



State of California – Natural Resources Agency  
DEPARTMENT OF FISH AND WILDLIFE  
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**GAVIN NEWSOM, Governor**  
**CHARLTON H. BONHAM, Director**



December 14, 2022

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Subject: **Conditional Use Permit (CUP21-014) East Cleveland Road Solar Project (Project)**  
**MITIGATED NEGATIVE DECLARATION (MND)**  
**State Clearinghouse No. 2022110239**

Dear Tiffany Ho:

The California Department of Fish and Wildlife (CDFW) received a Mitigated Negative Declaration (MND) from Merced County Community and Economic Development Department (Merced County), as Lead Agency, for the Conditional Use Permit (CUP21-014) East Cleveland Road Solar Project (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, 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 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

<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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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. 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 will be required.

In this role, CDFW is responsible for providing, as available, biological expertise during public agency environmental review efforts (e.g., CEQA), focusing specifically on project activities that have the potential to adversely affect fish and wildlife resources. CDFW provides recommendations to identify potential impacts and possible measures to avoid or reduce those impacts.

**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 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).

**Unlisted Species:** Species of plants and animals need not be officially listed as Endangered, Rare, or Threatened (E, R, or T) on any State or Federal list to be considered E, R, or T under CEQA. If a species can be shown to meet the criteria for E, R, or T, as specified in the CEQA Guidelines section 15380, CDFW recommends it be fully considered in the environmental analysis for the Project.

## **PROJECT DESCRIPTION SUMMARY**

**Proponent:** RPCA Solar 7, LLC

### **Objective:**

The Project proposes to construct a 3 megawatt (MW) solar photovoltaic (PV) electric generating facility on approximately 18.3 acres of the 40-acre parcel, south of the existing on-site residences with access via South Arbor Way. There are two project areas bisected by an irrigation canal, which is avoided with a 40-foot setback. The solar facilities would consist of a ground-mounted, single-axis tracking system featuring 8,316 PV panels and 24 string inverters. The project would be equipped with energy storage

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technology (battery energy storage system [BESS]) that would allow on-site renewable energy generation to be stored and dispatched onto the grid when needed. The power generated from the Project would be transported via an existing PG&E electrical distribution system located on the southeast side of the parcel.

**Location:** The proposed Project site is located on Assessor's Parcel Number (APN) 075-072-008 on East Cleveland Road and South Arbor Way in the El Nido area of Merced County. The project site is approximately 12 miles south of the city of Merced and in a heavily agricultural area. The project site is located approximately 3 miles north of State Route (SR) 152, 2 miles east of SR 59, and approximately 30 miles east of Interstate (I-) 5.

**Timeframe:** Unspecified

## COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist Merced County 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 CEQA document.

Aerial imagery of the Project boundary and its surroundings show the area contains annual grassland and private residences surrounded by agricultural lands. Based on a review of the Project description, a review of California Natural Diversity Database (CNDDDB) records, and the surrounding habitat, special status species could potentially be impacted by Project activities.

Currently, the MND acknowledges that the Project area is within the geographic range of several special-status animal species and proposes specific mitigation measures to reduce impacts to less than significant. CDFW has concerns about the ability for some of the proposed mitigation measures to reduce impacts to less than significant and avoid unauthorized take for several special-status animal species, including the State threatened and federally endangered San Joaquin kit fox (*Vulpes macrotis mutica*); the State threatened Swainson's hawk (*Buteo swainsoni*); the State and federally threatened California tiger salamander (*Ambystoma californiense*); and the State species of special concern American badger (*Taxidea taxus*) and western spadefoot toad (*Spea hammondi*).

CDFW is also concerned that project-related activities may potentially impact several special-status plant species including the California rare plant rank (CRPR) 1B.2 California alkali grass (*Puccinellia simplex*); the CRPR 1B.2 heartscale (*Atriplex cordulata* var. *cordulata*); the CRPR 1B.1 lesser saltscale (*Atriplex minuscula*); the

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CRPR 1B.2 recurved larkspur (*Delphinium recurvatum*); and the CRPR 1B.2 subtle orache (*Atriplex subtilis*). Finally, CDFW is concerned with potential impacts to migratory and non-migratory nesting birds.

### **San Joaquin kit fox**

Mitigation Measure MM BIO-3 states that, “A qualified biologist (approved by the USFWS) shall perform early evaluation surveys in accordance with the current USFWS approved protocol for SJKF prior to ground- or vegetation-disturbing activities associated with preconstruction, geotechnical, or soils investigations; construction; operations; or maintenance. Upon completion of early evaluation surveys, informal consultation with the USFWS shall be initiated to determine proper techniques to employ to avoid impacts to this species during project construction, which would be considered significant under CEQA.” CDFW also recommends the following mitigation measures be incorporated for the proposed project:

#### **Recommended Mitigation Measure 1: SJKF Avoidance Buffer**

CDFW recommends following the USFWS “Standardized recommendations for protection of the San Joaquin kit fox prior to or during ground disturbance” (2011) for appropriate avoidance buffer distances to avoid impacts to SJKF potential, atypical, known, and Natal/pupping dens.

#### **Recommended Mitigation Measure 2: Take Authorization**

SJKF detection warrants consultation with CDFW to discuss how to avoid take. If avoidance is not feasible, take authorization through the acquisition of an ITP, prior to ground disturbing activity, pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA.

### **Swainson’s Hawk (SWHA)**

The MND identified SWHA as potentially occurring within the Project area and identified suitable foraging and nesting habitat within and adjacent to the Project site, but did not provide specific mitigation measures to reduce Project impacts to less than significant. SWHA have been documented to occur in several locations adjacent to the Project site with the closest occurrence located approximately four miles north of the Project (CDFW 2022).

CDFW is concerned that impacts to SWHA would occur without implementing the following mitigation measures:

#### **Recommended Mitigation Measure 3: SWHA Surveys**

To evaluate potential Project-related impacts, CDFW recommends that a qualified wildlife biologist conduct protocol surveys for nesting SWHA following the entire

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survey methodology developed by the SWHA Technical Advisory Committee (SWHA TAC 2000) in the survey season immediately prior to Project implementation. SWHA detection during protocol-level surveys warrants consultation with CDFW to discuss how to implement Project activities and avoid take.

**Recommended Mitigation Measure 4: SWHA Avoidance Buffer**

If Project-specific activities will take place during the SWHA nesting season (i.e., February 1 through September 15), and active SWHA nests are present, CDFW recommends a minimum ½-mile no-disturbance buffer be delineated and maintained around each nest, regardless of whether it was detected by surveys or observed incidentally. These buffers would 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, to prevent nest abandonment and other take of SWHA as a result of Project activities.

**Recommended Mitigation Measure 5: SWHA Take Authorization**

CDFW recommends that in the event an active SWHA nest is detected, and a ½-mile no-disturbance buffer is not feasible, consultation with CDFW occur 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.

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

Finally, CDFW recommends compensation for the loss of SWHA foraging habitat as described in CDFW's "Staff Report Regarding Mitigation for Impacts to Swainson's Hawks" (CDFG 1994) to reduce impacts to foraging habitat to less than significant. The Staff Report recommends that mitigation for habitat loss occur within a minimum distance of 10 miles from known nest sites. CDFW has the following recommendations based on the Staff Report:

- For projects within 1 mile of an active nest tree, a minimum of 1 acre of habitat management (HM) land for each acre of development is advised.
- For projects within 5 miles of an active nest but greater than 1 mile, a minimum of ¾ acre of HM land for each acre of development is advised.
- For projects within 10 miles of an active nest tree but greater than 5 miles from an active nest tree, a minimum of ½ acre of HM land for each acre of development is advised

**Other State Special-Status Species**

Appendix C of the MND identified California tiger salamander, American badger, and western spadefoot as having a low potential to occur on the Project site and did not

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provide specific mitigation measures to reduce Project impacts to these species. As all three of these species have been documented recently within approximately four miles of the Project area (CDFW 2022) and are known to inhabit grassland habitats, CDFW is concerned the Project could impact these species if they are present during construction. CDFW recommends the following mitigation measures be incorporated for the proposed Project:

**Recommended Mitigation Measure 7: Other State Special-Status Species Surveys**

CDFW recommends that a qualified biologist conduct focused surveys for California tiger salamander, American badger, and western spadefoot in potentially suitable habitat no more than 30 days prior to the beginning of ground disturbing activities.

**Recommended Mitigation Measure 8: Other State Special-Status Species Avoidance Buffer**

CDFW recommends avoidance whenever possible via delineation and observation of a 50 foot no-disturbance buffer around entrances of burrows, dens, and crevices in which California Tiger salamander, American badger, and western spadefoot could be present.

**Recommended Mitigation Measure 9: CTS Take Authorization**

CTS detection warrants consultation with CDFW to discuss how to avoid take. If avoidance is not feasible, take authorization through the acquisition of an ITP, prior to ground disturbing activity, pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA.

**Special-Status Plants**

The MND states that special status plants, including California alkali grass, heartscale, lesser saltscale, recurved larkspur, and subtle orache are unlikely to occur within the Project site due to the level of disturbance and presence of non-native species. This conclusion was based on a habitat assessment conducted in January and did not include seasonally appropriate botanical surveys. While these species may have a low potential to occur, suitable grassland habitat is present within the Project area and several special status plant species have been documented within approximately two miles of the Project. CDFW recommends the following mitigation measures be incorporated for the proposed project to justify the conclusions reached in the MND:

**Recommended Mitigation Measure 10: Special-Status Plants Surveys**

CDFW recommends the Project site be surveyed for special status plants by a qualified botanist following the "*Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities*" (CDFG, 2018). This protocol, which is intended to maximize detectability, includes the identification

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of reference populations to facilitate the likelihood of field investigations occurring during the appropriate floristic period.

**Recommended Mitigation Measure 11: Special-Status Plants Avoidance Buffer**

CDFW recommends special status plant species be avoided whenever possible by delineation and observing a no-disturbance buffer of at least 50 feet from the outer edge of the plant population(s) or specific habitat type(s) required by special status plant species. If buffers cannot be maintained, then consultation with the CDFW is warranted to determine appropriate minimization and mitigation measures for impacts to special status plant species.

**Nesting Birds**

The MND provides a mitigation measure for nesting birds, which states, “If construction or vegetation removal activities must occur during the bird breeding season (February 1–August 31), surveys for active nests shall be conducted by a qualified biologist no more than 30 days prior to the start of construction. For raptors, an initial no-disturbance buffer of 500 feet shall be established around active nests and demarcated with fencing or flagging. This buffer shall be increased to 0.5-mile for Swainson’s hawk. For non-raptors, an initial no-disturbance buffer of 250 feet shall be established around active nests and demarcated with fencing or flagging. No project-related activities shall occur within the buffer zone until a qualified biologist has determined that the birds have fledged and are no longer reliant on the nest or parental care for survival. The buffer distance for species not listed under the CESA or ESA may be reduced at the discretion of a biologist who has extensive experience observing bird behavior and monitoring nests, if the biologist observes that the birds’ behavior is not disturbed by activity closer to the nest, depending on the sensitivity of the species and nest location. Buffer sizes for species listed under the CESA and/or ESA may be reduced in consultation with the responsible state and/or federal agency: CDFW and/or USFWS.” Currently, the MND allows for buffer variance without CDFW concurrence. CDFW recommends that qualified biologist advise and support any variance from these buffers and notify CDFW in advance of implementing a variance. Additionally, CDFW recommends the following mitigation measure to adjust the timing of surveys proposed in the MND:

**Recommended Mitigation Measure 12: Nesting Bird Surveys**

If ground-disturbing activities occur during the nesting bird season (February 1 – September 15), CDFW recommends that a qualified 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 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 a project. In addition to direct impacts (i.e., nest

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destruction), noise, vibration, odors, 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.

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

**Federally Listed Species:** CDFW recommends consulting with USFWS regarding potential impacts to federally listed species including but not limited to San Joaquin kit fox and California tiger salamander. Take under the Federal Endangered Species Act (FESA) is more broadly defined than CESA; take under FESA also includes significant habitat modification or degradation that could result in death or injury to a listed species by interfering with essential behavioral patterns such as breeding, foraging, or nesting. Consultation with the USFWS in order to comply with FESA is advised well in advance of any Project activities.

### **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 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**

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**

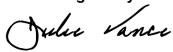
CDFW appreciates the opportunity to comment on the MND to assist Merced County in identifying and mitigating Project impacts on biological resources.



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If you have any questions, please contact Jeremy Pohlman, Senior Environmental Scientist (Specialist), at the address provided on this letterhead, by telephone at (805) 503-2375 or by electronic mail at [Jeremy.Pohlman@wildlife.ca.gov](mailto:Jeremy.Pohlman@wildlife.ca.gov).

Sincerely,

DocuSigned by:  


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**Julie A. Vance**  
Regional Manager

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## REFERENCES

California Department of Fish and Game (CDFG), 1994. *Staff Report Regarding Mitigation for Impacts to Swainson's Hawks (Buteo Swainsoni) in the Central Valley of California*. California Department of Fish and Wildlife.

CDFG, 2018. *Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities*. California Department of Fish and Game, March 2018.

California Department of Fish and Wildlife (CDFW), 2022. *Biogeographic Information and Observation System (BIOS)*.

<https://www.wildlife.ca.gov/Data/BIOS>. Accessed September 29, 2022.

Swainson's Hawk Technical Advisory Committee (SWHA TAC), 2000. *Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in the Central Valley of California*. Swainson's Hawk Technical Advisory Committee. May 31, 2000.

USFWS, 2011. *Standard Recommendations for the Protection of the San Joaquin Kit Fox Prior to or During Ground Disturbance*. United States Fish and Wildlife Service. January 2011.

**Attachment 1**

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

**PROJECT: East Cleveland Road Solar Project**

**SCH No.: 2022110239**

<b>RECOMMENDED MITIGATION MEASURE</b>	<b>STATUS/DATE/INITIALS</b>
<i>Before Disturbing Soil or Vegetation</i>	
SJKF	
Recommended Mitigation Measure 2: SJKF take authorization	
SWHA	
Recommended Mitigation Measure 3: SWHA surveys	
Recommended Mitigation Measure 5: SWHA take authorization	
Recommended Mitigation Measure 6: SWHA foraging habitat mitigation	
Other State Special-Status Species	
Recommended Mitigation Measure 7: Other State Special-Status Species surveys	
Recommended Mitigation Measure 9: Other State Special-Status Species take authorization (for CTS)	
Special-Status Plants	
Recommended Mitigation Measure 10: Special-Status Plant surveys	
Nesting Birds	
Recommended Mitigation Measure 12: Nesting Birds surveys	
<i>During Construction</i>	
SJKF	
Recommended Mitigation Measure 1: SJKF avoidance buffer	
SWHA	
Recommended Mitigation Measure 4: SWHA avoidance buffer	
Other State Special-Status Species	
Recommended Mitigation Measure 8: Other State Special-Status Species avoidance buffer	
Special-Status Plants	
Recommended Mitigation Measure 11: Special-Status Plants avoidance buffer	