

Memorandum

Date: February 11, 2011

To: Mr. James Boyd, Vice Chair, Presiding Member
Energy Commission Docket Unit
California Energy Commission
1516 Ninth Street, MS-4
Sacramento, California 95814

From: 
Scott Wilson, Acting Regional Manager
Department of Fish and Game – Bay Delta Region, 7329 Silverado Trail, Napa, California 94558

Subject: Comments on Preliminary Staff Assessment, Part B, Docket 09-AFC-4, Oakley Generating Station, Contra Costa County

DOCKET	
09-AFC-4	
DATE	<u>02/11/11</u>
RECD.	<u>04/21/11</u>

Thank you for providing the Department of Fish and Game (DFG) with the opportunity to provide comments on the preliminary Staff Assessment for the proposed Oakley Generating Station Project (project). The following comments are intended to provide guidance to the California Energy Commission (CEC) for preparation of the final Staff Assessment.

Fully Protected Species

The list of criteria for "special-status species" on page 4.2-11 should include "species that are fully protected under California Fish and Game Code sections 3511 and 4700." Take¹ of fully protected species, such as the white-tailed kite (*Elanus leucurus*), is prohibited under Fish and Game Code. No agency may issue permits, licenses or other approvals that could result in take of a fully protected species.

Participation in the East Contra Costa HCP/NCCP

Please add language to the second paragraph on page 4.2-1 clarifying that participation in the East Contra Costa Habitat Conservation Plan/Natural Communities Conservation Plan (HCP/NCCP) would address impacts for species covered under the Plan only. Impacts to non-covered species, such as the federally endangered Lange's metalmark butterfly (*Apodemia mormo langei*), the federally and state endangered Antioch Dunes evening primrose (*Oenothera deltoids ssp. howellii*), and federally and state endangered Contra Costa wallflower (*Erysimum capitalum var. angustatum*), cannot be addressed through participation in the Plan. Similarly, the fourth paragraph on page 4.2-2 states that compliance with the California Environmental Species Act (CESA) will be achieved through participation in the HCP/NCCP. As stated above, participation in the HCP/NCCP cannot mitigate for impacts to species not covered under the Plan.

On page 4.2-27, the preliminary Staff Assessment states that "any temporary or permanent impacts to general vegetation would be mitigated to a less-than-significant level through a one-time payment to the [HCP/NCCP] Conservancy." Participation in the HCP/NCCP also requires that applicants employ standard avoidance and minimization measures to reduce

¹ "Take" means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.

impacts to habitat. Please add text clarifying that both payment of HCP/NCCP fees and implementation of avoidance and minimization measures are required to fully mitigate habitat impacts.

Please also note that participation in the HCP/NCCP is subject to concurrence that proposed mitigation complies with the terms and requirements of the Plan and associated permits from the U.S. Fish and Wildlife Service (USFWS) and DFG.

Nitrogen Deposition Impacts

The preliminary Staff Assessment indicates that the project would have a significant impact on Lange's metalmark butterfly, Antioch Dunes evening primrose and Contra Costa wallflower as a result of nitrogen deposition. These species are extremely rare, and distribution of the species' habitat is limited to an area of less than 100 acres, occurring mostly at the Antioch Dunes National Wildlife Refuge (NWR). Loss of these species would be permanent and irreplaceable. DFG offers the following comments pertaining to the analysis of nitrogen deposition impacts in the preliminary Staff Assessment.

Setting of the Analysis

Please add text in the Setting to clarify that the analysis area for the preliminary Staff Assessment includes off-site habitat beyond the project area, including habitat at the Antioch Dunes NWR. Similarly, the descriptions of special-status species beginning on page 4.2-17 should be expanded to include descriptions of off-site species that could be adversely affected by the project, including those species found at Antioch Dunes NWR. Information regarding threats to survival, habitat needs, distribution and abundance of these species is necessary for the evaluation of the project's potential impacts. Background information provided on pages 4.2-38 through 4.2-39 may be more appropriate in the Setting of the Staff Assessment.

Biological Resources Table 2 indicates that the federally and state endangered Contra Costa wallflower and Antioch Dunes evening primrose are found only at the Antioch Dunes NWR. However, a few isolated occurrences of both species are found on unmanaged private properties east of the Refuge.

CESA Requirements and Proposed Mitigation

The CESA "jeopardy" clause [Section 2081(c)] prohibits issuance of an incidental take permit if "issuance of the permit would jeopardize the continued existence of the species." Permits issued under CESA must demonstrate a finding that the Project will not put species at risk of extinction based on "best scientific and other information that is reasonably available" regarding "(1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities."

CESA also requires "full mitigation" for any act that would result in take of a state-listed species [CESA Section 2081(b)]. Full mitigation means that no net loss of listed species may occur as the result of a proposed action. Under CESA, impacts include direct, indirect and cumulative effects. Neither DFG nor any other public agency may issue a CESA incidental take permit for unavoidable and/or unmitigated impacts to listed species.

The Staff Assessment does not clearly indicate how the proposed mitigation for nitrogen deposition impacts (Mitigation Measure BIO-19) will address and fully mitigate expected project impacts. The analysis does not describe the management activities that are needed to offset the project's impact; therefore, it is unclear whether the proposed financial contribution will be sufficient to address such management needs. If the current mitigation proposal does not adequately anticipate the future costs of management, labor, supplies, transport, utilities, etc. necessary to address the project's contribution to increased nitrogen deposition, management activities at Antioch Dunes NWR may not be able to control the spread of invasive species. The resulting impact on listed species would be an avoidable residual impact, which is not allowable under CESA.

DFG recommends that the CEC consult with USFWS to determine what resources are necessary for management of invasive species and whether the current operating budget of the Antioch Dunes NWR is an appropriate baseline for calculation of mitigation fees. Preparation of a Property Analysis Report (PAR), a tool used by DFG and USFWS to estimate habitat management costs based on a habitat management strategy, may be useful in this regard.

DFG strongly recommends that CEC obtain written concurrence from the USFWS on the mitigation proposal prior to approval of the project. The terms of the mitigation agreement, including financial compensation, must be acceptable to the USFWS, who would bear the burden for management activities. Prior to accepting the proposed mitigation, the CEC should also consult with USFWS as to whether the agency is willing to accept the mitigation burden on behalf of the applicant. Without clear agency consent to this mitigation arrangement, the proposed mitigation transfers responsibility for impact abatement from a private party to a public agency.

Finally, proposed mitigation does not take into account loss or degradation of habitat on private lands. Without management, invasive species spread will likely result in local species extirpations within these patches of isolated habitat. It may be necessary to acquire, conserve and manage additional habitat within the project vicinity to achieve the CESA full mitigation standard.

If you have any questions, please contact Ms. Randi Adair, Environmental Scientist, at (707) 944-5596; or Mr. Liam Davis, Habitat Conservation Supervisor, at (707) 944-5529.

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