

**DESERT TORTOISE COUNCIL**

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**Via email and Regulations.gov**

30 October 2023

Docket Management Facility  
U.S. Department of Transportation  
1200 New Jersey Ave. SE  
Washington, DC 20590  
Attn: Ms. Rebecca Yedlin  
[rebecca.yedlin@dot.gov](mailto:rebecca.yedlin@dot.gov)

RE: Docket No. FHWA-2023-0032 – Federal Highway Administration’s Notice of Proposed Second Renewed Memorandum of Understanding Assigning Certain Federal Environmental Responsibilities to the State of Arizona, Including National Environmental Policy Act Authority for Certain Categorical Exclusions

Dear Ms. Yedlin,

The Desert Tortoise Council (Council) is a non-profit organization comprised of hundreds of professionals and laypersons who share a common concern for wild desert tortoises and a commitment to advancing the public’s understanding of desert tortoise species. Established in 1975 to promote conservation of tortoises in the deserts of the southwestern United States and Mexico, the Council routinely provides information and other forms of assistance to individuals, organizations, and regulatory agencies on matters potentially affecting desert tortoises within their geographic ranges.

Both our physical and email addresses are provided above in our letterhead for your use when providing future correspondence to us. When given a choice, we prefer that the Federal Highway Administration (FHWA) and Arizona Department of Transportation (ADOT) email to us future correspondence, as mail delivered via the U.S. Postal Service may take several days to be delivered. Email is an “environmentally friendlier way” of receiving correspondence and documents rather than “snail mail.”

We appreciate this opportunity to provide comments on the above-referenced, proposed renewal of the Memorandum of Understanding (MOU) giving ADOT authority to declare projects as

categorically excluded. Given that the locations of several future projects to be covered under this MOU will be in habitats occupied/used by the Sonoran desert tortoise (*Gopherus morafkai*) (synonymous with Morafka's desert tortoise), our comments pertain to ensuring protection of this species during activities funded, authorized, or carried out by FHWA through ADOT. We request that our comments will be added to the Decision Record. Please accept, carefully review, and include in the relevant project file the Council's following comments and attachments for the proposed action.

The Sonoran desert tortoise, located east and south of the Colorado River in the United States and northern México, is one of three desert tortoise species located in North America, the other two being the Mojave desert tortoise (*G. agassizii* or Agassiz's desert tortoise) located mostly west and north of the Colorado River and the Sinaloan thornscrub tortoise (*G. evgoodei* or Goode's thornscrub tortoise) located in Mexico.

The Sonoran desert tortoise is not currently listed under the Federal Endangered Species Act (FESA), although it has been proposed for listing and was formerly designated as warranted but precluded. We understand that efforts are underway to reevaluate the U.S. Fish and Wildlife Service's recent decision not to list this species.

Currently, in Arizona, Morafka's desert tortoise is a state protected species, and Arizona Game and Fish Commission Order 43 has prohibited the removal of Sonoran a desert tortoise from the wild since 1988. Under Arizona Revised Statute (ARS) 17-306, it is unlawful to release wildlife (this includes Morafka's desert tortoise) tortoises in Arizona without prior approval from the Commission/Arizona Game and Fish Department. ARS 17-309 establishes the penalty for a violation. Per Arizona Administrative Code R12-4-402, it is unlawful to import, export, or offer to sell live wildlife, including Morafka's desert tortoises. It is unlawful to propagate captive Morafka's desert tortoises or export a desert tortoise from Arizona.

We are concerned that if the State of Arizona will be able to issue categorical exclusions without Federal oversight there may be a tendency to "gloss over" direct and indirect loss of desert tortoises, degradation/loss of tortoise habitats, and reduction/loss of connectivity between tortoise populations (please see our discussion below on CEQ 2023).

We are also adamant about the Council's access to project plans at the initial stage of their development, so that we can provide clear and scientifically-based evaluations of projects prior to when they are typically provided to the public for comment. Early involvement of the public in project development is an effective way to identify alternatives that avoid or substantially reduce impacts to the tortoise/tortoise habitats and appropriate mitigation for any such impacts, if they avoidance is not possible.

The Sonoran desert tortoise currently lacks Federal status under the Federal Endangered Species Act (FESA). If ADOT projects cause additional degradation and/or loss of tortoises/tortoise habitats/population connectivity, ADOT's actions could lead to a documented need to add Federal protection for the tortoise under the FESA.

ADOT is a signatory to the Candidate Conservation Agreement for the Sonoran Desert Tortoise (Agreement) (USFWS et al. 2015). When signing this Agreement, ADOT committed to:

- Promote awareness of the conservation status of the Sonoran desert tortoises within ADOT
- Collect data on Sonoran desert tortoise sightings in ADOT right-of-way and provide that information to AGFD
- Partner with AGFD to implement survey and handling procedures, conservation approaches and research related to Sonoran desert tortoises
- Maintain ADOT right-of-way to minimize invasive plant species and fire risks as authorized
- Partner with State and Federal agencies to address invasive plant species in and adjacent to ADOT right-of-way
- Coordinate and partner with State and Federal agencies and other interested parties to incorporate project design features to minimize Sonoran desert tortoises habitat fragmentation and vehicle strikes.
- Conduct habitat suitability surveys and analyze potential impacts for projects with a scope of work that could impact Sonoran desert tortoise habitat.
- Provide awareness training and/or information to ADOT and contractor personnel working on construction and maintenance projects in areas with suitable habitat.
- Follow the most current protocol for relocating any Sonoran desert tortoise that may be impacted by an ADOT construction or maintenance project.

The purpose of the Agreement is for the Federal and State agencies to work together to effectively manage for the conservation of the tortoise/tortoise habitat so it does not meet listing criteria under FESA. To effectively do this will require ADOT to partner with other signatories of the Agreement and develop a database and geospatial tracking system for special status species, including Sonoran Desert tortoises, which track cumulative impacts (e.g., surface disturbance, paved and unpaved routes, linear projects, invasive species occurrence, herbicide/pesticide use, wildfires, etc.), management decisions, and effectiveness of mitigation for projects already implemented and future projects. Without such a tracking system, ADOT is unable to determine whether its management for the tortoise complies with its commitment in the Agreement.

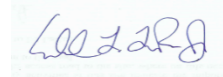
The Council wants to ensure that this commitment is effectively implemented by ADOT, that FHWA is aware of and fully supports this commitment, and that the implementation of this commitment is included in the MOU.

The Federal Register Notice lists several Federal statutes and Executive Orders that ADOT would be required to comply with under the MOU. We request that the Council on Environmental Quality's (2023) recent document on Ecological Connectivity and Wildlife Corridors be added to this list. CEQ's direction to all Federal agencies in this document should be implemented with respect to the tortoise.

We appreciate this opportunity to provide comments on the proposed renewal of the MOU and trust the parties involved will take seriously the need to protect tortoises during any future authorized activities. Herein, we reiterate that the Desert Tortoise Council wants to be identified as an Affected Interest for this and all other projects funded, authorized, or carried out by FHWA and ADOT that may affect species of desert tortoises, and that any subsequent environmental

documentation is provided to us at the contact information listed above. Additionally, we ask that you respond in an email that you have received this comment letter so we can be sure our concerns have been registered with the appropriate personnel and office for this project.

Respectfully,



Edward L. LaRue, Jr., M.S.  
Ecosystems Advisory Committee, Chairperson  
Desert Tortoise Council

### **Literature Cited**

[CEQ] Council on Environmental Quality. 2023. Guidance for Federal Departments and Agencies on Ecological Connectivity and Wildlife Corridors. March 21, 2023. <https://www.whitehouse.gov/wp-content/uploads/2023/03/230318-Corridors-connectivity-guidance-memo-final-draft-formatted.pdf>

[USFWS et al.] U.S. Fish and Wildlife Service, Bureau of Land Management, Bureau of Reclamation, National Park Service, Department of Defense, Customs and Border Protection, U.S. Forest Service, Natural Resources Conservation Service, Arizona Game and Fish Department, and Arizona Department of Transportation. 2015. Candidate Conservation Agreement for the Sonoran Desert Tortoise (*Gopherus morafkai*) in Arizona. May 27, 2015. <https://www.blm.gov/sites/blm.gov/files/policies/IMAZ-2016-004-a1.pdf>