SCOPING ORDER STATUS CONFERENCE

BEFORE THE

CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

In the Matter of: )
for the Genesis Solar Energy ) 09-AFC-8
Project )

CALIFORNIA ENERGY COMMISSION

HEARING ROOM B

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

TUESDAY, JANUARY 26, 2010

1:37 p.m.

Reported by:
Peter Petty
Peters Shorthand Reporting Corp.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345
COMMITTEE MEMBERS PRESENT
Kenneth Celli, Commissioner and Presiding Member

SITING COMMITTEE MEMBERS AND ADVISORS PRESENT
James D. Boyd, Vice-Chair and Presiding Member
Sarah Michael, Advisor to Commissioner Boyd
Robert Weisenmiller, Commissioner and Asso. Member
Susannah Churchill, Advisor to Commissioner Weisenmiller

STAFF AND CONSULTANTS PRESENT
Caryn Holmes, Staff Counsel
Robin Mayer, Staff Counsel
Michael Monosmith, Project Manager

APPLICANT
Scott Galati, Galati & Beck, representing Nextera Energy
Scott Busa, Director with Project Development for Nextera Energy
Matthew Handel, Vice-President, Nextera Energy

INTERVENORS
Tanya Gulessarian, Adams, Broadwell, Joseph & Cardozo, representing CURE

ALSO PRESENT
Allison Shaffer, Bureau of Land Management
Holly Roberts, Bureau of Land Management, Palm Springs Field Office
# Index

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proceedings</td>
<td>1</td>
</tr>
<tr>
<td>Introductions</td>
<td>1</td>
</tr>
<tr>
<td>Background</td>
<td>4</td>
</tr>
<tr>
<td>Comments from the Parties on Issue One</td>
<td></td>
</tr>
<tr>
<td>Applicant</td>
<td>6</td>
</tr>
<tr>
<td>CEC Staff</td>
<td>11</td>
</tr>
<tr>
<td>Intervenor</td>
<td>17</td>
</tr>
<tr>
<td>Questions from CEC Commissioners on Issue One</td>
<td>24</td>
</tr>
<tr>
<td>Comments from the Parties on Issue Two</td>
<td></td>
</tr>
<tr>
<td>Applicant</td>
<td>30</td>
</tr>
<tr>
<td>CEC Staff</td>
<td>35</td>
</tr>
<tr>
<td>Intervenor</td>
<td>36</td>
</tr>
<tr>
<td>Questions from CEC Commissioners on Issue Two</td>
<td>39</td>
</tr>
<tr>
<td>Comments from the Parties on Issue Three</td>
<td></td>
</tr>
<tr>
<td>Applicant</td>
<td>61</td>
</tr>
<tr>
<td>CEC Staff</td>
<td>66</td>
</tr>
<tr>
<td>Intervenor</td>
<td>71</td>
</tr>
<tr>
<td>Questions from CEC Commissioners on Issue Three</td>
<td>73</td>
</tr>
<tr>
<td>Comments from the Parties on Issue Four</td>
<td></td>
</tr>
<tr>
<td>Applicant</td>
<td>95</td>
</tr>
<tr>
<td>CEC Staff</td>
<td>96</td>
</tr>
<tr>
<td>Intervenor</td>
<td>97</td>
</tr>
<tr>
<td>Questions from CEC Commissioners on Issue Four</td>
<td>98</td>
</tr>
<tr>
<td>Public Comment</td>
<td>102</td>
</tr>
<tr>
<td>Adjournment</td>
<td>103</td>
</tr>
<tr>
<td>Reporter's Certificate</td>
<td>104</td>
</tr>
</tbody>
</table>
P R O C E E D I N G S

1:37 p.m.

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

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

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

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

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

To my left is my advisor, Sarah Michael.

And, in the middle here, we have Ken
Celli, the Hearing Officer.

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

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

MR. BUSA: And my name is Scott Busa.

I'm a Director with Project Development for
Nextera Energy.

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

PRESIDING COMMISSIONER BOYD: And the
Staff?

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

MS. MAYER: Robin Mayer, Staff Counsel.

MS. HOLMES: Caryn Holmes, Staff
Counsel.

PRESIDING COMMISSIONER BOYD: And
Intervenors?

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

PRESIDING COMMISSIONER BOYD: I don't
see Michael Boyd here. Do we have a phone
connection to that? I didn't even ask.

HEARING OFFICER CELLI: He did not call in.

PRESIDING COMMISSIONER BOYD: All right.

So we have no one on the phone?

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

PRESIDING COMMISSIONER BOYD: Okay.

Well, with that then I will turn the proceedings over to our Hearing Officer, Ken Celli.

HEARING OFFICER CELLI: Thank you, Commissioner.

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

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

HEARING OFFICER CELLI: Hi Allison.

MS. SHAFFER: Good afternoon, everyone.

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

Seeing none, any elected officials or representatives from the State of California
present? I don't see any.

Mojave Desert Air Quality Management District? Riverside County? The City of Blythe?

Or any other boards or agencies?

Hearing none, the Scoping Order Status Conference is sponsored by the Energy Commission to inform the Committee, the parties, and the community about the project's progress to date and to discuss legal issues raised by the parties'
b Briefs.

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

The Order required the parties to brief the following questions:

What is the Commission's policy on the use of water for power plant cooling purposes;

what is the legal effect of the U.S. Bureau of
Reclamation's Accounting Surface Methodology on groundwater pumping in the Chuckawalla Valley Groundwater Basin; what is the legal standard for including future projects in the cumulative impact analysis under the California Environmental Quality Act and the National Environmental Policy Act; and does the Commission have a policy of conserving water use by projects that are not yet identified.

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

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

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

Following the conference, the Committee
will hearing public comment, and after the close
of the hearing the Committee will issue a written
Decision.

So with that, Applicant, please.

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

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

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

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

The first question that was asked is just to articulate exactly what the Commission's water policy is. And I want to make a big distinction between the Energy Commission's requirement under CEQA to identify impacts and when I'm talking about the policy I'm not talking about that at all. I'm only talking about is there a policy that you would apply as a LORS that
the Committee would have to make a finding that you comply with. The Environmental Impact Analysis, both direct, indirect, and cumulative impacts, we absolutely agree that that is a separate analysis and it's fact-based. We are asking for some guidance on the law on what to include in a Cumulative Impact Analysis so that we're all on the same page.

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

The fundamental issue is what is fresh water, because if you're not using fresh water then you comply with the policy. That's how we interpret the policy. The policy says if you are using fresh water -- we're only going to prove that under certain circumstances, primarily the showing of alternative technologies, environmentally unsound and economically infeasible standards. But if you are not using
fresh water like, for example, reclaim water,
there would be no need to go to that second step.

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

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

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

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

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

Implicit in that question is the policy that you adopted in 2003 deals with power plant cooling. So we need some guidance and Staff needs some guidance. Does that policy also apply to...
non-cooling purposes? And I would submit to you that it doesn't and I can quote several examples of projects that are using very high quality water for their makeup, high quality water for construction, high quality water for irrigation purposes, high quality water to augment when they have -- augmenting their dry cooling.

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

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

HEARING OFFICER CELLI: Thank you.

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

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

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

What I'd like to talk about here is the analysis that the Commission needs to undertake in order to assess whether or not this project is, in
fact, consistent with State Water Policy. As Commissioner Boyd knows, who's been sitting on a number of cases and has been involved in a number of discussions in the past regarding water use, we begin with the State Constitution which prohibits waste and unreasonable use, and encourages conservation. That's the basis of the State Water Policy.

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

Staff has always been concerned about the use of water, particularly in a desert. Our concern is heightened as we enter our third year of drought. Staff has never used a simplistic single-number test for determining whether water use is reasonable or not. This Commission has never used a simplistic numerical test to determine whether water use is reasonable or not.
I will not go through the past Commission cases that were identified in our brief, but I believe that a review of those cases will demonstrate that the Commission has always considered a multiplicity of factors in assessing the, excuse me, the reasonableness of water use.

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

We sought information and guidance from the State Board last fall. We received a letter last week. That letter supports the Commission's approach of considering a variety of factors in reaching a determination about the reasonableness of water use. Somewhat surprisingly, at least to me, the letter also stated that the language that
appears as the IEPR water policy was intended, when that language was adopted by the Board, to apply only to surface water. Ground water, said the Board, is covered by a different resolution, Resolution 8863, which directs regional boards to identify ground and surface water quality -- excuse me, quantities if the TDS levels are below 3,000 milligrams per liter as potential municipal supplies.

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

I believe that the Applicant has adopted the latter position; Staff has adopted the former
position. We believe that our position, in which
the Commission considers a variety of factors in
assessing reasonableness of use, is consistent
with State Water Policy all the way from the
Constitution up to the letter that we received
from the State Board last week. We recommend that
the Committee not grant the Applicant's order but
instead direct Staff to undertake an analysis
that's been consistent with past practices in
which we look at is there a conservation or offset
program. In the Blythe case, in the Panoche case,
in the Starwood case, and the Sentinel case there
were water conservation and water offset programs.

We would ask you to look at the quantity
of water that's being used. In this case the
water, the amount of water that's being used will
use ten times as much water on a per-megawatt hour
basis as a project which uses dry cooling. We
would ask you to look at the quality of water
that's being used. Although I think this issue is
something in flux, my understanding is that the
Applicant is proposing to use water that's between
1,000 and 1,500 milligrams per liter TDS. That's
well below the 3,000 milligrams per liter level
specified in Resolution 8863. We would ask you to
look at competing uses, are there other projects out there that may need to use water, are there seeps and springs that support habitat for fish and wildlife, are there wells that may be affected by this project.

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

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

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

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

PRESIDING COMMISSIONER BOYD: Not yet.

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

MS. GULESSERIAN: Thank you. I want to back up, start by backing up. The issues here
today are strikingly similar to the Water Board's at the turn of the last century, standing from Los Angeles' need for water in a semi-arid area. In the latter half of the last century so much ground water had been pumped to meet growth needs that Owens Valley springs and seeps dried up and disappeared, and ground water dependent vegetation began to die.

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

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

Today, in 2010, the United States and the State of California are taking actions to reduce pollution that is responsible for global warming. One of these actions involves the
development of renewable energy. But in doing so we cannot forget that drought and water shortages are due, in part, to global warming, and drought and water shortages are predicted to increase over the coming decades.

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

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

To address the first issue that is before the Committee regarding the Commission's
policy on the use of water for power plant cooling, CURE believes that there are a number of state policies, laws, and regulations governing the use of water that comprise the Commission's current policy on the use of water for power plant cooling. The California Constitution prevents the unreasonable -- prohibits the waste, unreasonable use, or unreasonable method of use, or method of diversion of water. The Warren-Alquist Act, Section 2500(H) promotes all feasible means of water conservation and all feasible means, all feasible uses of alternative water supply sources. That is part of the Commission's policy. It is a broad policy that applies to any water that is proposed for use at a power plant.

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

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

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

The State Board has also clarified that Policy 8863 specifically speaks to both surface and ground waters of the state are considered to be suitable
or potentially suitable for municipal or domestic water supplies. There are exceptions. Based on tedious content, based on reasonable expectations that the water may be used for municipal water supplies, those factors that are even in Policy 8863 would be added to the policies and the factors that are set forth in 7558 and the Commission's own policy.

With respect to surface waters, Policy 7558 again has broad language on water conservation. It also sets forth an additional demonstration that Applicants must meet when fresh inland waters are proposed for power plant cooling. We do not believe this narrows the analysis of all the other factors that are set forth in the Commission's policies and state water laws in the State Constitution. We believe it is an added demonstration that must be met when fresh inland water is proposed for cooling purposes. And we are all familiar with that added demonstration that must be met because it is set forth in both the 2003 IEPR and Policy 7558, which states that the use of fresh inland waters for power plant cooling will only be approved when it's demonstrated that the only alternative water
supply source and alternative cooling technologies
are shown to be environmentally undesirable or
economically unsound. Excuse me. We do not
believe this is a limitation on the analysis that
must be conducted for either fresh water or
surface ground water in any circumstance.

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

I think I'm trying to understand a point
that was just made by Caryn Holmes regarding that
they would not need to undertake a feasibility of
alternatives analysis, it was for construction.
And based on the language of the Warren-Alquist
Act that, and CEQA that the Commission considers
all feasible means of water conservation and all
feasible uses of alternative water supplies, that
a limitation that would not require an analysis of
ground water for construction would not be
Those are my initial comments on the first question presented. Thank you.

HEARING OFFICER CELLI: Thank you.

Commission Boyd, did you have any questions of any of the parties on this first issue?

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

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

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

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

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

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

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

PRESIDING COMMISSIONER BOYD: Yeah, I know it's not a matter of law, but it's just a
matter of fact that I wanted to understand. Thank you.

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

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

So I'll answer your question this way, is if you rely on the letter then our use of ground water complies with that policy. I also will tell you that I believe that 7558 is the Water Board's interpretation of waste and unreasonable use under the Constitution. If you do not rely on that letter and believe that it is the opinion of an Executive Director and it is not the law, then I would urge you to read 7558. And 7558 very specifically sets forth the hierarchy of water that is fresh water and water that is not fresh water. And this Applicant chose to use
water that is not fresh water and, therefore, would comply with the policy because it is using brackish water.

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

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

But I'd also like to just expand upon we're talking about this policy and we're talking about Article II of the Constitution. Everything that Staff brought up and, in fact, everything that CURE brought up is an appropriate CEQA
analysis. We're not saying don't do the analysis to see if there's impacts, don't do the analysis to see if it's a bad use of water because you hurt a neighbor, don't use this impact because it's a drought condition and, therefore, we're contributing to something bad. That is an appropriate level of inquiry under CEQA. But to say the policy prohibits this use, you can't veer away from the plain language of the policy.

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

HEARING OFFICER CELLI: Staff, your response, please?

MS. HOLMES: Staff believes that the State Board letter does, in fact, support Commission practice on the Staff position. The
State Board letter says that principle two applies to surface water. Principle two is what the Commission took verbatim and incorporated into the 2003 IEPR as its water policy.

So you're left with two alternatives. If you're going to treat the State Board letter interpretation consistent with your interpretation of the policy, you're left with two alternatives. You can say that you look elsewhere in state law, Water Board resolutions, the Constitution, for what is State Water Policy and what to evaluate when you're determining whether a project's use of water is reasonable. Or you can take the Applicant's position, which is 7558 and 8863 don't apply. In fact, if you take their position literally, that means that there is no State Water Policy that you need to consider when you're evaluating this project's ground water use. There is no reason to distinguish between fresh and brackish, as Mr. Galati indicated. His interpretation would result logically in a conclusion that this Commission should not be looking at ground water use at all, and I don't think that's a position that this Commission wants to adopt.
I'd also like to point out that it is very difficult to understand how the Commission could determine whether a use is waste or unreasonable without looking at site-specific factors. How do you determine whether use is unreasonable unless you know what the, unless you know how much water is out there relative to other users? How do you know whether you can, whether or not it's waste or unreasonable use without knowing what the competing uses are? I don't understand how the Commission can make that determination. I don't think that such an approach is consistent with the Commission's past interpretation of State Water Policy, and I don't think it's consistent with the State Board's letter.

HEARING OFFICER CELLI: CURE?

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

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

MR. GALATI: If you notice, our brief deals with whether the accounting surface should
be applied to this project as what the Commission
normally calls a LORS. But the Commission needs
to make two findings: does the project have any
impacts under CEQA and are they mitigated or
alternatives available; or two, does the project
comply with all the laws, ordinances, regulations,
and standards.

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

The simple question is if you drill a
well right on the bank of the Colorado River, are
you using California ground water or are you using
Colorado River water. And the Supreme Court said
that the Bureau has the right to regulate. If
they can prove that there is a main stream or
there's a replacement, you're actually pumping
water from the main stream of the Colorado River.

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

So in 2001 that regulation wasn't even
proposed, but the accounting surface methodology
was exactly the same as it is today. And the
Commission hear testimony on that point from the
Bureau, they heard testimony from the Colorado
River Board, they heard testimony and written
documentation from MWD, Palo Verde Irrigation
District, Coachella Valley Irrigation District, from experts in the field, and what they ultimately concluded was that the accounting surface was not a LORS that they were going to apply because it was not a law.

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

I think that this is very similar to two things: applying the law from one place to another when they don't have any jurisdiction. This is California ground water. Staff says that they're concerned that some day there would be law that then stops the project from using the water. Well, that would stop every project from using
water, whether it's dry cooled or not. That analysis is exactly the same for every single project and shouldn't be a reason to delay the Genesis Project.

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

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

So we urge you to say it doesn't apply. We also urge you to say because it doesn't apply it shouldn't form some basis, some fictitious basis for accumulative impact. Accumulative
impact analysis, the significance threshold should
be something different. Thank you.

HEARING OFFICER CELLI: Staff, please?

MS. MAYER: Good afternoon, Commissioners.

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

What happened here is that the BLM, the
U.S. BOR, and the Colorado River -- California
Colorado River Board all expressed concern in an
interagency meeting that this much water pumping
would eventually reach Colorado, reach water to be
replaced, it would be replaced by Colorado River
water. The BOR was very blunt and to the point and said it would be, if such a thing happened and the water was taken illegally it would be forced to shut down the project.

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

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

HEARING OFFICER CELLI: Ms. Gulessarian?

MS. GULESSERIAN: Mr. Galati has posed a question on whether the accounting surface
methodology constitutes LORS. And the question posed by the Committee is different. It is the legal effect of Reclamation's accounting surface methodology on ground water pumping in the region. This is a different question.

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

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

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

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

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

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

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

HEARING OFFICER CELLI: Commissioner Weisenmiller?

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

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

MR. GALATI: Yes.

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

MS. MAYER: No.
HEARING OFFICER CELLI: Okay. Your microphone, ma'am.

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

HEARING OFFICER CELLI: That they do have jurisdiction?

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

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

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

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

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

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

MS. GULESSERIAN: A lot of --

MS. MAYER: Sorry.

MS. GULESSERIAN: No.

HEARING OFFICER CELLI: Okay.

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

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

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

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

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

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

MS. HOLMES: I think that the answer to that question is that is what the accounting surface is. That is USGS's conclusion as a result of a number of years of study and efforts to
identify at what point do you start running into
water that will replace Colorado River water. And
so that is what the accounting surface is.

HEARING OFFICER CELLI: Please,
Mr. Galati.

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

The citation for do they have the
ability to regulate is absolutely correct. They
do have the ability to regulate when you are
pumping water that is either replaced by or part
of the main stream of the Colorado River. But the
evidence, unless there's evidence brought
different, again look at Blythe One and Blythe
Two, that the Bureau throughout the entire time
it's had that authority has regulated one well in
the entire valley. So you guys have been to
Blythe, you've seen the Palo Verde Irrigation
District and you've seen the number of wells out
there. There are thousands of wells out there and
they have never regulated it. In fact, what they
did is propose a regulation to allow them to
extend by some method beyond what is clearly being replaced by. That is the accounting surface.

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

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

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

Now, if you look at Blythe One and Blythe Two, and those projects were pumping 3,000 acre feet, there is a very detailed analysis about how long it would take to take a molecule of water...
and pump it over eight miles so that those were hydrologically connected. It is an undisputed fact that this project is at least 15 miles farther away from the river.

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

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

If it's just a methodology, we use all sorts of methodologies here, you know. You want to make an economic analysis of alternatives, the parties are free to use whatever accounting methods they want to use, and parties are free to bring in their experts and use methodologies according to proof and really according to the credibility of your witness in a tried and true, tested nature of whatever methodology is being used. And I'm not sure, but I believe there's no law requiring any kind of methodology when it
comes to proving that whatever these issues may be.

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

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

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

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

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

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

So my primary point here is that Staff
has singled Genesis out not because of the accounting surface, not because of the State Water Resources Control Board policy, but because they want them to dry cool. But there is no additional analysis that is placed upon Staff for the accounting surface or for the policy, because this project is proposing to use brackish water. And so I wanted to face that squarely and make sure that Staff knows that, and that the Committee can order Staff to treat this project like every other and evaluate it quickly instead of looking for reasons for it to be delayed. Because the accounting surface, if it applies, which we do not believe it applies, or if they're going to use it (indiscernible) analysis, then they're going to use it as accumulative impact analysis for everybody.

HEARING OFFICER CELLI: Thank you.

Staff, please.

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

HEARING OFFICER CELLI: Can I ask about

that?

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

HEARING OFFICER CELLI: I'm sorry to

interrupt, but if I don't ask the question, I

won't remember it.

MS. MAYER: Sure.

HEARING OFFICER CELLI: Okay. They're

using ten times more water by virtue of not using

dry cooling.

MS. MAYER: Yes, sir.

HEARING OFFICER CELLI: And then the

other projects have applied for contracts with the

BOR, but Genesis has not.

MS. MAYER: Kind of as an insurance

policy.

HEARING OFFICER CELLI: And the idea is

that they, in the event that BOR determines that

they are seeping water out of the ground that

rightfully is Colorado River water, then they're

doing it illegally without a contract, or if they

don't have a contract they're doing it illegally;

if they have a contract, it's legal.

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

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

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

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

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

I do not have an expert here to rebut
the statements regarding the effectiveness of the
methodology, so I would reserve the questions of
HEARING OFFICER CELLI: And I appreciate that. That really raises --

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

HEARING OFFICER CELLI: I was --

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

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

MR. GALATI: That's a fair question.

That's not what Staff said. Staff said we can't pump ground water without an entitlement from the Colorado River water, approved by the Bureau of
Reclamation. That's not correct. If Staff wants to go through the analysis and have us go through the analysis and put proof that we don't impact the Colorado River, that's a CEQA question, fully open, fully on the table. If Staff wants to use the accounting surface methodology to use that, they're free to do so.

What I'm asking you for is -- because remember what we're responding to. We're responding to Staff telling us both at the site visit informational hearing and in subsequent workshops that this project is so complex that it cannot be processed in time for ERA funding. And when you boil it down and you break it down, this project has the same issues as every other project. Whether you're using 300 acre feet or 1,500 acre feet, you should evaluate whether that water is Colorado River water or causes significant impact. But to call it a LORS, say that we don't have a contract -- and to clarify because I do represent the other two Applicants. Those Applicants do not need that contract and it's not a contract for use of the water. There's been water that's been set aside and should that policy come into place, and if the
Water Board, the River Board grants those applications, which has not been done, if they will allow it without a policy, then they might be protected. Blythe Two and Blythe One chose to protect itself with a water conservation offset program. Genesis believes that such a taking, such a protection is not necessary.

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

PRESIDING COMMISSIONER BOYD: I have no further questions.

HEARING OFFICER CELLI: Chairman Weisenmiller?

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

So part of my question is just in terms of scheduling. If we really aren't addressing stuff in this context, how much more complicated
is it going to be in the CEQA context and how much
more time-consuming might it be at that stage?
And that's obviously for all three.

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

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

Once the model is set up, putting in a
scenario where there is X pounds and you see what
happens versus putting in what's X plus one and
you see what happens. The work is putting the model together and we are in no way, shape, or form saying that Staff should not evaluate every drop of water we're going to use, both in a direct, indirect, and cumulative impact analysis.

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

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

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

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

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

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

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

HEARING OFFICER CELLI: So now let's
hear from Staff, and I wanted to hear, among other things, your response to the "what difference does it make if you're doing the same amount of, you know, the same analysis for projects using less water if it's all the same water."

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

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

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

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

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

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

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

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

HEARING OFFICER CELLI: Ms. Mayer?

MS. MAYER: I just want to add one note, and that is because of the amount of the water there's, we have been investigating the likelihood of a site-built water pumping affecting seeps and springs and, henceforth, affecting biology of particular plants. And we've been, we've had two or three workshops on these issues alone. So the amount of water definitely has a stronger impact on the biological aspect than -- it's something,
you know, we can't ignore, it just takes a good, consideration and investigation.

HEARING OFFICER CELLI: Thank you.

Ms. Gulesserian, anything?

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

My second point is just about the broad question of what difference does it make what numbers you plug into your modeling. And I am just stunned sitting here today because I have repeatedly requested in various proceedings that the assumptions used for an Applicant's particular modeling don't seem to be representative of actual conditions, and I had requested an Applicant, just generally, to plug in some different numbers because -- that represent more realistic assumptions for the methodology. And time and time again I've been told it's not just a matter
of plugging in the numbers, it is a long analysis
that needs to be done in order for us to redo our
modeling for this project.

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

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

PRESIDING COMMISSIONER BOYD: No. No,
thank you.

HEARING OFFICER CELLI: Commissioner
Weisenmiller?

MR. WEISENMILLER: No.

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

None. Then let's move into cumulative
impacts.

MR. GALATI: Again, I'm trying to point
out to the Commission that we asked for some
significant guidance, we asked Staff. They won, the first half hour of the workshop. What do we use as a significant threshold for cumulative impact? Would it be one foot of draw down, would it be 25 feet of draw down, would it be you affect a seep and spring that's a certain flow? What would be the significant threshold above which you have an impact and below which you don't? Day one. I've never received an answer.

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

And so we asked this question so that we can -- and we researched the law to determine that there has to be a certain amount. I think actually we agree on the general parameters.
Things that are too speculative shouldn't be included in a cumulative impact analysis, and things that are specific enough certainly should. And so what we tried to do was to tell you where it is, where the breaking point is, and we believe the breaking point is that someone must have filed a complete enough an application so that you can meaningful do the analysis.

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

So what we said is if there -- there needs to be a specific application. We think for the Energy Commission that's an AFC and that it's data adequate, that it can be included in the analysis. We said when it, for BLM land they're not only has to be a right-of-way grant application, but a POD, and a Plan of Development,
which is specific enough so that an evaluation can
take forward, go forward.

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

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

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

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

MR. GALATI: And in using the BLM
handbook we originally proposed that a Notice of
Intent had to be filed. We then got comments from BLM where they said, you know, sometimes an Applicant has started enough environmental studies that they should be included in cumulative impact analysis. So in our reply brief we modified our stipulation and our request for order to say if BLM were to, based on information they have, know that an NLI is imminent, that they're actually about ready to start the environmental review, that makes sense to include them as well.

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

Our purpose here is to get on the same level playing field. And these are not questions of fact, it's a question of fact which project to include, but it's not a question of fact of what standard that project has to meet. There's already a standard. It says it's got to be a foreseeable, probable project. We're to avoid speculative projects.
In addition, Staff had told us that their primary concern is that in the future, some day, there might be people who want to use this water for other power plant development, and they pointed to ready study, they pointed to BLM planning. We would say that those things are not yet specific enough to include in an analysis. I can't tell you where those projects are going to be, I can't tell you how much water they're going to use. I have no idea how much land BLM will allow to be developed. So how can you do a meaningful analysis?

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

HEARING OFFICER CELLI: Thank you.

Staff, please.

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

It seems to me that Mr. Galati addressed two issues. One had to do with significant thresholds and the other had to do with which projects get included in cumulative impacts analysis. Ms. Mayer will be addressing the
latter, but I wanted to correct the record with respect to the former.

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

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

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

HEARING OFFICER CELLI: Thank you.

MS. MAYER: Thank you. (Indiscernible)

the two problems here. One is what future
projects to include. A project that's too
speculative is not going to have enough
information to analyze. But, before you get to
that point, you have to know what projects are too
speculative to analyze and you have to know what
the plans are and what those projects might be and
what information is out there. And that's a
factual determination.

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

In the past Staff has used both methods,
especially for evaluating cumulative air impacts.
And there's nothing in case law to contradict
that. Indeed, case law encourages a wide view of
what a future project should be merited for consideration in the analysis, not a narrow view at all. In San Franciscans for Reasonable Growth the court found it more practical and reasonable (indiscernible) projects that have not surpassed all regulatory hurdles. And despite what Mr. Galati says, if you're asking for an NLI to be published and the application to be complete, I mean that's a regulatory hurdle.

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

So those are just some of the framework for CEQA. In other words, you need to go out, you need to find out what's there, and you need to
include anything that's practical in your analysis as a foreseeable, reasonably foreseeable future project. It is a question of reason. It's not a broadline threshold; maybe that's frustrating, but it isn't.

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

So the plan documents that are currently available, I mean, again, it doesn't mean that the project should be in the (indiscernible) analysis
but that does mean that the staff has to at least consider it. Current plan documents include a BLM plan development list, which is a step beyond applications as got noted, the Department of Energy and BLM Development and Program (indiscernible) EIS for projects in the Genesis area, the Commission's and other agencies' Desert Renewable Energy Conservation Plan to concentrate solar development, and most feasible, at least environmentally sensitive parts of the desert, and the Renewable Energy Transmission Initiative to facilitate transmission of renewable energy.

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

HEARING OFFICER CELLI: CURE, anything?

MS. GULESSERIAN: The issue is the legal standard for including future projects in the cumulative impact under CEQA and NEPA, and we've stated that the legal standards are set forth in the statutes and the case law, and in agency guidance that the parties have included in their briefing.
Examples of the standards are closely related, reasonable, foreseeable, probable future projects, reasonably foreseeable future actions regardless of what agency undertakes those other actions. For each of those projects the nature of each environmental resource being examined, the location of the project and its type must be considered. And the geographic scope of the area affected by the cumulative effect. Those are just a few examples of what factors must be considered in determining what is a reasonably foreseeable future project that needs to be analyzed in the cumulative impact analysis.

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


MS. GULESSERIAN: No problem. And this speaks to what Staff mentioned, is that what is excluded will be projects that are speculative. What is speculative is a question of fact. Where
preparation of an environmental document is almost always evidence of foreseeability, the case law does not require the preparation of an environmental document to be, to make a project foreseeable.

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

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

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

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

MR. GALATI: Okay. So let's look at BLM
Handbook, because that's a handbook to say here's how you do it.

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

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

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

We took a shot at giving you some. If we want to come up with different ones, great, but the idea that we can sit here, all these smart people, and can't say how we're going to look at it, that's what I find frustrating and it's
setting us up for a fight, and it's setting up
every Applicant for a fight based on what Staff
selects and what they don't select. They ought to
be able to tell you.

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

MR. GALATI: Yeah, that is my suspicion.

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

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

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

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

MR. GALATI: And Staff's going to
include it in their cumulative impact analysis.

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

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

MR. GALATI: I'm sorry?

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

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

HEARING OFFICER CELLI: Okay.

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

HEARING OFFICER CELLI: Okay, but --

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

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

MR. GALATI: Not if it's not complete.

Why would it be a minimum POD that requires
hundreds of pages of updating before you can begin
the environmental review?
HEARING OFFICER CELLI: Wow, that's a --
but I'm just suggesting that perhaps the list is
enough and if you're asking Staff to make a
further analysis and determine the seriousness of
each project on that list, that that sets them
back.

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

HEARING OFFICER CELLI: Right, that's
true.

MR. GALATI: Right?

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

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

HEARING OFFICER CELLI: Well,
foreseeability and reasonableness --

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

HEARING OFFICER CELLI: Let's hear from
Staff.

MS. MAYER: I think we have. I mean,
it's the case law may be frustrating but that's
the way it is. We would be remiss if we didn't at
least consider all these trends and, by your own
case that you quoted, solar development that's in
the area, we would be remiss not to at least
examine it for a probable future project.

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

And I believe, and for the most part,
that we are following that list. So we're not
going wildly outside that, but the law says, the
case law says, is really clear, that we need to
look at planning documents. The Staff cannot just
pretend those planning documents don't exist,
especially when you have an problematic
Environmental Impact Statement for the area. I mean, it simply has to be looked at.

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

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

So the main concern I have is that this is a factual question and it's a fight that may have to happen, as you say. This may be a fight coming down the pipe but it's so, it's such a factually driven question that it's awfully early in the process to start looking at what is or is
not allowable in the discretion of Staff to be
considered as a project. I mean, it seems to me
the projects will fall in and fall out, and that's
something that you, as an advocate, will have to
point out and present to the Committee.

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

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

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

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

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

Thank you very much.

HEARING OFFICER CELLI: Thank you.

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

HEARING OFFICER CELLI: Commissioner?

PRESIDING COMMISSIONER BOYD: Well, you
began to answer, I believe, the question I was
going to ask. And that is will Staff apply
basically the same analysis to all the projects in
this same area, and we've kind of identified those
projects today. This project is bookended by
other projects.

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

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

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

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

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

    PRESIDING COMMISSIONER BOYD: And yet
it's the subsequent projects that may really cause the problem.

MS. HOLMES: Well, I think that we will, the way that the Staff would proceed would be to identify contributions by this and other projects which are before the Commission in light of the impacts associated with other projects, some of which I believe are not before the Commission, and try to come up with some sort of mechanism so that any mitigation measure that's proposed is reasonable and represents a project's fair share.

I don't think Staff, in fact, believes that it would be wrong as a matter of law to require mitigation from a single project for a cumulative impact that's been created by a whole series of other projects.

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

MR. GALATI: If I might add, because I think it might be able to bring this to closure, is Staff had originally listed cumulative impacts as a reason why the Genesis project would be difficult to handle EIR funding. If that is no longer the case, and the cumulative impacts
analysis would be similar, and while we might not
agree on what project's in and what project's out,
but as long as it's not a reason for Genesis alone
to be delayed, we are comfortable proceeding and
we might be bringing to you another time of why a
project should be in or should be not.

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

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

So if the question is just which
projects to include, I agree that that should not
take time such that the EIR funding deadline would
present a problem. But to the extent that the
impacts, the cumulative impacts associated with
this project may be greater or the project's
contribution may be greater than other projects, I
think that does contribute to our concerns about
schedule.

HEARING OFFICER CELLI: Ms. Guresserian,
did you want to weigh in?

MS. GULESSERIAN: I have nothing to add.

Thank you.

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

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

MS. MAYER: Can I give you these
numbers?

HEARING OFFICER CELLI: Please.

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

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

HEARING OFFICER CELLI: Okay.

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

PRESIDING COMMISSIONER BOYD: And again,
I'm just trying to clarify when we're talking about cumulative water use and impacts. I'm not talking about the difference between wet cooling and dry cooling, I'm talking about other Applicants using amount of water that are not ten times greater than the amount of water that Genesis is proposing.

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

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

Thank you for that clarification.

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

MR. WEISENMILLER: Yeah. I want to move the attorneys back from the factual questions to a legal question. And I just wanted to understand the relationship between the cumulative impact
study, cumulative impact analysis you have to do with the definitions under NEPA versus CEQA. Are they identical, are they different, and, if they're different, which is the most stringent?

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

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

And they use very similar terms, "reasonably foreseeable," "probable," and avoid "too speculative." And, when in doubt, try to include it. I have no problem with that.
Our concern really was that we thought because it was that we were being singled out from a cumulative analysis as being delayed. And, again, I'll go to the point. The impact analysis on direct impacts, those are going to develop some sort of mitigation if there's a direct impact. If there's no significant impact there, you take the impact of others, after mitigation, and put them together. And if cumulatively that's a significantly impact, that's what we're going to mitigate.

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

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

HEARING OFFICER CELLI: Hi, Holly.

MS. ROBERTS: Palm Springs Field Office.

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

MS. ROBERTS: Well, just to clarify one thing on reasonable/foreseeable. We did look at more than just (indiscernible) development. We are required to go through (indiscernible) these
companies and the fact that they have submitted a POD is one thing, because frequently we do get very poor plans of development. But we try to keep all these companies as quickly as possible.

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

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

MS. ROBERTS: Okay.

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

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

PRESIDING COMMISSIONER BOYD: Yes, loud and clear.

MS. ROBERTS: Okay, got you. Well, the clarification that I wanted to add was that it was not just a Plan of Development that BLM looks at. We are required to look at due diligence from every proponent and, when a plan comes in, we are supposed to have time to sit down with them, go through a series of comments to make sure that the
Plan of Development meets all of our requirements. In other words, we have a proposed action good enough to start analysis. But there's other things that on go at the same time the Plan of Development, which also fit in to due diligence, and that is the fact that a company shows us that they are indeed trying to secure contracts for their environmental consultants and initiate the field investigations that go behind a good Plan of Development so you can actually refine a proposed action. We have, through due diligence, and I think it was Scott had pointed out, dropped this little projects, they were nonresponsive.

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

These things come and go on such a regular basis for BLM. Clearly we have players that we're not sure are bona fide developers. They do not compare to the likes of Nextera and
Solar Millennium, who we think have done a pretty good job.

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

And lastly, I guess, there are other projects far greater in terms of water use that are not being compared with solar, including things like Eagle Crest Mountain pumping storage, which is essentially a FIRC (phonetic) project, a federalized project, and they are, it's a very difficult, complex thing to analyze and compare their relationship to other ongoing things. I just hope we all remain flexible and put things in context, say look at some offset compensation strategies for our water issues out there.
HEARING OFFICER CELLI: Thank you very much; very, very clear, Ms. Roberts.

Anything else? Please, Ms. Mayer.

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

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

HEARING OFFICER CELLI: Anything from CURE?
MS. GULESSERIAN: Nothing to add. Thank you.

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

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

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

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

MR. GALATI: Our concern is this. Staff told us in a workshop, we're concerned about you guys using water because there could be ten more solar projects using the same amount of water, and we think that someday those might come. What I don't want to see is those ten future solar
projects that are nowhere documented being rolled
into our cumulative impact analysis for that
purpose.

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

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

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

HEARING OFFICER CELLI: Staff?

MS. MAYER: Of course we have a, you
know, we have a mandate to conserve the resource
in general from the Constitution and regulations
and law. But, yes, the Staff has been actively
working with BLM and will continue to.

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

HEARING OFFICER CELLI: CURE?

MS. GULESSERIAN: I agree that the
resolution of the last issue would, speaks to the
resolution of this issue regarding the
Commission's policy on conserving water for use by
projects that are not yet identified. I do also
believe that the policy is so broad that the
Commission will be considering whether the project
proposes, is a sustainable project, it enables
water resources and other resources in this region
to continue to survive such that there will be --
it will enable future economic and natural use of the area.

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

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

HEARING OFFICER CELLI: Thank you.
MS. GULESSERIAN: Thank you.
HEARING OFFICER CELLI: Commissioner, any questions?
MR. WEISENMILLER: No.
HEARING OFFICER CELLI: Commissioner Boyd, anything further on these issues?
PRESIDING COMMISSIONER BOYD: Well, I just want to say this has been an interesting and difficult subject area. It meant for a lot of long hours reading and rereading letters and
briefs over the past weekend and through last night.

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

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

So nothing more in the way of questions.

I know we have public comment to deal with yet.

HEARING OFFICER CELLI: Thank you.

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

MR. GALATI: Yeah, if significant impacts to seeps and springs means an impact to the biology supported by those seeps and springs,
that did clear that issue up for me.

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

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

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

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

MR. GALATI: If I can just address something there. And, again, the words mean things. It's not any impacts to a seep or spring or the biology, it's significant impacts to the biology around the seeps and springs. So if one plant dies over a 30 year period, I would suggest
that that might be an impact, but not significant.

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

HEARING OFFICER CELLI: And Staff is nodding.

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

In other words, if a biological resource is important in some way, which is a factual determination that we assess at hearings, we don't want that impact to occur. We would -- particularly in light of the fact that most of those resources are important because there's very few of them left. And so when we get to a situation where resources are important because
they've been threatened over the years by
development and draw down and other kinds of
factors, the threshold for significance for water
impacts is very, very low.

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

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

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

HEARING OFFICER CELLI: Thank you.

Other than it's a question of fact.

Now I'm going to ask the people seated
in here, in person, are there any members of the
public who wanted to make any comment?

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

Hearing none I guess we have no public
comment today.

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

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

Good day.

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

--o0o--
CERTIFICATE OF REPORTER

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

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

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

PETERS SHORTHAND REPORTING CORPORATION  (916) 362-2345