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September 19, 2011

VIA EMAIL AND MAIL

Mr. Eric Solorio, Siting Project Manager
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: Pio Pico Energy Center Project (11-AFC-01)
Correspondence to United States Fish and Wildlife Service

Dear Mr. Solorio:

On behalf of Applicant Pio Pico Energy Center, LLC, please find the enclosed correspondence to Mr. Eric Porter of the United Sates Fish and Wildlife Service dated September 14, 2011 regarding the Pio Pico Energy Center Project. Should you have any questions regarding this correspondence, please contact Melissa Foster at (916) 319-4673.

Respectfully submitted,

Kimberly J. Hellwig
Paralegal

KJH:jmw
Enclosure
cc: Proof of Service List

URS

September 14, 2011

Eric Porter
Unites States Fish and Wildlife Service
Carlsbad Fish and Wildlife Office
6010 Hidden Valley Road
Carlsbad, CA 92011

Subject: Pio Pico Energy Center

Dear Mr. Porter:

The Pio Pico Energy Center Project (the "project") is a proposed facility to be located within an unincorporated area south of the City of San Diego, California. The project site is within the San Bernardino Meridian, Section 30, Township 18 South, and Range 1 East of the Otay Mesa United States Geological Survey (USGS) 7.5-Minute Topographic Quadrangle Map (USGS 1975). The primary permitting authority is the California Energy Commission (CEC) via an Application for Certification (AFC), but the project is also required to obtain a Prevention of Significant Deterioration (PSD) permit from U.S. Environmental Protection Agency (EPA), Region 9.

This letter demonstrates that and explains how the project's nitrogen emissions are miniscule and will not have any significant adverse environmental effects to federally endangered or threatened species, jeopardize the continued existence or result in the destruction or adverse modification of designated critical habitat for such a species and that, for those reasons, there is no reason or legal basis to require or include a Section 7 consultation under the Endangered Species Act. This is primarily because the maximum possible levels of nitrogen contribution from the project are negligible and is not sufficient to cause an identifiable or statistically significant change in plant growth patterns. This is also because any possible effects of even greater levels of nitrogen deposition in the areas of possible concern have already been eliminated by virtue of agreed to environmental enhancements provided by an immediately adjacent power plant.

This letter is intended to assist the EPA and U.S. Fish and Wildlife Service (FWS) in their respective understanding of the AFC and PSD applications and in particular, PPEC's air quality modeling and nitrogen deposition analysis results and the conclusion that the project does not trigger any further evaluation or permitting under the Endangered Species Act (ESA).

Applicable Legal Authority

The ESA requires Federal agencies. i.e., EPA Region 9, to consult with the U.S. Fish and Wildlife Service (FWS), to ensure that agency actions are not likely to jeopardize federally-designated endangered or threatened species, or result in the destruction or adverse modification of critical habitat for such a species. Section 7 (a)(2) of the ESA states that each Federal Agency shall, in consultation with FWS, ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of a listed species or result in the destruction of adverse modification of designated critical habitat. In fulfilling these requirements, the use of the best scientific and commercial data shall be provided (USFWS 1998). "Jeopardize the continued existence of" is

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defined as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species" (USFWS 1998). "Destruction or adverse modification of critical habitat" is defined as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical" (USFWS 1998).

Background

The project's facility placement and design were intended to avoid populations of special-status species within the region. The majority of the study area has been previously disturbed and includes developed areas containing commercial and public infrastructure. Additionally, the industrial park developer graded the project property in first quarter 2011 as described in the 2009-2010 County of San Diego Grading Permit 2700-1555. This soil removal and grading of the property was already planned for prior to the inception of this project and occurred regardless of the project. Accordingly, the environmental baseline includes facility placement and design that targets the majority of project impacts towards lands that are adjacent to cleared or disturbed areas and roads. The lands abutting the project's ground disturbance footprint include the Otay Mesa Generating Project (OMGP) and its appurtenances. Any individual species present in the area or in adjacent/surrounding areas are assumed to have acclimated and developed tolerance to substantial noise, light, and other effects resulting from the presence of an active power plant and its access roads. Botanical and wildlife field studies conducted within the project site did not identify any threatened or endangered plant or wildlife species within the project study area (URS 2010). Construction of the project will be on 9.99 acres of previously developed/disturbed non- native habitat. The hills approximately 1,500 feet east of the project include FWS designated critical habitat for Otay Tarplant, Quino Checkerspot Butterfly, and California Gnatcatcher.

The existing OMGP, which is a baseload power plant of greater power generation (approximately 500 MW) and significantly greater capacity factor (greater than 90 percent equivalent to 8,000 hours per year) is located immediately adjacent to and east of the proposed project. OMGP agreed to provide assurances against any possible nitrogen deposition effects by funding regular inspection for and eradication of non-native weeds in essentially the same nitrogen deposition zone as the proposed project. In contrast, the proposed project will generate 300 MW and operate a maximum of 4,000 hours per year (which is equivalent to a 46 percent capacity factor). As such, the proposed project's contribution to nitrogen deposition will be substantially smaller than OMGP's contribution to the habitat areas located east of the project. This is highly relevant when considering any possible, and by definition necessarily much smaller incremental effects of the proposed project, since the primary possible impact area has already been provided assurances against any adverse impact by virtue of OMPP's agreed to nitrogen deposition impact elimination activities.

Nitrogen Deposition

Generally speaking, increasing nitrogen deposition onto vegetated areas may increase non-native invasive plant species and alter native vegetation communities, which could negatively affect threatened and endangered species. Atmospheric nitrogen deposition also has the potential to decrease biodiversity and contribute to the loss of critical habitat for endangered species by altering

the structure and function of terrestrial ecosystems (Weiss 2006). Nitrogen is often a primary limiting nutrient on overall plant productivity; as a result, an increase of nitrogen in natural communities can result in an abundance of nitrophilous species, which then out-compete native species adapted to the natural environmental conditions. Based on a California-wide study of nitrogen deposition, 5 kg/ha/yr has been used as a benchmark to assess potential effects of nitrogen deposition on plant communities); however, this benchmark does not imply that 5 kg/ha/yr is the critical load for negative impacts for all ecosystems, since some may be more sensitive and some may be less sensitive (Weiss, 2006). This CEC-derived threshold serves as a benchmark for coarse screening of nitrogen deposition on plant communities and it is not a federal regulation related to the ESA.

The regional background deposition without the project is estimated to be 11.56 kg/ha/yr (Tonneson et. al. 2007), which is more than double the threshold for significance in sensitive areas. The peak impact from OMGP, which is located directly east of the project, is roughly 13 kg/ha/yr, compared to the project's contribution of 1.6 kg/ha/yr. The contribution of nitrogen deposition from the project is 2% of the total cumulative regional nitrogen background, averaged over the critical habitat for Otay Tarplant, Quino Checkerspot Butterfly, and California Gnatcatcher, with portions experiencing a 6% increase.

Accordingly, the project will result in a miniscule increase in nitrogen concentrations in the areas surrounding the project, particularly to the east. The potential increase of non-native invasive plant species and the alteration of native vegetation communities are negligible on a regional level compared to the current regional background. The incremental increase in nitrogen emissions from the proposed project will not have significant adverse environmental effects to federally endangered or threatened species, jeopardize the continued existence or result in the destruction or adverse modification of designated critical habitat for such a species.

The project's NOx emissions will also be offset at the District mandated ratio of 1 to 1.2. These NOx offsets were generated from the decommissioning of a power plant located 10 miles west of the project site. Based on the incremental contribution to the local background and the NOx offsets, the project team concluded that NOx emissions will not have a significant adverse impact on endangered species and/or critical habitat. The project Applicant has, nevertheless, agreed to voluntarily contribute funds in support of weeding efforts at an approved research and habitat management area that would include periodic weeding of non-native plants. The proposed funding would be sufficient to pay for weeding of 50 acres once every four years for the life of the 20-year project The project as thus constituted will, therefore, have no significant adverse effects on biological resources.. Moreover, the project would not (either individually or cumulatively) cause an impermissible "take" of a protected species under section 9 of the ESA. This is because the definition of "harm" under the regulations implementing the ESA is not met here.

In summary, the information contained in the AFC proceeding, including air quality modeling and nitrogen deposition analysis, is sufficient to support a determination that the project will not have significant adverse environmental effects to federally endangered or threatened species, jeopardize the continued existence or result in the destruction or adverse modification of critical habitat for such a species. Furthermore, with the NOx emission offsets and voluntary habitat weeding, the project will compensate for all inconsequential direct, indirect, and cumulative adverse impacts from the project on biological resources to levels that are not significant.

These findings can be confirmed by the EPA, and a determination of compliance can be made, without a consultation under the ESA. However, the EPA in its review will rely on the FWS for direction of the requirements of the ESA and it is the applicant's understanding that the FWS will not require a formal section 7 consultation because the project's nitrogen emissions will not have significant adverse environmental effects to federally endangered or threatened species, jeopardize the continued existence or result in the destruction or adverse modification of designated critical habitat for such a species.

Please contact me at (714) 648-2824 with questions. We respectfully request confirmation that the proposed Project will not require a formal ESA Section 7 consultation.

We appreciate your attention to this matter.

Sincerely,
URS CORPORATION

Lincoln Hulse
Natural Resources Division
2020 East First Street, Suite 400
Santa Ana, CA 92705

References

Tonnesen, G., Wang, Z., Omary, M., Chien, C.-J., 2007. Assessment of nitrogen deposition: modeling and habitat assessment. California Energy Commission, PIER Energy-Related Environmental Research. CEC-500-2006-032. Available from: http://www.energy.ca.gov/2006publications/CEC-500-2006-032/CEC-500-2006-032.PDF.

U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. Endangered Species Habitat Conservation Handbook. March 1998.

USGS (United States Geological Service). 1975 7.5-Minute Quadrangle Map Otay Mesa, California.

Weiss, S.B. 2006. Impacts of Nitrogen Deposition on California Ecosystems and Biodiversity. California Energy Commission, PIER Energy-Related Environmental Research. http://www.energy.ca.gov/2005publications/CEC-500-2005-165/CEC-500-2005-165.PDF, May.

CC:
Gary Chandler, PPEC
Maggie Fitzgerald, URS
Missy Foster, Stoel-Rives
Gerardo Rios, EPA Region 9
Gary Rubenstein, Sierra Research
Eric Solorio, CEC

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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APPLICATION FOR CERTIFICATION
FOR THE *PIO PICO ENERGY CENTER, LLC*

Docket No. 11-AFC-1
PROOF OF SERVICE
(Revised 5/15/11)

Pio Pico Energy Center, LLC
Letter to Eric Solorio, Siting Project Manager, California Energy Commission, dated September 19, 2011 Regarding Correspondence to Eric Porter, U.S. Fish and Wildlife Services, dated September 14, 2011.

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DECLARATION OF SERVICE

I, Judith M. Warmuth, declare that on September 19, 2011, I deposited copies of the aforementioned document and, if applicable, a disc containing the aforementioned document in the United States mail at 500 Capitol Mall, Suite 1600, Sacramento, California 95814, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

AND/OR

Transmission via electronic mail, personal delivery and first class U.S. mail were consistent with the requirements of California Code of Regulations, Title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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

Judith M. Warmuth