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

May 27, 2025

Ann Crisp
Project Manager
California Energy Commission
715 P Street
Sacramento, CA 95814

SUBJECT: FOUNTAIN WIND PROJECT, STATE CLEARINGHOUSE NUMBER 2023110139 CDFW COMMENTS ON STAFF ASSESSMENT AND DRAFT ENVIRONMENTAL IMPACT REPORT

Dear Ann Crisp:

The California Department of Fish and Wildlife (CDFW) has reviewed the Staff Assessment and Draft Environmental Impact Report (DEIR) prepared by the California Energy Commission (CEC) for the Fountain Wind Project (Project). CDFW appreciates this opportunity to comment on the DEIR.

CDFW's Role

CDFW is California's Trustee Agency for fish and wildlife resources and holds those resources in trust 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 the California Environmental Quality Act (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.

The proposed Project would ordinarily require one or more discretionary approvals by CDFW because it may result in substantial adverse impacts to fish and wildlife resources, such as incidental take of species protected under the California Endangered Species Act (CESA; Fish and G. Code § 2081), take of fully protected species (Fish and G. Code § 3511, 4700, 5050, and 5515), and lake and streambed alteration (Fish and G. Code, § 1602). CDFW would typically submit comments as a Responsible Agency under CEQA (Pub.

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Resources Code, § 21069; CEQA Guidelines, § 15381.) However, because the applicant opted into the Assembly Bill (AB) 205 certification process, the CEC has exclusive jurisdiction over the proposed Project and is responsible for ensuring any certification of the proposed Project is consistent with state law, including all conditions necessary to ensure compliance with the Fish and Game Code and its implementing regulations found in Title 14 of the California Code of Regulations (Pub. Resources Code, § 25544 subd. (a) and (g)(2)). Thus, CDFW does not have a direct permitting role for this Project that would ordinarily trigger a Responsible Agency role. CDFW instead submits these comments as a Trustee Agency under CEQA.

Pursuant to AB 205, the CEC and CDFW developed a coordination plan through a Memorandum of Understanding (MOU) to ensure that all potential impacts to fish, wildlife, and plant resources, and the habitats upon which they depend, are consistent with the Fish and Game Code and its implementing regulations (Pub. Resources Code § 25545.5, subd. (a)). The MOU also ensures timely and effective consultation between the CEC and CDFW with respect to any proposed CEC findings and actions regarding potential impacts to fish, wildlife, and plant resources (*Ibid*.). CDFW is also submitting these comments in its consultation role under AB 205 and the MOU.

CESA Listed Species

Fish and Game Code section 2080 prohibits the unauthorized take[1] of species listed as endangered, threatened, or candidate endangered or threatened pursuant to CESA. Fish and Game Code section 2081, subdivision (b) authorizes CDFW to issue an Incidental Take Permit (ITP) for incidental take of species protected under CESA if specific conditions are satisfied. Pursuant to AB 205, Fish and Game Code authorization and compliance is integrated into the state-level opt-in review process through the conditions of certification (COCs), but enforcement authority for take of CESA-listed species remains with CDFW.

The DEIR describes activities associated with construction of the Project that will result in take of CESA listed species, including Crotch's bumble bee (*Bombus crotchii*, CESA candidate) and western bumble bee (*Bombus occidentalis*, CESA candidate). The DEIR also describes take occurring during Project operations for CESA-listed species, including Tricolored blackbird (*Agelaius tricolor*, CESA threatened), bank swallow (*Riparia riparia,* CESA threatened), willow flycatcher (*Empidonax traillii*, CESA endangered), Swainson's hawk

[1] "Take" means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill. Fish and Game Code section 86

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(*Buteo swainsoni*, CESA threatened), burrowing owl (*Athene cunicularia*, CESA candidate), bald eagle (*Haliaeetus leucocephalus*, CESA endangered), and greater sandhill crane (*Antigone canadensis tabida*, CESA threatened) in addition to Crotch's bumble bee and western bumble bee.

Under CESA, "minimization" refers to reducing the extent or likelihood of take through measures that reduce harm, while "full mitigation" involves compensating for the remaining impacts of take that cannot be avoided through minimization measures. While CDFW staff concur that the COCs include minimization measures to reduce impacts on CESA listed species during construction and operation of the Project, the DEIR does not include the measures necessary to achieve full mitigation for the take of listed species consistent with CESA by identifying compensatory mitigation strategies and adequate funding to ensure mitigation can be completed, as required for compliance Fish and Game Code section 2081. The absence of such mitigation measures is expected to leave the Project in violation of CESA, the applicant at risk of enforcement proceedings, and the CEC in a position where it may be unable to make the required findings that the Project conforms with state law.

Fully Protected Species

CDFW has jurisdiction over fully protected species of birds, mammals, amphibians and reptiles, and fish, pursuant to Fish and Game Code sections 3511, 4700, 5050, and 5515. With limited exceptions, fully protected species may not be taken or possessed at any time, and no licenses or permits may be issued for their take. In 2023, California Senate Bill 147 (SB 147) was signed into law. SB 147 codified Fish and Game Code Section 2081.15 which allows CDFW to authorize take for unavoidable impacts to fully protected species for certain infrastructure projects, including wind projects, if certain conditions are satisfied.

Golden eagle (*Aquila chrysaetos*), greater sandhill crane (*Antigone canadensis tabida*), and white-tailed kite (*Elanus leucurusare*) are identified within Fish and Game Code as fully protected species (Fish and G. Code, § 3511). The DEIR states that take of these species will occur during project operations through collisions with wind turbine generators, transmission lines, and/or meteorological towers. Additionally, the DEIR states that operational impacts to fully protected species would be significant and unavoidable, even with the implementation of proposed COCs. Regardless of the proposed CEQA level of significance finding, CDFW does not believe that the DEIR has included

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measures necessary to comply with the incidental take authorization requirements of Fish and Game Code section 2081.15, which requires full mitigation of impacts and all other requirements of subdivisions (b) and (c) of Fish and Game Code section 2081, as well as measures necessary to satisfy the conservation standard of subdivision (d) of Fish and Game Code section 2805, measures to ensure take is avoided to the maximum extent possible as to the species for which take is authorized, and a monitoring program and an adaptive management plan for monitoring the effectiveness of, and amending, as necessary, the measures to minimize and fully mitigate the impacts of the authorized take.

CDFW supports the inclusion of COCs BIO-28, BIO-29, and BIO-30 to avoid and minimize impacts to fully protected species. The inclusion of these COCs is a strong effort towards meeting the requirements of Fish and Game Code section 2081.15, but they do not satisfy the take authorization requirements for fully protected species. CDFW believes additional measures are necessary to meet these requirements, such as identifying compensatory mitigation strategies, ensuring adequate funding, adaptive management plans for each species, and additional measures to meet the conservation standard in Fish and Game Code section 2805, subdivision (d).[2] The absence of such mitigation measures is expected to leave the Project in violation of the Fish and Game Code, the applicant at risk of enforcement proceedings, and the CEC in a position where it may be unable to make the required findings that the Project conforms with state law.

[2] Fish and Game Code section 2805, subdivision (d): "Conserve," "conserving," and "conservation" mean to use, and the use of, methods and procedures within the plan area that are necessary to bring any covered species to the point at which the measures provided pursuant to Chapter 1.5 (commencing with Section 2050) are not necessary, and for covered species that are not listed pursuant to Chapter 1.5 (commencing with Section 2050), to maintain or enhance the condition of a species so that listing pursuant to Chapter 1.5 (commencing with Section 2050) will not become necessary.

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Conclusion

CDFW staff appreciates the CEC's continued efforts to coordinate with our agency on the Project and to provide an opportunity for comments on the DEIR. CDFW staff are available to further consult with the CEC in refining conditions of certification for the Project to ensure full compliance with the Fish and Game Code. If you have any questions, please contact Helen Bowman, Senior Environmental Scientist (Specialist), by email at R1CEQARedding@wildlife.ca.gov.

Sincerely,

DocuSigned by:
Tina Bartlett
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Tina Bartlett, Regional Manager
Northern Region

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