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June 26, 2017

Sent via e-mail to: stephen.okane@aes.com

Mr. Stephen O'Kane
Director, Sustainability and Compliance
AES Huntington Beach
21730 Newland Street
Huntington Beach, CA. 92646

HUNTINGTON BEACH ENERGY PROJECT (12-AFC-02C) COMPLIANCE ADVICE LETTER FOR BIOLOGICAL RESOURCES MONITORING

Dear Mr. O'Kane:

The purpose of this compliance advice letter is to address recent incidents of non-compliance with certain Biological Resources conditions of certifications on the recently-completed August 10, 2016 Limited Notice to Proceed (LNTP), and to establish norms for compliance with conditions of certification going forward on the construction and operation of the Huntington Beach Energy Project. This letter also responds to AES's April 21, 2017 letter to California Energy Commission staff regarding a notification of non-compliance with certain Biological Resources conditions of certification.

Background

On March 29, 2017 staff was made aware of an encroachment within a killdeer nest buffer zone which occurred on March 23, 2017. In addition, staff provided comments to AES on the March 2017 monthly compliance report (MCR) on April 13, 2017 outlining five comments regarding compliance with the biological conditions of certification. These comments included:

- 1) Regarding burrowing owls, staff pointed out that checking for, preventing entrapment of animals, and notifying the Designated Biologist (DB) or Biological Monitor (BM) if special status species is spotted, injured, or dead is the extent of duties someone other than an approved BM should do. Staff asked for the names of the approved BMs that will be assisting the DB, and any resumes of any other BMs that are needed. Staff also wanted to make sure that they were utilizing the correct buffer zone, whether it is 50 feet or 200 feet, depending on the time of year, in some cases.

- 2) Also regarding burrowing owls, staff pointed out that proper notification, once the buffer zone was violated, as per the condition language, should have been within 24 hours.
- 3) Regarding a mallard duck and ducklings, staff noted that if a nest was present, a proper buffer zone should have been established.
- 4) Regarding the killdeer nest, staff noted that the proper buffer zone that should have been placed around the nest was 50 feet, that all nests should be mapped in order of discovery, and that all nests should be monitored once a week, and observations noted. Staff also requested that the owner update us on the progress on the clapper rail habitat assessment as soon as possible.
- 5) Staff inquired if observations of special status species were reported to the appropriate agency, and if the proper forms were used.

A response to these recommendations was received from AES on April 21, 2017, which raised several objections to staff's April 13, 2017 comments. One of AES's objections raised in the April 21, 2017 letter was that the only biological resources conditions of certification deemed applicable to the LNTP were identified to be BIO-1, BIO-3, BIO-5, and BIO-6. In the April 21, 2017 letter, AES repeatedly states that BIO-8 (Preconstruction Nest Surveys and Impact Minimization Measures for Breeding Birds) was not identified as applicable to the scope of the LNTP activities. However, BIO-8 is included in the matrix of conditions for the LNTP, and the record contains BIO-8 submittals in both May and August of 2016. Furthermore, staff does not have the authority to waive any condition of certification at its discretion. In addition, AES objected to requirements that fell outside the designated boundary of the LNTP scope of work, in other words, their contention was that several items were outside the Energy Commission's jurisdiction. The balance of the letter took issue, point by point, with the five comments from staff's (Tia Taylor's) April 13, 2017 email about the March, 2017 monthly compliance report.

In response to AES's April 21, 2017 response letter, staff provides the following clarifications related to the biological resources conditions of certification to help ensure compliance.

STAFF DETERMINATION

Per Public Resources Code section 25532, the Energy Commission shall assure that any facility it certifies is operating in compliance with conditions adopted or established by the Energy Commission, or specified in the written decision on the application. In addition, California Code of Regulations, Title 20, section 1770 states that the Energy Commission shall provide adequate monitoring of all conditions and measures set forth in the final decision required to mitigate potential impacts and to assure that the facility is constructed and operated in compliance with all applicable laws, ordinances, regulations, and standards (LORS).

Staff has reviewed all Biological Resources Conditions of Certification, as well as monitoring reports, and emails and letter correspondence from the project owner's Biological Resources personnel and AES management related to the March 23, 2017 monitoring, as well as activity performed prior to and after that date. Based on staff's review, the following items are noted for special attention.

- As per BIO-2 (per section 3 and 4 of the condition), only the Designated Biologist (DB) or a pre-approved Biological Monitor (BM) can establish buffer zones and monitor biological resources. Checking for, preventing entrapment of animals, notifying DB or BM if special-status species are observed, injured or dead, are the extent of duties someone other than the DB or an approved BM may perform. In addition please note that BIO-2, section 4, and the conditions of certification in general are written to protect biological resources (i.e., special-status plant/animal species, migrating birds, etc.), and also pertain to how the project may affect resources off of the site (i.e., impacts from noise). The Biological Resources Conditions of Certification do not necessarily have a set zone of assessment dictated by the boundary of the project site. If project activities may potentially affect a biological resource then steps should be taken to prevent or minimize the impacts. Also, as per BIO-2, section 10, all observations of all special-status species shall be reported to the California Natural Diversity Database.
- BIO-8 requires a GPS/GIS map of all active nests discovered on the site and within 300 feet of the site; nests are then assigned a number in order of discovery. Active nests are to be monitored at least once a week, and the map, as well as observations of the nests, will be recorded within the required Nest Monitoring Plan. BIO-8, section 6 requires a light-footed clapper rail habitat assessment, due as soon as possible.
- As per BIO-8, for a special-status species, if an active nest is identified, the size of each buffer zone shall be determined by the DB in consultation with the CPM (in coordination with California Department of Fish and Wildlife (CDFW) and United States Fish and Wildlife Service). The burrowing owl is a CDFW Species of Special Concern and as such is considered to be a special-status species. Although, the *2012 Staff Report on Burrowing Owl Mitigation* written by the CDFW is not a part of BIO-8 it is still the most recent appropriate reference for burrowing owl mitigation and impact minimization. According to this report, HBEP and HBGS now have active burrowing owl habitat since active habitat is defined as a site having at least one siting of a burrowing owl or its sign at or near a burrow entrance within the last three years. In light of the known burrowing owl presence, staff will be coordinating with CDFW and will contact AES if any further action is required.

Energy Commission staff will continue to work closely with AES to ensure conformance with all conditions of certification in the 2012 Amended Final Decision (the Decision). As stated in the LNTP, "...staff will continue to work closely with AES to ensure conformance with all conditions of certification as written in the Decision. Lack of conformance with any of the conditions of certification may result in suspension of demolition activities." If demolition/construction activities are occurring during the nesting season (February 1 through August 31), the requirements of BIO-8 apply.

Mr. Stephen O'Kane
June 22, 2017
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Should you have any questions or concerns, please contact Eric W. Veerkamp,
Compliance Project Manager, at (916) 654-4295 or at eric.veerkamp@energy.ca.gov.

Sincerely,

Signature on File

Christine Root
Compliance Office Manager
Siting, Transmission, and Environmental
Protection (STEP) Division

cc: Joshua Wynia, Project Manager
Shawn Pittard, Deputy Director
Eric Knight, Environmental Office Manager
Jon Hilliard, Biological Resources Unit Supervisor
Kirk Oliver, Staff Counsel, Energy Commission