



State of California – The Natural Resources Agency **GAVIN NEWSOM, Governor**
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September 6, 2023

Jacob Aragon
Planner II
Madera County Community and Economic Development Planning Division
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Subject: Conditional Use Permit (CUP) # 2022-016 - New Leaf Energy Project
Mitigated Negative Declaration (MND)
State Clearinghouse No. 2023080134

Dear Jacob Aragon:

The California Department of Fish and Wildlife (CDFW) received a Mitigated Negative Declaration (MND) from the Madera County Community and Economic Development Planning Division (Madera County), as Lead Agency, for the Conditional Use Permit (CUP) #2022-016 - New Leaf Energy Project (Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.

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 (F&GC, §§ 711.7, subd. (a) & 1802; Public Resources Code, § 21070; CEQA Guidelines § 15386, subd. (a)). CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (Id., § 1802). Similarly, for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public

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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 (Public 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 and Game Code, § 2050 et seq.), related authorization as provided by the Fish and Game Code will be required.

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, sections 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 pursuant to CESA and/or the federal Endangered Species Act (ESA) to be considered E, R, or T under CEQA. If a species can be shown to meet the criteria for a listing as E, R, or T under CESA and/or ESA as specified in the CEQA Guidelines (California Code of Regs tit. 14, Chapter 3, § 15380), it should be fully considered in the environmental analysis for the Project.

As a responsible agency, 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.

PROJECT DESCRIPTION SUMMARY

Proponent: Stallion Energy Storage 1, LLC

Objective: The Project proposes to construct and operate a 200-megawatt (MW) Battery Energy Storage System (BESS). The BESS will initially comprise 2,400 storage containers with rows facing east to west and running north to south on the northside of the property. An additional 840 storage containers will be added throughout the Project's life to maintain storage capacity. The Project will also include a substation located on

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the northeast corner of the parcel. The parcel's Project area will be enclosed with a seven-foot-high chain link fence.

Location: The proposed Project is located on the east side of Road 30 ½, approximately ½-mile southeast of its intersection with Avenue 12, Madera County.

Timeframe: Unspecified

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist Madera 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 orchards, and developed access roads, that may have suitable habitat for special status species. Based on a review of the Project description, a review of California Natural Diversity Database (CNDDDB) records, and the surrounding habitat, several special status species could potentially be impacted by Project activities.

As mentioned previously in CDFW's November 1, 2022, Notice of Preparation (NOP) comment letter to this Project, there is the potential that several special-status species may utilize the Project site. CDFW is concerned that the Project did not include mitigation measures that adequately mitigate for impacts to these species, and the Biological Resource Evaluation (BRE) prepared by Colibri Ecological Consulting (Colibri) to inform the MND on potential biological resources, was not provided as an appendix to further justify the species and measures included as part of the Project. Based on the recent CNDDDB occurrence data surrounding the Project and lack of biological survey information provided in the MND, CDFW is concerned that the Project would likely result in take of the State and federally threatened California tiger salamander (*Ambystoma californiense*). As such, CDFW reiterates the recommendation of consultation with CDFW to discuss the Project, biological surveys conducted, and adequacy of the mitigation measures outlined in the MND. Please see further information below for comments to Mitigation Measures BIO MM-1, 2, and 3.

Currently, the MND acknowledges that the Project site 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 of 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

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threatened Swainson's hawk (*Buteo swainsoni*); the State and federally threatened California tiger salamander; the State species of special concern burrowing owl (*Athene cunicularia*); the State species of special concern western spadefoot (*Spea hammondi*); and the federally threatened vernal pool fairy shrimp (*Branchinecta lynchi*). CDFW is also concerned with potential impacts to migratory and non-migratory nesting birds.

Swainson's Hawk

Mitigation Measure BIO MM-2 includes measures to protect nesting Swainson's hawk (SWHA) and states that, "If it is not possible to schedule construction between September and February, a qualified biologist shall conduct surveys for Swainson's hawk in accordance with the Swainson's Hawk Technical Advisory Committee's Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley (SWTAC 2000, Appendix D). These methods require six surveys, three in each of the two survey periods, prior to project initiation. Surveys shall be conducted within a minimum 0.5-mile radius around the Project site." CDFW concurs with conducting SWHA surveys following the entire Technical Advisory Committee (SWHA TAC 2000) if work is anticipated to occur during the SWHA nesting season. In addition to Mitigation Measure BIO MM-2, CDFW recommends incorporating the following mitigation measures into the final IS/MND for the Project:

Recommended Mitigation Measure 1: 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 0.5-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 2: SWHA Take Authorization

CDFW also recommends that in the event an active SWHA nest is detected, and a 0.5-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 issuance of an Incidental Take Permit (ITP), pursuant to Fish and Game Code section 2081 subdivision (b) is necessary to comply with CESA.

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California Tiger Salamander

Mitigation Measure BIO-MM-1 states that the Project will, “Install exclusion/silt fencing around all excavations and other areas of potentially ground disturbing activities to preclude California tiger salamander and western spadefoot from entering the active work area. The silt fence should be a minimum of 36 inches tall and toed-in six inches below ground. If the fence cannot be toed-in, the bottom of the fence should be weighted down with sandbags or similar weights such that there are no gaps under the fence where wildlife can enter.” CDFW would like to note that installation of exclusion fencing/silt fencing would have the potential to result in take of California tiger salamander (CTS), and as it is not apparent in the MND that protocol-level surveys were conducted in accordance with the USFWS “Interim Guidance on Site Assessment and Field Surveys for Determining Presence or a Negative Finding of the California Tiger Salamander” (USFWS CTS Protocol) (USFWS 2003), CDFW is concerned implementation of this portion of Mitigation Measure BIO-MM-1 may result in unauthorized take. As such, CDFW reiterates the recommendation of consultation prior to construction.

Mitigation Measure BIO-MM-1 continues by stating, “To avoid impacts to California tiger salamander and western spadefoot, work should take place during the dry season (generally June—September). If work must occur during the wet season (generally October—May), a qualified biologist shall determine which construction activities may need to be halted within 24 hours of a predicted 0.25-inch rain event to ensure any impacts to California tiger salamander or western spadefoot are avoided. If by 2 pm rain is forecasted for the remainder of the day or subsequent night with a 70% or greater probability of rain (based on the nearest National Weather Service forecast, available at <http://forecast.weather.gov/>), work may be postponed until 24 hours have passed between the last rain event and the start of work. If work cannot be postponed due to public or crew safety concerns, a qualified biological monitor must be present, and work may be continued until a safe working environment is reached, at which time work will be halted as described above. If work activities need to occur during rain events, the biological monitor in coordination with the construction contractor may be required to inspect access roads and work areas prior to use.” As it is not apparent in the MND that CTS protocol-level surveys were conducted in accordance with the USFWS CTS Protocol (USFWS 2003) and implementation of this portion of Mitigation Measure BIO-MM-1 may still result in unauthorized take if the species is present during construction, CDFW strongly recommends the following:

Recommended Mitigation Measure 3: Focused CTS Protocol-level Surveys

CDFW recommends that a qualified biologist conduct protocol level surveys in accordance with the USFWS CTS Protocol (USFWS 2003) at the appropriate time of

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year to determine the existence and extent of CTS breeding and refugia habitat. The protocol level surveys for CTS require more than one survey season and are dependent upon sufficient rainfall to complete. CDFW advises that the protocol level survey include a 100-foot buffer around the Project site in all areas of wetland and upland habitat that could support CTS. Please be advised that protocol level survey results are viable for two years after the results are reviewed by CDFW. Note that obtaining an ITP for take of CTS from CDFW, pursuant to Fish and Game Code section 2081 subdivision (b), would assume presence of CTS and negate the need to do protocol surveys.

Recommended Mitigation Measure 4: CTS Avoidance Buffer

While it is strongly recommended that USFWS CTS Protocol surveys be conducted and/or an ITP be obtained, if CTS protocol level surveys are not conducted, CDFW advises that a minimum 50-foot no-disturbance buffer be delineated around all small mammal burrows of any size within and/or adjacent to the Project site. Further, CDFW recommends potential or known breeding habitat within and/or adjacent to the Project site be delineated with a minimum 250-foot no-disturbance buffer. Both upland burrow and wetland breeding no-disturbance buffers are intended to minimize impacts to CTS habitat and avoid take of individuals.

Recommended Mitigation Measure 5: CTS Take Authorization

As there is a strong potential that CTS could occupy the Project site during project-related activities, CDFW recommends the Project obtain take authorization for CTS. CDFW continues to strongly recommend consultation with us to determine if the Project can avoid take. If take cannot be avoided, take authorization would be warranted prior to initiating ground-disturbing activities to comply with CESA. Take authorization would occur through issuance of an ITP by CDFW, pursuant to Fish and Game Code section 2081 subdivision (b).

Burrowing Owl

The MND provides a table of potential special-status species and includes burrowing owl (BUOW); however, BUOW is not discussed within the MND, and no mitigation measures are provided. As such, CDFW recommends the following:

Recommended Mitigation Measure 6: BUOW Habitat Assessment

If any small mammal burrows are present on or adjacent to the Project site, CDFW recommends that a qualified biologist conduct a focused Habitat Assessment for

BUOW to determine if species-specific surveys are necessary to determine if BUOW may be impacted by Project activities.

Recommended Mitigation Measure 7: BUOW Surveys Prior to Construction

If the habitat assessment concludes surveys are warranted, CDFW recommends that surveys, following the “Burrowing Owl Survey Protocol and Mitigation Guidelines” (CBOC 1993) and CDFW’s “Staff Report on Burrowing Owl Mitigation” (CDFG 2012) be conducted the survey season immediately prior to construction.

Recommended Mitigation Measure 8: BUOW Avoidance Buffer

If a BUOW is detected, CDFW recommends that 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 9: 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), excluding birds from burrows is not a take avoidance, minimization, or mitigation method and is instead considered a potentially significant impact under CEQA. However, if it is necessary for Project implementation, CDFW recommends that burrow exclusion be conducted only during the non-breeding season, by a CDFW approved qualified biologist, 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 one (1) burrow collapsed to one (1) artificial burrow constructed (1:1) to

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mitigate for evicting BUOW and the loss of burrows. BUOW may attempt to colonize or 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.

Western Spadefoot

Mitigation Measure BIO-MM-1 states that the Project will, "Install exclusion/silt fencing around all excavations and other areas of potentially ground disturbing activities to preclude California tiger salamander and western spadefoot from entering the active work area. The silt fence should be a minimum of 36 inches tall and toed-in six inches below ground. If the fence cannot be toed-in, the bottom of the fence should be weighted down with sandbags or similar weights such that there are no gaps under the fence where wildlife can enter." CDFW would like to note that installation of exclusion fencing/silt fencing may have the potential to result in the capture or entrapment of western spadefoot (spadefoot) if there is suitable habitat/burrows within the Project site and the site has not previously been surveyed by a qualified biologist. As such, CDFW recommends the following:

Recommended Mitigation Measure 10: Spadefoot Surveys Prior to Construction

CDFW recommends that a qualified biologist conduct focused surveys immediately prior to construction and/or installation of exclusion fencing for spadefoot and their requisite habitat features.

Recommended Mitigation Measure 11: Spadefoot Avoidance Buffer

If spadefoot are found during pre-construction surveys, avoidance whenever possible is encouraged via delineating and observing a 50-foot no-disturbance buffer around burrows. If spadefoot are observed on the Project site, CDFW recommends that Project activities in their immediate vicinity cease and individuals be allowed to leave the Project site on their own accord. Alternatively, a qualified biologist with appropriate authorization can move them out of harm's way and to a suitable location.

Vernal Pool Fairy Shrimp

The MND provides a table of potential special-status species and includes Vernal Pool Fairy Shrimp (VPFS); however, VPFS is not discussed within the MND, and no mitigation measures are provided. As such, CDFW recommends the following:

Recommended Mitigation Measure 12: VPFS Surveys and Discussion with CDFW

CDFW recommends that a qualified biologist conduct protocol level surveys in accordance with the USFWS “Survey Guidelines for the Listed Large Branchiopods” (USFWS 2017) the survey season prior to construction. These surveys would need to be conducted at the appropriate time of year to determine the existence and extent of VPFS. If through surveys it is determined that VPFS are occupying or have the potential to occupy the Project site, discussion with CDFW is recommended well in advance of any planned vegetation- or ground-disturbing activities to determine appropriate avoidance and minimization measures including adequate implementation of no-disturbance buffers. Additionally, consultation with USFWS may be necessary to minimize the potential for federal “take” and/or mitigate for potential impacts.

Nesting Birds

Mitigation Measure BIO-MM-3 states that, “To the extent practicable, construction shall be scheduled to avoid the nesting season, which extends from February through August. If it is not possible to schedule construction between September and January, a pre-construction clearance survey for nesting birds shall be conducted by a qualified biologist to ensure that no active nests will be disturbed during Project construction. A pre-construction clearance survey shall be conducted no more than 14 days prior to the start of construction activities. During this survey, the qualified biologist shall inspect all potential nest substrates in and immediately adjacent to the impact areas, including within 250 feet in the case of raptor nests and within 100 feet for nests of all other birds. If an active nest is found close enough to the construction area to be disturbed by these activities, the qualified biologist shall determine the extent of a construction free buffer to be established around the nest. If work cannot proceed without disturbing the nesting birds, work may need to be halted or redirected to other areas until nesting and fledging are completed or the nest has failed for non-construction related reasons.” CDFW does not recognize the pre-construction clearance survey window and buffer distances as appropriate for protection of the species and therefore does not concur with the mitigation measure as proposed and recommends the following:

Recommended Mitigation Measure 13: Nesting Bird Surveys Prior to Construction

If ground-disturbing activities occur during the nesting bird season (February 1 – September 15), CDFW recommends that a qualified biologist conduct pre-construction surveys for active nests no more than **one week** prior to the start of

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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 the 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 14: 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.

Editorial Comments and/or Suggestions

California Natural Diversity Database: Please note that the CNDDDB is populated by records through voluntary submissions of species detections. As a result, species may be present in locations not depicted in the CNDDDB but where there is suitable habitat and features capable of supporting species. A lack of an occurrence record in the CNDDDB does not mean a species is not present. In order to adequately assess any potential Project-related impacts to biological resources, surveys conducted by a qualified biologist during the appropriate survey period(s) and using the appropriate protocol survey methodology are warranted in order to determine whether or not any special status species are present at or near the Project site.

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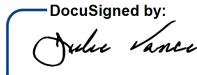
Federally Listed Species: CDFW recommends consulting with USFWS regarding potential impacts to federally listed species including but not limited to CTS and VPFS. Take under the Federal Endangered Species Act (FESA) is more broadly defined than CESA; take under FESA also includes significant habitat 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.

CONCLUSION

CDFW appreciates the opportunity to comment on the Project to assist Madera County in identifying and mitigating the Project's 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:

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Julie A. Vance
Regional Manager

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REFERENCES

- California Burrowing Owl Consortium (CBOC), 1993. *Burrowing owl survey protocol and mitigation guidelines*. Pages 171-177 in Lincer, J. and K. Steenhof (editors). 1993. The burrowing owl, its biology and management. Raptor Research Report Number 9.
- California Department of Fish and Game (CDFG), 2012. *Staff Report on Burrowing Owl Mitigation*. California Department of Fish and Game. March 7, 2012.
- 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.
- U.S. Fish and Wildlife Service (USFWS), 2003. *Interim Guidance on Site Assessment and Field Surveys for Determining Presence or a Negative Finding of the California Tiger Salamander*. U.S. Fish and Wildlife Service. October 2003.
- USFWS, 2017. *Survey Guidelines for the Listed Large Branchiopods*. U. S. Fish and Wildlife Service, Pacific Southwest Region, Sacramento, California. Revised November 2017.

Attachment 1**CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
RECOMMENDED MITIGATION MONITORING AND REPORTING PROGRAM (MMRP)****PROJECT: New Leaf Energy Project****SCH No.: 2023080134**

| RECOMMENDED MITIGATION MEASURE | STATUS/DATE/INITIALS |
|--|-----------------------------|
| <i>Before Disturbing Soil or Vegetation</i> | |
| SWHA | |
| Recommended Mitigation Measure 2: SWHA take authorization | |
| CTS | |
| Recommended Mitigation Measure 3: Focused CTS protocol-level surveys | |
| Recommended Mitigation Measure 5: CTS take authorization | |
| BUOW | |
| Recommended Mitigation Measure 6: BUOW habitat assessment | |
| Recommended Mitigation Measure 7: BUOW surveys prior to construction | |
| Recommended Mitigation Measure 9: BUOW passive relocation and mitigation | |
| Spadefoot | |
| Recommended Mitigation Measure 10: Spadefoot surveys prior to construction | |
| VPFS | |
| Recommended Mitigation Measure 12: VPFS surveys and discussion with CDFW | |
| Nesting Birds | |
| Recommended Mitigation Measure 13: Nesting bird surveys prior to construction | |
| | |
| <i>During Construction</i> | |
| SWHA | |
| Recommended Mitigation Measure 1: SWHA avoidance buffer | |
| CTS | |
| Recommended Mitigation Measure 4: CTS avoidance buffer | |
| BUOW | |
| Recommended Mitigation Measure 8: BUOW avoidance buffer | |
| Spadefoot | |
| Recommended Mitigation Measure 11: Spadefoot avoidance buffer | |

| | |
|--|--|
| Nesting Birds | |
| Recommended Mitigation Measure 14: Nesting bird monitoring and/or avoidance buffer | |