



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



November 22, 2024

Gerardo Quero
Planner II
County of Imperial
801 Main Street
El Centro, CA 92243

Dear Mr. Quero:

ALBA PEAKER BATTERY ENERGY STORAGE SYSTEM (PROJECT)
MITIGATED NEGATIVE DECLARATION (MND)
SCH# 2024100832

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an MND from County of Imperial for the Project pursuant 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, we appreciate 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 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.), the project proponent may seek related take authorization as provided by the Fish and Game Code.

PROJECT DESCRIPTION SUMMARY

Proponent: Apex Energy Solutions, LLC

Objective: The objective of the Project is to construct a 100-megawatt (MW) battery energy storage system (BESS). The project would also construct an interconnection line to connect the proposed BESS facility to an existing Imperial Irrigation District line. Primary Project activities include the construction and operation of the BESS.

Location: The Project site is located on a privately-owned parcel that encompasses 6.3 acres in the unincorporated community of Seeley in Imperial County. The Project site is approximately 7.5 miles west of the City of El Centro and approximately one mile north of Interstate 8.

Timeframe: 5 months of construction.

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.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist County of Imperial 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 in Attachment A, CDFW concludes that a Mitigated Negative Declaration is appropriate for the Project.

I. Environmental Setting and Related Impact Shortcoming

Would the Project have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by CDFW or USFWS?

COMMENT 1:

Section IV, Page 36; Appendix B, Section 2.0

Issue: CDFW is concerned that the Project's survey effort is not sufficient enough to support an impact determination. Only one general biological survey was conducted on the project site on March 24, 2023. Also, neither the MND nor the Biological Resources Report in Appendix B include measures to avoid, minimize, or mitigate impacts to any special-status plant species, should they be found on the project site during construction.

Specific impact: The biological field survey was only performed once on March 24, 2023, despite the MND stating that two sensitive plant species were historically documented in the vicinity of the project site. Per the *Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities* (CDFW, March 2018), botanical field survey visits should be spaced throughout the growing season and multiple visits to the project area are usually required to capture the floristic diversity at a level necessary to determine the presence of special-status plant species.

Why impact would occur: The single general biology survey conducted on March 24, 2023, does not follow the *Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities* (CDFW, March 2018), and thus may not provide adequate baseline conditions to identify and evaluate impacts to special-status species. If any special-status plant species are found on the project site during construction, no avoidance, minimization, or mitigation measures are provided in the MND to ensure that impacts are reduced to less than significant levels.

Evidence impact would be significant: Sensitive plant species are listed under CESA as threatened, or endangered, or proposed candidates for listing; designated as rare under the Native Plant Protection Act; or plants that otherwise meet the definition of rare, threatened, or endangered species under CEQA. Plants constituting California Rare Plant Ranks 1A, 1B, 2A, and 2B generally meet the criteria of a CESA-listed species and should be considered as an endangered, rare or threatened species for the purposes of CEQA analysis. Take of any CESA-listed species is prohibited except as authorized by state law (Fish and Game Code, §§ 2080 & 2085). Fish and Game Code Sections 1900–1913 includes provisions that prohibit the take of endangered and rare plants from the wild and a salvage requirement for landowners.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Project Description and Related Impact Shortcoming)

To reduce impacts to less than significant: CDFW recommends botanical field surveys following the *Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities* (CDFW, March 2018) be conducted annually prior to the start of construction by qualified personnel. One botanical field survey may not be sufficient to detect plants that are not evident and identifiable every year. CDFW recommends mitigation measure BIO-2 Pre-Construction Plant Surveys, listed in Attachment A, to be incorporated into the MND.

COMMENT 2:

Section IV, Page 36; Appendix B, Section 3.3.4

Issue: CDFW is concerned regarding the MND's analysis of impacts to burrowing owl. The MND and Biological Resources Report state that burrowing owl was evaluated for presence on the project site, but no details are provided on how the evaluation was conducted or if the 150-meter buffer zone was included in the evaluation. As of October 25, 2024, the burrowing owl is an official candidate species for listing under CESA.

Specific impact: The MND and Biological Resources Report are not clear on if breeding and non-breeding season surveys were conducted following the *Burrowing Owl Survey Protocol and Mitigation Guidelines* (The California Burrowing Owl Consortium, April 1993). The MND states that the level of disturbance on the Project site contributes to the burrowing owls' low potential of occurrence. However, the MND acknowledges that the Project site has not been actively tilled for at least two decades and native vegetation has re-established on half of the site. While minor vehicle access still occurs on some portions of the site, burrowing owls have a high potential to move into disturbed sites prior to and during construction activities. Burrowing owls frequently move into disturbed areas since they are adapted to highly modified habitats (Chipman et al., 2008; Coulombe, 1971).

Why impact would occur: Without focused surveys conducted following the *Burrowing Owl Survey Protocol and Mitigation Guidelines* (The California Burrowing Owl Consortium, April 1993), adequate baseline conditions cannot be established, and associated impacts cannot be identified or analyzed. The MND does not propose avoidance or mitigation measures if burrowing owls are found on the project site during construction, nor does the MND propose the obtaining of a CESA incidental take permit (ITP).

Evidence impact would be significant: As a candidate species for listing, burrowing owl is granted the same protection as threatened or endangered species under CESA. Take of any CESA-listed species is prohibited except as authorized by State law (Fish and Game Code § 2080 and § 2085). Consequently, if a Project, including Project construction or any Project-related activity during the life of the Project, results in the take of CESA-listed species, CDFW recommends that the Project proponent seek appropriate authorization prior to Project implementation. This may include an incidental take permit or a consistency determination (California Fish and Game Code § 2080.1 and § 2081).

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Environmental Setting and Related Impact Shortcoming)

To reduce impacts to less than significant: CDFW recommends focused burrowing owl surveys following the *Burrowing Owl Survey Protocol and Mitigation Guidelines* (The California Burrowing Owl Consortium, April 1993). If active burrows are present within the Project footprint during pre-construction take avoidance surveys and complete avoidance is infeasible, the Project proponent shall not undertake Project activities and Project activities shall be postponed until the appropriate authorization (i.e. CESA ITP under the California Fish and Game Code § 2081) is obtained. CDFW recommends mitigation measure BIO-3 Burrowing Owl Avoidance and Mitigation, listed in Attachment A, to be incorporated into the MND.

II. Mitigation Measure or Alternative and Related Impact Shortcoming

Would the Project have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by CDFW or USFWS?

COMMENT 3:

Section IV, Page 36, BIO-1

Issue: The MND does not analyze impacts to loggerhead shrike (*Lanius ludovicianus*), a CDFW Species of Special Concern (SSC) whose range encompasses the Project site. In addition, mitigation measure BIO-1 only mitigates for the nests that are active during the time of pre-construction surveys and defers mitigation if nesting birds are found during pre-construction surveys.

Specific impact: Loggerhead shrike is not mentioned in the MND or the Biological Resources Report, despite the species range covering the entirety of Imperial County and the species' SSC status. The land cover types found on the Project site matches Loggerhead shrike habitat, but this species was not considered in any analysis for the Project.

Mitigation measure BIO-1 does not consider impacts to birds on the Project site during non-nesting or non-breeding season, nor does it consider the loss of spatial habitat, specifically the southern portion of the Project site that has been re-established with native vegetation. The MND states that big saltbush has colonized the Project site and has grown to large statures, covering up to sixty percent of the site. Nevertheless, the MND does not evaluate the importance of avian habitat needs that the cover of big saltbush can provide, such as foraging habitat, dispersal habitat, feeding areas, and/or lookout perches.

Why impact would occur: Loggerhead shrikes prefer open habitats with scattered shrubs and often uses shrubs or small trees for cover. Loggerhead shrikes are often found in open cropland with bare ground (Zeiner et al., 1990). This habitat preference matches the habitat that is currently present on the Project site. Loggerhead shrike has been observed to aggressively defend its territory year-round (Smith, 1973).

Non-nesting habitat may be adversely affected by Project construction and presence, but neither the MND nor Biological Resources Report provides analysis or mitigation for this impact. Mitigation measure BIO-1 defers mitigation by requiring a mitigation plan to be developed and implemented at a later date, should the need be identified through pre-construction surveys. Deferring the development of mitigation measures does not reduce Project impacts to a less than significant determination. All avoidance, minimization, and mitigation measures required to bring impacts to species to less than significant should be contained within the MND. Additionally, mitigation strategies developed at a future time may not be effective to reduce impacts to less than significant, as the requirements are not contained within the MND to ensure compliance.

Evidence impact would be significant: Loggerhead shrike is listed as a CDFW SSC with a State rank of S4. With the S4 ranking, this species has possible cause for concern as a result of local recent declines and threats (CDFW, October 2024).

The project proponent is responsible for complying with Fish and Game Code (FGC) sections (§) 3503, 3503.5, and 3513, which state the following: FGC § 3503 states that it is unlawful to take, possess, or needlessly destroy the nest or eggs or any bird, except as otherwise provided by Fish and Game Code or any regulation made pursuant thereto; FGC § 3503.5 states that it is unlawful to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds-of-prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by

the Fish and Game Code or any regulation adopted pursuant thereto; FGC § 3513 states that it is unlawful to take or possess any migratory nongame bird except as provided by rules and regulations adopted by the Secretary of the Interior under provisions of the Migratory Bird Treaty Act of 1918, as amended (16 United States Code § 703 et seq.).

Under the CEQA Guidelines § 15126.4, formulation of mitigation measures should not be deferred to a future time, unless the Lead Agency commits to the mitigation, adopts specific performance standards the mitigation will achieve, and identifies the potential actions that can feasibly achieve that performance standard.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Mitigation Measure or Alternative and Related Impact Shortcoming)

Mitigation Measure BIO-1:

To reduce impacts to less than significant: CDFW recommends a qualified biologist survey the Project area not only for breeding and nesting birds, including Loggerhead shrike, but also for other bird activity, such as foraging, and for behavior possibly caused by Project activities, such as agitation, stress, and/or nest abandonment. CDFW provide editorial suggestions for BIO-1 in Attachment A.

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 California Natural Diversity Database (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 MND to assist County of Imperial in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Lily Mu, Senior Environmental Scientist (Specialist) at (909) 544-2521 or Lily.Mu@wildlife.ca.gov.

Sincerely,

DocuSigned by:

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Brandy Wood
Environmental Project Manager

Attachments

Attachment A. Draft Mitigation, Monitoring, and Reporting Program

cc: Office of Planning and Research, State Clearinghouse, Sacramento

REFERENCES

The California Burrowing Owl Consortium. April 1993. Burrowing Owl Survey Protocol and Mitigation Guidelines.

(<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83842&inline>)

California Department of Fish and Wildlife (CDFW). March 2018. Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities. (<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18959&inline>)

California Department of Fish and Wildlife (CDFW). October 2024. Special Animals List. (<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=109406&inline>)

California Department of Fish and Game (CDFG). 2012. Staff Report on Burrowing Owl Mitigation. (<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843&inline>)

Chipman, E. D., N. E. McIntyre, R. E. Strauss, M. C. Wallace, J. D. Ray, and C. W. Boal. 2008. Effects of human land use on western burrowing owl foraging and activity budgets. *Journal of Raptor Research* 42(2): 87-98.

Coulombe, H. N. 1971. Behavior and population ecology of the Burrowing Owl, *Speotyto cunicularia*, in the Imperial Valley of California. *Condor* 73:162–176.

Smith, S. M. 1973. Aggressive display and related behavior in the loggerhead shrike. *Auk* 90:287-298.

Zeiner, D.C., W.F.Laudenslayer, Jr., K.E. Mayer, and M. White, eds. 1988-1990. *California's Wildlife*. Vol. I-III. California Depart. of Fish and Game, Sacramento, California.

**Attachment A
 Draft Mitigation, Monitoring, and Reporting Program**

Draft Mitigation, Monitoring, and Reporting Program (MMRP)

CDFW provides the following language to be incorporated into the MMRP for the Project.

Biological Resources (BIO)		
Mitigation Measure (MM) Description	Implementation Schedule	Responsible Party
<p>BIO-1 Pre-Construction Bird Surveys:</p> <p>To avoid direct impacts to avian species, removal of habitat that supports active nests and other Project-related disturbance in the proposed area of disturbance Project site should occur outside the general breeding season for these species (February 1 to September 15 August 31 for raptors and March 15 to August 31 for the majority of migratory bird species). If removal of habitat or other Project-related disturbance in within the proposed area of disturbance Project site must occur during the breeding season, the a a qualified biological monitor avian biologist would will conduct a preconstruction survey to determine the presence or absence of nesting birds on the proposed area of disturbance within and adjacent to the Project site. The preconstruction survey would be conducted within 10 not more than 3 calendar days prior to the start of construction activities (including removal of vegetation). Pre-construction surveys shall focus on both direct and indirect evidence of nesting, including nesting locations and nesting behavior (including but not limited to copulation, carrying food or nesting materials, nest building, agitation, aggressive interaction, feigning injury, or distraction displays), and non-nesting behavior (including but not limited to foraging or habitat defense). The nesting bird survey shall include the Project site and all suitable areas, including trees, shrubs, bare ground, burrows, cavities, and structures. The applicant would will submit the results of the pre-construction survey to CDFW for review and approval prior to initiating any construction activities.</p> <p>If nesting birds or active nests are detected, a letter report or mitigation plan in conformance with applicable state and federal law (i.e., appropriate follow up surveys, monitoring schedules, construction and noise barriers/buffers, etc.) would be prepared and include proposed measures to be implemented to ensure that take of birds or eggs or disturbance of breeding activities is avoided. The report or mitigation plan would be submitted for review and approval. the biologist shall establish an appropriately sized no-work buffer zone around the nest, which will be based upon the biologist’s best professional judgment, the bird’s displayed behavior (agitation or stress), the nesting species, it’s sensitivity to disturbance, nesting stage and expected types, and the intensity and duration of disturbance. The no-work buffer zone shall be clearly marked but should not alert predators. Construction activities shall not occur within any no-work buffer zone until the young birds have successfully fledges and the nest is deemed inactive by the qualified avian biologist.</p>	<p>Prior to the start of Project related activities</p>	<p>Project Proponent</p>

<p>BIO-2 Pre-Construction Plant Surveys:</p> <p>Prior to the start of construction, a qualified biologist¹ shall conduct a botanical field survey following the methodology described in <i>Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities</i> (CDFW, March 2018). The survey shall be floristic in nature (i.e., identifying all plant species to the taxonomic level necessary to determine rarity), and shall be inclusive of areas proposed for disturbance and indirectly impacted by the Project. The results of the survey shall be documented in a letter report that will be submitted to County of Imperial and CDFW. The survey shall be conducted annually until start of construction to ensure the floristic diversity is accurately captured and effective avoidance, minimization, and mitigation strategies are developed.</p> <p>If special-status plant species are observed during the pre-construction rare plant survey(s) within the development area of the Project, the Project shall be designed to reduce impacts to these species through the establishment of buffers, to the extent feasible. Buffer distances will be determined by the qualified biologist, typically 50 feet or greater from an identified special-status plant species, unless the Qualified Biologist determines a reduced buffer would suffice to avoid impacts to the species.</p> <p>If avoidance of special-status plant species is not feasible, a Special-Status Plant Relocation Plan shall be developed and implemented. The Special-Status Plant Relocation Plan shall address mitigation for special-status plants, including topsoil salvage to preserve seed bank and management of salvaged topsoil; seed collection, storage, possible nursery propagation, and planting; salvage and planting of bulbs as feasible; location of on-site receptor sites; land protection instruments for receptor areas; and funding mechanisms. The Special-Status Plant Relocation Plan shall include methods, monitoring, reporting, success criteria, adaptive management, and contingencies for achieving success.</p> <p>All special-status plant species identified on site shall be mapped onto a site-specific aerial photograph and topographic map and included on the construction, grading, fuel modification, and landscape plans.</p>	<p>Prior to the start of Project related activities</p>	<p>Project Proponent</p>
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¹ Botanical field surveyors should possess the following qualifications: Knowledge of plant taxonomy and natural community ecology; Familiarity with plants of the region, including special status plants; Familiarity with natural communities of the region, including sensitive natural communities; Experience with the CNDDB, BIOS, and Survey of California Vegetation Classification and Mapping Standards; Experience conducting floristic botanical field surveys as described in *Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities* (CDFW, March 2018), or experience conducting such botanical field surveys under the direction of an experienced botanical field surveyor; Familiarity with federal, state, and local statutes and regulations related to plants and plant collecting; and Experience analyzing the impacts of projects on native plant species and sensitive natural communities.

<p>BIO-3 Burrowing Owl Surveys and Avoidance:</p> <p>Focused Burrowing Owl Surveys</p> <p>To avoid construction-level impacts to unidentified burrowing owls on-site, qualified biologists shall conduct focused burrowing owl surveys during the breeding and non-breeding season in accordance with the California Department of Fish and Wildlife’s (CDFW) 2012 Staff Report on Burrowing Owl Mitigation. The survey shall cover the Project site and a 150-meter (500-foot) buffer, where legally accessible. The Project applicant shall coordinate with CDFW in the preparation of a Burrowing Owl Protection and Mitigation Plan (see below) to allow commencement of disturbance activities on site. A pre-construction survey shall be conducted within 14 days prior to the start of construction activities (see below).</p> <p>Pre-Construction Survey and Avoidance Measures</p> <p>Depending on the Project activity type and associated disturbance, an avoidance buffer distance of 50 meters (165 feet) to 100 meters (330 feet) during the non-breeding season (September through January) and 100 meters (330 feet) to 250 meters (825 feet) during the breeding season (February through August) shall be maintained between active burrows and construction activities. A Qualified Biologist shall monitor the burrowing owls for any sign of distress and adjust the buffers as necessary to ensure no take occurs.</p> <p>Any area where owls are sighted shall be subject to frequent surveys by the qualified biologist for burrows before construction begins. If construction is to begin during the breeding season, mitigation measures shall be implemented prior to February 1 to discourage nesting by burrowing owls within the Project footprint.</p> <p>Pre-construction take avoidance surveys for this species shall be conducted within 14 days prior to the start of ground disturbance and 24 hours prior to construction to determine the presence or absence of this species within the Project footprint. A report shall be submitted by a qualified and agency-approved biologist. The Project footprint shall be clearly demarcated in the field by the Project engineers and biologist prior to the commencement of the pre-construction take avoidance surveys. The surveys shall follow the protocols provided in the Burrowing Owl Survey Protocol and Mitigation Guidelines, prepared by the California Burrowing Owl Consortium, and following the guidance of the Staff Report on Burrowing Owl Mitigation (CDFG, 2012).</p> <p>If active burrows are present within the Project footprint and complete avoidance is infeasible, the Project proponent shall not undertake Project activities and Project activities shall be postponed until the appropriate authorization (i.e. CESA incidental take permit under the California Fish and Game Code § 2081) is obtained.</p>	<p>Prior to the start of Project related activities</p>	<p>Project Proponent</p>
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