

January 22, 2010

California Energy Commission
Docket Unit
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: **GENESIS SOLAR, LLC REPLY BRIEF IN SUPPORT OF COMMITTEE
SCOPING ORDER
DOCKET NO. (09-AFC-8)**

Enclosed for filing with the California Energy Commission is the original copy of
**GENESIS SOLAR, LLC REPLY BRIEF IN SUPPORT OF COMMITTEE SCOPING
ORDER**, for the Genesis Solar Energy Project (09-AFC-8).

Sincerely,



Marie Mills

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STATE OF CALIFORNIA
Energy Resources
Conservation and Development Commission

In the Matter of:

Application for Certification for the
Genesis Solar Energy Project

DOCKET NO. 09-AFC-8

**GENESIS SOLAR, LLC REPLY
BRIEF IN SUPPORT OF COMMITTEE
SCOPING ORDER**

Genesis Solar, LLC hereby files this Reply Brief in support of its Motion for Scoping Order for processing of the Genesis Solar Energy Project (GSEP). This Reply Brief provides specific responses to the Opening Briefs filed by CURE and the Staff and addresses a recent letter from the Executive Director of the State Water Resources Control Board (SWRCB) dated January 20, 2010, attached. This letter was received by Genesis on January 21, 2010.

For summary purposes, Genesis lists the questions the Committee ordered the parties to brief.

1. What is the Commission's Policy on use of water for power plant cooling purposes?
2. What is the legal affect of the US Bureau of Reclamation's Accounting Surface Methodology on groundwater pumping in the Chuckwalla Valley Groundwater Basin?
3. What is the legal standard for including future projects in the cumulative impact analysis under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA)?
4. Does the Commission have a policy of conserving water for use by projects that are not yet identified?

Neither Staff nor CURE answers the Committee's questions.

- I. **Genesis requests the Committee define the applicable law and standards and does not request the Committee adjudicate facts nor answer the ultimate question of whether the FWEP can use the degraded groundwater in the Chuckwalla Valley Basin for cooling and other purposes.**

CURE's Opening Brief carries one major theme and fails to answer the Committee's questions; CURE believes that evidentiary hearings must be held to answer the Committee's questions. CURE fails to acknowledge that Genesis is not requesting the Committee determine the ultimate facts of whether the GSEP can use the degraded water in the Chuckwalla Valley Basin for cooling and other purposes. As the Committee stated in its Order, such a determination is beyond the scope of Genesis' Motion and the requested Scoping Order. Rather, Genesis is requesting the Committee to articulate the legal standards by which the project will be evaluated and provide meaningful definitions and guidance to ensure the law and standards can be appropriately applied. This request is reasonable and although CURE believes the standards are clear, it fails to define any of the elements of the rules and standards it believes should be applied the GSEP. The Committee should reject CURE's assertion that evidentiary hearings are necessary to issue a Scoping Order:

- II. **The Commission's Water Policy adopted in the 2003 IEPR restates existing state water law and policy and in particular restates SWRCB Policy 75-58 and therefore the Commission's Water Policy must be applied consistent with SWRCB Policy 75-58.**

CURE and Staff agree in their Opening Briefs that the Commission's Water Policy is based upon and incorporates SWRCB Policy 75-58.¹ Further, CURE correctly identifies that the "Water Code Section 13146 requires *all* state agencies, including the CEC, to comply with all State Board Water Quality Control Policies, including Resolution 75-58, "unless otherwise directed or authorized by statute."² We agree that the Commission must comply with SWRCB Policies, including 75-58. As identified in our Opening Brief it is clear that the Commission did not make any new water policy or law as it lacked the statutory authority to do so, but rather as articulated in the BEP II Decision,

The Commission views Section 5 of the 2003 IEPR as a restatement of *existing* State water policy. We did not create new, substantive water policy in the 2003 IEPR.³

On November 23, 2010 the Executive Director of the Commission sent the attached letter to the Executive Director of the State Water Resources Control Board seeking clarification on the application of SWRCB Policies on the use of water for renewable energy projects for industrial purposes including mirror washing, steam generation, construction and

¹ Staff Opening Brief, page. 2, CURE Opening Brief, page 5.

² CURE Opening Brief page 6.

³ Blythe Energy Project Phase II (02-AFC-1) Commission Decision, Page 248

temporary dust control and cooling. The letter was not docketed and Genesis was unaware of the request until supplied by Staff on January 21, 2010 upon request.

On January 20, 2010 the Executive Director responded to Staff's inquiries and stated the following,

As official state policies for water quality control, State Water Board Resolutions 75-58 and 88-63 are binding on all state agencies unless the Legislature provides otherwise. (Water Code, § 13146.)⁴

No party disputes this correct application of water law. Therefore, in accordance with Water Code Section 13146 and SWRCB direction, the Commission is bound by SWRCB Policy 75-58 and 88-63.

III. SWRCB Policy 75-58's restriction on the use of fresh water for cooling specifically does not apply to groundwater and SWRCB Policy 88-63 as applied to power plant cooling, if applicable at all, only applies to surface water.

When specifically asked by Staff to interpret the application of its own policies to renewable energy projects, the SWRCB stated that SWRCB Policy **does not apply to groundwater** and when applying the policy to **surface water** use, the Commission should consider the Board Policy 88-63's goal of protecting waters that may suitable, or potentially suitable, for future potable uses. Specifically, the SWRCB stated,

More specifically, your questions relate to Resolution 75-58's definitions of "brackish waters" and "fresh inland waters" and Resolution 88-63's treatment of "sources of drinking water." "Brackish waters" is defined by Resolution 75-58 as "waters with a salinity range of 1,000 to 30,000 mg/l and a chloride range of 250 to 12,000 mg/l." (State Water Board Resolution 75-58, p. 2.) "Fresh inland waters" is defined by Resolution 75-58 as "those inland waters which are suitable for use as a source of domestic, municipal, or agricultural water supply and which provide habitat for fish and wildlife." (Ibid.) **As a general matter, that means "fresh inland waters" for purposes of Resolution 75-58 does not extend to groundwater**, which typically does not provide fish and wildlife habitat. On the other hand, State Water Board Resolution 88-63 generally provides that all surface waters and ground waters with a TDS of 3,000 mg/L or less shall be considered to be suitable for municipal or domestic water supply.

The Commission's primary issue revolves around whether brackish water with a TDS of between 1,000 and 3,000 mg/L should be considered to be fresh inland waters in the context of Resolution 75-58's Principle No. 2. The answer is typically yes for surface waters and **no for ground waters**. Due to the State Water Board's subsequent adoption of Resolution 88-63, which establishes the threshold of 3,000 mg/L for suitability, or potential suitability,

⁴ SWRCB Letter, page 2

for domestic or municipal water supply, surface waters that support fish and wildlife habitat and have a concentration of 3,000 mg/L or less should be considered to be “fresh inland waters” for the purposes of Resolution 75-58’s Principle No. 2. As a result, such waters should only be used for these renewable energy projects upon a demonstration that the use of other water supplies or methods of cooling would be “environmentally undesirable” or “economically unsound.” ***With respect to ground waters, they would not be considered “fresh inland waters” because they do not provide habitat for fish and wildlife. (Emphasis added.)***⁵

Therefore, for purposes of State Water Policy as incorporated into the Commission's 2003 IEPR Water Policy, the use of groundwater complies with the policy because it is not a use prohibited or restricted by either SWRCB Policy 75-58 or 88-63. For purposes of complying with the Commission's 2003 IEPR Water Policy, the Staff need perform no additional analysis beyond what is articulated in the SWRCB letter and Genesis requests the Committee include such direction in a Scoping Order.

IV. No party has produced any legal reference that would support application of the Accounting Surface Methodology to the use of groundwater in the Chuckwalla Valley Basin and therefore it is not a LORS that should be applied by the Commission for any purpose.

As articulated in our Opening Brief, the Bureau has not adopted a policy by which it can regulate California groundwater in the Chuckwalla Valley Basin as use of Colorado River Water. An Accounting Surface Methodology has been proposed but the law that would make that method applicable has been withdrawn. Those facts are not disputed by Staff or CURE. The party asserting that a law should be applicable to the GSEP has the burden of producing that law. Neither Staff nor CURE can do so because no such law exists. As articulated in our Opening Brief, the Commission has decided this issue on two occasions and since that time there is even greater evidence that the Accounting Surface Methodology is not a LORS that should apply to the GSEP or any project. Staff relies on personal communications and emails for which there has been no Record of Conversation docketed and absent a showing that the Bureau has enacted a law with specific applicable legal requirements, the Committee should Order Staff, that until that policy becomes law, it should not be applied to any project.

V The Committee should adopt Genesis’ definition of projects that should be included in a cumulative impact analysis because it reflects the current status of CEQA and NEPA requirements.

Staff’s Opening Brief supports Genesis’ contention that in order for a project to be included in a cumulative impact analysis, it must be sufficiently defined and reasonably foreseeable and probable. Staff believes that Genesis contends that in order to meet that definition, projects must have “passed certain regulatory hurdles”. On the contrary, Genesis does

⁵ SWRCB Letter, page 3.

not define reasonably foreseeable project that have obtained approvals but rather provides a clear and concise definition before such approvals are obtained. Mainly the filing of a complete application and the beginning of environmental review. These milestones are well before regulatory approvals. Staff cites similar case law supporting that a project must be defined sufficient enough to allow meaningful analysis. If a project has not filed an application or has not begun environmental review, how can one determine how much water it is proposing to use, or where it would be located, or how much land it might disturb, or when it might be constructed? Genesis proposed a definition that would provide sufficient information to distinguish those projects that might be "planned" from those that are sufficiently advanced to allow meaningful consideration and evaluation.

Similarly, Staff believes it can and should rely on Planning Documents for future projects. Use of such documents may be informative, but a mere plan is purely speculative unless formally adopted and provides sufficient detail to allow meaningful analysis. Therefore, Genesis requests the Committee order Staff to include only those projects that meet the criteria set forth in our Opening Brief and to include only those plans that are formally adopted and include sufficient information about future projects to allow meaningful analysis.

VI. The Committee should reject Staff's contention that the issues are too complex for it to complete its analysis of the GSEP in time to support ARRA funding.

While Genesis has attempted to work with Staff to resolve these issues, Staff has been unwilling to engage in meaningful dialogue about what standards should be applied to the GSEP beyond directing Genesis to switch to dry cooling. As described in our Opening Brief, the application of the Accounting Surface and the need to do a cumulative impact analysis are issues for every renewable project seeking ARRA funding. Either the Accounting Surface applies or it does not. The Committee can answer that question now for all projects.

With respect to cumulative impact analysis for groundwater, all of projects are using groundwater in some way or another and Staff will be required to perform a cumulative impact evaluation for groundwater for each one. It is not how much water that is being used that drives the need to perform the analysis. With respect to cumulative groundwater modeling, the modeling must be performed whether the model input is a 300 acre feet/year or 1600 acre feet/year and the input to the model does not affect the effort required. In other words the level of effort required by Staff to perform a cumulative groundwater analysis is the same regardless of how much water is being used by a particular project.

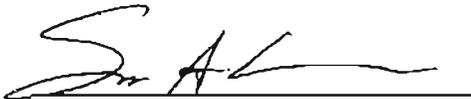
With respect to application of the Commission's 2003 IEPR Water Policy, we believe Staff can easily complete that analysis in reliance on the SWRCB letter and no longer needs to complete an alternative cooling analysis to demonstrate compliance.

It is unfair to single out Genesis as requiring too much time and effort to be completed in time to support ARRA funding. Such a result ignores the strides that Genesis has made in resolving other environmental issues through its site selection and in responding to over

250 data requests and full participation in over 7 public workshops and hearings in the past two months. Disagreement with Staff should not preclude Staff completing a timely analysis.

Genesis respectfully requests the Committee issue a Scoping Order as requested in our Opening Brief as modified by this Reply Brief and direct Staff to meet the deadlines outlined in the Committee Scheduling Order.

Dated: January 22, 2010

A handwritten signature in black ink, appearing to read "S. Galati", written over a horizontal line.

Scott A Galati
Counsel to Genesis Solar, LLC



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

Docket No. 09-AFC-8

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(Revised 1/04/10)

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DECLARATION OF SERVICE

I, Ashley Y. Garner, declare that on January 22, 2010, I served and filed copies of the attached, **GENESIS SOLAR, LLC REPLY BRIEF IN SUPPORT OF COMMITTEE SCOPING ORDER**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:
[\[http://www.energy.ca.gov/sitingcases/genesis_solar\]](http://www.energy.ca.gov/sitingcases/genesis_solar)

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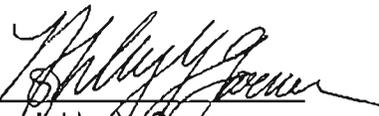
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I declare under penalty of perjury that the foregoing is true and correct.



Ashley Y. Garner