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GAVIN NEWSOM, Governor  
 CHARLTON H. BONHAM, Director



January 20, 2023  
 Sent via email

Jim Morrissey  
 San Bernardino County  
 385 N. Arrowhead Avenue, First Floor  
 San Bernardino, CA 92415  
 Jim.Morrissey@lus.sbcounty.gov

Subject: Draft Environmental Impact Report  
 Vidal Energy Project (Project)  
 State Clearinghouse No. 2022030713

Dear Mr. Morrissey:

The California Department of Fish and Wildlife (CDFW) received a Draft Environmental Impact Report (DEIR) from the County of San Bernardino (Lead Agency) for the Project pursuant 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, we appreciate 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 the 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.

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.) 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.), the Project proponent may seek related take authorization as provided by the Fish and Game Code.

## PROJECT DESCRIPTION SUMMARY

**Proponent:** CDH Vidal, LLC (CORE) (Applicant)

**Objective:** The Project has the following objectives:

- Utilize property within the County to site photovoltaic (PV) solar power-generating facilities and energy storage near existing utility infrastructure.
- Support California's efforts to reduce greenhouse gas (GHG) emissions consistent with the timeline established by the California Global Warming Solutions Act under California AB 32, as amended by SB 32, which requires that Statewide GHG

<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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emissions are reduced to at least 40 percent below the Statewide GHG emissions limit by 2030.

- Support California's Renewable Portfolio Standard (RPS) Program consistent with the timeline established by SB 100.
- Develop an economically feasible and commercially financeable power-generating facility and energy storage system.
- Provide solar-generated electricity to the California Independent System Operator (CAISO) grid.
- Promote the County's role as the state's leading producer of renewable energy.
- Provide green jobs to the County and the state of California.
- Site and design the Project in an environmentally responsible manner consistent with current County guidelines.

**Location:** The Project is located approximately 2.5 miles southeast of Vidal, an unincorporated area of San Bernardino County; east of U.S. Route 95, north of the Riverside County border, and west of the Colorado River.

**Timeframe:** Project construction is anticipated to begin in 2023 and is expected to be complete within approximately 14 months. Once construction is complete, the Project has an anticipated operational life of up to 35 years, after which CORE may choose to update site technology and recommission, or decommission, the facility and remove the systems and their components.

**Description:** The Project includes the construction and operation of an approximately 1,090-acre solar photovoltaic (PV) electricity generation and battery energy storage system (BESS) facility. The Project will generate up to 160 megawatts (MW) of alternating current of solar power and include up to 640 megawatt hours (MWh) of energy storage capacity. The Project would be supported by the existing Western Area Power Administration (WAPA) 161 kilovolt (kV) overhead transmission corridor. The facility would include the construction of one onsite substation facility that would collect and convert the power generated onsite for transmission via an overhead or underground line to the WAPA transmission system and interconnection location. The Project's permanent facilities would include PV panels, BESS, fencing, service roads, a power collection system, communication cables, overhead and underground transmission lines, electrical switchyards, a Project substation, and operations and maintenance facilities.

## COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the Lead Agency in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. Editorial comments or other suggestions may also be included to improve the document.

### Assessment of Impacts to Biological Resources

The DEIR bases its analysis of impacts to biological resources on the Biological Resources Report (Appendix D of the DEIR) prepared by Chambers Group, Inc. dated December 2020. A reconnaissance-level survey was conducted in April 2020; focused plant survey in May 2020; and desert tortoise and burrowing owl focused survey in May 2020, making these surveys nearly three years old. Note that CDFW generally considers field assessments for wildlife to be valid for a one-year period. Further, the report indicates that the focused desert tortoise and burrowing owl surveys were conducted concurrently. CDFW generally does not support the approach of the same personnel concurrently conducting surveys for multiple species, as protocol requirements vary and some sign may be missed.

### Nesting Birds

Project implementation could result in the loss of nesting and/or foraging habitat for passerine and raptor species from the removal of desert scrub vegetation onsite. The biggest threat to birds includes habitat loss and the conversion of natural vegetation into commercial, residential and industrial land uses.

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It is the Project proponent's responsibility to comply with all applicable laws related to nesting birds and birds of prey. Migratory non-game bird species are protected by international treaty under the federal Migratory Bird Treaty Act (MBTA) of 1918, as amended (16 U.S.C. 703 et. seq.). In addition, sections 3503, 3503.5, and 3513 of the Fish and Game Code also afford protective measures as follows: Section 3503 states that it is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, except as otherwise provided by FGC or any regulation made pursuant thereto; Section 3503.5 states that it is unlawful to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds-of-prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by FGC or any regulation adopted pursuant thereto; and Section 3513 states that it is unlawful to take or possess any migratory nongame bird as designated in the MBTA or any part of such migratory nongame bird except as provided by rules and regulations adopted by the Secretary of the Interior under provisions of the MBTA.

The final EIR should include specific avoidance and minimization measures to ensure that impacts to nesting birds do not occur. Project-specific avoidance and minimization measures may include, but not be limited to: Project phasing and timing, monitoring of Project-related noise, sound walls, and buffers. The final EIR should also include specific avoidance and minimization measures that will be implemented should a nest be located within the Project site.

CDFW supports the inclusion of Mitigation Measure BIO-4, with minor edits (in ~~strikethrough~~ and **bold**) in the final EIR to avoid impacts to nesting birds:

Mitigation Measure BIO-4 – Vegetation trimming/crushing shall take place outside the general bird breeding season (February 15 to September 15), to the maximum extent practicable. ~~If this is not possible,~~ **Regardless of the time of year**, prior to ground-disturbing activities, a qualified biologist shall conduct a nesting bird survey to comply with CDFW Code 3503 and 3503.5 and the Migratory Bird Treaty Act. The survey shall occur no more than ~~30~~ **three (3)** days prior to initiation of proposed Project activities **and shall include any potential habitat (including trees, shrubs, the ground, or nearby structures)**. Any occupied passerine and/or raptor nests occurring within ~~or adjacent to~~ the proposed Project area **or the Project's zone of influence (generally 100-300 feet)** shall be delineated **and a no-disturbance buffer zone (as determined by the avian biologist) shall be established and maintained during Project activities**. Additional follow-up surveys may be required by the resource agencies and the County of San Bernardino. ~~If an active nest is identified, an avoidance buffer zone around occupied nests (as determined by the avian biologist) shall be maintained during physical ground-disturbing activities.~~ The buffer zone shall be sufficient in size to prevent impacts to the nest. **A qualified biologist shall monitor active nests to determine whether construction activities are disturbing nesting birds or nestlings. If the qualified biologist determines that construction activities pose a disturbance to nesting, construction work shall be stopped in the area of the nest and the no disturbance buffer shall be expanded.** Once nesting has ceased and the fledglings are no longer using the nest area **as confirmed by a qualified biologist**, the buffer may be removed. A nesting bird survey report shall be provided to the County of San Bernardino **and CDFW. If an active nest is encountered during construction, construction shall stop immediately until a qualified biologist can determine the status of the nest and when work can proceed without risking violation to state or federal laws.**

### **Burrowing Owl**

The Project has the potential to adversely affect burrowing owl (*Athene cunicularia*), a CDFW Species of Special Concern. According to the DEIR, one round of burrowing owl surveys was conducted concurrently with the focused desert tortoise survey over a five-day period from May 11, 2020 through May 15, 2020. CDFW appreciates that surveys were conducted, however, as noted above, CDFW generally does not support the approach of concurrently conducting surveys for different species. Further, while the DEIR states that three potential burrows and sign were observed within the Project site and that impacts to burrowing owl could potentially be significant, it does not clearly identify the extent of suitable habitat within the Project site and therefore CDFW cannot determine the potential

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extent impacts. In areas where burrowing owl may be present, CDFW recommends that the Lead Agency follow the recommendations and guidelines provided in the *Staff Report on Burrowing Owl Mitigation* (2012 Staff Report). The 2012 staff report specifies three steps for project impact evaluations: a habitat assessment; surveys; and an impact assessment. As stated in the *Staff Report*, the three progressive steps are effective in evaluating whether a project will result in impacts to burrowing owl, and the information gained from the steps will inform any subsequent avoidance, minimization, and mitigation measures. Habitat assessments are conducted to evaluate the likelihood that a site supports burrowing owl. Burrowing owl surveys provide information needed to determine the potential effects of proposed projects and activities on burrowing owls, and to avoid take in accordance with Fish and Game Code sections 86, 3503, and 3503.5. Impact assessments evaluate the extent to which burrowing owls and their habitat may be impacted, directly or indirectly, on and within a reasonable distance of the proposed Project activity.

Burrowing owl are susceptible to impacts year-round as their breeding season generally extends from February 1 to August 31 and their overwintering period generally from September 1 to January 31. In areas where burrowing owl may be present, ground disturbing activities should be avoided to the extent practicable. Solar development may be considered a high level of disturbance and an appropriate buffer should be determined to avoid take of the species. If burrowing owl are found within the Project area during pre-construction surveys or construction activities, and it is not possible to avoid active burrows, passive relocation and mitigation shall be implemented.

CDFW recommends the following edits to Mitigation Measure BIO-6 (in ~~strikethrough~~ and **bold**)

Mitigation Measure BIO-6 – **No less than 14 days** prior to ~~construction~~ **any ground disturbance activities**, a burrowing owl Take Avoidance Survey shall be conducted by a qualified biologist **in accordance with the *Staff Report on Burrowing Owl Mitigation* (California Department of Fish and Game 2012)**. ~~The survey shall be conducted no less than 14 days prior to initiating ground disturbance activities.~~ If burrowing owls are determined to be present where Project activities will occur, ~~minimization and avoidance measures shall be required including but not limited to a final survey within 24 hours prior to ground disturbance.~~ **site-specific non-disturbance buffer zones shall be established by the qualified biologist based on monitoring and assessments of the Project's effects on the burrowing owls. If it is not possible to avoid active burrows during the nonbreeding season, passive relocation shall be implemented.**

CDFW further recommends that the Project proponent prepare a Burrowing Owl Mitigation and Monitoring Plan to be submitted to CDFW for review 60 days prior to the start of ground disturbing activities.

### **Desert Kit Fox**

Five active desert kit fox (*Vulpes macrotis arsipus*) burrow/burrow complexes were identified on the Project site during the desert tortoise and burrowing owl surveys. While the DEIR states that “..desert kit fox is a non-sensitive species...”, please note that kit fox is in fact protected as a fur-bearing mammal pursuant to Title 14 of the California Code of Regulations section 460 and may not be taken (including trapping and handling) at any time. Because desert kit fox has high fidelity to natal dens, it is crucial to adequately assess whether desert kit fox is present on the Project site well in advance of commencing Project activities.

CDFW recommends the following edits to Mitigation Measure BIO-7 (in ~~strikethrough~~ and **bold**):

Mitigation Measure BIO-7 – **Prior to commencing Project activities, a qualified biologist shall conduct a focused survey for desert kit fox, including assessment of all burrows in the Project area. If potential burrows are located, they shall be monitored by the qualified biologist.** If any burrow/burrow complex is determined to house desert kit fox and the burrow/burrow complex is unavoidable, exclusionary devices (e.g., one-way doors) ~~should~~ **shall** be fitted on the active burrow openings, and once the burrow has been

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confirmed vacant **as determined by the qualified biologist and in consultation with CDFW**, the burrow ~~should~~ **shall** be carefully excavated to prevent re-entry/re-use of the burrow. These exclusion/excavation activities ~~should~~ **shall** only occur during the non-breeding season (July 2- January 15). If construction will occur during the breeding season, any active burrow/burrow complex that is unavoidable ~~should~~ **shall** be provided a 500-foot no work buffer until the end of breeding season (July 1) or until the burrow has been determined to be inactive (and does not contain pups) by the qualified biologist.

CDFW further recommends that the Project proponent prepare a Desert Kit Fox Monitoring and Mitigation Plan to be submitted to CDFW for review 60 days prior to the start of ground disturbing activities. The Plan should include a summary of desert kit fox occurrence in the Project area, and avoidance and minimization measures, including but not limited to pre-construction surveys, active den and burrow monitoring, excavation of inactive or unoccupied burrows, and details on passive relocation from active, non-natal dens and burrows.

### **Desert Tortoise**

The desert tortoise (*Gopherus agassizii*) is listed as threatened and a candidate as endangered under the California Endangered Species Act (CESA). CDFW is responsible for ensuring appropriate conservation of fish and wildlife resources including threatened, endangered, and/or candidate plant and animal species, pursuant to (CESA). A CESA Incidental Take Permit (ITP) is issued to conserve, protect, enhance, and restore State-listed CESA species and their habitats. CDFW recommends that a CESA ITP be obtained if the Project has the potential to result in "take" (California Fish and Game Code Section 86 defines "take" as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill") of CESA-listed species. Take of any CESA-listed species is prohibited except as authorized by state law (Fish and G. Code, §§ 2080 and 2085). If the Project, including the Project construction or any Project-related activity during the life of the Project, results in take of CESA-listed species, CDFW recommends that the Project proponent seek appropriate authorization prior to Project implementation through an ITP.

No live desert tortoises, active desert tortoise burrows or other desert tortoise sign were identified during focused surveys, but one potential desert tortoise burrow was observed within the survey buffer near the southwest corner of the Project. While the burrow was filled with spider webs and appeared to have been in disuse, this does not necessarily exclude use or occupation of the Project site by desert tortoise. Also, as noted above, the desert tortoise surveys are nearly three years old and CDFW recommends conducting updated protocol surveys for desert tortoise. The DEIR does not include any desert tortoise-specific mitigation measures, but Mitigation Measure BIO-5 address sensitive species in general, indicating that any sensitive species found will be relocated out of harm's way. Desert tortoise may not be moved or handled in any way without proper permits.

### **Lake and Streambed Alteration Program**

The DEIR identifies five drainage systems as well as ephemeral drainages and washes within the Project site subject to CDFW jurisdiction, for a total of 123.85 acres. CDFW appreciates that the Project has been designed to minimize impacts to the largest washes onsite and that the DEIR indicates that impacts to all CDFW jurisdictional resources warrant the need for a 1602 Streambed Alteration Agreement.

Fish and Game Code section 1602 requires an entity to notify CDFW prior to commencing any activity that may do one or more of the following: Substantially divert or obstruct the natural flow of any river, stream or lake; Substantially change or use any material from the bed, channel or bank of any river, stream, or lake; or Deposit debris, waste or other materials that could pass into any river, stream or lake. Please note that "any river, stream or lake" includes those that are episodic (i.e., those that are dry for periods of time) as well as those that are perennial (i.e., those that flow year-round). This includes ephemeral streams, desert washes, and watercourses with a subsurface flow. It may also apply to work undertaken within the flood plain of a body of water.

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Upon receipt of a complete notification, CDFW determines if the proposed Project activities may substantially adversely affect existing fish and wildlife resources and whether a Lake and Streambed Alteration (LSA) Agreement is required. An LSA Agreement includes measures necessary to protect existing fish and wildlife resources. CDFW may suggest ways to modify your Project that would eliminate or reduce harmful impacts to fish and wildlife resources.

CDFW's issuance of an LSA Agreement is a "project" subject to CEQA (see Pub. Resources Code § 21065). To facilitate issuance of an LSA Agreement, if necessary, the DEIR should fully identify the potential impacts to the lake, stream, or riparian resources, and provide adequate avoidance, mitigation, and monitoring and reporting commitments. Early consultation with CDFW is recommended, since modification of the proposed Project may be required to avoid or reduce impacts to fish and wildlife resources. To obtain a Lake or Streambed Alteration notification package, please go to <https://www.wildlife.ca.gov/Conservation/LSA/Forms>.

## 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: [http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDDB\\_FieldSurveyForm.pdf](http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDDB_FieldSurveyForm.pdf). The completed form can be mailed electronically to CNDDDB at the following email address: [CNDDDB@wildlife.ca.gov](mailto:CNDDDB@wildlife.ca.gov). The types of information reported to CNDDDB can be found at the following link: [http://www.dfg.ca.gov/biogeodata/cnddb/plants\\_and\\_animals.asp](http://www.dfg.ca.gov/biogeodata/cnddb/plants_and_animals.asp).

## FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is 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 in order 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.)

## CONCLUSION

CDFW appreciates the opportunity to comment on the DEIR to assist San Bernardino County in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Rose Banks, Senior Environmental Scientist (Specialist) at (760) 218-0022 or [Rose.Banks@wildlife.ca.gov](mailto:Rose.Banks@wildlife.ca.gov).

Sincerely,

DocuSigned by:  
  
84FBB8273E4C480...

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