GALATI | BLEK LLP

455 Capitol Mall Suite 350
Sacramento CA 95814
Tel· 916.441.6575
Fax· 916.441.6553

August 2, 2010

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

Subject**: GENESIS SOLAR, LLC REPLY BRIEF—EVIDENTIARY HEARING DAY 1 AND DAY 2 TOPICS**
- **PART 1: REPLY TO CEC STAFF**
- **PART 2: REPLY TO CURE**

GENESIS SOLAR ENERY PROJECT
DOCKET NO. (09-AFC-8)

Enclosed for filing with the California Energy Commission is the original of **GENESIS SOLAR, LLC REPLY BRIEF—EVIDENTIARY HEARING DAY 1 AND DAY 2 TOPICS-PART 1: REPLY TO CEC STAFF PART 2: REPLY TO CURE**, for the Genesis Solar Energy Project (09-AFC-8).

Sincerely,

Marie Mills

Scott A. Galati
Robert Gladden
GALATIBLEK, LLP
455 Capitol Mall, Suite 350
Sacramento, CA 95814
(916) 441-6575

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 – EVIDENTIARY HEARING DAY 1 AND 2 TOPICS** - **PART 1: REPLY TO CEC STAFF** - **PART 2: REPLY TO CURE**

In accordance with the Committee order at the evidentiary hearings held on July 12, 13 and 21, 2010, Genesis Solar, LLC (Genesis) submits this Reply Brief in response to the separate Opening Briefs of CEC Staff and CURE, as follows:

PART I - REPLY TO STAFF OPENING BRIEF

I.

GENESIS AGREES THAT STAFF'S BRIEF PROPERLY STATES THE LAW AS IT APPLIES TO CUMULATIVE IMPACTS, HOWEVER, STAFF HAS INCORRECTLY APPLIED IT TO THE FACTS OF THE GENESIS SOLAR ENERGY PROJECT (GSEP).

The emphasis by Staff in their Opening Brief that a less than significant direct impact can nevertheless result in an adverse cumulative impact is not the point to be debated. Rather, the fundamental point that the Committee should focus upon is whether Staff's analysis supports a finding that the GSEP's impacts to visual resources can truly be said to be cumulatively considerable when considered with other foreseeable projects.

In its Opening Brief at Page 2, Staff correctly identifies the laws that support a finding that a project could contribute to a cumulative impact without having a direct impact by itself. In its Opening Brief at Page 3, Staff states:

> In considering which upcoming projects are appropriate to analyze, the lead agency may either list probable future projects, or use existing projections from regional planning documents. (CEQA Guidelines, §15130, subd. (b)(1).) When selecting projects for a list, factors include the "nature of the environmental resource being examined, the location of the project and its type." (§ 15130, subd. (b)(2).) It is especially appropriate to take a wide approach to visual resources when the landscape is practically untouched and mountain trails offer sweeping views. (RSA, Visual Resources, Figures 2, 3, 8a, 8b, 9a, 9b, 9c, l0a, and l0b).

While correctly citing the guidance, Staff then lumps all projects together taking a broad and expansive approach across the entire desert without considering “the nature of the environmental resource being examined.” If such a broad and limitless approach were applied, it would logically follow that Staff should be including projects in Arizona and Nevada’s deserts as well. In fact, why not include projects in the San Joaquin Valley because it is possible that such projects could be viewed while at the same time viewing projects in the desert if one were viewing during air travel.

The Committee must draw the line somewhere and Genesis believes the standard should be whether or not the GSEP can be seen from an appropriately selected Key Observation Point (KOP) while other projects can be viewed at the same time and in the same view from those appropriately selected KOPs. That simply is not the case for the GSEP and it is not logical that one could conclude that GSEP interferes with the view in one direction from any one of the appropriately selected KOPs when no other projects can be seen from these same KOPs at the same time. Staff fails to embrace this simple concept and instead focuses on the potential development within the entire desert, adopting a broad planning view that would be appropriate if Staff were conducting a planning study. However, Staff is not conducting such an analysis and must be limited by using a rule of reason.

If the appropriate methodology was not limited to analysis from appropriately selected KOPs, why would a proponent be required to produce visual simulations from various KOPs as the CEC data adequacy regulations require? Staff would simply not need them. All that would be needed would be a simple map locating all foreseeable projects and then Staff, using the same methodology, would determine that every project contributes to significant visual impacts with every other project on the map.

Staff is correct that the agency has broad discretion in determining the scope of inquiry in evaluating cumulative impacts. However, agencies should not abandon common sense when determining the geographic scope applicable to a resource area. Staff cites air quality as a resource area as an example. Taking that specific example, Staff would have the Committee believe that the GSEP’s cumulative analysis for air quality should be taken outside of the air basin into the Arizona and Nevada air basins. That makes no sense. Similarly, it would not make any sense to conclude that a project would contribute to noise impacts at the location of a sensitive receptor where the

project could not be heard, even though that sensitive receptor is being impacted from another project situated much closer. This is exactly what Staff has done. They have abandoned a rule of reason, taken a "view from 30,000 feet" and applied it inappropriately to the GSEP.

The facts of the GSEP are simple. Staff states in its Opening Brief at page 2:

> Visually, Genesis is a single project quite a distance from the freeway. But simply by being built across some 1800 acres and requiring transmission lines that will stretch for miles, it cumulatively contributes to the solar development that will change the look of Chuckwalla Valley for decades to come.

That should not be the standard. Applying the correct standard would require Staff to identify which projects could be viewed in combination with the GSEP from appropriate KOPs. Staff fails to support its analysis by citing any project that can be viewed from an appropriately-selected KOP while at the same time viewing the GSEP. As Mr. Paulsen testified, the analysis must consider the viewshed and the project in context[1]. As Mr. Stein explained, the use of Staff's KOPs is inappropriate[2] and it does not make sense to use those KOPs and conclude that the GSEP's impacts are cumulatively considerable when:

1) There would be few to no viewers from the KOPs on which Staff is relying on for its cumulative impacts analysis (BLM found these KOPs to be inappropriate for its NEPA review), and
2) Even if the Committee somehow concludes that the Staff's KOPs are appropriate, a viewer from those KOPs would not be able to see the GSEP and any other of the proposed solar projects in the same view.[3]

For these reasons, we do not believe the Committee needs to make a finding of override, but we do agree with Staff's brief which makes a logical and accurate argument in support of one in the event that the Committee somehow concludes that the GSEP's impacts to visual resources are cumulatively considerable.

II.

THE GSEP WILL NOT RESULT IN A CUMULATIVELY CONSIDERABLE IMPACT TO LAND USE

Genesis acknowledges the legal standard set out by Staff - that a less than significant impact may nonetheless be cumulatively considerable when combined with other projects. However, this case differs from any other in these respects:

---

[1] 7/12/10 RT 430-431
[2] Ibid at page 431; See also Genesis Opening Brief Days 1 and 2.
[3] 7/12/10 RT 432

1. As indicated by Staff in their testimony confirming that the BLM (owner and manager of the land) reports that there is no use to be interfered with[4]. Similarly, Genesis expert witness, Mr. Anderson confirmed the same information from BLM.[5] The land is not used and there is no reason to believe that it will ever be used in light of its current land use designation. To state otherwise is pure speculation. Speculation that is unsupported by CEQA law; and
2. In this case, with the Right of Way (ROW) grant coupled with the California Desert Conservation Area (CDCA) Plan Amendment, there will be no measurable effect on Land Use – whether considering LORS or CEQA.

This latter point is true despite any argument that the impacts (collective) are significant. The fact is, the BLM owns the land and there are few, if any, recreational users. Staff points out in its brief that "…the grand scale of renewable development will inevitably displace certain activities, including recreation and the availability of open space." However, conspicuously missing from this conclusion is the analysis as it relates to this unused land. And, it is that point that Genesis requests the Committee to keep in mind when assessing any cumulative impact. To decide this matter otherwise would be to place form over substance in allowing the decision to be based on what "could" occur instead of what actually has been, is and will be occurring.

Additionally, Staff bases its conclusion on the assumption that the GSEP interferes with the uses of the surrounding lands, specifically the Wilderness areas. However, the only basis for such interference relied on by Staff is that the GSEP can be "viewed" from these areas. In order for the GSEP to be viewed from these areas, they must be used. The record is clear that the surrounding areas are relatively inaccessible and according to BLM hardly ever used.[6] To conclude that future, remote, speculative use raises itself to significant cumulative impact simply elevates an opinion by Staff that is factually and legally unsupported. Instead, the speculative nature of the Staff conclusion should reasonably be dismissed and the Committee should reasonably assess the cumulative conclusion in light of the principle expressed in CEQA Guideline 15145: "If, after thorough investigation, a Lead Agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." That is exactly the guidance the Committee should follow on this point.

Additionally, the Committee should consider that BLM is actually amending the CDCA as part of the approval process of the GSEP. In other words, if the BLM decides to

---

[4] Vahidi; 7/12/10; RT 450: "Now, BLM will and has and may say that it's not used as regularly or it's not currently being used,…."

[5] Anderson; 7/12/10 RT 434: "There are -- the direct quote that was given to me by BLM, 'There are no trailheads. There are no trails. There are no camp sites. There are no recreationists.'"

[6] 7/12/10; RT 450; Although intervener Budlong introduced information of the magazine article on July 12, and it was admitted as Exhibit 710 on July 13 this is entirely hearsay and, under the Commissions Regulations §1212(d), cannot be used to support any finding by the Committee absent direct non hearsay evidence that the area is more extensively used. Additionally, the Exhibit documents a single backpacking event after the GSEP was proposed and not a history of long standing use. Furthermore, the use of remote or random appreciation of a Resource is not legally sufficient to sustain the conclusion of Staff. "CEQA is not concerned with effect on particular persons". *Friends of Davis v. City of Davis* (2000) 83 CalApp4th 1004, 1021-1022.

grant the ROW to Genesis for the GSEP, it will amend the CDCA and specifically authorize the GSEP. In that regard, BLM will resolve any inconsistency between land uses by actually amending the plan, making the GSEP consistent with the CDCA.

Therefore, for the reasons articulated above, the Committee should conclude that the GSEP does not interfere with the use of the Wilderness area if there is no one there to view the GSEP and would not result in any significant land use impacts.

PART II RESPONSE TO CURE OPENING BRIEF DAY 1

I.

THE LAW DOES NOT REQUIRE THAT EVERY POSSIBLE STUDY BE UNDERTAKEN BEFORE APPROVAL OF A PROPOSED PROJECT IS GIVEN

CURE's arguments all have a similar theme. CURE contends that there always needs to be more surveys, more study and more analysis yet never specifically identified which surveys, which studies and what analysis should be performed until its pre-filed testimony. CURE is simply wrong and has intentionally targeted areas to create confusion and not to ensure compliance with any LORS. CURE is clearly not seeking to assist the Commission in developing an analysis upon which it may base its decision. The facts are simple, and the Committee should not allow itself to be misdirected by CURE's attempt at confusion.

A perfect example of such misdirection is CURE's criticism of Staff's evaluation of the expansion to the Colorado River Substation (CRSS). CURE fails to acknowledge to the Committee that this expansion is not being authorized or permitted by the Commission. In fact, as CURE and all parties know, the appropriate state-level permitting authority is the California Public Utilities Commission (CPUC). Therefore, Staff's analysis is one of general disclosure to the Committee and need not be performed at the same level as is required for the Committee to consider effects of the GSEP, over which it has exclusive jurisdiction.

There has never been a project before this Commission or any other agency where more surveys, more study and or more analysis could not have been performed. But that is not the relevant inquiry. The relevant question is how much data is necessary to perform an adequate analysis to enable the Committee to reach a Decision. While the public is part of this process, ultimately the Committee must decide whether it has sufficient information. So while CURE may believe the Committee requires more information, that is merely CURE's opinion and is non-binding on the Committee.

While quantity alone is not determinative, Genesis implores the Committee to simply scan the docket log and the exhibits included in the evidentiary record to get a feel for

the amount of data and analysis that has been included. The Committee should also not discount that the GSEP had twenty workshops to exchange information and discuss the issues openly. [7] The Committee should require CURE to demonstrate not whether more information can be collected but whether it must be collected in order for the Committee to make a Decision. In this regard CURE fails by citing broad concepts and legal buzzwords like "environmental baseline" and "feasibility of mitigation" without any specifics on why the Committee does not have enough information in the record to properly support its conclusions.

CURE does cite the law correctly in its Opening Brief at page 5 and 6:

> "The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context." (*Cadiz Land Co.*, *supra*, 83 2364-111a 6 Cal.App.4th at p. 92.) CEQA guidelines require "a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences . . . [t]he courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (*County of Amador*, *supra*, 76 Cal.App.4th at 954, quoting CEQA Guidelines § 15151; *see also Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Commrs.* (2001) 91 Cal.App.4th 1344, 1367)

However, there is more case law on point that demonstrates what the courts expect when it comes to an agency making a good faith effort at disclosure and analysis. For example, "CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project, [t]he fact that additional studies might be helpful does not mean that they are required."[8] A study, required by an agency, which "takes place over two winters could conflict with the requirement that EIR's for private projects be prepared and certified within one year."[9] CEQA requires the EIR performed on a potential project to "reflect a good faith effort at full disclosure", does not "mandate perfection or the EIR to be exhaustive" and "will be judged in light of what was reasonably feasible."[10]

The Committee should apply these principles to CURE's allegations of incompleteness, inadequacy of environmental baseline and insufficiency of analysis and should keep in mind that CURE never proposes a solution that would enable the GSEP to move forward. Is it possible that without a labor agreement, no amount of information will be sufficient for CURE to support the GSEP obtaining a License?

---

[7] 15 workshops and several open negotiations; Staff Opening Brief p. 13

[8] *Gray v. County of Madera*, (2008) 167 Cal. App.4th 1099. (Quoting *Associated of Irritated Residents v. County of Madera*, (2003) 107 Cal.App.4th 1383).

[9] Id. (See also, Public Resources Code 21100.2, 21151.5; CEQA Guidelines 15108)

[10] *City of Long Beach v. Los Angeles Unified School District*, (2009) 176 Cal. 889.

II.

THE BIOLOGICAL RESOURCES BASELINE FOR THE GSEP, AS ESTABLISHED AND ANALYZED BY STAFF AND APPLICANT, IS ACCURATE AND SUFFICIENT TO MEET THE REQUIREMENTS OF CEQA AND ALL RELATED LORS

A. The Revised Staff Assessment (RSA) and Applicant's Evidence Established an Accurate Environmental Baseline for the Couch's Spadefoot Toad

CURE claims that the only way to establish an environmental baseline for the Couch's Spadefoot Toad is to conduct surveys during storm events. That is one way but not the only way. As the RSA (Exhibit 400) describes at pages C.2-38, 39, the Couch's Spadefoot Toad breeds in ponds and the GSEP is within mapped habitat[11] according to NECO.[12] In the relevant portions, the RSA (Exhibit 400), testimony of Dr. Alice Karl and CURE's Testimony of Scott Cashen (Exhibit 500), all agree that the ponding must occur for a period of at least eight to nine days in order to support breeding.[13] As explained by Dr. Karl, in 2009 and 2010 Genesis surveyed for evidence of ponding[14]. This is broader than a survey of only those ponds that are known breeding ponds because any depression that appeared to hold water was treated like it could retain water for eight to ten days and was also being used by Couch's Spadefoot Toads to breed[15].

Therefore, the studies that were done and the reasonable inferences from them were conservative in that they treat all potential areas for ponding as actual Couch's Spadefoot Toad habitat. CURE states that the RSA has relied on "unsupported assumptions regarding presence or absence of Couch's Spadefoot toad habitat",[16] but Spadefoot toads have been documented on earlier surveys in the borrow pit, as testified by Staff and Dr. Karl. Using these data, the RSA has established mitigation for this location, in the event that there is no rain in 2010 to establish current toad presence. This approach is not only sufficient for the Committee but, if anything, overestimates the environmental baseline and potential impacts. Staff and Genesis agree with this approach.[17] The Committee should reject CURE's argument that a conservative estimate of habitat and impacts to that habitat is insufficient under CEQA. Condition of Certification **BIO-27** allows additional surveys to be performed to reduce the potential impacts which are assumed and overly conservative. It requires mitigation for Couch's Spadefoot Toad habitat in an amount that is confirmed by the surveys. This approach cannot result in undermitigation.

---

[11] Exhibit 400, Biological Resources, Figure 16
[12] Northeastern Colorado Desert Plan
[13] Exhibit 400, p. C.2-85; Dr. Karl testimony 7/12/10 RT 78; and Exhibit 500, p. 8
[14] 7/12/RT 78
[15] Ibid at page 79
[16] CURE Opening Brief, p. 6
[17] 7/12/RT 78

B. The RSA Provides for More Than Adequate Mitigation for Impacts to Couch's Spadefoot Toad

CURE cites in its Opening Brief at page 6:

> Only "where substantial evidence supports the approving agency's conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy." (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027 (*SOCA*), citing *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 407)

It is amazing that CURE can simultaneously claim that the Committee has no basis for concluding that the GSEP can avoid impacts to Couch's Spadefoot toad and that if impacts are not avoided, cannot mitigate by constructing suitable ponds. It is important to note that an artificial borrow pit located along the transmission line route may be the only breeding pond in the area and would be avoided.[18] In the unlikely event that other breeding ponds are found that cannot be avoided, Condition of Certification **BIO-27** requires Genesis to construct ponds to serve as potential breeding habitat. The Committee has the best evidence available to ensure that ponds can be artificially created as explained by Dr. Karl - the fact that the only current evidence of habitat for this species within the area is an artificial borrow pit.[19]

C. The RSA Sufficiently Demonstrates that the Proposed Compensatory Mitigation for Impacts to Special-Status Species and Their Habitat will be Feasible, Effective and Capable of Implementation

CURE's basic challenge here is one that would derail every solar project being considered by the Commission and other agencies. It is based on the inappropriate expansion of the entirely legal concept that the agency should not rely on mitigation that is infeasible. CURE expands that concept to conclude that if the agency cannot determine that Genesis can acquire all the land it needs now, it cannot move forward with approval of the GSEP. This ignores the substantial case law that an agency can adopt mitigation that has clear performance standards that if met, will ensure mitigation. The performance standard approach is reflected in the substantial specific Conditions of Certification governing land acquisition. Rather than list each performance standard, the Committee should simply read the Conditions of Certification for Biological Resources where the standards are set out in detail. Such an approach is supported by all of the resource agencies as indicated in their panel testimony and joint contribution to the RSA.

---

[18] 7/12/10 RT 79-80

[19] Ibid, page 80-81

GSEP has undertaken due diligence with real-estate agents and mitigation banking organizations that has demonstrated there is plenty of private land with suitable habitat for sale. In addition, the CDFG has recently confirmed this availability in their Draft Interim Mitigation Strategy dated July 14, 2010, and it should be noted in the record by the Committee (Admin. Notice) that the CDFG found that "The DFG and the REAT agencies have identified mitigation target areas that **exceed** the total acreage of lands potentially affected by project implementation." (at p. 17, emphasis added)

D. Potentially Significant Impacts to Biological Resources from the Creation of Couch's Spadefoot Toad Breeding Habitats are Purely Speculative

CURE asserts that failure to discuss the potential mitigation for the speculative need for mitigation for the Couch's Spadefoot toad ponding habitat is unacceptable under CEQA standards. Nothing could be farther from the truth. Surveys were conducted for several route alternatives, wherein 420-ft route widths and a suite of buffer transects were surveyed for each alternative.[20] Genesis has conducted more than ample environmental assessment of all areas in which an artificial pond, if necessary, would be constructed. Furthermore, despite the enormous effort and amount of studies already undertaken by Genesis, CEQA does not require survey, analysis and mitigation for speculation (in this matter, remoteness or non-existence). CEQA Guidelines 15145, states: "If, after thorough investigation, a Lead Agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." That is exactly what Genesis requests of the Committee.

The quote by Dr. Sanders is taken out of context and its use by CURE for the reason proposed borders on the absurd. In fact, Dr. Sanders' use of the word "anything" – is not regarded in the most common language as an absolute – that something will happen. In the context of the examination, it clearly implies that something <u>could</u> happen <u>if</u> artificial ponds are needed (two levels of possibility are required). But this hypothetical context proposed by CURE ignores the reality that no ponding was found in the 2009 and 2010 surveys on the site – it was only found on the linears, and is easy to avoid as pointed out by Dr. Karl and Staff's expert witness, Dr. Sanders.[21] The ponding mitigation that was agreed to by Genesis, **if needed**, will only be relative to ponding that might exist. And to that, Dr. Karl clearly indicates that if it is needed, the evidence of artificial ponding only supports the premise that artificial ponds could easily be created.[22] Genesis asserts that no mitigation will ever be needed for potential ponding on the project site due to the results of surveys conducted in 2009 and 2010 which found none. But, in an attempt to accommodate the concerns of Staff in regard to the remote possibility that ponding might be discovered on the project site or transmission line, Genesis has agreed to the Condition of Certification **BIO-27** which provides the remedy for that double layered possibility.

---

[20] 7/12/10 RT 320

[21] 7/12/10 RT 79-80 and 204, respectively

[22] 7/12/10 RT 80

If ponding was discovered on the project site (despite no presence in 2009 or 2010), it would be simple to create an artificial pond in the linear – much like the artificial pond that already exists will be avoided. Simply put, CURE wishes the Committee to ignore the surveys undertaken by Genesis and the corresponding analysis by Staff in order to entertain the unsupported notion that an analysis of potential mitigation for speculative need should be conducted. In retrospect, they have crossed the border – their position is absolutely absurd.

E. The RSA Need Not Analyze Speculative Impacts from the Use of All-Terrain Fire Engines

CURE asserts that the potential use of existing BLM roads or other areas for accessing the GSEP during an emergency needs to be analyzed for its potential effects on biological resources. To inhibit emergency service needs is ludicrous and clearly enlightens the disruptive purpose that CURE has brought to these proceedings. It is clear from the record that the probability of the need for the Riverside County Fire Department to actually use the all terrain vehicles to provide emergency response to the GSEP is extremely low and based on the testimony of Duane McCloud, has not happened in the history of the SEGS or Harper Lake Projects.[23] Further, to assume that if such a response was required, that such a single response could result in significant impacts to biological resources is even more speculative and remote. In addition, the route that emergency vehicles might take to the power plant site under this highly unlikely scenario would depend on the nature and location of the emergency and, therefore, it is impossible in any event to quantitatively evaluate what the relatively minor impacts would be. Given the very conservative mitigation measures being imposed on the project for potential impacts to desert tortoise habitat (e.g., 1:1 mitigation for the entire project footprint despite poor quality tortoise habitat and no indication that tortoises currently occupy the site), such mitigation measures would surely cover any minor impacts that might result from an emergency response incident.

III.

THE PROJECT WILL NOT RESULT IN UNANALYZED AND UNMITIGATED SIGNIFICANT IMPACTS FROM HEAT TRANSFER FLUID (HTF) SPILLS AND VIOLATIONS OF LORS

A. The Project Will Not Result in an Unanalyzed and Unmitigated Significant Adverse Impact From Possible HTF Spills

This Committee has taken Administrative Notice of the testimony and evidence provided in the Beacon Solar Energy Project (BSEP) proceeding.[24] In accordance with the

[23] 7/12/10 RT
[24] 7/12/10 RT 332-333.

information provided to the Committee in the BSEP proceeding, a Presiding Member's Proposed Decision (PMPD) was issued. [25] Instructive in the BSEP PMPD, and based on the supporting testimony and evidence submitted, when analyzing this/these same issues, the Committee determined that Heat Transfer Fluid (HTF), similar if not identical to the HTF that would be used in the GESP, is not a hazardous material. The Committee went on further to say that a spill of such HTF does not pose an acute or chronic health hazard to humans or wildlife. Additionally, any such spill would be handled in accordance with the United States Environmental Protection Agency (USEPA) current version of the manual "Test Methods for Evaluating Solid Waste" the results of which will be submitted to the Department of Toxic Substance and Control (DTSC) for a determination of the appropriate disposal method. Based on the fact that the issues, testimony and factual circumstances are almost identical or at least substantially similar, we ask the Committee to reiterate those findings here.

1. The RSA Analyzed Impacts from Reasonably Foreseeable HTF Spills

Again, this exact issue was presented and argued by CURE at the BSEP evidentiary hearing. The PMPD previously referenced above found, based on the testimony and evidence presented, that:

> "[I]t takes about 202 liquid gallons or 174 dry gallons to make a cubic yard…. Using the lesser number, in order to attain "triple digits" in cubic yards, it requires at least, 17,350 gallons. Staff's analysis, based upon 750 cubic yards of soil, equates to 130,125 gallons of contaminated soil. This number represents more contaminated soil than the SEGS facility has produced in its entire twenty years of operation combined."[26]

Accordingly, it is spurious of CURE to consent to the foundational basis of this calculation being admitted into evidence in the GSEP proceeding pursuant to the Administrative Notice that was ordered, and then promote contrary opinions. The limitations on calculations that CURE attributes to Staff is simply a diversion from the actual factual basis which provides for more than a sufficient analysis of the impacts.

2. The RSA Analyzed and Adequately Mitigates Impacts from Free-Standing HTF

CURE's argument that neither Genesis nor Staff analyzed the significant impacts from free-standing HTF, but only analyzed the impacts of the HTF in a liquid state, is an attempt to mislead the Committee by misconstruing the actual physical properties involved as it relates to free standing or liquid state HTF. Perhaps it was best stated in these terms: the disparity between free-standing and liquid state is "akin to the

---

[25] It is important to remember at this juncture that the reason Administrative Notice was taken in this matter is due to the fact that the contending parties in the Beacon project are the same as those contending here: Nextera (GSEP) and CURE. Accordingly, the evidence, as consolidated for decision in the Beacon matter is not new information to the parties; and, no other party to this matter objected.

[26] Beacon, PMPD at p. 204

difference between spilling a cup of ice or a cup of water onto the ground."[27] The only difference between the two is the temperature of the HTF.[28] In this respect, Genesis asserts that the Staff analysis and mitigation measures proposed are more than sufficient to meet either concern of CURE: liquid state or free standing. In the event of a HTF spill, Genesis would evaluate the spill per the Operations Waste Management Plan pursuant to Condition of Certification **WASTE-9** and the Spill Prevention Control and Countermeasure (SPCC) Plan pursuant to Condition of Certification **HAZ-4** and take appropriate action. Should a portion of the spilled HTF be recoverable including any free liquid, as part of a waste minimization effort this HTF would be returned to the process. Such recovery would not only reduce the formation of potentially hazardous waste, but eliminate the potential for any free liquid waste.

3. The RSA Analyzed and Adequately Mitigates Impacts from Benzene as an HTF Degradation Product

The confusion that CURE attempts here is to have the Committee think that none of the Staff consultants in the relevant topic areas assessed the Benzene effect. For instance, consider the RSA (Exhibit 400, page C.5-14), where Staff notes that information obtained from Genesis regarding decomposition products of the HTF, which include benzene, occur in trace amounts.[29] Also noteworthy is Dr. Greenberg's testimony on point, where it is abundantly clear that Staff did undertake a thorough analysis of the benzene effect.[30] Furthermore, the rebuttal testimony given by Genesis addresses the issue and presence of benzene within the HTF and its degradation. The rebuttal testimony identified and incorporated the results of studies performed on the SEGS units to "characterize exposure to benzene and other possible HTF degradation projects", which yielded a result of no significant worker exposure to such products due to the trace levels of benzene content in the HTF.[31]

In addition, Genesis rebuttal testimony on this issue further identified that the last industrial hygiene study performed showed workers were not exposed to levels of benzene above acceptable levels. CURE argues that in the event of an HTF spill, the trace amounts of benzene found in the HTF have the remote potential to infiltrate ground water located approximately 100 feet below the surface. It is speculative, and unrealistic at best, to claim that this remote scenario would create a potential impact that needs to be analyzed, even after the appropriate remediation is conducted.

Again, in an abundance of caution if the need for any special protection equipment was identified for any special jobs, it would be in the plans located under WORKER SAFETY-2 and the California OSHA regulations.

---

[27] Id. at p. 205
[28] Id.
[29] Exhibit 400, p. C.5-13
[30] 7/12/10 RT 366
[31] Exhibit 63: Waste Management section, Rebuttal Testimony, p. 4

B. The RSA's Mitigation Measures for HTF Spills Mitigate All Impacts and Comply With LORS

1. The RSA's Conditions of Certification Mitigate All Impacts from HTF Spills

As discussed above, and in respect to spill volume analysis, any potential HTF spill will vary in the total volume. However, Staff evaluated 750 cubic yards of soil contamination and its potential effects. Additionally, the installation of isolation valves serves the purposes of mitigating or limiting the amount of the HTF spill. CURE's assertion that the spill itself is a significant impact is inaccurate due to Staff's evaluation of HTF and its potential effects. Similar to the BSEP, here "CURE has offered no evidence showing that isolation valves would not mitigate HTF spills."[32] Neither did they rebut the asserted conclusion that isolation valves will prevent excessive spillage.

Finally, as stated above, Genesis would evaluate any spill that might occur per the Operations Waste Management Plan (OWMP) pursuant to Condition of Certification **WASTE-9** and the Spill Prevention Control and Countermeasure (SPCC) Plan pursuant to Condition of Certification **HAZ-4** as well as implement other safety measures indicated under **WORKER SAFETY-2** and the California **OSHA** regulations.

2. The RSA Conditions for Waste Management Mitigate All Impacts and Comply with LORS

CURE states that waste management conditions fail to mitigate significant impacts and violate LORS, but then proceeds with a discussion of only LORS concerns. This discussion mixes references from current SEGS practices with proposed practices for Genesis. However, Genesis will be subject to a new CEC license, applicable LORS, and practices dictated by the appropriate agencies, making much of the SEGS discussion irrelevant. The detailed Genesis practices seem to be something that CURE is adamant to see in their entirety immediately. However those details are yet to be developed as part of the OWMP, SPCC, Waste Discharge Requirements (WDR) issued by the CRBRWQCB, and other related documents. At a high level, affected soil would be moved to the LTU area on plastic sheeting until analytical results indicate that it is acceptable for on-site treatment. Any contaminated soil that is not acceptable will be removed from the site and disposed of as hazardous waste. As such, hazardous waste will not be stored in the LTU, but will be temporarily accumulated in a storage area specifically set aside for this purpose.

The storage area will require separate permitting with the County under the hazardous waste generator number obtained for the facility. This is a routine procedural detail that is anticipated in the framework of plans and permits described in the RSA, and are not a violation of LORS. In fact, all final plans developed in conjunction with the appropriate agencies, will have to be in compliance with applicable LORS. This will include the designation of the appropriate location(s) for temporary waste storage and the

[32] Beacon PMPD, at p. 179

appropriate thickness of HDPE sheeting to be used in those locations. See Conditions 66 through 75, Appendix B to the Water Resources Section of the RSA, Exhibit 434 for assurance that the Regional Water Quality Control Board is comfortable with the LTU procedures.

IV.

THE GSEP DOES NOT RESULT IN UNANALYZED AND UNMITIGATED IMPACTS FROM POSSIBLE UNEXPLODED ORDNANCE

The remote possibility of unexploded ordinance was sufficiently analyzed by Genesis and Staff, and that is borne out in the record.[33] The difference of conclusions about the subsequent action to take after the Phase I ESA[34], based on CURE's witness alleging intense military maneuvers in the area 65 years ago, is not sufficient to justify the imposition of a Phase II study and is not mandated by CEQA law.[35]

Consideration of the evidence submitted by CURE, particularly the figures attached to witness Haggeman's written testimony[36], evinces something astonishing and contrary to their stated conclusions. That "gunnery range"[37] on one figure has the same approximate placement as "headquarters"[38] in the other figure, which is approximately 8 miles or more away from the site. To imply that maneuvers in the Palen Pass resulted in the deployment of mines is not supported by the evidence. Rather, the allegation by CURE of mine fields being deployed in the Desert Training area is only disconcerting at first blush – and, disconcerting was the effect intended by CURE. But, the fact of the matter is, there was no evidence presented that "live" mines were ever utilized in any part of the Desert Training. And, even if mines were used, there was no evidence that any mines were ever deployed in the project area. But, the most outrageous innuendo of danger comes in Mr. Haggeman's written testimony where he alleges in Exhibit 517, p. 9, that mines were deployed by the defending position against opposition training forces. CURE must be kidding – live mines against friendly forces?

CURE (at page 18 of their Opening Brief, Day 1) then subverts the credibility of Staff by stating that Staff only undertook a "limited analysis" in Exhibit 400. What CURE fails to recognize is that the only legal requisite under these facts is to follow the directive of CEQA Guideline 15145, which states: "If, after thorough investigation, a Lead Agency finds that a particular impact is too speculative for evaluation, the agency should note its

---

[33] Exhibit 400, RSA, pp. C.13-11, C.13-12, C.13-28, C.13-32, C.14-5; Exhibit 403, RSA Supp., pp. C.3-123, D.5-53, D.5-58, D.5-61; Exhibit 11, Waste Management, Data Request Responses to Set 1A,Items 215 and 226

[34] 7/12/10 RT 351

[35] The Committee need only summarize the main points of disagreement and explain the acceptance of one opinion over the other. *Greenebaum v. City of Los Angeles* (1984) 153 CalApp3rd 391, 413.

[36] Exhibit 517

[37] Exhibit 517, Attachment 4

[38] Exhibit 517, Attachment 3

conclusion and terminate discussion of the impact." That is exactly what Staff did upon the thorough assessment of information from the workshops, data requests and docketed submissions[39]. And the reasons for Staff's conclusions are patent and based on common sense: if mines were used in desert training, they were not live; and, only one bullet was found at the project site. Condition of Certification, **WASTE-5** (training program for workers) is more than sufficient to protect all site workers from the ration containers and military issue utensils that were actually found on the site, as well as any remote potential for UXO.

Condition of Certification, **WASTE-5** (training program for workers) is more than sufficient to meet the real concerns of Genesis and Staff, and even the speculative concerns of CURE. For the same legal basis for which the argument about ponding was dismissed above, Genesis asserts that CURE wishes the Committee to ignore the surveys undertaken by Genesis and the corresponding analysis by Staff. There is simply no credible evidence that additional mitigation is required.

V.

CONCLUSION

Contrary to the depthless assertions by CURE, Staff successfully undertook a monumental task and more than adequately assessed all the impacts for this project, not just the ones iterated here. The Committee has heard and received significant and substantial evidence that supports the issuance of a license for the GSEP. Accordingly, Genesis requests the Committee recognize the stellar work product of Staff in the approval of the GSEP and disregard the meritless and unnecessarily time-consuming arguments CURE presented in its Opening Briefs.

Dated: August 2, 2010

/original signed/

_____

Scott A Galati
Counsel to Genesis Solar, LLC

[39] CEC Staff's Opening Brief, p. 10; Exhibit 11, and Exhibits 1, 11, 12, 51, 60 and 63, respectively

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION FOR THE
GENESIS SOLAR ENERGY PROJECT

Docket No. 09-AFC-8

PROOF OF SERVICE
(Revised 7/23/10)

APPLICANT
Ryan O'Keefe, Vice President
Genesis Solar LLC
700 Universe Boulevard
Juno Beach, Florida 33408
e-mail service preferred
Ryan.okeefe@nexteraenergy.com

Scott Busa/Project Director
Meg Russel/Project Manager
Duane McCloud/Lead Engineer
NextEra Energy
700 Universe Boulvard
Juno Beach, FL 33408
Scott.Busa@nexteraenergy.com
Meg.Russell@nexteraenergy.com
Duane.mccloud@nexteraenergy.com
e-mail service preferred
Matt Handel/Vice President
Matt.Handel@nexteraenergy.com
e-mail service preferred
Kenny Stein,
Environmental Services Manager
Kenneth.Stein@nexteraenergy.com

Mike Pappalardo
Permitting Manager
3368 Videra Drive
Eugene, OR 97405
mike.pappalardo@nexteraenergy.com

Kerry Hattevik/Director
West Region Regulatory Affairs
829 Arlington Boulevard
El Cerrito, CA 94530
Kerry.Hattevik@nexteraenergy.com

APPLICANT'S CONSULTANTS
Tricia Bernhardt/Project Manager
Tetra Tech, EC
143 Union Boulevard, Ste 1010
Lakewood, CO 80228
Tricia.bernhardt@tteci.com

James Kimura, Project Engineer
Worley Parsons
2330 East Bidwell Street, Ste.150
Folsom, CA 95630
James.Kimura@WorleyParsons.com

COUNSEL FOR APPLICANT
Scott Galati
Galati & Blek, LLP
455 Capitol Mall, Ste. 350
Sacramento, CA 95814
sgalati@gb-llp.com

INTERESTED AGENCIES
California-ISO
e-recipient@caiso.com

Allison Shaffer, Project Manager
Bureau of Land Management
Palm Springs South Coast
Field Office
1201 Bird Center Drive
Palm Springs, CA 92262
Allison_Shaffer@blm.gov

INTERVENORS
California Unions for Reliable
Energy (CURE)
c/o: Tanya A. Gulesserian,
Rachael E. Koss,
Marc D. Joseph
Adams Broadwell Joesph
& Cardoza
601 Gateway Boulevard,
Ste 1000
South San Francisco, CA 94080
tgulesserian@adamsbroadwell.com
rkoss@adamsbroadwell.com

Tom Budlong
3216 Mandeville Cyn Rd.
Los Angeles, CA 90049-1016
tombudlong@roadrunner.com

Mr. Larry Silver
California Environmental
Law Project
Counsel to Mr. Budlong
e-mail preferred
larrysilver@celproject.net

Californians for Renewable
Energy, Inc. (CARE)
Michael E. Boyd, President
5439 Soquel Drive
Soquel, CA 95073-2659
michaelboyd@sbcglobal.net

Lisa T. Belenky, Senior Attorney
Center for Biological Diversity
351 California St., Suite 600
San Francisco, CA 94104
lbelenky@biologicaldiversity.org

Ileene Anderson
Public Lands Desert Director
Center for Biological Diversity
PMB 447, 8033 Sunset Boulevard
Los Angeles, CA 90046
ianderson@biologicaldiversity.org

OTHER
Alfredo Figueroa
424 North Carlton
Blythe, CA 92225
lacunadeaztlan@aol.com

ENERGY COMMISSION

JAMES D. BOYD
Commissioner and Presiding Member
jboyd@energy.state.ca.us

ROBERT WEISENMILLER
Commissioner and Associate Member
rweisenm@energy.state.ca.us

Kenneth Celli
Hearing Officer
kcelli@energy.state.ca.us

Mike Monasmith
Siting Project Manager
mmonasmi@energy.state.ca.us

Caryn Holmes
Staff Counsel
cholmes@energy.state.ca.us

Robin Mayer
Co-Staff Counsel
rmayer@energy.state.ca.us

*Jared Babula
Co-Staff Counsel
jbabula@energy.state.ca.us

Jennifer Jennings
Public Adviser's Office
publicadviser@energy.state.ca.us

DECLARATION OF SERVICE

I, Marie Mills, declare that on August 2, 2010, I served and filed copies of the attached**: GENESIS SOLAR, LLC REPLY BRIEF—EVIDENTIARY HEARING DAY 1 AND DAY 2 TOPICS-PART 1: REPLY TO CEC STAFF PART 2: REPLY TO CURE** dated August 2, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [http://ww.energy.ca.gov/sitingcases/genesis_solar].

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

FOR SERVICE TO ALL OTHER PARTIES:

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

_____ by personal delivery;

__X__ by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses NOT marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

__X__ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

OR

_____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 09-AFC-8
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

docket@energy.state.ca.us

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

Marie Mills