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STATE OF CALIFORNIA
STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF:

Docket No.:21-AFC-02

***Willow Rock Energy Storage
Center***

**California Energy Commission Staff's Post-
Evidentiary Hearing Opening Brief**

INTRODUCTION

At the conclusion of the Willow Rock Energy Storage Center Project (Willow Rock) evidentiary hearing, held on August 21, 2025, the assigned Committee provided an opportunity for parties to file post-evidentiary hearing briefs. Staff offers the following discussion of two legal issues raised by the parties at the evidentiary hearing: (1) the Center for Biological Diversity's (CBD) claim that an updated western Joshua tree census is required before take can be authorized (Exhibit No. 4000, pg. 6); and (2) Kern County's claim that the California Energy Commission (CEC), in error, is requiring habitat mitigation for project activities associated with construction of transmission lines in road rights-of-way (Evidentiary Hearing Transcript, pg. 174, lines 3-18). Staff also addresses a procedural matter relating to the comment period on the Presiding Member's Proposed Decision (PMPD).

DISCUSSION

1. Western Joshua Tree Census

The Western Joshua Tree Conservation Act, set forth in Chapter 11.5 of the Fish & Game Code, provides a framework for the conservation of western Joshua trees in California. Fish & Game Code section 1927.3(a)(1) authorizes the take of western Joshua trees through the issuance of a take permit by California Department of Fish and Wildlife (CDFW) if certain conditions are met including the applicant submitting "a census of all western Joshua trees on the project site..." (CA Fish & Game Code § 1927.3)

CBD argues that this language compels complete census of the project site, which has not been carried out, before a take permit can be issued. (Exhibit 4000, pg. 6. Hearing Transcript, pg. 274: 2-10.). The applicant rebuts the allegation of incomplete surveys claiming “complete census surveys were conducted for WJT across the project area, including the gen-tie alignments. Areas with no right of entry were necessarily excluded from the survey.” (Exhibit 1234, pg. 5.)

The evidence in the record indicates that complete surveys were performed on the core parcels where the facility would be located, laydown areas P1, P2N, P2S, VH, and the preferred transmission line route. The applicant could not access and survey one parcel in a portion of the alternative transmission route and seven parcels comprising buffer areas along the alternative transmission line routes. (Hearing Transcript, pg.144: 6-25; pg.145: 23-25; pg. 147: 1-7.) Thus, the practical implication is that complete surveys were performed and any potential survey gaps are limited to parcels that are not likely to be used. But to account for the possibility of an alternative transmission route being used and to address gaps in western Joshua tree surveys, staff amended Condition of Certification (COC) **BIO-12** to require the applicant to submit an updated western Joshua tree Census and final Western Joshua Tree Relocation Plan to the Compliance Project Manager (CPM) for review and approval, and to CDFW for review and comment, prior to any site mobilization or ground-disturbing activities. (Exhibit No. 2003, pgs. 87 and 88).

The salient issue is whether the CEC’s certification of the project, which incorporates the western Joshua tree take permit requirements and authorizes take, in advance of complete census surveys, is consistent with the Fish & Code section 1927.3(a)(1).

Typically, CDFW issues a take permit after a lead agency completes its CEQA obligations and approves a project. Thus, take permits are a second step, after project approval, issued during construction or operations of the project. The key aspect is that project approval and take permit issuance are usually separated in time which allows for more complete implementation of mitigation measures by the time the take permit is issued.

For this project, CDFW is not issuing an incidental take permit, the authorization to take western Joshua trees is contained within the CEC’s certification which under the CEC’s process is at the time of project approval. Under Public Resources Code section 25500 the CEC has exclusive permitting authority over the project and the issuance of a certificate by the CEC is in lieu of most permits issued by local or state agencies, such as incidental take permits.

Here, should the project be approved by the CEC, and the project ends up needing to utilize the alternative transmission route, complete census surveys would be required

prior to site mobilization and prior to allowing any disturbance to western Joshua trees. The operative language in **BIO-12** states,

“The project owner shall submit an updated Western Joshua Tree Census and Western Joshua Tree Relocation Plan to the CPM for review and approval, and to CDFW for review and comment, prior to any site mobilization or ground-disturbing activities within 50 feet of any WJT.” (Exhibit 2003, pg. 12.)

BIO-12 follows essentially the same timeline or process as would have applied had the applicant obtained an incidental take permit directly from CDFW. The revisions to **BIO-12** ensure that the project complies with the requirements of the Western Joshua Tree Conservation Act because complete surveys would be concluded before any take occurs allowing for the implementation of avoidance and mitigation measures. Thus, while authorization to take is contained within the CEC’s certification, a condition precedent, complete surveys, is required before any take.

2. Habitat Mitigation for Transmission Lines in Road Rights-of-Way

During the evidentiary hearing Kern County Board of Supervisor’s representative, Lorelei Oviatt, Kern County Planning and Natural Resources Director, asserted that the staff, in error, is requiring habitat mitigation for project activity associated with construction of transmission lines in road right-of-way which have no habitat. (Evidentiary Hearing Transcript, pg. 174, lines 3-18). Staff utilized the amount of temporary and permanent impacts to vegetation and landforms provided by the applicant in the incidental take permit application. (Exhibit No. 1149, pgs. 6 to 8). In its opening testimony the applicant presented Table 2-3 which identified acres of land disturbed by the project for both the berm and no berm alternative. Table 2-3 includes multiple categories related to transmission line construction activities and acres of land disturbed. (Exhibit 1233, pg. 2-4.) A plain reading of Table 2-3 is that transmission line construction will result in impacts to 46 acres for both the berm and no berm option. $(0.2+23.6+21.5+0.7=46)$ Staff did not parse out whether any land disturbances related to transmission line construction occur on road rights-of-way devoid of vegetation.

However, staff agrees with the County’s assertion that certain portions of the road right-of-way may not warrant habitat mitigation for impacts to Crotch’s bumble bee and western burrowing owl. Fish and Game Code, section 2081(b)(2) requires that the measures to minimize and fully mitigate impacts of authorized take of endangered species, threatened species, or candidate species must be roughly proportional in extent to the impact. To ensure clarity in the conditions of certification regarding the project owner’s obligations to obtain offsite mitigation lands and address the concerns of Kern County, staff recommends the following modifications to COC **BIO-14**.

BIO-14 Habitat Management Land Acquisition for Crotch's Bumble Bee and Western Burrowing Owl

To mitigate for impacts to Crotch's bumble bee and western burrowing owl the project owner shall fulfill the following requirements:

~~The project owner shall purchase 843 acres of Crotch's bumble bee and western burrowing owl mitigation or conservation bank credits at a location approved in advance by the CPM, in coordination with CDFW, or shall provide for both the permanent protection and management of 843 acres of Habitat Management (HM) lands pursuant to Item 3 (Habitat Management Lands Acquisition and Protection) and the calculation and deposit of the management funds pursuant to Item 5 (Endowment Fund). The proposed mitigation lands shall also include Joshua Tree Woodland at the same 3:1 ratio should that community be impacted along the optional transmission line route.~~

The project owner shall mitigate for impacts to Crotch's bumble bee and western burrowing owl habitat by one of the following methods, subject to prior approval by the CPM in coordination with CDFW, with the final amount to be calculated as described below.

- a) **Credit Purchase:** Purchase 843 acres of Crotch's bumble bee and western burrowing owl mitigation or conservation bank credits at a location approved in advance by the CPM, in coordination with CDFW; or
- b) **Habitat Management Lands:** Provide for both the permanent protection and management of 843 acres of Habitat Management (HM) lands pursuant to Item 3 (Habitat Management Lands Acquisition and Protection) and the calculation and deposit of the management funds pursuant to Item 5 (Endowment Fund).

The proposed mitigation lands shall also include Joshua Tree Woodland at the same 3:1 ratio should that community be impacted along the optional transmission line route.

The amount of mitigation required shall be calculated based on the project's final direct permanent and temporary loss of suitable Crotch's bumble bee and western burrowing owl habitat, identified prior to ground disturbance as approved by the CPM, in consultation with CDFW. ~~Mitigation lands are not required for areas of the project site that are going to be avoided and areas of the project site or transmission lines that comprise roadway rights-of-way, that have a history of vegetation management.~~ Mitigation lands shall not be required for areas of the project site that are avoided and areas of the project site or transmission line construction that comprise roadway rights-of-way that support disturbed or developed habitat or are subject to routine vegetation management unless they have the potential to support sensitive plants or wildlife. The project owner shall submit detailed maps identifying areas of permanent and temporary

habitat loss, areas avoided, and areas exempt under this condition for approval by the CPM, in consultation with CDFW prior to site mobilization. Maps shall be provided in a format acceptable to the CPM.

The purchase of mitigation or conservation bank credits or permanent protection and funding for perpetual management of HM lands must be complete before starting project activities, or within 18 months of the date of the site mobilization, if Security is provided pursuant to the Security (Item 11) below for all uncompleted obligations.

1. **Cost Estimates.** For the purposes of determining the Security amount, it is estimated the cost for the CPM or its contractors to complete acquisition, protection, and perpetual management of the HM lands is as follows:
 - a. Land acquisition costs for HM lands identified in the Item 3 (Habitat Management Lands Acquisition and Protection) below, estimated at \$2,698.00/acre for 843 acres: \$2,274,414.00 or an adjusted value calculated based on the assessment of the defined project disturbance footprint. The adjusted Security amount shall be determined by the CPM, in coordination with CDFW, based on the final acre amount calculated, as detailed above. Land acquisition costs are estimated using local fair market current value per acre for lands with habitat values meeting mitigation requirements.
 - b. All other costs are necessary to review and acquire the land in fee title and record a conservation easement as described below in Item 3b. (Conservation Easement) below: \$558,750.00. These costs would be adjusted based on the assessment of the defined project disturbance footprint.
 - c. Start-up costs for HM lands, including initial site protection and enhancement costs as described in the Item 3f (Start-up Activities) below, estimated at \$344,549.00 for 843 acres or an adjusted value calculated based on the assessment of the defined project disturbance footprint.
 - d. Interim management period funding as described in the Item 4 (Interim Management) (Initial and Capital)) below, estimated at \$466,799.00 for 843 acres or an adjusted value calculated based on the assessment of the defined project disturbance footprint.
 - e. Long-term management funding as described in the Item 5 (Endowment Fund) below, estimated at \$2,918,823.00 for 843 acres or an adjusted value calculated based on the assessment of the defined project

disturbance footprint. Long-term management funding is estimated initially for the purpose of providing security to ensure implementation of HM lands management.

- f. Related transaction fees including but not limited to account set-up fees, administrative fees, title and documentation review and related title transactions, expenses incurred from other state agency reviews, and overhead related to transfer of HM lands to CDFW as described in the Item 10 (Reimburse CDFW), estimated at \$13,600.00 for 843 acres or an adjusted value calculated based on the assessment of the defined project disturbance footprint.
- g. All costs associated with the CPM engaging an outside contractor to complete the mitigation tasks, including but not limited to acquisition, protection, and perpetual funding and management of the HM lands and restoration of temporarily disturbed habitat. These costs include but are not limited to the cost of issuing a request for proposals, transaction costs, contract administration costs, and costs associated with monitoring the contractor's work \$45,479.00 for 843 acres or an adjusted value calculated based on the assessment of the defined project disturbance footprint.

2. Mitigation Bank Credits. If the project owner elects to purchase credits to complete Crotch's bumble bee and western burrowing owl compensatory mitigation obligations, then project owner shall purchase 843 acres, or an adjusted value based on the assessment of the defined project disturbance footprint. The adjusted Security amount shall be determined by the CPM, in coordination with CDFW, based on the final acre amount calculated in accordance with BIO-14, of Covered Species credits from a mitigation or conservation bank approved in advance by the CPM prior to initiating project activities, or no later than 18 months from the start of site mobilization, if Security is provided pursuant to Item 11 (Security) below. Prior to the purchase of credits, the project owner shall obtain CPM approval to ensure the mitigation or conservation bank is appropriate to compensate for the impacts of the project. The project owner shall submit to the CPM a copy of the Bill of Sale(s) and Payment Receipt prior to initiating site mobilization or within 18 months from start of site mobilization, if Security is provided.

[No changes to BIO-14 subsections (3)-(12)]

c) Presiding Member's Proposed Decision

The CEC's regulations at California Code of Regulations, title 20, section 1745.5(c) provide for a 30-day comment period on the PMPD. Section 1203 authorizes the presiding member to manage the siting proceedings including, for good cause, to shorten the time required for compliance with any provision in the regulations. Because there is no statutory requirement to have a 30-day comment period on the PMPD, the committee can modify the comment period on the PMPD.

Given the complexities of the business meeting schedules, the general support for the project from Kern County and the local community as reflected at the evidentiary hearing, the fact that the Preliminary Staff Assessment was subject to a 45-day comment period, that there was opportunity to comment on the Final Staff Assessment, that there will be opportunity to comment at the business meeting, and the direction to the CEC under Executive Order N-33-25 to streamline siting processes, staff would not oppose the committee shortening the comment period on the PMPD to facilitate scheduling the matter at the earliest possible business meeting.

CONCLUSION

Staff thanks the Committee for the opportunity to provide additional briefing on the law applied to the evidence in the record as discussed above. The hearing record is adequate for a decision to be reached on the application.

Date: September 5, 2025

Respectfully submitted,

STATE ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

By: **/s/**

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