



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Central Region
1234 East Shaw Avenue
Fresno, California 93710
(559) 243-4005
www.wildlife.ca.gov

GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director



September 13, 2024

Tiffany Ho, Planner III
Merced County Community and Economic Development Department
2222 M Street, 2nd Floor
Merced, California 95340
(209) 385-7654 ext. 4407
Tiffany.Ho.countyofmerced.com

Subject: **100 Tower Road 252 MW Battery Energy Storage System (Project)
Mitigated Negative Declaration (MND)
State Clearinghouse No. 2024080705**

Dear Tiffany Ho:

The California Department of Fish and Wildlife (CDFW) received an MND from Merced County, as Lead Agency, for the 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.

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 purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on

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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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. As proposed, for example, the Project may be subject to CDFW's lake and streambed alteration regulatory authority (Fish & G. Code, § 1600 et seq.). 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.

Nesting Birds: CDFW has jurisdiction over actions with potential to result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections that protect birds, their eggs, and nests include 3503 (regarding unlawful take, possession or needless destruction of the nest or eggs of any bird), 3503.5 (regarding the take, possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory nongame bird).

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

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: Cougar Energy Storage 1, LLC

Objective: The proposed Project involves the construction and operation of a battery energy storage system (BESS) consisting of lithium-ion battery modules on an approximately 10-acre site. The Project would include the installation of approximately 315 containers with approximately 40 battery modules each and interconnection equipment that would connect to the nearby Pacific Gas and Electric (PG&E) Wilson substation directly across North Tower Road.

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Location: The Project site is located at 100 North Tower Road, approximately one-half mile south of State Route 140 in unincorporated Merced County. The entirety of the Project site is within Assessor's Parcel Number (APN) 062-063-018.

Timeframe: Undetermined, but Construction is anticipated to last approximately 6-12 months.

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, indirect, and cumulative 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 agricultural lands including row crops and orchards. 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.

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. After review of the included Biological Resources Assessment and MND, CDFW concurs with the mitigation measures proposed in the MND for CDFW has concerns about the ability of the proposed mitigation measures to reduce impacts to less than significant for the State threatened Swainson's hawk (*Buteo swainsoni*).

Swainson's Hawk

Mitigation Measure BIO-3 is provided to mitigate for potential impacts to Swainson's hawk (SWHA) and states that, "If construction of the off-site transmission lines cannot be timed outside of the nesting season, to avoid, minimize, and mitigate potential impacts on Swainson's hawk and other raptors nesting on or adjacent to the project site, the applicant shall retain a qualified biologist to conduct preconstruction surveys and identify active nests on and within 0.5 mile of the project site for construction activities conducted during the breeding season (February 1–September 15). The surveys shall be conducted before the approval of grading and/or building plans (as applicable) and no less than 14 days and no more than 30 days before the beginning of construction. Guidelines provided in *Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in the Central Valley* (Swainson's Hawk Technical Advisory Committee 2000) shall be followed for surveys for Swainson's hawk. If no nests are found, a letter

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report will be prepared by the biologist and submitted to the California Department of Fish and Wildlife and the Merced County Community and Economic Development Department, where it will be kept on file, and no further measures are required.” CDFW concurs with conducting preconstruction surveys for SWHA but recommends that these surveys follow the guidelines developed by the Swainson’s Hawk Technical Advisory Committee (SWHA TAC 2000). Please note that these guidelines recommended multiple surveys, including an early season survey, to assist the Project proponent in implementing necessary avoidance and minimization measures, and in identifying active nest sites prior to initiating ground-disturbing activities.

Mitigation Measure BIO-3 continues by stat that, “If found, impacts to nesting Swainson’s hawks shall be avoided by establishing appropriate buffers around active nest sites. No project activity shall commence within the buffer areas until a qualified biologist has determined, in coordination with California Department of Fish and Wildlife, the young have fledged, the nest is no longer active, or reducing the buffer would not result in nest abandonment. California Department of Fish and Wildlife guidelines recommend implementation of 0.25- or 0.5-mile-wide buffers for Swainson’s hawk nests, but the size of the buffer may be decreased if a qualified biologist, in consultation with California Department of Fish and Wildlife, determine that such an adjustment would not be likely to adversely affect the nest.” CDFW concurs with implementing avoidance buffers around active SWHA nests, but CDFW recommends that in the event an active SWHA nest is detected during surveys and the ½-mile no-disturbance buffer around the nest cannot feasibly be implemented, 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(b) is necessary to comply with CESA.

Editorial Comments and/or Suggestions

Lake and Streambed Alteration: The MND notes that multiple aquatic features are located adjacent to the Project site, including two “drainage channels” along the northern portion of the Project site. Project activities that substantially change the bed, bank, and channel of any river, stream, or lake are subject to CDFW’s regulatory authority pursuant Fish and Game Code section 1600 et seq. Fish and Game Code section 1602 requires an entity to notify CDFW prior to commencing any activity that may (a) substantially divert or obstruct the natural flow of any river, stream, or lake; (b) substantially change or use any material from the bed, bank, or channel of any river, stream, or lake (including the removal of riparian vegetation); (c) deposit debris, waste or other materials that could pass into any river, stream, or lake. “Any river, stream, or lake” includes those that are ephemeral or intermittent as well as those that are perennial and may include those that are highly modified such as canals and retention basins.

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CDFW is required to comply with CEQA in the issuance of a Lake or Streambed Alteration Agreement (LSAA); therefore, if the CEQA document approved for the Project does not adequately describe the Project and its impacts to lakes or streams, a subsequent CEQA analysis may be necessary for LSAA issuance. For information on notification requirements, please refer to CDFW's website (<https://wildlife.ca.gov/Conservation/LSA>) or contact CDFW staff in the Central Region Lake and Streambed Alteration Program at (559) 243-4593.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database, which may be used to make subsequent or supplemental environmental determinations (Pub. Resources Code, § 21003, subd. (e)). Accordingly, please report any special-status species and natural communities detected during Project surveys to the CNDDDB. The CNDDDB field survey form can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The completed form can be mailed electronically to CNDDDB at the following email address: CNDDDB@wildlife.ca.gov. The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required in order for the underlying project approval to be operative, vested, and final (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089).

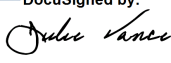
CONCLUSION

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

If you have any questions, please contact Ren Cotter, Environmental Scientist, at the address provided on this letterhead, by telephone at (559) 767-0956 or by electronic mail at Ren.Cotter@wildlife.ca.gov.

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Sincerely,

DocuSigned by:

FA83F09FE08945A...

Julie A. Vance
Regional Manager

ec: State Clearinghouse
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REFERENCES

Swainson's hawk technical advisory committee (SWHA TAC). 2000. Recommended timing and methodology for Swainson's hawk nesting surveys in the central valley of California. Swainson's Hawk Technical Advisory Committee.

Attachment 1

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

PROJECT: 100 Tower Road 252 MW Battery Energy Storage System

SCH No.: 2024080705

RECOMMENDED MITIGATION MEASURE	STATUS/DATE/INITIALS
<i>Before Disturbing Soil or Vegetation</i>	
BUOW	
Recommended Mitigation Measure 18: BUOW surveys prior to construction	
<i>During Construction</i>	
BUOW	
Recommended Mitigation Measure 19: BUOW avoidance buffer	