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DOCKET	
08-AFC-10	
DATE	<u>OCT 26 2009</u>
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October 26, 2009

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

Subject: USFWS RESPONSE TO NCPA's REQUEST FOR PROJECT INCLUSION UNDER THE INTRA-SERVICE BIOLOGICAL AND CONFERENCE OPINION ON ISSUANCE OF A SECTION 10(a)(1)(B) DOCKET NO. (08-AFC-10)

Enclosed for filing with the California Energy Commission is the original copy of the **USFWS RESPONSE TO NCPA's REQUEST FOR PROJECT INCLUSION UNDER THE INTRA-SERVICE BIOLOGICAL AND CONFERENCE OPINION ON ISSUANCE OF A SECTION 10(a)(1)(B)**, for the Lodi Energy Center (08-AFC-10).

Sincerely,

Marie Mills



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Sacramento Fish and Wildlife Office
2800 Cottage Way, Room W-2605
Sacramento, California 95825-1846



In reply refer to:
81420-2009-F-0963-01
1-1-00-F-0231

OCT 22 2009

Mr. Ed Warner
Project Manager
Northern California Power Agency
P.O. Box 1478
Lodi, CA 95241

Subject: Addendum of the Proposed Lodi Energy Center Project in San Joaquin County, California, to the *Intra-Service Biological and Conference Opinion on Issuance of a Section 10(a)(1)(B) Incidental Take Permit to Multiple Applicants for a Multiple-Species Habitat Conservation Plan for San Joaquin County, California* (Service File 1-1-00-F-0231)

Dear Mr. Warner:

This letter is in response to your October 15, 2009, electronic mail to the U.S. Fish and Wildlife Service (Service) requesting project inclusion under the *Intra-Service Biological and Conference Opinion on Issuance of a Section 10(a)(1)(B) Incidental Take Permit to Multiple Applicants for a Multiple-Species Habitat Conservation Plan for San Joaquin County, California*. This response is pursuant to section 7(a) of the Endangered Species Act of 1973, as amended (Act), on the proposed Lodi Energy Center (LEC) Project in San Joaquin County, California. At issue are the potential effects of the proposed project on the federally-listed as threatened giant garter snake (*Thamnophis gigas*; GGS). There is no critical habitat for GGS that is present within the action area.

The proposed project site is located approximately 2.2 miles southeast of the I-5 and Highway 12 juncture in San Joaquin County. It is mapped in the Terminous and Lodi South U.S. Geological Survey 7.5-minute Quadrangle topographic maps, with an approximate centerpoint of Latitude 38°05'19"N, Longitude 121°23'06"W. The elevation is approximately 13 feet above sea level.

The proposed project will consist of a primary facility and a natural gas line extending from the new facility impacting a total of approximately 19.71 acres. The primary LEC facility will impact 9.8 acres of urban lands, both permanent and temporary. The proposed project includes the grading of the existing area and construction of the new facility between the existing Northern California Power Agency (NCPA) Combustion Turbine Project and the City of Lodi's White Slough Water Pollution Control Facility (WPCF). The holding ponds associated with the WPCF are located immediately to the north and the San Joaquin County Mosquito and Vector Control facility is located to the south of the proposed site. The construction lay down and parking areas will be within existing site boundaries of the WPCF on City-owned property.

TAKE PRIDE
IN AMERICA 

The proposed natural gas line will extend from the LEC site for 2.4 miles to the east, impacting 9.91 acres. Most of the pipeline route (1.5 miles) will be within existing graveled/paved farm and county roads. The remainder (0.9 miles) will be within agricultural fields consisting of irrigated hay and alfalfa crops. The lands will be restored to preconstruction condition after the pipeline is developed.

Due to the existing industrial facilities adjacent to the proposed project site, the area available for development is limited. As a result, the establishment of the 200-foot setback from the irrigation canal located immediately south of the City property is not possible. In order for the project to proceed with construction, it will impact GGS habitat within the 200-foot upland buffer. The NCPA has requested a reduction in the buffer to a 30 foot setback, which will affect 5.90 acres of GGS upland habitat. The reduction of this buffer is necessary for the construction of this project. As identified in section 5.5.9 of the San Joaquin County Multi-Species Habitat Conservation Plan (SJMSCP), the Habitat Technical Advisory Committee, on a case-by-case review, can establish a setback and buffer zone to be used by a project in place of the 200 feet suggested. The NPCA has agreed to provide slightly greater than 3:1 mitigation land totaling 20.5 acres. This mitigation land is immediately east of the White Slough Wildlife Preserve and is higher quality habitat than what will be affected by the project.

The findings in this consultation are based on the following documents reviewed by the Service: (1) a copy of the September 2008 Application of Certification to the California Energy Commission; (2) the April 27, 2009, Lodi Energy Center Proposed Mitigation Measures for Special-Status Species; (3) electronic mail and telephone correspondence between the San Joaquin Council of Governments, the California Energy Commission, CH2MHill, California Department of Fish and Game, and the Service; and (4) other information available to the Service.

The proposed project, including the avoidance, minimization, and mitigation measures submitted, appears consistent with the SJMSCP. No new circumstances as identified at 50 C.F.R. 402.16 have occurred that would alter the non-jeopardy determination for the covered species made by the Service in its internal biological opinion (Service File 1-1-00-F-0231) regarding the SJMSCP and associated incidental take permit issued to San Joaquin County. Therefore, that biological opinion remains valid.

Provided the NCPA fulfills its obligations under the SJMSCP and the project applicant complies with the Incidental Take Minimization Measures and Conditions issued by the San Joaquin Council of Governments, take of giant garter snake by the applicant will be authorized through the SJMSCP's incidental take permit.

INCIDENTAL TAKE STATEMENT

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harass is defined by the Service as an intentional or negligent act or omission that creates the likelihood of injury to a listed species by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering. Harm is defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by impairing behavioral patterns, including breeding, feeding, or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental

to and not intended as part of the agency action is not considered to be prohibited taking under the Act, provided that such taking is in compliance with this Incidental Take Statement.

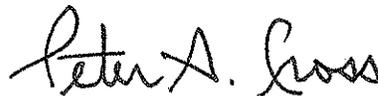
Amount or Extent of Take

The Service anticipates that incidental take of GGS will be difficult to detect or quantify for the following reasons: giant garter snakes are cryptically colored, secretive, and known to be sensitive to human activities. GGS may avoid detection by retreating to burrows, soil crevices, vegetation, or other cover. Individual snakes are difficult to detect unless they are observed, undisturbed, at a distance. Most close-range observations represent chance encounters that are difficult to predict. It is not possible to make an accurate estimate of the number of GGS that will be harassed, harmed, injured, or killed during construction. In instances when take is difficult to detect, the Service may estimate take in numbers of individuals per acre of habitat lost or degraded as a result of the action. Therefore, the Service anticipates that all GGS inhabiting 5.90 acres of upland habitat may be subject to take in the form of harm, harassment, wound or kill due to the loss and destruction of habitat as a result of the proposed project.

This concludes formal consultation on the proposed Lodi Energy Center Project. As provided in 50 CFR § 402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been maintained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

The Service wishes to thank you for your continued efforts and dedication to the conservation of America's wildlife resources. Please contact Ellen R. McBride or Susan P. Jones at (916) 414-6630 if you have questions regarding this response. Please refer to Service file numbers 1-1-00-F-0231 and 81420-2009-F-0963 in any future correspondence.

Sincerely,



Susan K. Moore
Field Supervisor

cc:

Mr. Dan Gifford, California Department of Fish and Game, Rancho Cordova, California

Ms. Andrea Grenier, Grenier & Associates, Inc., Roseville, California

Mr. Steve Mayo, San Joaquin Council of Governments, Stockton, California



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

APPLICATION FOR CERTIFICATION
 FOR THE *Lodi Energy Center*

Docket No. 08-AFC-10

PROOF OF SERVICE
 (Revised 2/17/09)

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DECLARATION OF SERVICE

I, Ashley Y. Garner, declare that on October 26 2009, I served and filed copies of the attached **USFWS RESPONSE TO NCPA's REQUEST FOR PROJECT INCLUSION UNDER THE INTRA-SERVICE BIOLOGICAL AND CONFERENCE OPINION ON ISSUANCE OF A SECTION 10(a)(1)(B)** dated **October 22, 2009**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [www.energy.ca.gov/sitingcases/lodi]. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

For service to all other parties:

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

by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

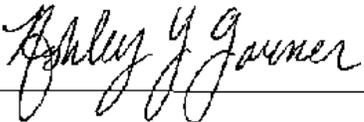
sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

OR

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

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. **08-AFC-10**
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

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



Ashley Y. Garner