COMMITTEE CONFERENCE

BEFORE THE

CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

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

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

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6 Robert B. Weisenmiller, Associate Member

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16 Ken Stein, Nextera

17 Meg Russel, Nextera

18

19 INTERVENORS

20 Rachael E. Koss, Esq., Adams, Broadwell, Joseph & Cardozo

21 Lisa Belenky, Center for Biological Diversity
(via telephone)

22

23 ALSO PRESENT

24 Magdalena Rodriguez, California Department of Fish

25 Tannika Englehard, U.S. Fish & Wildlife Service

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PROCEEDINGS

PRESIDING MEMBER BOYD: I'm Commissioner Jim Boyd, the presiding member of this Genesis Solar Energy Project siting case. We are here today for the presiding member's proposed decision Committee conference. I am joined by the associate member of the Committee, Commissioner Weisenmiller.

Bob, glad to see you made it. I thought I was going to have to say you might be a little late, but you pulled in.

On his right is his advisor, Eilleen Allen. On my left, shortly I think, will be my advisor Sarah Michael. So I won't take time to introduce her when she does come in. Obviously a little late. She's scrambling for me.

And, of course, our hearing officer, Kenneth Celli. And Mr. Celli will be doing the honors shortly after we go through the preliminaries and the formalities of setting up the hearing today.

I think at this point we should have introduction of the parties starting with the Applicant.

Mr. Galati?

MR. GALATI: Scott Galati, representing NextEra.

MR. STEIN: Ken Stein, environmental permitting manager with NextEra.

MS. RUSSEL: Meg Russel, business development director, project director.

PRESIDING MEMBER BOYD: Very good. Thank you.

Staff?

MS. HAMMOND: Christine Hammond. I'm covering for Caryn Holmes and Robin Mayer.

And to my right is Mike Monasmith, the project manager.

PRESIDING MEMBER BOYD: Thank you.

And how about our intervenors?

CURE.

MS. KOSS: Good afternoon. Rachael Koss for California Unions for Reliable Energy.

PRESIDING MEMBER BOYD: Good afternoon, Rachael.

Californians for Renewable Energy, or CARE.

Mike Boyd, are you out there?

He is not.

Intervenor Tom Budlong, are you or Mr. Silver on the phone?

Well, I know the Center for Biodiversity is there.

Ms. Belenky, do you want to say hello?

MS. BELENKY: Yes, hi. This is Lisa Belenky at the Center for Biological Diversity. And Ileen Anderson was unable to attend today because she is at the DRECP

meeting down in Ontario.

PRESIDING MEMBER BOYD: Okay. How's the weather in San Francisco, Lisa?

MS. BELENKY: It's a lovely day here.

PRESIDING MEMBER BOYD: Oh, you sent it all over here then. It's cloudy and dark.

Okay. Are there any elected officials out there who want to be identified? State, county, local jurisdiction, elected folks?

How about federal government agencies such as BLM, Fish & Wildlife Service, others? Anyone want to identify themselves?

MS. RODRIGUEZ: Magdalena Rodriguez, Fish & Game.

PRESIDING MEMBER BOYD: Oh, thank you.

MS. ENGLEHARD: Tannika Englehard, Fish & Wildlife Service.

PRESIDING MEMBER BOYD: Oh, very good.

Could you repeat your name?

MS. ENGLEHARD: Tannika Englehard.

PRESIDING MEMBER BOYD: All right. Mr. Celli is typing your name in as fast as he can into his computer here.

Do we have any regional agency folks, such as the Mojave Desert Air Quality Management District representatives?

County folks of Riverside County?

City folks such as Blythe or others?

Other state regional folks such as the water board? And we just got Fish & Game.

Okay. It's a smaller group. And I was about ready to introduce our public advisor, and I don't see her back here at the moment, but Jennifer Jennings or her staff are usually around.

Okay. I'm going to now turn the hearing over to Mr. Celli to talk about the PMPD, its errata, and then oversee our discussion of the materials we've received on the subject.

Mr. Celli.

HEARING OFFICER CELLI: Thank you, Commissioner. Thank you, Commissioner Boyd.

The notice of availability of the PMPD required that the parties file written comments on or before September 20th, of 2010. The Applicant filed comments or draft comments on the PMPD on September 7th, 2010. None of the other parties have filed comments yet; is that correct?

Correct from CURE.

MS. HAMMOND: That's correct.

HEARING OFFICER CELLI: Staff has not filed comments. The Applicant and the Committee's comments have

been incorporated into a draft errata, copies of which have been made available here today for everyone on the table out in front. Hope you all got a chance to grab a copy of the errata, or the draft errata, I should say.

With that, how I would like to proceed today, unless the parties have something they would like to present, I just thought we would go through Applicant's proposed errata and have a discussion as needed as we go.

So with that, Mr. Galati.

MR. GALATI: Sure. First of all, we'd like to thank the Committee for wading through quite a bit of evidence and writing a PMPD in record time. We appreciate that very much.

Most of our comments have to do with some minor changes to the project description that weren't caught that were in the record, the idea would be to avoid the requirement to amend, so many of the changes have to do with distances or sizes of things. I didn't think we would belabor going through any of those unless the Committee had specific questions. I probably would to the changes that we really would like to discuss.

And that is, in the water area, we think that we proposed a change in Soil and Water, and this is on -- there's a series of them that start on page 24 of our comments, our draft comments.

HEARING OFFICER CELLI: You know what, Mr. Galati, do you mind if I just interrupt for a sec?

MR. GALATI: Sure.

HEARING OFFICER CELLI: Before we jump that far, and I'm working off of your Genesis Solar LLC's comments on the presiding member's proposed decision. Okay?

There were a few places -- let's start on page 4.

PRESIDING MEMBER BOYD: Are you broaching the numerical difficulties we were having?

HEARING OFFICER CELLI: Yes. We were talking about this. There are -- and I realize now that since we're using two different documents, I'm going to have to -- your reference was page 4, Water Treatment Systems, bottom of the page, and that is on page 3 of the draft errata that everyone else has here, okay?

And there were changes, I believe there was highlighted by the Committee, in fact, there are a number of places throughout the PMPD where we put yellow highlights because we assume there were changes in quantities or dimensions of some sort, and needed clarification. I see that -- the one I'm addressing has to do with the 700,000 gallons of raw water, fire water storage tank, and the cite to that.

The question I have is, I'm fine with the updated changes, but I'm going to need a new cite, I think,

because the cite that we had at that section cited to the FSA or the RSA, the old numbers, and I just need whatever exhibit the new number showed up in.

MR. GALATI: Yeah, I will provide that to you. I believe it's in Exhibit 62, our Project Description, but I will double check that and make sure that I respond after this is over.

Again, we put these comments together as quickly as we could to give the Committee something to do today to go through comments. We intended to make changes and fix those and formally docket those before the 20th as a result of today's hearing. So I will make sure there's an appropriate cite there.

HEARING OFFICER CELLI: That's excellent. And so what's going to happen is the Applicant's going to file an updated errata that will -- if you would please, be conscientious about making sure that everything that is new or a change has a citation to the record so that we can make sure that we know where we got that number and that it's in the record. That would be great. So that was the big one.

So go ahead, Mr. Galati, you have the floor.

MR. GALATI: Two areas that we really wanted to talk with you about today, and again, we made some changes in the water section, we believe that we produced some

evidence that the project would not draw the static ground level water down below the theoretical accounting surface, and we noticed that the PMPD said that there wasn't any evidence on that point. We had provided that evidence and that appropriate citation, so we would like that included.

HEARING OFFICER CELLI: What page are we talking about?

MR. GALATI: Page 26 of our comments.

I apologize, page 25 of our comments. The caption is entitled page 12, first paragraph.

HEARING OFFICER CELLI: Yes.

MR. GALATI: And we added some language for the Committee to include in the decision that acknowledged the fact that Exhibit 62, page 19 of the Soil and Water Resources testimony that we filed, is the only evidence that we could find about whether the project would cause the static groundwater level to drop below the theoretical accounting surface, if such accounting surface were adopted. And we just want to point that out to the Committee, because the Committee's decision was that there wasn't any evidence on that point, and we believe there was, and so we'd like that identified.

HEARING OFFICER CELLI: Okay. But the context was there was no evidence supplied by CURE to -- other than -- they had provided Exhibit -- oh, I don't have

enough of an excerpt here. I think it was 524, but don't hold me to that one. 541 maybe. So this was in Soil and Water?

MR. GALATI: Yes.

HEARING OFFICER CELLI: Page 12.

Okay.

MR. GALATI: Yeah, Exhibit 541 was introduced on the update of the accounting surface along the lower Colorado River.

HEARING OFFICER CELLI: That's correct. So CURE put in 541.

MR. GALATI: Correct.

HEARING OFFICER CELLI: Okay. And you're saying that there was -- the methodology was applied to GSEP?

MR. GALATI: Yeah. If you -- what we did in our testimony is, again, and our main contention is there is no accounting surface, it does not apply to us for all of the legal reasons we briefed, but if it did, we provided testimony that we would not draw the static groundwater level below that theoretical accounting surface, and we wanted that noted as well.

When we read this paragraph that starts on page 11 and then ends on 12, it sounded like the Committee may not have been aware that we had provided that evidence.

HEARING OFFICER CELLI: Okay.

MR. GALATI: So that's our -- that was the change we thought might warrant additional discussion. And if you look at page 19 of our Soil and Water testimony, which is in Exhibit 62, it -- our expert testifies it would not draw down the static water level.

HEARING OFFICER CELLI: Let me ask you this: Up on the top of page 11 where it says "Applicant's reply brief argues that the U.S. doesn't recognize the wells as pumping the Colorado River and that Applicant further argues that even if the GSEP would not cause the static groundwater table to drop below" -- I'm sorry, "further argues that even though the accounting surface methodology is applied to GSEP, it is undisputed that GSEP would not cause the static groundwater table to drop below the theoretical accounting surface."

MR. GALATI: Right, and I certainly argued that in the brief, but in this section where you're pointing to the evidence, I just wanted you to point to the evidence as well. It wasn't just Mr. Galati's argument which --

HEARING OFFICER CELLI: That's reasonable.

Anything from Staff on that point?

MS. HAMMOND: I have a placeholder, that's something that Staff would comment on that the accounting surface discussion appears to lack a discussion about

water levels, so that discussion would be added with reference to evidence. Yeah, that's a point that we would want to make as well.

HEARING OFFICER CELLI: Okay. I guess what I'm going to see is something in Staff's errata. When am I going to get Staff's errata?

MR. MONASMITH: On its due date.

HEARING OFFICER CELLI: On the 20th.

MR. MONASMITH: Correct.

HEARING OFFICER CELLI: Well, timing being what it is, this was the only date we could get for a conference, I'm afraid.

MR. MONASMITH: If the Committee would wish it earlier, we can try, but given all the constraints on Staff, it's -- the 20th is what we're looking at. We can try to bring it in a few days earlier. I believe that's a Monday.

HEARING OFFICER CELLI: Well, I'm concerned about how substantial a change this might be. If Staff has -- is pointing out that there's omitted evidence on the issue of the water table.

MR. MONASMITH: Water levels. I believe it's just a clarification that our Staff will be making, and in response to that, a component of the PMPD where we already have draft comments that are circulating among management

and within the technical staff and within the senior and the OM, but nothing that we have ready for you all to look at.

HEARING OFFICER CELLI: One moment. I'm going to have to mute people here because we can hear some --

PRESIDING MEMBER BOYD: Ms. Belenky is having too much fun in the background.

MS. BELENKY: Oh, no, I thought I was still on mute not having any fun.

HEARING OFFICER CELLI: All right.

MS. BELENKY: Here, I'll make sure -- I don't know what happened when I changed to my headset because I had to leave the room for a second.

PRESIDING MEMBER BOYD: Your laughter is unmistakable, Lisa.

HEARING OFFICER CELLI: Doesn't make you a bad guy.

Okay. So I guess we will have to see what Staff comes up with. Let's hear from CURE.

MS. KOSS: Yes, thank you.

The project's use of Colorado River water is one of the two issues that CURE wishes to discuss today. And I'd like to take a step back and just look at the broader picture here related to the Colorado River.

The Colorado River is a critical source of water

for the United States. The river nourishes 15 percent of our nation's crops. It provides drinking water for one out of every twelve Americans. The river is already besieged by climate change, overuse, and drought. And one study called the Colorado River the nation's most endangered waterway.

Researchers from the Scripp's Institution of oceanography warn that due to climate change and overuse, the river's reservoirs may run dry within 12 years.

Every drop of Colorado River water to which California has rights to under the law of the river is allocated. And the United States Supreme Court in Arizona v. California requires every drop of the 4.4 million acres of Colorado River water used by Californians each year to be accounted for.

In addition, under the Supreme Court decree, all consumptive use of Colorado River water requires an entitlement. Consumptive use includes water drawn from the mainstream by underground pumping. And there's just no way around that; federal law requires it.

Now, the U.S. Geological Survey determined that the Chuckwalla Valley Groundwater Basin lies within a ground basin tributary to the Colorado River. That is evidence in the record presented by CURE. It is Exhibit 541. That evidence also needs to be included in

the PMPD.

The USGS also indicated that the Chuckwalla Valley Groundwater Basin is hydraulically connected to the Colorado River. That is also evidence in this record. USGS determined that wells drawing groundwater within the Chuckwalla Valley Groundwater Basin are considered to be pumping Colorado River water. That is also evidence in this record that need to be included in the PMPD.

Staff concluded that wells extracting water in the Chuckwalla Valley Groundwater Basin are extracting water from the Colorado River. That is also evidence in this record that needs to be included in the PMPD.

Staff also concluded that the project's reduction in outflow from Chuckwalla Valley Groundwater Basin to Palo Verde Mesa Groundwater Basin, which we discussed quite extensively at hearings, would be made up at least in part by inflow from the Colorado River, and, therefore, Staff concluded that proposed project pumping would result in a significant impact to the Colorado River by inducing flow from it. That is evidence in this record as well.

Now, there are several other agencies that agree with USGS and Staff. Metropolitan Water District agrees that the project proposes to pump groundwater from a groundwater basin that is hydraulically connected to the Colorado River. That is evidence in this record. The

Colorado River Board also agrees that the project is located within an area considered to be hydraulically connected to the Colorado River and, therefore, groundwater pumped from wells located on the project site would be replaced by Colorado River water. That is also evidence in this record.

In addition, the Bureau of Land Management recently published its Final Environmental Impact Statement. And in the FEIS, BLM concluded that all groundwater production at the project site would be considered Colorado River water.

Also, we recently received a FOIA response from the Bureau of Reclamation, the water master for the Colorado River. And according to Reclamation, the Applicant's conclusion that the project would not impact the Colorado River or require an entitlement is unjustified.

Now, the Commission, considering all of this evidence, must require an entitlement for the project. Federal law requires it, the Commission cannot fudge it, the Commission cannot ignore it. And the Commission should not be concerned about it. The Metropolitan Water District submitted a letter to the Energy Commission, it's evidence in this record, stating that it was willing and able to supply the Applicant with water that would be

accounted for pursuant to the Supreme Court decree. It's really as simple as that.

Now CURE, based on all the evidence, has proposed changes to some language in the PMPD, conditions in the PMPD.

HEARING OFFICER CELLI: Are we going to get this?

MS. KOSS: I would be happy to distribute it now, if that's all right.

HEARING OFFICER CELLI: Is this going to be your final errata?

MS. KOSS: No. This is just preliminary proposed changes to the PMPD regarding just Soil and Water Resources. I do have some from cultural as well that I'll hand out when we get there. But now?

HEARING OFFICER CELLI: Please.

Thank you.

MS. KOSS: I'd be happy to run through it, answer questions, however you prefer.

HEARING OFFICER CELLI: Let's give everyone a chance to read this and see what it contains, and then we will give the Applicant a chance to respond, and Staff.

My recollection, just as -- I haven't finished reading this, but as I'm reading this was that the conclusion of Staff that there was an impact on the Colorado River was arrived at before the switch to the dry

cooling alternative. And so I'm concerned that there might be some confusion there with regard to the amount of water use.

MS. KOSS: At that evidentiary hearing, Staff said that even with dry cooling they do still consider the project to significantly impact the Colorado River.

HEARING OFFICER CELLI: Okay. Clear.

And Exhibit 532 was the Metropolitan Water District's letter?

MS. KOSS: Yes, I believe so.

HEARING OFFICER CELLI: Okay. That's straightforward enough, including that part about the suggested change to the conditions of certification.

Anything further from you, Ms. Koss, before I listen to Mr. Galati speak to the issue?

MS. KOSS: No. I may have something to respond to at that point, but not right now.

HEARING OFFICER CELLI: Mr. Galati, go ahead.

MR. GALATI: First I want to start with an overview.

This is one of those areas of law like a home contract. You read your real estate contract, and every word matters. The area of water law, every word matters. And if you notice, not once did CURE say the project would be pumping from the mainstream of the Colorado River,

which is the only thing that the law says.

There's a USGS study that has said it's possible that water that's replaced by the Colorado River, could be pumping from the mainstream, doesn't say definitively, and that report in 2004 and 2008, Exhibit 541 in this case, is just a report of USGS about if the bureau would like to make that claim, how would they regulate. So it doesn't use the word "hydraulically connected," it doesn't say tributaries.

The law says very specifically -- and it's been the same since 1964, nothing has changed with the 2006 Supreme Court decision. As pointed out in our brief, it says, the consumptive use could be underground pumping from the mainstream of the Colorado River.

Let's not forget to use a little bit of common sense. Over geologic time just about everything could pump from or be hydraulically connected to a surface water source. All groundwater and surface water are connected. It's the one time I know that. I'm a geological engineer and used to do that modeling. They are all connected. It matters what time frame you want to look at, a hundred years, a thousand years, a million years. That's not what the law says. It says am I pumping from the mainstream of the Colorado River.

And as pointed out in our testimony and in our

brief, the only wells that have ever been regulated are those wells that are within the flood plain of the Colorado River where you could actually see the difference. You pump this well, and it's the same level as it is in the Colorado River. Colorado River goes up, within a few days you see the well go up. That's the only time it's ever been regulated.

Be very careful about treading into water law as complex as the Colorado River, because this would affect every project along the I-10 corridor, every project anywhere near the Colorado River. There is a body of law out there to regulate it. We suggest, as we did in our brief, that you simply just allow that to occur. There isn't anything here to show we need an entitlement.

Second of all, let's look at the evidence, because what Ms. Koss didn't say is probably more important than what she did. She didn't tell you that the letter she's relying on for MWD says if it's pumping from Colorado River, it didn't say you're pumping from the Colorado River, if you are, and that's the real issue here. Nobody has proven the project will pump from the mainstream of the Colorado River, and the only evidence in the record is that it will not pump from the mainstream of the Colorado River.

HEARING OFFICER CELLI: Actually, isn't that in

dispute with Staff and the Applicant?

MR. GALATI: It is not in dispute with Staff and Applicant of whether it will pump from the mainstream of the Colorado River. There was a dispute between Applicant and Staff over geologic time would there be an influence or an impact. And rather than get into a long, lengthy discussion about how the mounded irrigation water between the Colorado River and this, Staff and Applicant came to an accommodation that requires the Applicant to offset things we don't need to offset. But clearly, and Staff was very clear about it, no entitlement to Colorado River should be concluded from their analysis, they do not believe that there is an entitlement, nor does anybody else.

In addition, the most telling thing that Ms. Koss said today is that she's in possession of some evidence from the U.S. Bureau of Reclamation that apparently supports her position, which was not in this record, and we'd like to move to strike that we're relying on something from the U.S. bureau in a FOIA request --

HEARING OFFICER CELLI: Let's look at that.

MR. GALATI: Yeah, I'm sure it says if, because I've seen that letter five or six times.

HEARING OFFICER CELLI: Let me just ask Ms. Koss.

Is that in our record, this letter that you're

referring to?

MS. KOSS: It's not. We received their response just last week.

HEARING OFFICER CELLI: Okay.

MS. KOSS: From the Bureau of Reclamation.

HEARING OFFICER CELLI: Then the Committee can't consider that because the evidence is closed then. Just to be clear on that.

Go ahead.

MR. GALATI: In addition, the Colorado River Board, which she didn't tell you, they signed on to the letter that says if as well.

And lastly, let's not forget, of course, if you're MWD, and you own the only water rights that will be uncontested -- and why is that? Because everybody above you gets theirs first. So MWD, if you tried to get an allocation from PVID or IID, MWD would oppose you. So of course they'd be willing to sell us an entitlement. And if I were a business person, I'd tell you I have an entitlement for you.

With respect to the Final EIS, there was a mistake made in the Final EIS as well, and we are perfectly comfortable that that's going to be fixed. There's a lot of confusion in this area between an impact and requiring an entitlement. And it's complex. And

it -- I think it's going to be worked out in the Final EIS, because there's another round of comments and a ROD, as it should be done, as you did here.

So we'd be -- the concept of a tributary to the Colorado River, that, again, is not the law. What the law is is pumping from the mainstream. It's in the replacement, it's not hydraulic, it's not tributary, it's not impact. And if you just apply the law, you come to the same conclusion that you came to in the PMPD, which is correct.

HEARING OFFICER CELLI: Let me ask, I wonder if there's anyone from the BLM who is on the telephone right now.

Is there anyone from the BLM on the phone?

Okay. I just thought I'd be interested to hear what they have to say about the FEIS.

Anything further from Applicant on this point?

MR. GALATI: If you do want to use the 2008 USGS study, use all of it, don't just use the part that says tributary. Use the part that says here's the accounting surface above which is not Colorado River, below which is might be a tributary and Colorado River. So if you want to use the USGS study, don't just use the part that Ms. Koss has suggested you use, that somehow all pumping in the Chuckwalla Valley is Colorado River.

That study, if it were the law, wouldn't regulate all pumping, it would not regulate pumping above the accounting surface. That study updated the accounting surface. That was its primary purpose.

So again, the only evidence in the record, as we pointed out, Exhibit 62, page 19, Soil and Water testimony clearly shows this project will not draw the static water level down below the accounting surface, even if you wanted to use the study as if it were law.

HEARING OFFICER CELLI: Thank you.

Let's hear from Staff if we could on this point, please.

MS. HAMMOND: Thank you for allowing Staff to speak to Staff's position. And I would refer the Committee and the Commission to Staff's brief on this subject. And what Staff did say is that it's not clear how much of the Colorado River is affected. So I think, Hearing Officer Celli, you have that right.

HEARING OFFICER CELLI: That the matter was -- I remember it was not a settled point.

MS. HAMMOND: It's not a point that we can know at this point. And we were deferring to the appropriate agency, the California Colorado River Board.

HEARING OFFICER CELLI: Okay. So Applicant's position is that the accounting surface -- accounting

surface there has to be some sort of metric to show that the amount of they're using will pump below the accounting surface, and we have any evidence of that?

MR. GALATI: Let me just explain.

What the accounting surface is, remember, I explained to you before that the wells that were regulated, were actually responded to levels of the river, they were basically the same water. So this is near the bank of the water, a couple hundred feet away from the bank of the river. And so you pop a well in there, you pump the well, the well comes back right immediately when you stop pumping back to the Colorado River water level. When the Colorado River goes high, the well's high, it's that connection.

What the 2008 study did is it assumed that that extended forever, that there was no geology, it was all a big bowl of sand, and they extended that line on an elevation level. And the 2008 study adjusted that line for high water for Colorado River water and low water for Colorado River. That's all it did. So it assumed this line. So everything below that line could be replaced from Colorado River over geologic time is what the accounting surface proposed.

HEARING OFFICER CELLI: Right.

MR. GALATI: If you're pumping above that,

there's a bunch of water above that in some locations, if you pump below -- above that and you never cause the static water level to go down, the water is determined to not be Colorado River, but would be natural recharge from all the different basins.

HEARING OFFICER CELLI: Right.

MR. GALATI: And again, the only evidence in the record about what pumping happens to that static water level is in Soil and Water 19, which summarizes it, studies that were submitted in other exhibits. But that's our expert testimony, would not draw for the life of the project.

HEARING OFFICER CELLI: And initially there was a finding by the Committee that the accounting surface methodology was not LORS, it was just a methodology which was subject to the parties' evidence essentially as you were going to put it into the record.

What I have is 541, which is a description really of the accounting surface, and it contains maps that show that the Genesis Project would fall within the area expected to be included in the accounting surface methodology if the accounting surface methodology were to be used.

So that was -- I just wanted to bring us current on at least that much of a finding.

Ms. Koss, you're being patient.

MS. KOSS: I'd like to respond to several of the points raised.

First --

HEARING OFFICER CELLI: Let me ask you a question, if I may.

MS. KOSS: Sure.

HEARING OFFICER CELLI: If we have it that there is -- that the accounting surface is not a LORS, then it's really just a piece of evidence to show some sort of proof that the water underneath the Genesis site would somehow be connected to the Colorado River. Okay. And that you're -- I need you to make the connection between that water and the need for an entitlement. The water directly below the Genesis site that they're going to be pumping --

MS. KOSS: Yes.

HEARING OFFICER CELLI: -- without evidence that, because I don't believe we have any evidence in the record on what that water level is and how does that level relate to the accounting surface level --

MS. KOSS: Let me just start by saying what the law requires and what Arizona v. California says.

HEARING OFFICER CELLI: Because I read it. And I didn't see anything about the Chuckwalla Valley in Arizona versus California.

MS. KOSS: No. What it does say is consumptive use of the mainstream includes water drawn from the mainstream by underground pumping. It's not as if you stick a straw down and what's underneath the straw is the Colorado River. If pumping over a period of time draws water from the Colorado River, that is considered to be using the mainstream of the Colorado River. That is what Arizona v. California says.

Now, Arizona v. California also says that all of that water has to be accounted for. And in order to account for that water, Bureau of Reclamation asked USGS to come up with some tool to try to figure out what wells are going to be pumping Colorado River water, not by sticking a straw down and sucking it out, but by inducing flow from the Colorado River. That's what the accounting surface methodology was, is. It's a tool, it's not a LORS. We never argued it was a LORS. We agree it's a tool.

And based on that tool, USGS and Staff agree that pumping in Chuckwalla Valley would be pumping Colorado River water.

Now, let's just take the accounting surface methodology out of the picture. Let's just take it out. We still have Arizona v. California, we still have the fact that Chuckwalla Valley Groundwater Basin is a

tributary to the Colorado River.

HEARING OFFICER CELLI: Now, how do we have that? That's the part I'm missing.

MS. KOSS: USGS determined that.

HEARING OFFICER CELLI: But other than in Exhibit 541, where do we have that in our record? See, the question is, we take Exhibit 541 out of the mix --

MS. KOSS: There's no need to take 541 out of the mix. There's a whole discussion of the law of the river in there, Arizona v. California, the basins, tributaries, hydraulic connections. There's no dispute that the Chuckwalla Valley is hydraulically connected. There's no dispute.

HEARING OFFICER CELLI: I think there is.

MR. GALATI: Yes, there is. And Exhibit 541 specifically says we assume for purposes of the accounting surface rule that they are hydraulically connected. That -- there's an assumption, there's no modeling, there was no study.

HEARING OFFICER CELLI: So the point is --

MR. GALATI: Use it all or don't use it.

HEARING OFFICER CELLI: -- there is a dispute. That's what I'm looking for.

MS. KOSS: And Metropolitan Water District, USGS, Colorado River Board, Bureau of Reclamation, BLM, Energy

Commission Staff all agree that Chuckwalla Groundwater Basin is hydraulically connected to the Colorado River. All of the agencies agree.

HEARING OFFICER CELLI: I think -- let me just be clear.

My sense from Staff was that it may be hydraulically connected. I didn't get an unequivocal is hydraulically connected from Staff.

Do I have that right, Ms. Hammond?

MS. HAMMOND: I think that is probably an overstatement. It's when there's wet cooling that there would be a draw of Colorado River water, because the amount of water consumed is going to down to such a low level, we can't conclude that at this point.

HEARING OFFICER CELLI: Okay.

Is that helpful, Ms. Koss?

Okay. The overstatement you were saying, the way I characterized it was an overstatement?

MS. HAMMOND: I beg your pardon. I was referring to Ms. Koss.

HEARING OFFICER CELLI: Okay. So her characterization -- speak clear; step back.

Staff's position is you don't have enough information to make the determination. So we can say maybe. Is that helpful?

MS. KOSS: Well, my reading of the record, what the record shows, Staff's testimony states that even with dry cooling, over a period of time, even with dry cooling, the project would impact the Colorado River by inducing flow. That inducing flow is what triggers Arizona v. California, because consumptive use of the mainstream of the Colorado River includes drawing water, inducing flow from the Colorado River.

What Staff doesn't know is how much will be impacted, how much water will be used by the project. That is what is unknown by Staff --

HEARING OFFICER CELLI: Now, wasn't there a stipulation I thought we had to a number -- 50 comes to mind, maybe 50 acre feet a year between the Palo Verde Groundwater Basin and the Chuckwalla Valley Basin?

MR. GALATI: Yes, there was.

HEARING OFFICER CELLI: Okay.

MR. GALATI: There will be further modeling to refine that number, but we had put into evidence in the record of what our original modeling had shown.

HEARING OFFICER CELLI: So that is as far as I thought Staff took it, was to that impact between those two groundwater basins.

MS. KOSS: That's correct. Staff concluded that project pumping over a period of time would reduce the

flow from Chuckwalla Valley to Palo Verde Mesa and, therefore, induce flow from the Colorado River.

HEARING OFFICER CELLI: Well, doesn't it have to go below the accounting surface to induce flow from the Colorado River? And is there any evidence in the record to show that 50 -- I think it was 50 acre feet a year, would bring the water table down in the Chuckwalla Valley low enough to get it below the accounting surface? Isn't that the question?

MS. KOSS: There's no modeling to show how much of the Colorado River water would be affected, impacted, used. There's -- the original Soil and Water 19 would have had the Applicant do that modeling. After a stipulation between Staff and Applicant, they decided to do that modeling at a different point between the two basins. So there's no evidence, there has been no modeling to show how much of the water from the Colorado River would be impacted, would be used.

HEARING OFFICER CELLI: If any. That's my understanding of the state of the evidence right now.

MR. GALATI: That is correct. We have put in evidence in the record in our data responses in -- I can't remember which one -- to show that the project does not impact the Colorado River. And there's a difference here again between hydraulically connected versus an

entitlement or inducing flow from or to, and really the question wasn't whether or not Colorado River moves to -- towards the Chuckwalla Valley from our pumping, the real question was whether or not the flow that's coming from the Chuckwalla Valley in through the Palo Verde Groundwater Basin and then in through the valley basin is actually somewhat less into the Colorado River.

So the question was never pumping from the mainstream, the question was are you pumping water that over geologic time could someday get to the Colorado River that now does not.

HEARING OFFICER CELLI: All right. And I think that a large part of that discussion occurred, was really centered around the issue of the wet cooling that -- before the change was made.

Go ahead, Ms. Koss, you were going to say --

MS. KOSS: I just want to again point out that BLM, based on the same evidence presented to the Energy Commission, came to a different conclusion, which is that all water used by the project, even with dry cooling, would be considered Colorado River water. They say it repeatedly, they have a thorough discussion of why Arizona v. California is applicable to this project. Also --

HEARING OFFICER CELLI: Did they create a

condition?

MS. KOSS: They do have conditions. I can't recite them; I apologize.

HEARING OFFICER CELLI: I can answer that question.

And there is no condition to get an entitlement, and that -- what Ms. Koss is referring to is an analysis of their staff similar to the analysis of your staff, it's not BLM's final position.

MS. KOSS: And I also would like to direct the Committee to way back when I actually wasn't here, but there was some briefing, there was a scoping order on the accounting surface methodology. And I know, you know, we can take that out of the picture, and it doesn't matter, but in that -- at that hearing, Staff counsel actually testified -- or not testified, argued, relayed information from the Bureau of Reclamation that is in the transcript that the Bureau of Reclamation does consider over the life of the project that the project would be using Colorado River water. So I point you to the transcript there as well.

HEARING OFFICER CELLI: Okay. I'd like to hear it from Staff now, please.

MR. MONASMITH: That specific reference is in fact -- was briefed by Staff Counsel Robin Mayer on this.

We extensively briefed the issue of use of Colorado River water. This issue was discussed throughout the proceedings, throughout the workshops, both down in Riverside County and here in Sacramento.

I think the brief that Robin wrote on August 2nd is very definitive and very clear. And if it would be okay with the Committee, I'd like to recite it, just two paragraphs from that.

HEARING OFFICER CELLI: Please.

MR. MONASMITH: "It is clear that using Colorado River without entitlement is illegal." And she cites Arizona v. California. "The 2006 consolidated decree is just the latest tip of a very deep iceberg which the Committee is surely familiar with by now from Staff's opening brief, CURE's second opening brief, as well as the briefs addressing the scoping order," which Ms. Koss just referred to.

"What isn't clear and has never been clear is how much or if at all the Genesis project would draw Colorado River water. The latest letter from the Colorado River Board required a contract if it is determined that these wells are, in fact, pumping Colorado River water, Exhibit 546. The U.S. Bureau of Reclamation never made a determination, neither did the River Board nor the Bureau of Reclamation nor the commercially-interested

Metropolitan Water District suggest a particular amount of acre feet. Most conservatively, Staff's original concerns positing that the wells might conceivably dip below the accounting surface towards the end of the project's 30-year life," which Ms. Koss just referred to, a statement by staff counsel, Caryn Holmes, "were based on the use of wet cooling. And Applicant's consent to dry cooling dramatically lowered impacts. If pumping below the accounting surface was far off in the future, it is beyond the life of the project with dry cooling and enters the realm of speculative.

"More pertinently, if the most knowledgeable agencies responsible for the river would not previously state unequivocally there would be pumping of the river, there are much less likely for the state to do so now."

Again, we briefed this issue extensively, we would refer the Committee to this fact. I know it's brought up over and over again, but I just wanted to state that for the record.

HEARING OFFICER CELLI: Thank you.

Ms. Koss, would you like to reply?

MS. KOSS: Yes, just briefly.

Much of the argument in that brief is not supported by the record. The discussion that's --

HEARING OFFICER CELLI: It's argument.

MS. KOSS: It's argument, but not based on the record.

Staff testified that even with dry cooling, the project would impact the Colorado River. Staff never said it was speculative, Staff still concludes that with dry cooling the project would impact the Colorado River; so despite the argument in the brief, it's not supported by the record.

HEARING OFFICER CELLI: Actually, I'm looking at page 11, Soil and Water, and basically the PMPD addresses CURE's argument, page 10, really at the bottom of page 10 if you have it -- I don't know -- talks about that CURE correctly asserts that federal law requires lower Colorado mainstream water users to have an entitlement and that consumptive use of the mainstream includes water drawn from the mainstream by underground pumping, citing CURE's second opening brief, and Arizona versus California. CURE relies on the U.S. Bureau of Reclamation's accounting surface methodology, which is Exhibit 541.

Then we go on to say that Applicant's reply brief argues that the bureau does not recognize the wells in the Chuckwalla Valley as pumping from the mainstream of the Colorado River. Applicant further argues that even if the accounting surface methodology is applied to the GSEP, it is undisputed that the GSEP would not cause the static

groundwater table to drop below the theoretical accounting surface.

Okay? So so far everybody is nodding that we have that right in the PMPD.

The next paragraph, "Staff argues it has never been clear if the Genesis project would draw Colorado River water at all. Staff points out that the latest letter from the Colorado River Board required a contract only if it is determined that these wells are, in fact, pumping Colorado River water." That's Exhibit 546.

"Staff also states that the U.S. Bureau of Reclamation has never made a determination. Staff asserts that they have," quote, "never argued that there is an existing a legal requirement for this project to obtain a Colorado River entitlement." That's a quote from our hearing on 7/12. So so far, and I got a nod from Staff, so so far the PMPD, there's no issue yet.

So both Staff and Genesis agree that the GSEP would not be required to secure an entitlement of Colorado River water in order to legally pump groundwater in the Chuckwalla Valley, citations, we agree with CURE that using Colorado River without an entitlement is illegal.

The question before the Committee is whether groundwater pumped at the GSEP site from the Chuckwalla Valley Groundwater Basin is water drawn from the

mainstream of the Colorado River.

That's the question that this Committee needs to deal with. And in the way that they looked at it was that we just did not have enough evidence to see, to know what the accounting -- whether we're going to -- I mean, basically, at the scoping hearing the Committee ruled that the U.S. Bureau of Reclamation's accounting surface methodology is not a LORS and that the methodology's applicability to the Genesis AFC process is a question of fact that may be heard in future evidentiary hearings if necessary. So it was a question of fact brought before us.

And other parties introduced testimony at the evidentiary theory on the accounting surface methodology's applicability to the Genesis project. CURE introduced Exhibit 541 entitled, "Update of the Accounting Surface Along the Lower Colorado River," which describes the methodology and contains maps that indicate that the accounting surface may extend to the area where the GSEP site will be located. However, there's nothing in Exhibit 541 or anywhere else in the record that we see that compels us to adopt the methodology which we have already found is not a LORS.

And then we -- now, Staff had a problem with the following language. It says, more to the point, there's

nothing in the record that actually applies the methodology to the quantity of groundwater that the GSEP will use or that the GSEP would cause the static groundwater table to drop below the theoretical accounting surface as argued by the Applicant.

That's the kind of data that when I'm looking in the record to see, I don't see anything like that in the record.

So CURE simply has not provided sufficient evidence to convince the Committee to make a finding that the groundwater pumped at the GSEP site and the Chuckwalla Valley Groundwater Basin is water drawn from the mainstream of the Colorado River; that was the logic that the Committee used.

Now, Applicant proposes changes to that language. But I think in terms of just the underlying understanding of what's going on, that's the question, is where is the evidence that shows that there is -- there's a dispute, but we don't have evidence that really proves that this is Colorado River mainstream water that would be used by the GSEP other than Exhibit 541.

Do I have that right?

MS. KOSS: Well, pardon me. I'm sorry.

HEARING OFFICER CELLI: One moment. Applicant suggests that there were two more exhibits that I

didn't -- that weren't included that contained evidence with regard to the accounting surface.

MR. GALATI: If you do not use Exhibit -- if you do not use Exhibit 541 for the accounting surface and you don't use -- there's another exhibit with an earlier report for the accounting surface, and you don't use -- if that report's out of the record, for example, and you don't use it as a tributary, then there's no need to cite to our evidence which said if it were, it's also not Colorado River. Since I couldn't tell whether or not you were -- wanted an evaluation of the accounting surface, I was merely pointing out to the Committee there is evidence in the record, it's only ours, that the dry cooled project will not draw the static water level below the accounting surface in the Chuckwalla Valley if you chose to use it from the 2008 Exhibit 541.

HEARING OFFICER CELLI: So that's offered arguendo.

MR. GALATI: Correct.

And again, the primary point here is -- and if you go back and you read Staff's testimony, and what you hear is there is a settlement of all of their potential issues, but their issues always have been are we reducing outflow towards the Colorado River, never are we inducing inflow from the Colorado River, and that's never been

decided. And there is evidence in the record that it's about 52 acre feet at the boundary between the Chuckwalla Valley Basin and the Palo Verde Mesa Groundwater Basin.

So I think there's plenty here, and it's the confusion between the words. There is no evidence that the project will pump from the mainstream of the Colorado River, and no agency has said that.

HEARING OFFICER CELLI: And I think what we're doing here, now at this point I just wanted to -- and I appreciate the parties participating in this discussion, because what -- with all of the volume coming so quickly, you know, things can be missed. And we want to make sure -- this Committee wants to make sure that there wasn't some evidence that was overlooked or that something was dropped out.

You know, one or the other parties is going to be unhappy with the result, whatever the result is that the Committee decides, and that's just the nature of the business that we do, but I just wanted to make sure that the record was clear and that we were all satisfied that we were all operating with the same evidence.

So I'm not hearing that there's anything other than what Mr. Galati raised that needed to be added in, was those two exhibits.

MR. GALATI: Just a correction for levity.

Sometimes your decisions make all of the parties upset at the same time.

HEARING OFFICER CELLI: Yeah. That's true.

MS. KOSS: May I?

HEARING OFFICER CELLI: Please, Ms. Koss, go ahead.

HEARING OFFICER CELLI: Because technically, legally the burden would be on CURE in this case.

MS. KOSS: There are actually several exhibits that CURE includes in its recommended changes, Exhibit 400, Exhibit 48, Exhibit 402, Exhibit 546, 532. I believe that's it. But they're all -- you'll see them all in the red-line portions of our proposed changes.

HEARING OFFICER CELLI: Yes.

MS. KOSS: And I would again like to point out whether the Committee considers it as evidence or not, the Bureau of Reclamation, who is the water master of the Colorado River, disagrees with the Applicant's conclusion that the project would not impact the river or require an entitlement. They're the water master; they have the duty under Arizona v. California to account for water.

I implore you to read Arizona v. California again and to seriously consider Bureau of Reclamation's opinion on this matter.

HEARING OFFICER CELLI: Do you remember --

MR. GALATI: I'm going to -- motion that strike that. That's like the third time that she's referring to --

HEARING OFFICER CELLI: Right. I just --

MR. GALATI: And the testimony of Caryn Holmes arguing that somebody said something in January, again, it's not evidence, and I just want to be on the record that that is not evidence in this record.

HEARING OFFICER CELLI: You know what's troubling is that at the informational hearing -- I'm trying to remember whether you were at the informational hearing or not. No, it was Loulena Miles I think was there. CURE was there. And this discussion came out right out of the shoot day one. It was an argument over the accounting surface. And I recall at the time when Staff and the BLM at the time were still joined at the hip and they were going to create this joint document, specifically the representative from the BLM said we will get you that letter. Because I said, well, can't we just resolve this with a letter from the Bureau of Reclamation? And, oh, yes, we will get you that letter. And however long ago that was, it was ample time for us to have received some kind of evidence from them. We didn't.

We have this letter from the bureau -- the Colorado River -- who is it? The ones who said if, and

possibly if this, in fact, pumping you would need an entitlement in the subjunctive, but not a statement, not an unequivocal statement that says that they're pumping Colorado River water. And so now it's a little -- it's not available to us, whatever the BOR is going to do, because our record is closed. So I have to -- we, the Committee has to deal with the record that we have. And so that's what we're looking at.

So we will consider these, look at them or review the exhibits that you've cited and present to the Committee whatever that information presents, and then we will take it from there, but I thank you for bringing this up.

Is there anything further on this discussion before we move to the next item?

Nothing? Okay.

Anything, Ms. Belenky, out there?

MS. BELENKY: Not on that water issue particularly. I do have -- and I'm sure everyone wants to get out early today, I do have to be somewhere at 5:30, and we just have a couple of issues we wanted to raise sometime this afternoon.

HEARING OFFICER CELLI: Well, hang in there with us.

Let me just ask right now, it's ten after 2:00,

did Mr. Boyd from Californians for Renewable Energy come on the line? Any members of Californians for Renewable Energy on the phone? Hearing none.

What about Mr. Tom Budlong? Are you there, Mr. Budlong or Larry Silver?

Okay. I guess they're not part of this.

Okay. Let's move on. Mr. Galati, that was one of two issues I thought you wanted to present.

MR. GALATI: Yeah, I think the rest are self-explanatory. I'll -- the second issue was something that we argued in our brief, something that we discussed the last day of evidentiary hearings. We didn't see a discussion of it in the Committee PMPD so we wanted to raise it again. And this is the issue of the compliance project manager having the authority to approve compliance plans, not drawings, not CBO drawings, but compliance plans prepared for a particular activity so that you could continue with construction.

And the examples that I gave is if you're not going to get to constructing something far off into the solar field for quite some time but you need to build your access road, could you prepare a plan for the access road, get constructed on it, like your Soil and Water pollution prevention plan, your drainage erosion control plan, or if you do a dust control plan, and either amend and augment

as you move towards other areas of the field.

Again, we didn't ask for a blanket ability to do this, we just asked for acknowledgement that the CPM has the discretion to be able to do that, to accept compliance plans in a way that mimic construction. Staff objected to it.

I know that we have done this before, and the reason that we're asking for this clarification is obviously there's a loss of institutional memory, but I remember very much working on gas-fired plants where we got our authority to construct to a certain level before additional plans were submitted. And that's all we're asking for, is a specific acknowledgement by the Committee so the CPM knows that they have that authority so that they're not -- because at this time I think they've been instructed they do not have that authority.

Again, the language we proposed is general, and it allows the discretion of the CPM on a case-by-case basis.

HEARING OFFICER CELLI: Let's hear from Staff.

Now, Staff had opposed this previously. But I do want to acknowledge that, Ms. Hammond, in the Blythe case, this language was adopted in Blythe, the same -- in their PMPD, this identical language exists. And I don't think I'm giving away too much by saying that the concern the

Committee had initially was that basically it was the Committee's feeling that the CPM already had this power to exercise their judgment and that this additional language was unnecessary.

And we weren't -- and, frankly, the language proposed seems quite vague in terms of we're trying to determine how this would be used and didn't really get a very concrete example of how it might be used, and that was why there were some misgivings. But I wanted to hear from Staff on this point with regard to this language.

MS. HAMMOND: I'll make some general comments and hand it over to other members of Staff.

My understanding is there's a reluctance to make a blanket statement about giving this sort of discretion to the compliance project manager for all types of plans. There is a material difference between the types of plans that the compliance project managers are willing to approve on, you know, having received partial submittals.

One example that was given to me was in the area of the CPM -- Cultural Resources, the CPM might be willing to approve an archeologist, and that partial submittal is based on the nature of the other portions of the condition that concern on-the-ground activities, but they concern activities that an archeologist might follow, procedures that the archeologist might follow upon discovery of

certain artifacts.

That type of condition is materially different from, I guess, storm water pollution prevention plans, plans that might go to the need to modify the project. Those types of plans should be submitted in toto rather than on a partial basis.

Now, if Mr. Monosmith has something to add, or perhaps other members of Staff, I'll turn it over.

HEARING OFFICER CELLI: I also see that you have a compliance staff person here who you might want to call upon.

MR. MONASMITH: I also just would like to, again, point the Committee to the fact that this issue was briefed. As you remember, it did come up during evidentiary hearings, and Staff did in its reply brief, one, on page 7 of 18, list five components of reasons why there was hesitancy in this matter.

And Compliance Project Manager Chris Davis will join us now I think to articulate part of the reason why the phasing in gives us and gives the compliance department some degree of uncertainty and pause.

MR. DAVIS: My name is Chris Davis. One of the issues, probably the biggest problem, especially with a storm water pollution prevention plan is that the plan deals with only, say, a road. It could turn out that

without looking at the overall project and the impact of this one part, it wouldn't work at all when you take a look at the plan for the overall project.

From what I understand there is quite a bit of drainage on this site. And that would be one of the big issues. Same with the biological resources monitoring and mitigation, cultural resources. That approving one tiny part of a plan without looking at it in the overall -- how it fits into an overall plan could be a problem.

HEARING OFFICER CELLI: That makes sense.

My concern, Mr. Galati, is that -- and the Committee acknowledges that there might be, let's say, the experience factor. You create one structure that you're doing something, create an identical structure in the other half of the project; well, you run into something that was unforeseen that, you know, you'd be able to amend to change the plans if you needed to on the second one. So I -- we understand that.

The problem I guess is with the high level blanket broad brush of this language just could be applied to just about anything, and that's --

MR. GALATI: Let me clarify that.

It's not broad brush. It only applies to what the CPM will let you. Okay? That's very narrow. So if I was having this conversation with the CPM right now about

the soil and water plan, I would say, look, we need to get a well up and operating and I need to get a temporary road in there. Is it okay if I get the well up and operating with the following BMPs for that temporary activity while you're approving the rest of the storm water pollution prevention plan so that I have water available to me when I mobilize, because this site is windy and there's dust that needs to be controlled. Or I need to do a lot of desert tortoise fencing, and in order to do that desert tortoise fencing, I actually need to get that well up and operating. So I'm not grading the entire site, there will not be any storm water problems because I'm doing this in the summertime, and all I really need to do is to get out there and put the Desert Tortoise fence in.

That could be something the CPM could say, I can -- you give me something, and I can write you a letter authorizing you only that.

Or, for example, maybe the storm water pollution prevention plan within the power block is a little different than the larger grading activities on the outside when I'm putting in the drainage.

My point is we don't have to solve that here; I'm not asking for that to be solved here. I've asked just to engage in the conversation. If we can't convince the CPM that that's doable, then he says, no. Okay? But he has

said yes in the past for these kinds of things when we made a strong case. And I'm not talking about approve, you know, just this and there's a piece missing, I'm talking about a complete activity, a complete discrete activity and a plan associated with activity. Just give us the opportunity to make our case to Mr. Davis that I'm not messing up the rest of the plan.

And some of the plans, for example, require levels of detailed engineering that might take more time to do. And we revise these plans as we go. There are hundreds of compliance submittals, hundreds. We sit down with the CPM and we put forth a compliance contract, a table, and we sit down, we go through each thing, and if one of these comes up, we want to be able to have that conversation there.

What the Committee will be sending the message is what Staff currently believes is that for every plan, the answer is no because there are some plans, the answer will be no for. Totally get it. There are some plans they'll say no. We just want you to give them the ability to sometimes say yes. And that would help us a lot. And it wouldn't hurt anything.

So I think what's happening here is there is a fear that all of a sudden we're only going to get compliance plans that are piecemeal. The language I

drafted stops it, stops that from happening.

COMMISSIONER BOYD: Let me -- as Mr. Celli said, when we got this request, we pondered it, and we were kind of curious, I mean, and I can almost see -- you know, we're anxious to see that maximum flexibility within reason is given. We kind of thought the Staff already had that. And by you broaching this and then having to have a response back, we may be painting ourselves into an unnecessary corner.

Let me ask the Staff, I kind of thought they had the kind of latitude you were talking about already. And let me ask Mr. David or Mr. Monosmith if they want to respond to that. I mean, where do you draw the line? And I struggle with it on a case by case. I mean, how do you define that situation?

But anyway, I'd like to hear from our award winning compliance manager. You weren't here this morning to hear Mr. Davis get a superior accomplishment award for his good work.

MR. GALATI: I've worked with Mr. Davis. I appreciate that he deserves it and that he would let me do this if we had a conversation.

MR. DAVIS: That's amazing. He knows things about myself that I don't know.

We did in the Humboldt Bay Generating Station

allow them to phase in, do -- first phase I think was tearing out the old building, second phase grading. They did not have all the required submittals in, but the ones they did have in were complete, if my memory's correct. And the piecemeal issue that Mr. Galati raised is really the thing that we're worried about.

MR. GALATI: I only brought this to the Committee's attention because during an early compliance discussion, I got that we don't have the authority to do this. That was the answer back. So I always thought they had the authority because they'd done it in the past. And it was only during a conversation about thinking and starting the conversation about doing it again was the response back, we don't have the authority, we can't do it. And that's why I'm asking for the Committee, because this is exactly the authority the Commission has, the CPM on a case-by-case basis, meaning you bring me a good case, and it makes sense and it doesn't violate the condition, I'll consider it, but I won't do it blanket, I won't do it for all storm water plans, I won't do it for all fugitive dust plans, I won't do it for all plans, but your site might show something unique about it, like the well, and like Humboldt with demolition.

So there are reasons to do it on a case by case. I'm not asking for a blanket that they do it all the time.

HEARING OFFICER CELLI: And that is the one of the concerns I had, was to my way of thinking, when we say case-by-case basis, case by case means Beacon, Genesis, those are cases.

MR. GALATI: Not that language.

HEARING OFFICER CELLI: Okay. We could maybe -- and I think a point you're trying to make is that each decision as it arises isn't binding on the next one so that if the CPM finds that it's not acceptable, having just approved one last week and then the following week they get another one and they find that it doesn't -- it doesn't smell right to them, they would have the ability -- they wouldn't be bound by the precedent of the prior decision.

MR. GALATI: That certainly was my intent here. My intent, for example, Humboldt, had very unique situations, so we were able to do something. Colusa had very unique situations. Gateway had its own unique situations. And for all of those we were able to do pieces of things. The submittals that we submitted were complete for the activity we were going to do.

So if we could change that based on particular circumstances before the CPM on that project or something like that, any of those types of language. I was actually trying to limit by using case by case, trying to limit it

so that it would be a determination for that CPM on those facts on that plan.

HEARING OFFICER CELLI: Staff, anything further?

MR. DAVIS: There is another issue of workload. The kind of thing that Mr. Galati is talking about is going to take more staff time, and so it's a decision if this Commission wants to spend that.

HEARING OFFICER CELLI: In other words, if you get a partial plan and then you're going to get subsequent more complete plans that you have to go back and cover the same ground again; is that the idea?

MR. DAVIS: Well, and you get a partial plan, and then you have to pull everybody together to see if they can live with that partial plan, which requires maybe only one meeting or maybe we can't get ahold of the Fish & Wildlife Service for that meeting or Fish & Game who would also have an opinion. So it takes time to go over these things and decide whether or not to approve it.

HEARING OFFICER CELLI: Anything from CURE?

MS. KOSS: No, thank you, not at this time. We may have something in our written comments.

HEARING OFFICER CELLI: Thank you.

Ms. Belenky, anything on this issue regarding the CPM?

MS. BELENKY: Yeah, I mean, I think that the

Center did, you know, adjust this in our briefing. We don't think that it's necessarily a problem per se, but I do still feel that the Applicant should come forward and say what it is they want now. I'm not sure why they feel that they need to wait and not apprise all of the parties of what it is they want as their initial step on this project.

So regardless of that, I don't have a particular objection if the Staff feels that it is -- has enough information to make those kind of decisions and that the Applicant realizes by not putting it out at this point and having, you know, the PMPD recognize what they want, they may not get it at all. And I feel like this is a little bit of an awkward way of doing this.

HEARING OFFICER CELLI: Uh-huh.

MS. BELENKY: So I think the preference would be for them to be extremely clear at this stage what it is they want, and we would all address it, and then it could be in the PMPD instead of waiting for the Staff to be put in the position of making a decision at the last minute in a rush, undoubtedly, you know, when they're very pushed because they have a very short time frame to meet their deadlines.

HEARING OFFICER CELLI: That makes sense.

Mr. Galati.

MR. GALATI: There's a whole other side to the process that not a lot of people in this room, other than Mr. Davis, have any experience in, and that is what compliance is like. There are hundreds of plans, there are hundreds of meetings. And this is not something that you can describe at this stage other than -- let me just give you an example.

Until we start to prepare the storm water pollution prevention plan, we may realize that in the middle of the power block which we're not going to get to till month 21, or whatever it is, that there needs to be a particular thing designed that would help with the BMPs for that one area, but the rest of the drainage is all coming in another area. We might be able to go to Mr. Davis and say, look, I got the BMPs for everything here, here's a box, here's the six things I'm contemplating, I'll know in another four months which one I'll do. Are you comfortable with that? Those things come up as you're doing final design. And people don't do final design with the uncertainty of a permit. So we're doing final design now because it looks like we're going to get a permit.

So this happens all the time in construction, there are daily decisions made. As long as they don't violate the condition, there's lots of discretion and

decisions about things like which bolt and what goes first and suddenly the construction schedule got messed up, so we can't do X first, we need to do Y first. That happens; you have to allow that flexibility. This does it.

If we don't like the language for that, if we don't like case by case, I'd consider -- we'll go back and put our heads together and file additional comments by the 20th, some additional language, but I think -- I think we've been as clear as we can about what is it we would like to do. And again, it's been done, so we just want an acknowledgement that it can be done and that the CPM has that discretion.

As far as the workload, consider the alternative. If we don't, and every plan had to be done perfectly for the next 24 or 30 months of construction or whatever it would end up taking, before you could move anything, you're just -- I think you're having a delay without any additional protection or environmental protection or additional compliance. There's a way to do it, and we've done it before. Just make sure they understand they can. We'll do our part, we'll make our case as to why it should be done on a particular plan.

HEARING OFFICER CELLI: Well, then I suppose we'll need to see the new language that you come up with. But let me just ask -- we'll go off the record for a

moment.

(Discussion off the record.)

HEARING OFFICER CELLI: So what I'd like to do just quickly is review my notes just to see if there was anything further about Staff's comments -- I'm sorry, Applicant's comments. I look forward to getting Staff's response to these comments because a lot of my notes in the margin say is this okay with Staff? And I'd like to hear what Staff has to say. Just to verify a lot of these changes in numbers, quantities, dimensions, we need to see sites.

There was a -- page 12 on Bio, table lists 151 acres for downwind impacts under indirect impacts and should be deleted per Staff testimony in Exhibit 68. This is -- I'm looking on page -- the problem, just so everyone who's trying probably to follow me with your papers, is that I'm working off of the comments from Staff rather than the errata that we put out. So this is on biology -- biological resources, page 12, Mojave Fringe Toed Lizard.

MR. GALATI: I can answer that question. When the RSA was produced, there was a belief on the part of Staff that an area downwind of the project supported Mojave Fringe Toed Lizards. So it wasn't about -- and so there was a wind shadow that Staff calculated that they thought were indirect impacts to Mojave Fringe Toed

Lizard. We believe that it was Mojave Fringe Toed Lizard habitat, we also believe the wind shadow wasn't there, but it -- we produced evidence.

Staff asked some additional in the last workshop, some additional information about temperature. You heard testimony on it because CURE disagreed with the temperature data, put testimony in that it should have been treated as Mojave Fringe Toed Lizard habitat, but Staff and the Applicant's experts agreed that it was not Mojave Fringe Toed Lizard habitat, so it didn't matter if there was a downwind shadow. So those indirect impacts actually went away, they're not in the condition that requires mitigation, and Staff and Applicant agreed that we didn't have to mitigate for that.

When the PMPD was prepared, that section of the RSA that originally thought it was Mojave Fringe Toed Lizard habitat was lifted and it wasn't corrected. That's what we're pointing out.

HEARING OFFICER CELLI: Okay.

Go ahead, Ms. Belenky.

MS. BELENKY: Oh, sorry, this is another issue that the Center did brief, and, you know, we feel that it is quite clear that this is an indirect impact of this project and that it is appropriate to mitigate them, we said that during the hearings as well. So I think that

the PMPD got this right, that it correctly includes the indirect impacts and mitigation for them. And if not, there will have to be quite a lot of significant changes to that portion of your PMPD, which specifically said that you recognize the indirect impact and if you are now no longer recognizing that, that would be, I think, hard to justify at this point.

There are certainly indirect impacts of this project, edge effect and fragmentation that this is just one piece of it that was actually quantified by Staff, and I don't think it was ever clear why Staff abandoned this. The question is not just whether what habitat is occupied by Mojave Fringe Toed Lizard, that is not the only issue. This is a whole basin with sand moving across it, and those -- I think that the evidence showed fairly clearly there may be Mojave Fringe Toed Lizard in that area and that the surveys were not sufficient to show absence, which is much harder to show than presence in some case, and I think that in either case it shows that this is an area of indirect impact in the sand shadow and should be mitigated for. So the PMPD, in our opinion, got that right.

HEARING OFFICER CELLI: Thank you.

CURE?

MS. KOSS: Nothing to add at this time. Thank

you.

HEARING OFFICER CELLI: Staff?

Ms. Sanders, identify yourself, please.

MS. SANDERS: This is Susan Sanders, the biologist that worked on the revised staff assessment.

The Applicant has it right. We were going to make that correction in the PMPD. In Exhibit 435 on page 28 we actually -- we made the correction for the removal of the 151 indirect -- 151 acres of indirect impacts. And so that changes the mitigation obligation to -- I believe 136 acres is the total.

HEARING OFFICER CELLI: Okay.

MS. SANDERS: We went through this pretty thoroughly during the hearings, the reasons that Staff revised their conclusions about considering the 151 acres as Mojave Fringe Toed Lizard habitat. As you recall, we were waiting for some more information from the Applicant as to how their surveys were conducted and what the habitat was like. They supplied that information fairly late, and so we introduced in the record at the hearings the reasons for Staff's revisions, and those were captured in Exhibit 435.

HEARING OFFICER CELLI: Okay. Thank you. So let me just make a note of that. 435.

Okay. I just -- as relates to the Applicant's

changes, just as an explanation, when there is some sort of preamble language in the conditions, which is unusual, that was because when we received the exhibit, the exhibit contained a preamble, and we put the whole exhibit in the conditions assuming that the whole of that exhibit was the condition. But I do agree with some of these -- the idea of taking that preamble language out or any of that sort of textural analytical information and putting it in the analysis where it belongs and getting it out of the conditions. So that's no problem.

MR. GALATI: I can point out to the Committee that this was discussed at the evidentiary hearing on the 12th, transcript page 223, starting with Dr. Collison who describes why Staff removed the 151.

HEARING OFFICER CELLI: Say it again. I'm sorry.

MR. GALATI: On the 12th hearing, page 223, Dr. Collison describes why the indirect impact for Mojave Fringe Toed Lizard were removed from the condition, the 151 that we made -- this is basically a correction to the PMPD to make the condition consistent with the analysis, because the condition does not require the mitigation for those additional acreage. And then Dr. Sanders goes in and explains more. And I'll find that page number for you as well; but 223's a good starting place.

HEARING OFFICER CELLI: Thank you. Just moving

on, the way that we normally handle -- to avoid confusion, because we're creating a record that may be read by the Supreme Court some day, and the record contains all sorts of references to Cultural 17, Cultural 16. We don't change the numbers on the conditions. So what we do if a condition goes away is we just keep the number and say omitted or deleted. So that -- I just wanted you to understand that. On page 17. And I think that covers all of the errata as submitted to date from the Applicant, from the Committee's point of view.

There were some questions on PMPD with regard to the yellowed-out sections that the Committee gave you. And I think most of that was handled, most of that had to do with things like quantities of water, sizes of tanks, things like that that may have changed with the change from wet cooling to dry cooling. There were specific questions with regard to cultural that were yellowed out. Yes, that's right. Okay. So Cultural 1 and Cultural 2 --

MS. HAMMOND: Hearing Officer Celli, I'd like to ask, are you proceeding -- are we leaving Bio now? As long as we have Dr. Sanders here, can she chime in on giving a heads up on what Staff is going to be offering as errata?

HEARING OFFICER CELLI: That would be great.

MS. SANDERS: This might be a long chiming. Do

you -- is this going to fit in with what you're doing?

HEARING OFFICER CELLI: You know, it's unfortunate that we -- the timing of this, because it would have been best if we would have had everybody's written documents before we had this conference, but unfortunately we just couldn't schedule it to meet everybody's preferences.

So we also have Ms. Belenky on the line who had some questions with regard to biology. So, Ms. Sanders, why don't you go ahead and give us a preview of coming attractions in Staff's errata.

MS. SANDERS: All right. Thank you.

Some of the changes that Staff will be suggesting are the minor tweaks to acreages, the PMPD did a good job capturing all the changes that came about toward the end, but there were a few minor tweaks, and we'll be fixing those, one of which we've already discussed, the other was acreage of impacts for mitigation for state waters, it's 111 acres.

But I think one of the largest changes are similar to those we've introduced on other projects, and that is application of the Renewable Energy Action Team table for compensatory mitigation. So originally in the -- and you'll recall on July 21st Mr. Roger Johnson introduced that table, a slightly earlier version of it,

and said that we would be applying it.

Well, now what we need to do is put in the numbers, the security numbers that you get when you plug in the table for compensatory mitigation. That would be for Desert Tortoise, for sand dune habitat, Burrowing Owl and waters. So you'll be seeing that change. And a good model for what it's going to look like is what happened in Blythe. And I think the stipulated conditions were just filed today, so that -- the language in there and the level of detail that we provide is going to be similar to what Staff will be doing for this project as well.

HEARING OFFICER CELLI: So we're not -- but all of those numbers and all of that is somewhere in the evidence in the record that we have; is that correct?

MS. SANDERS: The security numbers calculated from the REAT table are not currently in the record. You could get there by just applying the numbers; so the means by which you get the numbers is in there, but not the numbers themselves.

MR. GALATI: If I could clarify, because --

HEARING OFFICER CELLI: Please.

MR. GALATI: The REAT table in one version was entered as an exhibit in this record. And so it's modified slightly, although I don't believe that modification affected the numbers. The numbers that Staff

then put in the condition which said your security shall be X, that number changed. And you don't have that in the record yet, but you do have the table from which those numbers could be derived.

HEARING OFFICER CELLI: CURE, anything?

MS. KOSS: Not at this moment.

HEARING OFFICER CELLI: Ms. Sanders, are those numbers going to go up?

MS. SANDERS: Yes, they will go up.

HEARING OFFICER CELLI: Okay. So in other words, with the new application there's going to be greater protection to the designated species?

MS. SANDERS: It's not a change in the amount of acreage that's impacted, it's the fees that are taken into account for the security.

HEARING OFFICER CELLI: Oh, okay.

MS. SANDERS: So, for example, the original revised staff assessment only included acquisition fee, which I believe was 1450 an acre; initial enhancement, like fencing, clearing of hazardous waste was something like 250; and then long-term monitoring and management fee, which was, I believe, 1350 or thereabouts. Well, those fees are pretty much in the new REAT able, but there's new ones; for example, an appraisal fee, environmental hazard assessment fee, all the fees

associated with preparing a management plan, those things that are real cost that normally come about when an agency or some party buys property and manages it for habitat. Those are now incorporated because the REAT agencies got together to come up with a consistent approach to coming up with security on all these projects. And this is happening on Ivanpah, Blythe, it will be happening on Palen, Calico, Imperial, Rice, all these -- the REAT table is being applied to all of these.

HEARING OFFICER CELLI: I wonder if we could get a stipulation with regard to the new table and the new numbers from the parties. Maybe that would --

MR. GALATI: That is how we handled it in Blythe. There were other minor changes to the conditions of certification, and if they are similar as Dr. Sanders is saying, I think that we -- if we started with the stipulated conditions in Blythe, I think that we can arrive that between the Applicant.

Many of these changes are very, very minor, and the one that deals with security is just basically the updated assessment of what it's going to cost, and ultimately, just so you know, ultimately the Applicant is not tied to paying that number. That number is used to put up security to ensure that they do perform. So if they go out and find land that's cheaper or find in the

actual cost of clean up of a particular piece of land is cheaper, then they can do that.

Their job is to give the land -- there are certain other fees, endowment and things that need to be done, but again, I just wanted to make sure the Committee understands that the Applicant and Staff, we believe we can work this out in a stipulated fashion; this is not an area of dispute.

HEARING OFFICER CELLI: That's great. I think the Committee would feel better with a stipulation and with citations to the record than -- if it's in the evidence and if it's something that the parties all agree to, then the Committee shouldn't have a problem with it.

MR. GALATI: The comments are due on the 20th. I propose that we work up a Staff stipulation. We'll take the pen on that since we know Staff is busy doing other things, we'll circulate it to all the parties by next week, and all the parties can comment on it. Ultimately, not all parties may stipulate to it, but we'll be focused on just the conditions and just those minor changes.

So if Dr. Sanders could give to us their current version of what they think needs to change, I can make sure that it's incorporated, and I'll circulate to all the lawyers on the proof of service list.

HEARING OFFICER CELLI: Thank you.

Anything further, Ms. Sanders -- Dr. Sanders?

MS. SANDERS: Thank you. That's a nice offer from Mr. Galati.

I just want to clarify one thing. We will be needing to introduce the most updated REAT table into the record, which is slightly different than the one Mr. Johnson provided. It adds a $30,000 fee from the National Fish & Wildlife Service Foundation, and we're using an assumption of 160 acres per parcel rather than the 40 acres per parcel which was in the original REAT table that was submitted. So those changes will happen also.

But I think that's very workable. Thank you.

HEARING OFFICER CELLI: Thank you. So we're interested in -- go ahead.

ASSOCIATE MEMBER WEISENMILLER: While we're on the REAT table, I think in the other cases the other issue that came up was whether the Applicant wanted the option to use the in lieu fee program. I don't know if that's on the table in this case.

MR. GALATI: Both in this project and on the Blythe project there is a condition that says you can satisfy by using the in lieu fee. The particular issue we were talking about, Commissioner Weisenmiller, had to do with one particular condition on big horn sheep. We

weren't sure, since it was going to be managed by federal agency, whether the in lieu fee could actually work for that. And we worked out that language; so we're good, and I think we're covered here. We have a bio condition that says you can use the in lieu fee, and the Blythe project has a bio condition that says you can use the in lieu fee.

ASSOCIATE MEMBER WEISENMILLER: I think to the extent there were other issues that were settled between -- associated issues that were settled between Staff and Applicant, again, I think they would be good to roll into this if necessary.

I think the other question was sort of the -- on in lieu fee was environmental assessment there.

MR. GALATI: I'm sorry, I didn't hear that last part.

ASSOCIATE MEMBER WEISENMILLER: I thought along with the in lieu fee option there was also the question of the environmental assessment associated with that.

MR. GALATI: Yeah, there certainly was. And in that particular issue, and only with the big horn sheep issue in that case, BLM wrote a letter and agreed to take responsibility for those issues, and so it didn't become an issue for us.

HEARING OFFICER CELLI: So if there's -- is there anything further from Staff, please, on biology?

MS. SANDERS: Yes, there are some things.

With respect to Bio 29, which is that in lieu fee condition that we just talked about, we did have some improvements to the language which we're going to apply to -- we hope to apply to Genesis, which makes it a little easier to clarify. If you don't mind, could I just read it so you'll hear what they are? It's only one or two sentences.

HEARING OFFICER CELLI: Well, let me get there. Hang on.

Oh, boy. Has your legal counsel seen Bio 29 and weighed in on it yet?

MS. SANDERS: Well --

HEARING OFFICER CELLI: And that's a big -- because we went around and around and around on Bio 29. There's some legal concerns. And so I just wonder if --

MS. SANDERS: Well, I can tell you the language that was decided this morning with -- there was some input from legal counsel. Not -- not Ms. Hammond, but I think the head of our legal counsel looked at that. I'm not sure if she approved it yet.

HEARING OFFICER CELLI: Okay.

MS. SANDERS: Let me just give you the language, and we can tell you -- and I don't think anything's going to be objectionable in this language, it simply makes it

easier for compliance.

And the additional sentence that would be added to the condition itself for Bio 29 is, "If the in lieu fee proposal is found by the Commission to be in compliance and the project owner chooses to satisfy its mitigation obligations through the in lieu fee, the project owner shall provide proof of the in lieu fee payment to the CPM prior to project -- prior to construction related ground disturbance."

So basically it's moving something that's currently in the verification into the condition. And then one more sentence is added too -- well, there's one more phrase added to the verification. What's current in there is, "If electing to use this provision, the project owner shall notify the Commission," and here's what's added: "and all parties to the proceeding that it would like a determination that the project's in lieu fee proposal meets CEQA and CESA requirements."

And then another sentence is added, "Prior to construction-related ground disturbance, the project owner shall provide proof of the in lieu fee payment to the CPM." So this is essentially just making it a little easier to comply with and adding some timing requirements that were missing before.

HEARING OFFICER CELLI: Okay.

CURE, anything on that?

MS. KOSS: I don't think so. Not right now. Perhaps I could --

HEARING OFFICER CELLI: I'm sorry, you know --

MS. KOSS: Perhaps I could look at her screen to just read it again.

HEARING OFFICER CELLI: Okay. I'm confusing -- I had a lot of projects lately. This isn't the one where we went around and around on this language, it was a different one. I'm sorry. I just realized it was another solar project. We didn't. That's fine. I'm sorry about that. It's hard to keep them separated.

MS. SANDERS: And in lieu fees is used kind of loosely for many different things, so there's a lot of confusion about what constitutes an in lieu fee.

HEARING OFFICER CELLI: Yes.

MS. HAMMOND: And I think the Commission, Ms. -- or Dr. Sanders was referring to is the condition concerning SB 34.

HEARING OFFICER CELLI: Yes.

MS. HAMMOND: And from what I heard and read, the substance doesn't change except that proof of payment of the mitigation fee should occur before ground disturbance. That appears to me to be the only change.

HEARING OFFICER CELLI: Right. Okay.

Ms. Belenky, anything on that?

MS. BELENKY: No, that seems fine.

HEARING OFFICER CELLI: Okay. So let's -- Mr. Galati?

MR. GALATI: What I heard doesn't sound objectionable. I do want to think about it a little bit more. So I think there's two things that were added here. One, show that you paid the fee.

I guess you caught us. No, just kidding.

Okay. That's easy.

The second thing is notifying all parties.

I'd like to understand what happens then. So does that give CURE an opportunity to file motions that the in lieu fee is ineffective and reopen the record or something? I'm assuming they have to come ask you to do that, that there's a not an automatic right --

HEARING OFFICER CELLI: That's correct.

MR. GALATI: -- we'd notify, and they'd have to come in and try to reopen and delay construction or whatever they do.

HEARING OFFICER CELLI: To the best of my understanding, having had to go around and around in Beacon, not Genesis, sorry if I panicked anybody, is that essentially it would be a citizen -- it would be like a public complaint under -- in compliance.

MR. GALATI: But they'd have to bring something?

HEARING OFFICER CELLI: That's correct.

MR. GALATI: Okay. So it wouldn't automatically open up --

HEARING OFFICER CELLI: They had would have to bring -- they're notified, they have a choice. If they don't like it, they can file a complaint.

MR. GALATI: I think we're okay with what we hear.

MS. SANDERS: It's actually identical to what was in Beacon. So if you want to see the language in writing before we end up with the stipulated conditions, that's where it came from.

MR. GALATI: If it's identical to Beacon, then we have no objection.

HEARING OFFICER CELLI: That's what I think they're going towards; and this Committee always prefers stipulations, so that would be great.

So we're still with you, Dr. Sanders, on biology.

MS. SANDERS: Yes. One more thing, and this, for those of you who have participated in Blythe, the Fish & Wildlife Service -- and I've just e-mailed Tannika Englehard from Fish & Wildlife Service to call back in, she is working on the biological opinion for this project right now. She would like achieve maximum consistency

between this document and her biological opinion so she can incorporate by reference, just incorporate our conditions and have them serve for hers. And because of that, she had some changes. They were relatively minor, which we made on Blythe. And again, that was just filed today. And she would like to make similar changes to Genesis.

There are changes, for example, having the WEAP, the worker awareness program, the educational program provided not for approval but provided to Fish & Wildlife and Fish & Game, because endangered species is a major component of that, provisions that they be provided a copy of the BRMP. If there's work stoppage related to Desert Tortoise or other endangered species, they be notified. You can see all of them that we're contemplating in the Blythe stipulated conditions that were just filed this morning.

So I don't know if Tannika's on the phone yet, but that was her hope, was to be able to make those changes.

HEARING OFFICER CELLI: I had her earlier, and then she seems to have hung up.

MS. SANDERS: Well, she said she didn't want to stay for the water, but she would come back if I called her for bio. She has a conference call from 3:30 to 4:00,

but --

HEARING OFFICER CELLI: Well, let me ask you this: Will BLM's comments come in separately from BLM or are they going to come through Staff?

MS. SANDERS: BLM's comments on our proposed changes?

HEARING OFFICER CELLI: That's right.

MS. SANDERS: Well, we coordinated very closely with BLM on the Blythe conditions, which were similar. I don't think they're going to be submitting separate comments, we've just been working together --

HEARING OFFICER CELLI: Okay.

MS. SANDERS: -- and sending them copies of -- they've gotten a copy of the PMPD, they've gotten copies of the Blythe changes, so they know what's going on.

HEARING OFFICER CELLI: I just to say that Mr. Galati and his people did a good job of creating -- telling us what they think the errata were, and then in those cases where it was called for, they would actually give us a paragraph on why.

And in the event that we're making some change for the benefit of BLM for consistency sake or whatever, it would be good if you could just insert a little explanation in those instances. That would be helpful to the Committee.

MS. SANDERS: I will do that.

HEARING OFFICER CELLI: Okay. Anything further?

MS. SANDERS: Did you want to go over minor changes in the text not related to the conditions?

HEARING OFFICER CELLI: If they're truly minor changes. I mean, things like we've got the wrong -- you know, a wrong amount or something like that, I'm sure we're going to get all of those changes in writing, and the parties will be able to see those comments, and we're happy to put those into the PMPD. So there's no need to do it orally right now because we will receive those.

The important thing is that -- the concern I have is that the changes are reflected in the record that we have and that they're cited to the record we have. So if there was an amount of some quantity of water or something like that and that changed because of dry cooling, then right now in the PMPD, we have a cite, an original cite to wherever we pulled that evidence from, Exhibit 400, page whatever, and if there was a change an update to that amount of water or whatever, I need the cite to that, where that number came from to put in there with it.

So to me, that's the most -- I know it's annoying, but that's the most important thing I'm going to need, is the actual cite where that evidence came from. So if we're going to make a change in number, I need to

see that it's in the record, I need to know what exhibit it was.

MS. SANDERS: Clear enough.

I have one change that I'll run by you, and you can decide if it's worth continuing. This won't take long. But this is characterization of the habitat as Desert Tortoise habitat or not. So let me just go through that briefly.

Currently the PMPD on page 7, the first full paragraph says, "The evidence shows that the project disturbance area is currently unoccupied by Desert Tortoise, and the northwestern portion of the GSEP site is suitable or marginally suitable habitat, while the remainder of the site is not habitat for Desert Tortoise."

There's considerable evidence in the record that the resource agencies, Fish & Wildlife, Fish & Game, BLM, consider the entire site to be Desert Tortoise habitat. And what I've cited in the record for that is -- oh, I don't think it has an exhibit -- oh, it's from Staff rebuttal testimony, it's attachment A, which was docketed on June 29th, 2010, and that's the Fish & Wildlife Service and BLM's assessment of the site as Desert Tortoise habitat.

So what it boils down to is deleting the phrase

"while the remainder of the site is not habitat for the Desert Tortoise." That, I'm suggesting we delete, and I've provided the evidence as to why we're doing that.

HEARING OFFICER CELLI: Okay. Well, we'll get that.

MS. SANDERS: Okay.

HEARING OFFICER CELLI: We'll get a cite, strike through and a cite, right?

MS. SANDERS: And I have to say I've not completely finished a careful review of everything. Those are the things that I know are going to be changed or would like to change, and it's possible there are other that I haven't detected yet. I think this is it.

HEARING OFFICER CELLI: Well, thank you very much. But don't leave, because we have Lisa Belenky on the phone, and she had some issues with regard to biology.

So, Ms. Belenky, are you there?

MS. BELENKY: Yes.

HEARING OFFICER CELLI: Go ahead.

MS. BELENKY: Okay. I just -- I mean, I think at this point there's just a couple of things that are in the PMPD we wanted to highlight. One is the response in the PMPD regarding the all-terrain fire engines and whether there's a need for any kind of preplanning analysis of the impacts that they would have on wild lands if they are

used off road, which is, in fact, what they are designed to be used for.

HEARING OFFICER CELLI: What page are you on, Ms. Belenky?

MS. BELENKY: I think on page, maybe, 34 to 35.

HEARING OFFICER CELLI: Okay.

MS. BELENKY: And I mean, the Center still believes that there has not been any analysis, there may be planning. We believe that it would be far better if the PMPD would acknowledge the need for that planning and actually have a date certain by which that planning should be done. It cannot just be a random moment of an emergency when they're needed and people don't know what to do.

The fire department said they would do preplanning. I believe that it makes much more sense for this PMPD to give a date by which that planning should be done. It simply doesn't make sense to say they will just be used in emergency and, therefore, they are not subject to CEQA. That is not correct, it's not a correct analysis of the law, and the likelihood or unlikelihood is not really the question when you're talking about something like fire; it may happen, it has happened in the past.

HEARING OFFICER CELLI: You know, Ms. Belenky, are you just trying to prove your point by having fire

engine noise in the background?

MS. BELENKY: No, this is where I work.

So I really feel that this is not adequately addressed in the PMPD, that it would be far superior if the Committee would acknowledge that this is possible and at least have some schedule for preplanning on these things. That's why people have fire drills, that's why people have fire planning. And I think it really needs to be done.

HEARING OFFICER CELLI: Are you going to submit some proposed language in your comments?

MS. BELENKY: Yes, we will.

HEARING OFFICER CELLI: Okay. That's great. Thank you. Go ahead.

MS. BELENKY: And then the second point that hasn't yet been mentioned is the whole question of the gate, which I think is in the PMPD, in the cultural section it does discuss the gate. And I think that if you look at the record and you look at the impacts of this new road in that area, it also has -- clearly has impacts on biological resources. And it's hard for me to understand. It may have something to do with the history of how you do your conditions, but I don't see why this isn't also provided as a condition for biological resources.

HEARING OFFICER CELLI: Now, I recall that there

was -- are you looking at the page in cultural that discussed the gate area?

MS. BELENKY: I could be.

HEARING OFFICER CELLI: I just recall that it was there. And maybe we can hear from the parties on that with regard to the overlap in terms of time, because my sense for the -- I wasn't clear whether the -- how long the gate was going to be there and how long it was going to be guarded for. That was a BLM issue as I recall.

MS. BELENKY: It's on page 50, just, and it's called 7, I think.

HEARING OFFICER CELLI: Page 50 of biology or cultural?

MS. BELENKY: Oh, cultural. It's CUL 14. And I do understand that the Committee appears to believe it is a BLM issue. I respectfully disagree; I think it's both. And I think that the Committee providing this in the PMPD is very important.

This is a road that is being authorized for use for this project, and I think these kind of protective measures really need to be in the PMPD itself as well.

HEARING OFFICER CELLI: Okay. And you, again, are going to propose some language to that?

MS. BELENKY: I think we did before, but I'm happy to put in new language again.

HEARING OFFICER CELLI: Well, thank you. I mean, really, we have -- the 20th is the last day to provide us with any comments and errata to the PMPD, so I'm just going to encourage you to do that.

I'm sorry, I'm looking for it, and you said it was on page 50 of Cultural?

MS. BELENKY: That's what I have written down, but let's see if I can find it again.

MR. GALATI: Page 50 there's two statements in the condition. One says, "Prior to commencement of grading operations on the plant site, the project owner will provide documentation to the CPM demonstrating the security gate and/or guard is in place." That seems pretty clear to me.

HEARING OFFICER CELLI: Yes. And so she would -- you want the same language, Ms. Belenky, in Biology.

MS. BELENKY: Yes. Yes. We believe this is an important condition to protect biological resources as well as cultural resources.

MR. GALATI: How about just a reference in the text that there will be a gate and, therefore, in Biology; because to have another condition, what do I have to do, submit it twice?

HEARING OFFICER CELLI: Yeah.

MR. GALATI: Submit proof twice to comply with

Bio 16, and then CUL -- there's going to be a gate, it's here, if you want to maybe refer to CUL 14 in the bio section.

MS. BELENKY: That seems like a good compromise. I think it needs to be acknowledged that that's part of the reason for the gate.

HEARING OFFICER CELLI: Seems reasonable to me. So that sounds good.

Go ahead, Ms. Belenky, you still have the floor.

MS. BELENKY: Okay. I think those were the two that we identified for, you know, in our first read through. Obviously there's always more, but I think that will do for now.

HEARING OFFICER CELLI: Okay. Thank you very much. You have about two weeks to consider this before we close the comment period on it.

MS. BELENKY: We'll try to get you any additional comments as soon as possible.

HEARING OFFICER CELLI: Thank you.

Mr. Galati, do you have a question?

MR. GALATI: Yeah. May I address the first issue on the roadway planning for the secondary emergency response?

Ms. Belenky was saying that this PMPD should include a timeline for the planning of how the emergency

all-terrain vehicles respond to the site. I just wanted to remind the Committee that you certainly have jurisdiction over us, but you don't have jurisdiction over how Riverside County is going to conduct its fire planning and how those all-terrain vehicles will ultimately be used.

You have a lot of evidence in the record that it's very likely they will never be used to respond to the Genesis project. In fact, it's more likely they won't be used than they will be used, but it's a caution, we provided that as mitigation in case -- and again, to remind the Committee, this is only if the access road and/or -- the access road, there's an incident on that while there's also an incident at the site. So that they need to get to the site and that they cannot go around the access road or they could not drive around the incident off of the access road to site. It's only then that there would be an opportunity for them to come across the desert, however they're going to get there, for a secondary access.

We provided quite a bit in our briefs and so did Staff, that it's speculative for this Commission to require us to mitigate as a CEQA impact for any of those biology.

I also submit to you that it's not appropriate

for this Commission to force some sort of planning timeline on the Riverside County Fire Department.

HEARING OFFICER CELLI: Understood. Okay.

If that's everything, Ms. Belenky on biology, unless Staff or CURE had anything further, Dr. Sanders?

MS. SANDERS: I just want a clarification. Is Staff going to be writing -- adding an element to some condition calling for a gate similar to what's in Cultural? Is that what I've been directed to do?

HEARING OFFICER CELLI: I think CBD is planning on offering some language that would have some reference in Biology to CUL 14 with regard to the obligation to install a gate and possibly have the gate guarded.

MS. SANDERS: All right. So we'll just wait to see what CBD submits.

HEARING OFFICER CELLI: That's right. Or --

MS. BELENKY: If you want to do it, I mean, I can certainly come up with some language and suggest where it could be put; and if Staff has ideas of how to best work that in, I'd be happy to have that.

HEARING OFFICER CELLI: And the parties are free to discuss and perhaps come together with a stipulated -- a stipulation of some stipulated language that covers it and makes everybody happy.

MR. GALATI: Yeah, I'll certainly include some

language. Again, the theory that I was going to include was not going to be any change to the biology conditions, but in the text of the PMPD for Biology, it would say, and the biological impacts would be reduced by the security gate which is required under CUL 14. It would be that simple. That's all I was planning to do. And then the parties can add to that statement if they like. But I wasn't intending to do it in a condition.

HEARING OFFICER CELLI: Okay. And that was my understanding. And I have nods from the parties here in the room.

Okay. Anything on Biology before we move on to Cultural?

MS. HAMMOND: Just a couple more general statements, and Staff will be putting these in its comments.

Staff is going to be requesting that the Committee incorporate some of the other actions that are recommended in the PMPD to reduce the impacts to less than significant. It's not just the mitigation measures that are -- Staff would like to see a recognition of the avoidance and minimization measures to bring the impacts to less than significant.

On the discussion of cumulative impacts, Staff is going to request that the focus be shifted from presently

the project's -- focus on the project's impacts alone, and shifting that focus toward the project's contribution to impacts in the region.

HEARING OFFICER CELLI: Well, right now as it stands, we have the usual flow as, you know, construction and operation, direct and indirect, and then cumulative impacts, each treated pretty much separately, cumulative from the direct impacts. So I'm not sure what -- are you just telling me in general that basically you're going to be looking for more -- you need more -- what is it you need? I'm not sure what you're looking for in the cumulative impacts.

MS. HAMMOND: Well, I guess Staff is concerned about what it perceives to be is a misstatement in the PMPD that a finding of impacts being reduced to less than significant without acknowledging the residual impacts would lead necessarily to a conclusion that there are no cumulative impacts.

HEARING OFFICER CELLI: I believe that we came to the conclusion that there were cumulative impacts.

MS. HAMMOND: I'm thinking in particular in the areas of Biology, possibly Soil and Water as well.

HEARING OFFICER CELLI: Okay. So Staff is -- just to be clear then, PMPD right now as it came out comes to the conclusion in Soil and Water -- now, I don't even

remember that there were no cumulative impacts or direct impacts from soil and water.

MS. HAMMOND: Uh-huh, uh-huh.

HEARING OFFICER CELLI: And is it now Staff's position that there were cumulative impacts?

MS. HAMMOND: We're not changing the -- asking for a change in the position of the PMPD but just perhaps a correction in the analysis.

HEARING OFFICER CELLI: Okay. All right. Well, we'll see what Staff submits on paper, and we'll take a look at that.

I just want to -- I just was trying to get a sense of what we were -- what to expect.

MS. HAMMOND: Yeah, if I can restate it or rephrase it --

HEARING OFFICER CELLI: Please.

MS. HAMMOND: -- maybe it will be clearer.

What Staff has seen and interprets the PMPD as saying is that because there are no significant impacts or that significant impacts have been reduced to less than significant, that necessarily there are no cumulative impacts. We don't believe that that is a correct way to do a cumulative impacts analysis, that a cumulative impacts analysis has to also consider the residual impacts when impacts are reduced to less than significant. And so

we would just -- we're concerned that the PMPD be corrected.

HEARING OFFICER CELLI: Okay. I'll eagerly watch for those comments and see what we get from there.

With that, can we move on to Cultural?

MS. ENGLEHARD: Hi. This is Tannika Englehard with the Fish & Wildlife Service. I just called back and I understood that there may be some additional questions for me?

MS. SANDERS: Tannika, this is Susan. Thank you for calling in.

We discussed briefly the fact that we're trying to get consistency between the biological opinion and our conditions, and I referenced everybody hear to the Blythe changes. And I believe what we're going to do is simply submit those and see if all parties can agree that those are reasonable changes. I believe that's how we left it.

HEARING OFFICER CELLI: Yes.

MS. SANDERS: So I guess we don't have questions for you. Thank you for calling back in, unless someone did have questions.

MS. ENGLEHARD: Okay. All right. Thanks.

HEARING OFFICER CELLI: Did the Committee have any committees for the USFWS?

No questions. Thank you.

Okay. Ms. Bastian's here.

Hello.

Mr. Monosmith, you might want to resume a place at the table.

Cultural. Going to defer to Ms. Allen who had several questions with regard to Cultural. This is having to do with Cultural 1 and Cultural 2, which we put in highlight in the PMPD.

MS. ALLEN: I wondered if Staff could go through a brief explanation for CUL 1 and CUL 2 on the concepts of who will do what by when in terms of actual products involved in the documentation and possible nomination for the historic register process. I know that I asked this question in the Blythe proceeding also, but we need to get it on the record for this proceeding.

MS. BASTIAN: Okay. For both of the landscape level studies, the one addressing World War II resources and the one addressing prehistoric and ethnographic resources, the timeline is really broken into two, a very quick and immediate delivery of the information that we decided is necessary to inform the data recovery activities of the project prior to their beginning ground disturbance, and those will be historic contexts from which are derived evaluation criteria and the essential data to answer research questions and the research

questions themselves. And we are expecting to have those middle of October.

I still, I have to say, do not have somebody working on it. It's proved extremely difficult and slow to get -- to be able to employ the people that I needed to have do this, very high-level scholars. Their availability was excellent; the problem has been actually getting them on a contract basis.

Still expecting to get something -- enough that I think will be what we need to inform, as I say, the data recovery activities archaeological teams as they begin their work prior to starting ground disturbance on the project. After that, the timetable is fairly wide open, and, in fact, could best be characterized as episodic in the sense that this project will be phased. They will build some parts of their project, and then other parts later. And our conditions allow them to provide data as it is acquired, but not across the entire site, just across that part of the site for each aspect of their construction phasing that they are affecting and where the data recovery would have to happen.

So the data recovery, or the recovered data, would be provided then to the landscape level people to incorporate eventually into the final documentation and nomination to the National Register of these two cultural

landscapes. So there's a feedback relationship between the landscape level scholars and the CRS for this project and the other two as well.

The landscape level people provide elements of the critical research design for the project -- CRS is cultural resources specialists -- and the cultural resources specialist, as the data are generated, again, with this phasing that the project anticipates doing, provides data to the landscape level, the regional level scholars to put into their final products. And that, as I've said, is somewhat open and dependent because they are drawing on data from three different projects, each with its own schedule and its own phasing. So this could be -- the second part of this whole program could be prolonged.

MS. ALLEN: Thank you. My reading of the wording in the condition, CUL 1 and similar wording in condition CUL 2 doesn't present any mention of research questions or data recovery or the personnel that would be involved. That doesn't come through in the condition as currently written. Do you anticipate any challenges with implementation of the conditions?

MS. BASTIAN: Not in terms of the program. It was a deliberate decision to not have the actual program detail spelled out in the conditions because we need flexibility in ultimately designing the program. This is

to say that when the particular experts are on board, their input is going to be very important to how this is approached. They are the people who know the region. Beth and I and all the other people who contributed ideas could layout a fairly detailed program, but I think the ultimate elements of that need to be approved by and have the input of these regional experts, so we did not want to lock them into specifics, and we, therefore, have these programs discussed in detail in the RSA itself.

MS. ALLEN: I did notice that detail in the RSA, so thank you for making the link here.

HEARING OFFICER CELLI: I had a question. Is there anything further on CUL 1 or 2?

I was concerned about the management of the funds. I recall in compliance many years ago that there was a situation, I don't remember if Mr. Monosmith was involved in this or not, where there was a fund set up for the Keno Checkerspot Butterfly out of San Diego. This was a biology issue. And it said you shall create an endowment fund to be administered by the Energy Commission and the USFWS to take care of the Keno Butterfly.

The USFWS took the money and was going to put it into the creation of some regional, you know, like mitigation lands thing without any analysis of whether the butterfly was going to benefit from these funds. And

there was a bit of a meltdown, and it finally resolved after much, much turbulence.

And I wonder if Applicant or Staff might want to insert something that requires some sort of an MOU between any of the parties that would be administered funds so that it's clear what the roles are. In the case of that one power plant, I won't mention which one it was, we ended up having an MOU, coming to an MOU where it created an endowment fund, we brought in a third party who was willing to stipulate to the jurisdiction of the Energy Commission, because we had no jurisdiction over him, and we worked it out that way.

But I just am concerned that there be some sort of detailed instrument that lays out what the respective responsibilities of the parties would be.

Mr. Galati.

MR. GALATI: How I envision this currently working and the way the language works, it's -- right now it's an Energy Commission only managed fund. It's and/or BLM, should BLM choose to participate. In the final EIS, it's unclear to me about whether the BLM's going to participate in the fund or how that's going to work. So we prefer to have one agency manage the fund, have the Energy Commission manage the fund. We think that's easier. I can tell you that I'm still working on an MOU

for a project that is almost licensed, so -- on how the parties are going to process the project together. So sometimes that can be pretty hard.

Since this is not going to be a fund that then is expended to benefit something like that, it hires people, these people are identified as to how they coordinate the people that Genesis hires in the other condition, like in Cultural 5, when we prepare the CRMMP. This person -- the people who are hired under CUL 1 and CUL 2, they -- we have to coordinate with them to make sure when our monitors go out into the field, that if they are -- they see something or they're collecting data, they're collecting data with some input of how it affects something regionally, not just that particular site. And then when that data is done and collected, it's given to them. And the landscape people then who are paid through this fund take that data, collect it, and study it, and do a broader landscape study which may allow the larger regional landscape to be eligible for listing.

So I think that for us it's more of a scope of work if we pay the money that these people are available to work with our people, and so far, at least on the Blythe project, we've started working that out. So I'm less concerned with the fund, you know, not being used for -- to benefit a species, for example, like in your

case --

HEARING OFFICER CELLI: This is for the benefit of these trails, right?

MR. GALATI: It's -- the fund is really not to benefit the trails; the fund is to actually hire the people who can interpret the data. So a little different than they're not enhancement to the trail or something like that.

It's really, we just need to get these people on board, and there's no way to pay for them, so the Applicants are paying for getting these people on board. That's how I see the fund.

HEARING OFFICER CELLI: Is there a problem, Staff, with just making it be CEC rather than and/or BLM?

MS. BASTIAN: I'm anticipating no problems with that. And as Mr. Galati said, at this time it's rather unclear what role BLM will play, but for -- I see it where the worst-case scenario is that almost chooses not to recognize -- I don't think this is a real possibility, just from my informal feedback from BLM at this point, but should BLM choose not to recognize these two landscapes as resources for which mitigation needs to be arranged and would not, therefore, include in any respect the equivalent of CUL 1 and CUL 2 and the programs that are in the RSA, in their programmatic agreement, we can proceed

with the implementation of CUL 1 and CUL 2 and these programs because no aspect of that entails a permission from BLM to proceed. They do have to give permission for anything that involves ground disturbance, but these programs are not of that nature.

HEARING OFFICER CELLI: I'm just throwing this out there because I've encountered a similar problem in the past. Maybe if, Staff Counsel, you might want to present this to whoever's going to handle this and have a discussion and maybe offer some language that leaves us -- makes us a little more certain what the responsibility -- who's responsible for management. I mean, as written, it looks like the two agencies, they're handling it.

MR. GALATI: Well, while Staff is considering that, I did want to correct a statement that I said.

It's not only to fund the people, but we understand that during that process there -- this particular group will also do the Native American consultation that's called out in CUL 14.

HEARING OFFICER CELLI: Right.

MR. GALATI: So again, it funds that effort.

HEARING OFFICER CELLI: Maybe in consultation with or something like that, but the and/or just seems like it's a -- it's a big hole to step into.

So is there anything further on that from Staff?

MS. HAMMOND: I guess -- I'm not familiar, terribly familiar with this case. Could you clarify or restate what you're looking for?

HEARING OFFICER CELLI: Well, you were consulting with your cultural consultants, so you didn't hear me, but I was basically saying my concern is with the and/or, because that's the language we had in that circumstance that I described before in Biology down in the San Diego area. And what I was looking for is perhaps maybe something more along the lines of a -- you know, an offer of language in your comments that accomplishes what you want to accomplish but makes it clear what the roles are. Perhaps CEC in consultation with, or something like that. But leaving it "CEC and/or BLM," everything's kind of, oh, they're doing it, essentially.

MS. HAMMOND: No, absolutely, that's a very, very good point, and we will address it in kind.

HEARING OFFICER CELLI: So that's all we were asking, I'm asking for.

Anything further on CUL 1 or CUL 2 from the Committee?

Ms. Michael?

Applicant?

MR. GALATI: Nothing from us.

HEARING OFFICER CELLI: CURE?

Ms. Belenky? Ms. Belenky, are you -- oh, didn't she mention that she had to go to another -- okay, we may have lost her.

By the way, is Mr. Budlong --

MS. BELENKY: You didn't lose me. I'm sorry. I just was listening.

HEARING OFFICER CELLI: Okay. The question was was there anything further on cultural from CBD.

MS. BELENKY: No, that's okay. Thank you.

HEARING OFFICER CELLI: Is CARE, Californians for Renewable Energy, any representative from CARE on the phone?

Or Tom Budlong?

Okay. Is there anything further from anyone on Cultural at all?

MS. KOSS: Yes.

HEARING OFFICER CELLI: Go ahead, Ms. Koss.

MS. KOSS: Thank you.

CURE just has one more thing to ask of the Commission today, of the Committee today, rather, and that is to recognize the fact that this project is proposed to be built in an area that's very rich with cultural resources. And just to give some perspective, if the 13 projects that are proposed to be built along the I-10 corridor, including this project, are approved, over

48,000 acres of desert lands would be disturbed and over 800 cultural resource sites would be destroyed.

And if you look at it on a broader scale, looking at the southern California desert region, if all of the projects proposed to be built in the region are approved, one million acres, that's over 1500 square miles of desert lands would be disturbed and over 17,000 cultural resource sites would be destroyed. This needs to be taken to heart.

Specifically, this project is proposed to be built on approximately 1800 acres of relatively undisturbed desert land along the edge of a dry lake bed where significant prehistoric remains exist. And as one of the Native American elders who has actively participated in this proceeding stated, the project is proposed to be built in the most sacred area on the North American continent. It's an area, according to Staff's and CURE's expert witnesses, that has a high likelihood, a high likelihood of containing buried resources, including human burials. But the Commission did not analyze the project's impacts on human burials. That was admitted by Staff at the hearing, and the PMPD does not mention human burials at all.

Now, CEQA requires the Commission to disclose and analyze each of the project's impacts. That includes

impacts on human burials. And CEQA requires the Commission to impose all feasible mitigation.

If the Commission doesn't analyze the project's impacts on human burials, the Commission cannot make its finding required under CEQA, specifically until the analysis is performed and the Commission is adequately informed of all the project's environmental effects, including impacts on human burials; the Commission simply cannot find that all feasible mitigation was required, nor can the Commission find that the project's significant impacts on cultural resources are outweighed by the project's benefits. It is impossible to make those determinations without an impact analysis.

Now, if the Commission does not analyze the project's impacts on human burials, despite the state law that requires it to do so, the Commission in the alternative should require the Applicant to conduct Phase 2 test excavations prior to project ground disturbance. This is necessary to determine the extent of buried resources on the project site and significance values that those sites may contain. Only then can it be determined whether additional sites need to be avoided.

The way the process is currently set up, going straight to data recovery, it's impossible to avoid any sites once ground disturbance has begun. And it's also

very important that this testing be conducted by hand, not mechanical means; otherwise, there's no chance of preserving any resources that may be lost. This is a very simple ask. We just ask that this is done prior to ground disturbance so that there's a chance of saving this culturally-rich area. Over 17,000 cultural resources will be destroyed if all of these projects are approved.

HEARING OFFICER CELLI: Do you have proposed language with you today in this?

MS. KOSS: I have a little summary of what I just stated. I also will provide specific language for a condition as soon as we hear back from our consultant. We're just waiting for specific language, and I'm hoping to get that very soon, and we'll submit it as soon as it's ready prior -- hopefully prior to the 20th. But I do have --

HEARING OFFICER CELLI: It's got to be prior to the 20th. The 20th is the last day.

MS. KOSS: Right, I mean --

HEARING OFFICER CELLI: On or before.

MS. KOSS: Yeah, but I'm going to be submitting written comments on the 20th, and I'm just hoping that this specific condition language I can get to you sooner.

HEARING OFFICER CELLI: Thank you.

Any response to this particular issue from --

well, let's hear from Staff first since you have Ms. Bastian here.

MS. BASTIAN: Yes, thank you.

HEARING OFFICER CELLI: This is the idea of a Phase 2 analysis.

MS. BASTIAN: Our conditions of certification, the specific mitigation measures that are -- that address data recovery also include an evaluation phase, which was discussed in the RSA as a compressed Phase 2, Phase 3 operation. So the -- on every site where there is a prospect at -- by what is known about those sites at this time of any kind of buried deposits, including burials, and at this point there is no indication of that in this area.

The first effort will be a hand operation testing and a determination of the prospect of buried resources, and the application of machinery in the event that the buried resources are not burials but rather a type of site known in the desert region and I guess adjacent to these lakes of house pits and related features that would represent habitation sites.

We believe our mitigation measures provide for the concerns, address the concerns expressed by CURE both with respect to considering the prospect of burials, going about an evaluation phase that indeed entails hand

excavation, and using machinery in the event to explore other types of sites -- other types of deposits, excuse me.

HEARING OFFICER CELLI: So can you kind of direct us to which cultural condition?

MS. BASTIAN: I don't have that with me, I'm sorry to say.

HEARING OFFICER CELLI: Because this is going to be the condition I think that Ms. Koss is going to have to be offering an amplification to.

MS. BASTIAN: I believe the primary one that she -- yes, it would be CUL 11 where there is the consideration of the potential for buried deposits of any kind where the initial effort is to do hand excavation and then to pursue the potential for deposits that represent house sites with a machine-type operation. And I would have to guess that that's where CURE may be suggesting alternative -- an alternative approach.

HEARING OFFICER CELLI: CUL 11 is entitled "Data Recovery for Large Sites."

MS. BASTIAN: Correct.

HEARING OFFICER CELLI: And "Prior to the start of ground disturbance, project owner shall ensure that the CRMMP includes a planned recovered data from those parts of site CARAV 9072 that the project will directly impact.

When ground disturbance is within 30 meters of the boundaries of this site, the project owner shall ensure that the plan is implemented if allowed by the BLM. Subsurface data recovery plan shall at a minimum include the following: Marking with lathe and flagging, research questions related to data recovery, detailed examination of the surface within the site study area, creation of digital map --"

MS. BASTIAN: Number five is where the hand testing --

HEARING OFFICER CELLI: Okay. "Testing of horizontal limits of the site by placing test units down to the upper boundary of the --" is that QOAF alluvium?

MS. BASTIAN: Correct.

MR. STEIN: And also at the bottom of the page under D.

HEARING OFFICER CELLI: Okay. "Buried features shall be excavated by hand or by mechanical stripping with a backhoe bucket to remove sterile overburden."

Looks like we're missing a period or we're missing the rest of that sentence.

MS. BASTIAN: I'm not certain. It could well be a period.

HEARING OFFICER CELLI: Okay. "Sterile overburden," is "overburden" a noun?

MS. BASTIAN: Yes.

HEARING OFFICER CELLI: Rather than a verb?

MS. BASTIAN: Yes, it is a noun.

We should check to see that that is a complete version of what we had as that condition.

HEARING OFFICER CELLI: So are those -- Ms. Koss, I just want to be clear, are we in the right ballpark here in terms of the kind of detail you're looking for?

MS. KOSS: Well, this condition is for data recovery.

HEARING OFFICER CELLI: Yes.

MS. KOSS: And that's exactly the problem. We -- CURE submitted extensive testimony that going straight to data recovery prohibits any opportunity to avoid resources that may be discovered. And if you're using, as allows in 8D, a backhoe, you're -- you could very well destroy them as well. So there's two issues with this condition.

HEARING OFFICER CELLI: But you understand that the Committee found that there -- I mean, you can't -- the only way to have avoidance on the project is to not have the project. And so the Committee found that there was a significant impact, an unmitigable impact essentially because the presumption of ethnographic resources on the site will be disturbed if the project goes forward, and it's an unmitigable impact. That's the worst case, I

mean, that was the worst case, it was based on worst-case scenario.

MS. KOSS: Right. And there was extensive briefing on that, and as the PMPD notes, it wasn't actually based on the worst-case scenario.

HEARING OFFICER CELLI: Well, actually, the Committee added a couple extra factors to make it a little worse, make it the worst possible. The worst-case scenario would be that the assumed presence of cultural that there were there, which I assume to be significant, are also assumed to be spiritual values or ethnographic resources.

MS. KOSS: I think it would be imperative to include in the PMPD why despite all of the testimony and briefing on human burials the issue has been dismissed.

HEARING OFFICER CELLI: Oh, and I -- I'm not -- what I am going to encourage you to do is actually come up with some language that addresses the human burial question which you've raised.

MS. KOSS: Yes.

HEARING OFFICER CELLI: So I'm asking -- I mean, we invite you to bring some language. I just wanted to get you to the right place. Because if Staff is saying, look, we've already dealt with that, and you're saying that they didn't, I just want to make sure that you're

both talking about the same thing.

MS. KOSS: I will do that.

HEARING OFFICER CELLI: So that would be helpful.

Applicant, anything on -- any comments?

MR. GALATI: Just real brief.

Nothing stops the Applicant if it can to avoid something it finds that it didn't anticipate, and that happens a lot. If you find something in a trench or you find something in an area that you can move around or you find something while you're starting to do grading for a transmission pole, things can be moved. So the idea that nothing can be avoided from here on out is not actually accurate, but the Committee is overestimating and assuming and mitigating that it's all gone.

HEARING OFFICER CELLI: Correct.

MR. GALATI: The real question that we're debating was the question that was briefed and the Committee already decided, whether or not additional work had to be done in order to comply with CEQA prior to the Committee taking action. And we've identified in our brief and we agree with Staff that the conditions here are not just data recovery; they involve the CRMMP, they involve performance standards, they involve avoidance, they involve additional testing. There's testing in here as you start to get closer to known sites, that's not data

recover, that's testing to further identify the limit; and if we can avoid those, we will. So we think that this issue has been resolved, and I don't think we're hearing anything new today.

HEARING OFFICER CELLI: Staff?

MS. BASTIAN: I would agree with that. And the language that is in there may not say specifically "testing," but it says "explore," "determine the limits of," "determine the nature of these deposits." All of that is essentially the same as is evaluation phase for the determination of the presence of the sorts of resources, these burial resources that CURE is concerned about.

HEARING OFFICER CELLI: Just to be clear, the reason that Staff -- my impression is that the reason that the Staff went with the worst-case scenario was that there just was not the ability to do a Phase 2 study -- I guess is the word we call it -- Phase 2 study of the area for burial sites, et cetera, which is digging down and poking around.

MS. BASTIAN: That's correct. Not for burials or any other buried deposits of whatever nature.

HEARING OFFICER CELLI: Okay. But what I -- what CURE is raising -- and I just want to make sure because I don't -- I'm not sure it's here, is do the conditions as

they exist right now impose an obligation due to Phase 2 prior to ground disturbance.

MS. BASTIAN: I believe so, yes.

HEARING OFFICER CELLI: Okay. It doesn't actually say --

MS. BASTIAN: It's not explicit, I agree.

HEARING OFFICER CELLI: Yes.

MR. GALATI: It does say to do the evaluation as -- you know, within so many feet of the sites that we're anticipating where we've done surface looks, and it is correct that it's possible that during a pedestrian survey you didn't see anything on the ground, there could be something underneath, that goes to show you that it -- would a Phase 2 study involved for 18 acres, how many test pits, hand dug test pits would it take to preclude that possibility. We can't preclude that possibility.

What we did do is a geoarcheology study to determine what the land forms are and, in fact, the deposits where we think they are in the areas where the alluvium is the thickest. So we've already moved the site several times and moved and identified areas to stay away from.

Are the limits of those areas, are they known because we went out and did test excavation or hand digging? No. That's why Staff requires us as we get

close to them to actually do that evaluation phase as we move close to them. So there is that evaluation phase. It's not a Phase 2 before site work is done, but it's a Phase 2 before site work near these resources.

HEARING OFFICER CELLI: Ms. Koss.

MS. KOSS: Yeah, just a small point.

From a big picture perspective, there's no reason to destroy resources if it is feasible to avoid them. This plan is a plan to destroy resources. That's what data recovery is. When you think from an ethnographic, a cultural value perspective, data recovery destroys the value of the resource. So all CURE is saying is take the ten days, two weeks, whatever it may be, short period of time, we submitted testimony that I think 85 resource sites were excavated, test excavated in two weeks. This project site has 27. We're talking about days. All CURE is saying is do the testing. Let's be cautious here. Let's not destroy these resources where it's not necessary to do so.

HEARING OFFICER CELLI: And that seems eminently reasonable to me. I'm eager to see proposed language in that regard. And then if you can sort of integrate it to what the existing conditions are, that would be most helpful.

MS. KOSS: I will do that.

HEARING OFFICER CELLI: Thank you.
Anything further on Cultural, Ms. Koss?
MS. KOSS: No, thank you.
HEARING OFFICER CELLI: Okay. Ms. Belenky, anything on Cultural?
MS. BELENKY: No.
HEARING OFFICER CELLI: And Mr. Boyd, did you come in?
Mike Boyd?
Tom Budlong?
Okay. Are we finished with Cultural, parties?
MS. HAMMOND: Staff would like to request, and perhaps it's efficient and expedient if CURE does circulate the language, maybe the parties could come to a stipulation.
HEARING OFFICER CELLI: That would be preferred.
MS. KOSS: Sure. Will do.
HEARING OFFICER CELLI: That would be great.
MS. HAMMOND: Thank you.
MS. BELENKY: Is there a break? Did I miss that? Hello?
(Discussion off the record.)
HEARING OFFICER CELLI: The Committee is -- requests and encourages the parties to communicate, share information, do what you can to stipulate -- come to

stipulated agreement on any changed language or conditions that you can reach agreement on.

We had talked about a possible workshop. We don't think there's enough time really. It's -- in ten days it's the 20th, essentially, with weekends. So -- and the parties are welcome to stay after tonight and discuss whatever language, whatever stipulations you can reach while you're all here together would be helpful. But again, it's easiest for the Committee to receive language when all the parties agree to it than trying to sift through and go back through the record and try to make a determination based on new comments.

With that, have we covered everything we need to with regard to errata?

I'll start with the Applicant.

MR. GALATI: Yeah, the rest is in here, and I don't think we are going to have very many more changes; if they are, they're just minor.

HEARING OFFICER CELLI: Okay. Staff?

And, Ms. Hammond, thanks for coming in and stepping in in the absence of your colleagues.

MS. HAMMOND: Thank you for that encouraging comment.

HEARING OFFICER CELLI: Nothing further from Staff?

MS. HAMMOND: Nothing further. Thank you.

HEARING OFFICER CELLI: Thank you.

Ms. Koss?

MS. KOSS: No. We look forward to submitting our written comments as soon as we can.

HEARING OFFICER CELLI: Look forward to seeing them.

And, Ms. Belenky, anything further on the PMPD?

MS. BELENKY: No, not at this time. I think we will send in our comments as soon as we can. And thank you for listening today.

HEARING OFFICER CELLI: Thank you.

Now it is time for the public comment part of our program.

I just want to make a point to say that the PMPD and errata, the errata, proposed errata have to be to the Committee on the 20th. Assuming that there are no revisions that would trigger a 15-day comment period again, the PMPD and errata would be up before the full Commission at the September 29th business meeting. So that is where I think we're headed unless we are surprised by something in your proposed errata.

And, Mr. Galati, did you have a point?

MR. GALATI: Yeah, if I could just address the Committee. And again, it's more of a general comment.

And the general comment is that we would prefer in the future with PMPD conference hearings, even if they get scheduled soon, the parties are not -- do not qualify for the 30-day public comment period. And in the past and what the Committee should do in the future is require all parties to file comments before the PMPD conference hearing so that there are no surprises that have to be addressed at the business meeting. And it's okay for the Committee to do that because we're parties and you can tell us we have less than 30 days. That's the rights and responsibilities of a party. Once you become a party, you are subject to the presiding member's decision on timelines.

So what is often done is all parties have filed their comments before a date today so that all parties can respond to each other's comments and there are no surprises. And then if there's anything to work out, stipulations, you can do so between that and the close of comment period.

The public comment period comes in, and then the Committee is only left with looking at comments from the public as opposed to the complex comments that often come from parties, and that makes the business meeting, in my opinion, run a lot smoother than the last few that I've seen where that didn't occur.

So I'd really implore, and primarily talking to the commissioners here, is the next PMPD conference hearings require every party to file comments before the hearing. Because we're going to get -- I know what we're going to get, and it's going to be very difficult to deal with in the nine days between then and the business meeting, and then we're going to hear -- we're going to go through them at the business meeting, and it's going to take a long time. And that's awful hard. It's unfair to the Committee. The Committee should have an opportunity to take and ask questions about those comments, not in a business meeting setting.

HEARING OFFICER CELLI: That's true. And we will take those to heart.

MR. GALATI: I just wanted to put that on the record.

HEARING OFFICER CELLI: Point well made, yes; point well made.

COMMISSIONER BOYD: I've been a victim of some of those long business meetings.

HEARING OFFICER CELLI: We're on public comment. I'm looking around the room. I don't see anyone who looks like they qualify as public only because they're all members of the parties. So I'm going to go to the phones.

And Ashley Pinnock, are you still on the line?

No, I guess she hung up.

I have Tricia Bernhardt. Did you wish to make a comment?

MS. BERNHARDT: No. No comments from Tricia Bernhardt.

HEARING OFFICER CELLI: Thank you.

Scott Busa. Hi, Scott.

MR. BUSA: Hi, Ken. Hello, everyone. Sorry I couldn't make it today. No comment.

HEARING OFFICER CELLI: Thank you.

Reed Farmer?

MR. FARMER: No comment.

HEARING OFFICER CELLI: Thank you.

Lisa Belenky, any further comment?

MS. BELENKY: No, I can't -- I didn't do that on purpose.

HEARING OFFICER CELLI: Do you live above the fire department?

MS. BELENKY: There's a lot of fire drills today.

Okay. No, I have no further --

COMMISSIONER BOYD: It's a tough day in San Francisco.

MS. BELENKY: Okay. Thank you.

HEARING OFFICER CELLI: Not to beat a dead horse or anything.

Okay. Let's see. Jennifer Jennings is on the line.

Hi, Jennifer.

Emily Festger, any comment?

MS. FESTGER: No comments, thanks.

HEARING OFFICER CELLI: Duane McCloud?

MR. McCLOUD: No comment.

HEARING OFFICER CELLI: Okay. This leaves me as usual at these hearings with people identified as Call-in User 10, Call-in User 12, Call-in User 6, Call-in User 7, and Call-in User 8. I don't know who you are. If you are on the phone and you wish to make a comment, please speak up, and we'll go with whoever's the most aggressive.

MR. KLINE: George Kline, BLM. I have no comments.

HEARING OFFICER CELLI: Thank you, George, for identifying yourself.

Anyone else on the phone who would like to make a comment?

I have -- and these could be staff people listening in for all I know.

Anyone on the phone who would like to make a public comment at this time and make a record in front of the two commissioners who make up this Committee?

Hearing none, I guess we've finished the public

comment section. And I will turn it other to Commissioner Boyd who will adjourn the conference.

COMMISSIONER BOYD: Thank you, Hearing Officer Celli.

Well, thanks to all of you for your continuing hard work and your efforts on this case and your efforts to resolve differences. As hinted at by Hearing Officer Celli, we encourage you to have some interaction on language, if you can, and try to resolve differences as best you can. While we can't take the approach recommended by the Applicant today in finishing this case, we can encourage everybody to try to work together on language issues before submitting your final comments on the 20th, and hopefully we will be able to resolve issues such that the business meeting won't be as protracted as some of them have been of late, just over a siting case.

So with that, I thank you all. Wish you all a happy evening.

(Thereupon the California Energy Commission, Genesis Solar Energy Project Committee Conference adjourned at 4:12 p.m.)

CERTIFICATE OF REPORTER

I, JOHN COTA, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Committee 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 hearing, nor in any way interested in outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 13th day of September 2010.

_____
JOHN COTA