

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:) Docket No. 08-AFC-3
Application For Certification)
For the Mirant Marsh Landing) **STAFF'S COMMENTS ON AUGUST 17,**
Generating Station Project) **2010, LETTER FROM U.S. FISH AND**
) **WILDLIFE SERVICE**
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On July 23, 2010, the Committee for the Application for Certification for the Mirant Marsh Landing Generating Station (MLGS) Project (Committee) published the Presiding Member's Proposed Decision (PMPD). The Notice of Availability of the PMPD encouraged written comments on the PMPD to be filed and served to the Proof of Service List, via e-mail no later than August 23, 2010. The parties filed and served written comments on August 16, 2010 and are in agreement in all technical areas.

On August, 17, U.S. Fish and Wildlife Service, (Service) filed and served a comment letter on the PMPD, signed by Cay C. Goude, Assistant Field Supervisor. In the letter, Ms. Goude discussed the proposed mitigation for nitrogen deposition impacts to federally endangered species at Antioch Dunes National Wildlife Refuge (Antioch Dunes NWR or ADNWR) and compliance with the federal Endangered Species Act (ESA). The letter expressed disagreement with the PMPD that Biological Resources Condition of Certification, BIO-8, would mitigate impacts below the level of significance and that compliance with the federal ESA would be achieved. At the conclusion of the letter, the Service provided its recommendation as follows:

- (1) the California Energy Commission and/or the applicant ensure the proposed Marsh Landing Generating Station does not jeopardize the Contra Costa wallflower and Antioch Dunes evening primrose, or result in adverse modification or destruction of critical habitat for these two endangered plants; and
- (2) the California Energy Commission and/or the applicant obtain authorization for incidental take of the endangered Lange's metalmark butterfly pursuant to sections 7 or 10(a) of the Act prior to the adoption of the *Presiding Member's Proposed Decision*.

Staff disagrees with the Service's position that a section 7 or a section 10(a) permit is required. Regardless, the Commission may still approve the Application for Certification at the August 25, 2010 business meeting, because there is not a federal nexus to the project required for a section 7 permit, and the Applicant may elect to obtain a section 10(a) permit post-certification.

Staff Thoroughly Analyzed Nitrogen Deposition

Staff thoroughly analyzed the possible impact of nitrogen deposition on the Antioch Dunes NWR in the Biological Resources section in both its Staff Assessment, issued on April 26, 2010, and its Revised Staff Assessment (RSA), published on June 10, 2010. The Antioch Dunes are approximately 0.75 miles west of the MLGS site. Staff relied on recent studies that have determined the baseline for nitrogen deposition in the area to be approximately 6.39 kg/ha/yr. The data used is from 2002, and advances in emissions control technology and offsets for stationary sources have resulted in a decrease of NO_x activity. (RSA, 4.2-16) Although staff relied on this baseline in its analysis, it is possible that this is a conservative estimate.

The Applicant provided that modeled nitrogen deposition rates from the MLGS at the Antioch Dunes NWR would be between 0.0307 and 0.0447 kg/ha/yr. Based on the power plant running the maximum of 1,752 hours annually, staff determined that threats to the endangered species at the Antioch dunes from noxious weeds are likely exacerbated by nitrogen fertilization; therefore, additional nitrogen deposition at this already stressed ecosystem would be a significant impact. (RSA, 4.2-16.) Discussing its proposed mitigation, staff stated in the RSA:

Staff's proposed mitigation approach requires the applicant to remit annual payment towards the operation and maintenance cost of the Antioch Dunes NWR. The annual operating cost is approximately \$385,000 and includes money for non-native plant removal/fire prevention, sand acquisition, grazing management, butterfly propagation, and rare plant

propagation (Picco 2009). Contributing payment would partially fund the management activities required to address impacts to the Antioch Dunes NWR from the effects of noxious weed proliferation resulting from nitrogen deposition.

It is understood that emissions from the proposed MLGS project would not be the only source of nitrogen deposition at Antioch Dunes NWR. There are existing industrial stationary sources as well as mobile sources (i.e., transportation) in the San Francisco Bay area that have collectively elevated local and regional nitrogen deposition. Accordingly, staff proposes that the applicant's payment toward the operating cost of Antioch Dunes NWR be proportional to the proposed project's contribution toward total nitrogen deposition at Antioch Dunes NWR. The following equation was developed by staff to calculate the amount of mitigation that would be proportional to the project's contribution to ongoing impacts. Refer also to Condition of Certification **BIO-8** (Antioch Dunes National Wildlife Refuge Funding).

$(\text{MLGS N-dep at ADNWR} / \text{baseline N-dep at ADNWR}) \times \text{annual operating cost of ADNWR} = \text{mitigation } \$/\text{year}$

$(0.0447 \text{ kg/ha/yr}/6.3947 \text{ kg/ha/yr}) \times \$385,000 = \$2,693.00/\text{year}$

It is staff's determination that annual payment toward the operating cost of Antioch Dunes NWR that is proportional to the MLGS project's contribution to cumulative total nitrogen deposition (as calculated using the above equation and described in **BIO-8**) would mitigate adverse impacts to Antioch Dunes NWR and the Antioch Dunes evening primrose, Contra Costa wallflower, and Lange's metalmark butterfly from noxious weed proliferation exacerbated by MLGS nitrogen deposition. (RSA, pp. 4.2-16-4.2-17.)

Staff maintains its position that the mitigation required for this project should be proportional to the impacts of the project.

Staff Requested the Service's Participation in the Siting Process

Given staff's prior exemplary record of effective coordination with the Service, it was surprising to receive a formal letter from the Service just over a week before the final Business Meeting at which this proceeding would be discussed and considered. Please see *Attachment A* for a summary of staff's outreach efforts and the coordination

history between the Energy Commission and the Service regarding nitrogen deposition for Marsh Landing.

In January, staff became aware of the Service's mitigation approach that the Applicant for MLGS pay the entire operating budget for the Antioch Dunes. Soon thereafter, staff expressed its disagreement to the Service in that approach based on the lack of proportionality of the mitigation to the possible impacts, and requested the Service defend that position formally at a workshop, at evidentiary hearings, or in response to the SA or RSA. Despite repeated requests for comments on the SA and RSA, as well as participation in workshops and hearings, the Service did not provide any documentation to convey its formal position for the record.

Furthermore, the letter received on August 17, 2010, does not support the Service's previous informal mitigation proposal of full payment for the operating budget, but recommends a take permit. First, it is staff's opinion that the possible adverse impact from the small amount of nitrogen deposition that is possible from the operation of MLGS does not constitute a "take." Second, the Service is recommending a take permit under either section 7 or section 10(a). There is no federal nexus to the project; therefore, the Applicant could not obtain a section 7 permit. Finally, the Applicant may elect to obtain a section 10(a) permit post-certification of the project, thereby not impacting the Energy Commission's schedule.

In conclusion, the Energy Commission may still approve the project as scheduled on August 25, 2010, and, if necessary, the Applicant can go through the section 10(a) permit process prior to the power plant's operation.

DATED: August 23, 2010

Respectfully submitted,

 /s/ Kerry A. Willis
KERRY A. WILLIS
Senior Staff Counsel

ATTACHMENT A

Staff's Outreach Efforts to U.S. Fish and Wildlife Service

- May 13, 2009 Staff conducted a meeting at the Energy Commission that was attended in person by the Service (Chris Nagano and Angela Picco) and California Department of Fish and Game (Suzanne Gilmore). The purpose of the meeting was to introduce the nitrogen deposition issue. Agenda items included Data Requests, Defining Significance Thresholds, Mitigation Strategy, Permitting, Agency Coordination – USEPA/section 7. Willow Pass was identified as the priority project, with the understanding that the approach to addressing nitrogen deposition would be the same for Willow Pass and Marsh Landing.
- June 18, 2009 Site visit to Antioch Dunes NWR with the Service (CDFG was also invited by the Service, but did not attend). The site visit was initiated by staff.
- August 20, 2009 Conference call with Energy Commission air quality and biology staff, the Service, and Environmental Protection Agency (organized by EPA) to discuss PSD review and possible Section 7 consultation in light of nitrogen deposition issue. No determinations or decisions were made during the call.
- September 4, 2009 Sent Draft of the Willow Pass Generating Station Staff Assessment to A. Picco for review, included nitrogen deposition impact analysis and interim draft conditions. The entire operating budget was believed at the time to be \$50,000. Draft Condition also included reapportionment of funds as other projects were proposed that demonstrated similar impacts to ADNWR.
- January 4, 2010 Comments on Willow Pass PSA provided by the Service with annual operating budget revised to \$445,000 in year 1 with subsequent years at \$385,000, and the requirement to set up an endowment rather than annual payments.
- March 4, 2010 Staff emailed the Service (A. Picco) requesting their participation in a biological resources workshop to discuss mitigation for nitrogen deposition impacts with the Applicant.
- March 9, 2010 Staff received email response from the Service declining to participate in public workshops, unless the Service is the project proponent.
- March 11, 2010 Meeting with the Service to discuss nitrogen deposition and staff's concern about the Service's PSA comments requiring payment of the entire operating budget by Mirant. Staff's proportional approach

ultimately used in BIO-8 was presented to the Service (C. Nagano, A. Picco, and Ryan Olah). The Service reiterated its position that annual payment of the entire operating budget would be required by the first project on-line and should be set up as an endowment. The Service also stated that the onus would be on the first project (Marsh Landing) to reapportion payment with subsequent applicants. Staff expressed disagreement with the approach and requested the Service's participation in workshops and hearings to defend their position.

- March, 2010 Project manager and staff counsel notified the Applicant that the Service may have additional requirements and it would be prudent to contact the Service about nitrogen deposition.
- CEC tentatively scheduled a workshop for March 25, 2010, to discuss the results of the applicant's nitrogen deposition modeling results as presented in the applicant's Responses to Data Requests 99-101 submitted to CEC on 2/23/10. Mirant Marsh Landing was informed on March 15, 2010, that the March 25, 2010 workshop was cancelled because USFWS legal staff would not be able to attend.
- April 15, 2010 Email invitation from Staff to the Service (A. Picco, R. Olah, C. Nagano) to participate in the Staff Assessment workshop. No response received.
- April 26, 2010 Staff Assessment published
- April 27, 28, 2010 Request for comments on the SA, with a link to the SA, sent via email from Staff to the Service (A. Picco and R. Olah)
- May 4, 2010 SA Workshop. No agency participation.
- May 26, 2010 Notice of pre-hearing conference and evidentiary hearing emailed to the Service (A. Picco)
- June 10, 2010 RSA published
- June 10, 2010 Notice of RSA publication and link to RSA emailed to Service (A. Picco)
- June 30, 2010 Chris Nagano called Rick York expressing disagreement with the way the biology section was handled and wanted to know how to participate. Rick advised either coming to the hearings or commenting on the PMPD. Mr. Nagano indicated they would comment on the PMPD.
- July 26, 2010 Rick York emailed Mr. Nagano the PMPD with guidance on how to comment and the hearing notice.