

DOCKET

09-AFC-4

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Communities for a Better Environment
Sierra Club California
Wild Equity Institute

May 17, 2011

Chairman Robert B. Weisenmiller
Commissioner Carla Peterman
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Subject: 09-AFC-4 -- Potential Effects of Oakley Generating Station on Endangered Species

Dear Chairman Weisenmiller:

Communities for a Better Environment, Sierra Club California and Wild Equity Institute are writing to express our serious concerns relating to the apparent failure by the California Energy Commission to prevent or adequately mitigate the impacts of the Oakley Generating Station power plant on the Lange's metalmark butterfly and two endangered plant species within the Antioch Dunes National Wildlife Refuge ("ADNWR").

It is our understanding that the Commission is reviewing a proposal to build the Oakley Generating Station within 2.5 miles from the ADNWR. The ADNWR contains the last remaining wild population of Lange's metalmark butterfly. As the United States Fish and Wildlife Service ("USFWS") informed the Commission, the status of Lange's metalmark butterfly has dramatically declined in the last few years. Between 50 to 100 years ago, the number of butterflies was estimated to be about 25,000 individuals.¹ The number dropped to about 5,000 individuals in 1972 and the population has continued to plummet.² The number of Lange's metalmark butterflies observed during the 2010 flight season is of particular concern. Only 26 individuals were observed during the last week of August 2010, which normally is the peak of the flight season.³ There is a substantial risk that the butterfly could go extinct if additional threats to the species are permitted by regulatory agencies.

The CEC, unfortunately, is proposing to permit just that. Over the past decade, entomologists and ecologists have conducted painstaking research documenting the link between nitrogen emissions from industrial sources and the decline of endangered species. Although these studies are relatively recent, their conclusions are profound: many scientists believe that we have altered the nitrogen cycle more substantially than the carbon cycle. The ramifications of these changes are most acutely felt by imperiled species like the Lange's metalmark butterfly. As nitrogen emissions are deposited into the soil, the soil's chemical composition is changed, making the soil

¹ USFWS Comments Regarding the Oakley Generating Project, October 13, 2010, CEC Docket #58786 ("USFWS October Comments").

² *Id.*

³ *Id.*

less suitable for the butterfly's host plant. The host plant is then outcompeted by invasive weeds that provide no habitat value for the butterfly, leading to the butterfly's eventual demise. Nitrogen deposition can also adversely impact endangered plant species, including the Antioch Dunes Evening Primrose and Contra Costa Wallflower.

The Commission has received considerable evidence in the Oakley proceeding that the nitrogen deposition from the proposed power plant will have a significant adverse effect on the Lange's metalmark butterfly, the Evening Primrose and the Wallflower:

- USFWS informed the Commission that the proposed Oakley Generating Station likely will result in "take" of the butterfly and adversely affect the two plants and their critical habitat: "We are concerned that the indirect and cumulative effects from the additional nitrogen from the proposed power generating plant that will be deposited at the ADNWR may well reverse or negate the intensive conservation efforts that have and are being implemented to prevent the decline and perhaps extinction of the endangered Lange's metalmark butterfly."⁴
- The Final Staff Assessment states: "Given that threats to the endangered species at the Antioch Dunes from noxious weeds are exacerbated by nitrogen fertilization, the proposed project's deposition of additional nitrogen at this already stressed ecosystem would be a significant impact."⁵

The California Department of Fish and Game ("CDFG") also agrees that the Oakley project would have a significant impact on the Lange's metalmark butterfly, the Antioch Dunes evening primrose and the Contra Costa wallflower: "These species are extremely rare, and distribution of the species' habitat is limited to an area of less than 100 acres, occurring mostly at the Antioch Dunes National Wildlife Refuge (NWR). Loss of these species would be permanent and irreplaceable."⁶

Despite the overwhelming evidence that the Oakley Generating Station would have significant direct and cumulative effects on endangered species and a critical habitat area, the PMPD recommends that the Applicant pay just \$5,000 annually to mitigate its impacts, with the first payment due after the plant commences operation. Both CDFG and USFWS question whether this very modest amount adequately anticipates the future costs of management, labor, supplies, and transport necessary to address the project's contribution to increased nitrogen deposition. The Commission has failed to adequately address these agencies' concerns.

The PMPD imposes a very small mitigation fee on the Oakley Generating Station because the CEC Staff has calculated the nitrogen deposition from the power plant as a percentage of overall

⁴ *Id.*

⁵ Oakley Generating Station, Final Staff Assessment, p. 4.2-45.

⁶ CDFG, Comments on the Preliminary Staff Assessment, February 11, 2011, CEC Docket #60303.

nitrogen deposition in the ADNWR. In other words, the PMPD focused on the relative effects of the individual project's impact, but omitted facts relevant to an analysis of the collective effect this and other sources will have upon the ADNWR. This is inconsistent with basic CEQA requirements. As one California Court explained, "the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant."⁷ Similarly, the greater the existing environmental problems are – in this case the extinction of a species – the less effective is the mitigation based on a mere ratio/comparative approach. Public Resources Code § 21002 requires agencies to adopt feasible mitigation measures to substantially lessen or avoid the otherwise significant environmental impacts of proposed projects. If the mitigation fee is calculated based on the ratio/comparative approach, it will not substantially lessen or avoid the true significance of the Oakley project's impact on the Antioch Dunes NWR and would, as a consequence, run afoul of CEQA.

In prior licensing proceedings, the Commission has played a strong environmental leadership role and has required full mitigation for the impacts of nitrogen deposition on endangered species:

- In the Metcalf Energy Center proceeding, the Commission required the Applicant to mitigate the impact of nitrogen deposition by providing 116 acres of land on Tulare Hill and 15 acres of land on Coyote Ridge and by funding an endowment to administer and manage the lands in perpetuity.⁸ The Metcalf project owner was required to provide this mitigation within one week of commencing ground disturbance.⁹
- In the Los Esteros licensing proceeding (where the nitrogen deposition impacts of the proposed project on critical habitat were only half as much as the impacts of the proposed Oakley Generating Station on the ADNWR)¹⁰, the Commission required the Applicant to provide a minimum of 40-acres of land within a high priority or occupied USFWS Critical Habitat Unit, and endowment funds to administer and manage in perpetuity. In the Los Esteros case, the project owner was required to provide the mitigation within 30 days of certification, whether or not it commenced construction.
- In the Pico Power Plant proceeding, the Pico project owner was required to provide, in consultation with USFWS, a minimum of 40 acres of land

⁷ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 720-721.

⁸ Commission Decision on the Metcalf Energy Center, 99-AFC-3, September 2001, Condition BIO-10.

⁹ *Id.*

¹⁰ Commission Decision on the Los Esteros Critical Energy Facility, 01-AFC-12, July 2012, Condition BIO-16; *see infra* at footnote 16.

within critical habitats, an endowment to manage the lands in perpetuity and a Property Analysis Record for the dedicated habitat.¹¹

- For each of the large scale solar projects recently approved by the Commission, the Commission respected the recommendations of USFWS and the CDFG. In these recent cases, the Commission not only accepted all of the federal and state agencies' recommendations for mitigation, the Commission also ensured that the California Environmental Species Act ("CESA") was enforced by requiring "full mitigation" of the impacts on endangered species.

For no apparent reason, the PMPD has substantially deviated from these precedents of strong environmental stewardship. For federal species issues in this case, USFWS recommended that the Oakley project "obtain authorization for incidental take from the Service for the endangered Lange's metalmark butterfly prior to any earthmoving at the proposed project site."¹²

In October 2010, USFWS provided three very specific mitigation measures that should be implemented.¹³ USFWS subsequently submitted comments on the Preliminary Staff Assessment, reiterating its concerns and recommending that the Commission "obtain the written concurrence from [USFWS] that the proposed Oakley Generating Station will not jeopardize the Lange's metalmark butterfly, Contra Costa wallflower and Antioch Dunes evening primrose" and that "the [Commission] and/or the applicant should obtain authorization for incidental take of the endangered Lange's metalmark butterfly pursuant to sections 7 and 10(a) of the [federal Endangered Species] Act prior to adoption of the final environmental document."¹⁴ Again, USFWS recommended that the Commission "and/or the applicant commit to completing specific activities that more directly relate to project impacts, such as captive breeding and release of the butterfly, or restoration and management of specific acreages at the Refuge", rather than provide a specific dollar amount that would not accurately reflect the necessary conservation measures.¹⁵

¹¹ Commission Decision on the Pico Power Plant, 02-AFC-3, September 2003, Conditions BIO-7 and BIO-9.

¹² USFWS October 2010 Comments, p. 4; USFWS April 2011 Comments, pp. 2-3.

¹³ "The following conservation measures should be implemented by the applicant as part of the Oakley Generating Station project for the operational life of the facility to ensure the proposed action does not jeopardize 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: (1) annual removal of all exotic weeds from a quarter of the ADNWR, the removal methods should include cattle (*Bos taurus*) or other appropriate grazing animals, and hand tools and appropriate mechanical equipment; (2) annual cultivation of at least 250 individuals of the naked-stem buckwheat, 100 individuals of the Contra Costa wallflower, and 100 individuals of the Antioch Dunes evening primrose, and the planting of these individuals on the Refuge with a success criteria of 50% after five years; and (3) captive breeding of Lange's metalmark butterfly and the annual release of at least 200 individuals on the Refuge." USFWS October Comments, p. 4.

¹⁴ USFWS Comments on Preliminary Staff Assessment, February 14, 2011, CEC Docket #59762, p. 4.

¹⁵ *Id.*

An errata to the PMPD filed yesterday, May 16, 2011, posits that “In exercising our exclusive jurisdiction over the project and fulfilling our obligations as CEQA lead agency, we find that the Preliminary and Final Staff Assessments adequately address USFWS concerns...”¹⁶ In a footnote, the errata observes that “As discussed above in this [document]... and shown by evidence and comments in the record, including but not limited to, discussion during the March 15, 2011 hearing with USFWS representative Chris Nagano, USFWS concerns were directly addressed by Staff and the Committee .”¹⁷

Quite to the contrary, the USFWS concerns have never been addressed. Indeed, the USFWS was forced to submit yet another letter after conclusion of the March 15, 2011 hearing and the issuance of the PMPD. After reviewing the PMPD, USFWS submitted a subsequent comment on April 28, 2011 (“USFWS April Comments”). The USFWS April Comments reiterate that the CEC or Applicant should secure an incidental take permit. The USFWS emphasized that it is not sufficient to wait until the bulldozers are poised for action.¹⁸ Rather, the take permit should be issued “prior to the adoption” of the Commission’s final document.¹⁹

As with the federal Endangered Species Act, for state species issues, the project proponent is required to “consult” and secure a permit from California Department of Fish and Game (“CDFG”) under CESA for incidental take of state listed species. That permit cannot be given if it will jeopardize the species. CDFG recommended a number of mitigation measures including seeking written concurrence from USFWS and a Property Action Report (“PAR”) analysis to confirm that the mitigation monies to be paid will provide full mitigation. Oakley’s \$5,000 per year contribution is woefully inadequate, especially compared to the larger sum required of other projects, including the large endowments necessary for funding of critical habitats in perpetuity.

Where in the past the Commission has required the Applicant to provide compensation habitat and a substantial endowment prior to construction or within one week of commencing construction, it is difficult to understand why the Oakley PMPD proposes only a paltry fee paid after commencement of operations. The PMPD fails to address the disparity in treatment for the Oakley project compared to other similarly situated projects, in terms of the form of mitigation, the amount of mitigation and the timing of the payments.

In light of these issues, the PMPD should be revised as follows:

¹⁶ Errata to PMPD, p. 7.

¹⁷ *Id.*, footnote 1.

¹⁸ The importance of securing all necessary take permits prior to issuance of the CEC permit is highlighted by the fact that on May 10, 2011, the California Independent System Operator unequivocally announced that the Oakley plant is not needed to integrate renewables into the grid, a claim often asserted to support construction of the plant. Thus, to the extent the CEC allows the plant to move forward, threatening three species, it is doing so without any need for the energy the plant will provide.

¹⁹ USFWS April Comments, pp. 2-3.

- 1) Where the threat of the Oakley Generating Station to the Lange's metalmark butterfly is so much more severe than the impacts of other similarly situated projects that have been licensed by the Commission,²⁰ the amount of mitigation for the Oakley Generating Station should be set at a level that meets, if not exceeds, the compensation required of the Pico, Metcalf and Los Esteros projects.²¹
- 2) The Commission should, prior to approval of the project, ensure that the project obtains incidental take authorization for all three federally-listed species from the USFWS through the procedures established by the federal Endangered Species Act, and adopts fully any program of mitigation recommended by USFWS.
- 3) The Commission should also, prior to approval of the project, ensure that the project obtains incidental take authorization for the two state-listed plant species from the California Department of Fish and Game through the consultation procedures established by the California Endangered Species Act, and adopts fully any program of mitigation recommended by the CDFG.

These recommendations are consistent with the recommendations made by both CDFG and USFWS, which have recommended that the Applicant

obtain written concurrence from USFWS on the mitigation proposal prior to approval of the project. The terms of the mitigation agreement, including financial compensation, must be acceptable to the USFWS, who would bear the burden for management activities. Prior to accepting the proposed mitigation, the CEC should also consult with USFWS as to whether the agency is willing to accept the mitigation burden on behalf of the applicant. Without clear agency consent to this mitigation arrangement, the proposed mitigation transfers responsibility for impact abatement from a private party to a public agency.

This agency consent should include any required "take" permit from CDFG with respect to the species listed under the CESA.

As in several past proceedings, the Commission should require proof of completion of the above steps either prior to the start of construction or within 30 days of certification, so that the mitigation can be implemented before the potentially adverse impacts occurs, not after the fact.

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²⁰ The maximum modeled deposition from the Los Esteros facility at the nearest critical habitat was estimated to be 0.0392 kg/ha-yr. (Commission Decision on the Los Esteros Critical Energy Facility, 01-AFC-12, July 2012, p. 113.) In contrast, the maximum modeled deposition from the Oakley Generating Station at ADNWR is estimated to be 0.083 kg/ha-yr, twice the level of Los Esteros. (Oakley PMPD, p. 10.)

²¹ See footnote 13.

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Commissioner Peterman
California Energy Commission
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Thank you for your leadership in ensuring that the Oakley Generating Station project provides full and effective mitigation to avoid or reduce its impacts on these endangered species.

Respectfully submitted,

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cc: CEC Commissioners Boyd, Douglas, Eggert



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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, Shana Lazerow declare that on May 17, 2011, I served and filed copies of the document entitled

Letter re 09-AFC-4 – Potential Effects of Oakley Generating Station on Endangered Species

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 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:

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

AND

For filing with the Energy Commission:

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

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

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 07-AFC-3
1516 Ninth Street, MS-4
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 17, 2011, at Oakland, California.

/s

Shana Lazerow