



DEPARTMENT OF FISH AND WILDLIFE

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GAVIN NEWSOM, Governor  
CHARLTON H. BONHAM, Director



Governor's Office of Planning & Research

May 07 2021

May 7, 2021

## STATE CLEARINGHOUSE

Terrance Smalls  
Kern County Planning and Natural Resources Department  
2700 "M" Street Suite 100  
Bakersfield CA, 93301

**Subject: Raceway 2.0 Solar, by sPower Development Corporation, LLC (Project)  
Draft Environmental Impact Report (DEIR)  
SCH No.: 2020079007**

Dear Mr. Smalls:

The California Department of Fish and Wildlife (CDFW) received a DEIR from the Kern County Planning and Natural Resources Department for the above-referenced Project pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.<sup>1</sup>

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife. Likewise, CDFW appreciates the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under Fish and Game Code.

### CDFW ROLE

CDFW is California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all the people of the State (Fish & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, subd. (a)). CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (*Id.*, § 1802). Similarly, for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on projects and related activities that have the potential to adversely affect fish and wildlife resources.

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<sup>1</sup> CEQA is codified in the California Public Resources Code in section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

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CDFW is also submitting comments as a **Responsible Agency** under CEQA (Pub. Resources Code, § 21069; CEQA Guidelines, § 15381). CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code. As proposed, for example, the Project may be subject to CDFW's lake and streambed alteration regulatory authority (Fish & G. Code, § 1600 et seq.). v Likewise, to the extent implementation of the Project as proposed may result in "take" as defined by State law of any species protected under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.), related authorization as provided by the Fish and Game Code may be required.

**Nesting Birds:** CDFW has jurisdiction over actions with potential to result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections that protect birds, their eggs and nests include, sections 3503 (regarding unlawful take, possession or needless destruction of the nest or eggs of any bird), 3503.5 (regarding the take, possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory nongame bird).

## PROJECT DESCRIPTION SUMMARY

**Proponent:** sPower Development Company, LLC

**Project Description:** The proposed project would involve construction and operation of two solar photovoltaic (PV) power-generating facilities, on six discontinuous sites, which would produce a combine total of approximately 291 megawatts (MW) of renewable electricity with up to 291 megawatt hours (MWh) energy storage on 1,330 acres of land in unincorporated Kern County.

**Location:** The proposed project is in the western extent of the Mojave Desert near Rosamond, California between Rosamond Boulevard and Avenue A, and between 70th Street West and 90th Street West in Sections: 20, 21, 28, 29 and 32, T9N/R13W in the eastern portion of unincorporated Kern County, California.

## COMMENTS AND RECOMMENDATIONS

CDFW is concerned regarding potential impacts to special-status species including, but not limited to, the State and Federally threatened desert tortoise (*Gopherus agassizii*); the State threatened Swainson's Hawk (*Buteo swainsonii*); the State candidate for listing under CESA western Joshua tree (*Yucca brevifolia*); and the State species of special concern burrowing owl (*Athene cunicularia*). Mitigation Measures for these species, as proposed in the DEIR, may not reduce impacts to less than significant or result in unauthorized take. Our specific comments follow.

### COMMENT 1: Western Joshua Tree (Joshua tree)

Table 4.4-3 states that no Joshua trees were observed on the Project site, but the species does occur within the gen-tie route. In addition, Table 4.4-1 lists 2.01 acres of Joshua tree

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woodland, a CDFW sensitive plant community, occurring within the gen-tie route. The DEIR cites measures from the Willow Springs Specific Plan that are applicable to Joshua tree. These measures include:

- Measure 15: Where possible, project development within the Specific Plan Update area shall be designed to avoid displacement or destruction of Joshua tree habitat, to the satisfaction of the Kern County Agricultural Commissioner's Office. Areas adjacent to the woodland shall have a 50-foot setback from the Joshua tree plants. Within that setback, a native plant cover should be restored to natural habitat values to serve as a buffer, if such plant cover is not present.
- Measure 16: A Joshua Tree Preservation and Transportation Plan shall be developed by the applicants for each parcel where Joshua trees are located on site. The plan shall be submitted to the Kern County Agricultural Commissioner's office for review and approval prior to grading permit issuance.
- Measure 23: A Joshua Tree Preservation and/or Transplantation Plan shall be developed by applicants of discretionary projects for each parcel where Joshua trees are located on site. The plan shall be submitted to the Kern County Agricultural Commissioner for review and approval prior to grading permit issuance.

As noted above, Joshua tree is currently a candidate for listing pursuant to CESA. Candidate species are protected as if they were listed as a threatened or endangered species under CESA. Measures 16 and 23 would require take authorization from CDFW to relocate individual Joshua trees in order to comply with CESA. CESA applies to every life stage of a listed species, and for Joshua tree, this would include the seed bank. The 50-foot no-disturbance buffer from individual Joshua trees required in Measure 15 of the Willow Springs Specific Plan, as well as the 25-foot buffer listed in DEIR Mitigation Measure 4.4.-12 for special status plants, is likely insufficient to avoid impacts to the seedbank. Vander Wall et. al. 2006 documented 290 feet as maximum distance of seeds dispersed carried by rodents. A 290-foot buffer is warranted to not only avoid impacts to individual trees, but potential impacts to the seed bank as well. CDFW recommends the following edits to the DEIR.

#### **Recommended Mitigation Measure 1: Western Joshua Tree Avoidance**

CDFW recommends a no-disturbance buffer for individual western Joshua trees of 290 feet. If buffers cannot be maintained, then consultation with CDFW is warranted to determine appropriate minimization and mitigation measures for impacts to special-status plant species.

#### **Recommended Mitigation Measure 2: Western Joshua Tree Take Authorization**

If a 290-foot buffer for Joshua tree is not feasible, consultation with CDFW is warranted to determine if the Project can avoid take of that species. If take cannot be avoided, take

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authorization would need to occur through acquisition of an Incidental Take Permit (ITP) from CDFW to comply with CESA and/or Fish and Game Code section 1900 and California Code of Regulations, title 14, section 786.9, subdivision (b). If Joshua trees will be translocated to comply with the Willow Springs Specific Plan, acquisition of an ITP is necessary to comply with CESA.

**COMMENT 2: Desert Tortoise**

The DEIR (e.g., Table 4.4-3) states that the potential for desert tortoise to occur on-site is low because there is a lack of suitable habitat. The DEIR defines desert tortoise habitat as alluvial fans, washes, canyon bottoms, and hillsides. Desert tortoise have been observed in other habitat type and the lack of their presence does not preclude desert tortoise from occurring with the Project site. Based on the information provided, CDFW cannot conclude that desert tortoise is absent from the Project site. CDFW recommends the following edits to the DEIR.

**Recommended Mitigation Measure 3: Desert Tortoise Protocol Surveys**

CDFW recommends surveys for desert tortoise be conducted by a qualified wildlife biologist who understands and will follow the pre-project survey protocol as outlined in “Preparing for any action that may occur within the range of the Mojave Desert tortoise (*Gopherus agassizii*)” (USFWS, 2010) and has previous experience surveying for desert tortoise. Survey results are advised to be submitted to both CDFW and the USFWS.

**Recommended Mitigation Measure 4: Desert Tortoise Take Authorization**

If desert tortoise is found within the Project area during surveys advised in Recommended Mitigation 3 above, DEIR Mitigation Measure 4.4-4: Preconstruction Clearance Surveys, or construction activities, consultation with CDFW is advised to discuss how to implement the Project and avoid take; or if avoidance is not feasible, to acquire an ITP pursuant to Fish and Game Code section 2081 subdivision (b) prior to any vegetation- or ground-disturbing activities. Any take of desert tortoise without take authorization would be a violation of Fish and Game Code section 2080.

**COMMENT 3: Swainson’s Hawk (SWHA)**

Table 4.4.-3 of the DEIR states that one active SWHA nest was observed on the Project site during 2020 burrowing owl surveys. The DEIR states that additional active nests occur within 5 miles of the Project site and that suitable foraging habitat occurs throughout the Project site. Several measures are provided as part of DEIR Mitigation Measure 4.4.-8: Swainson’s Hawk Mitigation and Monitoring Plan. DEIR Mitigation Measure 4.4-8b requires “no new disturbances, habitat conversions, or other project-related activities that may cause nest abandonment or forced fledgling occur within 0.5 miles of an active nest between March 1 and September 15. Buffer zones

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may be adjusted in consultation with CDFW and the County.” However, these Project activities are not defined and CDFW advises that the 0.5-mile buffer apply to all Project-related activities to avoid unauthorized take. We acknowledge that not all Project-related activities may require a 0.5-mile buffer, but the type of activity should be discussed as part of the consultation with CDFW and the County for a reduced buffer.

DEIR Mitigation Measure 4.4-8e requires habitat management (HM) lands to mitigate the loss of Swainson’s hawk foraging habitat by providing “HM lands within the Antelope Valley Swainson’s hawk breeding range at a minimum 1:1 ratio for such habitat impacted within a 5-mile radius of active Swainson’s hawk nest(s).” The Swainson’s Hawk Survey Protocols, Impact Avoidance, and Minimization Measures for Renewable Energy Projects in the Antelope Valley of Los Angeles and Kern Counties, California (CEC and CDFG 2010) recommends “mitigating loss of Swainson’s hawk foraging habitat by providing HM lands within the Antelope Valley Swainson’s hawk breeding range at a minimum 2:1 ratio for such habitat impacted within a five-mile radius of active Swainson’s hawk nest(s).” Based on the information provided in the DEIR, CDFW cannot conclude that a ratio lower than 2:1 will reduce impacts to Swainson’s hawk foraging habitat to less than significant. CDFW recommends the following edits to the DEIR.

**Recommended Mitigation Measure 5: SWHA No Disturbance Buffer**

CDFW recommends that the type of activities for the 0.5-mile buffer in DEIR Mitigation Measure 4.4-8b are changed from “project-related activities that may cause nest abandonment or forced fledgling” to all “all Project activities.” CDFW recommends the nest buffer remain in place until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival.

**Recommended Mitigation Measure 6: SWHA Foraging Habitat**

CDFW recommends that the amount of foraging habitat mitigation required by DEIR Mitigation Measure 4.4-8e is increased from a minimum 1:1 ratio to a minimum 2:1 ration to reduce impacts to SWHA foraging habitat to less than significant based on Swainson’s Hawk Survey Protocols, Impact Avoidance, and Minimization Measures for Renewable Energy Projects in the Antelope Valley of Los Angeles and Kern Counties, California (2010).

**Recommended Mitigation Measure 7: SWHA Take Authorization**

If an active SWHA nest is detected and a 0.5-mile no-disturbance buffer around the nest cannot feasibly be implemented, consultation with CDFW is warranted to discuss how to implement the project and avoid take. If take cannot be avoided, take authorization through the acquisition of an ITP, pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA.

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#### **COMMENT 4: Burrowing Owl (BUOW)**

DEIR Mitigation Measure 4.4-6: Preconstruction Burrowing Owl Surveys requires a buffer of no fewer than 100 meters (330 feet) from an active BUOW burrow during the breeding season (i.e., February 1 to August 31) and buffer of no fewer than 50 meters (165 feet) from a BUOW burrow during the non-breeding season. CDFW typically recommends greater no-disturbance buffers based on the “Staff Report on Burrowing Owl Mitigation” (CDFG 2012). No explanation was provided as why these reduced buffers are sufficient to avoid take of BUOW or nest failure. Therefore, CDFW recommends extending the BUOW no-disturbance buffers. CDFW recommends the following edits to the DEIR.

#### **Recommended Mitigation Measure 8: BUOW Avoidance**

CDFW recommends the no-disturbance buffers listed in DEIR Mitigation Measure 4.4-6 be expanded to the buffers recommended in the “Staff Report on Burrowing Owl Mitigation” and listed in the table below. Specifically, CDFW’s Staff Report recommends that impacts to occupied burrows be avoided in accordance with the following table unless a qualified biologist approved by CDFW verifies through non-invasive methods that either: 1) the birds have not begun egg laying and incubation; or 2) that juveniles from the occupied burrows are foraging independently and are capable of independent survival.

Location	Time of Year	Level of Disturbance		
		Low	Med	High
Nesting sites	April 1-Aug 15	200 m*	500 m	500 m
Nesting sites	Aug 16-Oct 15	200 m	200 m	500 m
Nesting sites	Oct 16-Mar 31	50 m	100 m	500 m

\* meters (m)

#### **Editorial Comments and/or Suggestions**

#### **Comment 5: Nesting birds**

CDFW generally encourages Project implementation at individual Project sites occur during the bird non-nesting season if suitable nesting bird habitat is present. However, if ground-disturbing activities must occur during the breeding season (February through mid-September), the Project’s applicant is responsible for ensuring that implementation of the Project does not result in violation of the Migratory Bird Treaty Act or relevant Fish and Game Codes as referenced above.

To evaluate Project-related impacts on nesting birds if suitable habitat is present, CDFW recommends that a qualified wildlife biologist conduct pre-activity surveys for active nests no more than 10 days prior to the start of ground disturbance to maximize the probability that nests that could potentially be impacted are detected. CDFW also recommends that

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surveys cover a sufficient area around the work site to identify nests and determine their status. A sufficient area means any area potentially affected by the Project. In addition to direct impacts (i.e. nest destruction), noise, vibration, and movement of workers or equipment could also affect nests. Prior to initiation of construction activities, CDFW recommends a qualified biologist conduct a survey to establish a behavioral baseline of all identified nests. Once construction begins, CDFW recommends a qualified biologist continuously monitor nests to detect behavioral changes resulting from the Project. If behavioral changes occur, CDFW recommends the work causing that change cease and CDFW consulted for additional avoidance and minimization measures.

If continuous monitoring of identified nests by a qualified wildlife biologist is not feasible, CDFW recommends a minimum no-disturbance buffer of 250 feet around active nests of non-listed bird species and a 500-foot no-disturbance buffer around active nests of non-listed raptors. These buffers are advised to remain in place until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival. Variance from these no disturbance buffers is possible when there is compelling biological or ecological reason to do so, such as when the construction area would be concealed from a nest site by topography. CDFW recommends that a qualified wildlife biologist advise and support any variance from these buffers and notify CDFW in advance of implementing a variance.

## **ENVIRONMENTAL DATA**

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database which may be used to make subsequent or supplemental environmental determinations (Pub. Resources Code, § 21003, subd. (e)). Accordingly, please report any special-status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDDB). The CNDDDB field survey form can be found at the following link:

<https://www.wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The completed form can be mailed electronically to CNDDDB at the following email address: CNDDDB@wildlife.ca.gov.

The types of information reported to CNDDDB can be found at the following link:

<https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

## **FILING FEES**

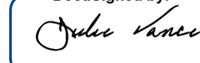
If it is determined that the Project has the potential to impact biological resources, an assessment of filing fees will be necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required for the underlying project approval to be operative, vested, and final (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089).

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CDFW appreciates the opportunity to comment on the Project to assist the Kern County Planning and Natural Resources Department in identifying and mitigating the Project's impacts on biological resources.

More information on survey and monitoring protocols for sensitive species can be found at CDFW's website (<https://www.wildlife.ca.gov/Conservation/Survey-Protocols>). If you have any questions, please contact Jaime Marquez, Environmental Scientist, at the address provided on this letterhead, by telephone at (559) 243-4014, extension 291, or by electronic mail at [Jaime.Marquez@wildlife.ca.gov](mailto:Jaime.Marquez@wildlife.ca.gov).

Sincerely,

DocuSigned by:  
  
FA83F09FE08945A...  
Julie A. Vance  
Regional Manager

cc: Office of Planning and Research, State Clearinghouse, Sacramento

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## **LITERATURE CITED**

CDFG. 2012. Staff Report on Burrowing Owl Mitigation. California Department of Fish and Game.

California Energy Commission (CEC) and CDFG, 2010. Swainson's Hawk Survey Protocols, Impact Avoidance, and Minimization Measures for Renewable Energy Projects in the Antelope Valley of Los Angeles and Kern Counties, California. California Energy Commission and Department of Fish and game, June 2, 2010.

USFWS. 2010. Preparing for any action that may occur within the range of the Mojave Desert tortoise (*Gopherus agassizii*). United States Fish and Wildlife Service.

Vander Wall et. al. 2006. Joshua tree (*Yucca brevifolia*) seeds are dispersed by seed-caching rodents. *EcoScience*. Vol.13 (4): 539-543

**Attachment 1**

**MITIGATION MONITORING AND REPORTING PROGRAM (MMRP)  
FOR CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE  
RECOMMENDED MITIGATION MEASURES**

**PROJECT: Raceway Solar  
SCH No.: 2020079007**

<b>RECOMMENDED MITIGATION MEASURE</b>	<b>STATUS/DATE/INITIALS</b>
<i>Before Disturbing Soil or Vegetation</i>	
Mitigation Measure 2: Western Joshua Tree Take Authorization	
Mitigation Measure 3: Desert Tortoise Protocol Surveys	
Mitigation Measure 4: Desert Tortoise Take Authorization	
Mitigation Measure 6: SWHA Foraging Habitat	
Mitigation Measure 7: SWHA Take Authorization	
<i>During Construction</i>	
Mitigation Measure 1: Western Joshua Tree Avoidance	
Mitigation Measure 5: SWHA No Disturbance Buffer	
Mitigation Measure 8: BUOW Avoidance	