



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



March 2, 2023

Cameron Christie, Planner I  
Merced County Community and Economic Development Department  
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Subject: **Conditional Use Permit Application No. CUP22-009 - West II Clean Power LLC Solar Project (Project)**  
**MITIGATED NEGATIVE DECLARATION (MND)**  
**State Clearinghouse No. 2023020049**

Dear Cameron Christie:

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 No. CUP22-009 – West II Clean Power LLC 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).

## **PROJECT DESCRIPTION SUMMARY**

**Proponent:** Renewable America LLC

**Objective:**

The Project proposes to construct a two megawatt alternating current (MWac) photovoltaic (PV) solar power generation facility, a 600-square-foot equipment pad, PV system equipment and a mounted transformer, and various associated site improvements. The Project would include the construction of an eight acre solar PV power generation facility that would generate two MWac of solar energy with associated inverters, fencing, and an internal access road and driveway. The Project would deliver power to the Pacific Gas and Electric Company (PG&E) existing distribution network through a primary service interconnection located on Westside Boulevard.

**Location:** The proposed Project site is located within an 8.5-acre portion of a 36.9-acre parcel (identified as Assessor’s Parcel Number [APN] 047-290-002) located

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approximately 0.7 mile south of the city of Livingston in unincorporated Merced County, California. The project site is situated at the northeast corner of Lincoln and Westside Boulevards at 5056 Lincoln Boulevard and would be accessed via an existing on-site 15-foot-wide and 1,990-foot-long access driveway from Lincoln Boulevard.

**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.

Aerial imagery of the Project boundary and its surroundings show the area contains agricultural lands including almond orchards and fallow farmland, ruderal and landscaped vegetation, and private residences and homesteads. 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 the State threatened tricolored blackbird (*Agelaius tricolor*). CDFW is also concerned with potential impacts to migratory and non-migratory nesting birds.

### **Tricolored Blackbird (TRBL)**

The MND identified the Project area as not having conditions suitable for TRBL as suitable nesting habitat such as freshwater marsh habitat was absent from the Project site. While TRBL typically nest within or adjacent to aquatic habitats, they have been known to breed within agricultural habitat and frequently forage within semi-natural grasslands and agricultural lands (Beedy et al. 2017). As the Project area and surrounding lands are comprised of agricultural and ruderal habitat suitable for TRBL foraging, and historical occurrences occur within the Project area, CDFW recommends the following mitigation measures:

#### **Recommended Mitigation Measure 1: TRBL Surveys**

CDFW recommends that Project activities be timed to avoid the normal bird breeding season (February 1 through September 15). However, if Project activities

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must take place during that time, CDFW recommends that a qualified wildlife biologist conduct surveys for nesting TRBL no more than 10 days prior to the start of implementation to evaluate presence/absence of TRBL nesting colonies in proximity to Project activities and to evaluate potential Project-related impacts.

### **Recommended Mitigation Measure 2: TRBL Avoidance**

If an active TRBL nesting colony is found during preconstruction surveys, CDFW recommends implementation of a minimum 300-foot no-disturbance buffer in accordance with CDFW's "Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agriculture Fields in 2015" (CDFW 2015). CDFW advises that this buffer remain in place until the breeding season has ended or until a qualified biologist has determined that nesting has ceased, the birds have fledged, and are no longer reliant upon the colony or parental care for survival. It is important to note that TRBL colonies can expand over time and for this reason, the colony should be reassessed to determine the extent of the breeding colony within 10 days for Project initiation.

### **Recommended Mitigation Measure 3: TRBL Take Authorization**

In the event that a TRBL nesting colony is detected during surveys, consultation with CDFW is warranted to discuss how to implement the Project and avoid take, or if avoidance is not feasible, to acquire an ITP, pursuant to Fish and Game Code section 2081 subdivision (b), prior to any ground-disturbing activities.

## **Nesting Birds**

The MND provides Mitigation Measure MM BIO-1 to mitigate for nesting birds, which includes measures for nesting bird surveys, buffer establishment, buffer reductions, and nest monitoring, and reporting. CDFW does not recognize the nesting bird survey season, timing of nesting bird surveys, buffer distances, and buffer reduction procedures as adequate to protect nesting birds and CDFW recommends the following mitigation measure to adjust the nesting bird measure language within the MND:

### **Recommended Mitigation Measure 4: 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.

### **Recommended Mitigation Measure 5: Nesting Bird Monitoring and/or Avoidance Buffer**

Once construction begins, CDFW recommends a qualified biologist continuously monitor nests to detect behavioral changes resulting from the project. If behavioral changes occur, CDFW recommends the work causing that change cease and that CDFW be consulted for additional avoidance and minimization measures.

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

## **ENVIRONMENTAL DATA**

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database, which may be used to make subsequent or supplemental environmental determinations (Pub. Resources Code, § 21003, subd. (e)). Accordingly, please report any special-status species and natural communities detected during Project surveys to the 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

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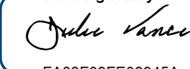
operative, vested, and final (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089).

## **CONCLUSION**

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

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:  
  
FA83F09FE08945A...  
**Julie A. Vance**  
Regional Manager

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## REFERENCES

Beedy, E. C., W. J. Hamilton III, R. J. Meese, D. A. Airola, and P. Pyle, 2017. *Tricolored Blackbird (Agelaius tricolor), version 3.0*. in *The birds of North America*. P. G. Rodewald (Ed.). Cornell Lab of Ornithology, Ithaca, New York, USA.  
<https://doi.org/10.2173/bna.tribla.03>. Accessed February 21, 2023.

California Department of Fish and Wildlife (CDFW), 2015. *Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015*. March 19, 2015.

**Attachment 1**

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

**PROJECT: West II Clean Power LLC Solar Project**

**SCH No.: 2023020049**

<b>RECOMMENDED MITIGATION MEASURE</b>	<b>STATUS/DATE/INITIALS</b>
<i>Before Disturbing Soil or Vegetation</i>	
TRBL	
Recommended Mitigation Measure 1: TRBL Surveys	
Recommended Mitigation Measure 3: TRBL take authorization	
Nesting Birds	
Recommended Mitigation Measure 4: Nesting Bird surveys	
<i>During Construction</i>	
TRBL	
Recommended Mitigation Measure 2: TRBL avoidance buffer	
Nesting Birds	
Recommended Mitigation Measure 5: Nesting Bird monitoring and avoidance buffer	