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DEPARTMENT OF FISH AND WILDLIFE
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May 4, 2023

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**Subject: CUP No. 3718 IS No. 8116 Apache Energy Storage 1, LLC Project
(Project)
MITIGATED NEGATIVE DECLARATION (MND)
State Clearinghouse No. 2023030706**

Dear Ejaz Ahmad:

The California Department of Fish and Wildlife (CDFW) received a Mitigated Negative Declaration (MND) from Fresno County Department of Public Works and Planning (Fresno County), as Lead Agency, for the CUP No. 3718 IS No. 8116 Apache Energy Storage 1, LLC Project (Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹

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. While the comment period may have ended, CDFW would appreciate if you will still consider our comments.

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

¹ 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: Apache Energy Storage 1, LLC

Objective:

The Project proposes to construct, operate, and ultimately decommission a battery energy storage system (BESS) consisting of lithium-ion based battery modules housed in purpose-built metal enclosures with an integrated power conversion equipment, fire suppression system, transformer, and 115 kilovolt (kV) transmission poles for the overhead wires crossing McCall Avenue for interconnection to the nearby Pacific Gas and Electric (PG&E) Sanger substation. The project will be located on an approximately 11.3-acre portion of a 37.56-acre parcel in the AE-20 (Exclusive Agriculture; 20-acre minimum parcel size) Zone District.

Location: The proposed Project is located on the northeast corner of South McCall and East Jensen Avenues at 10018 East Jensen Avenue, approximately 1.26 miles west of

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the city limits of the City of Sanger. The project is located within Assessor Parcel Number (APN): 314-080-36.

Timeframe: Project is anticipated to begin construction in June 2024.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist Fresno 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 recently fallowed fields, row crops, and orchards, ruderal and landscaped vegetation, and scattered residences. 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 states that "the Project will not have substantial adverse impacts, directly or indirectly, on any special status species or their habitat", even though the project is within the geographic range of several special-status animal species and no biological surveys or assessments were documented for the Project (it appears only a desktop review occurred). The MND also states that, "the project was routed to the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife for review and comments. Neither agency offered any comments concerning the impact on biological resources." CDFW would like to note that as a Trustee Agency, CDFW often provides expertise and input during the early coordination portion of the environmental process; however, a lack of comment does not negate the CEQA lead agency from conducting the biological habitat assessments, surveys, and evaluations necessary to identify potential project-related impacts to biological habitats and resources and to then include measures to avoid or reduce those impacts.

As the MND has not documented that species specific habitat assessments or focused surveys were conducted and does not propose specific mitigation measures to reduce impacts to less than significant for any biological resources, CDFW has concerns about Project-related impacts to the State threatened Swainson's hawk (*buteo swainsoni*); and the State species of special concern burrowing owl (*Athene cunicularia*). CDFW is also concerned with potential impacts to migratory and non-migratory nesting birds.

Swainson's Hawk (SWHA)

The Project is within the known geographic range of SWHA, and a recent occurrence has been documented approximately 5.3 miles west of the Project site (CDFW 2023).

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SWHA are known to breed within the Central Valley of California and prefer to nest and forage in alfalfa, fallow fields, field crops, and grassland habitats with a sufficient source of small mammals (CDFG 1994). Based on aerial imagery, most of the Project site contains suitable habitat for SWHA foraging. In addition, there are trees and structures located within and adjacent to the Project area that may provide suitable nesting habitat. As SWHA have the potential to use the Project site and have been documented within the Project vicinity, CDFW recommends the following:

Recommended Mitigation Measure 1: SWHA Surveys

To evaluate potential impacts, CDFW recommends that a qualified biologist conduct surveys for nesting SWHA following the survey methods developed by the Swainson's Hawk Technical Advisory Committee (SWHA TAC 2000) prior to project implementation. The survey protocol includes early season surveys to assist the project proponent in implementing necessary avoidance and minimization measures, and in identifying active nest sites prior to initiating ground-disturbing activities.

Recommended Mitigation Measure 2: SWHA Avoidance Buffer

If Project-specific activities will take place during the SWHA nesting season (i.e., March 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 3: SWHA Take Authorization

CDFW also recommends that in the event an active SWHA nest is detected, and a ½-mile no-disturbance buffer is not feasible, consultation with CDFW is warranted to discuss how to implement the project and avoid take. If take cannot be avoided, take authorization through the acquisition of an Incidental Take Permit (ITP), pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA

Burrowing Owl (BUOW)

The Project is within the known geographic range of BUOW, and a historical occurrence has been documented approximately 5.3 miles northwest west of the Project site (CDFW 2023). BUOW inhabit open grassland or adjacent canal banks, ROWs, vacant lots, etc. containing small mammal burrows, a requisite habitat feature used by BUOW for nesting and cover. Review of aerial imagery indicates that the Project site contains recently fallowed agricultural fields which may provide suitable nesting habitat for

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BUOW. As BUOW have the potential to use the Project site and have been documented within the Project vicinity, CDFW recommends the following:

Recommended Mitigation Measure 4: BUOW Surveys

CDFW recommends assessing presence/absence of BUOW by having a qualified biologist conduct surveys following the California Burrowing Owl Consortium’s “Burrowing Owl Survey Protocol and Mitigation Guidelines” (CBOC 1993) and CDFW’s Staff Report on Burrowing Owl Mitigation” (CDFG 2012). Specifically, CBOC and CDFW’s Staff Report suggest three or more surveillance surveys conducted during daylight with each visit occurring at least three weeks apart during the peak breeding season (April 15 to July 15), when BUOW are most detectable.

Recommended Mitigation Measure 5: BUOW Avoidance Buffers

CDFW recommends no-disturbance buffers, as outlined in the “Staff Report on Burrowing Owl Mitigation” (CDFG 2012), be implemented prior to and during any ground-disturbing activities. Specifically, CDFW’s Staff Report recommends that impacts to occupied burrows be avoided in accordance with the following table unless a qualified biologist approved by CDFW verifies through non-invasive methods that either: 1) the birds have not begun egg laying and incubation; or 2) that juveniles from the occupied burrows are foraging independently and are capable of independent survival.

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

* meters (m)

Recommended Mitigation Measure 6: BUOW Passive Relocation and Mitigation

If BUOW are found within these recommended buffers and avoidance is not possible, it is important to note that according to the Staff Report (CDFG 2012), exclusion is not a take avoidance, minimization, or mitigation method and is considered a potentially significant impact under CEQA. However, if necessary, CDFW recommends that burrow exclusion be conducted by qualified biologists and only during the non-breeding season, before breeding behavior is exhibited and after the burrow is confirmed empty through non-invasive methods, such as surveillance. CDFW recommends replacement of occupied burrows with artificial burrows at a ratio of 1 burrow collapsed to 1 artificial burrow constructed (1:1) as mitigation for the potentially significant impact of evicting BUOW. BUOW may attempt to colonize or

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re-colonize an area that will be impacted; thus, CDFW recommends ongoing surveillance, at a rate that is sufficient to detect BUOW if they return.

Nesting Birds

The Project site is within the known geographic range of many species of migratory and non-migratory nesting birds (CDFW 2023). As nesting birds have the potential to use the Project site and have been documented within the Project vicinity, CDFW recommends the following:

Recommended Mitigation Measure 7: 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 one week 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 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 8: 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.

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Editorial Comments and/or Suggestions

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

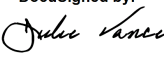
The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required in order 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 Fresno 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.

Sincerely,

DocuSigned by:

FA83F09FE08945A...
Julie A. Vance
Regional Manager

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REFERENCES

- California Burrowing Owl Consortium, 1993. *Burrowing owl survey protocol and mitigation guidelines*. April 1993.
- 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, 2012. *Staff Report on Burrowing Owl Mitigation*. California Department of Fish and Game.
- California Department of Fish and Wildlife, 2023. *Biogeographic information and observation system (BIOS)*.
<https://www.wildlife.ca.gov/Data/BIOS>. Accessed April 17, 2023.
- Swainson's Hawk Technical Advisory Committee (SWHA TAC), 2000. *Recommended timing and methodology for Swainson's hawk nesting surveys in California's Central Valley*. Swainson's Hawk Technical Advisory Committee, May 31, 2000.

Attachment 1

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

PROJECT: Apache Energy Storage Project

SCH No.: 2023030706

RECOMMENDED MITIGATION MEASURE	STATUS/DATE/INITIALS
<i>Before Disturbing Soil or Vegetation</i>	
SWHA	
Recommended Mitigation Measure 1: SWHA surveys	
Recommended Mitigation Measure 3: SWHA take authorization	
BUOW	
Recommended Mitigation Measure 4: BUOW surveys	
Recommended Mitigation Measure 6: BUOW passive relocation and mitigation	
Nesting Birds	
Recommended Mitigation Measure 7: Nesting bird surveys	
<i>During Construction</i>	
SWHA	
Recommended Mitigation Measure 2: SWHA avoidance buffer	
BUOW	
Recommended Mitigation Measure 5: BUOW avoidance buffers	
Nesting Birds	
Recommended Mitigation Measure 8: Nesting bird monitoring and/or avoidance buffer	