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**STATE OF CALIFORNIA**

**Energy Resources Conservation  
and Development Commission**

**In the Matter of:**

**The Application for Certification for the**

**HUNTINGTON BEACH ENERGY  
PROJECT**

**Docket No. 12-AFC-02**

**AES SOUTHLAND DEVELOPMENT, LLC'S  
OPENING BRIEF AFTER EVIDENTIARY HEARINGS**

August 20, 2014

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On August 6, 2014, the Committee for the Huntington Beach Energy Project (“HBEP” or the “Project”) ordered the parties to submit Opening Briefs after Evidentiary Hearings (“Opening Brief”) on or before August 20, 2014 and any Reply Brief on or before August 25, 2014.<sup>1</sup> To that end, Applicant herein provides its Opening Brief in support of the Huntington Beach Energy Project (the “Project” or “HBEP”).

**I. COMMITTEE’S SPECIFIC QUESTIONS**

**A. The Role of the Coastal Commission in the HBEP Application for Certification Proceedings Is Governed By Section 30413(e) of the Coastal Act**

The Warren-Alquist Act provides the California Energy Commission (“CEC” or Energy Commission”) with exclusive jurisdiction regarding the siting, design, and permitting of thermal power plants in California. (Pub. Resources Code §§ 25000 *et*

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<sup>1</sup> See also August 13, 2014 Memorandum from Hearing Officer Susan Cochran to all parties setting forth the briefing schedule for this proceeding. (TN# 202912.)

seq.) Public Resources Code Section<sup>2</sup> 25500 provides:

The commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.

The licensing authority provided under Public Resources Code section 25500 supersedes all other local and state permitting authority.<sup>3</sup> (Pub. Resources Code § 25500; *see also* Bay Area Air Quality Management District, Russell City Energy Center, *Statement of Basis for Draft Amended Federal ‘Prevention of Significant Deterioration’ Permit*, Dec. 8, 2008, p. 5.) The Energy Commission’s certificate constitutes the only state, local or regional approval necessary to construct and operate a power plant, and all other such approvals are effectively subsumed within the Energy Commission permit. (*City of Morgan Hill v. Bay Area Air Quality Management District* (2004) 118 Cal.App.4th 861, 879.)

Within this exclusive jurisdiction framework, the Warren-Alquist Act and the

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<sup>2</sup> Unless otherwise noted, all references to “Section” herein pertain to the Public Resources Code.

<sup>3</sup> Although the City of Huntington Beach has a certified Local Coastal Program (“LCP”) and the proposed HBEP site is within the jurisdiction of the Coastal Commission, the Coastal Commission’s permitting authority is subject to the Energy Commission’s exclusive jurisdiction over thermal power plants. (Pub. Resources Code §§ 25500, 30600.) Were the Coastal Commission to exercise its permitting authority, it would review the project against the policies of the City of Huntington Beach’s LCP, general plan, and zoning ordinance as well as the Coastal Act. When exercising its jurisdiction, the Energy Commission conducts a similar analysis and solicits and considers the views of the agencies that would otherwise have jurisdiction over a proposed project, such as the Coastal Commission.

Coastal Act both expressly allow for Coastal Commission participation in Energy Commission proceedings involving the siting of power plants in the coastal zone. (Pub. Resources Code §§ 25507, 25508, 25519(d), 25523(b), 30314.) Specifically, in a notice of intention (“NOI”) process for new power plant sites and related facilities,<sup>4</sup> Coastal Commission participation is mandated. (Pub. Resources Code §§ 25507<sup>5</sup>, 25508<sup>6</sup>, 30413(d).) In an Application for Certification (“AFC”) proceeding, for facilities on sites previously certified through the NOI process or for power plants exempt from the NOI process, such as natural-gas fired facilities, Coastal Commission involvement is permissible, but not mandated. (Pub. Resources Code §§ 25519(d), 25523(b), 30413(e).)

Although HBEP is not an NOI proceeding, the legal framework for Coastal Commission participation in NOI proceedings is relevant to understanding the role of the Coastal Commission in non-NOI proceedings. NOI proceedings involving sites in the coastal zone require the Energy Commission to transmit a copy of the NOI to the Coastal Commission, and, in addition, the Coastal Commission “shall analyze the notice and

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<sup>4</sup> An NOI proceeding does not contain a full permitting process. As set forth in Section 25502, an NOI is “an attempt primarily to determine the suitability of the proposed sites to accommodate the facilities and to determine the general conformity of the proposed sites and related facilities with standards of the commission and assessments of need.” The NOI process culminates in a decision that fundamentally indicates which sites are feasible for a power plant of the nature proposed. (Pub. Resources Code § 25516.6.)

<sup>5</sup> “If any alternative site and related facility proposed in the notice is proposed to be located, in whole or in part, within the coastal zone, the commission shall transmit a copy of the notice to the California Coastal Commission. The California Coastal Commission shall analyze the notice and prepare the report and findings prescribed by subdivision (d) of Section 30413 prior to commencement of hearings pursuant to Section 25513.”

<sup>6</sup> “The California Coastal Commission . . . may participate in public hearings on the notice and on the application for site and related facility certification as an interested party in such proceedings.” (Emphasis added.)

prepare the report and findings prescribed by subdivision (d) of Section 30413 ....” (Pub. Resources Code § 25507(a).)

Pursuant to section 30413(d) of the Coastal Act, cited in Section 25507(a) of the Warren-Alquist Act (which solely pertains to NOI proceedings), the Coastal Commission must analyze each NOI and then provide a written report to the Energy Commission on the suitability of the proposed site and related facilities specified in the NOI. Such report shall be provided to the Energy Commission prior to the Energy Commission’s completion of the report required by Section 25510 of the Warren-Alquist Act.<sup>7</sup> In an NOI proceeding for a site in the coastal zone, the Coastal Commission’s report must contain a consideration of, and findings regarding, all of the following:

- (1) The compatibility of the proposed site and related facilities with the goal of protecting coastal resources.
- (2) The degree to which the proposed site and related facilities would conflict with other existing or planned coastal-dependent land uses at or near the site.
- (3) The potential adverse effects that the proposed site and related facilities would have on aesthetic values.
- (4) The potential adverse environmental effects on fish and wildlife and their habitats.
- (5) The conformance of the proposed site and related facilities with certified local coastal programs in those jurisdictions which would be affected by any such development.
- (6) The degree to which the proposed site and related facilities could reasonably be modified so as to mitigate potential adverse effects on coastal resources, minimize conflict with existing or planned coastal-dependent uses at or near the site, and promote the policies of this division.

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<sup>7</sup> Section 25510 is only relevant to NOI proceedings as it provides the timeline within which the CEC shall issue to the public a summary and hearing order on an NOI to file an application.

(7) Such other matters as the commission deems appropriate and necessary to carry out this division.

(Pub. Resources Code § 30413(d).)

For a natural gas-fired power plant like the proposed HBEP, however, an Applicant is statutorily exempt from filing an NOI prior to filing an AFC (referred to as “AFC-only proceeding”). (Pub. Resources Code § 25540.6(a)(1).) In AFC-only proceedings, the Energy Commission must transmit a copy of the AFC to the Coastal Commission for its review and comment where a facility is proposed in the coastal zone.

(Pub. Resources Code § 25519(d).<sup>8</sup>) In contrast to NOI proceedings, however, for all non-NOI proceedings, the Coastal Act simply directs that the Coastal Commission

may, at its discretion, participate fully in other proceedings conducted by the State Energy Resources Conservation and Development Commission pursuant to its powerplant siting authority. In the event the commission participates in any public hearings held by the State Energy Resources Conservation and Development Commission, it shall be afforded full opportunity to present evidence and examine and cross-examine witnesses.

(Pub. Resources Code § 30413(e) (emphasis added).) Thus, for non-NOI proceedings, such as the HBEP AFC proceeding, the Coastal Commission has discretion to participate in the proceeding, but is not required to participate. Accordingly, the Coastal Commission *may* prepare and provide to the Energy Commission a report or other assessment of a proposed facility’s conformity with the Coastal Act, pursuant to Public Resources Code section 30413(e), in the same manner as other participants in the proceeding. Section 25507(a), which requires the Coastal Commission to prepare a

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<sup>8</sup> Section 25519(d) provides that “[i]f the site and related facility specified in the application is proposed to be located in the coastal zone, the commission shall transmit a copy of the [AFC] to the California Coastal Commission for its review and comments.” (Emphasis added.)

report pursuant to Section 30413(d), is not triggered in non-NOI proceedings. Rather, Coastal Commission participation in non-NOI proceedings is governed by Sections 25519(d) and 30413(e).

As further evidence in support of Applicant's arguments set forth herein, on August 2, 2004, the Legislative Counsel provided an opinion stating that the plain language of Section 30413(d) applies only to NOI proceedings. (*See* Exhibit 1133 (Attachment A pp. 6-7).) Specifically, the Legislative Counsel determined that "the report made by the Coastal Commission pursuant to subdivision (d) of Section 30413 is submitted only in response to a NOI, and the AFC-only procedure does not include a NOI proceeding." The Legislative Counsel concluded that "the statutory requirement that the Energy Commission include such specific provisions in its decision on an AFC . . . is inapplicable in an AFC-only procedure established under Section 25540.6." (*Id.* at p. 7 (emphasis added); *see also id.* at Exhibit B attached thereto).<sup>9</sup>)

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<sup>9</sup> As recently as July 2012, in a brief filed with the California Supreme Court (*City of Carlsbad v. California Energy Resources and Development Commission, et al.* (Case No. S203634), the CEC Chief Counsel argued that 30413(d) reports are not relevant in AFC-only proceedings. (*See* Applicant's Exhibit 1133 (Attachment A, Exhibit B at pp. 16-20; specifically, CEC's July 9, 2012 Preliminary Opposition for Writ of Mandate and Related Appendix).) As further support to that argument, the CEC relied on a 1990 document filed by the Coastal Commission in an NOI proceeding wherein the Coastal Commission also noted that its role in AFC-only proceedings is dictated by Section 30413(e):

The Coastal Commission's role with respect to the AFC . . . would be similar to that discussed above with respect to the NOI [Fn. omitted.] The major difference is that the Coastal Commission is not required to submit a report to the Energy Commission. The Coastal Commission is nevertheless authorized, "at its discretion, to participate fully" in the proceeding pursuant to section 30413(e).



Lastly, the 2005 Memorandum of Agreement (“Memorandum”) between the Energy Commission and the Coastal Commission is not dispositive of the Coastal Commission’s legal obligations. The Memorandum provides that the Energy Commission and the Coastal Commission believe it is useful “to ensure a shared understanding of their respective roles and responsibilities during the AFC review, to maintain clear communication and expectations between the two Commissions and their staffs, and to assure that the reviews and analyses necessary during an AFC review are completed in a thorough and timely manner.” (See Memorandum at p. 3.) The Commissions’ outline of their “respective roles and responsibilities” in the Memorandum does not, and cannot, change statutory requirements. As discussed above, the obligations of the Coastal Commission with respect to an AFC are clear under the plain language of the Coastal Act.

The intentions of the agencies for Coastal Commission participation in AFC proceedings set forth in the Memorandum do not negate the direction provided to the Coastal Commission in the Coastal Act. The entire lawmaking authority of the State of California is vested in the legislature. (*County of Sonoma v. Comm’n on State Mandates* (2000) 84 Cal.App.4th 1264, 1280.) As administrative agencies, the limits of the Coastal Commission’s and the Energy Commission’s powers and authority are defined in their

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(See Applicant’s Exhibit 1133 (Exhibit 4 to the CEC’s July 9, 2012 Appendix to Preliminary Opposition to Petition for Writ of Mandate; specifically Memorandum of Deputy Chief Counsel Dorothy Dickey to Commissioner David Malcolm (May 23, 1990), pp. 3-4.) Regarding the NOI process, the Coastal Commission’s 1990 correspondence correctly stated that “the Energy Commission will consider (but will not be not bound by) the Coastal Commission’s recommendations” in an NOI process. (*Id.* p. 3.) Thus, the same is true for an AFC-only proceeding: the Energy Commission shall consider the input of the Coastal Commission but is not bound by the Coastal Commission’s recommendations.

enabling statutes, and as administrative agencies, they cannot “expand or enlarge [their] power in the absence of either express or implied legislative authority.” (*Am. Fed’n of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1041; *20th Century Ins. Co. v. Quackenbush* (1998) 64 Cal.App.4th 135, 139 (“An administrative agency or official may exercise only those powers conferred by statute.”).)

Nor can administrative agencies “engage in rulemaking, including interpreting and implementing a statute, through informal procedures such as oral announcements, internal memoranda, or written and oral correspondence with affected parties.” (*B.C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 951.) Where a statute does not appear to have the meaning informally assigned to it by the decision making body of an administrative agency and the agency’s director, and the statute has not been interpreted and implemented through an appropriate administrative rulemaking process, the agency may not give the statute a meaning that is not apparent from its terms and statutory setting by engaging in informal, ad hoc decision making. (*Id.* at p. 952.)

Even assuming that the Memorandum requires the Coastal Commission or the Energy Commission’s informal interpretations of their implementing statutes be given some consideration, agency interpretations must be rejected where contrary to statutory intent (*Pacific Legal Found. v. Unemployment Ins. App. Bd.* (1981) 29 Cal.3d 101, 111) or when the proposed interpretation ignores the plain meaning of the statute (*Indian Springs v. Palm Desert Rent Review Bd.* (1987) 193 Cal.App.3d 127, 134, 135) (emphasis added).) The Memorandum does not change existing statutory law, or create new statutory duties. The Energy Commission has sought to encourage Coastal Commission participation in proceedings for coastal facilities, both by proposing and

signing the Memorandum, and by directly requesting participation, but these acts in no way legally bind the Energy Commission to treat a “Report” in an AFC-only proceeding differently than contemplated by the Warren-Alquist Act.

The Coastal Commission’s role in the HBEP AFC proceeding is as an interested agency that has the ability to participate and provide comments pursuant to Section 25519(b) of the Warren-Alquist Act and Section 30413(e) of the Coastal Act.

**B. The Committee Should Treat the Coastal Commission “Report” As Comments Filed Pursuant to Section 30413(e)**

During the HBEP Continued Evidentiary Hearing on August 6, 2014 (“Continued Hearing”), the Committee asked the parties to respond to the following question: If the Coastal Commission is not required to issue a formal report, how should the Committee treat the Coastal Commission report? As noted in Applicant’s Prehearing Conference Statement and as explained in Part I.A, *supra*, the “Report” submitted by the Coastal Commission should be treated by the Committee simply as comments filed by an interested agency.<sup>10</sup> Section 25523(b) of the Warren Alquist Act governs the Energy Commission’s treatment of a 30413(d) report. Since a 30413(d) report is not applicable to AFC-only proceedings, the findings required by Section 25523(b) are also not applicable. Significantly, unlike Section 30413(d), there are no specific requirements governing how the Energy Commission should treat a “report” or comments submitted pursuant to Section 30413(e), if one is prepared, other than as “comments” allowed by

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<sup>10</sup> Regardless, Applicant fully addressed each of the Coastal Commission’s recommendations, with reference to evidence and supporting documentation, in Applicant’s Rebuttal Testimony. (Exhibit 1137, pp. 15-30.)

Sections 25519(d) and 30413(e).<sup>11</sup>

As noted above, Applicant acknowledges that the Coastal Commission may choose to participate in the HBEP AFC proceedings. (*See* Pub. Resources Code § 30413(e).) However, such participation is governed by Public Resources Code Section 30413(e), not Section 30413(d). Here, the Coastal Commission mistakenly assumed that since it chose to participate in the HBEP AFC proceedings before the CEC, the requirements of Section 30413(d) apply. As explained herein, that is not the case. (*See* FN9, *supra*; *see generally* Part I.A, *supra*.) In an AFC-only proceeding, it is clear that the Energy Commission shall consider the input of the Coastal Commission but is not bound by the Coastal Commission's recommendations. Therefore, regardless of the title of the Coastal Commission's comments, any comments or "report" provided by the Coastal Commission in the HBEP AFC proceedings should be treated as participation by the Coastal Commission pursuant to Section 30413(e) and not as an official "report" as defined in Section 30413(d).<sup>12</sup>

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<sup>11</sup> Applicant has stated throughout the HBEP AFC proceeding that any involvement by the Coastal Commission is pursuant to 30413(e). (*See, e.g.*, Exhibits 1010, 1087, 1132, and 1133.) *See also* Section 25519(b).

<sup>12</sup> Moreover the Coastal Commission "Report" fails on its face to meet the express statutory requirements of Section 30413(d). For reports filed in accordance by Section 30413(d) (in NOI proceedings), the report shall contain a consideration of, and findings regarding, all of the following: (1) The compatibility of the proposed site and related facilities with the goal of protecting coastal resources; (2) The degree to which the proposed site and related facilities would conflict with other existing or planned coastal-dependent land uses at or near the site; (3) The potential adverse effects that the proposed site and related facilities would have on aesthetic values; (4) The potential adverse environmental effects on fish and wildlife and their habitats; (5) The conformance of the proposed site and related facilities with certified local coastal programs in those jurisdictions which would be affected by any such development; (6) The degree to which the proposed site and related facilities could reasonably be modified so as to mitigate potential adverse effects on coastal resources, minimize conflict with existing or planned

Based on the foregoing, Applicant reiterates that the Coastal Commission’s “report” should be treated as “comments” submitted by an interested agency, as contemplated by Section 25519(b) of the Warren-Alquist Act and Section 30413(e) of the Coastal Act. Because the “report” is not a 30413(d) report, the Energy Commission is not required to make the findings set forth in Section 25523(b). Further, as Applicant previously indicated in Applicant’s Rebuttal testimony (Exhibit 1137 at pp. 15-30), the comments and recommendations submitted by the Coastal Commission are not supported by evidence in the evidentiary record for the HBEP AFC proceeding and, thus, should be rejected.

## **II. OTHER TOPICS APPLICANT BELIEVES ARE RELEVANT**

### **A. Coastal Commission Review and Comment Regarding Visual Resources Plans Is Contrary to Law**

As discussed above, the HBEP site is within the exclusive jurisdiction of the Energy Commission and the Coastal Commission’s authority is subject to the Energy Commission’s jurisdiction over power plants. (Pub. Resources Code §§ 25500, 30600.) Were the Coastal Commission to exercise its permitting authority, it would review the project against the policies of the City of Huntington Beach’s Local Coastal Program, General Plan, and zoning ordinance as well as the Coastal Act. The Energy Commission,

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coastal-dependent uses at or near the site, and promote the policies of this division; and (7) Such other matters as the commission deems appropriate and necessary to carry out this division. (Pub. Resources Code § 30413(d).) Here, the Coastal Commission “Report” clearly does not meet the express statutory requirements of 30413(d) as it fails to consider, let alone provide findings regarding, at a minimum, “the degree to which the proposed site and related facilities would conflict with other existing or planned coastal-dependent land uses at or near the site” and “the potential adverse effects that the proposed site and related facilities would have on aesthetic values.” In fact, the “Report” is narrowly focused on only five areas: (1) land use and alternatives; (2) ESHA and wetlands; (3) flood, tsunami, and sea level rise; (4) geologic hazards; and (5) public access to the shoreline.

when exercising its jurisdiction, conducts a similar analysis and solicits and considers the views of the agencies that would otherwise have jurisdiction over a proposed project, including the Coastal Commission, during this permitting process. Ultimately, the Energy Commission is charged with making its independent determination regarding project compliance with the Coastal Act and other LORS during review of the AFC. Additional, post-approval review and comment by the Coastal Commission is contrary to law and therefore is not permissible.

Because the Energy Commission has exclusive jurisdiction over HBEP and the Warren-Alquist Act and Coastal Act clearly define the role of the Coastal Commission in AFC proceedings, all references to the Coastal Commission should be removed from the Visual Resources Conditions of Certification. (*See* Attachment A hereto.)

**B. HBEP Complies with Land Use LORS, including the Coastal Act and the City's LCP**

Contrary to assertions by Intervenor Rudman in her Opening Testimony (Exhibit 4013), HBEP is in compliance with all land use LORS, including the City's Local Coastal Program and the Coastal Act. (*See* Exhibit 2000 (Final Staff Assessment ("FSA")) at p. 4.5-15). Ms. Rudman mischaracterizes the City's General Plan by asserting that because HBEP is not a coastal dependent energy facility, it is not allowed pursuant to the General Plan. In fact, the Coastal Element of the City's General Plan includes Policy C 1.1.2, which states that "coastal dependent developments shall have priority over other developments on or near the shoreline." (Emphasis added.)

Further, the Coastal Act assures "priority for coastal-dependent and coastal-related development over other development on the coast," but does not preclude the development of non-coastal dependent uses within the coastal zone. (Pub. Resources

Code §§ 30001.5, 30255.) Coastal Act policies underscore the permissible development of both coastal dependent industrial uses and other industrial uses within the coastal zone.

The Legislature further finds and declares that notwithstanding the fact electrical generating facilities, refineries, and coastal-dependent developments, including ports and commercial fishing facilities, offshore petroleum and gas development, and liquefied natural gas facilities, may have significant adverse effects on coastal resources and coastal access, it may be necessary to locate such development in the coastal zone in order to ensure that inland as well as coastal resources are preserved and that orderly economic development proceeds within the state.

(*Id.* at § 30001.2 (emphasis added).) No provision of the Coastal Act or the City's General Plan requires new or expanded development in the coastal zone to be coastal dependent. While coastal dependency may allow for development priority over other facilities, it is not a prerequisite to siting within the coastal zone. Thus, HBEP complies with the LCP and the Coastal Act.

### **C. Comments on Staff's Revised Conditions**

#### **1. Biological Resources**

Applicant proposes revisions to various Biological Resources Conditions proposed by Staff for the following reasons. Federally-listed special-status species have not been documented within the HBEP site; therefore, consultation with the United States Fish & Wildlife Service ("USFWS") should not be required. In addition, the only special-status species that has been documented in the Magnolia Marsh is Belding's savannah sparrow (*Passerculus sandwichensis beldingi*), which is a state-listed species. As stated on page 4.2-48 of the FSA (Exhibit 2000), "take is defined differently under CESA and project-related disturbance and noise would not constitute take. Take is defined in Section 86 of the Fish and Game Code as 'hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill,' but does not include indirect effects

such as harassment.” (*See also* Exhibit 1090 at p. 6; *see also* Exhibit 1132 at Exhibit C-1.) Therefore, there will be no construction noise-related impacts to, or take of, state-listed species and consultation with the California Department of Fish & Wildlife (“CDFW”) should not be required.

Regarding federally-listed species, particularly the light-footed clapper rail (*Rallus longirostris levipes*), Applicant has provided a lengthy record<sup>13</sup> discussing the habitat preferences of this species, habitat assessment of the Magnolia Marsh, the challenges associated with marsh restoration, and the current distribution of the species. Based on the evidence submitted, this species has not been documented within the Magnolia Marsh and all impacts Staff have associated with this species are speculative. Since the HBEP is not expected to significantly impact federally-listed species-status species, USFWS does not have jurisdiction. If federally-listed special-status species are documented breeding within the Magnolia Marsh during the HBEP construction or during demolition of HBGS Units 1 and 2, the CPM will be notified and the project owner will coordinate with USFWS as required. If state-listed special-status species are documented breeding within the HBEP site during HBEP construction or during demolition of HBGS Units 1 and 2, the CPM will be notified and the project owner will coordinate with CDFW.

As stated on page 4.2-55 in the FSA (Exhibit 2000), there are no significant impacts to Biological Resources related to HBEP operations. Therefore, any mitigation associated with operations and/or closure is not warranted and should not be required. (See Applicant’s revisions to BIO-1 through BIO-8 in Attachment A hereto.)

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<sup>13</sup> *See, e.g.*, Exhibits 1001, 1017, 1052, 1087, 1090, and 1132 (Exhibit C thereto).)



In addition to the foregoing, and as stated in Applicant's Opening testimony (Exhibit 1132), Applicant proposes to delete BIO-9 in its entirety. No noise sensitive species have been identified in the marshes adjacent to the Project. On the contrary, species that inhabit these urban marshes are more tolerant than species that are not able to reside within areas with so much human influence. The marsh complex is adjacent to both an existing power plant and a highway, historic uses that have been present for over 50 years. The adjacent marsh complex is man-made, recently restoring habitat that had been severely degraded for decades. Staff has not demonstrated that exceedances of any of the proposed metrics (Lmax, Leq) or time periods (hourly, 1-second, etc.) present a risk of significant impact to the species that inhabit the area, nor have Staff addressed the possibility that any bird that was disturbed could move to other habitat, further away from the border of the site. Applicant has offered clear noise criteria that would trigger clear actions and Staff has not identified that exceedance of Applicant's proposed criteria would result in significant noise impacts to sensitive species. (Exhibit 1105).

Moreover, Staff has not clarified their concerns related to noise at the adjacent marsh nor demonstrated that the substantial effort required to meet an arbitrary sound level over an arbitrary duration with numerous measurement and reporting requirements is warranted. The record does not support Staff's proposed Condition of Certification BIO-9. Moreover, Condition of Certification BIO-8, as modified in Applicant's revisions to BIO-8 (set forth in Attachment A hereto), includes numerous actions to minimize any actual adverse impact on wildlife. Dr. Dooling's opening testimony (Exhibit 1132,

Exhibit C-3) explains in more detail that 60 dBA “would register less than 50 and perhaps approaching even 40 dB” on a bird scale.<sup>14</sup>

Despite the lack of evidence to support imposing BIO-9, as an alternative to deleting BIO-9, Applicant has proposed several revisions to BIO-9 to assist Staff in drafting a reasonable condition that is workable.<sup>15</sup> Staff noted at the April 3, 2014 PSA Part B Workshop that their primary concern was pile driving and that the existing wildlife have adapted or habituated to the less than pristine acoustical environment (an area adjacent to an existing power plant and a highway). (Exhibit 1090; *see also* WebEx Recording of the April 3, 2014 Public Workshop on the Preliminary Staff Assessment, Part B at 01:07:00 to 01:08:00.) Staff also indicated that they understood the variability in both existing and construction noise and that their goal was to address sustained, continuous or semi-continuous, activities occurring over a longer duration and have the “Applicant and the CPM work together” (TN# 202838 at p. 176, line 25) as well as establish a “reporting level for noise in the marsh comparable to what residents might have in the nearby area.” (*Id.* at p. 177, lines 8-9.) Thus far, Staff’s multi-page proposed BIO-9 far exceeds how noise at nearby residences is addressed, even though it is acknowledged that birds hearing is less sensitive than humans and the “A-scale of sound is perhaps not the appropriate to birds.” (*Id.* at 175, lines 17-18.)

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<sup>14</sup> In addition, Applicant offers the following correction to the transcript of Dr. Dooling’s testimony from the July 21 Evidentiary Hearing. (July 21 Evidentiary Hearing Transcript, TN# 202838, at p.178, lines 12-16) “... you know what would happen if we did have a bird scale. It would reduce the sound pressure level by about ~~a~~ 10 DB or so because birds hear much less well at low frequencies than humans do.” And Page 178 at 22-23: “A 60 DBA sound would be about the same as 45 to 50 DBA for a bird.”

<sup>15</sup> Applicant notes that the version of BIO-9 proposed in Attachment A hereto differs from Applicant’s proposed BIO-9 included in Applicant’s Opening Testimony (Exhibit 1132). Applicant is amenable to either version of proposed BIO-9.

Moreover, the proposed establishment of an additional monitoring location in addition to those already part of this AFC proceeding is not warranted because data was collected in close proximity to the additional area proposed by Staff, there are no identified species of concern or suitable habitat in the area, and in the over two years this proceeding has been on-going, this is the first time Staff requested monitoring in this additional location. Moreover, calculations or construction noise estimates are already part of this AFC proceeding and the need for supplemental submittals has not been established. The very short timeline for analysis and reporting proposed in Staff's revised BIO-9 is also not supported by the record, nor is Staff's proposed reporting requirement to multiple agencies supported by the evidence in this proceeding. All of these factors result in an onerous and complicated condition that does not meet the goal of trying to work together to minimize noise by implementing best management practices, as needed. Rather, Staff's proposed condition requires extensive planning, monitoring, analysis and near-immediate reporting even though no bird may be in the area or those that are present may show no signs of disturbance or distress. Given the lack of evidence establishing a potentially significant impact and lack of science supporting the proposed threshold/action level, the record simply does not support BIO-9.

While Staff stated during the July 21 Evidentiary Hearing that their "recommended revisions to BIO-9 is going to look a fair amount like Applicant's recommend revisions" (TN# 202838 at p. 87, lines 4-7), the multi-page condition, though improved, varies substantially from Applicant's proposals. While the Applicant reiterates that the record does not support the need for a BIO-9 condition, particularly given the level of protection afforded by BIO-8 and the power vested in the CPM to address any

actual harm, should the Committee find a BIO-9 is necessary, the Applicant offers a revised proposed BIO-9 as set forth in Attachment A hereto.<sup>16</sup>

## **2. Cultural Resources**

Applicant has reviewed Staff's revised Conditions and although Applicant is amenable to the changes that Staff has made to the third paragraph of CUL-1 regarding "noncompliance of a CRS," Applicant, however, requests a few additional proposed revisions to CUL-1 related to the appropriate qualifications of a CRS.

CUL-1 contains language regarding the mandatory qualifications for a CRS beyond those required by federal regulations. Specifically, Staff's additional qualification requirements (see pp. 45 Items 1-4) provide yet another opportunity for subjective interpretation in that they far exceed the simple and historical use of the baseline qualification by the CEC- that is, that a CRS meet the Secretary of Interior standards. Moreover, Item 2 of the CUL-1 Verification requires that the project owner provide the CPM with a résumé for a proposed replacement CRS at least 10 day prior to termination or release of the existing CRS. If termination or release of a CRS is warranted, it may not involve much, if any, advance notice. For example, if the project owner observes an unsafe work practice or a violation of a health and safety LORS, termination or removal of a CRS may occur without advance planning. In such instance, the project owner would not have prior knowledge of such circumstances and, thus, would not have provided the CPM with a résumé for a new CRS at least 10 days prior to such termination or removal. Therefore, the advance 10-day notice requirement prior to

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<sup>16</sup> *See also* FN15, *supra*.

termination or removal of a CRS will be impossible to meet. Applicant has proposed revisions to CUL-1 to address such concerns.

Applicant also proposes a revised Condition of Certification CUL-6 to tailor the condition to the circumstances involved at the HBEP site. Such changes include removing the requirement to have the continuous presence of a Native American Monitor and regulating archeological monitoring, as such is done in other Energy Commission projects.

As previously stated (*see* Exhibits 1132 (and Exhibit D attached thereto), 1087, and 1090) and as discussed at length during the July 21 Evidentiary Hearing (TN# 202838 at pp. 238-251), Applicant objects to Staff's proposed CUL-6 in its entirety. As documented in the records for this proceeding, no historical resources of any kind were found as a result of the comprehensive cultural resources analysis conducted for HBEP, nor were resources found during prior geotechnical testing or during any phase of previous construction. Additionally, no Native American sacred sites or areas of concern are located within or near the HBEP site and no individual, group, or tribe indicated such resources exist at HBEP.

As the Committee is aware, the HBEP project site is highly disturbed from decades of development and use. This highly disturbed condition is undisputed and has been described by the Applicant in multiple filings to-date. (*See* Exhibits 1017, 1087, 1090, 1111, 1132 at Exhibit D); *see also* TN #202838 at pp. 216- 251.)

As previously stated, the Applicant continues to assert that a portion of the HBEP Block 2 foundation slab, measuring approximately 50 feet by 130 feet, is the primary component of the Project that has potential to impact previously undisturbed soils.

Planned excavations in this small area are expected to be up to nine feet deep. Up to six inches of soil at the bottom of these excavations could possibly intrude into undisturbed soils, however, this six inches lies beneath the eight to nine feet of overburden of disturbed soil and artificial fill, so that less than five percent of the total volume of soil that will be impacted is theoretically undisturbed. In addition, as discussed above, based on previous construction of the existing Huntington Beach Generating Station, the 5 percent of soil has a very low potential of containing historical resources. Moreover, Staff concluded, and the Applicant agrees, that “The likelihood that the proposed project would actually result in significant impacts to buried archaeological resources appears low.” (TN# 202838 at p. 237, lines 23-25; Exhibit 2000 at p. 4.3-50.)

In practical and simple terms, the net result of the analysis is that archaeological sensitivity in this location is low and the project’s potential to affect undisturbed native soils having potential to impact buried archaeological resources is also low.

For a site such as HBEP, and for sites with similar low potential for impacting historic resources, the CEC, through the licensing of numerous projects, has determined the preparation of a Cultural Resources Mitigation and Monitoring Plan (“CRMMP”) with discovery plans and implementation of a Worker Environmental Awareness Program (“WEAP”) is appropriate, adequate and commensurate mitigation; therefore, for HBEP the preparation of a CRMMP and WEAP for HBEP is the appropriate mitigation.

Based on the foregoing, Applicant proposes a new CUL-6 in lieu of CUL-6 as proposed by Staff. (*See* Attachment A hereto.)

### **3. Hazardous Materials Handling**

As Applicant noted during the August 6 Continued Hearing, Applicant concurs

with Staff's proposed revisions to HAZ-6. (TN# 202915 at p. 20, lines 14-17.)

#### **4. Land Use**

As Applicant noted during the August 6 Continued Hearing, Applicant concurs with Staff's proposed revisions to LAND-1. (TN# 202915 at pp. 24-25.)

#### **5. Noise**

Applicant generally concurs with Staff's proposed NOISE conditions. However, Applicant has two minor comments regarding NOISE-4 (noting a typographical error) and NOISE-6 (language that is duplicative of both NOISE-1 and NOISE-8). These changes are noted in Attachment A hereto.

#### **6. Soil & Water Resources**

Applicant has reviewed Staff's revised Conditions regarding Soil and Water Resources and reiterates its previous comments regarding SOIL&WATER-4, which noted a reference to an incorrect NPDES permit number.

In addition, and for the first time in this proceeding (and just two days before the evidentiary hearing on water resources), Staff has proposed a condition related to construction dewatering. As stated in Applicant's response to Energy Commission Staff's Data Request #32 (Exhibit 1017), the small excavation areas and shallow depths indicate that any required dewatering is likely to be small in volume and potentially unmeasurable given other, much larger, water sources that help sustain the adjacent marshes. Moreover, Staff has not identified a significant impact that requires such a condition. Thus, Applicant does not believe that a dewatering condition is necessary. However, if the Committee determines that such a condition is warranted, Applicant

proposes such condition be revised to clarify and streamline the plan and review process. Applicant's proposed revisions are set forth in Attachment A hereto.

## **7. Visual Resources**

In addition to Applicant's comments in Part II.A., *supra*, Applicant has the following additional comments on Staff's revised Visual Resources Conditions of Certification. Staff has requested five plans in the Visual Resources Conditions:

1. Visual Screening and Enhancement Plan for Project Structures (VIS-1)
2. Perimeter Screening and On-Site Landscape and Irrigation Plan (VIS-2)
3. Long Term Construction Screening, Landscape Protection and Site Restoration Plan (VIS-3)
4. Long-term Lighting Plan (VIS-4)
5. Lighting Management Plan (VIS-5)

Applicant proposes various revisions to the Visual Resources Conditions of Certification in Attachment A hereto. All of the conditions should have similar schedules as the project owner may determine it best to submit a single plan that covers all of these elements and thus meet the requirements of each of the conditions. Applicant also notes that various visual conditions require revisions such that they do not contradict the requirements of GEN-2 and the timing of the engineering design.

Further, as drafted, the Conditions prohibit the project owner from ordering or otherwise committing to various items. Just as the risk of permitting for a project such as HBEP is borne by the Applicant, including the ordering of turbines and other project-related equipment prior to receipt of the CEC license, any risk related to the ordering of visual-related items shall also be borne by the project owner post-licensing. Thus, Applicant has deleted all such prohibitions from the Visual Resources Conditions of Certification.



Applicant also proposes an additional change to the text of VIS-3 related to the construction of the masonry wall. As proposed, VIS-3 requires that construction screening remain in place while the 8-foot tall masonry wall is being constructed. As the masonry wall will be erected on the site boundary, it is impossible to also have construction screening present during construction of the wall. Therefore, Applicant suggests that VIS-3 be modified such that the CPM will allow the removal of construction screening fencing from the portions of the site boundary where the masonry wall will be constructed prior to commencement of construction of the masonry wall - not after installation of the masonry wall, as VIS-3 currently requires.

In addition, as currently drafted, the Conditions require that all of the plans be provided to the City for review and comment. Previously, Staff required that the plans also had to be provided to the Coastal Commission for review and comment. In the Revised Conditions, Staff struck all references to the Coastal Commission from Conditions VIS-3 and VIS-5, but arbitrarily left the references to the Coastal Commission in VIS-1 and VIS-2. For the reasons set forth above, all references to the Coastal Commission should be deleted from the Visual Resources Conditions of Certification.

## **8. Waste Management**

As Applicant noted during the August 6 Continued Hearing, Applicant concurs with Staff's proposed revisions to WASTE-1 and WASTE-2. (TN# 202915 at p. 20, lines 14-17.)

## **9. Compliance Conditions**

As discussed during the August 6 Continued Hearing, Staff agreed to Applicant's proposed changes to COM-15, set forth in Attachment A hereto. (TN# 202915 at pp. 92-

94.) Further, Staff agreed to allow Applicant forty-eight hours to provide the CPM with a copy of an incident report as specified in COM-13. (*Id.* at p. 83.) Lastly, while Staff did not expressly agree to Applicant's proposed change to COM-13 related to the time within which an incident report must be prepared (six business days instead of one week), Staff counsel explained to the Committee that they had no objection to the change. (TN# 202915 at p. 83.) The specific changes and the reasoning behind such changes to COM-13 and COM-15 are set forth in Exhibit 1132 (*see, specifically*, Exhibit L attached thereto). Further, the specific changes are also set forth in Attachment A hereto.

### **III. CONCLUSION**

Applicant believes that the Committee has all the information needed to prepare a Presiding Member's Proposed Decision recommending approval of the HBEP. Furthermore, Applicant is confident that the record in this proceeding sets forth a comprehensive environmental analysis of the proposed Project and allows the full Commission to make a favorable decision.

Date: August 20, 2014

Stoel Rives LLP



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AES SOUTHLAND DEVELOPMENT, LLC

**ATTACHMENT A**  
*APPLICANT'S OPENING BRIEF AFTER EVIDENTIARY HEARING*

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**ATTACHMENT A TO APPLICANT'S OPENING BRIEF AFTER EVIDENTIARY  
HEARINGS**

Applicant has only included the portions of those conditions below to which Applicant proposes revisions from Staff's proposed conditions docketed on August 4, 2014 (Exhibit 2003).

**BIOLOGICAL RESOURCES**

**BIO-1** The project owner shall assign at least one Designated Biologist to the project. The project owner shall submit the resume of the proposed Designated Biologist, with at least three references and contact information, to the Energy Commission Compliance Project Manager (CPM) for approval ~~in consultation with CDFW and USFWS.~~

The Designated Biologist must meet the following minimum qualifications:

1. Bachelor's degree in biological sciences, zoology, botany, ecology, or a closely related field;
2. Three years of experience in field biology or current certification of a nationally recognized biological society, such as The Ecological Society of America or The Wildlife Society; and
3. At least one year of field experience with biological resources found in or near the project area.

In lieu of the above requirements, the resume shall demonstrate to the satisfaction of the CPM, ~~in consultation with CDFW and USFWS,~~ that the proposed Designated Biologist or alternate has the appropriate training and background to effectively implement the conditions of certification.

**Verification:** The project owner shall submit the specified information at least ~~75~~ **60** days prior to the start of site mobilization or construction-related ground disturbance activities. No pre-construction site mobilization or construction related activities shall commence until a Designated Biologist has been approved by the CPM, ~~in consultation with CDFW and USFWS.~~

If a Designated Biologist is replaced, the specified information of the proposed replacement must be submitted to the CPM **as soon as practicable** ~~at least ten working days prior to the termination or release of the preceding Designated Biologist.~~ In an emergency, the project owner shall immediately notify the CPM to discuss the qualifications and approval of a short-term replacement while a permanent Designated Biologist is proposed to the CPM for consideration.

**BIO-2** The project owner shall ensure that the Designated Biologist performs the following during any site (or related facilities) mobilization, ground disturbance, grading, **demolition, and construction, activities as needed.** ~~At the direction of the CPM in consultation with CDFW and USFWS, the project owner may terminate the Designated Biologist's function during plant operation. However, the project owner shall appoint a replacement Designated Biologist at any time as directed by the CPM, and will ensure the same duties are~~

~~performed during closure and restoration activities. If no Designated Biologist is available at any time during the life of the project (including operation phase) and the CPM determines that project-related actions may affect biological resources, the CPM may direct the project owner to assign a Biological Monitor or replacement Designated Biologist, for short-term or long-term monitoring and reporting.~~ The Designated Biologist may be assisted by the approved Biological Monitor(s) but remains the contact for the project owner and CPM. The Designated Biologist Duties shall include the following:

1. Advise the project owner's Construction ~~and Operation~~ Managers on the implementation of the biological resources conditions of certification;
2. Consult on the preparation of the Biological Resources Mitigation Implementation and Monitoring Plan (BRMIMP) to be submitted by the project owner;
3. Be available to supervise, conduct and coordinate mitigation, monitoring, and other biological resources compliance efforts, particularly in areas requiring avoidance or containing sensitive biological resources, such as special status species or their habitat;
4. Clearly mark sensitive biological resource areas and inspect these areas at appropriate intervals for compliance with regulatory terms and conditions;
5. Inspect or direct the site personnel how to inspect active construction areas where animals may have become trapped prior to construction commencing each day. Inspect or direct the site personnel how to inspect the installation of structures that prevent entrapment or allow escape during periods of construction inactivity. Periodically inspect areas with high vehicle activity (e.g., parking lots) for animals in harm's way. Inspect soil or spoil stockpiles and dust abatement watering for compliance with Condition of Certification BIO-7. Inspect erosion control materials (e.g., hay bales) to confirm weed-free certification. Inspect weed infestations and monitor eradication measures to determine success. Inspect trash receptacles, monitor site personnel compliance with trash handling, pet prohibitions, and all other WEAP components (Condition of Certification BIO-5);
6. Notify the project owner and the CPM of any non-compliance with any biological resources condition of certification;
7. Respond directly to inquiries of the CPM regarding biological resource issues;
8. Maintain written records of the tasks specified above and those included in the BRMIMP. ~~Summaries of these records shall be submitted in the monthly compliance report and the annual compliance report;~~
9. Train the Biological Monitors as appropriate, and ensure their familiarity with the BRMIMP, Worker Environmental Awareness Program (WEAP) training, and all permits; and
10. Maintain the ability to be in ~~regular~~, direct communication with representatives of CDFW, USFWS, and CPM as required, including notifying these agencies of dead or injured listed species and reporting

special status species observations to the California Natural Diversity Database.

**Verification: The Designated Biologist will notify the CPM of any non-compliance or special-status species injury or mortality within one (1) working day of the incident.** The Designated Biologist shall submit in the monthly compliance report to the CPM copies of all written reports and summaries that document construction activities that have the potential to affect biological resources. **The Designated Biologist's written records will be made available for the CPM's inspection on request at any time during normal business hours.** ~~If actions may affect biological resources during operation the Biological Monitor(s), under the supervision of the Designated Biologist, shall be available for monitoring and reporting. During project operation, the Designated Biologist(s) shall submit record summaries in the annual compliance report unless their duties cease, as approved by the CPM.~~

**BIO-4** The project owner's construction/~~operation~~ manager shall act on the advice of the Designated Biologist and Biological Monitor(s) to ensure conformance with the biological resources conditions of certification.

If required by the Designated Biologist ~~and~~ **or** Biological Monitor(s) the project owner's construction/~~operation~~ manager shall halt all site mobilization, ground disturbance, grading, construction, and operation activities in areas specified by the Designated Biologist. The Designated Biologist shall:

1. Require a halt to all activities in any area when determined that there would be an unauthorized adverse impact to biological resources if the activities continued;
2. Inform the project owner and the construction/~~operation~~ manager when to resume activities; **and**
3. Notify the CPM if there is a halt of any activities and advise the CPM of any corrective actions that have been taken or would be instituted as a result of the work stoppage. **and**
4. ~~**The CPM, in coordination with CDFW or USFWS as appropriate, will determine if corrective action has been effective and will direct the project owner to take further corrective action as needed.**~~

If the Designated Biologist is unavailable for direct consultation, the Biological Monitor shall act on behalf of the Designated Biologist.

**Verification:** The project owner shall ensure that the Designated Biologist or Biological Monitor notifies the CPM immediately (and no later than the morning following the incident, or Monday morning in the case of a weekend) of any non-compliance or a halt of any site mobilization, ground disturbance, grading, construction, and operation activities.

The project owner shall notify the CPM of the circumstances and actions being taken to resolve the problem **within one (1) five (5) working days of initiating the corrective action.** ~~Whenever corrective action is taken by the project owner, a determination of success or failure would be~~

~~made by the CPM within five working days after receipt of notice that corrective action is completed, or the project owner would be notified by the CPM that coordination with other agencies would require additional time before a determination can be made.~~

**BIO-5** The project owner shall develop and implement an HBEP-specific Worker Environmental Awareness Program (WEAP) and shall secure approval for the WEAP from the CPM. ~~in consultation with USFWS and CDFW.~~ The WEAP shall be administered to all onsite personnel including surveyors, construction engineers, employees, contractors, contractor's employees, supervisors, inspectors, and subcontractors. The WEAP shall be implemented during site mobilization, ground disturbance, grading, construction, operation, and closure. The WEAP shall:

1. Be developed by or in consultation with the Designated Biologist and consist of an on-site or training center presentation in which supporting electronic media and written material, ~~including wallet-sized cards with summary information on special status species and sensitive biological resources,~~ is made available to all participants;
2. Discuss the locations and types of sensitive biological resources on the project site and adjacent areas, explain the reasons for protecting these resources, and the function of flagging in designating sensitive resources and authorized work areas;
3. Discuss federal and state laws afforded to protect the sensitive species and explain penalties for violation of applicable laws, ordinances, regulations, and standards (e.g., federal, and state endangered species acts);
4. Place special emphasis on the light-footed clapper rail, western snowy plover, California least tern and Belding's savannah sparrow, including information on physical characteristics, distribution, behavior, ecology, sensitivity to human activities, legal protection and status, penalties for violations, reporting requirements, and protection measures;
5. Include a discussion of fire prevention measures to be implemented by workers during project activities; request workers to dispose of cigarettes and cigars appropriately and not leave them on the ground or buried;
6. ~~Present the meaning of various temporary and permanent habitat protection measures~~ **Include a discussion of the biological resources conditions of certification;**
7. Identify whom to contact if there are further comments and questions about the material discussed in the program; and
8. Include a training acknowledgment form to be signed by each worker indicating that they received the WEAP training and shall abide by the guidelines.

The specific WEAP shall be administered by a competent individual(s) acceptable to the Designated Biologist.

**Verification:** At least **45 30** days prior to the start of any **planned** project-related site disturbance activities, the project owner shall provide to the CPM a copy of the draft WEAP and

all supporting written materials and electronic media prepared or reviewed by the Designated Biologist and a resume of the person(s) administering the program. The CPM shall approve the WEAP materials prior to their use. The Notice to Proceed will not be issued until the WEAP has been revised according to the CPM's direction, and approved by the CPM.

The project owner shall provide in the monthly compliance reports the number of persons who have completed the training in the prior month and a running total of all persons who have completed the training to date. ~~At least 10 days prior to site and related facilities mobilization, the project owner shall submit two copies of the CPM-approved final WEAP.~~

~~Training acknowledgement forms signed during construction shall be kept on file by the project owner for at least six months after the start of commercial operation.~~

~~Throughout the life of the project, the worker education program shall be repeated annually for permanent employees, and shall be routinely administered within one week of arrival to any new construction personnel, foremen, contractors, subcontractors, and other personnel potentially working within the project area.~~ Upon completion of the orientation, employees shall sign a form stating that they attend the program and understand all protection measures. These forms shall be maintained by the project owner and shall be made available to the ~~EMP~~ CPM upon request. Workers shall receive and be required to visibly display a hardhat sticker or certificate indicating that they have completed the required training.

Training acknowledgement forms signed during construction shall be kept on file by the project owner for at least six months after the completion of all project construction activities. ~~During project operation, signed statements for operational personnel shall be kept on file for six months following the termination of an individual's employment.~~

**BIO-6** The project owner shall develop a BRMIMP and submit two copies of the proposed BRMIMP to the CPM (for review and approval) ~~and to CDFW and USFWS (for review and comment)~~, and shall implement the measures identified in the approved BRMIMP. The BRMIMP shall be prepared in consultation with the Designated Biologist and shall and shall include the following:

1. All biological resource mitigation, monitoring, and compliance measures proposed and agreed to by the project owner;
2. All biological resource conditions of certification identified in the Commission Decision as necessary to avoid or mitigate impacts;
3. All biological resource mitigation, monitoring, and compliance measures required in other state agency terms and conditions, such as those provided in the National Pollution Discharge Elimination System (NPDES) Construction Activities Stormwater General Permit;
4. A list or tabulation of all sensitive biological resources to be impacted, avoided, or mitigated by project construction, operation, and closure;
5. All required mitigation measures for each sensitive biological resource;



6. A detailed description of measures that shall be taken to avoid or mitigate disturbances from construction and demolition activities;
7. All locations, shown on a map, at an approved scale, of sensitive biological resource areas subject to disturbance and areas requiring temporary protection and avoidance during construction;
8. Aerial photographs, at an approved scale, of all areas to be disturbed during project construction activities; ~~include one set prior to any site or related facilities mobilization disturbance,~~ **for comparison with aerial photographs at the same scale to be provided** and ~~one set subsequent to completion of project construction~~ **(see Verification)**.
9. Duration for each type of monitoring and a description of monitoring methodologies and frequency;
10. Performance standards **from each biological resource condition of certification** to be used to help decide if/when proposed **determine if** mitigation and conditions are or are not successful;
11. ~~All performance standards and~~ **R**emedial measures to be implemented if performance standards are not met;
12. A discussion of biological resources-related facility closure measures ~~including a description of funding mechanism(s);~~
13. A process for proposing plan **BRMIMP** modifications to the CPM ~~and appropriate agencies~~ for review and approval; and
14. A requirement to submit any sightings of any special-status species that are observed on or in proximity to the project site, or during project surveys, to the California Natural Diversity Database (CNDDDB) per CDFW requirements **as needed**.

**Verification: No fewer than 45-30 days prior to the planned start of construction, the project owner will submit a draft BRMIMP to the CPM for review in coordination with CDFW and USFWS. The Notice to Proceed will not be issued until the BRMIMP has been revised according to the CPM's direction, and approved by the CPM.** The project owner shall provide the specified document at least 45 days prior to start of any project related ground disturbing activities.

The CPM shall determine the BRMIMP's acceptability within 30 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, ~~the CDFW, and USFWS~~ within 5 days of their receipt, and the BRMIMP shall be revised or supplemented to reflect the permit condition **and submitted to the CPM** 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.~~

The project owner shall notify the CPM no less than 5 working days before implementing any **proposed** modifications to the approved BRMIMP **and will implement changes only after obtaining CPM approval** to obtain CPM approval. Any changes to the approved BRMIMP must also be approved by the CPM ~~in consultation with CDFW, the and USFWS,~~ and appropriate agencies to ensure no conflicts exist.

Implementation of all BRMIMP measures shall be reported in the monthly compliance reports by the designated biologist (i.e., survey results, construction activities that were monitored, species observed). Within 30 days after completion of project construction, the project owner shall provide to the CPM, for review and approval, a written construction closure report identifying which items of the BRMIMP have been completed; a summary of all modifications to mitigation measures made during the project's site mobilization, ground disturbance, grading, and construction phases; and which mitigation and monitoring items are still outstanding. **The Construction Closure Report will include a set of aerial photographs of the site at an approved scale for comparison with the pre-construction set (Item 8 above).**

**BIO-7** The project owner shall ensure implementation of the following measures during site mobilization, construction, ~~operation, and closure~~ to manage their project site and related facilities in a manner to avoid or minimize impacts to biological resources:

1. The boundaries of all areas to be temporarily or permanently disturbed (including staging areas, access roads, and sites for temporary placement of spoils) shall be delineated with stakes and flagging prior to **demolition or** construction activities in consultation with the Designated Biologist. Spoils shall be stockpiled in disturbed areas, which do not provide habitat for special-status species. Parking areas, staging and disposal site locations shall similarly be located in areas without native vegetation or special-status species habitat. All disturbances, vehicles, and equipment shall be confined to the flagged areas.
2. ~~At the end of each work day, the Designated Biologist, Biological Monitor, and/or site personnel shall ensure that all potential wildlife pitfalls (trenches, bores, and other excavations) have been backfilled.~~ If site personnel are inspecting trenches, bores, and other excavations and wildlife is trapped, they will immediately notify the Designated Biologist and/or Biological Monitor. If backfilling is not feasible, all trenches, bores, and other excavations shall be sloped at a 3:1 ratio at the ends to provide wildlife escape ramps, or covered completely to prevent wildlife access. Should wildlife become trapped, the Designated Biologist or Biological Monitor shall remove and relocate the ~~individual~~ **animal** to a safe location. Any wildlife encountered during the course of construction shall be allowed to leave the construction area unharmed.
3. **To the extent feasible and in compliance with TSE-3,** transmission lines and all electrical components shall be designed, installed, and maintained in accordance with the Avian Power Line Interaction Committee's (APLIC's) *Suggested Practices for Avian Protection on Power Lines* (APLIC 2006) and *Reducing Avian Collisions with Power Lines* (APLIC 2012) to reduce the likelihood of large bird electrocutions and collisions.
4. Spoils shall not be stockpiled adjacent to the southeastern fence line to minimize potential for spoils to enter into adjacent wetlands.
5. Soil bonding and weighting agents used on unpaved surfaces shall be non-toxic to wildlife and plants.

6. ~~Facility lighting shall be designed, installed, and maintained to prevent side casting of light towards the project boundaries. Lighting shall be shielded, directional, and at the lowest intensity required for safety. Lighting shall be directed away from biologically sensitive areas (e.g., Magnolia Marsh).~~ **To the extent feasible,** FAA visibility lighting shall employ only strobed, strobe-like or blinking incandescent lights, preferably with all lights illuminating simultaneously. Minimum intensity, maximum “off-phased” dual strobes are preferred, and no steady burning lights (e.g., L-810s) shall be used.
7. Water applied to dirt roads and construction areas (trenches or spoil piles) for dust abatement shall use the minimal amount needed to meet safety and air quality standards ~~in an effort~~ to prevent the formation of puddles, which could attract California least tern predators to construction sites. During construction, site personnel shall patrol these areas to ensure water does not puddle and attract crows and other wildlife to the site, and shall take appropriate action to reduce water application rates where necessary.
8. Report all inadvertent deaths of special-status species to the appropriate project representative, including road kill. Species name, physical characteristics of the animal (sex, age class, length, weight), and other pertinent information shall be noted and reported in the monthly compliance reports. For special-status species, the Designated Biologist or Biological Monitor shall contact CDFW and USFWS within 1 working day of receipt of the carcass for guidance on disposal or storage of the carcass. Injured animals shall be reported to CDFW and/or USFWS and the CPM, and the project owner shall follow instructions that are provided by CDFW or USFWS. During construction, injured or dead animals detected by personnel in the project area shall be reported immediately to a Biological Monitor or Designated Biologist, who shall remove the carcass or injured animal promptly. During operations, the Project Environmental Compliance Monitor shall be notified.
9. All vehicles and equipment shall be maintained in proper working condition to minimize the potential for fugitive emissions of motor oil, antifreeze, hydraulic fluid, grease, or other hazardous materials. The Designated Biologist shall be informed of any hazardous spills immediately as directed in the project Hazardous Materials Plan. Hazardous spills shall be immediately cleaned up and the contaminated soil will be properly disposed of at a licensed facility. **Any on-site servicing of vehicles or** construction equipment shall take place only at a designated area **approved by the Designated Biologist.** Service/maintenance vehicles shall carry a bucket and pads to absorb leaks or spills.
10. During construction all trash and food-related waste shall be placed in self-closing containers and removed weekly or more frequently from the site. Workers shall not feed wildlife, or bring pets to the project site.
11. Except for law enforcement personnel, no workers or visitors to the site shall bring firearms or weapons.
12. ~~Standard best management practices (BMPs) from the project Stormwater Pollution Prevention Plan shall be implemented during all phases of the project (construction, demolition, operation, and decommissioning) where stormwater run-~~

~~off from the site could to enter adjacent marshes or channels. Sediment and other flow restricting materials shall be moved to a location where they shall not be washed back into the jurisdictional waters. All disturbed soils within the project site shall be stabilized to reduce erosion potential, both during and following construction.~~

**12.** The project owner shall implement the following measures during construction and operation to prevent the spread and propagation of nonnative, invasive weeds:

- a. Limit the size of any vegetation and/or ground disturbance to the absolute minimum **area needed for safe completion of project activities**, and limit ingress and egress to defined routes;
- b. Use only weed-free straw, hay bales, and seed for erosion control and sediment barrier installations. Invasive non-native species shall not be used in landscaping plans and erosion control. Monitor and rapidly implement control measures to ensure early detection and eradication of weed invasions.

**13.** During construction and operation, the project owner shall conduct pesticide management in accordance with standard BMPs. The BMPs shall include non-point source pollution control measures. The project owner shall use a licensed herbicide applicator and obtain recommendations for herbicide use from a licensed Pest Control Advisor. Herbicide applications must follow EPA label instructions. Minimize use of rodenticides and herbicides in the project area and prohibit the use of chemicals and pesticides known to cause harm to non-target plants and wildlife. The project owner shall only use pesticides for which a “no effect” determination has been issued by the EPA’s Endangered Species Protection Program for any species likely to occur within the project area or adjacent wetlands. If rodent control must be conducted, zinc phosphide or an equivalent product shall be used.

**Verification:** All mitigation measures and their implementation methods shall be included in the BRMIMP and implemented. Implementation of the measures ~~would~~ **shall** be reported in the monthly compliance reports by the Designated Biologist. Within 30 days after completion of project construction, the project owner shall provide to the CPM, for review and approval, a written ~~construction termination report~~ **Construction Completion Report** identifying how measures have been completed (**see Condition of Certification BIO-6 verification**).

~~**Monthly and annual compliance reports will include results of all regular inspections by the Designated Biologist and Biological Monitor(s), including but not limited to the requirements cited above and in Condition of Certification BIO-2.**~~

~~**The project owner will maintain written records of vehicle and equipment inspection and maintenance, and will provide summaries in each monthly and annual compliance report. The complete written vehicle maintenance record will be available for the CPM’s inspection during normal business hours.**~~

**The BRMIMP (Condition of Certification BIO-6) will include affirmation by the project owner that:**

- All electrical component design conforms to applicable APLIC guidelines;**
- and**
- All soil binders conform to the requirements stated above.**

**BIO-8** Pre-construction nest surveys shall be conducted if construction or demolition activities will occur from February 1 through August 31. The Designated Biologist or Biological Monitor shall perform surveys in accordance with the following guidelines:

1. Surveys shall cover all potential nesting habitat and substrate within the project site and areas surrounding the project site within 300 feet of the project boundary.
2. At least two pre-construction surveys shall be conducted, separated by a minimum 10-day interval. Pre-construction surveys shall be conducted no more than 14 days prior to initiation of construction activity. One survey needs to be conducted within the 3-day period preceding initiation of construction activity. Additional follow-up surveys may be required if periods of construction inactivity exceed three weeks **during February 1 through August 31** in any given area, an interval during which birds may establish a nesting territory and initiate egg laying and incubation.
3. If active nests are detected during the survey, a no-disturbance buffer zone (protected area surrounding the nest) shall be established around each nest. Specific buffer distances are provided below for applicable avian groups **(Biological Resources Table 5 provided in the Verification); these buffers may be modified with the CPM's approval.** For special-status species, if an active nest is identified, the size of each buffer zone shall be determined by the Designated Biologist in consultation with the CPM (in coordination with CDFW and USFWS **as needed**). Nest locations shall be mapped using GPS technology.
4. If active nests are detected during the survey, the Designated Biologist or Biological Monitor shall monitor all nests with buffers at least once per week, to determine whether birds are being disturbed. If signs of disturbance or distress are observed, the Designated Biologist or Biological Monitor shall immediately implement adaptive measures to reduce disturbance in coordination with the CPM. These measures could include, but are not limited to, increasing buffer size, halting disruptive construction activities in the vicinity of the nest until fledging is confirmed, or placement of visual screens or sound dampening structures between the nest and construction activity.
5. If active nests are detected during the survey, the Designated Biologist **will prepare a Nest Monitoring Plan. The Designated Biologist** or Biological Monitor shall monitor the nest until he or she determines that nestlings have fledged and dispersed or the nest is no longer active. Activities that might, in the opinion of the Designated Biologist or Biological Monitor, disturb

nesting activities (e.g., exposure to exhaust), shall be prohibited within the buffer zone until such a determination is made.

~~6. **A habitat assessment** for light footed clapper rail will be conducted in Magnolia and Upper Magnolia Marshes by qualified biologists during the breeding season (March 1 to August 1) immediately preceding the commencement of construction and demolition activities. **If suitable breeding habitat for the light footed clapper rail is identified, focused surveys will be conducted prior to any construction or demolition activities. Surveys are not required if no suitable habitat is present.**~~

~~If breeding clapper rails are detected **during the breeding season**, the CPM, CDFW, and USFWS will be notified and the project owner will consult with the USFWS for incidental take authorization, if required.~~

**Verification:** The project owner shall provide notification to the CPM, ~~CDFW, and USFWS~~ at least 2 weeks prior to initiating ~~preconstruction nesting bird~~ **the habitat assessment and any subsequent** surveys ~~for light footed clapper rail~~; notification will include the name and resume of the biologist(s) conducting ~~the habitat assessment and~~ surveys and the timing of the surveys. **Within ten (10) days of completion of the field work,** Prior to the start of any pre-construction site mobilization, the project owner shall provide the CPM, ~~CDFW, and USFWS~~ a letter-report describing the findings of the preconstruction nest ~~surveys and the light footed clapper rail~~ **habitat assessment and focused** survey ~~(if surveys were conducted)~~, including **a description and representative photographs of habitat in the marshes;** the time, date, methods, and duration of the surveys; identity and qualifications of the surveyor(s); and a list of species observed. **If special status species are observed, a letter-report summarizing findings will be submitted to CDFW and USFWS as applicable.** If active nests are detected during the surveys, the reports shall include a map or aerial photo identifying the location of the nest(s) and shall depict the boundaries of the proposed no disturbance buffer zone around the nest(s). ~~USFWS and CDFW must submit any comments on the letter report to the CPM in a timely manner.~~ **If special-status species are observed, the CPM will consider any timely comments received from CDFW and USFWS in review of the letter-report.**

~~Additionally, a **the nest monitoring plan** shall be submitted to the CPM for review and approval **prior to any planned demolition or construction activities in the vicinity of any active nest. No such demolition or construction activities may proceed without CPM approval of the monitoring plan, in consultation with CDFW and USFWS.** Additional copies shall be provided to the CDFW and USFWS for review and comment; agency comments on the nest monitoring plan must be provided to the CPM in a timely manner. If light-footed clapper rails are documented **during the breeding season** in Upper Magnolia or Magnolia Marshes, **prior to any planned pile driving on the site or demolition or construction activities within 400 feet of the marsh boundary,** the project owner will notify the CPM and will consult with the USFWS for incidental take authorization **or a determination that no incidental take authorization is required.** Approval of the plan is required before construction may commence.~~

All impact avoidance and minimization measures related to nesting birds shall be

included in the BRMIMP and implemented. Implementation of the measures shall be reported in the monthly compliance reports by the Designated Biologist.

**Biological Resources Table 5**  
**HBEP Construction and Demolition Buffers for Active Nests**

<b><u>Avian Group</u></b>	<b><u>Species Potentially Nesting in the Project Vicinity</u></b>	<b><u>Buffer for Construction and Demolition Activities (feet)</u></b>
Bitterns and herons	Black-crowned night heron, great blue heron, great egret, green heron, snowy egret	250
Cormorants	Double-crested cormorant	100
Doves	Mourning dove	25
Geese and ducks	American widgeon, blue-winged teal, cinnamon teal, Canada goose, gadwall, mallard, northern pintail, ruddy duck	100
Grebes	Clark's grebe, eared grebe, horned grebe, pied-billed grebe, western grebe	100
Hummingbirds	Allen's hummingbird, Anna's hummingbird, black-chinned hummingbird	25
Plovers	Black-bellied plover, killdeer	50
Raptors (Category 1)	American kestrel, barn owl, red-tailed hawk	50
Raptors (Category 2)	Cooper's hawk, red-shouldered hawk, sharp-shinned hawk	150
Raptors (Category 3)	Northern harrier, white-tailed kite	These are special-status species; buffer determined in consultation with CPM
Stilts and Avocets	American avocet, black-necked stilt	150
Terns	Elegant tern, Forster's tern, royal tern	100

Passerines (cavity and crevice nesters)	House wren, Say's phoebe, western bluebird	25
Passerines (bridge, culvert, and building nesters)	Black phoebe, cliff swallow, house finch, Say's phoebe	25
Passerines (ground nesters, open habitats)	Horned lark	100
Passerines (understory and thicket nesters)	American goldfinch, blue-gray gnatcatcher, bushtit, California towhee, common yellowthroat, red-winged blackbird, song sparrow, Swainson's thrush	25
Passerines (scrub and tree nesters)	American crow, American goldfinch, American robin, blue-gray gnatcatcher, Bullock's oriole, bushtit, Cassin's kingbird, common raven, hooded oriole, house finch, lesser goldfinch, northern mockingbird	25
Passerines (tower nesters)	Common raven, house finch	25
Passerines (marsh nesters)	Common yellowthroat, red-winged blackbird	25
Species not covered under MBTA	Domestic waterfowl, including domesticated mallards, feral (rock) pigeon, European starling, and house sparrow	N/A

**Strike Staff's BIO-9 and replace with the following:**

**BIO-9 The project owner shall monitor sound levels during the first two days of pile driving or other significant construction and demolition activities located within 400 feet of the Magnolia Marsh when such activities take place during the bird breeding season (February 1 to August 31). Monitoring shall be conducted at M5 and M6. Noise monitoring is not required if (1) no pile driving is occurring anywhere on site, and (2) no significant construction or demolition activities are occurring within 400 feet of the fenceline separating the project and the marsh.**



**The project owner will review the monitoring data with the CPM to determine if additional noise minimization methods are warranted and feasible. Construction noise minimization techniques include, but are not limited to:**

- **Use of pads or dampers;**
- **Reduce speed limits;**
- **Replace and update noisy equipment;**
- **Moveable task noise barriers;**
- **Queue trucks to distribute idling noise;**
- **Temporary noise barriers;**
- **Locate vehicle access points and loading and shipping facilities away from the southern and eastern project boundaries;**
- **Place noisy stationary construction equipment in acoustically engineered enclosures or relocate them away from the southern and eastern project boundaries;**
- **Reorient or relocate construction equipment to minimize noise at the Magnolia Marsh; and**
- **Perform pile driving with quieter equipment.**

**Verification: No fewer than 45 days prior to the planned start of construction and demolition activities, the project owner shall provide the CPM with a letter acknowledging this condition and identifying personnel assigned to it.**

**Sound levels will be reported in terms of hourly A-weighted Leq. Project sound levels which exceed both 60 dBA and result in an 8 dBA increase above the sound levels documented in the AFC proceeding may require additional evaluation and implementation of additional noise minimization measures as agreed upon by the project owner and the CPM. In reviewing the measured sound levels and assessing the need for additional noise minimization measures, the CPM shall consider 1) if the sound levels are attributable to project activities; 2) the magnitude and duration of the measured sound levels; 3) the presence of noise sensitive birds and nests; 4) observations of the designated biologist; and 5) the expected duration of the subject activities.**

## **CULTURAL RESOURCES**

**CUL-1      \*\*\***

**\*\*\***

### **CULTURAL RESOURCE SPECIALIST**

The resumes for the CRS and alternate CRS(s) shall include information demonstrating to the satisfaction of the CPM that their training and backgrounds conform to the U.S. Secretary of the Interior's Professional Qualifications Standards, as published in Title 36,

Code of Federal Regulations, part 61. In addition, the CRS and alternate CRS(s) shall have the following qualifications:

1. ~~Qualifications appropriate to the needs of the project, including a~~ **A** background in anthropology, archaeology, history, architectural history, or a related field;
2. ~~At least 10 years of~~ **Specific** archaeological or historical experience (as appropriate for the project site), **with including** resources mitigation and fieldwork;
3. At least one year of field experience in California; and
4. At least three years of experience in a decision-making capacity on cultural resources projects in California. ~~and the appropriate training and experience to knowledgeably make recommendations regarding the significance of cultural resources. The resumes of the CRS and alternate CRS shall include the names and telephone numbers of contacts familiar with the work of the CRS/alternate CRS on referenced projects and demonstrate to the satisfaction of the CPM that the CRS/alternate CRS has the appropriate training and experience to implement effectively the Conditions.~~

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## **CULTURAL RESOURCES TECHNICAL SPECIALISTS**

The resume(s) of any additional technical specialist(s), e.g., geoarchaeologist, historical archaeologist, historian, architectural historian, and/or physical anthropologist, shall be submitted to the CPM for approval. The resume of each proposed specialist shall demonstrate that their training and background meet the U.S. Secretary of Interior's Professional Qualifications Standards for their specialty (if appropriate), as published in Title 36, Code of Federal Regulations, part 61, ~~and show the completion of appropriate graduate-level coursework. The resumes of specialists shall include the names and telephone numbers of contacts familiar with the work of these persons on projects referenced in the resumes and demonstrate to the satisfaction of the CPM that these persons have the appropriate training and experience to undertake the required research.~~ The project owner may name and hire any specialist prior to certification. All specialists are under the supervision of the CRS.

### **Verification:**

1. At least 45 days prior to the start of construction-related ground disturbance, the project owner shall submit the resume for the CRS and alternate CRS(s) (if proposed), to the CPM for review and approval.
2. **As soon as is practical and no more than 10 days after a denial, resignation,** ~~At least 10 days prior to a~~ **denial,** termination or release of the CRS, ~~or within 10 days after the resignation or denial of a CRS,~~ the project owner shall submit the resume of the proposed new CRS to the CPM for review and approval. If there is no alternate CRS in place to conduct the duties of the CRS, a previously approved CRM may serve in place of a CRS so

that construction-related ground disturbance may continue up to a maximum of three days without a CRS. If cultural resources are discovered, construction-related ground disturbance will remain halted until there is a CRS or alternate CRS to make a recommendation regarding significance.

3. At least 20 days prior to construction-related ground disturbance, the CRS shall provide a letter naming anticipated CRMs, NAMs, and additional specialists, for the project. The letter shall state that the identified monitors and specialists meet the minimum qualifications for cultural resources monitoring and resource management required by this condition.
4. If efforts to obtain the services of a qualified NAM are unsuccessful, the project owner shall inform the CPM of this situation in writing at least 30 days prior to the beginning of post-certification cultural resources field work or construction-related ground disturbance.
5. At least 5 days prior to additional CRMs or NAMs beginning on-site duties during the project, the CRS shall review the qualifications of the proposed CRMs or NAMs and send approval letters to the CPM, identifying the monitors and attesting to their qualifications.
6. At least 10 days prior to any technical specialists beginning tasks, the resume(s) of the specialists shall be provided to the CPM for review and approval.
7. At least 10 days prior to the start of construction-related ground disturbance, the project owner shall confirm in writing to the CPM that the approved CRS will be available for onsite work and is prepared to implement the cultural resources conditions.

**Strike Staff's CUL-6 and replace with the following:**

**CUL-6 In the event that a CRHR eligible (as determined by the CPM) cultural resources is discovered, at the direction of the CPM, the project owner shall ensure that the CRS or alternate CRS monitor full time all ground disturbances in the area of the CRHR-eligible cultural resources discovery has been made. The level, duration, and spatial extent of monitoring shall be determined by the CPM. In the event that the CRS believes that a current level of monitoring is not appropriate, a letter or email detailing the justification for changing the level of monitoring shall be provided to the CPM for review and approval prior to any change in the level of monitoring.**

**Full-time archaeological monitoring for the project, if deemed necessary due to the discovery of a CRHR-eligible cultural resource, shall be the archaeological monitoring of all earth-moving activities in the areas specified in the previous paragraph, for as long as the CPM requires.**

**Where excavation equipment is actively removing dirt and hauling the excavated material to a location farther than fifty feet from the location of active excavation, full-time archaeological monitoring shall require at least two monitors per excavation area. In this circumstance, one monitor shall observe the location of active excavation and a second**

monitor shall inspect the disposal of the excavated soil. For excavation areas where the excavated soil is disposed of no farther than fifty feet from the location of active excavation, one monitor is sufficient to observe both the excavation and soil disposal.

The research design in the CRMMP shall govern the collection, treatment, retention/disposal, and curation of any archaeological materials encountered during archaeological monitoring.

If monitoring should be needed, as determined by the CPM, due to the discovery of a CRHR-eligible cultural resource, the CRS shall keep a daily log of any monitoring and other cultural resources activities and any instances of non-compliance with the Conditions and/or applicable LORS on forms provided by the CPM. Copies of the daily monitoring logs shall be provided by the CRS to the CPM, if requested by the CPM. From these logs, the CRS shall compile a monthly monitoring summary report to be included in the MCR. If there are no monitoring activities, the summary report shall specify why monitoring has been suspended.

The CRS, at his or her discretion, or at the request of the CPM, may informally discuss cultural resource monitoring and mitigation activities with Energy Commission technical staff.

Cultural resources monitoring activities are the responsibility of the CRS. Any interference with monitoring activities, removal of a monitor from duties assigned by the CRS, or direction to a monitor to relocate monitoring activities by anyone other than the CRS shall be considered non-compliance with these Conditions.

Upon becoming aware of any incidents of non-compliance with the Conditions and/or applicable LORS, the CRS and/or the project owner shall notify the CPM by telephone or e-mail within 24 hours. The CRS shall also recommend corrective action to resolve the problem or achieve compliance with the Conditions. When the issue is resolved, the CRS shall write a report describing the issue, the resolution of the issue, and the effectiveness of the resolution measures. This report shall be provided in the next MCR for the review of the CPM.

Verification: 1. At least 30 days prior to the start of ground disturbance, the CPM will provide to the CRS an electronic copy of a form to be used as a daily monitoring log.

2. Monthly, while monitoring is on-going, the project owner shall include in each MCR a copy of the monthly summary report of cultural resources related monitoring prepared by the CRS and shall attach any new DPR 523A forms completed for finds treated prescriptively, as specified in the CRMMP.

3. At least 24 hours prior to implementing a proposed change in monitoring level, the project owner shall submit to the CPM, for review and approval, a letter or email (or some

other form of communication acceptable to the CPM) detailing the CRS's justification for changing the monitoring level.

4. No later than 30 days following the discovery of any Native American cultural materials, the project owner shall submit to the CPM copies of the information transmittal letters sent to the Chairpersons of the Native American tribes or groups who requested the information. Additionally, the project owner shall submit to the CPM copies of letters of transmittal for all subsequent responses to Native American requests for notification, consultation, and reports and records.

5. Within 15 days of receiving them, the project owner shall submit to the CPM copies of any comments or information provided by Native Americans in response to the project owner's transmittals of information.

## **NOISE & VIBRATION**

### **NOISE-6**

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**Verification:** Prior to ground disturbance, the project owner shall transmit to the CPM a statement acknowledging that the above restrictions will be observed throughout the construction of the project.

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At least 15 days prior to working outside of the above hours, the project owner shall submit a statement to the CPM, specifying the time of night and the number of nights for which activities will occur, the approximate distance of activities to residential receptors, and the expected sound levels at these receptors, stating that the activities will be performed in a manner to ensure excessive noise is prohibited as much as practicable. ~~**At the same time, the project owner shall notify the residents within one mile of this work. In this notification, the project owner shall state that it will perform this activity in a manner to ensure excessive noise is prohibited as much as practicable. The project owner shall submit a copy of this notification to the CPM prior to the start of pile driving.**~~

## **SOIL & WATER RESOURCES**

**SOIL&WATER-4:** Prior to mobilization for construction, the project owner shall obtain a National Pollutant Discharge Elimination System permit for industrial waste and stormwater discharge to the Pacific Ocean. The project owner shall discharge to the same outfall currently utilized by the Huntington Beach Generating Station under the requirements of Order No. ~~R8-2010-0062~~ **R8-2006-0011**, NPDES No. CA0001163. The project owner shall provide a copy of all permit documentation sent to the Santa Ana or State Water Board to the CPM and notify the CPM in writing of any reported non-compliance.

**SOIL&WATER-8:** Prior to any groundwater dewatering, the project owner shall submit a dewatering plan to the CPM for review and approval. ~~The plan shall be consistent with the requirements of compliance for Bio-32.~~ The dewatering plan shall **describe the scope of necessary dewatering,** include **inge** maximum daily and average daily pumping rates, ~~and~~ total volume expected to be pumped during dewatering, as well as the ~~dates~~ **approximate duration expected to be used for of** dewatering. The plan ~~shall will~~ also include estimates of drawdown that may occur at the adjacent marsh land **and identify potential mitigation, as needed, as well as describe** water levels that would trigger mitigation such as changes in pumping or use of ~~alternative dewatering methods, discussion of methods that would be used and~~ under what circumstances they would be implemented.

**Verification:** At least **ninety sixty (960)** days prior to dewatering, the project owner shall submit a dewatering plan to the CPM. The project owner shall provide a report on the dewatering daily average and maximum rate and total daily volumes in each monthly compliance report when dewatering occurs. ~~The report will also include data from the monitoring program implemented to ensure there are no offsite impacts.~~

## **VISUAL RESOURCES**

**VIS-1** ~~Prior to submitting the master drawings and master specifications list for the project to the Chief Building Official (CBO) and the Compliance Project Manager (CPM), t~~**The project owner shall prepare and submit a Visual Screening and Enhancement Plan for Project Structures (Plan)** that includes methods and materials to visually screen and treat surfaces of publicly visible power plant structures. (Condition of Certification **GEN-2** in the **Facility Design** section of the Commission Decision addresses requirements pertaining to the master drawings and master specifications list.)

The submitted **Plan** will include evidence of review by a ~~qualified~~ **licensed** structural or civil engineer and an assessment of the feasibility and structural integrity of the architectural and decorative screening elements contained in the **Plan**. ~~The licensed engineer's report and other comments shall be attached to the Plan. The registered engineer shall review and sign the Plan.~~ Any design changes recommended by the ~~qualified~~ **licensed registered** structural or civil engineer to ensure the structural soundness and safety of the project and the architectural design elements shall be incorporated in the ~~Visual Screening and Enhancement Plan for Project Structures before its submittal to the~~ Energy Commission ~~CPM~~ for review and approval, and the City of Huntington Beach and the Coastal Commission for timely review and comment. The plan must be implemented before commercial operation of Power Block 1.

**The project owner shall not submit instructions for architectural screens and other structures and colors and finishes to manufacturers or vendors of project structures, or perform final field treatment on any structures, until written approval of the final Plan is received from the CPM. Modifications to the final Plan shall not occur without the CPM's approval.**

The Visual Screening and Enhancement Plan for Project Structures shall be consistent with ~~the architectural treatments and modifications recommended in Resolution No. 2014-18 adopted by the City of Huntington Beach City Council on April 7, 2014 (TN #202084). Consistent with Resolution No. 2014-18, all power plant structures that are 50 feet tall or taller from ground elevation shall be visually screened with architectural enhancements and other surface treatments to enhance public views of those structures.~~ Surface treatments for all other publicly visible power plant structures shall be included in the Plan. Proposed surface treatments shall minimize the potential visual effects of glare from project surfaces. ~~Surface treatments (i.e., painting and/or texturing) alone are not considered adequate to visually screen and enhance the project. Methods to visually screen and enhance the project site shall visually unify the project~~ **to the extent practicable while maintaining compliance with City Resolution No. 2014-18** ~~so that proposed architectural screening and other enhancements for one air cooled condenser are similar to or the same for the other.~~

The monopoles for the on-site 230-kV transmission line shall have a surface treatment that enables them to blend with the environment to the greatest extent feasible, and the finish shall appear as a matte patina. Unpainted exposed lagging and surfaces of steel structures that are visible to the public shall be embossed or otherwise treated to reduce glare.

The ~~Visual Screening and Enhancement Plan for Project Structures~~ shall meet the following minimum content requirements:

- Inventory of major project structures and buildings specifying the ~~proposed~~ architectural and decorative screening structures and materials to visually screen and enhance those structures. The inventory shall specify height, length, and width or diameter for each major structure, and scale plans and elevation views shall be included in the Plan with architectural and project structures clearly identified.
- List of colors and finishes that will be applied to architectural screening structures and directly to power plant structures (e.g., paint scheme and finish types for the air cooled condenser). Proposed colors must be identified by vendor, name, and number, or according to a universal designation system.
- Electronic files and a set of print copies of 11-inch by 17-inch (or larger, if necessary) color visual simulations at life-size scale showing the architectural screening structures and surface treatments proposed for the project. Key observation point (KOP) 1, KOP 4, and KOP 5 shall be used to prepare images showing the completed Visual Screening and Enhancement Plan for Project Structures. Colors must be identified by vendor, name, and number, or according to a universal designation system.
- Schedule for completing construction of architectural and decorative screening structures and the surface treatments for all publicly visible power plant structures **during the construction timeline**.

- Procedure and maintenance schedule to ensure that all surface treatments and architectural structures are well maintained and consistent with the approved Plan for the life of the project.

**Supplement to the Visual Screening and Enhancement Plan for Project Structures** – Prior to ~~construction of visual enhancement and screening elements, submitting instructions and orders for architectural screening materials, prefabricated project structures, and paints and other surface treatments to manufacturers or vendors of project structures,~~ the project owner shall submit a Supplement to the Visual Screening and Enhancement Plan for Project Structures (**Supplement**). The Supplement shall include color brochures, color chips, and/or physical samples showing each proposed color and finish that will be applied to architectural screening structures and directly to power plant structures. Electronic files showing proposed colors may not be submitted in place of original samples. Colors must be identified by vendor, name, and number, or according to a universal designation system.

The project owner shall meet these plan review and approval requirements:

- ~~The submitted Visual Screening and Enhancement Plan for Project Structures shall include evidence of review by a qualified structural or civil engineer and an assessment of the feasibility and structural integrity of the architectural and decorative screening elements contained in the plan. The qualified engineer’s report and other comments shall be attached to the plan.~~
- ~~The Visual Screening and Enhancement Plan for Project Structures shall be submitted to the CPM for review and approval, and to the City of Huntington Beach Planning and Building Department and the Executive Director of the Coastal Commission for timely review and comment. City staff requests seven sets of plans. Any comments on the plan from the City and the Coastal Commission shall be provided to the CPM. The project owner shall not submit instructions for architectural screens and other structures and colors and finishes to manufacturers or vendors of project structures, or perform final field treatment on any structures, until written approval of the final plan is received from the CPM. Modifications to the Visual Screening and Enhancement Plan for Project Structures are prohibited without the CPM’s approval.~~

**Verification:** At least ~~30-45~~ calendar days ~~before~~ **after** submitting the master drawings and master specifications list to the CBO (in accordance with the requirements of **GEN-2**), the project owner shall submit a Visual Screening and Enhancement Plan for Project Structures ~~simultaneously~~ to the CPM for review and approval, and to the City’s **of Huntington Beach** Planning and Building Department ~~and the Executive Director of the Coastal Commission~~ for timely review and comment. **City staff requires seven copies of the Plan.**

At least 60 calendar days before ~~constructing any visual enhancement or screening element submitting any instructions or orders for architectural screening, prefabricated project structures, and paints and other surface treatment materials,~~ the project owner shall submit a Supplement to the Visual Screening and Enhancement Plan for Project Structures ~~simultaneously~~ to the CPM for review and approval, and to the City’s Planning and Building Department ~~and the Executive Director of the Coastal Commission~~ for timely review and comment. **City staff requires seven**



**copies of the Supplement text and one set of physical samples of paint colors and other surface treatments.**

If the CPM determines that the Visual Screening and Enhancement Plan for Project Structures and/or its Supplement require revisions, the project owner shall provide a plan **an updated version** with the specified revision(s) for review and approval by the CPM. A copy **Copies** of the revised **Plan and/or the Supplement (if either is required)** shall be provided to the City and the Executive Director of the Coastal Commission for timely review and comment. **City staff requires seven copies of the revised Plan or Supplement. A copy of the revised Plan (if it is required) shall be provided to the Executive Director of the Coastal Commission for review and comment.**

The project owner shall provide the CPM with **a copy copies** of the transmittal letter~~s~~ submitted to the City ~~and the Coastal Commission~~ requesting ~~those agencies' respective timely~~ review~~s~~ of the Plan, the Supplement, and any plan ~~revisions~~. **Review comments from the City and/or the Coastal Commission must be submitted to the project owner within 30 calendar days of receiving any of the stated plans. In the absence of comments within that timeframe, the CPM shall deem the Plan, the Supplement, and any revisions acceptable to the City and/or the Coastal Commission. The City's ~~ose agencies'~~ comments on the stated plans shall be provided to the CPM within 3 business days of receipt.**

**At least 10 calendar days** before commercial operation of Power Block 1, the project owner shall notify the CPM **in writing with information on 1) the status of implementing the requirements set forth in** that the Visual Screening and Enhancement Plan for Project Structures are implemented and the facility is ready for inspection., **and 2) a schedule for completing the remaining Plan requirements during the construction timeline.** The project owner shall obtain written confirmation from the CPM that the project complies with the Visual Screening and Enhancement Plan for Project Structures. This **These** steps shall be repeated before **for** commercial operation of Power Block 2.

**The project owner shall schedule periodic site visits with the CPM to view progress on implementing the Plan. At a minimum, site visits shall be scheduled within 30 calendar days of commercial operation of Power Block 1 and again within 30 calendar days of commercial operation of Power Block 2. The Plan shall be fully implemented within 90 calendar days of completing demolition of the Huntington Beach Generating Station Units 1 and 2. The project owner shall verify in writing when the Plan is fully implemented and the facility is ready for inspection. The project owner shall obtain written confirmation from the CPM that the project complies with the Visual Screening and Enhancement Plan for Project Structures.**

The project owner shall provide a status report regarding maintenance of the architectural screens and surface treatments in the Annual Compliance Report for the project. At a minimum, the report shall include:

- Descriptions of the condition of the architectural screening structures and treated surfaces of all publicly visible structures at the power plant site.

- Descriptions of major maintenance and painting work required to maintain the original condition of architectural screening structures and treated surfaces during the reporting year.
- Electronic photographs showing the results of maintenance and painting work.
- ~~Any scheduled maintenance activities pertaining to the Visual Screening and Enhancement Plan for Project Structures for the next year.~~

**VIS-2** The project owner shall prepare and implement a Perimeter Screening and On-site Landscape and Irrigation Plan (**Plan**) to ~~substantially~~ screen views of power plant structures. The **Plan** shall achieve a goal to screen and soften views of the power plant from Magnolia Marsh, the Huntington Beach Wetlands & Wildlife Care Center, the Huntington By-The-Sea Mobile Estates and RV Park, ~~and along~~ Newland Street, Magnolia Street, and the Pacific Coast Highway. ~~The plan shall include new and replacement landscape plantings in all available on-site perimeter spaces along the northwest, southwest west, and southeast east boundaries.~~

The **Plan** shall be prepared with the direct involvement of a ~~qualified~~ **licensed** professional landscape architect familiar with local growing conditions, suitable native and non-invasive plant species **for the project area**, and local availability of proposed species. ~~The licensed landscape architect's shall review and sign report and other comments shall be attached to the Plan.~~ Any changes recommended by the ~~qualified~~ **licensed** landscape architect shall be incorporated in the Perimeter Screening and On-site Landscape and Irrigation Plan *before* its submittal to the Energy Commission Compliance Project Manager (CPM) for review and approval, and the City of Huntington Beach and the Coastal Commission for timely review and comment. The ~~submitted~~ **Plan** shall comply with the landscape and irrigation requirements of the City of Huntington Beach General Plan and the Huntington Beach Zoning & Subdivision Ordinance.

~~The submitted Plan shall show evidence of participation by a wildlife biologist qualified to comment on tree species proposed for planting adjacent to Magnolia Marsh and confirm that those species will not introduce new opportunities for raptors to prey on special-status birds in the marsh.~~

Design and submittal of the ~~Perimeter Screening and On-site Landscape and Irrigation Plan~~ shall occur *after* completion of the project's final general arrangement/site plan to accurately show all interior area constraints (e.g., paved interior site access and emergency response roads).

The ~~Perimeter Screening and On-site Landscape and Irrigation Plan~~ shall include construction of a ~~solid~~ **an** 8-foot-tall decorative masonry wall to extend along the site boundary adjacent to the Huntington Beach Wetlands & Wildlife Care Center and parking lot and along Magnolia Marsh (i.e., the southwest-west and southeast-east boundaries). All existing **exterior** site perimeter chain-link fencing shall be replaced with a ~~solid~~ **an** 8-foot-tall decorative masonry wall.

~~The project owner shall not purchase or order plants, landscape and irrigation supplies and materials, or construction materials for the masonry wall until written approval of the final Plan is received from the CPM. Modifications to the final Plan shall not occur without the CPM's approval.~~

The ~~Perimeter Screening and On-site Landscape and Irrigation~~ Plan shall meet the following minimum requirements:

- Provide a detailed landscape and irrigation plan at a scale of 1 inch to 40 feet (1:40) (or similar scale) listing proposed plant species, and installation sizes, quantities, and spacing. The plan shall include expected heights at 10 years and maturity and expected growth rates to maturity. To achieve year-round screening, **the Plan shall emphasize the use of only** evergreen species ~~shall be used~~. No new or replacement lawn areas shall be planted anywhere on the site interior.
- Proposed tree species shall be 24-inch box size unless the ~~professional~~ **licensed** landscape architect recommends a different size for a species. Except for areas where planting of new or replacement trees at the site periphery is infeasible (based on the final general arrangement/site plan), spacing of trees shall be sufficiently dense to ensure maximum screening by the tree canopy at maturity. Faster-growing tree species shall be included provided that those species are non-invasive and suited to the coastal environment.
- Proposed shrub species shall be selected to achieve maximum screening effectiveness. Shrubs planted inside the 8-foot-tall masonry wall along Magnolia Marsh shall be selected to achieve a mature height of 12 feet to 15 feet, with a goal to increase the effectiveness of visual screening provided by the wall. Shrubs shall be installed at 5-gallon size unless the ~~professional~~ **licensed** landscape architect recommends a different size for a species.
- Proposed tree species along the site boundary adjacent to Magnolia Marsh shall be selected with a goal to discourage perching by raptors and minimize predation on special-status birds. Tree species with **branch and foliage characteristics** ~~droopy branches or dense foliage~~ that would not **be attractive to** ~~attract~~ perching raptors are preferred.
- Provide electronic files and sets of print copies of 11-inch by 17-inch (or larger, if necessary) color visual simulations at life-size scale showing the landscape plantings at the time of installation and 10 years after installation. Key observation point (KOP) 1, KOP 4, and KOP 5 shall be used to prepare the visual simulations.
- Provide discussions of plans and methods to efficiently irrigate landscape plantings to ensure their survival and maintain optimal growth rates.
- Provide a plan view of the project site that clearly shows the planting plan for the site and the existing and new ~~solid~~ 8-foot-tall decorative masonry walls along the **exterior** site perimeter. Details on the materials and design of the masonry wall shall be included in the plan.

- Provide a detailed schedule for completing installation of landscape plantings during the project construction schedule and the masonry walls along the site perimeter.
- Provide a procedure for maintaining and monitoring the landscape and irrigation system and replacing all unsuccessful plantings for the life of the project.
- Provide a table summarizing the project's conformance with the City's landscape screening and irrigation regulations, including applicable goals, objectives, and policies in the Urban Design Element, Circulation Element, and Coastal Element of the General Plan, ~~as identified in VISUAL RESOURCES APPENDIX 4 of the Final Staff Assessment.~~ The table shall include applicable chapters and sections of the Huntington Beach Zoning & Subdivision Ordinance, **as identified in VISUAL RESOURCES APPENDIX-4 of the Final Staff Assessment.**

The project owner shall meet these plan submittal and review requirements:

- ~~The submitted Perimeter Screening and On-site Landscape and Irrigation Plan shall show evidence of participation by a qualified professional landscape architect familiar with local growing conditions, suitable native and non-invasive plant species for the project area, and local availability of proposed plant species. The landscape architect's report and other comments shall be attached to the plan.~~
- ~~The submitted plan shall show evidence of participation by a wildlife biologist qualified to comment on tree species proposed for planting adjacent to Magnolia Marsh and confirm that those species will not introduce new opportunities for raptors to prey on special status birds in the marsh.~~
- ~~The project owner shall request comments on the plant species proposed along Magnolia Marsh from the Director of the Huntington Beach Wetlands Conservancy. Any comments from the Director shall be attached to the submitted plan.~~
- ~~The Perimeter Screening and On-site Landscape and Irrigation Plan shall be submitted to the CPM for review and approval, and to the City of Huntington Beach Planning and Building Department and the Executive Director of the Coastal Commission for timely review and comment. City staff requests seven sets of plans. Any comments on the plan from the City and the Coastal Commission shall be provided to the CPM. The project owner shall not purchase or order plants, landscape and irrigation supplies and materials, or construction materials for the masonry wall until written approval of the final plan is received from the CPM. Modifications to the Perimeter Screening and On-site Landscape and Irrigation Plan are prohibited without the CPM's approval.~~

**Verification:** At least **945** calendar days ~~before site mobilization~~ **after submitting the master drawings and master specifications list to the CBO (in accordance with the requirements of GEN-2)**, the project owner shall submit the Perimeter Screening and On-site Landscape and Irrigation Plan **simultaneously** to the CPM for review and approval, ~~and to the City of Huntington Beach Planning and Building Department and the Executive Director of the Coastal Commission~~ for timely review and comment. **City staff requires seven copies of the Plan.**

If the CPM determines that the **Plan** requires revision, the project owner shall provide a **plan an updated version** with the specified revision(s) for review and approval by the CPM. **A copy Copies** of the revised plan shall be provided to the City's Planning and Building Department **and the Executive Director of the Coastal Commission** for timely review and comment. **City staff requires seven copies.**

The project owner shall provide the CPM with **a copy copies** of the transmittal letters submitted to the City **and the Coastal Commission** requesting **those agencies' respective** timely reviews of the Plan and any plan-revisions. **Review comments from the City and/or the Coastal Commission must be submitted to the project owner within 30 calendar days of receiving any of the stated plans. In the absence of comments within that timeframe, the CPM shall deem the Plan and any revisions acceptable to the City and/or the Coastal Commission. The City's ose-agencies' comments on the stated plans shall be provided to the CPM within 3 business days of receipt.**

~~Prior to the start of~~ **At least 10 calendar days before** commercial operation of Power Block 1, the project owner shall notify the CPM **in writing with information on 1) the status of implementing the requirements set forth in the Perimeter Screening and On-site Landscape and Irrigation Plan, and 2) a schedule for completing the remaining Plan requirements during the construction timeline.** that some areas covered by the plan elements are finished and ready for inspection (i.e., areas where landscape plantings will not be disturbed by later construction phases). The project owner shall obtain written confirmation from the CPM that the project complies with the Perimeter Screening and On-site Landscape and Irrigation Plan. This **These** steps shall be repeated before **for** commercial operation of Power Block 2.

~~The project owner shall schedule periodic site visits with the CPM to view progress on implementing the Plan. At a minimum, site visits shall be scheduled within 30 calendar days of commercial operation of Power Block 1 and again within 30 calendar days of commercial operation of Power Block 2. The Plan shall be fully implemented within 90 calendar days of completing demolition of the Huntington Beach Generating Station Units 1 and 2. The project owner shall verify in writing when the Plan is fully implemented and the facility is ready for inspection. The project owner shall obtain written confirmation from the CPM that the project complies with the Perimeter Screening and On-site Landscape and Irrigation Plan.~~

The project owner shall provide a status report describing landscape maintenance activities in the Annual Compliance Report for the project. At a minimum, the report shall describe:

- Overall condition of the landscape areas and irrigation system at the power plant site.
- Major activities that occurred during the reporting year, including replacement of dead or dying vegetation.
- Maintenance of the site periphery masonry wall and any other elements included in the plan.

**VIS-3** Prior to the start of site mobilization, the project owner shall prepare and implement a Construction Screening, Landscape Protection, and Site Restoration Plan (**Plan**) describing methods and materials that will be used during each project phase to screen project construction and parking areas and views of the project site from areas where construction activities have the potential to be visible during a phase. The **Plan** will describe methods and materials to identify and protect existing landscape trees and shrubs ~~that are not within areas affected by the project footprint.~~ **The Plan will identify existing landscaped areas where plantings will be retained and where they will be permanently removed.** The **Plan** will include provisions to restore areas where ground disturbance occurred during construction.

To minimize the adverse visual impacts of project construction during each project phase, the project owner shall install and maintain construction screening fencing along the perimeters of the project site areas where there could be views from public use areas of construction activities during a phase. The **project owner will consult with the** Compliance Project Manager (CPM); ~~in consultation with the visual resources staff and the City of Huntington Beach,~~ shall decide **to determine areas** where screening fencing is required during a project phase or phases. Depending on the location of on-site construction work, the areas requiring screening include the perimeter of the wetland along the southeast-east site boundary, the west side perimeter of the project site on Newland Street, and the southwest-west perimeter of the site along the Huntington Beach Wetlands Conservancy property ~~adjacent to the Pacific Coast Highway (PCH).~~ The screening fencing for the power plant site shall be no less than 12 feet tall.

Brightly-colored construction exclusion fencing shall be used on-site to clearly delineate areas where existing landscape plantings will be protected and retained.

Condition of Certification **VIS-2** includes construction of ~~a solid~~ **an** 8-foot-tall decorative masonry wall to extend along the site boundary adjacent to the Huntington Beach Wetlands & Wildlife Care Center and the wetland ~~(i.e., the southwest west and southeast east boundaries).~~ Upon **commencement of construction** ~~completing installation~~ of the masonry wall, the CPM shall allow the project owner to remove all construction screening fencing from those portions of the site boundary.

Screening fencing shall be installed to visually screen the open lots that will be used for parking on Newland Street across from the project site and along the **Pacific Coast Highway (PCH)** at Beach Boulevard. The screening fencing for the parking lots shall be no less than 6 feet tall and shall meet the City of Huntington Beach corner lot visibility requirements specified in Title 23, Chapter 230, "Site Standards," of the Huntington Beach Municipal Code (i.e., 25-foot by 25-foot corner visibility triangle).

~~The Construction Screening, Landscape Protection, and Site Restoration Plan shall provide images showing options for site perimeter screening materials; examples shall include fencing materials in unobtrusive shades of green or brown as well as printed decorative designs. Possible options include knitted polyethylene material, bottom locking fence slats with chain link fencing, pre-printed mesh fabric, or printable mesh vinyl.~~ All site perimeter screening fencing

and construction exclusion fencing shall be well maintained and repaired or replaced as necessary for the duration of project demolition, construction, and commissioning.

When construction is finished, all evidence of construction activities shall be removed—including ground disturbance at staging, material storage, and construction worker parking areas— **and disturbed areas** restored to its **their** original or better condition. The ~~Construction Screening, Landscape Protection, and Site Restoration Plan~~ shall describe the methods and schedule for the restoration work to occur.

~~The Construction Screening, Landscape Protection, and Site Restoration Plan shall be submitted to the CPM for review and approval, and to the City of Huntington Beach Planning and Building Department and the Executive Director of the Coastal Commission for timely review and comment. City staff requests seven sets of plans. Any comments on the plan from the City and the Coastal Commission shall be provided to the CPM. The project owner shall not purchase or order any materials for site perimeter screening fencing until written approval of the final Plan is received from the CPM. Modifications to the Construction Screening, Landscape Protection, and Site Restoration Plan are prohibited **shall not occur** without the CPM's approval.~~

**Verification:** At least ~~60~~ **45** calendar days ~~before~~ **after submittal of the GEN-2 documentation the start of site mobilization**, the project owner shall submit a Construction Screening, Landscape Protection, and Site Restoration Plan to the CPM for review and approval, and to the City of Huntington Beach Planning and Building Department ~~and the Executive Director of the Coastal Commission~~ for timely review and comment. ~~The project owner shall provide the CPM with a copy of the transmittal letters submitted to the City and the Coastal Commission requesting those agencies' respective timely reviews of the plan.~~ **City staff requires seven copies of the Plan.**

If the CPM determines that the Plan requires revision, the project owner shall provide a plan **an updated version** with the specified revision(s) for review and approval by the CPM. A copy of the revised Plan shall be provided to the City's Planning and Building Department ~~and the Executive Director of the Coastal Commission~~ for timely review and comment. **City staff requires seven copies.**

The project owner shall provide the CPM with copies of the transmittal letters ~~submitted to the City and the Coastal Commission~~ requesting those agencies' respective **the City's** timely reviews of the Plan and any plan-revisions. **Review comments from the City must be submitted to the project owner within 30 calendar days of receiving the Plan and any revisions. In the absence of comments within that timeframe, the CPM shall deem the Plan and any revisions acceptable to the City. Comments received from the City shall be provided to the CPM within 3 business days of receipt.**

~~The project owner shall install all site perimeters screening fencing and construction exclusion and parking area fencing. Before the start of ground disturbance at the project site,~~ **the project owner shall install site perimeter screening fencing and construction exclusion and parking area fencing at the locations agreed upon in consultation with the CPM.** The project owner shall notify the CPM within 7 calendar days of installing the screening ~~and construction exclusion~~ fencing that it is ready for inspection.

The project owner shall report any work required to repair or replace temporary screening and construction exclusion fencing in the Monthly Compliance Report for the project.

Within 10 calendar days of receipt of confirmation from the project owner that **construction of** the permanent 8-foot-tall masonry wall **is ready to begin** ~~has been completed~~, the CPM shall notify the project owner that construction screening fencing can be removed from the portions of the site boundaries where the masonry wall **is will be** erected.

~~The project owner shall complete site restoration. Within 60~~**30** calendar days of completing construction of the HBEP power blocks and buildings, including demolition of HBGS Units 1 and 2, **the project owner shall notify the CPM in writing of the status of implementing the requirements set forth in the Construction Screening, Landscape Protection, and Site Restoration Plan. Such notification shall include a schedule for completing the Plan requirements. The Plan shall be fully implemented within 90 180 calendar days of completing demolition and construction. The project owner shall verify in writing that the Plan is implemented and restored areas are ready for inspection. The project owner shall obtain written confirmation from the CPM that the project complies with the Plan.** ~~notify the CPM within 7 calendar days of completing site restoration that restored areas are ready for inspection.~~

**VIS-5** Prior to commercial operation of the HBEP Power Block 1, the project owner shall prepare and implement a comprehensive Lighting Management Plan for the HBEP.

Consistent with applicable worker safety regulations, the project owner shall ensure the design, installation, and maintenance of all permanent exterior lighting such that light sources are not directly visible from areas beyond the project site, reflected glare is avoided, and night lighting impacts are minimized or avoided to the maximum extent feasible. All lighting fixtures shall be selected to achieve high energy efficiency for the HBEP facility.

**~~The project owner shall not purchase or order any lighting fixtures or apparatus until written approval of the final plan is received from the Compliance Project Manager (CPM). Modifications to the final Lighting Management Plan shall not occur without the CPM's approval.~~**

The project owner shall meet these requirements for permanent project lighting:

- ~~The~~**A** Lighting Management Plan shall be prepared ~~with the direct involvement of a certified lighting professional trained to~~ **that** integrates efficient technologies and designs into lighting systems. The plan shall include evidence of ~~the a~~ certified lighting professional's participation in plan preparation.
- Exterior lights shall be hooded and shielded and directed downward or toward the area to be illuminated to prevent obtrusive spill light (i.e., light trespass) beyond the project site.



- Exterior lighting shall be designed to minimize backscatter to the night sky to the maximum extent feasible.
- Energy efficient lighting products and systems shall be used for all permanent new lighting installations. Smart bi-level exterior lighting using high efficiency directional LED fixtures shall be used as appropriate for exterior installations. The lighting system shall work in conjunction with occupancy sensors, photo sensors, wireless controls, and/or other scheduling or controls technologies to provide adequate light for security, worker safety, and ~~maximize~~ maximization of energy savings.
- Lighting fixtures shall be kept in good working order and continuously maintained according to the original design standards.
- The ~~Compliance Project Manager~~ (CPM) shall be notified of any complaints about permanent lighting at the project site. Complaints shall be documented using a form in the format shown in **Attachment 1**, and completed forms shall record resolution of each complaint. A copy of each completed complaint form shall be provided to the CPM. Records of lighting complaints shall also be kept in the compliance file at the project site.

The project owner shall meet these plan submittal and review requirements:

- ~~The comprehensive Lighting Management Plan shall be submitted to the CPM for review and approval, and to the City of Huntington Beach Planning and Building Department and the Executive Director of the Coastal Commission for timely review and comment. City staff requests seven sets of plans. Any comments on the plan from the City and the Coastal Commission shall be provided to the CPM.~~
- ~~The project owner shall not purchase or order any lighting fixtures or apparatus until written approval of the final plan is received from the CPM. Modifications to the Lighting Management Plan are prohibited without the CPM's approval. Installation of lighting must be completed by the start of commercial operation of Power Block 1.~~

**Verification:** At least ~~90~~ **60** calendar days before ordering any permanent lighting equipment for Power Block 1 and related facilities and structures, the project owner shall submit a comprehensive Lighting Management Plan (**Plan**) to the CPM for review and approval, and to the City of Huntington Beach Planning and Building Department ~~and the Executive Director of the Coastal Commission~~ for ~~timely~~ review and comment.

The project owner shall provide the CPM with a copy of the transmittal letters submitted to the City and the Coastal Commission requesting those agencies' respective ~~timely~~ reviews of the Lighting Management Plan. **City staff requires seven copies of the Plan.**

If the CPM determines that the **Plan** requires revision, the project owner shall provide a ~~plan~~ **an updated version** with the specified revision(s) for review and approval by the CPM. A copy of the revised **Plan** shall be provided to the City's Planning and Building Department ~~and the~~

Executive Director of the Coastal Commission for timely review and comment. **City staff requires seven copies.**

The project owner shall provide the CPM with copies of the transmittal letters submitted to the City and the Coastal Commission requesting those agencies' respective timely **the City's** reviews of the Lighting Management Plan and any plan revisions. **Review comments from the City must be submitted to the project owner within 30 calendar days of receiving the Plan and any revisions. In the absence of comments within that timeframe, the CPM shall deem the Plan and any revisions acceptable to the City. Comments received from the City shall be provided to the CPM within 3 business days of receipt.**

Prior to the start of commercial operation of Power Block 1, the project owner shall notify the CPM **in writing** that installation of permanent lighting for Power Block 1 has been completed and that the lighting is ready for inspection. If the CPM notifies the project owner that modifications to the lighting system are required, within 30 days of receiving that notification, the project owner shall implement all specified changes and notify the CPM that the modified lighting system(s) is ready for inspection. **The project owner shall obtain written confirmation from the CPM that the project complies with the Plan.**

Within 48 hours of receiving a complaint about permanent project lighting, the project owner shall provide to the CPM a copy of the complaint report and resolution form **to the CPM,** including a schedule for implementing corrective measures to resolve the complaint.

The project owner shall report any complaints about permanent lighting and document their resolution in the Annual Compliance Report for the project, accompanied by copies of completed complaint report and resolution forms for that year.

**VIS-6** Prior to commercial operation of the HBEP Power Block 2, the project owner shall conduct a full review of the approved Lighting Management Plan to determine whether updates to the **Plan** are needed (e.g., to implement lighting technology changes). Review of the **Plan** shall include preparation **and submittal** of a letter report summarizing conclusions and recommendations for the lighting plan. ~~The plan review shall be conducted with the direct involvement of a certified lighting professional trained to integrate efficient technologies and designs into lighting systems.~~ The letter report shall include evidence of the **a** certified lighting professional's participation in **Plan** review.

~~The plan review and letter report shall be submitted to the Compliance Project Manager (CPM) for review and approval and the City of Huntington Beach Planning and Building Department for timely review and comment. Any comments on the letter report from the City shall be provided to the CPM.~~

~~The project owner shall not purchase or order any permanent lighting for Power Block 2 or new buildings (including administrative or maintenance buildings or warehouses) until written approval of the **final Plan review and letter report is received from the Compliance Project Manager (CPM).** Installation of lighting must be completed by the start of commercial operation of Power Block 2.~~

**Verification:** At least 60 calendar days before ordering any permanent lighting for Power Block 2 and other buildings and structures, the project owner shall submit the **Plan** review and letter report to the CPM for review and approval, and **to** the City of Huntington Beach Planning and Building Department for ~~timely~~ review and comment. **City staff requires seven copies of the letter report.** The project owner shall provide the CPM with a copy of the transmittal letter submitted to the City requesting the City's ~~timely~~ review of the letter report. **Review comments from the City must be submitted to the project owner within 30 calendar days of receiving the letter report. In the absence of comments within that timeframe, the CPM shall deem the report acceptable to the City. Comments received from the City shall be provided to the CPM within 3 business days of receipt.**

Prior to the start of commercial operation of Power Block 2, the project owner shall notify the CPM **in writing** that installation of permanent lighting has been completed and that the lighting is ready for inspection. If the CPM notifies the project owner that modifications to the lighting system are required, within 30 days of receiving that notification, the project owner shall implement all specified changes and notify the CPM that the modified lighting system(s) is ready for inspection. **The project owner shall obtain written confirmation from the CPM that the project complies with the Lighting Management Plan.**

## **COMPLIANCE CONDITIONS**

**COM-13: Incident-Reporting Requirements.** Within one hour after it is safe and feasible, the project owner shall notify the CPM or Compliance Office Manager, by telephone and e-mail, of any incident at the power plant or appurtenant facilities that results, or could result, in any of the following:

1. health and safety impacts on the surrounding population;
2. property damage off-site;
3. response by off-site emergency response agencies;
4. serious on-site injury;
5. serious environmental damage; or
6. emergency reporting to any federal, state, or local agency.

The notice shall describe the circumstances, status, and expected duration of the incident. If warranted, as soon as it is safe and feasible, the project owner shall implement the safe shutdown of any non-critical equipment and removal of any hazardous materials and waste that pose a threat to public health and safety and to environmental quality (also, see specific conditions of certification for the technical areas of **HAZARDOUS MATERIALS MANAGEMENT** and **WASTE MANAGEMENT**).

Within ~~one week~~ **six (6) business days** of the incident, the project owner shall submit to the CPM a detailed incident report, which includes, as appropriate, the following information:

1. a brief description of the incident, including its date, time, and location;

2. a description of the cause of the incident, or likely causes if it is still under investigation;
3. the location of any off-site impacts;
4. description of any resultant impacts;
5. a description of emergency response actions associated with the incident;
6. identification of responding agencies;
7. identification of emergency notifications made to federal, state, and/or local agencies;
8. identification of any hazardous materials released and an estimate of the quantity released;
9. a description of any injuries, fatalities, or property damage that occurred as a result of the incident;
10. fines or violations assessed or being processed by other agencies;
11. name, phone number, and e-mail address of the appropriate facility contact person having knowledge of the event; and
12. corrective actions to prevent a recurrence of the incident.

The project owner shall maintain all incident report records for the life of the project, including closure. After the submittal of the initial report for any incident, the project owner shall submit to the CPM copies of incident reports within ~~twenty-four (24)~~ **forty-eight (48)** hours of a request.

**COM-15: Facility Closure Planning.** To ensure that a facility’s eventual permanent closure and long-term maintenance do not pose a threat to public health and safety and/or to environmental quality, the project owner shall coordinate with the Energy Commission to plan and prepare for eventual permanent closure.

**A. Provisional Closure Plan and Estimate of Permanent Closure Costs**

To assure satisfactory long-term site maintenance and adequate closure for “the whole of a project,” the project owner shall submit a Provisional Closure Plan and Cost Estimate for CPM review and approval within sixty (60) days after the start of commercial operation. The Provisional Closure Plan and Cost Estimate shall consider applicable final closure plan requirements, and reflect ~~the use of an independent third party to carry out the~~**that** permanent closure **will be carried out by qualified personnel.**

The Provisional Closure Plan and Cost Estimate shall provide for a phased closure process and include but not be limited to:

1. comprehensive scope of work and itemized budget;
2. closure plan development costs;
3. dismantling and demolition;
4. recycling and site clean-up;
5. mitigation and monitoring direct, indirect, and cumulative impacts;
6. site remediation and/or restoration;

7. interim and long term operation monitoring and maintenance, including long-term equipment replacement costs; and
8. contingencies.

~~The project owner shall include an updated Provisional Closure Plan and Cost Estimate in every fifth year ACR for CPM review and approval. Each updated Provisional Closure Plan and Cost Estimate shall reflect the most current regulatory standards, best management practices, and applicable LORS.~~

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