

CALIFORNIA ENERGY COMMISSION

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California Energy Commission

**DOCKETED
08-AFC-3A**

TN # 67363

SEP 28 2012

DATE: September 28, 2012

TO: Interested Parties

FROM: Christine Stora, Compliance Project Manager

SUBJECT: Marsh Landing Generating Station Project (08-AFC-3C)
Staff Analysis of Proposed Modifications to **BIO-8** to Allow a Broader Range of Management Activities

On May 14, 2012, GenOn Marsh Landing LLC. filed a petition with the California Energy Commission (Energy Commission) to amend the Energy Commission Decision for the Marsh Landing Generating Station Project to change the recipient of the mitigation funds required by Condition of Certification **BIO-8** from Friends of San Pablo Bay to the California Wildlife Foundation. Staff prepared an analysis of this proposed change and recommends approval. A copy of Staff's analysis is enclosed for your information and review.

The Marsh Landing Generating Station Project is a 760-megawatt facility that was certified by the Energy Commission on August 25, 2010. The project is located north of the City of Antioch, in Contra Costa County and is currently under construction.

Condition of Certification **BIO-8** requires that an annual payment be made by the project owner in support of weed mitigation efforts at the Antioch Dunes National Wildlife Refuge (NWR). The proposed modifications include allowing that the annual payments made under **BIO-8** be used to directly implement a broader range of management activities to address impacts to sensitive species and other biological resources occurring at the Antioch Dunes NWR site. It is staff's opinion that, with the implementation of the revised condition, the project will remain in compliance with applicable laws, ordinances, regulations, and standards and that the proposed modifications will not result in a significant adverse direct or cumulative impact to the environment (Title 20, California Code of Regulations, Section 1769).

The amendment petition and staff's analysis have been posted on the Energy Commission's webpage at <http://www.energy.ca.gov/sitingcases/marshlanding/compliance/index.html>. The Energy Commission's Order (if approved) will also be posted on the webpage. Energy Commission staff intends to recommend approval of the petition at the November 14, 2012, Business Meeting of the Energy Commission.

Any person may file written comments on staff's analysis / determination within 30 days of the date of this notice. All comments must be in writing and must be sent to the

Energy Commission Dockets Unit. Please include the docket number (08-AFC-3C) in the subject line or first paragraph of your comments. Those submitting comments electronically should provide them in either Microsoft Word format or as a Portable Document Format (PDF) to [docket@energy.ca.gov]. Please include your name or organization's name in the file name. Those preparing non-electronic written comments should mail or hand deliver them to:

California Energy Commission
Dockets Unit, MS-4
Docket No. 08-AFC-3C
1516 Ninth Street
Sacramento, CA 95814-5512

For further information on how to participate in this proceeding, please contact the Energy Commission Public Adviser's Office, at (916) 654-4489, or toll free in California at (800) 822-6228, or by e-mail at publicadviser@energy.ca.gov. News media inquiries should be directed to the Energy Commission Media Office at (916) 654-4989, or by e-mail at mediaoffice@energy.ca.gov.

If you have any comments or questions on the technical analysis, please contact Christine Stora, Compliance Project Manager, at (916) 654-4745, or by fax to (916) 654-3882, or via e-mail at: christine.stora@energy.ca.gov.

Enclosure
Mail List 7299

MARSH LANDING GENERATING STATION (08-AFC-3C)
Request to Amend Condition of Certification BIO-8
Introduction and Summary
Prepared by: Christine Stora, CPM
September 17, 2012

INTRODUCTION AND SUMMARY

On May 14, 2012, GenOn Marsh Landing, LLC. (GenOn), filed a petition with the California Energy Commission (Energy Commission) requesting to make modifications to the Marsh Landing Generating Station (Petition, 2012). The 760-megawatt project was certified by the Energy Commission on August 25, 2010. The power plant is located north of the City of Antioch, in Contra Costa County and is currently under construction.

The petition provides a description of the affected environment and an analysis of the potential environmental and cumulative impacts associated with the project amendment, along with measures to avoid adverse impacts. The analysis and supporting information are provided to comply with Energy Commission requirements, including the California Environmental Quality Act (CEQA) and to determine compliance with applicable laws, ordinances, regulations and standards (LORS).

In the petition, GenOn proposed changes to both **BIO-8** and **SOIL AND WATER-6**. Condition of Certification **BIO-8** requires payments to be made to the nonprofit Friends of San Pablo Bay, and earmarks funds for assistance in “noxious weed management”. United States Fish and Wildlife Service (USFWS) personnel have requested that the payments be made to the California Wildlife Foundation in lieu of the Friends of San Pablo Bay. The proposed modifications also include allowing the funds under **BIO-8** to be used to directly implement a broader range of management activities to address impacts to the Antioch Dunes National Wildlife Refuge (NWR) species. Additional information is provided in the Biological Resources Staff Analysis attached to this report.

The request to change **SOIL AND WATER-6** was withdrawn by the applicant on August 21, 2012 and Docketed on August 22, 2012. This document can be viewed at <http://www.energy.ca.gov/sitingcases/marshlanding/compliance/index.html>. The proposed changes to **BIO-8** will not affect Soil and Water Resources.

**MARSH LANDING GENERATING STATION
GROUNDWATER WELL AMENDMENT
TABLE 1 TECHNICAL AREAS REVIEWED**

TECHNICAL AREAS REVIEWED	STAFF RESPONSE			New or Revised Conditions of Certification Recommended
	Technical Area Not Affected	No Significant Environmental Impact*	Process As Amendment	
Air Quality	X			N/A
Biological Resources		X		Yes
Cultural Resources	X			N/A
Geological Hazards & Resources	X			N/A
Hazardous Materials Management	X			N/A
Facility Design	X			N/A
Land Use		X		N/A
Noise and Vibration	X			N/A
Paleontological Resources	X			N/A
Public Health	X			N/A
Socioeconomics		X		No
Soil and Water Resources ¹	X			No
Traffic and Transportation	X			N/A
Transmission Line Safety & Nuisance	X			N/A
Transmission System Engineering	X			N/A
Visual Resources	X			N/A
Waste Management	X			N/A
Safety	X			N/A

*There is no possibility that the modifications may have a significant effect on the environment and the modification will not result in a change or deletion of a condition adopted by the commission in the final decision or make changes that would cause the project not to comply with any applicable laws, ordinances, regulations, or standards (LORS) (20 Cal. Code Regs., § 1769 (a)(2)).

REFERENCES

GenOn 2012a – GenOn Marsh Landing, LLC (TN 65208) Petition to Amend, dated May 2012. Submitted to CEC/Dockets Unit on May 14, 2012.

¹ The proposed changes to **SOIL AND WATER-6** were withdrawn by the applicant on August 12, 2012 and proposed changes to **BIO-8** do not affect this technical area.

MARSH LANDING GENERATING STATION (08-AFC-3C)
Request to Amend Condition of Certification BIO-8
Biological Resource Staff Analysis
Prepared by: Ann Crisp
September 16, 2012

INTRODUCTION

The Petition to Amend the Energy Commission Decision (Decision) (CEC 2010a) for the Marsh Landing Generating Station Project requests modification of Condition of Certification **BIO-8**. This analysis addresses the proposed modifications to **BIO-8** and potential impacts to the federally protected Lange's metalmark butterfly (*Apodemia mormo langei*) and the state and federally protected Contra Costa wallflower (*Erysimum capitatum* var. *angustatum*) and Antioch Dunes evening primrose (*Oenothera deltoides* subsp. *howellii*) and other biological resources occurring at the Antioch Dunes National Wildlife Refuge (NWR), including naked-stemmed buckwheat (*Eriogonum nudum* var. *psychicola*, (California Rare Plant Rank 1B.1), the larval host plant of Lange's metalmark butterfly.

LAWS, ORDINANCES, REGULATIONS AND STANDARDS (LORS) COMPLIANCE

The project's proposed modifications are subject to all the laws, ordinances, regulations, and standards (LORS) described in the Marsh Landing Generating Station Project Decision. No new state, federal, or local laws, ordinances, regulations, and standards (LORS) concerning biological resources have been adopted since the Marsh Landing Generating Station Project Decision that would affect this project. The proposed modifications would not cause the Marsh Landing Generating Station Project to be out of compliance with applicable LORS.

ANALYSIS

Staff has reviewed the Marsh Landing Generating Station Project Staff Assessment (CEC 2010b), the Marsh Landing Generating Station Project Revised Staff Assessment (CEC 2010c), and the Marsh Landing Generating Station Project Commission Decision (CEC 2010a) to determine if the petition request has any potential environmental effects and to determine consistency with applicable LORS. Based on this review, staff has determined that the proposed modifications to Condition of Certification **BIO-8** do not have the potential to impact special-status plant and wildlife species or effect consistency with applicable LORS, as discussed in detail below.

Condition of Certification **BIO-8** requires an annual payment be made by the project owner in support of noxious weed management at the Antioch Dunes National Wildlife Refuge (NWR). The proposed modifications include allowing that the annual payments made under **BIO-8** may be used to directly implement a broader range of management activities to address impacts to the Antioch Dunes NWR species. The proposed modifications allow that, in addition to noxious weed management, management

activities would include captive breeding and release of Lange's metalmark butterfly; propagation and transplantation of naked-stemmed buckwheat, Contra Costa wallflower, and Antioch Dunes evening primrose; and noxious weed eradication. The modifications also allow that the annual payment may be used to fund other activities not specified that benefit the species impacted by nitrogen deposition and provided for under **BIO-8** at the direction by the U.S. Fish and Wildlife Service (USFWS). Because the Antioch Dunes NWR is already experiencing habitat degradation likely caused by nitrogen fertilization, additional nitrogen deposition from Marsh Landing Generating Station at this already stressed ecosystem would be a significant impact, as discussed in the Decision. As required by **BIO-8**, implementation of the management activities funded by annual payment toward the operating budget of Antioch Dunes NWR 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 Marsh Landing Generating Station's contribution to nitrogen deposition. Impacts would be less than significant with the implementation of **BIO-8**.

Condition of Certification **BIO-8** requires that annual payment be provided to the Friends of San Pablo Bay to assist in the management activities required under **BIO-8**. The proposed modifications include changing the funding entity under **BIO-8** from the Friends of San Pablo Bay to the California Wildlife Foundation. Based on correspondence with USFWS representatives, USFWS requested that funds to be contributed by GenOn in association with the Marsh Landing Generating Station for activities that benefit Antioch Dunes species be held by the California Wildlife Foundation instead of by Friends of San Pablo Bay. This was proposed by USFWS because they ascertain that the California Wildlife Foundation is able to release funds for payment of invoices, which allows for easier dispersal of funds to the Antioch Dunes NWR in order to meet management needs that may arise quickly and are often difficult to predict (USFWS 2012a). USFWS representatives also provided documentation that Friends of San Pablo Bay were notified by USFWS of the proposed change and Friends of San Pablo Bay agrees to the requested change of funding entity (USFWS 2012b).

CUMULATIVE IMPACTS

The proposed amendment to modify Condition of Certification **BIO-8** will not cause the project to contribute to cumulative biological resources impacts to a greater degree than originally analyzed in the Commission Decision (CEC 2010a).

CONCLUSIONS AND RECOMMENDATIONS

Staff agrees in part with the proposed modifications to Condition of Certification **BIO-8** and has incorporated the proposed modifications into staff's proposed revisions to Condition of Certification **BIO-8**. However, in staff's opinion, the proposed modification to **BIO-8** that allows "other activities that benefit native habitat and species" to be funded by the annual payment were too vague in regards to which native habitats and species would be benefitted by the activities. Staff has proposed alternative language that allows a broader the range of activities to be funded by the annual payment, in addition to noxious weed eradication, but would retain the intent of **BIO-8** to restrict the annual payment to benefit only the state and/or federally listed species and their native

habitats that were determined to be impacted by nitrogen deposition in the Commission Decision (CEC 2010a). It is staff's opinion that the use of the additional voluntary payment of \$20,000 per year made by the project owner to USFWS is not under the Energy Commission's authority since it was negotiated between the project owner and USFWS. Therefore this additional voluntary payment may be used to fund management activities at the direction of the USFWS without any of the above described restrictions. The proposed modifications to Condition of Certification **BIO-8** would not change the intent of the original Condition of Certification **BIO-8** but would instead provide a range of management activities which the annual payment will be used to fund at the Antioch Dunes NWR. Contributing payment would be used to directly implement management activities required to address impacts to the Antioch Dunes NWR from the effects of noxious weed proliferation resulting from nitrogen deposition attributable to the Marsh Landing Generating Station. The change of funding entity would not cause any change to the effectiveness of **BIO-8** and would instead ensure the USFWS could promptly fund necessary management activities. In addition, the project owner is voluntarily offering to begin making the payments prior to commercial operation which will provide a benefit to the protected species at the Antioch Dunes NWR. The project owner proposed adding language to **BIO-8** regarding voluntarily offering "to contribute the annual payment, as well as the additional \$20,000 payment, in advance of operation, by June 30 of each year, beginning in 2012, until the year in which project operation begins" however the project owner may make this payment prior to operation without adding this requirement to **BIO-8**. Impacts would still be less than significant with the proposed modifications to Condition of Certification **BIO-8**.

PROPOSED MODIFICATIONS TO CONDITIONS OF CERTIFICATION

Staff has proposed modifications to the Biological Resources conditions of certification as shown below. (**Note:** Deleted text is in ~~strikethrough~~, new text is **bold and underlined**)

BIO-8 The project owner shall provide an annual payment to ~~Friends of San Pablo Bay~~ **the California Wildlife Foundation or other third party approved by the CPM in coordination with the USFWS performing similar work** to assist in noxious weed management **and other activities that benefit state and/or federally protected species, including Lange's metalmark butterfly, Contra Costa wallflower, and Antioch Dunes evening primrose** at the Antioch Dunes National Wildlife Refuge. **Management activities funded may include but are not limited to: captive breeding and release of Lange's metalmark butterfly; propagation and transplantation of naked-stem buckwheat, Contra Costa wallflower, and Antioch Dunes evening primrose; and noxious weed eradication using grazing animals, hand tools and/or appropriate mechanical equipment.** The first annual payment shall be at least equal to \$2,805.00.

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 **and other activities that benefit native habitat and species** 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~~ **California Wildlife Foundation or other third party approved by the CPM in coordination with the USFWS performing similar work** 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 **and other management activities as required under BIO-8 as directed by the USFWS.**

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 the San Pablo Bay~~ **California Wildlife Foundation or other third party approved by the CPM in coordination with the USFWS performing similar work** 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 an annual report from the ~~Friends of the San Pablo Bay~~ **California Wildlife Foundation or other third-party approved by the CPM in coordination with the USFWS performing similar work** documenting how each annual payment required hereunder was used and applied to assist in noxious weed management **and other management activities as required under BIO-8** 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.

REFERENCES

CEC 2010a - California Energy Commission - Marsh Landing Generating Station Commission Decision (08-AFC-03). August, 2010.

CEC 2010b - California Energy Commission - Marsh Landing Generating Station Staff Assessment (08-AFC-03). April, 2010.

CEC 2010c - California Energy Commission - Marsh Landing Generating Station Revised Staff Assessment (08-AFC-03). June, 2010.

USFWS. 2012a. U.S. Fish and Wildlife Service/S. Jenstch (tn 66929). U.S. Fish and Wildlife Service email to CEC re: funding dated August 23, 2012. Submitted to CEC/Docket Unit on August 24, 2012.

USFWS. 2012b. U.S. Fish and Wildlife Service/S. Jenstch (tn 66927). U.S. Fish and Wildlife Service email to CEC re: funding dated August 24, 2012. Submitted to CEC/Docket Unit on August 24, 2012.