
24 times come from?

25 MS. MAYER: Can I give you these

1 numbers?

2 HEARING OFFICER CELLI: Please.

3 MS. MAYER: From Worley Parsons'
4 Executive Summary of the Recluses Dry Cooling,
5 presented by the Applicant, it would -- Genesis
6 would pump 1,644 acre feet a year with wet
7 cooling, and with dry cooling 132 acre feet a
8 year, which is a difference of 1,512 acre feet a
9 year. So we're talking about similarly sized when
10 we talk about the ten times, we talk about the
11 difference, we're talking about similarly sized
12 project.

13 But that's just a whopping difference.
14 I mean, the difference between wet and dry cooling
15 on this project alone, leaving everybody else out,
16 is 1,500 hundred feet. And our Staff has told us
17 that's about half the current surplus of this
18 eastern part of the basin in a normal year of
19 precipitation. On top of that, the USGS is
20 predicting a long-term lower than average
21 precipitation for the next several years.

22 HEARING OFFICER CELLI: Okay.

23 Ms. Holmes, you looked like you wanted to chime
24 in. Okay.

25 PRESIDING COMMISSIONER BOYD: And again,

1 I'm just trying to clarify when we're talking
2 about cumulative water use and impacts. I'm not
3 talking about the difference between wet cooling
4 and dry cooling, I'm talking about other
5 Applicants using amount of water that are not ten
6 times greater than the amount of water that
7 Genesis is proposing.

8 So if we're talking about cumulative
9 impacts and water use, I just wanted to make it
10 clear on how much water one for our project was
11 using compared to another Applicant who's
12 proposing to use 900 acre feet of water.

13 MS. HOLMES: And I agree. I don't
14 disagree with him. We were talking on a per
15 megawatt hour basis, so we were talking about
16 water, the amount of water that it takes to
17 produce a megawatt hour of electricity, not the
18 absolute amount of water.

19 Thank you for that clarification.

20 HEARING OFFICER CELLI: Thank you. And,
21 Commissioner Weisenmiller, you had a question?

22 MR. WEISENMILLER: Yeah. I want to move
23 the attorneys back from the factual questions to a
24 legal question. And I just wanted to understand
25 the relationship between the cumulative impact

1 study, cumulative impact analysis you have to do
2 with the definitions under NEPA versus CEQA. Are
3 they identical, are they different, and, if
4 they're different, which is the most stringent?

5 MR. GALATI: I would agree with Staff
6 that the case law, there are certain case law in
7 NEPA that says you may take into account some
8 things that might be broader. The examples that I
9 saw is when that agency was taking actions as
10 opposed to projects that were being proposed for
11 approval with that agency.

12 When there were projects proposed by
13 others that the agency had to review and approve,
14 I think that they are identical to CEQA. And it's
15 that since NEPA applies to a federal agency taking
16 an action, there are some things that the agency
17 might do by memo, but that's the agency doing it
18 for themselves as opposed to an Applicant coming
19 in, asking for permission from that agency. But
20 when that happens, I believe that they are
21 identical.

22 And they use very similar terms,
23 "reasonably foreseeable," "probable," and avoid
24 "too speculative." And, when in doubt, try to
25 include it. I have no problem with that.

1 Our concern really was that we thought
2 because it was that we were being singled out from
3 a cumulative analysis as being delayed. And,
4 again, I'll go to the point. The impact analysis
5 on direct impacts, those are going to develop some
6 sort of mitigation if there's a direct impact. If
7 there's no significant impact there, you take the
8 impact of others, after mitigation, and put them
9 together. And if cumulatively that's a
10 significantly impact, that's what we're going to
11 mitigate.

12 I disagree with Ms. Holmes that that is
13 any more difficult with 600 acre feet versus 1,600
14 acre feet.

15 MS. ROBERTS: Excuse me, Commissioners,
16 I am joining this phone call. My name is Holly
17 Roberts.

18 HEARING OFFICER CELLI: Hi, Holly.

19 MS. ROBERTS: Palm Springs Field Office.

20 HEARING OFFICER CELLI: All right,
21 Holly, did you want to weigh in on this question?

22 MS. ROBERTS: Well, just to clarify one
23 thing on reasonable/foreseeable. We did look at
24 more than just (indiscernible) development. We
25 are required to go through (indiscernible) these

1 companies and the fact that they have submitted a
2 POD is one thing, because frequently we do get
3 very poor plans of development. But we try to
4 keep all these companies as quickly as possible.

5 (Thereupon, the microphone was not
6 turned on and a portion of the hearing
7 proceeded unrecorded.)

8 PRESIDING COMMISSIONER BOYD: I'm sorry.
9 I'm going to have to put a mic on you because I
10 got -- the court reporter pointed out that this
11 was not being picked up.

12 MS. ROBERTS: Okay.

13 PRESIDING COMMISSIONER BOYD: So I'm
14 going to ask you to repeat, if you wouldn't mind.

15 MS. ROBERTS: Okay. Whoa. Are you
16 hearing me?

17 PRESIDING COMMISSIONER BOYD: Yes, loud
18 and clear.

19 MS. ROBERTS: Okay, got you. Well, the
20 clarification that I wanted to add was that it was
21 not just a Plan of Development that BLM looks at.
22 We are required to look at due diligence from
23 every proponent and, when a plan comes in, we are
24 supposed to have time to sit down with them, go
25 through a series of comments to make sure that the

1 Plan of Development meets all of our requirements.
2 In other words, we have a proposed action good
3 enough to start analysis.

4 But there's other things that on go at
5 the same time the Plan of Development, which also
6 fit in to due diligence, and that is the fact that
7 a company shows us that they are indeed trying to
8 secure contracts for their environmental
9 consultants and initiate the field investigations
10 that go behind a good Plan of Development so you
11 can actually refine a proposed action. We have,
12 through due diligence, and I think it was Scott
13 had pointed out, dropped this little projects,
14 they were nonresponsive.

15 We are initiating another go-round of
16 due diligence requiring that all of these
17 companies show us that they are, indeed, pursuing
18 their environmental consultant contracts and
19 initiating the field work, all field studies, this
20 year to support refining their Plan of
21 Development.

22 These things come and go on such a
23 regular basis for BLM. Clearly we have players
24 that we're not sure are bona fide developers.
25 They do not compare to the likes of Nextera and

1 Solar Millennium, who we think have done a pretty
2 good job.

3 The other thin I think from the BLM
4 perspective in terms of cumulative affect, I think
5 the CEC, Scott has done a great job trying to pull
6 together some of the project-specific aspects of
7 cumulative affect, and particularly this water
8 issue. And even though one project may use more
9 water than another, I think there's clearly some
10 offset compensation that should be accounted for.
11 And there are so many ways to offset what could
12 happen to this water basin, so I hope that we all
13 remain flexible and work forward with that kind of
14 mitigation strategy.

15 And lastly, I guess, there are other
16 projects far greater in terms of water use that
17 are not being compared with solar, including
18 things like Eagle Crest Mountain pumping storage,
19 which is essentially a FIRC (phonetic) project, a
20 federalized project, and they are, it's a very
21 difficult, complex thing to analyze and compare
22 their relationship to other ongoing things. I
23 just hope we all remain flexible and put things in
24 context, say look at some offset compensation
25 strategies for our water issues out there.

1 HEARING OFFICER CELLI: Thank you very
2 much; very, very clear, Ms. Roberts.

3 Anything else? Please, Ms. Mayer.

4 MS. MAYER: Sure. I just wanted to
5 support that and also, as far as NEPA versus CEQA,
6 from my research NEPA was a bit broader and a bit
7 more careful, understandably, a federal agency
8 taking a federal action. But in terms of not
9 looking at other agencies, I want to point you to
10 this EPA guidance that I quoted in the brief.

11 And keep in mind EPA is the final stop
12 for this joint EIS that we're -- all the joint
13 EISes that we will do. Not only do you want to
14 include reasonably foreseeable future actions,
15 even if they are not specific proposals, the
16 criterion for leaving them out of speculative but,
17 "the NEPA document should include discussion of
18 future actions to be taken by the action agency,
19 and should also incorporate information based on
20 the Planning Documents of other federal agencies
21 and state and local governments." In other words,
22 we really have to look at what's out there and
23 that's what we're doing.

24 HEARING OFFICER CELLI: Anything from
25 CURE?

1 MS. GULESSERIAN: Nothing to add. Thank
2 you.

3 HEARING OFFICER CELLI: Thank you. I
4 think -- are we on to the next question? Unless
5 there's any further -- Mr. Galati?

6 MR. GALATI: No, thank you. I think we
7 resolved that.

8 HEARING OFFICER CELLI: And I kind of
9 think that we resolved the last question, too,
10 which is the question of unidentified projects,
11 unless there's more on that that I didn't catch.
12 I think that the briefs make it clear that Staff
13 is going to, is going to include certain large
14 scale development plans in their analysis and I
15 like the way they said it. They can't unring the
16 bell; they're aware of it, they know it's out
17 there.

18 So why don't you go ahead and comment on
19 that, Mr. Galati.

20 MR. GALATI: Our concern is this. Staff
21 told us in a workshop, we're concerned about you
22 guys using water because there could be ten more
23 solar projects using the same amount of water, and
24 we think that someday those might come. What I
25 don't want to see is those ten future solar

1 projects that are nowhere documented being rolled
2 into our cumulative impact analysis for that
3 purpose.

4 If there is a Planning Document, let's
5 take a look at some other Planning Documents, like
6 a General Plan. If a General Plan is undergoing
7 revision, you're not going to take into account
8 the General Plan things until they're adopted,
9 because they could change. It doesn't mean you
10 don't take out the other General Plan.

11 So if there are studies being done that
12 show that there could be transmission lines built,
13 absolutely you should take those projects
14 involved. But to assume that there will be X-
15 number of solar projects in this area when there
16 are no applications for that, without consulting
17 with BLM and what their long-term management goals
18 are, the BLM's plans, I think, for the BLM land,
19 probably would be more useful to be using than
20 something else that might be done.

21 And that's my primary point. It's let's
22 look at the land manager's plans. Those are the
23 most important.

24 HEARING OFFICER CELLI: Staff?

25 MS. MAYER: Of course we have a, you

1 know, we have a mandate to conserve the resource
2 in general from the Constitution and regulations
3 and law. But, yes, the Staff has been actively
4 working with BLM and will continue to.

5 Our very first workshop we sat down with
6 BLM, the very first thing we talk about was
7 reasonably foreseeable and getting out this POD
8 list so that we knew, at least, of those projects.
9 I don't think, you know, as how he pointed out
10 we're not limited to that list, and I think it
11 would be kind of putting on blinders to do so.
12 But absolutely, it's a very, very important list
13 of what is probably most likely to happen in this
14 region. And that's a good starting base.

15 HEARING OFFICER CELLI: CURE?

16 MS. GULESSERIAN: I agree that the
17 resolution of the last issue would, speaks to the
18 resolution of this issue regarding the
19 Commission's policy on conserving water for use by
20 projects that are not yet identified. I do also
21 believe that the policy is so broad that the
22 Commission will be considering whether the project
23 proposes, is a sustainable project, it enables
24 water resources and other resources in this region
25 to continue to survive such that there will be --

1 it will enable future economic and natural use of
2 the area.

3 And those policies on, you know,
4 conserving water for projects that are not yet
5 identified, you know, are set forth in the Public
6 Resources Code. And we listed those out in our
7 brief. But it involves ensuring that we maintain
8 a quality of environment for the people of this
9 state now and in the future.

10 So to the extent that Staff needs to
11 consider the future of the economy of our state
12 and the natural environment of our state, I
13 believe that they will do that based on
14 substantial evidence in the record.

15 HEARING OFFICER CELLI: Thank you.

16 MS. GULESSERIAN: Thank you.

17 HEARING OFFICER CELLI: Commissioner,
18 any questions?

19 MR. WEISENMILLER: No.

20 HEARING OFFICER CELLI: Commissioner
21 Boyd, anything further on these issues?

22 PRESIDING COMMISSIONER BOYD: Well, I
23 just want to say this has been an interesting and
24 difficult subject area. It meant for a lot of
25 long hours reading and rereading letters and

1 briefs over the past weekend and through last
2 night.

3 And I guess all I can say is that the
4 Committee will deeply ponder this. I note the
5 room was full of managers of other projects. I'm
6 afraid we're in precedential area here a little
7 bit, so we're going to be very careful with what
8 we do but it's predicated on the law and what's
9 been briefed and what's been said here today.

10 I must say I'll probably come away with
11 this case with some thoughts for consideration by
12 our Siting Committee in the future, but that's a
13 long way off policy. We have to deal with the
14 policies we have now.

15 So nothing more in the way of questions.
16 I know we have public comment to deal with yet.

17 HEARING OFFICER CELLI: Thank you.
18 Before we get to the public comment, I just wanted
19 to go back over my notes and ask Mr. Galati, the
20 significance threshold of five feet draw down and
21 any impacts in seeps and springs as stated by
22 Staff, did that clear that question up for you?

23 MR. GALATI: Yeah, if significant
24 impacts to seeps and springs means an impact to
25 the biology supported by those seeps and springs,

1 that did clear that issue up for me.

2 HEARING OFFICER CELLI: That's what I
3 believe they had in mind.

4 Is there anything further from Staff
5 before we get to public comment?

6 MS. HOLMES: Well, the water Staff wants
7 me to remind everybody that I pointed out that
8 Staff has used a five foot draw down in wells as a
9 significant threshold and any impacts on
10 biological, important biological resources, and we
11 are moving into, in several cases, instances in
12 which we are evaluating aquifer characteristics to
13 determine the appropriateness of that five foot
14 significant threshold. I believe I mentioned that
15 before, but if I didn't I think that's an
16 important point.

17 I'm not sure it's particularly relevant
18 to this case, because I don't believe there are
19 any wells that are nearby.

20 MR. GALATI: If I can just address
21 something there. And, again, the words mean
22 things. It's not any impacts to a seep or spring
23 or the biology, it's significant impacts to the
24 biology around the seeps and springs. So if one
25 plant dies over a 30 year period, I would suggest

1 that that might be an impact, but not significant.

2 So it's significant impacts to biology
3 around those seeps and springs. I believe that's
4 the threshold and that's what I thought I heard
5 Staff say before.

6 HEARING OFFICER CELLI: And Staff is
7 nodding.

8 MS. HOLMES: I think that I actually --
9 I don't want to get involved in a long argument
10 about this at this point, but I believe that what
11 I said and what is the Staff position if one looks
12 at past Commission cases including High Desert and
13 Victorville Two and Three Mountain, and CPV
14 Sentinel isn't licensed yet, but they'll be,
15 there's a similar discussion, a Staff assessment
16 there, it's any impacts to important biological
17 resources.

18 In other words, if a biological resource
19 is important in some way, which is a factual
20 determination that we assess at hearings, we don't
21 want that impact to occur. We would --
22 particularly in light of the fact that most of
23 those resources are important because there's very
24 few of them left. And so when we get to a
25 situation where resources are important because

1 they've been threatened over the years by
2 development and draw down and other kinds of
3 factors, the threshold for significance for water
4 impacts is very, very low.

5 HEARING OFFICER CELLI: Thank you. And
6 lastly Ms. Gulesserian.

7 MS. GULESSERIAN: Thank you. I just
8 wanted to clarify that whether these parties agree
9 with a particular significance threshold, it is a
10 question of fact and it would be based on
11 substantial evidence in the record. And as far as
12 I know, there is no particular Commission policy
13 on what the significance threshold is for a
14 particular impact in water, seeps, and springs, or
15 biology. Under CEQA an agency is permitted to
16 establish significance thresholds based on
17 substantial evidence. But here it is mostly done
18 on a case-by-case basis.

19 And so I do not have a position on what
20 the particular, or what the correct threshold is
21 for this case at this time.

22 HEARING OFFICER CELLI: Thank you.

23 Other than it's a question of fact.

24 Now I'm going to ask the people seated
25 in here, in person, are there any members of the

1 public who wanted to make any comment?

2 Seeing none, I'm going to go to the
3 phone line now. I can't put people on hold, so
4 you're just going to have to, you know, speak up
5 if you wanted to make a public comment. So if
6 anyone's on the phone who would like to make a
7 public comment, please state your name.

8 Hearing none I guess we have no public
9 comment today.

10 So with that I'm going to hand the
11 hearing back to Commissioner Boyd for adjournment.

12 PRESIDING COMMISSIONER BOYD: That ought
13 to be rather easy; I already made my final
14 statement, having forgotten about public comment
15 there until you gouged me, so -- anyway, thank you
16 everybody for being here today. And this, as I
17 said, is a very important issue in a short term
18 and over the long term. I mean, well, I'll let it
19 go at that. So if no other comments from up here,
20 I'll adjourn this hearing and thank everybody.
21 Good day.

22 (Whereupon, at 3:36 p.m., the Status
23 Conference was adjourned.)

24 --o0o--

25

CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Prehearing Conference; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said conference, nor in any way interested in outcome of said conference.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of February, 2010.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345