

**STATE OF CALIFORNIA**  
**Energy Resources Conservation**  
**And Development Commission**

**DOCKET**

**09-AFC-4**

DATE Apr 27 2011

RECD. Apr 27 2011

**In the Matter of:**

**Docket No. 09-AFC-4**

**Application for Certification  
for the Oakley Generating Station**

**ENERGY COMMISSION STAFF'S RESPONSE AND COMMENTS  
TO THE PRESIDING MEMBER'S PROPOSED DECISION**

On March 15, 2011, the evidentiary hearing in the matter of the Oakley Generating Station was held in Oakley, California. The hearing was conducted, with witnesses from all parties testifying in their respective areas of expertise in disputed areas. The hearing concluded following a period of public comment, and was continued for further proceedings on March 25, at which time the parties rested and the record was closed.

On April 1, 2011, Staff filed Energy Commission's Staff Errata. The corrections noted in the Errata remain relevant to the information contained in the PMPD, and staff therefore requests that those corrections be considered as comments to the PMPD. Staff hereby incorporates the Errata by reference.

On April 12, 2011, the committee assigned to hear this matter filed the Presiding Member's Proposed Decision (PMPD). Among other things, the PMPD recommends approval of the Oakley Generating Station. Staff agrees with the recommendation that the Oakley Generating Station should be approved, and agrees with the findings that the project will comply with all applicable LORS and will cause no significant environmental impacts with the imposition of staff's recommended conditions of certification.

Staff's continuing position is that, based on the evidence, the Oakley Generating Station should be approved as complying with all applicable LORS and causing no significant environmental impacts with the imposition of staff's recommended conditions of certification.

## STAFF PMPD COMMENTS

### AIR QUALITY

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Staff submits the following proposed revisions to this technical section:

#### **Pages 16 to 17**

*Delete discussion of Avenal Energy project and Footnote 7 because the precedent decision in the Avenal case relates to greenhouse gas (GHG) emissions, not criteria air pollutants that are the subject here.*

BAAQMD Rule 2-2-302 establishes an offset ratio for OGS of 1.15 to 1 for NO<sub>x</sub>. BAAQMD allows VOC offsets to be used to offset emission increases of NO<sub>x</sub>. BAAQMD offset requirements for VOC for OGS are at a ratio of one-to-one. (Ex. 300, p. 4.1-34.) The District's offset ratios are in accord with Energy Commission **staff opinion** policy as established by the precedential **Avenal Energy Plant Project (08-AFC-1) Decision**,<sup>7</sup> recognizing the necessity of reducing emission reductions for all nonattainment pollutants and their precursors at a minimum overall one-to-one ratio. (Ex. ~~1300~~, pp. 4.1-33 - 4.1-34; **300, p. 4.1-36.**)

#### **Page 20, second full paragraph**

As a result, BAAQMD has no adopted implementation plan for particulate matter but, by ~~2010~~ **December 2012** BAAQMD must submit to ARB and the U.S. EPA a separate plan demonstrating how the region will comply with the federal PM<sub>2.5</sub> standard by no later than 2019. (Ex. 300, p. 4.1-38.)

#### **Page 24, first full paragraph.**

Finally, we note that compliance with BAAQMD Condition **AQ-15** will limit ammonia emissions to no more than 5,000 parts per million and thereby reduce to less than significant levels any related impacts.

#### **Page 24, final paragraph.**

We are persuaded, however, that the Lauritzen Yacht Harbor/ Driftwood Marina concerns warrant investigation and possible remediation but that such action **would need to be initiated by the marina.**

#### **Page 25, Finding #5:**

The project NO<sub>x</sub> and VOC emissions would contribute to existing violations of state and federal ambient air quality standards **for ozone**. Compliance with Condition of Certification **AQ-SC7** will mitigate the ozone impact to a less than significant level.

**Page 25, Finding #6:**

The PM10 and PM2.5 emissions and the PM10/PM2.5 precursor emissions of SOx will contribute to the existing violations of state PM10 and state and federal PM2.5 ambient air quality standards. Compliance with Condition of Certification **AQ-SC8** will ensure that a separate mitigation program administered by BAAQMD ~~or additional offsets beyond those required by BAAQMD~~ would provide reductions in sufficient quantities to offset these emissions at least a one-to-one ratio.

**Page 40, AQ-17**

**Verification:** The project owner shall notify both the District and CPM at least **24 hours** ~~7 days~~ prior to the combustor tuning. A summary of significant operation and maintenance events and monitoring records required shall be included in the quarterly operation report (**AQ-SC9**).

**Page 45, AQ-25**

...and to establish the emissions factors to be used to demonstrate compliance with ~~AQ-42(d) and AQ-42(e)~~ **AQ-43(d) and AQ-43(e)**; and while each Gas Turbine is operating at minimum load to determine compliance with **AQ-15(c)** and **AQ-15(d)**; and to verify the accuracy of the continuous emission monitors required in **AQ-21**.

**BIOLOGICAL RESOURCES**

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Staff submits the following proposed revisions to this technical section:

**Page 3, first full paragraph**

*Editorial correction*

Except for 1.4 miles of the transmission line route and 12 related towers, the project is within the jurisdiction of the ~~ECCC/NCCP~~ **ECCC HCP/NCCP**. The Plan enables Contra Costa County, the Contra Costa County Flood Control and Water Conservation District, the East Bay Regional Park District and the cities of Brentwood, Clayton, Oakley, and Pittsburg (collectively, the “Permittees”) to more effectively and consistently control endangered species permitting for activities and projects within their respective jurisdictions with a coordinated, regional approach.

**Page 5, third full paragraph**

*Editorial correction; additional edits provide clarification that discussion of **BIO-10** is related to protection for bats.*

Northern harriers, Loggerhead shrikes, Swainson’s hawk, burrowing owls, and other bird species protected by Fish and Game codes and the Migratory Bird Treaty Act could potentially nest or forage ~~within~~ in the project area. Construction of the projects could disrupt nesting behaviors or otherwise adversely affect reproductive success of species protected by CDFG Fish and Games codes or the Migratory Bird Treaty Act. **Western red bat, pallid bat, and other bat species could also potentially roost or forage within the project area.** Conditions of Certification **BIO-9, BIO-10, BIO-11, and BIO-12** outline a number of impact avoidance and minimization measures for all

of these bird **and bat** species, including specific measures for burrowing owls, bats, and Swainson's hawks based on prescribed agency guidelines.

**Page 6, fourth full paragraph**

*Edit provides clarification that discussion of **BIO-10** is related to protection for bats.*

OGS would comply with applicable LORS that address noise and vibration impacts to humans. Steam blowing will be the loudest construction activity and is expected to take place approximately 750 feet from Wetland E and the San Joaquin River shoreline. Both locations support a diversity of waterfowl. Pile driving could also result in temporary noise impacts. As discussed above, to minimize impacts to nesting birds and **roosting bats** during construction, we have adopted Conditions of Certification **BIO-9 and BIO-10**. With the steps outlined in these conditions, noise and vibration impacts from normal project construction would be temporary and less than significant. (Ex. 300, pp. 4.2-36 – 4.2-37.)

**Page 11, third full paragraph, fifth full paragraph**

*Essentially, all funding for the NWR is directed toward management of noxious weeds and its effects. It would be at the detriment to the NWR at the direction of USFWS if contributed funds were applied to something other than NWR management. Therefore, this scenario is highly unlikely and reporting provides sufficient accountability to address Dr. Weiss' concerns. It is problematic to require the project owner or its entity to implement management activities directly. This requires access to the NWR and/or highly specialized qualifications to propagate and transplant endangered butterflies and plants. As such, it is recommended that this requirement be deleted. An editorial change to correct a Condition of Certification number is also recommended, below.*

8. Indirect and Cumulative Impacts to Species at the Antioch Dunes National Wildlife Refuge  
To ensure that mitigation occurs as expected, we have modified Staff-proposed Condition of Certification **BIO-21** **20** to require the project owner to obtain an annual report from the California Wildlife Foundation (or other approved entity) documenting how each annual payment was used. The project owner must submit the report to the Energy Commission's compliance staff. This reporting requirement allows the Energy Commission to monitor implementation of **BIO-20** ~~and if necessary, require the project owner to directly undertake the mitigation activities if the funds are not being spent as required.~~ Thus, the evidence establishes that **BIO-20** addresses Weiss's stated accountability concerns.

We are further persuaded by the Applicant's and Staff's evidence that implementation of the management activities funded by annual payment toward the operating budget of Antioch Dunes NWR (as ~~calculated using the above equation and~~ described in Staff-proposed Conditions of Certification **BIO-20**) 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 OGS's contribution to nitrogen deposition. Impacts would be less than significant with the proposed mitigation.

**Page 16, Table 4, column 3, line 4, Fully Protected Species**

*Editorial correction to the condition of certification (**BIO-9**) that requires nesting bird surveys is recommended.*

Golden eagles, White-tailed kite, and other bird species that may use the site are California Fully Protected species. Condition of Certification ~~**BIO-8**~~ **BIO-9** provides for pre-construction nest

surveys, protective buffers, and monitoring if nests are found, and Condition of Certification **BIO-7** limits off-site disturbance.

## **CONDITIONS OF CERTIFICATION**

*In the Energy Commission Staff's Errata (Docket No. 09-AFC-4), Staff noted several non-substantive inconsistencies in the language originally proposed in the Conditions of Certification which were offered for consideration by the Committee. Staff recommends these and other changes to the Conditions of Certification as specified below.*

### **Page 27, Verification of BIO-6**

*Staff typically does not list a timeline for staff review of documents as staff does a timely review of all submittals. The removal of the 45 day timeline is an editorial correction that should have been made to the verification in the FSA so it is recommended to remove from the timeline from verification.*

**Verification:** The project owner shall provide the draft BRMIMP to the CPM at least 60 days prior to start of any site (or related facilities) mobilization. The CPM, in consultation with the East Contra Costa County Habitat Conservancy (Conservancy) (and USFWS and CDFG if they choose to comment), will determine the BRMIMP's acceptability ~~within forty-five (45) days of receipt~~. If there are any permits that have not yet been received when the BRMIMP is first submitted, these permits shall be submitted to the CPM within five (5) days of their receipt, and the BRMIMP shall be revised or supplemented to reflect the permit condition within 10 days of their receipt by the project owner. Ten days prior to site and related facilities mobilization the revised BRMIMP shall be resubmitted to the CPM.

### **Page 29, BIO-7, bullet 8**

*The current entities that maintain noxious weed lists are listed in the recommended edits below.*

**Avoid Use of Exotic Pest Plants.** Eliminate from landscaping plans any ~~'List A'~~ California exotic pest plants of concern as defined by ~~the California Exotic Pest Plant Council~~ **the California Department of Food and Agriculture (CDFA) and California Invasive Plant Council (Cal-IPC).**

### **Page 30, BIO-8**

*Editorial correction recommended below.*

**BIO-8** To comply with various protected tree ordinances, the project owner shall mitigate for loss of protected trees based on the results of the project owner's arborist report. Mitigation shall include either mitigation fees and/or the purchase of replacement trees. A tree permit shall be obtained from the City of Oakley Community Development Department and one of the following mitigation options is required: three new trees of the same species shall be planted for each protected tree removed; or the total appraisal fee for the protected trees scheduled to be removed shall be paid to the Community **Development Department**; or a combination of replacement tree plantings and in lieu fee payments shall be made. Mitigation will be assessed by the CPM in coordination with City of Oakley based on review of the arborist report.

### **Page 32, bullet 3 and bullet 5, BIO-9**

*The edit in bullet 3 is recommended as staff would like to receive weekly updates on nesting activity so actions can be recommended in a timely manner. Editorial correction to bullet 5 is also recommended to complete last sentence of bullet.*

3. If active nests are detected during the survey, a no-disturbance buffer zone (protected area surrounding the nest, the size of which is to be determined by the Designated Biologist in consultation with the CPM (in coordination with CDFG, and USFWS) and monitoring plan shall be developed; Consultation with the CPM in coordination with CDFG shall be required for any construction that occurs within 1,000 feet of a Swainson's hawk nest or 1/2 mile of an active golden eagle nest to ensure that no take of Swainson's hawk or golden eagle occurs during project construction. Nest locations shall be mapped using GPS technology and submitted, along with a weekly report stating the survey results, to the CPM. ~~in the Monthly Compliance Reports.~~
4. If Swainson's hawk young fledge prior to September 15, construction activities can proceed normally. If the active nest site is shielded from view and noise from the project site by other development, topography, or other features, the project applicant can apply to the Conservancy for a waiver of the no-disturbance buffer zone requirements. The waiver must also be approved by the CDFG and USFWS and the CPM must be notified of any request for a waiver.
5. The Designated Biologist shall monitor the nest until he or she determines that nestlings have fledged and dispersed. Activities that might, in the opinion of the Designated Biologist, disturb nesting activities (e.g., excessive noise above 60 dBA, especially during steam blowing), shall be **prohibited within the buffer zone until such a determination is made.**

#### **Page 33, BIO-10**

*The recommended timing changes below allows for surveys within 30 days and a report due within 15 days of any pre-construction site mobilization. The CPM should also be consulted by the bat biologist regarding alternative maternity colony sites and development of mitigation and exclusion measures. Also, recommended change to verification requires report of survey results upon completion of surveys regardless of bat detection.*

**BIO-10** The project owner shall conduct a survey for roosting bats within 200 feet of project activities within ~~15~~ **30** days prior to any pre-construction site mobilization, including tree removal. All trees and snags proposed for removal, topping, or pruning shall be marked in the field. A qualified bat biologist shall conduct a roost assessment of all the marked trees. The biologist shall be approved by the CPM. If no suitable roosting habitat is present, no further action is required. If suitable roosting habitat is present, the project owner shall also conduct surveys for roosting bats during the maternity season (March 1 to August 31) within 200 feet of project activities. Trees and other appropriate structures shall be surveyed by a qualified bat biologist. Surveys shall include a minimum of one day and one evening survey. The biologist shall be approved by the CPM. If active maternity roosts or hibernacula are found, the trees occupied by the roost shall be avoided (i.e., not removed) by the project, if feasible. If avoidance of the maternity roost is not feasible, the bat biologist shall survey (through the use of radio telemetry or other CPM-approved methods, developed in consultation with CDFG) for nearby alternative maternity colony sites. If the bat biologist determines, in consultation with **the** CPM and CDFG and with the approval of the CPM, that there are alternative roost sites used by the maternity colony and young are not present, then no further action is required and tree removal may occur.

However, if there are no alternative roosts sites used by the maternity colony, provision of substitute roosting bat habitat would be required. This measure would not apply to western red bat as they are solitary and primarily use trees as roosts. If western red bats are present during the breeding season,

tree removal would not occur during the breeding season and Item 3 below would be implemented. If active maternity roosts are absent, but a hibernaculum (i.e., a non-maternity roost) is present, then exclusion of bats prior to tree removal is required.

1. Provision of substitute roosting bat habitat. If a maternity roost will be impacted by the project, and no alternative maternity roosts are in use near the site, substitute roosting habitat for the maternity colony shall be provided on, or in close proximity to, the project site no less than three months prior to the eviction of the colony. Alternative roost sites will be designed and constructed in accordance with the specific bats' requirements and in coordination with CDFG and the CPM. Alternative roost sites must be of comparable size and proximal in location to the impacted colony. The CDFG shall also be notified of any hibernacula or active nurseries within the construction zone.

2. Exclude bats prior to removal of trees with roosts. If non-breeding bat hibernacula are found in the trees to be removed within the construction footprint, the individuals shall be safely evicted, under the direction of the qualified bat biologist, by partial dismantling of roost sites (e.g. removal of tree limbs) to induce abandonment by bats, or other appropriate measures. Additionally, on the day of tree removal the tree cutters will inspect the trees prior to them felling the trees for bats in areas that the Designated Biologist is not able to observe from the ground.

If an active maternity roost is located in an area to be impacted by the project, and alternative roosting habitat is available, the demolition of the roost site must commence before maternity colonies form (i.e., prior to March 1) or after young are flying (i.e., after August 31) using the exclusion techniques described above.

3. Western red bat specific measures. If an active western bat maternity roost is found in the trees to be removed, tree removal will not occur during the breeding season to avoid disturbing females with non-volant (incapable of flying) young (March 1 through August 31). The leaf litter associated with the tree(s) will be removed during the warm season to prevent western red bats from roosting under the leaf litter during the winter when tree removal will occur. Prior to tree removal, outside of the breeding period, on the day immediately preceding tree removal, any tree to be removed will first be disturbed at the end of the day (after 5:00 pm) by removing the lowest branches that do not have dense clusters of leaves. Trees should be removed the day after the initial disturbance as bats disturbed under these circumstances are not likely to return to the same tree for day roosting the next day. Additionally, on the day of tree removal the tree cutters will inspect the trees prior to them felling the trees for bats in areas that the Designated Biologist is not able to observe from the ground.

4. Bat maternity roosts in trees to remain on site. The Designated Biologist shall monitor the maternity roost until it is determined that young are volant (are capable of flying); activities that might, in the opinion of the Designated Biologist, disturb roosting activities (e.g., excessive noise above 60 dBA, especially during steam blowing), shall be prohibited within the buffer zone until such a determination is made.

**Verification:** All mitigation measures and their implementation methods shall be included in the BRMIMP and implemented. The resume of the proposed bat biologist will be submitted to the CPM for approval at least 30-45 days prior to the start of any bat surveys. Implementation of the measures will be reported in the Monthly Compliance Reports by the Designated Biologist. ~~If active roost trees are to be removed,~~ A written report summarizing the results of the pre-construction survey shall be sent to the CPM and CDFG no less than 15 days prior to the start of pre-construction site mobilization which will include documentation of any active roost trees to be removed. The report

shall describe survey methods, including the time, date, and duration of the survey, identity and qualifications of the surveyor(s), and a list of species observed, a figure showing roost locations observed, and proposed mitigation and exclusion measures. Mitigation and exclusion measures must be developed in coordination with **the CPM and CDFG**, and approved by the CPM prior to initiation of the measures or project activities that would disturb the roost site. Within 10 days of removal of trees with roost sites, the project owner shall submit a report describing the results of the exclusion, mitigation measures, and tree removal.

**Page 41, BIO-15**

*Editorial correction to be consistent with other conditions of certification that require exclusion fencing is recommended.*

**BIO-15** The following measures shall be implemented to avoid and minimize impacts to western pond turtle.

1. Pre-construction surveys shall be conducted concurrent with the Giant garter snake pre-construction surveys. Surveys shall be conducted as described below in Condition of Certification **BIO-16**.
2. **ESA Wildlife exclusion** fencing will be installed to protect the riparian habitat along East Antioch Creek in the vicinity of the intersection of the transmission line right-of-way as described under Giant garter snake avoidance and minimization measures (see **BIO-16**).

**Page 42, Verification of BIO-16**

*Correction to timing of surveys based on requirements of ECCC HCP/NCCP permit is recommended.*

**Verification:** All giant garter snake (GGS) impact avoidance and minimization measures shall be included in the BRMIMP and implemented. Implementation of the measures shall be reported in the Monthly Compliance Reports by the Designated Biologist. The Designated Biologist or a representative approved by the CPM, in consultation with the East Contra Costa County Habitat Conservancy (Conservancy), CDFG, and USFWS, must survey the construction area within potential GGS habitat no more than 24 hours prior to the initiation of **pre-construction site mobilization** ~~construction~~ in the vicinity the GGS habitat along East Antioch Creek. Another pre-construction survey must be conducted if construction activity ceases for a period of more than 2 weeks. The project owner shall submit a report to the Conservancy, USFWS, CDFG, and the CPM documenting results of pre-construction surveys within 24 hours of commencement of construction activities. The project owner shall submit a report to the Conservancy, USFWS, CDFG, and the CPM if any GGS are found within work areas no more than 24 hours after the sighting is made. Within 30 days after completion of construction the project owner shall provide to the CPM a written construction termination report identifying how impact minimization measures have been completed. Additional copies shall be provided to the Conservancy, CDFG, and USFWS.

**Page 43, BIO-17**

*Editorial correction is recommended*



**BIO-17** The following measures, developed in cooperation with East Contra Costa County Habitat Conservancy (Conservancy) shall be implemented to avoid and minimize impacts to California tiger salamander.

Wildlife exclusion fencing and silt fencing shall be installed to protect Wetland D, Wetland E, and Wetland F. "Sensitive Resource Area" signage shall also be installed at each wetland prior to pre-construction site mobilization.

**Page 46, BIO-20**

*As described above under edits to Indirect and Cumulative Impacts to Species at the Antioch Dunes NWR, it is problematic to require the Project owner or its entity to implement management activities directly. This requires access to the NWR and/or highly specialized qualifications to propagate and transplant endangered butterflies and plants. The intent of the payment is to support greater efforts to manage the NWR. Providing approximately \$5000 worth of management activities in isolation could have substantially less benefit to the target species and habitat. As such, it is recommended that the enforcement action of having the Project owner or its entity implement management activities directly be deleted from Condition of Certification BIO-23.*

*Additionally, the timing of report provision was moved to the Verification section of the Condition of Certification to be consistent with the standard format and contents of other Biological Resources conditions and to facilitate implementation by the CPM.*

**Antioch Dunes National Wildlife Refuge Funding**

**BIO-20** The project owner shall provide an annual payment to California Wildlife Foundation or other third-party approved by USFWS to assist in noxious weed management and its effects 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; noxious weed eradication using grazing animals, hand tools, and/or appropriate mechanical equipment. The first annual payment shall be no less than \$5,000.78.

Each subsequent annual payment 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 also shall request an annual report from the California Wildlife Foundation or other third party approved by USFWS 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 30 days after receipt. If the CPM determines that the funds are not being applied as specified by this condition, then the project owner or an agent of the owner shall directly implement noxious weed management until the CPM receives verifiable proof that the California Wildlife Foundation or other approved agency is using the funds as required.~~

**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 California Wildlife Foundation or other third-party approved by USFWS in accordance with this Condition of Certification. The project owner shall provide evidence that it has specified that its annual payment to California Wildlife Foundation or other third-party approved by USFWS can be used only to assist in noxious weed management and remediation of its effects (e.g., activities to support continued survival of Lange's metalmark butterfly, Contra Costa wallflower, and Antioch Dunes evening primrose) 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 California Wildlife Foundation or other third-party approved by USFWS 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 California Wildlife Foundation or other third-party approved by USFWS 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 30 days after receipt for the operating life of the project. If no such report is prepared by said third-party, then the project owner shall provide proof to the CPM of said request for report.**

#### **Page 47, Verification of BIO-21**

*Clarification which states the permit is required prior to any ground-disturbance which is defined under the Energy Commission's General Conditions as pre-construction site mobilization is recommended.*

**Verification:** A copy of the receipt of payment issued to Conservancy, verifying the funds have been paid, shall be provided to the CPM within 30 days prior to ~~site or related facilities pre-~~**construction site** mobilization.

#### **Page 47, Verification of BIO-22**

*Correction that ECCC HCP/NCCP permit is required prior to pre-construction site-mobilization is recommended.*

**Verification:** Within five business days of its receipt, **and prior to pre-construction site mobilization**, the project owner shall submit to the CPM a copy of the East Contra Costa County Habitat Conservancy's Certificate of Inclusion (permit) and verify that the permit terms and conditions are incorporated into the BRMIMP and will be implemented.

#### **Page 47, BIO-23**

*The following changes to Condition of Certification BIO-23 are recommended to make this condition consistent with the standard format and contents of other Biological Resources conditions. Inclusion in the Biological Resources Mitigation Implementation and Monitoring Plan (BRMIMP) and addition of Verification will ensure that the Condition of Certification is enforceable if a permit is issued by USFWS.*

**BIO-23** The project owner shall provide ~~the CPM with~~ a copy of any U.S. Fish and Wildlife permit **issued for the OGS project (e.g., Incidental Take Permit).** ~~requirements,~~

~~within 15 days from the date any such permit or permit amendment issues. **The terms and conditions contained in the permit shall be incorporated into the project's BRMIMP and implemented by the project owner.**~~

**Verification: The project owner shall submit to the CPM a copy of the USFWS permit within 15 days of issuance by the USFWS. At this time, the project owner shall also verify that the permit terms and conditions are incorporated into the BRMIMP and will be implemented.**

**Recently Received CDFG Comments on PSA**

*Staff received comments on the Preliminary Staff Assessment – Part B from CDFG on Thursday April 14, 2011 via email. The CDFG comment letter was addressed to Commissioner Boyd and dated February 11, 2011. Staff had not previously received this letter or knew of its existence prior to receiving the forwarded copy from CDFG.*

*The CDFG comment letter does not raise any substantive issues that were not already identified by USFWS and previously addressed by Staff and USFWS throughout the proceeding, including in the PSA, a public workshop (February 2, 2011), FSA, and Evidentiary Hearings.*

**LAND USE**

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Staff submits the following proposed revisions to this technical section:

**Page 1, sixth bullet**

*This threshold has been edited to match the language used in the FSA.*

- Conflicting with any applicable land use plan, policy, or regulation of an agency with jurisdiction, or that would normally have jurisdiction, over the project. This includes, but is not limited to, a General Plan, ~~community or specific plan, local coastal program, airport land use compatibility~~ **redevelopment** plan, or zoning ordinance; or

**Page 4, Land Use Figure 1**

*LU Figure 1 is provided to show the project site relative to surrounding existing land uses. LU Figure 1 illustrates the Important Farmland map designations from the California Department of Conservation Farmland Mapping and Monitoring Program (FMMP). Attached to these comments is the applicant's Existing Land Use map (AFC Figure 5.6-1) that provides details regarding the existing land uses, which may be a better illustrative map for LU Figure 1.*

**Page 6, first paragraph, last sentence**

DuPont prepared Phase I and Phase II Environmental Site Assessments for a portion of the property – the Western Development Area (**WDA**) – that contains the project site.

**Page 6, third paragraph, first sentence**

The City has designated the entire DuPont property, including the site, as a redevelopment zone, **as shown in Land Use Figure 3.** ~~H~~owever, the City has not officially rezoned the property.

### **Page 7, Land Use Figure 3**

*Land Use Figure 3 indicates that the project site is within the City of Oakley's Redevelopment zone, which may be confusing to the reader since that is not the applicable existing zoning designation of the site. Considering the complexity of the zoning issues related to the OGS site, staff recommends that Land Use Figure 3 be deleted from the PMPD, along with any references to the figure. In addition, the following revisions should be added to the text for clarity.*

### **Page 6, fifth paragraph**

~~Land Use Figure 3 below shows the land use zoning designations of the OGS site and surrounding lands. In view of the redevelopment designation and the pending DuPont Specific Plan, the figure depicts the OGS site as Redevelopment Agency Planned Development.~~ **As discussed above, the city has not formally rezoned the project site; therefore, the applicable zoning for the OGS site is Contra Costa County's H-I zoning designation.**

### **Page 8, second paragraph**

The transmission line traverses land ~~in both~~ **under the jurisdiction of Contra Costa County,** the City of Oakley, and the City of Antioch. As a result, the transmission line alignment includes several different land use designations. In **the County and the City of Oakley,** these **general plan** designations are ~~mostly~~ **Public/Semi-Public and Ceommercial, respectively. The portion of the line within county lands is not within a county zoning designation, and the city's zoning designations for the remaining portions of the transmission line are Light Industrial (L-I) and Retail Business (R-B).**

### **Page 8 and 9, first paragraph and first sentence under the Conversion of Farmland subsection**

Based on data obtained from the California Department of Conservation Farmland Mapping and Monitoring Program (FMMP), the **majority of the** project site is located on land designated as Farmland of Statewide Importance, **with areas designated as Urban and Built-Up Land.**

### **Page 12, first paragraph**

As discussed above, the OGS site is within the City of Oakley and portions of the transmission line traverse areas within the City of Antioch. **The project site has not officially been rezoned by the City of Oakley, so the property continues to have the H-I zoning designation established by Contra Costa County. Therefore, the county's and** the cities' General Plans and zoning ordinances are the primary laws governing local land use.

### **Page 28**

*The conclusion related to cumulative impacts should be added to the Findings of Fact.*

**The cumulative implementation of the planned developments would result in the conversion of lands that are currently in agricultural production to urban land uses; however, project-related cumulative land use impacts would be less than significant.**

## **VISUAL RESOURCES**

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Staff submits the following proposed revisions to this technical section:

### **Page 2, Section 2: Impact Assessment**

*Staff found that with the perimeter screening with landscape trees and plants as proposed, the impact under CEQA to the view from KOP 1 would be reduced to less than significant. Perimeter landscaping was included in VIS-2. Street tree planting along Bridgehead Road was not included in Staff's recommended condition VIS-2. Staff did reference the agreement between the City of Oakley and the project owner to add street trees to the frontage of Bridgehead Road and that it would further reduce impacts on the viewers at KOP 1. Staff does not recommend inclusion of the street trees as part of the mitigation under CEQA and recommends removing the text in ~~strikeout~~ below.*

### **Page 5, Section b.:**

**KOP 1:** This represents the vantage point of residents leaving the Sandy Point Mobile Home Park. Existing visual quality is low, due to interruptions of the view by a clutter of elements in the foreground. (Ex. 300, p. 4.12-12.) While it is close to the project site (0.25 mile), views of the OGS will be limited to local residents and guests at a nearby hotel. The evidence characterizes the overall visual sensitivity as moderate. KOP 1 will experience a high degree of visual change, due primarily to the size and form of the structures associated with the OGS which will reinforce the existing industrial nature of the area. While the impact to KOP 1 could be adverse, the evidence establishes that placing landscape screening trees along the project's perimeter ~~and along the Bridgehead Road east frontage~~ will reduce impacts to below a level of significance. (Ex. 300, pp. 4.12-13 - 4.12-14.) We have included this mitigation in Condition of Certification **VIS-2**.

### **Page 10, VIS-1, a-e:**

*There is a hanging item "f" for which there is no condition. Delete item "f".*

## **SOIL AND WATER**

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Staff submits the following proposed revisions to this technical section:

### **Page 16 – first line**

...constituents ~~would~~ may be outside of the ISD wastewater discharge requirements.

### **Page 19 – 2<sup>nd</sup> paragraph**

Provided that OGS converts to a recycled water supply, ~~Implementation of~~ **SOIL&WATER-4** will address Staff's concerns regarding Diablo Water District's increased freshwater (Delta water under the CVP and groundwater) use to meet the needs of OGS as well as existing and future DWD customers.

### **Page 20 – 3<sup>rd</sup> paragraph**

The evidence further establishes ~~that~~ the remote likelihood of a seiche; or tsunami to impact the site, and that current predictions of ~~or~~ sea level rise are below site grades.

**Pages 33-34 - Conditions of Certification SOIL&WATER-8 and SOIL&WATER-9**

*Per the stipulation between Energy Commission Staff and the Oakley Generating Station, Conditions of Certification **SOIL&WATER-8** and **SOIL&WATER-9** would be deleted and that Condition of Certification **SOIL&WATER-4** would be changed to the language as set forth in the stipulation.*

**TRAFFIC AND TRANSPORTATION**

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Staff submits the following proposed revisions to this technical section:

**Page 12, first bullet:**

*There is no way to completely avoid deterioration of these intersections as the original PMPD language would imply.*

- Adopt and implement provisions for monitoring intersection operations to ensure that construction-related vehicles must avoid the intersections of Main Street/Bridgehead Road (4:00 p.m. – 6:00 p.m.) and Wilbur Avenue/Bridgehead Road (7:00 a.m. – 9:00 a.m. and 4:00 p.m. – 6:00 p.m.) ensuring no deterioration of the existing LOS performance standard to minimize degradation of the LOS performance standard to the maximum extent feasible.

**Page 24, finding of fact #7:**

*This statement is unclear. The LORS Table provided in the PMPD indicates TRANS-1 through TRANS-4 would be required for complete LORS compliance. The PMPD has omitted the following FSA LORS and related COC's for compliance: City of Oakley Traffic Impact Fee and Regional Transportation Development Impact Mitigation Fee (requiring TRANS-5 for compliance); City of Oakley Municipal Code Title 6, Chapter 3, Articles 1 & 2, Road Dedication Standards (requiring TRANS-6 and TRANS-7 for compliance). In the event the PMPD wishes to only discuss compliance with the LORS provided in the PMPD table, the following changes are recommended:*

7. Compliance with ~~the~~ Conditions of Certification, including TRANS-1 through TRANS-4 and TRANS-5, will ensure that the OGS Project complies with applicable LORS.

**Page 15, third paragraph:**

*A number of OGS COC's would not apply to this component and therefore the following changes are recommended to clearly identify the recommended mitigation.*

With implementation of mitigation measures similar to the Conditions of Certification **TRANS-1 and TRANS-3** in the **Traffic and Transportation** section of this Decision, any potential impacts to traffic and transportation that would be less than significant.

## TRANSMISSION SYSTEM ENGINEERING

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Staff submits the following proposed revisions to this technical section:

### Page 5

#### Category B C (N-2) Conditions

- Kelso – Tesla 230 kV line (Kelso – USWP Ralph section)
- Kelso – Tesla 230 kV line (USWP Ralph – Tesla section)
- Lone Tree – Cayetano 230 kV line (Lone Tree – USWP JW Ranch section)

### Page 19

5. The interconnection of the OGS Project will cause new transmission line overloads under normal conditions on five identified 230 kV transmission lines; under Category B (N-1) conditions on six identified 230 kV transmission lines, and, under Category B C (N-2) conditions on six identified 230 kV transmission lines. The Phase II Interconnection study recommends adequate mitigation for these impacts.

## + CONCLUSION

The proposed Oakley Generating Station is consistent with all local Laws, Ordinances, Regulations, and Standards. The proposed project will have no significant environmental impact in any of the relevant technical areas. Based on evidentiary record, the Commission should approve the project as proposed, subject to the Conditions of Certification identified for each technical area.

DATED: April 27, 2011

Respectfully submitted,

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**APPLICATION FOR CERTIFICATION  
FOR THE *OAKLEY GENERATING STATION***

**Docket No. 09-AFC-4  
PROOF OF SERVICE  
(Revised 4/5/2011)**

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### DECLARATION OF SERVICE

I Janet Preis, declare that on April 27, 2011, I served and filed copies of the attached Energy Commission Staff's Response and Comments to the Presiding Member's Proposed Decision, dated April 27, 2011. 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:

<http://www.energy.ca.gov/sitingcases/oakley/index.html>].

The documents have 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;
- ☒ by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date 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**

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1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512  
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

/s/ Janet Preis