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**State of California**
**Energy Resources Conservation**
**and Development Commission**

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| In the Matter of: | ) | Docket 09-AFC-08 |
| | ) | |
| Application for Certification of the | ) | **Staff's Opening Brief for** |
| Genesis Solar Energy Project, | ) | **Issues Raised at July 21** |
| Genesis Solar, LLC | ) | **Evidentiary Hearings** |
| | ) | |

## INTRODUCTION

At the conclusion of the July 21, 2010 evidentiary hearing for the Genesis Solar Energy Project ("Genesis"), the Committee directed parties to file briefs on staff's finding that construction of the Genesis project would result in unmitigable significant cumulative impacts to cultural resources. In addition, the Committee left open the opportunity for the parties to brief other issues arising from the July 21 hearing.

## CULTURAL RESOUCES

### I. THE GENESIS SOLAR ENERGY PROJECT CONSTRUCTION IMPACTS, WHEN COMBINED WITH IMPACTS FROM PAST, PRESENT AND REASONABLY FORESEEBLE PROJECTS, RESULT IN UNMITIGABLE SIGNIFICANT IMPACTS TO CULTURAL RESOURCES AT BOTH A LOCAL AND REGIONAL LEVEL.

The Staff Assessment estimates that more than 800 sites within the I-10 Corridor, and 17,000 sites within the Southern California Desert Region, will potentially be destroyed. Staff concluded this loss is cumulatively significant. Cumulative impacts cannot be mitigated to a less-than-significant level because these resources will be changed permanently. (Revised Staff Assessment p. C.3-151) Although mitigation measures can reduce many individual site impacts to less-than-significant levels, archaeological excavation and analysis cannot recover all the scientific values of a site. (Revised Staff Assessment p. C.3-152) But archaeological techniques improve rapidly, increasing the amount of extractable information. For example, the quantity and quality of information obtained from things that were excavated a hundred years ago is far less than what would be obtained today. As is the case here; waiting provides an improved data set. (July 21, 2010 transcript, p. 148: 6-12) Ideally, portions of sites must be preserved so they

can be analyzed using these future, as-yet undeveloped, techniques. (Revised Staff Assessment p. C.3-152) No professionally agreed-upon limits for this balance between destruction and preservation exist. General professional archaeological opinion considers the proportion of certain site types that still exist when determining the cumulative impacts and possible public benefits of a project. (Revised Staff Assessment p. C.3-152)

In summary, as each of the potential 17,000 sites or resources in the Southern California Desert Region is destroyed, so also is cultural information. While the loss of cultural information at any one site may not be significant, in aggregate, the loss is significant. (Revised Staff Assessment p. C.3-153) With the removal and even destruction of a cultural resource from a site, there is little opportunity later to recover data through the application of newer archaeological and scientific techniques. (Revised Staff Assessment p. C.3-152)

Data recovery is the primary means for mitigation when resources are destroyed or removed. But data recovery also results in some loss for each resource. Excavation causes destruction of a site and potentially any cultural resources that are found. Over the course of 17,000 resources, the data loss is likely significant and, given the limits of technology, this loss cannot be mitigated below levels of significance. (Revised Staff Assessment p. C.3-152)

While it is impossible to identify the exact threshold between insignificant and significant data loss, identifying that line is not necessary in this case because of the large number of potential sites. The Staff Assessment found destruction of 17,000 resources provides ample opportunity for lost data. (Revised Staff Assessment p. C.3-152)

## II GEOGRAPHIC SCOPE OF CUMULATIVE IMPACTS EXTENDS TO THE SOUTHERN CALIFORNIA DESERT REGION

Cumulative impacts analysis must include "closely related past, present, and reasonably foreseeable probable future projects." (Pub. Resources Code § 15355, subd. (b).) Courts review an agency's decision of which projects to include in a cumulative analysis under the abuse of discretion standard. (*City of Long Beach v. Los Angeles Unified School Dist.* (2nd Dist., 2009) 176 Cal.App.4th 889, 906.) "The primary determination is whether it was reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately." (*Ibid.*, internal quotations omitted.) Agencies must cast a wide enough net to capture reasonably foreseeable projects; an "underinclusive" approach can be "misleading." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (5th Dist. 2004) 124 Cal.App.4th 1184, 1218; *San Franciscans for Reasonable Growth, supra*, 151 Cal.App.3d at 74 (City's "unreasonably narrow" view of cumulative impacts was abuse of discretion).)

In considering which upcoming projects are appropriate to analyze, the lead agency may either list probable future projects, or use existing projections from regional planning documents. (CEQA Guidelines, §15130, subd. (b)(1).) When selecting projects for a list, factors include the "nature of the environmental resource being examined, the location of the project and its type." (§ 15130, subd. (b)(2).)

Thus, projects under construction, approved projects not yet under construction, projects that are undergoing environmental review (*San Franciscans for Reasonable Growth*, *supra*, 151 Cal.App.3d at 73-74). and projects where the applicant has devoted "significant time and financial resources" to prepare for review (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127-1128) should be considered as probable future projects for the purposes of cumulative impacts analysis. A reasonable assumption is that an applicant devoted significant time and financial resources in applying to the Energy Commission and the BLM for the right to develop a solar plant. The BLM process automatically weeds out purely speculative projects by requiring a Plan of Development once an application is submitted. (RSA, B.3-2.) Developing all the required CEQA and NEPA documents is an "especially time consuming and costly process," (*Ibid.*) and, while it is likely not every project will be built, the Committee should find that staff appropriately favored inclusion rather than exclusion when selecting which projects in the desert are probable future projects.

### a) Cumulative impacts within the I-10 Corridor

In this case, staff first considered the projects proposed and under consideration along the I-10 Corridor, which include 13 proposed solar projects, transmission lines and the Chuckwalla Raceway project. (Revised Staff Assessment p. C.3-150) Given the grading and construction required by these projects, staff assumed in its cumulative analysis that these projects would destroy all of the cultural resources within the proposed project limits and that data recovery would be the primary mitigation. Together, these reasonably foreseeable future projects would disturb 48,056 acres, or 39 percent of the total I-10 Corridor. Staff's analysis concludes that these projects would destroy 816 cultural resources, 144 of which were California Register of Historical Resources, (CRHR) and National Register of Historic Places, (NRHP) eligible. (Revised Staff Assessment p. C.3-150) Staff finds that the Genesis project construction impacts, when combined with impacts from past, present, and reasonably foreseeable projects, contribute in a small but significant way to the cumulatively considerable adverse impacts for cultural resources at both the local I-10 Corridor and regional levels (Revised Staff Assessment p. C.3-1)

### b) Cumulative impacts within the desert region

Much of the Southern California Desert Region analyzed for this cumulative analysis consists of the California Desert Conservation Area (CDCA). Eleven million acres of the 25-million-acre CDCA are managed by the Bureau of Land Management, (BLM). Although there are undoubtedly other projects that have been proposed for this region, the projects proposed for construction within the BLM California Desert District make a reasonable proxy for patterns across the large area. Solar projects occupying 567,882 acres and wind projects occupying 433,721 acres have been proposed for this region, consisting of nearly four percent of the CDCA. (Revised Staff Assessment p. C.3-150)

The disturbance of 1 million acres would result in the destruction of at least 17,000 cultural resources, 3,000 of which were CRHR- and NRHP-eligible. (Revised Staff Assessment p. C.3-150 to C.3-151) It is expected that, for these projects on BLM land, significant sites would be subject to historical documentation or data recovery excavations to mitigate impacts. Although these measures would reduce most individual site impacts to less than significant levels, archaeological excavation and analysis cannot recover all the scientific values of a site. Based on the above, the cumulative loss of approximately 17,000 cultural resources is considered a significant impact that cannot be mitigated to less-than-significant levels. (Revised Staff Assessment p. C.3-150 to C.3-151)

Staff finds that the Genesis project construction impacts, when combined with impacts from past, present, and reasonably foreseeable projects, contribute in a small but significant way to the cumulatively considerable adverse impacts for cultural resources at both the local I-10 Corridor and regional levels (Revised Staff Assessment p. C.3-1)

## CONCLUSION

Although mitigation measures can reduce many individual site impacts to less than significant levels, archaeological excavation and analysis cannot recover all the scientific values of a site. Therefore, on a cumulative basis, mitigation based on data recovery, forgoes a future opportunity to obtain data presently unavailable. It is this loss of data that is cumulatively unmitigable.

Dated: August 3, 2010

Respectfully submitted,

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**APPLICATION FOR CERTIFICATION FOR THE**
***GENESIS SOLAR ENERGY PROJECT***

**Docket No. 09-AFC-8**

***PROOF OF SERVICE***
**(Revised 7/23/10)**

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## DECLARATION OF SERVICE

I, Scott McDonald, declare that on August 3rd, 2010, I served and filed copies of the attached **Staff's Opening Brief for Issues Raised at July 21 Evidentiary Hearings**, dated August 3, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[http://www.energy.ca.gov/sitingcases/genesis_solar].**

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

**(*Check all that Apply*)**

### FOR SERVICE TO ALL OTHER PARTIES:

__X__ sent electronically to all email addresses on the Proof of Service list;

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**CALIFORNIA ENERGY COMMISSION**
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

Scott McDonald