



State of California – Natural Resources Agency  
DEPARTMENT OF FISH AND WILDLIFE  
Inland Deserts Region  
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[www.wildlife.ca.gov](http://www.wildlife.ca.gov)

**GAVIN NEWSOM, Governor**  
**CHARLTON H. BONHAM, Director**



December 18, 2024  
*Sent via email*

Sue O' Strander, Planning Manager  
County of San Bernardino  
385 North Arrowhead Avenue, 1st Floor  
San Bernardino, CA 92415

Dear Ms. O' Strander:

LEAR AVE SOLAR PROJECT (PROJECT)  
MITIGATED NEGATIVE DECLARATION (MND)  
SCH# 2024110047

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an MND from the County of San Bernardino for the Project pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines.<sup>1</sup> CDFW submitted comments in response to the MND on December 2, 2024. On December 9, 2024, CDFW received a response to the comments.

Thank you for the opportunity to provide additional comments and clarify recommendations regarding those activities involved in the Project that may affect California fish and wildlife. Likewise, we appreciate the opportunity to provide further 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

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<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.

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.

## **ADDITIONAL COMMENTS AND RECOMMENDATIONS**

CDFW offers the additional comments and recommendations below to assist the County of San Bernardino 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 further improve the document.

### **I. RESPONSE TO CDFW COMMENTS**

#### **Response to CDFW Comment 1:**

##### **Page 6**

**Issue:** In the comments provided to CDFW, it was noted that Rincon biologists performed focused protocol surveys, "Rincon biologists also surveyed the Project Site and initiated a desert tortoise protocol survey on October 13, 2023, according to the methodology described in the United States Fish and Wildlife Service (USFWS) Preparing for Any Action That May Occur Within the Range of the Mojave Desert Tortoise."

**Concern with Response:** CDFW provides further clarification to our previous comment. Specifically, in Appendix B of the MND in Table 1 of the General Biological Resources Assessment Report (Rincon Consultants, Inc., 2024), it notes that the same personnel during on the same date and during the same time period conducted the reconnaissance survey and the desert tortoise protocol survey. Further, the document states, "A desert tortoise protocol survey was conducted concurrently with the field reconnaissance survey" in Section 3.4. Section 3.3.1 notes, "Meandering pedestrian transects were conducted throughout the [Area of Potential Effects] during the field reconnaissance survey, which allowed for an assessment to distinguish plant species and vegetation communities present on the site".

It is unclear if the two personnel were concurrently conducting surveys together, or each focused individually on a survey. If concurrent, the desert tortoise survey was not completed according to the protocol, as it was done concurrently with the reconnaissance survey to also document special-status plant and wildlife species and identifying sensitive vegetation communities and potentially jurisdictional resources. CDFW would like to emphasize that reconnaissance surveys are not ideal in identifying the environmental baseline. Surveys following approved protocols and

guidelines for each species are more desirable to understand which species are present on the Project site.

The desert tortoise protocol survey also was used to survey for western burrowing owls, a candidate species under CESA. CDFW reiterates surveys performed using the Staff Report on Burrowing Owl Mitigation (CDFG, 2012) guidelines, in the appropriate season, is a more appropriate methodology to verify whether the species is present on the Project site.

## **Response to CDFW Comment 2:**

### **Page 9**

**Issue:** In the comment provided to CDFW, it was noted that, “one ephemeral stream complex was observed within the northwestern portion of the [Area of Potential Effects] during the field delineation and one isolated ephemeral stream was observed within the southwestern portion of the [Area of Potential Effects].” and “No other ephemeral streams were identified based on accepted methods to identify jurisdictional features.”

**Concern with Response:** CDFW reiterates there is a concern that the jurisdictional delineation is based on the ordinary high-water mark (low flow channel) of the ephemeral streams and has not accounted for the full extent of the streams. A stream channel includes the area where water uniformly or habitually flows over a given course, and where the width of the watercourse can reasonably be defined. Thus, a channel is not limited to a specific flow event – such as ordinary high water – nor by the path of surface water associated with a particular low flow, as this path might vary seasonally. Rather, the channel is more appropriately based on the topography or elevations of land that confine the water to a particular course when the waters of a stream rise to their highest point. As the Project area has infrequent rainfall, there can be uncertainty using point-in-time field indicators.

In Appendix F Jurisdictional Delineation, Attachment 4 (Rincon Consultants, Inc., 2024), the Episodic Stream Indicator Data Sheet states that the jurisdictional delineation was only based on the low flow channel, thus, not accounting for the full extent of the ephemeral stream complex.

California Fish and Game Code section 1602 requires any entity (defined as any person, State or local governmental agency, or public utility) to notify the CDFW before beginning any activity that will do one or more of the following: 1) Substantially divert or obstruct the natural flow of any river, stream, or lake. 2) Substantially change or use any material from the bed, channel, or bank of any river, stream, or lake. 3) Deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake. Fish and Game Code section 1602 applies to any river, lake, or stream, including those that are perennial, intermittent, or ephemeral. CDFW recommends that you notify.

### **Response to CDFW Comment 3:**

#### **Page 12**

**Issue:** The revised MM BIO-1 did not accept all of CDFW's recommendations.

**Concern with Response:** CDFW is concerned the response to our previous comment did not accept the suggested revision in MM BIO-1 that said, "Prior to the issuance of grading or building permits, and prior to decommissioning, the Project Proponent shall retain a Lead Biologist(s) (or Qualified Biologist) **who has experience and expertise in desert species and as approved in writing by CDFW** to oversee compliance with protection measures for all listed and other special-status species that may be affected by the construction, operation, and decommissioning of the Project including, but not limited to, desert tortoise, western burrowing owl, desert kit fox, and nesting birds."

CDFW's recommendation for the language regarding biologist experience is intended to be more encompassing of the expertise needed to monitor this Project. As suggested in the response, the definition of an Authorized Biologist, per USFWS is described as follows: "As a general rule, an Authorized Biologist has a bachelor's or graduate degree in biology, ecology, wildlife biology, herpetology, or related discipline with prior field experience using accepted resource agency techniques to survey for desert tortoises" (USFWS, 2009). Note the definition is intended for desert tortoise, while your proposed mitigation measure also includes other special status species, including those that only have state designations.

### **Response to CDFW Comment 5:**

#### **Page 18**

**Issue:** The revised MM BIO-4 did not accept all of CDFW's recommendations.

**Concern with Response:** CDFW is concerned the response to our previous comment did not accept the suggested revision in MM BIO-4 that said, "The Authorized Biologist shall conduct a presence/absence survey within the Project area and 500-foot buffer of suitable habitat, no more than 15 days prior to Project activities and after any pause in Project activities lasting 30 days or more, in accordance with U.S. Fish and Wildlife Service 2009 desert tortoise survey methodology. The survey shall have 100-percent visual coverage for desert tortoise and their sign. **Preconstruction surveys cannot be combined with other surveys conducted for other species while using the same personnel.** Results of the survey shall be submitted to CDFW prior to start of Project activities. If the survey confirms absence, the Project shall move forward following MM BIO-1 with an Authorized Biologist monitoring for tortoises during grading and ground disturbance **and ensure desert tortoise do not enter the Project site.** If the survey or monitoring confirms presence, the Project Proponent shall avoid impacts to desert tortoise. If complete avoidance cannot be achieved, the Project Proponent shall consult with the County, USFWS, and CDFW to determine if

an ITP is necessary.

CDFW does not consider concurrently species surveys adequate, as the survey is looking for multiple species with varying life histories and survey methodology. If left without the recommended revisions, CDFW is concerned about the pre-construction surveys focusing on too many species at once. If the survey is too broad, there is a higher probability that a species will be missed. For this reason, CDFW recommends doing pre-construction surveys one species at a time.

### **Response to CDFW Comment 9:**

#### **Page 27**

**Issue:** Western burrowing owl surveys were performed concurrently with desert tortoise survey, and the response to comments did not accept CDFW's recommendation to perform appropriate surveys for the species.

**Concern with Response:** The purpose of this comment is to emphasize the importance of breeding and non-breeding surveys of western burrowing owls, a candidate species under CESA. These surveys will reveal if western burrowing owls are year-long residents or only present for breeding. Please refer to the Staff Report on Burrowing Owl Mitigation (CDFW, 2012) for guidance on performing these surveys. As previously mentioned, CDFW does not consider concurrent surveys appropriate, and the survey methodologies recommended for this species are not the same as desert tortoise.

## **II. Additional Editorial Comments and/or Suggestions**

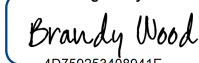
For any mention of Authorized Biologist, CDFW recommends the measure be revised to Lead or Qualified Biologist if it does not pertain to actions performed under a CESA incidental take permit. CDFW notes there are interchanging of terminologies for biologists throughout the mitigation measures.

### **CONCLUSION**

CDFW appreciates the opportunity to further comment on the MND to assist the County of San Bernardino in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Austin Gutierrez, Environmental Scientist at (909) 544-2525 or [Austin.Gutierrez@Wildlife.ca.gov](mailto:Austin.Gutierrez@Wildlife.ca.gov).

Sincerely,  
DocuSigned by:

  
4D759253408941E...

Brandy Wood  
Environmental Program Manager

Sue O' Strander, Planning Manager  
County of San Bernardino  
December 18, 2024  
Page 6 of 6

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## REFERENCES

California Department of Fish and Game (CDFG). 2012. Staff Report on Burrowing Owl Mitigation. State of California, Natural Resources Agency. Available for download at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843&inline>

U.S. Fish and Wildlife Service (USFWS). 2009. Desert Tortoise (Mojave Population) Field Manual: (*Gopherus agassizii*). Region 8, Sacramento, California.

Rincon Consultants, Inc. 2024. Appendix B General Biological Resources Assessment Report. San Diego, CA

Rincon Consultants, Inc. 2024. Appendix F Jurisdictional Delineation. San Diego, CA