



United States Department of the Interior

FISH AND WILDLIFE SERVICE

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



In Reply Refer To:
81420-2009-TA-1107-3

April 28, 2011

DOCKET

09-AFC-4

DATE APR 28 2011

RECD. APR 28 2011

Chairman
California Energy Commission
1516 Ninth Street
Sacramento, California 95814

Subject: Endangered Species and the Presiding Member's Proposed Decision for the Oakley Generating Station in Contra Costa County, California

Dear Mr. Chairman:

This letter concerns the Presiding Members Proposed Decision on the Oakley Generating Station in the City of Oakley in Contra Costa County, California. At issue are the potential adverse effects of this facility on the endangered Lange's metalmark butterfly (*Apodemia mormo langei*), endangered Contra Costa wallflower (*Erysimum capitatum* var. *angustatum*), endangered Antioch Dunes evening primrose (*Oenothera deltoides* ssp. *howellii*), and designated critical habitat for these two listed plants. This letter is issued under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. § 1531 *et seq.*)(Act).

The comments and recommendations in this letter are based on (1) *Oakley Generating Station Preliminary Staff Assessment – Part B* dated January 2011 that was prepared by the California Energy Commission; (2) letters from the U.S. Fish and Wildlife Service to the California Energy Commission regarding this proposed project dated October 13, 2010, and February 15, 2011; (3) *Oakley Generating Station Presiding Member's Proposed Decision* dated April 2011 that was prepared by the California Energy Commission; (4) Evidentiary Hearing held by the California Energy Commission on the proposed project in Oakley, California on March 15, 2011; and (5) other information available to the U.S. Fish and Wildlife Service (Service).

Section 9 of the Act prohibits the take of the Lange's metalmark butterfly by any person subject to the jurisdiction of the United States. As defined in the Act, take is defined as "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." "Harm" has been further defined to include habitat destruction when it injures or kills a listed species by interfering with essential behavioral patterns, such as breeding, foraging, or resting. Thus, not only is Lange's metalmark butterfly protected from activities such as

TAKE PRIDE
IN AMERICA 

collecting, but also from actions that result in its death or injury due to the damage or destruction of its habitat. This includes activities that will result in indirect effects to listed species or their habitat. Indirect effects are defined as those effects that are caused by or result from a proposed action and are later in times, but are reasonably certain to occur. The Act prohibits activities that "...remove and reduce to possession any listed plant from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law." The term "person" is defined as "...an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal government, of any State, municipality, or political subdivision of a State, or any other entity subject to the jurisdiction of the United States."

Take incidental to an otherwise lawful activity may be authorized by one of two procedures. If a Federal agency is involved with the permitting, funding, or carrying out of the project and a listed species and/or critical habitat are going to be adversely affected, then initiation of formal consultation between that agency and the Service pursuant to section 7 of the Act is required. Such consultation would result in a biological opinion addressing the anticipated effects of the project to the listed species and/or critical habitat, and may authorize a limited level of incidental take. If a Federal agency is not involved in the project, and listed species may be taken as part of the project, then an incidental take permit pursuant to section 10(a)(1)(B) of the Act should be obtained. The Service may issue such a permit upon completion of a satisfactory conservation plan for the listed species that would be taken by the project.

Our previous letters and comments made at the March 15, 2011, Hearing described the threats posed to Lange's metalmark butterfly by the deposition of airborne nitrogen. Due to the precarious status of this endangered species, and because the Antioch Dunes National Wildlife Refuge is currently suffering from significant habitat degradation, the additional nitrogen deposition from the Oakley Generating Station above the baseline likely will cause additional stresses to this animal, as well as the Antioch Dunes evening primrose, Contra Costa wallflower, and the designated critical habitat for these two endangered plants. We are concerned any additional environmental stresses on this animal could be the factor that pushes the animal into extinction.

Therefore, as described in our October 13, 2010, and February 15, 2011, letters, we recommend:

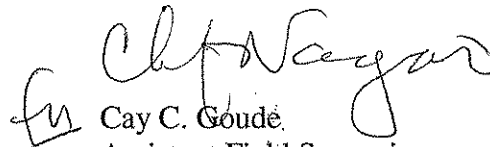
- (1) The California Energy Commission should obtain the written concurrence from the Service that the proposed Oakley Generating Station will not jeopardize the Lange's metalmark butterfly, Contra Costa wallflower and Antioch Dunes evening primrose, or result in adverse modification or destruction of critical habitat for these two endangered plants.
- (2) The California Energy Commission and/or the applicant should obtain authorization for incidental take of the endangered Lange's metalmark butterfly

pursuant to sections 7 or 10(a) of the Act prior to adoption of the final environmental document.

- (3) Rather than providing a specific dollar amount which may not accurately reflect the conservation that may be necessary for the three endangered species and designated critical habitat, we recommend that the California Energy Commission and/or the applicant commit to completing specific activities that more directly relate to project effects, such as captive breeding and release of the butterfly, or restoration and management of specific acreages at the Refuge.

We remain interested in assisting the California Energy Commission and the applicant in preventing the extinction of Lange's metalmark butterfly and ensuring California's energy needs are met. Please contact Stephanie Jentsch, Ryan Olah, or Chris Nagano at the letterhead address, electronic mail (Stephanie_Jentsch@fws.gov; Ryan_Olah@fws.gov; Chris_Nagano@fws.gov), or at telephone 916/414-6600 if you have any questions regarding this letter.

Sincerely,


Cay C. Goude
Assistant Field Supervisor
Endangered Species Program

cc:

Scott Wilson, Liam Davis, Randi Adair, California Department of Fish and Game, Yountville, California

Rick York, California Energy Commission, Sacramento, California

Louie Terrazas, Don Brubaker, Mendel Stewart, San Francisco Bay National Wildlife Refuge, Newark, California