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August 23, 2010

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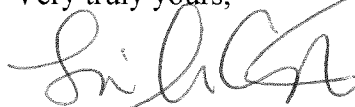
Re: Docket No. 08-AFC-3 – Mirant Marsh Landing, LLC

To the Docket Office:

Enclosed for docketing in the above-referenced proceeding is the *Response of Mirant Marsh Landing, LLC to U.S. Fish and Wildlife Service Comments on the Presiding Member's Proposed Decision*. Please file this document in Docket No. 08-AFC-3.

Thank you for your assistance.

Very truly yours,



Lisa A. Cottle

cc: Proof of service list for Docket No. 08-AFC-3

DOCKET

08-AFC-3

DATE AUG 23 2010

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**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA**

Application for Certification for the
Mirant Marsh Landing Generating Station Project

Docket No. 08-AFC-3

**RESPONSE OF MIRANT MARSH LANDING, LLC
TO U.S. FISH AND WILDLIFE SERVICE COMMENTS
ON THE PRESIDING MEMBER'S PROPOSED DECISION**

August 23, 2010

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I. Introduction and Summary

Pursuant to the Committee's request, Mirant Marsh Landing, LLC ("Mirant Marsh Landing") provides this response to the August 17, 2010 comment letter ("Letter") from the U.S. Fish and Wildlife Service ("Service") on the Presiding Member's Proposed Decision ("PMPD") for the Marsh Landing Generating Station Project ("MLGS" or "Marsh Landing Project").

The Letter questions the adequacy of mitigation recommended by Commission Staff and adopted in the PMPD to address the potential for nitrogen emissions from the MLGS to contribute to an indirect and/or cumulative significant adverse impact on species at the Antioch Dunes National Wildlife Refuge ("ADNWR") that are listed as threatened or endangered under the federal Endangered Species Act ("ESA"). The ADNWR is located approximately 0.75 miles from the Marsh Landing Project site. The Letter expresses concern that an adverse impact would occur when nitrogen emissions from the MLGS are added to nitrogen that is emitted into the atmosphere from numerous other sources such as cars and trucks. The concern is that enhanced levels of nitrogen fertilizes plants at the ADNWR and causes certain non-native plants to grow faster than three native plants – the Antioch Dunes evening primrose, the Contra Costa wallflower, and the naked-stemmed buckwheat – such that the non-native plants out compete the native plants. Because the naked-stemmed buckwheat is the food plant for the endangered Lange's metalmark butterfly, there is a concern that excessive nitrogen-enhanced growth of the non-native plants causes less food to be available for the butterfly.

The Letter suggests that the mitigation recommended by Staff and adopted in the PMPD is not sufficient to mitigate the Marsh Landing Project's very small potential contribution to

nitrogen-enhanced growth of non-native plants at the ADNWR, which could contribute to an indirect “adverse impact” on the endangered butterfly. The Letter further suggests that the MLGS may not comply with applicable laws, ordinances, regulations and standards (“LORS”), specifically the ESA, and recommends that a permit be obtained through either a Section 7 or Section 10 process under the ESA.

The assertions in the Letter are contrary to the evidence in the record and applicable legal standards. As explained in detail in Section II below:

- The record in this proceeding demonstrates that any potential contribution from the MLGS to nitrogen levels at the ADNWR would be extremely small (less than one percent of estimated background levels), and would be at least two orders of magnitude below the identified thresholds of significance for determining when additional nitrogen would cause a significant increase in plant growth. To the extent that MLGS emissions could contribute to existing levels of nitrogen that may already enhance some growth of non-native plants, the record shows that Condition of Certification BIO-8, which was recommended by Staff and adopted in the PMPD, is sufficient to mitigate the MLGS proportionate contribution such that the MLGS would not cause any significant adverse impact to the listed species.
- The record also supports the conclusion in the Revised Staff Assessment and the PMPD that the Marsh Landing Project complies with all applicable LORS, including the ESA. The legal standards cited in the Letter are not the correct standards to apply to the Marsh Landing Project. Section 7 of the ESA requires *federal agencies* to ensure that their actions do not jeopardize species or cause adverse modification to critical habitat. This standard does not apply to the Commission, a state agency, or to Mirant Marsh Landing, a private party. Section 10 of the ESA can provide private party applicants with incidental take authority where there is no other federal nexus. However, permitting under Section 10 is voluntary and would only be desirable where a “take” of a listed species in violation of Section 9 of the ESA is likely to occur. The record shows that this is not the case here. For nitrogen deposition attributable to the Marsh

Landing Project to constitute a level of harm that rises to an unlawful “take,” the nitrogen deposition from the MLGS must result in actual death or injury to the species and have a population-level effect, and the “take” must be proximately caused by the Marsh Landing Project. It is not sufficient to merely contribute to a much larger, atmospheric phenomenon that, in turn, degrades habitat, for an act to rise to the level of “take.” Thus, a potential cumulative “adverse effect” is not the standard for take. Staff considered this issue and concluded that MLGS nitrogen emissions would not result in “take” of any listed species. The evidence supports Staff’s conclusion and does not support a finding that MLGS nitrogen emissions would result in a significant modification to habitat that causes actual death or injury to the butterfly. Staff’s proposed mitigation also would address any potential adverse impacts on listed plant species at ADNWR.

- For these reasons, which are explained in more detail below, the Commission should uphold and adopt the conclusions of Staff and the Committee as set forth in the Revised Staff Assessment and the PMPD. Staff thoroughly analyzed potential impacts from MLGS nitrogen emissions and its recommended mitigation in BIO-8 is a reasonable approach that Mirant Marsh Landing has agreed to accept.

Prior to filing this response, Mirant Marsh Landing contacted the Service to discuss the concerns identified in the Letter.¹ Representatives of Mirant Marsh Landing and the Service participated in a conference call in the afternoon of the day this response was filed. Mirant Marsh Landing explained the key points of this response, namely that (1) there is no requirement for consultation with the Service under Section 7 of the ESA and the Section 7 consultation standards do not apply here, (2) incidental take authorization is not required under Section 10 of the ESA because the Marsh Landing Project would not result in any “take” in violation of Section 9 of the ESA, and (3) the Staff’s analysis and proposed mitigation are more than

¹ Mirant Marsh Landing also previously attempted to contact the Service several times in March and April of this year around the time that Staff was preparing to issue its Staff Assessment for the Marsh Landing Project, but received no response from the Service at that time. Staff had indicated that the Service had expressed concern regarding potential impacts at the ADNWR, but the Service never provided comments in writing or contacted the applicant. The Service also did not participate in the workshop on the Staff Assessment where Staff’s analysis was discussed, or in the evidentiary hearing.

adequate to address any potential indirect and/or cumulative impacts for purposes of the California Environmental Quality Act (“CEQA”). Mirant Marsh Landing proposed modifications to BIO-8 that would make it more clear that the required funding must be designated as support for weed management efforts at ADNWR, and to add progress reporting requirements. The Service representatives seemed to concur that these changes would help achieve the purpose of the mitigation. Mirant Marsh Landing also proposed to increase the required annual mitigation payment to a level that might address the concerns expressed in the Letter. One idea discussed on the call was to increase the funding to a level that reflects the MLGS maximum incremental contribution to the portion of the baseline nitrogen level at ADNWR (6.39 kilograms per hectare of land per year (“kg/ha/yr”), as explained below) that is above the 5.0 kg/ha/yr threshold of significance that was used in the Revised Staff Assessment. Applying that rationale, the Marsh Landing Project’s annual contribution would be approximately \$12,000. The Service representatives were receptive to this conceptual approach. Mirant Marsh Landing agreed to follow up with the Service after the Commission’s hearing on August 25, 2010 to continue discussions about why the Marsh Landing Project’s nitrogen emissions would not result in any “take” under Section 9 and would not require a permit under Section 10, but these discussions can occur after the Commission issues its license for the Marsh Landing Project. Thus, there is no reason for the concerns expressed in the Letter to delay the Commission’s adoption of the PMPD beyond August 25, 2010.

To reflect its discussion with the Service and for purposes of simplicity, Mirant Marsh Landing proposes to make an additional annual voluntary mitigation payment to support weed management efforts at ADNWR in the amount of \$20,000 per year. This additional amount would be in addition to the mitigation required in BIO-8 under Staff’s formula and would more than account for any increase that might apply under the rationale discussed with the Service. Proposed language for implementing this added mitigation through the Commission’s licensing decision is provided below, along with proposed language for making the other changes to BIO-8 that were discussed with the Service as referenced above. Given the evidence in this proceeding, this additional annual contribution goes above and beyond any mitigation that could reasonably be required based on MLGS nitrogen emissions.

Mirant Marsh Landing urges the Commission to uphold the analysis and conclusions in the Revised Staff Assessment and to adopt the PMPD at the August 25, 2010 hearing. The

Marsh Landing Project was selected as a winning project in PG&E's 2008 all-source competitive solicitation and Mirant Marsh Landing and PG&E have executed a long-term power purchase agreement for the output of the MLGS. Mirant Marsh Landing has explained at length in this proceeding that a licensing decision is needed no later than the end of August 2010 in order to facilitate a construction start date that is consistent with the on-line date in the power purchase agreement.² As reported in the applicant's comments on the PMPD, the California Public Utilities Commission approved the MLGS power purchase agreement on July 29, 2010. A licensing decision from the Commission is the last remaining hurdle in order for Mirant Marsh Landing to release its vendors and contractors so they can start work on the long-lead time items in time to meet a projected online date in Summer 2013. Mirant Marsh Landing therefore requests that the Commission vote on August 25, 2010 to adopt the PMPD with the few modifications proposed below and in the comments that Mirant Marsh Landing filed on August 16, 2010.

II. Discussion

A. The Record Shows That MLGS Nitrogen Emissions Would Not Result In A Significant Adverse Impact On Listed Species At ADNWR.

The potential for nitrogen emissions from the MLGS to have a significant adverse impact on biological species at the ADNWR was thoroughly analyzed and considered in this proceeding. The evidence in the record demonstrates the following.

- (1) The analysis stems from a concern that nitrogen emissions from numerous sources in the Bay Area, and particularly from transportation sources such as cars and trucks, have collectively increased nitrogen levels near urban areas that may be enhancing the growth of certain types of non-native species to the detriment of native species that have adapted to thrive best in nutrient-deficient soil such as the sand found at the ADNWR.³ The MLGS would be but one of many sources of nitrogen in the region.⁴ In fact, the paper cited in the Letter indicates that mobile

² See Mirant Marsh Landing, LLC's Letter to Committee Members Regarding Contractual Deadlines for the Marsh Landing Generating Station, dated May 25, 2010 (Exhibit 35).

³ Revised Staff Assessment dated June 10, 2010 ("RSA") (Exhibit 300), p. 4.2-15.

⁴ *Id.*

sources such as cars and trucks account for as much as sixty percent of nitrogen deposition.⁵

- (2) The amount of nitrogen from MLGS emissions that potentially could be deposited at the ADNWR is extremely small, equal to a rate of between 0.0307 and 0.0447 kilograms of nitrogen per hectare of land per year (kg/ha/yr).⁶ This deposition rate was calculated based on the assumption that the MLGS would operate every year at its maximum annual capacity factor of 20 percent.⁷ To the extent that the MLGS operates at less than its maximum annual capacity factor, the annual rate of nitrogen deposition would be lower.
- (3) The calculated nitrogen deposition rate is overstated because it does not account for the fact that Marsh Landing Project's NOx emissions would be fully offset. Pursuant to the Air Quality Conditions of Certification, Mirant Marsh Landing is required to provide offsets for its emissions of NOx at a ratio of 1.15 to 1.0, as required by regulations of the Bay Area Air Quality Management District.⁸ These NOx offsets are local as they were generated primarily by the shutdown of sources of NOx that were located immediately adjacent to the Marsh Landing Project site.⁹ Because none of these offsets were factored into the nitrogen deposition calculation, the projected nitrogen deposition rate is likely overstated. MLGS emissions of NOx are also subject to Best Available Control Technology requirements under applicable air quality laws and regulations, so nitrogen emissions from the MLGS would be controlled and offset to a much greater degree than mobile sources, which are the primary source of regional nitrogen emissions.

⁵ "Cars are the major regional source of NOx (60% or more) and little progress has been made in reducing car use despite chronic traffic problems." Weiss, Stuart B., "Cars, Cows and Checkerspot Butterflies: Nitrogen Deposition and Management of Nutrient-Poor Grasslands for a Threatened Species", *Conservation Biology* pp. 1476-1486 (1999), cited in RSA (Exhibit 300), p. 4.2-20. This article is also cited in the Letter.

⁶ RSA (Exhibit 300), p. 4.2-16; Written Testimony of Mirant Marsh Landing, LLC ("MML Testimony") (Exhibit 42), pp. 20-21; Responses to Staff Data Requests Set 3b (#99-101) (Exhibit 31), pp. 99-1 through 99-3.

⁷ Responses to Staff Data Requests Set 3b (#99-101) (Exhibit 31), pp. 99-1 through 99-3; Application for Certification Amendment (Exhibit 20), p.1-1; BAAQMD Final Determination of Compliance (Exhibit 301), p. 1.

⁸ MML Testimony (Exhibit 42), p. 20.

⁹ *Id.*

- (4) The calculated nitrogen deposition rate is further overstated because it also does not take into the account the scheduled retirement of the remaining operating units at the Contra Costa Power Plant (“CCPP”). The CCPP units, which are located adjacent to the MLGS site, are scheduled to be retired on April 30, 2013, thereby eliminating an adjacent source of nitrogen emissions.¹⁰ Construction of the MLGS facilitates the retirement of the CCPP units, which are aging generating units that utilize once-through cooling technology.¹¹ Retirement of the CCPP units would offset the MLGS nitrogen emissions but is not accounted for in the nitrogen deposition calculation or Staff’s mitigation calculation.
- (5) The nitrogen deposition rate is also overstated because the NOx emissions modeling used to estimate nitrogen deposition rates at the ADNWR was based on the maximum worst-case cold weather hourly NOx emission rate during normal operating hours plus turbine startups and shutdowns.¹² The worst-case annual modeling also incorporated worst-case stack parameters, as determined from screening modeling, for all four MLGS turbines. The projected nitrogen deposition rate thus represents a maximum value and overstates long-term average rates.
- (6) The MLGS maximum nitrogen deposition rate of 0.0447 kg/ha/yr at the ADNWR is far below any applicable threshold of significance for determining when elevated nitrogen deposition enhances plant growth to a degree that is significant to cause adverse impacts to nitrogen-sensitive species.¹³ Studies cited in the Revised Staff Assessment indicate that intensified annual grass invasions can occur in areas with nitrogen deposition levels of 11 to 20 kg/ha/yr, with relatively limited invasions at levels of 4 to 5 kg/ha/yr.¹⁴ The individual nitrogen deposition rates of 0.0307 to 0.0447 kg/ha/yr from the MLGS are two orders of magnitude

¹⁰ *Id.*

¹¹ See Letter from CAISO to BAAQMD (Exhibit 44).

¹² Responses to Staff Data Requests Set 3b (#99-101) (Exhibit 31), pp. 99-1 through 99-3.

¹³ To provide some context for the nitrogen deposition rate, 0.0447 kg of nitrogen is equivalent to just under 45 grams, or approximately 1.5 ounces of nitrogen per hectare per year. If you were to buy a 35 pound of fertilizer and distribute the fertilizer at a rate of 1.5 ounces each year, it would take 367 years to empty the bag.

¹⁴ RSA (Exhibit 300), p. 4.2-15 through 4.2-16.

lower than even the threshold for limited invasions. It is therefore clear that the individual nitrogen deposition rate from the MLGS would not have any significant impact on plant growth at the ADNWR.

- (7) Staff estimated the baseline deposition level at the ADNWR to be approximately 6.39 kg/ha/yr.¹⁵ Adding the maximum MLGS nitrogen deposition rate of 0.0447 kg/ha/yr to the background level results in a total nitrogen deposition rate of 6.4347 kg/ha/yr. This level is below the level of 11 to 20 kg/ha/yr that is cited as the threshold for causing intensified grass invasions, but slightly above the 4 to 5 kg/ha/yr level at which “relatively limited invasions” may occur, as cited above. Using the most conservative benchmark, Staff concluded that any additional nitrogen deposition at ADNWR, even the very small amount from MLGS, would be a significant impact.¹⁶
- (8) Based on the evidence summarized above, it is the applicant’s position that nitrogen deposition from the MLGS would not have any significant adverse impact on biological species at the ADNWR and that no mitigation is necessary.¹⁷ Using the most conservative estimates as described above and giving zero credit for the offsetting benefits of the NOx offsets and the retirement of CCPP, the MLGS maximum contribution to nitrogen emissions would be only 0.69 percent of existing background levels. This is far below the level that reasonably could be characterized as causing a measurable difference in weed growth.
- (9) The applicant nevertheless agreed to accept Staff’s proposed mitigation, which requires the project owner to contribute to weed management efforts at ADNWR in an amount that is proportionate to the MLGS maximum potential contribution to total nitrogen deposition levels. Staff testified that the annual operation and maintenance budget at ADNWR is \$385,000 and includes money for non-native plant removal/fire prevention, sand acquisition, grazing management, butterfly propagation, and rare plant propagation. Staff concluded that a contributing

¹⁵ *Id.*, p. 4.2-16.

¹⁶ *Id.*

¹⁷ MML Testimony (Exhibit 42), pp. 20-21.

payment from the MLGS would partially fund the management activities required to address impacts to the ADNWR from the effects of weed proliferation resulting from nitrogen deposition. Staff testimony explained that it is understood that emissions from the MLGS would not be the only source of nitrogen deposition at the ADNWR, recognizing that there are existing industrial stationary sources as well as mobile sources such as cars and trucks that have collectively elevated regional nitrogen deposition. Accordingly, Staff required the project owner's payment to ADNWR funding to be proportionate to the project's individual contribution to total nitrogen deposition at ADNWR. Staff calculated the ratio of the MLGS maximum individual nitrogen deposition rate (0.0447 kg/ha/yr) to the baseline level of nitrogen deposition at ADNWR (6.39 kg/ha/yr), which equals 0.0069 (or 0.69 percent). Staff multiplied this fraction by the \$385,000 ADNWR annual budget to yield a required payment of \$2,693 per year. BIO-8 requires the project owner to make this initial payment of \$2,693 per year to Friends of San Pablo Bay to assist in noxious weed management at ADNWR. BIO-8 requires each subsequent annual payment to be adjusted for inflation and paid to Friends of San Pablo Bay each year for as long as MLGS operates.¹⁸

- (10) To the extent there is concern that the Marsh Landing Project's required annual mitigation payment appears to be small, it must be emphasized that the size of the required payment is proportionate to the Marsh Landing Project's maximum impact and is a reflection of the negligible incremental contribution from MLGS emissions to nitrogen deposition at the ADNWR. Because MLGS would increase the background levels by less than one percent under worst case assumptions, the project owner is required to pay a similarly small percentage of the ADNWR annual operating budget.

This evidence demonstrates that the mitigation recommended by Staff and adopted in the PMPD is more than adequate to mitigate any potentially significant adverse impacts to plant and animal species at the ADNWR that could result from MLGS nitrogen emissions. The amount and type of mitigation requires a contribution to funding programs at the ADNWR that are

¹⁸ RSA (Exhibit 300).

already in place to assist with supporting and propagating the survival of the endangered ADNWR species. Contributing funding toward an existing established program resolves concerns about what specific actions would be implemented to assist the endangered species at the ADNWR.

The Letter questions whether there are success criteria or reporting requirements associated with BIO-8.¹⁹ As explained above, Mirant Marsh Landing proposed during its call with the Service to modify BIO-8 so that it requires the project owner to specify that its annual payment must be used for weed mitigation efforts, and to request a report from Friends of San Pablo Bay explaining how the required contribution was used and where it was applied. Suggested language to add these reporting requirements is provided below.

As also explained above, Mirant Marsh Landing also proposed during its call with the Service to provide additional funding to assist with weed removal efforts at the ADNWR. Mirant Marsh Landing proposed to make an additional annual payment that reflects the Marsh Landing Project's maximum contribution to the portion of the amount of background nitrogen deposition levels that are above the 5.0 kg/ha/yr threshold of significance that was used in the Revised Staff Assessment. Under this calculation, the project owner's total annual payment would be approximately \$12,000.²⁰ For purposes of simplicity, Mirant proposes to make an additional annual payment of \$20,000 in addition to the annual payment required under Staff's formula. The additional funding is offered as a way to help address some of the nitrogen emissions from sources such as cars and trucks that are not subject to the Commission's licensing jurisdiction. Mirant proposes this additional funding on a purely voluntary basis to be included as added mitigation beyond what is required under Staff's mitigation formula.

With the changes proposed above, BIO-8 would read as follows (changes shown in bold underlined text):

BIO-8 The project owner shall provide an annual payment to Friends of San Pablo Bay to assist in noxious weed management at

¹⁹ Letter, p. 5.

²⁰ This amount is calculated by first subtracting 5.0 kg/ha/yr from 6.4347 kg/ha/yr to yield the portion of the background level of nitrogen deposition at ADNWR that exceeds the threshold of significance. The result is 1.4347 kg/ha/yr. The ratio of the Marsh Landing Project's individual maximum deposition rate (0.0447 kg/ha/yr) to 1.4347 kg/ha/yr is then calculated, and the resulting fraction is multiplied by the \$385,000 ADNWR annual operating budget.

the Antioch Dunes National Wildlife Refuge. The first annual payment shall be at least equal to \$2,693.00.

Each subsequent annual payment **as calculated above** shall be adjusted for inflation in accordance with the Employment Cost Index – West or its successor, as reported by the U.S. Department of Labor's Bureau of Labor Statistics. Payment shall be made annually for the duration of project operation.

The project owner has voluntarily offered to contribute additional annual funding for weed management efforts at the Antioch Dunes National Wildlife Refuge in an amount equal to \$20,000 per year and has agreed to include that additional payment as a requirement in this condition of certification. The additional annual payment shall be made at the same time as the annual payment specified above and shall be made for the duration of project operation, but shall not be adjusted for inflation.

Verification: No later than 30 days following the start of project operation, the project owner shall provide written verification to the CPM, USFWS, and CDFG that the first-annual payment was made to the Friends of San Pablo Bay in accordance with this condition of certification. **The project owner shall provide evidence that it has specified that its annual payment to Friends of San Pablo Bay can be used only to assist in noxious weed management at the Antioch Dunes National Wildlife Refuge.**

Thereafter, within 30 days after each anniversary date of the commencement of project operation, the project owner shall provide written verification to the CPM, USFWS, and CDFG that payment has been made to the Friends of San Pablo Bay in accordance with this condition of certification. This verification shall be provided annually for the operating life of the project. **The project owner also shall request a annual report from the Friends of San Pablo Bay documenting how each annual payment required hereunder was used and applied to assist in noxious weed management at the Antioch Dunes National Wildlife Refuge. The project owner shall provide copies of such reports to the CPM within thirty (30) days after receipt.**

B. The PMPD Correctly Concludes That The MLGS Complies With Applicable LORS.

In the Letter, the Service expresses concern that the MLGS as proposed would not be in compliance with applicable LORS, and specifically the federal ESA, “because take or adverse impacts to the Lange’s metalmark butterfly, and adverse effects on the Antioch Dunes evening primrose and the Contra Costa wallflower are virtually certain to occur as a result of this project.”²¹ The Service recommends that the Commission or the applicant obtain authorization for incidental take of the endangered Lange’s metalmark butterfly pursuant to sections 7 or 10(a) of ESA prior to adoption of the PMPD.²²

As an initial matter, requirements for consultation with the Service under Section 7 of the ESA do not apply to the Marsh Landing Project. Section 7 of the ESA requires federal agencies to ensure that their actions do not “jeopardize” species or cause “adverse modification” to critical habitat.²³ These standards do not apply to the Commission, a state agency, or to Mirant Marsh Landing, a private party. Section 7 of the ESA and the legal standards cited in the Letter therefore are not the correct standards to apply to the Marsh Landing Project. Thus, the statements in the Letter expressing concern about potential “adverse modification” to habitat attempt to use Section 7 consultation standards that are clearly not applicable in this case.

Section 10 of the ESA can provide private party applicants with incidental take authority where there is no other federal nexus. However, permitting under Section 10 is voluntary and would only be desirable where a “take” of a listed species in violation of Section 9 of the ESA is likely to occur. The record shows that this is not the case here. Section 9 of the ESA defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²⁴ The only effect that is alleged to result from the MLGS concerns the potential for its maximum nitrogen deposition rate of 0.0447 kg/ha/yr to exacerbate the growth of competing plants to such an extent that they crowd out the endangered butterfly’s food plant. As documented in the Revised Staff Assessment, Staff evaluated whether this alleged indirect effect on the butterfly’s food source could result in an unlawful “take” under

²¹ Letter, p. 5.

²² *Id.*

²³ 16 U.S.C. § 1536(a)(2).

²⁴ 16 U.S.C. § 1538(a)(1)(B).

the ESA's prohibition against "harm" to an endangered species. The Service regulations implementing the ESA define "harm" to include "significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding or sheltering."²⁵ Staff concluded that the Marsh Landing Project's "relatively small incremental contribution to cumulative nitrogen deposition and the resultant habitat degradation at Antioch Dunes NWR would not result in harm as described above."²⁶ Staff thus concluded that no "take" of listed plant or wildlife species would occur.²⁷ The Revised Staff Assessment therefore confirms that "it is staff's determination that the proposed project would comply with the federal ESA."²⁸ Based on Staff's analysis and conclusion, the PMPD concludes that the MLGS complies with all applicable LORS.²⁹

The conclusions in the Revised Staff Assessment and the PMPD are supported by the record and the legal standards governing when a "take" is deemed to occur. As cited above, the Service regulation interpreting "harm" specifies that it only includes "significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding or sheltering." For a "take" to be deemed to occur through habitat modification, it must be proven that the act at issue (here offsite nitrogen emissions) is the proximate cause of "significant habitat modification" that results in "actual death or injury" to a listed species by "significantly impairing behavioral patterns such as breeding, feeding or sheltering." The U.S. Supreme Court has emphasized that "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures wildlife.'"³⁰ For the nitrogen deposition attributable to the MLGS to constitute "harm", and therefore "take" for the purposes of Section 9, it must result in actual death or injury to the butterfly by significantly impairing the butterfly's breeding or feeding habits and must degrade its habitat to an extent that "prevents, or possibly, retards, recovery of the species".³¹

²⁵ 50 C.F.R. section 17.3.

²⁶ RSA (Exhibit 300), p. 4.2-19. It is critical to note that even if an action is deemed to have an "effect" on a listed species under CEQA, merely having an "effect" under CEQA does not necessarily constitute "take" for the purposes of Section 9.

²⁷ "Take" of listed plant species is defined more narrowly than "take" of wildlife species. See Letter, p. 2; 16 U.S.C. § 1538(a)(2).

²⁸ *Id.*

²⁹ PMPD, p. 76.

³⁰ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697 (1995).

³¹ *Nat'l. Wildlife Fed. v. Burlington Northern Railroad, Inc.*, 23 F.3d 1508, 1512-13 (9th Cir. 1994)

Furthermore, for harm in the form of habitat modification to constitute take, it must have a population-level effect (i.e. a threat of extinction); in contrast, habitat modification that results merely in harm to a single or small number of individual animals is not sufficient to show take.³² Finally, proof of “harm” is subject to the “ordinary requirements of proximate causation and foreseeability.”³³ It is not sufficient to merely contribute to a much larger, atmospheric phenomenon that, in turn, degrades habitat, for an act to rise to the level of “take”.

The record in this proceeding does not support a finding that the Marsh Landing Project would cause significant habitat modification that actually kills or injures the endangered butterfly. First, the record does not prove a causal link between nitrogen deposition from the Marsh Landing Project and significant habitat modification that kills or injures the butterfly. The record demonstrates that nitrogen in the atmosphere emanates from multiple sources. The study cited in the Letter does not identify power plants as the cause of increased levels of nitrogen but instead attributes the increase primarily to cars and trucks and other transportation sources.³⁴ Thus, even if increased levels of nitrogen have an impact on the butterfly habitat, the MLGS is not the sole source of nitrogen emissions or even the most significant contributor to elevated nitrogen levels. Courts have held that a take is not shown where the evidence fails to establish that any one instance of an impact to habitat actually harmed the species at issue and does not distinguish the effects of other similar impacts to the same habitat.³⁵

Second, the uncontroverted evidence disproves any suggestion that Marsh Landing Project emissions could result in a “significant” modification to butterfly habitat because nitrogen emissions from the Marsh Landing Project are far below any level of significance for determining when elevated nitrogen levels cause additional plant growth. The maximum MLGS nitrogen deposition rate at ADNWR is only 0.0447 kg/ha/yr, whereas the record indicates that “intensified” levels of plant invasion do not occur until nitrogen deposition levels are between 11 and 20 kg/ha/yr. Even levels of 4 to 5 kg/ha/yr result in only “limited invasions” of plant

³² *Coalition for a Sustainable Delta v. McCamman*, 2010 WL 2867107, *4 (N.D. Cal 2010)

³³ *Sweet Home*, 515 U.S. 687 at 700 fn. 13.

³⁴ “Cars are the major regional source of NOx (60% or more) and little progress has been made in reducing car use despite chronic traffic problems.” Weiss, Stuart B., “Cars, Cows and Checkerspot Butterflies: Nitrogen Deposition and Management of Nutrient-Poor Grasslands for a Threatened Species”, *Conservation Biology* pp. 1476-1486 (1999), cited in RSA (Exhibit 300), p. 4.2-20.

³⁵ *Pyramid Lake Paiute Tribe vs. U.S. Dep’t of the Navy*, 898 F.2d 1410 (9th Cir. 1990).

growth. The MLGS individual nitrogen deposition rate is so far below these levels that there is no plausible support for a conclusion that MLGS project emissions would be the cause of any significant modification to butterfly habitat. The MLGS nitrogen emissions *alone* would have to individually pose a population-level threat to the listed butterfly to rise to the level of “harm” for the purposes of proving a Section 9 take. Under the legal authority cited above, the MLGS project emissions cannot be deemed to have caused an injury to an endangered species when so many other sources contribute to nitrogen emission levels.

The federal district court for the Northern District of California recently considered a case in which the plaintiff alleged that the California Department of Fish and Game’s regulation of striped bass constituted illegal take under Section 9 because it had the effect of marginally increasing non-native striped bass populations, and the striped bass in turn prey on listed native species. The Court held that no take had been shown, explaining that “finding that an actionable take occurred whenever an action that disturbs the balance of an ecosystem poses a reasonably certain threat of imminent harm to a single member of the listed species would effectively eviscerate *Sweet Home*’s requirements of proximate causation and foreseeability, imposed upon cases concerning harm from habitat modification.... This is particularly the case where the intervening actor is not a human, and therefore not within the complete control of the human actors involved.”³⁶ This reasoning also precludes a finding of take in this case. Under worst case assumptions, nitrogen emissions from the MLGS would result in a very small (0.69%) increase to regional nitrogen deposition rates, which in the aggregate may exacerbate non-native weed growth (i.e. an intervening, non-human actor), which in turn may adversely modify habitat for plant species that support the Lange’s metalmark butterfly. While Staff concluded that this effect may amount to a significant indirect or cumulative effect for the purpose of CEQA, it does not constitute an illegal take for the purposes of Section 9.

Common sense policy considerations point to the same conclusion. If the incremental contribution of MLGS nitrogen emissions to the cumulative effects of countless regional mobile and stationary nitrogen sources amounts to a take, then every single one of those other sources would require a Section 10 permit. This would be an absurd policy result that is inconsistent with the clear legal requirements of the ESA. For these reasons, there is no basis in the record to

³⁶ *Coalition for a Sustainable Delta*, 2010 WL 2867107 at *5.

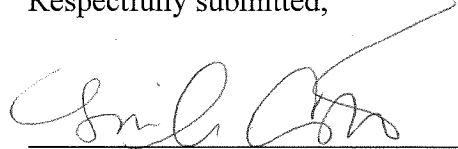
support a conclusion that MLGS nitrogen emissions would result in an unlawful take of the endangered butterfly. There is therefore no basis for requiring incidental take authorization under Section 10 of the ESA.

III. Conclusion

Mirant Marsh Landing appreciates the opportunity to submit this response. Mirant Marsh Landing requests that the Commission vote to adopt the PMPD with the changes recommended in Mirant Marsh Landing's comments on the PMPD that were filed on August 16, 2010 and the additional changes to BIO-8 that are recommended above.

August 23, 2010

Respectfully submitted,



Lisa A. Cottle
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Attorneys for Mirant Marsh Landing, LLC

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA**

Application for Certification for the
Mirant Marsh Landing Generating Station Project

Docket No. 08-AFC-3

DECLARATION OF SERVICE

I, Lisa A. Cottle, declare that on August 23, 2010, I served and filed copies of the attached *Response of Mirant Marsh Landing, LLC to U.S. Fish and Wildlife Service Comments on the Presiding Member's Proposed Decision (Docket No. 08-AFC-3)*. The original document filed with the Docket Unit is accompanied by a copy of the most recent Proof of Service list, located at the web page for this project at <http://www.energy.ca.gov/sitingcases/marshlanding/index.html>. 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:

- For service to all other parties: Sent electronically to all email addresses on the Proof of Service list; and by depositing in the United States mail at San Francisco, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses **NOT** marked as "email preferred."

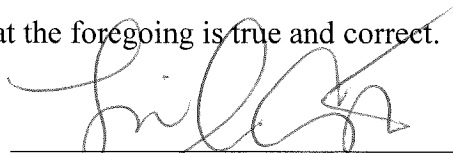
AND

- For filing with the Energy Commission: Sent an original paper copy and one electronic copy, mailed and emailed respectively, to the address below:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 08-AFC-3
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.



Lisa A. Cottle



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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**APPLICATION FOR CERTIFICATION
FOR THE MARSH LANDING
GENERATING STATION**

Docket No. 08-AFC-3

PROOF OF SERVICE
(Revised 7/14/2010)

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