



State of California – Natural Resources Agency

DEPARTMENT OF FISH AND WILDLIFE

Bay Delta Region

2825 Cordelia Road, Suite 100

Fairfield, CA 94534

(707) 428-2002

[www.wildlife.ca.gov](http://www.wildlife.ca.gov)

**Gavin Newsom, Governor**  
**CHARLTON H. BONHAM, Director**



October 20, 2023

Stephanie Stowers, Senior Planner  
San Joaquin County Community Development Department  
1810 E. Hazelton Avenue  
Stockton, CA 95205  
[SStowers@sigov.org](mailto:SStowers@sigov.org)

Subject: Griffith Energy Storage Project, Draft Environmental Impact Report, SCH No. 2022120675, City of Tracy, San Joaquin and Alameda Counties

Dear Stephanie Stowers:

The California Department of Fish and Wildlife (CDFW) received a Notice of Availability of a Draft Environmental Impact Report (EIR) from San Joaquin County (County) for the Griffith Energy Storage Project (Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.<sup>1</sup>

CDFW is submitting comments on the draft EIR to inform the County, as the Lead Agency, of our concerns regarding potentially significant impacts to biological resources associated with the Project.

## CDFW ROLE

CDFW is a **Trustee Agency** with responsibility under CEQA (Pub. Resources Code, § 21000 et seq.) pursuant to CEQA Guidelines section 15386 for commenting on projects that could impact fish, plant, and wildlife resources. CDFW is also considered a **Responsible Agency** if a Project would require discretionary approval, such as permits issued under the California Endangered Species Act (CESA), the Lake and Streambed Alteration (LSA) Program, or other provisions of the Fish and Game Code that afford protection to the state's fish and wildlife trust resources.

## REGULATORY AUTHORITY

### California Endangered Species Act

Please be advised that a CESA Incidental Take Permit (ITP) must be obtained if the Project has the potential to result in "take" of plants or animals listed under CESA, either during construction or over the life of the Project. Issuance of a CESA ITP is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures,

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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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and a mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain a CESA ITP.

### **Fully Protected Species**

Fully protected species, such as white-tailed kite (*Elanus leucurus*) and golden eagle (*Aquila chrysaetos*), may not be taken or possessed at any time and no licenses or permits may be issued for their take except as follows. The take is for necessary scientific research, efforts to recover a fully protected, endangered, or threatened species, live capture and relocation of a bird species for the protection of livestock, or if they are a covered species whose conservation and management is provided for in a Natural Community Conservation Plan (Fish & G. Code, §§ 3511, 4700, 5050, & 5515). Specific types of infrastructure projects may be eligible for an ITP for unavoidable impacts to fully protected species if certain conditions are met (see Fish & G. Code §2081.15). Project proponents should consult with CDFW early in the project planning process.

### **Raptors and Other Nesting Birds**

CDFW has jurisdiction over actions that may result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections protecting birds, their eggs, and nests include sections 3503 (regarding unlawful take, possession or needless destruction of the nests 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:** Griffith Energy Storage, LLC., 700 Universe Boulevard, Juno Beach, FL 33408

#### **Project Description**

The proposed Project includes construction, operation, maintenance, and decommissioning of a 400-megawatt (MW) battery energy storage system (BESS) and associated facilities and infrastructure, to be known as the Griffith Energy Storage Project (Project) in San Joaquin County. Additionally, the Project would connect at the Pacific Gas and Electric (PG&E) Tesla Substation in close proximity to the site in Alameda County via a 230-kilovolt (kV) interconnection generation tie (gen-tie) line that extends from the energy storage facility within a gen-tie corridor partially within San Joaquin County that will extend to the PG&E Tesla Substation within Alameda County. The energy storage facility would house lithium-ion batteries (or similar technology) totaling 400-MW of energy storage on a 106-acre site.

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The gen-tie corridor is approximately 14,920 feet long and 100 feet wide, such that the corridor incorporates approximately eight acres. The Project would contain pad-mounted energy storage units, in addition to inverters, supervisory control and data acquisition (SCADA) equipment, a collector substation, and an interconnection gen-tie line to the Tesla Substation. The Project would also include related and supporting facilities, such as on-site service roads, gates and security fencing, and temporary laydown and construction areas.

**Location:** The Project is located roughly in the southwestern corner of Township 2 South, Range 4 East, southeast portion of Section 32 of the Midway, California, U.S. Geological Survey (USGS) 7.5-minute topographic quadrangle. The Project site is centered at a latitude of 37.710 degrees and longitude of -121.554 degrees (in decimal degrees). The Property is approximately 0.9-mile southwest of Interstate 580 and approximately five miles southwest of the City of Tracy, and in proximity to the PG&E Tesla Substation. The Project site consists of county Assessor's Parcel Number (APN) 209-10-19 in San Joaquin County and APN 99B-7885-002 and 99B-7590-1-3 in Alameda County for the access road and gen-tie line.

## ENVIRONMENTAL SETTING

The Project area is situated on the rolling foothills (alluvial fans and terraces ecoregion) along the western edge of the San Joaquin Valley, adjacent to the Diablo Range of the Coast Range Physiographic Province. This series of low-relief Coast Range Mountains aligns predominately northwest to southeast and separates the Central Valley from the San Francisco Bay Area. Livermore Valley, followed by the San Francisco Bay, is to the west and San Joaquin Valley is to the east of the Project site.

The basin was historically drained by Mountain House Creek (two miles north/northwest of the Project) and Patterson Run Creek (one mile north of the Project), which drains eastward toward the San Joaquin Valley. No perennial sources are located on or adjacent to the Project, although ephemeral streams are present.

According to Biogeographic Information and Observation System (BIOS) records, the Project site contains positive detections of several special-status species and has the potential to support numerous special-status species and their associated habitat. Species with potential to occur on-site include, but are not limited to, California tiger salamander (*Ambystoma californiense*; federally threatened (FT), state threatened (ST)), California red-legged frog (*Rana draytonii*; FT, state Species of Special Concern (SSC)), burrowing owl (*Athene cunicularia*), golden eagle (*Aquila chrysaetos*; state Fully Protected), Swainson's hawk (*Buteo swainsonii*; ST), tri-colored blackbird (*Agelaius tricolor*; ST), American badger (*Taxidea taxus*; state SSC), big tarplant (*Blepharizonia plumosa*; California Native Plant Society Rank of Rare (CNPS), Threatened, or

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Endangered in California and Elsewhere), caper-fruited tropidocarpum (*Tropidocarpum capparideum*; CNPS, Threatened, or Endangered in California and Elsewhere).

## **COMMENTS AND RECOMMENDATIONS**

CDFW offers the comments and recommendations below to assist the 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 document. Based on the Project's avoidance of significant impacts on biological resources with implementation of mitigation measures, including those CDFW recommends, CDFW concludes that an EIR is appropriate for the Project. Please see Attachment 1 Draft Mitigation and Monitoring Reporting Plan outlining the mitigation measures recommended by CDFW below.

### **COMMENT 1: San Joaquin County Multi-Species Habitat Conservation and Open Space Plan (SJMSCP) Coverage and Incidental Take Coverage**

CDFW recognizes that the Project proponent is seeking coverage under the SJMSCP for the portion of the Project area within San Joaquin County. Additionally, the Project proponent has applied for CESA ITP covering California tiger salamander, Crotch's bumblebee (*Bombus crotchii*), and San Joaquin kit fox (*Vulpes macrotis mutica*) within the Alameda County portion of the Project and Crotch's bumblebee within the San Joaquin County portion of the Project.

The Biological Resources section within Table EX-1 states that California tiger salamander, Swainson's hawk, burrowing owl, white-tailed kite, San Joaquin kit fox, and American badger are covered under the SJMSCP. While this is the case for the San Joaquin County portion of the Project area, this Project also contains a portion within Alameda County which would not be covered under the SJMSCP. This information should be disclosed within the draft EIR, and take coverage sought for CESA-listed species that occur in the portions of the Project that are outside of San Joaquin County.

### **COMMENT 2: Species Surveys and Timing**

Focused surveys for special-status species using appropriate protocols should be conducted by qualified biologists at the Project site prior to any Project-related construction no earlier than seven (7) days prior to start of work, unless otherwise specified in this comment letter. Survey results should be sent to CDFW for review and acceptance.

Additionally, within *Section 4.4.1.6 Pacific Gas and Electric Tesla Substation Improvements*, biological surveys conducted in the Alameda County gen-tie footprint are referenced, but it does not append the cited Jacobs reports or incorporate Jacobs'

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survey data into draft EIR figures (e.g., Figs. 4.4-1 through 4.4-5) to clearly combine survey data and impact analyses. Combined data and impact analyses should be incorporated when preparing the Final EIR.

### **COMMENT 3: Lake and Streambed Alteration**

**Issue:** Page 4.10-15 of the draft EIR indicates the Project site contains ephemeral drainage courses and an ephemeral pond. Within the same section, impacts are described as 32 acres of surface disturbance during construction and a potential increase of 18.8 acres of impervious surface across the Project site after construction. The draft EIR does not adequately disclose how streams would be avoided during Project activities or whether an LSA is necessary due to proposed activities.

CDFW requires an LSA Notification, pursuant to Fish and Game Code section 1600 et seq., for Project activities affecting lakes or streams and associated riparian habitat. The Project's draft EIR states that impacts to streams would occur on-site. Therefore, the Project proponent should submit a 1602 notification covering all activities subject to Fish and Game Code 1602 authority.

Notification is required for any activity that may substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to notification requirements. CDFW will consider the CEQA document for the Project and may issue an LSA Agreement. CDFW may not execute the final LSA Agreement (or ITP) until it has complied with CEQA as a Responsible Agency.

**Recommendation:** Disclose and further evaluate all Project activities in the draft EIR that will occur in or adjacent to streams, rivers, and/or lakes. If impacts to the bed, bank, channel or riparian areas cannot be fully avoided, the Project proponent should submit a Notification for the work pursuant to Fish and Game Code 1602.

### **COMMENT 4: California Red-legged Frog**

**Issue:** Project activities have the potential to directly and/or indirectly impact California red-legged frog, and/or their habitat.

According to BIOS, there is an extant detection of California red-legged frog approximately 0.8 miles from the Project site (California Natural Diversity Database (CNDDB) accessed September 2023). Measure BIOS-1 requires pre-construction surveys with a maximum buffer distance of 300 feet from the Project site. This buffer distance is not adequate for detecting presence of California red-legged frog that could disperse between upland refugia and aquatic habitat. Additionally, the language does

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not describe survey methodology, including all focal habitat features to be surveyed (i.e., streams, plunge pools, burrows, crevices, etc.). The measure does not address removal of upland habitat and it does not clearly define California red-legged frog breeding habitat. Therefore, the measure as written is inadequate.

California red-legged frog require a variety of habitats, including aquatic breeding habitats and upland dispersal habitats. Breeding occurs sites are generally found in deep (greater than 2.5 feet), still or slow-moving aquatic habitats with a wide range of edge and emergent cover levels, including pools and backwaters within streams and creeks, ponds, marshes, springs, sag ponds, dune ponds and lagoons. Additionally, California red-legged frog frequently breed in artificial impoundments such as stock ponds (U.S. Fish and Wildlife Service (USFWS) 2002). California red-legged frog can breed at sites with dense shrubby riparian or emergent vegetation, such as cattails (*Typha* sp.) or overhanging willows (*Salix* sp.) or can proliferate in ponds devoid of emergent vegetation (i.e., stock ponds). Potential habitat for California red-legged frog includes nearly any area within one to two miles of a breeding site that stays moist and cool through the summer; this includes non-breeding aquatic habitat in pools of slow-moving streams, perennial or ephemeral ponds, and upland sheltering habitat such as rocks, small mammal burrows, logs, densely vegetated areas, and man-made structures (i.e., culverts, livestock troughs, spring-boxes, and abandoned sheds) (USFWS 2017b).

Habitat loss from growth of cities and suburbs, mining, overgrazing by cattle, invasion of nonnative plants, impoundments, water diversions, stream maintenance for flood control, degraded water quality, and introduced predators, such as bullfrogs are the primary threats to the species (Thompson et al. 2016; USFWS 2017b). Therefore, if California red-legged frog is present in the Project area and would be impacted, Project impacts to California red-legged frog would be potentially significant.

**Recommendations:** For an adequate environmental setting and to reduce potential impacts to California red-legged frog to less-than-significant, CDFW recommends editing the measure to include the following language:

*Within 48 hours prior to the commencement of ground-disturbing activities, the Project area and nearby vicinity, including a minimum 500-foot radius surrounding the Project area, shall be assessed by a qualified biologist for the presence of California red-legged frog individuals and habitat features. Habitat features include both aquatic habitat such as plunge pools and ponds and terrestrial habitat such as burrows. The results of the habitat feature assessment shall be submitted to CDFW for written acceptance prior to starting Project activities. Habitat features shall be flagged for avoidance to the extent feasible. If California red-legged frog are encountered during the assessment or Project activities, the Project shall not proceed or all work shall cease, and CDFW shall immediately be notified. Work shall not proceed until the California red-legged frog,*

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*through its own volition, moves out of harm's way and CDFW has provided permission in writing to proceed with the Project. If California red-legged frog is encountered or the qualified biologist believes that California red-legged frog is likely to occur in the Project area, the Project shall consult with USFWS pursuant to the federal Endangered Species Act (ESA). All California red-legged frog upland and breeding habitat should be considered and evaluated when consulting with USFWS for take authorization.*

It is understood that California red-legged frog is a covered species within the SJMSCP, which covers the San Joaquin County portion of the project. However, the Alameda County portion of the site is not covered by the SJMSCP. Therefore, consultation with USFWS should be sought if impacts to California red-legged frog are unavoidable within the Alameda County portion of the Project.

#### **COMMENT 5: Western Pond Turtle**

**Issue:** The draft EIR states that western pond turtle are not likely to occur on-site due to the presence of grazed grasslands and that other habitat features are not available. However, the draft EIR describes the presence of an ephemeral pond and ephemeral drainages on-site. Western pond turtle are known to nest in the spring or early summer within 100 meters of a water body, although nest sites as far away as 500-meter have also been reported. It is unclear where the described ephemeral pond or other water bodies are located on the Project site. Additionally, western pond turtle can spend up to 200 days away from water, especially since ponds tend to dry down during summer months. In addition, it is speculative that presence of grazed grasslands precludes use of the Project site by western pond turtle as CDFW is not aware of any scientific evidence to support this claim.

Without appropriate avoidance and minimization measures for western pond turtle, potentially significant impacts associated with Project activities include nest destruction, inadvertent entrapment, reduced reproductive success, reduction in health or vigor of eggs and/or young, and direct mortality.

**Recommendations:** CDFW recommends that the draft EIR include a measure requiring a qualified biologist to conduct focused surveys for potential western pond turtle nesting habitat prior to each phase of the Project. If nesting habitat is identified then to exclude any female western pond turtle from laying eggs within a development phase of the Project, exclusion fencing should be placed prior to the egg-laying season (March through August). Exclusion fencing should be designed to encompass each development phase and maintained weekly until construction activities have been completed.

Additionally, CDFW recommends that if any western pond turtle are discovered at the site immediately prior to or during Project activities, they should be allowed to move out

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of the area of their own accord. If a western pond turtle is unable to independently move out of the Project area, a qualified biologist should relocate it out of harm's way to habitat similar to where it was found.

**COMMENT 6: Nesting Migratory Birds, including Nesting Raptors and Fully Protected Birds**

**Issues:** Measure BIO-3 would not adequately reduce impacts to nesting birds to a level of less-than-significant. The Measure does not include an adequate survey radius relative to nest sites or nest trees that could prevent potential impacts to species, especially with respect to raptors. Additionally, the measure does not provide adequate details about nest monitoring timeline and requirements to ensure the qualified biologist does not miss signs of disturbance and/or distress. Without an adequate protocol specified, Project related impacts to nesting birds could lead to significant impacts to nesting birds including, but not limited to, nest abandonment, nest failure, impacts to availability of forage, chick mortality, and resultant population decline.

**Recommendations:** CDFW recommends the draft EIR be revised to incorporate the following edits to language in BIO-3 to ensure that significant impacts to bird species resulting from the Project are mitigated to a level of less-than-significant.

*Construction work should take place outside of the February 15 to September 15 bird nesting seasonal window to the maximum extent practicable. If construction is to be conducted during the nesting season, the Project Applicant is responsible for ensuring that the Project does not result in any violation of Fish and Game Code. A qualified biologist will conduct focused pre-construction nesting bird surveys throughout the Project area no more than five days prior to the initiation of on-site Project-related activities. Surveys will be conducted in all potential habitat located at, and adjacent to, Project work sites and in staging and storage areas. The minimum survey radii surrounding the work area will be the following: (1) 250 feet for non-raptors; (2) and 1,000 feet for raptors. In the event that there is a lapse in construction activities for seven days or more, a qualified biologist will conduct additional focused pre-construction nesting bird surveys in areas of potential habitat again before Project activities can be reinitiated. If an active nest is found, the qualified biologist may consult with CDFW if needed regarding appropriate action to comply with Fish and Game Code.*

- *Active Nest Buffers. Active nest sites and protective buffer zones will be designated as "ecologically sensitive areas" where no Project-related activities or personnel may enter (while occupied or in use for the season in the case of multi clutch bearing species) during the course of nesting bird season with the establishment of a fence barrier or flagging surrounding the nest site. The qualified biologist will determine the necessary buffer, in consultation with CDFW if needed, to protect nesting birds based on existing site conditions, such as*



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*construction activity, topography, and line of sight, and will increase buffers as needed to provide sufficient protection of nesting birds and their natural behaviors.*

- *Active Nests. A qualified biologist will observe any identified active nests prior to the start of any Project-related activities to establish a behavioral baseline of the adults and any nestlings. Once Project activities commence, all active nests will be continuously monitored by a qualified biologist to detect any signs of disturbance and behavioral changes as a result of the Project. In addition to direct impacts, such as nest destruction, nesting birds might be affected by noise, vibration, odors and movement of workers or equipment. If signs of disturbance and behavioral changes are observed, the qualified biologist will halt Project activities causing that change until the nestlings have fledged, and the nest is determined to be inactive.*

#### **COMMENT 7: Swainson's Hawk**

**Issue:** The draft EIR acknowledges potential for encountering Swainson's hawk on-site. Swainson's hawk nests have been identified within 0.5 miles of the Project site and reported anecdotally to CDFW staff and via eBird website (<http://ebird.org>). The nest site includes trees north of the intersection of Patterson Pass Road and Midway Road. The draft EIR Measure BIO-1 requires only one pre-construction survey within 10 days of Project commencement and does not provide details regarding how behavior should be monitored for active nests. Therefore, the measure as written is inadequate.

**Recommendations:** CDFW recommends conducting protocol-level surveys for Swainson's hawk nest sites to determine the appropriate mitigation to reduce impacts to less-than-significant. CDFW recommends using the Swainson's Hawk Technical Advisory Committee's *Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley* (TAC Report) available at: <https://www.wildlife.ca.gov/Conservation/Survey-Protocols>.

To mitigate for the loss of Swainson's hawk foraging habitat in a method consistent with the *Staff Report Regarding Mitigation for Impacts to Swainson's Hawks (Buteo swainsoni) in the Central Valley of California*, CDFW 1994, (Swainson's Hawk Staff Report), CDFW recommends the draft EIR incorporate the following language:

- For projects within one mile of an active nest tree (the Swainson's Hawk Staff Report defines an active nest as used during one or more of the last five years), provide at least one acre of land for each acre of development authorized;
- For projects within five miles of an active nest tree, but greater than one mile from the nest tree, provide at least 0.75 acres of land for each acre of

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development authorized; and

- For projects within 10 miles of an active nest tree, but greater than five miles from an active nest tree, provide at least 0.5 acres of land for each acre of development authorized.

CDFW recommends that Project-related disturbance within a minimum of 0.25 miles (and up to 0.5 miles depending on-site-specific conditions) of active Swainson's hawk nest site should be reduced or eliminated during the critical phases of the nesting cycle (March 15 through September 15) in order to avoid significant impacts to Swainson's hawk. If Project activities must be conducted during this critical phase, then appropriate buffers should be established by a qualified biologist.

CDFW acknowledges that Swainson's hawk is a covered species within the SJMSCP, which covers the San Joaquin County portion of the Project. However, the Alameda County portion of the site is not. Therefore, adequate mitigation would need to be sought if impacts to Swainson's hawk are unavoidable within the Alameda County portion of the Project.

#### **COMMENT 8: Golden Eagle**

The draft EIR states that golden eagle is unlikely to be present on-site since the Project does not contain preferred habitat. There is an extant golden eagle observation approximately 2.65 miles to the northwest of the Project site (CNDDDB accessed September 2023). The Project site contains grazed grassland, which is suitable for golden eagle to use as foraging habitat. Additionally, less than 0.25 miles North of the Project site, there is a line of mature trees that may serve as appropriate nesting habitat for golden eagle. Based on the Project site and surrounding habitat available, Project activities may cause significant impacts to golden eagle without appropriately focused surveys conducted.

Golden eagles are sensitive to both visual disturbances as well as noise disturbance alone, even with a full visual barrier. The species typically displays subtle behavioral changes signifying stress from noise and visual disturbances. These behavioral changes can easily be missed, so it is critical that any biologist conducting surveys have previous experience monitoring golden eagle nest behavior.

**Recommendations:** CDFW recommends incorporating following survey protocols per the *Interim Golden Eagle Inventory and Monitoring Protocols; and Other Recommendations* document:

<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83940>.

*Surveys should be conducted by a qualified biologist with sufficient experience surveying and monitoring golden eagle. Golden eagle are known to spend 90 percent of*

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*their time within one mile of a nest; therefore, nest surveys should be completed at minimum within one mile of the outer boundaries of Project related activities. Active golden eagle nests observed within one mile of Project related activities should be monitored by a qualified biologist and a “no-work” buffer should be implemented until all young have fledged. CDFW should be consulted to determine site specific buffers and monitoring requirements to avoid premature fledging or risk of nest failure.*

*If impacts to golden eagle as a result of Project related activities cannot be avoided, CDFW should be consulted for further instruction.*

### **COMMENT 9: Burrowing owls**

**Issues:** The draft EIR acknowledges that the Project has a high potential to impact burrowing owl. BIOS indicates two burrowing owl observations overlapping the Project site area (CNDDDB Accessed September 2023). However, Measure BIO-1 only requires a pre-construction level survey no greater than 14-days prior to start of ground-disturbing activities and within 24 hours prior to start of ground-disturbing activities. Please be advised that preconstruction surveys alone are inadequate to determine impacts to western burrowing owl and their habitat. Burrowing owl may also use unnatural features such as debris piles, culverts and pipes for nesting, roosting, or cover. If burrowing owl that may be impacted by the Project are not detected, the Project may result in reduced health and vigor, or direct mortality, of burrowing owl arising from impacts to occupied wintering habitat or from wintering burrow abandonment caused by auditory and visual disturbances (Klute et. al 2003). Burrowing owl is a California SSC and protected under Fish and Game Code sections 3503 and 3503.5. Therefore, if burrowing owl are present on or within 1,640 feet of the Project site, Project impacts to burrowing owl would be potentially significant.

**Recommendation:** For an adequate environmental setting evaluation and to reduce impacts to burrowing owl to a level less-than-significant, CDFW recommends revising the draft EIR to include the following revised mitigation measure:

*A qualified biologist shall conduct a habitat assessment for burrowing owl, and surveys if habitat is present. The qualified biologist shall follow the California Department of Fish and Game (now CDFW) 2012 Staff Report on Burrowing Owl Mitigation (CDFW 2012 Staff Report) habitat assessment and survey methodology prior to Project activities occurring during the burrowing owl wintering season from September 1 to January 31. The habitat assessment and surveys shall encompass a sufficient buffer zone to detect owls nearby that may be impacted, which shall be a minimum of 1,640 feet unless otherwise approved in writing by CDFW. Surveys shall include four non-breeding season surveys spread evenly throughout the nonbreeding season pursuant to the CDFW 2012 Staff Report. Time lapses between surveys or Project activities shall trigger subsequent surveys, as determined by a qualified biologist, including, but not limited to,*

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*a final survey within 24 hours prior to ground disturbance and before construction equipment mobilizes to the Project area. The qualified biologist shall have a minimum of two years of experience implementing the CDFW 2012 Staff Report survey methodology resulting in detections.*

*Detected burrowing owls shall be avoided pursuant to the buffer zone prescribed in the CDFW 2012 Staff Report, unless otherwise approved in writing by CDFW, and any eviction plan shall be subject to CDFW review. Please be advised that CDFW does not consider eviction of burrowing owls (i.e., passive removal of an owl from its burrow or other shelter) as a "take" avoidance, minimization, or mitigation measure; therefore, off-site habitat compensation shall be included in the eviction plan. Habitat compensation acreages shall be approved by CDFW, as the amount depends on site-specific conditions, and completed before Project construction unless otherwise approved in writing by CDFW. It shall also include placement of a conservation easement and preparation and implementation of a long-term management plan prior to Project construction.*

CDFW acknowledges that burrowing owl is a covered species within the SJMSCP, which covers the San Joaquin County portion of the Project. However, the Alameda County portion of the site is not. Therefore, adequate mitigation would need to be sought if impacts to burrowing owl are unavoidable within the Alameda County portion of the Project.

#### **COMMENT 10: Special-Status Plants**

**Issue:** The draft EIR Measure BIO-1 recognizes that big tarplant is likely to be present on-site and provides mitigation and monitoring measures for impacts. However, the draft EIR does not evaluate the potential for other rare plant species that are likely to occur on-site. According to BIOS, shining navarretia is detected approximately 2.05 miles from the Project site (CNDDDB Accessed September 2023). The Biological Resources Assessment submitted with the draft EIR indicates there is also high likelihood of encountering caper-fruited tropidocarpum, which has a rare plant rank of 1B.2. The Project proponent conducted botanical surveys in January 2022, which is outside of the blooming periods for plant species potentially within the Project site. The submitted Biological Resources Assessment recommends conducting additional botanical surveys. CDFW concurs with this recommendation.

In the absence of appropriate survey methodology and mitigation measures, the Project could potentially have a significant impact on special-status plant species. Potential impacts to special-status plants include inability to reproduce and direct mortality. Special-status plants are often narrowly distributed endemic species. They are susceptible to habitat loss and habitat fragmentation resulting from development, vehicle and foot traffic, and introduction of non-native plant species. Therefore, there is

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high potential for the Project to have significant impacts to these species and their populations.

Due to the high potential for encountering special-status plants on-site, appropriate methodologies for species detection should be outlined and conducted well in advance of the anticipated start of construction. If CESA listed plants that may be impacted by the Project go undetected, the Project may result in mortality of individuals from direct impacts or degradation of habitat adjacent to ground disturbance. The CESA listed plant species mentioned herein are considered endangered under CEQA pursuant to CEQA Guidelines section 15380. Therefore, if CESA listed plants are present on or directly adjacent to the Project site where they may be indirectly impacted, the Project may substantially reduce the number or restrict the range of these species, which would be a *mandatory finding of significance* pursuant to CEQA Guidelines section 15065, subdivision (a)(1).

**Recommendations:** For an adequate environmental setting and to reduce impacts to CESA listed plants to less-than-significant, CDFW recommends implementing the following additional measures related to botanical resources:

*The Project shall submit to CDFW two years of completed botanical survey results and obtain CDFW's written acceptance of the results. The botanical survey results shall follow CDFW's 2018 Protocols for Surveying and Evaluating Impacts to Special-Status Native Plant Populations and Sensitive Natural Communities. If CDFW is unable to accept the survey results, the Project applicant shall conduct additional surveys prior to initiation of Project activities or may assume presence of listed species. Please be advised that for CDFW to accept the results, they must be completed in conformance with CDFW's 2018 Protocols for Surveying and Evaluating Impacts to Special-Status Native Plant Populations, including, but not limited to, conducting surveys during appropriate conditions, utilizing appropriate reference sites, and evaluating all direct and indirect impacts such as altering offsite hydrological conditions where the above species may be present.*

*Surveys conducted during drought conditions may not be acceptable. If the botanical surveys result in the detection of CESA listed plants that may be impacted by the Project, or the presence of these species is assumed, the Project applicant shall obtain a CESA ITP from CDFW prior to construction and comply with all requirements of the ITP.*

CDFW concurs that a Mitigation and Monitoring Plan should be prepared and implemented prior to Project implementation if special-status plants, including those with a rare plant ranking, are found during surveys. The current draft EIR measure only describes big tarplant as requiring mitigation.

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The draft EIR should be revised to include all species of special-status plants that will be impacted, and a well-developed, robust proposal for how the Project would be re-designed to avoid, minimize and/or mitigate impacts to those special-status plants. The applicant should provide a copy of the special-status plant survey results and proposed Mitigation and Monitoring Plan to CDFW for review and acceptance.

## 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 CNDDDB. The CNDDDB field survey form can be filled out and submitted online at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

## ENVIRONMENTAL DOCUMENT FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of environmental document 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 environmental document filing 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 draft EIR to assist the County in identifying and mitigating Project impacts on biological resources. Questions regarding this letter or further coordination should be directed to Mia Bianchi, Senior Environmental Scientist (Specialist), at (707) 815-8722 or [Mia.Bianchi@wildlife.ca.gov](mailto:Mia.Bianchi@wildlife.ca.gov); or Michelle Battaglia, Senior Environmental Scientist (Supervisory), at (707) 339-6052 or [Michelle.Battaglia@wildlife.ca.gov](mailto:Michelle.Battaglia@wildlife.ca.gov).

Sincerely,

DocuSigned by:  
*Erin Chappell*  
B77E9A6211EF486  
Erin Chappell  
Regional Manager  
Bay Delta Region

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Attachment: Draft Mitigation Monitoring and Reporting Program

ec: Office of Planning and Research, State Clearinghouse (SCH No. 2022120675)

## REFERENCES

- California Department of Fish and Wildlife (formerly California Department of Fish and Game). 2012. Staff Report on Burrowing Owl Mitigation. Available online at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843&inline>
- California Department of Fish & Wildlife. 2021. California Natural Diversity Database (CNDDDB) Rarefind Electronic database. Sacramento, CA. Search of U.S. Geological Survey 7.5-minute quadrangles. Midway. Accessed September 2023.
- Jacobs. 2022. *Kola Battery Energy Storage System Habitat Assessment*.
- Jacobs. 2023. *Kola Interconnect Battery Energy Storage System Project Burrowing Owl Survey Report*.
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- Klute, D. S., L. W. Ayers, M. T. Green, W. H. Howe, S. L. Jones, J. A. Shaffer, S. R. Sheffield, and T. S. Zimmerman. 2003. Status Assessment and Conservation Plan for the Western Burrowing Owl in the United States. U.S. Department of Interior, Fish and Wildlife Service, Biological Technical Publication FWS/BTPR6001-2003, Washington, D.C.
- Thompson, R.C., A.N. Wright, and H.B. Shaffer. 2016. California Amphibian and Reptile Species of Special Concern. University of California Press and California Department of Fish and Wildlife.
- U.S. Fish and Wildlife Service. 2002. Recovery Plan for the California Red-legged Frog (*Rana aurora draytonii*). U.S. Fish and Wildlife Service, Portland, Oregon. viii and 173.
- U.S Fish and Wildlife Service. 2017b. Species Account for California Red-legged frog. December 2017. Sacramento, CA.

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## ATTACHMENT 1

### Draft Mitigation Monitoring and Reporting Program

Biological Resources (BIO)		
Mitigation Measure Description	Implementation Schedule	Responsible Party
<p><b>Additional Measure – Lake and Streambed Alteration:</b> Disclose and further evaluate all Project activities in the draft EIR that will occur in or adjacent to streams, rivers, and/or lakes. If impacts to the bed, bank, channel, or riparian areas cannot be fully avoided, the Project proponent should submit a Notification for the work pursuant to Fish and Game Code 1602.</p>	Prior to ground disturbance	Project Applicant
<p><i>Within 48 hours prior to the commencement of ground-disturbing activities, the Project area and nearby vicinity, including a minimum 500-foot radius surrounding the Project area, shall be assessed by a qualified biologist for the presence of California red-legged frog individuals and habitat features. Habitat features include both aquatic habitat such as plunge pools and ponds and terrestrial habitat such as burrows. The results of the habitat feature assessment shall be submitted to CDFW for written acceptance prior to starting Project activities. Habitat features shall be flagged for avoidance to the extent feasible. If California red-legged frog are encountered during the assessment or Project activities, the Project shall not proceed or all work shall cease, and CDFW shall immediately be notified. Work shall not proceed until the California red-legged frog, through its own volition, moves out of harm's way and CDFW has provided permission in writing to proceed with the Project. If California red-legged frog is encountered or the qualified biologist believes that California red-legged frog is likely to occur in the Project area, the Project shall consult with USFWS pursuant to the federal ESA. All California red-legged frog upland and breeding habitat should be considered and evaluated when consulting with USFWS for take authorization.</i></p> <p>It is understood that California red-legged frog is a covered species within the SJMSCP, which covers the San Joaquin County portion of the project. However, the Alameda County portion of the site is not covered by the SJMSCP. Therefore, consultation with USFWS should be sought if impacts to California red-legged frog are unavoidable within the Alameda County portion of the Project.</p>	Prior to ground disturbance	Project Applicant
<p><b>Additional Measure - Western Pond Turtle:</b> CDFW recommends that the draft EIR include a measure requiring a qualified biologist to conduct focused surveys for potential western pond turtle nesting habitat prior to each phase of the Project. If nesting habitat is identified then to exclude any female western pond turtle from laying</p>	Prior to ground disturbance and ongoing	Project Applicant



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<p>eggs within a development phase of the Project, exclusion fencing should be placed prior to the egg-laying season (March through August). Exclusion fencing should be designed to encompass each development phase and maintained weekly until construction activities have been completed.</p> <p>Additionally, CDFW recommends that if any western pond turtle are discovered at the site immediately prior to or during Project activities, they should be allowed to move out of the area of their own accord. If a western pond turtle is unable to independently move out of the Project area, a qualified biologist should relocate it out of harm's way to habitat similar to where it was found.</p>		
<p><b>Measure BIO-3 Nesting Bird Surveys:</b> <i>Construction work should take place outside of the February 15 to September 15 bird nesting seasonal window to the maximum extent practicable. If construction is to be conducted during the nesting season, the Project Applicant is responsible for ensuring that the Project does not result in any violation of Fish and Game Code. A qualified biologist will conduct focused pre-construction nesting bird surveys throughout the Project area no more than five days prior to the initiation of on-site Project-related activities. Surveys will be conducted in all potential habitat located at, and adjacent to, Project work sites and in staging and storage areas. The minimum survey radii surrounding the work area will be the following: (1) 250 feet for non-raptors; (2) and 1,000 feet for raptors. In the event that there is a lapse in construction activities for seven days or more, a qualified biologist will conduct additional focused pre-construction nesting bird surveys in areas of potential habitat again before Project activities can be reinitiated. If an active nest is found, the qualified biologist may consult with CDFW if needed regarding appropriate action to comply with Fish and Game Code.</i></p> <ul style="list-style-type: none"> <li>• <i>Active Nest Buffers. Active nest sites and protective buffer zones will be designated as "ecologically sensitive areas" where no Project-related activities or personnel may enter (while occupied or in use for the season in the case of multi clutch bearing species) during the course of nesting bird season with the establishment of a fence barrier or flagging surrounding the nest site. The qualified biologist will determine the necessary buffer, in consultation with CDFW if needed, to protect nesting birds based on existing site conditions, such as construction activity, topography, and line of sight, and will increase buffers as needed to provide sufficient protection of nesting birds and their natural behaviors.</i></li> <li>• <i>Active Nests. A qualified biologist will observe any identified active nests prior to the start of any Project-related activities to establish a behavioral baseline of the adults and any nestlings. Once Project activities commence, all active nests will be continuously monitored by a qualified biologist to</i></li> </ul>	<p>Prior to ground disturbance</p>	<p>Project Applicant</p>

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<p><i>detect any signs of disturbance and behavioral changes as a result of the Project. In addition to direct impacts, such as nest destruction, nesting birds might be affected by noise, vibration, odors and movement of workers or equipment. If signs of disturbance and behavioral changes are observed, the qualified biologist will halt Project activities causing that change until they nestlings have fledged, and the nest is determined to be inactive.</i></p>		
<p><b>Measure BIO-1 - Swainson's Hawk:</b> CDFW recommends conducting protocol-level surveys for Swainson's hawk nest sites to determine the appropriate mitigation to reduce impacts to less-than-significant. CDFW recommends using the Swainson's Hawk Technical Advisory Committee's <i>Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley</i> (TAC Report) available at: <a href="https://www.wildlife.ca.gov/Conservation/Survey-Protocols">https://www.wildlife.ca.gov/Conservation/Survey-Protocols</a>.</p> <p>To mitigate for the loss of Swainson's hawk foraging habitat in a method consistent with the <i>Staff Report Regarding Mitigation for Impacts to Swainson's Hawks (Buteo swainsoni) in the Central Valley of California</i>, CDFW 1994, (Swainson's Hawk Staff Report), CDFW recommends the draft EIR incorporate the following language:</p> <ul style="list-style-type: none"> <li>• For projects within one mile of an active nest tree (the Swainson's Hawk Staff Report defines an active nest as used during one or more of the last five years), provide at least one acre of land for each acre of development authorized.</li> <li>• For projects within five miles of an active nest tree, but greater than one mile from the nest tree, provide at least 0.75 acres of land for each acre of development authorized.</li> <li>• For projects within 10 miles of an active nest tree, but greater than 5 miles from an active nest tree, provide at least 0.5 acres of land for each acre of development authorized.</li> </ul> <p>CDFW recommends that Project-related disturbance within a minimum of 0.25 miles (and up to 0.5 miles depending on site-specific conditions) of active Swainson's hawk nest site should be reduced or eliminated during the critical phases of the nesting cycle (March 15 through September 15) in order to avoid significant impacts to Swainson's hawk. If Project activities must be conducted during this critical phase, then appropriate buffers should be established by a qualified biologist.</p> <p>CDFW acknowledges that Swainson's hawk is a covered species within the SJMSCP, which covers the San Joaquin County portion of the Project. However, the Alameda County portion of the site is not. Therefore, adequate mitigation would need to be sought if impacts to</p>	<p>Prior to ground disturbance</p>	<p>Project Applicant</p>

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<p>Swainson's hawk are unavoidable within the Alameda County portion of the Project.</p>		
<p><b>Additional Measure – Golden Eagle:</b> CDFW recommends incorporating following survey protocols per the <i>Interim Golden Eagle Inventory and Monitoring Protocols; and Other Recommendations</i> document:  <a href="https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83940">https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83940</a>.</p> <p><i>Surveys should be conducted by a qualified biologist with sufficient experience surveying and monitoring golden eagle. Golden eagle are known to spend 90 percent of their time within one mile of a nest; therefore, nest surveys should be completed at minimum within one mile of the outer boundaries of Project related activities. Active golden eagle nests observed within one mile of Project related activities should be monitored by a qualified biologist and a “no-work” buffer should be implemented until all young have fledged. CDFW should be consulted to determine site-specific buffers and monitoring requirements to avoid premature fledging or risk of nest failure.</i></p> <p><i>If impacts to golden eagle as a result of Project related activities cannot be avoided, CDFW should be consulted for further instruction.</i></p>	<p>Prior to ground disturbance</p>	<p>Project Applicant</p>
<p><b>Measure BIO-1 – Burrowing Owl:</b> <i>A qualified biologist shall conduct a habitat assessment for burrowing owl, and surveys if habitat is present. The qualified biologist shall follow the California Department of Fish and Game (now CDFW) 2012 Staff Report on Burrowing Owl Mitigation (CDFW 2012 Staff Report) habitat assessment and survey methodology prior to Project activities occurring during the burrowing owl wintering season from September 1 to January 31. The habitat assessment and surveys shall encompass a sufficient buffer zone to detect owls nearby that may be impacted, which shall be a minimum of 1,640 feet unless otherwise approved in writing by CDFW. Surveys shall include four non-breeding season surveys spread evenly throughout the nonbreeding season pursuant to the CDFW 2012 Staff Report. Time lapses between surveys or Project activities shall trigger subsequent surveys, as determined by a qualified biologist, including, but not limited to, a final survey within 24 hours prior to ground disturbance and before construction equipment mobilizes to the Project area. The qualified biologist shall have a minimum of two years of experience implementing the CDFW 2012 Staff Report survey methodology resulting in detections.</i></p> <p><i>Detected burrowing owls shall be avoided pursuant to the buffer zone prescribed in the CDFW 2012 Staff Report, unless otherwise approved in writing by CDFW, and any eviction plan shall be subject to CDFW review. Please be advised that CDFW does not consider eviction of burrowing owls (i.e., passive removal of an owl from its burrow or other shelter) as a “take” avoidance, minimization, or</i></p>	<p>Prior to ground disturbance</p>	<p>Project Applicant</p>

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<p><i>mitigation measure; therefore, off-site habitat compensation shall be included in the eviction plan. Habitat compensation acreages shall be approved by CDFW, as the amount depends on site specific conditions, and completed before Project construction unless otherwise approved in writing by CDFW. It shall also include placement of a conservation easement and preparation and implementation of a long-term management plan prior to Project construction.</i></p> <p>CDFW acknowledges that burrowing owl is a covered species within the SJMSCP, which covers the San Joaquin County portion of the Project. However, the Alameda County portion of the site is not. Therefore, adequate mitigation would need to be sought if impacts to burrowing owl are unavoidable within the Alameda County portion of the Project.</p>		
<p><b>Measure BIO-1 – Special Status Plants:</b> <i>The Project shall submit to CDFW two years of completed botanical survey results and obtain CDFW’s written acceptance of the results. The botanical survey results shall follow CDFW’s 2018 Protocols for Surveying and Evaluating Impacts to Special-Status Native Plant Populations and Sensitive Natural Communities. If CDFW is unable to accept the survey results, the Project applicant shall conduct additional surveys prior to initiation of Project activities or may assume presence of listed species. Please be advised that for CDFW to accept the results, they must be completed in conformance with CDFW’s 2018 Protocols for Surveying and Evaluating Impacts to Special-Status Native Plant Populations, including, but not limited to, conducting surveys during appropriate conditions, utilizing appropriate reference sites, and evaluating all direct and indirect impacts such as altering offsite hydrological conditions where the above species may be present.</i></p> <p><i>Surveys conducted during drought conditions may not be acceptable. If the botanical surveys result in the detection of CESA listed plants that may be impacted by the Project, or the presence of these species is assumed, the Project applicant shall obtain a CESA ITP from CDFW prior to construction and comply with all requirements of the ITP.</i></p> <p>CDFW concurs that a Mitigation and Monitoring Plan should be prepared and implemented prior to Project implementation if special-status plants, including those with a rare plant ranking, are found during surveys. The current draft EIR measure only describes big tarplant as requiring mitigation.</p> <p>The draft EIR should be revised to include all species of special-status plants that will be impacted, and a well-developed, robust proposal for how the Project would be re-designed to avoid, minimize and/or mitigate impacts to those special-status plants. The applicant should provide a copy of the special-status plant survey</p>	<p>Prior to ground disturbance</p>	<p>Project Applicant</p>

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results and proposed Mitigation and Monitoring Plan to CDFW for review and acceptance.		
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