

DOCKETED

Docket Number:	21-AFC-02
Project Title:	Willow Rock Energy Storage Center
TN #:	265921
Document Title:	Center for Biological Diversity Post Hearing Opening Brief
Description:	N/A
Filer:	Center for Biological Diversity
Organization:	Center for Biological Diversity
Submitter Role:	Intervenor Representative
Submission Date:	9/8/2025 4:43:34 PM
Docketed Date:	9/8/2025

STATE OF CALIFORNIA

**State Energy Resources Conservation and
Development Commission**

In the Matter of:

WILLOW ROCK ENERGY
STORAGE CENTER

Docket No. 21-AFC-02

**INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY'S
POST- EVIDENTIARY HEARING OPENING BRIEF**

Zeynep J. Graves
Lisa T. Belenky
Center for Biological Diversity
2100 Franklin St., Suite 375
Oakland, CA 94612
510.844.7160
zgraves@biologicaldiversity.org
lbelenky@biologicaldiversity.org

Attorneys for Intervenor,
Center for Biological Diversity

INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY'S POST- EVIDENTIARY HEARING OPENING BRIEF

INTRODUCTION

At the conclusion of the August 21, 2025 evidentiary hearing for the Willow Rock Energy Storage Center Project, and as memorialized in the Hearing Officer's August 27, 2025 Memorandum (TN 265796), the Committee invited the parties to submit post-hearing briefs. Intervenor Center for Biological Diversity (the "Center") submits this brief to address a single legal issue: whether a complete western Joshua tree census is required before any authorization of take may lawfully be granted. As explained below, the Western Joshua Tree Conservation Act makes clear that such a census is a mandatory precondition to take authorization, without which approval would contravene the statute and undermine the protections afforded to the western Joshua tree.

DISCUSSION

The Western Joshua Tree Conservation Act (the "WJTCA") (Cal. Fish & Game Code § 1927, et seq.) provides a framework to conserve the iconic western Joshua tree. It expressly prohibits the take of a western Joshua tree "or any part or product of the tree," except as authorized by the WJTCA, the California Endangered Species Act, or the Natural Community Conservation Planning Act. (Cal. Fish & Game Code § 1927.2(a).)

Here, the Applicant seeks an Incidental Take Permit for western Joshua tree under the WJTCA. Subsection 1927.3(a) of the WJTCA sets forth the mandatory prerequisites for authorizing take. Take may be authorized only if the statute's prescribed conditions—including the following—are met:

- (1) The permittee submits . . . for . . . approval a census of all western Joshua trees on the project site, including size information and photographs, that categorize the western Joshua trees according to [defined] size classes . . .
- (2) The permittee avoids and minimizes impacts to, and the taking of, the western Joshua tree to the maximum extent practicable. . . . [and]
- (3) The permittee mitigates all impacts to, and taking of, the western Joshua tree. . . . In lieu of completing the mitigation obligation on its own, the permittee may elect to satisfy this mitigation obligation by paying fees, pursuant to the [WJTCA] fee schedule . . . , for deposit into the fund.

Willow Rock Energy Storage Center
Docket No. 21-AFC-02

(Cal. Fish & Game Code § 1927.3(a).)

By its plain language, the statute establishes a condition precedent: before any impacts to western Joshua trees can be lawfully authorized, the permitting agency must receive all information required under the WJTCA for issuance of an incidental take permit—including a complete census of western Joshua trees—and payment of applicable mitigation fees. The requirement that a complete census be conducted before any authorization of take is not a matter of semantics. The census ensures that decisionmakers have site-wide information about the number and location of western Joshua trees before authorizing irreversible impacts. Without this baseline data, neither the scope of take nor the adequacy of avoidance, minimization, and mitigation measures (including the calculation of applicable mitigation fees) can be meaningfully assessed.

Here, the record confirms that a complete census has not been conducted across the entire Willow Rock Project site, which includes the gen-tie alignments. While the applicant asserts that it surveyed the WRESC project site, P1 North, P2 South, and the preferred gen-tie route, surveys were not conducted for at least one parcel of one of the optional gen-tie routes and seven buffer parcels along alternative alignments. (Hearing Tr. 143:25–146:3; Ex. 2000, Final Staff Assessment, 5.2-24; Ex. 4000, Ileene Anderson Opening Testimony, 7; Ex. 1185, Willow Rock CBD Data Request Set 1, Attachment DR5-1.)¹ By definition, this is not a “census of all western Joshua trees on the project site.” (Cal. Fish & Game Code § 1927.3(a)(1).)

Importantly, the WJTCA does not recognize exceptions for parcels that are difficult to access or not anticipated to be used. The optional gen-tie routes are part of the Project application, and approval of the Project necessarily encompasses those alignments. Absent a complete census of all potential alignments, the CEC cannot determine the number of Joshua trees that could be subject to take, whether the Applicant has avoided and minimized impacts to, and the taking of, the western Joshua tree to the maximum extent practicable, or the mitigation fees required under the WJTCA.

Unlike typical projects where the California Department of Fish and Wildlife (“CDFW”) issues a separate incidental take permit after CEQA review, the Willow Rock Project falls under the CEC’s exclusive jurisdiction. Public Resources Code Section 25500 provides that CEC certification supplants state, local, regional, and certain federal permits that would otherwise be required. As CEC Staff have acknowledged, “the *CEC’s certification* of the project” “incorporates the western

¹ Citations to the Hearing Transcript and Final Staff Assessment follow the source pagination. All other pinpoint citations refer to PDF page numbers.

Joshua tree take permit requirements and *authorizes take*.” (TN265879, Staff’s Post Evidentiary Hearing Opening Brief, 3 (emphases added).)

Accordingly, the CEC’s certification is the functional equivalent of a take permit under the WJTCA. This means that compliance with Section 1927.3’s prerequisites—including the census requirement—must occur before certification. To hold otherwise would invert the statutory scheme, authorizing take without first knowing the number of trees to be impacted, and postponing the very information the statute requires as a precondition.

CEC Staff suggest that any survey gaps are remedied by Condition of Certification BIO-12, which requires an updated census before site mobilization or ground-disturbing activity. (TN265879, Staff’s Post Evidentiary Hearing Opening Brief, 3.) While BIO-12 conditions may delay disturbance, they do not change the fact that take authorization is conferred upon project certification. Accordingly, in effect, BIO-12 improperly shifts a statutory prerequisite to a post-approval step, in direct conflict with the WJTCA’s plain terms.

Absent a complete census, the CEC would authorize take at the time of certification in areas where the number and distribution of western Joshua trees remain unknown. This approach is inconsistent with the requirements of the WJTCA.

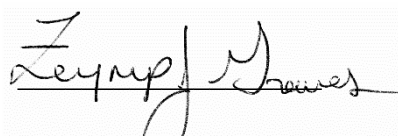
CONCLUSION

Subsection 1927.3(a) of the WJTCA makes clear that a census of all Joshua trees on the Project site is a mandatory condition precedent to take authorization. Here, the record demonstrates that the census is incomplete, yet CEC certification would nevertheless function as the take authorization. Post-approval conditions like BIO-12 cannot cure this noncompliance with the WJTCA.

For these reasons, the CEC should not certify the Willow Rock Project—and thereby authorize take of western Joshua trees—absent a complete census of the entire Project site, including all proposed gen-tie alignments.

Dated: September 8, 2025

Respectfully,

A handwritten signature in black ink, appearing to read "Zeynep J. Graves". The signature is fluid and cursive, with a horizontal line drawn across the middle of the name.

Zeynep J. Graves
Lisa T. Belenky
Center for Biological Diversity

Willow Rock Energy Storage Center
Docket No. 21-AFC-02

2100 Franklin St., Suite 375
Oakland, CA 94612
T: 510.844.7160
zgraves@biologicaldiversity.org
lbelenky@biologicaldiversity.org

Attorneys for Intervenor,
Center for Biological Diversity

Willow Rock Energy Storage Center
Docket No. 21-AFC-02