

July 26, 2021

California Department of Parks and Recreation
Off-Highway Motor Vehicle Recreation Division
Attn: Sixto Fernandez, Grants Manager
Grants and Cooperative Agreements
1725 23rd Street, Suite 200
Sacramento, California 95816-7100
Sent via email to: OHV.Grants@parks.ca.gov

Re: Proposed Amendments to California Code of Regulations, Title 14, Governing the Grants and Cooperative Agreements Program, and Changes to Information Requirements

Dear Mr. Fernandez:

Defenders of Wildlife (Defenders) and the Desert Tortoise Council (Council) appreciate the opportunity to provide comments on the proposed amendments to the California Code of Regulations governing the Grants and Cooperative Agreements Program (Program) administered by the Off-Highway Motorized Vehicle Recreation (OHMVR) Division of the Department of Parks and Recreation.

Defenders is a national conservation organization with 2.2 million members and supporters in the U.S., including 323,000 in California. It was founded in 1947 and dedicated to protecting all wild animals and plants in their natural communities. To this end, Defenders employs science, public education and participation, media, legislative advocacy, litigation, and proactive on-the-ground solutions to impede the accelerating rate of extinction of species, associated loss of biological diversity, and habitat alteration and destruction.

The 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 management and regulatory agencies on matters potentially affecting desert tortoises within their geographic ranges.

Background Information

The Grants and Cooperative Agreements Program administered by the OHMVR Division provides grant funding to eligible agencies and organizations for projects that develop, maintain, expand and manage high-quality OHV [off-highway vehicle] Recreation areas, roads, trails, and other Facilities, *while responsibly maintaining the wildlife, soils, and habitat in a manner that will sustain long-term OHV Recreation* [emphasis added].

All funded projects are reviewed for compliance with Program regulations and subject to audit by the Department of Parks and Recreation. In some cases, grant funds are returned to the State when

projects are not in compliance with Program regulations. The proposed regulation amendments will allow for a clearer understanding of the regulations by grantees, the public and OHMVR Division staff and address outstanding Program issues related to the review and award of Grants and/or Cooperative Agreements.

The proposed amendments address issues of interest to Defenders and the Council that include the (1) Environmental Review Datasheet, (2) Habitat Management Program and (3) Soil Conservation Plan.

Comments

Defenders and the Council submit comments on the following proposed amendments to the regulations:

1. General: We fully support the proposed amendments to the regulations and changes to required information needed to complete the Environmental Review Data Sheet (ERDS), Habitat Management Program (HMP) and Soil Conservation Plan (SCP). Clarifications regarding the purpose, benefit and necessity of the proposed amendments and information requirements will provide potential grant applicants with a clear understanding of the minimum requirements for a complete application.

Due to the complex, science-based information needed to satisfy the requirements for the ERDS, HMP and SCP, we recommend that the OHMVR Division review these documents submitted by grantees using agency Environmental Scientists with subject matter expertise rather than have the reviews performed by contracted entities lacking knowledge and expertise needed to determine if minimum requirements have been satisfied. We recommend that the OHMVR Division contact the California Department of Fish and Wildlife (CDFW), U.S. Fish and Wildlife Service and U.S. Geological Survey for assistance in reviewing and determining if information in submitted ERDS, HMP and SCP reports is science-based, accurate and of professional quality.

2. Definition of Terms: Although not proposed for amendment, we recommend that the definitions of the following terms under Regulation Section 4970.01 be modified or clarified as indicated:

(w) "Ground Disturbing Activity" means any earth moving Project-related activity.

Recommendation: Please include, at a minimum, the operation of OHVs open riding areas in Bureau of Land Management (BLM) designated and state-sanctioned open riding areas (areas where OHV use is allowed anywhere, both on and off existing routes) in the definition of a Ground Disturbing Activity. Such unlimited OHV use results in loss of vegetation, soil and wildlife habitat in general. Examples of significant loss of these resources are the Jawbone Canyon and Dove Spring Canyon OHV Open Areas on public lands managed by the BLM (Attachment 1). The Council (2019¹) compiled a list of pertinent references for OHV impacts, which we provide for your consideration.

We also recommend that OHV use on dirt roads and trails that results in cumulative displacement of soil by physical pressure, and subsequent erosion by wind and/or water, be included in the

¹Desert Tortoise Council. 2019. Road Impacts Bibliography. Palmdale, California.
<https://www.dropbox.com/s/vcfxz7qs5bo0w2m/%23Road%20Impacts%20Bibliography.pdf?dl=0>.

definition of a Ground Disturbing Activity. Examples of this type of ground disturbance are provided in Attachment 2.

(x) "Habitat Management Program (HMP)" means an animal and plant wildlife habitat protection program designed to sustain a Viable Species Composition for the Project Area, pursuant to PRC Sections 5090.50 and 5090.53.

Recommendation: The word wildlife should be removed from the definition because the purpose is to protect habitat for animals and plants, which are already included. The term Viable Species Composition could be clarified to also mean Minimum Viable Populations of species included in HMP Section 2, Table 2. All Special-Status Species and Any Other Species of Local Concern That Were Considered for Inclusion in the HMP.

(jj) "Project" means the activities and Deliverables described in the Project Application to be accomplished with funding, through a Project Agreement, which includes both Grant funds and matching funds.

Recommendation: The term activities should be clarified to include all OHV use directly supported or facilitated within the geographic area described in the application by grants.

(ll) "Project Area" means the physical boundaries within which the activities will be performed and Deliverables will be accomplished as described in the Project Agreement.

Recommendation: The phrase activities will be performed should be changed to activities will occur because the activities include OHV use that is supported or facilitated by the grant funding and may also facilitate illegal activities often associated with legal routes.

(pp) Restoration Planning means identifying appropriate restoration techniques, strategies, and Project implementation, including environmental review associated with the Project.

Recommendation: The phrase should include for the purpose of restoring soil, vegetation and ecosystem function similar or equivalent to what existed prior to being disturbed or impacted by OHV use.

(rr) "Viable Species Composition" means that species found in the Project Area have populations with the estimated numbers and distribution of reproductive individuals to enable their continued existence.

Recommendation: Assessing if populations of plants and animals within a Project Area are at viable density and naturally distributed in suitable habitats will require analysis and modeling by qualified biologists or ecologists with expertise according to ecoregion and affected species. Grant applicants should be advised that they should obtain the services of such professionals in monitoring populations of plants and animals within Project Areas and preparing any associated annual reports required as part of the HMP. As per General comment #1 above, this is a pertinent example of our recommendation to review proposed methodologies and subsequent results by Environmental Scientists.

3. Compliance with the California Environmental Quality Act (CEQA): It is common practice within the OHMVR Division to determine that OHV-related projects funded by, and activities facilitated by, grant funding are exempt from CEQA. For example, a Categorical Exemption under Sections 15301 and 15306 was issued for OHV Maintenance and Operations of Ridgecrest BLM OHV Areas on 3/24/2017. The Project description stated, The project funds operating the jawbone station visitor center, restoring trail head, maintaining information kiosks, producing interpretive materials, installing regulatory and route signs, providing trash collection, and maintaining management area fence lines along with barriers to prevent

damage to sensitive areas and areas off limits to motorized vehicles. Additionally, BLM resource staff members such as biologists, archaeologists, range specialists, and natural resource specialists will carry out field resource reviews along with conduct biological and vegetative monitoring as outlined in the Ridgecrest Habitat Management Program and trail monitoring for the Soil Conservation Plan.

The stated Reason for the Categorical Exemption was, The project is exempt because it falls within the CE classes listed above. Project activities described above do not have the potential for causing a significant adverse effect on the environment. A CEQA Exemption Review form for the project is on file at the OHMVR Division office listed above.

Recommendation: Based on the proposed amendments to language in the HMP, Part 2, namely that, If the species could potentially be affected by any Project activities, *including the use directly facilitated by those activities...* [emphasis added], we recommend that continued use of the Categorical Exemption is not appropriate for OHV activities in these areas because adverse impacts to various plants and animals, and especially those designated as Special Status Species, are likely to occur throughout Project Areas where extensive authorized OHV use is facilitated by grant funding.

Defenders and the Council are aware that this issue has been documented on BLM-managed public lands in the Western Mojave Desert where OHMVR Division grants have facilitated OHV use through signing and maintenance of open routes, providing maps of areas where OHV use is allowed, and maintaining access roads to popular OHV use areas. As a result of such use, for example, BLM documented and reported that from 2016-2020, 15 desert tortoises were directly killed by OHVs being operated on designated open routes, which we believe is a fraction of the total number because they were based on opportunistic observations rather than science-based monitoring of undocumented tortoises lost along designated open routes to crushing, vandalism, and collection [see references provided in Desert Tortoise Council (2019)]. The desert tortoise is one of many Special Status Species in the Western Mojave Desert, and is listed as a threatened species under both the California Endangered Species Act (CESA) and the federal Endangered Species Act (ESA).

Recommendation: The environmental effects of the Grants and Cooperative Agreements Program have never been analyzed and disclosed under CEQA. While individual Projects may be Categorically Exempted from CEQA, or subject to a CEQA analysis through a Mitigated Negative Declaration or Environmental Impact Report, the cumulative impacts of the Program as a whole have evaded scrutiny under CEQA. Based on our decades of experience working to conserve Special Status Species in the California Desert and minimize adverse impacts from human activities, we recommend that the environmental effects of the Grants and Cooperative Agreements Program, with a focus on the OHV activities it facilitates throughout California, be analyzed under CEQA through the preparation of an Environmental Impact Report. Among the most important components of the environment that should be analyzed are Special Status Species and their habitats.

4. Amend Appendix – Environmental Review Data Sheet (ERDS): Numerous amendments are proposed to the ERDS, as follows:

- A. ERDS Item 2: Item 2 seeks information about Projects that would fund preparation of a CEQA or a National Environmental Quality Act (NEPA) document.

Recommendation: We recommend that for any Project, including OHV use supported or facilitated by grant funding, that may affect species listed as threatened or endangered by the California Fish and Game Commission, or that are Candidate species for such listings (e.g., Western Joshua tree), grant funding should support preparation of only a CEQA document. The reason for this is because mitigation requirements for impacts to threatened or endangered species differ under CEQA and NEPA. Under CEQA, impacts to species listed under CESA must be fully mitigated through impact avoidance or minimization measures, and through compensation for unavoidable impacts. NEPA does not have such a requirement.

Under NEPA, impacts to a threatened or endangered species are addressed through consultation with the U.S. Fish and Wildlife Service under the ESA. The legal requirement is that activities shall not 1) jeopardize the continued existence of a threatened or endangered species nor 2) destroy or adversely modify critical habitat. Further, compliance with the ESA, either through consultation for federal agencies, or through preparation of a Habitat Conservation Plan for non-federal entities, is entirely separate from CEQA.

- B. ERDS Item 3 (Projects): Item 3 seeks information to determine if Project activities are defined as a Project under CEQA, and requires an explanation rather than a Yes or No response.

Comment: We fully support this proposed amendment because OHV recreation would be categorized as a Project because it results in physical changes to the environment, especially on a cumulative scale.

- C. ERDS Item 4 (Impact Avoidance Measures): Item 4 requires the applicant to provide information indicating all standard measures to avoid potential impacts to biological, cultural and other resources resulting from OHV recreation supported or facilitated by grant funding. Such measures include Best Management Practices (BMPs), Standard Operating Procedures (SOPs), Limited Operating Procedures (LOPs), etc.

Comment/Recommendation: We fully support this amended language in Item 4. We recommend clarification or guidance on what actions constitute BMPs, SOPs, LOPs and other standard measures deemed acceptable in avoiding potential adverse impacts to biological, cultural and other resources. Another example would be seasonal closures to OHV use in Project areas to avoid disruption, injury or mortality to certain Special Status Species, such as the threatened desert tortoise or Mohave ground squirrel (MGS). In addition, periodic closure of Project areas to OHV use to prevent excessive soil impact during and immediately following precipitation events appears to be a reasonable BMP. Based on our field experience, we consider such measures appropriate, but they are rarely, if ever, used on federal lands in the Mojave Desert.

We fully support adoption of measures that effectively avoid direct and indirect adverse impacts and caution that many traditional BMPs and SOPs have proven ineffective in avoiding impacts to Special Status Species and their habitats, because they have not been tested for efficacy, only addressed direct impacts, or cannot be effectively enforced.

- D. ERDS Item 5: Item 5 requires an analysis of Project activities on sensitive environmental resources, including wetlands, navigable waters, Special Status Species (including threatened and endangered species), and sensitive habitats. It requires all grant applicants to address impacts on Special Status Species that have the potential or are known to occur within the Project area. Furthermore, the applicant must provide detailed information about how the impact analysis was performed.

Comment/Recommendation: We consider Item 5 to be extremely important and foundational in subsequent development of impact avoidance measures. It is critical that the operation of OHVs in Project areas, even if such use is in compliance with designated riding areas or open trails, be analyzed for its effect on Special Status Species, sensitive habitats and sensitive natural communities. This requirement will correct loopholes that allowed grant applicants to assume no impacts would occur if OHV recreation use simply complied with rules governing OHV use in particular areas.

- E. ERDS Item 6: Item 6 requires disclosure if the Project area is within or adjacent to designated critical habitat for any threatened or endangered species, with a Yes or No answer.

Recommendation: In addition to an applicant simply stating Yes or No, we recommend that the ERDS specifically require applicants to identify the species for which critical habitat was designated, the extent of critical habitat within the Project area, and the extent and intensity of Project area OHV use that affects critical habitat. In addition, the indirect and cumulative impacts to designated critical habitat that have occurred from OHV use in the Project area should be identified and what specific measures will be utilized to ensure that no further impacts occur. Based on our experience in the Mojave Desert on federal land managed by BLM and within desert tortoise critical habitat, unauthorized OHV use is common and results in cumulative destruction and modification of critical habitat. To date, law enforcement actions have proven ineffective in halting this use.

- F. ERDS Item 7: Item 7 requires an analysis and description of cumulative impacts to the environment within Project areas associated with OHV use supported or facilitated by grant funding. It includes the requirement to analyze impacts from increased noise and dust. It requires reference to cumulative impacts discussion in the environmental impact statement, land management plan, or other sources as appropriate. It requires the applicant to describe what analysis was completed as a part of the evaluation to determine potential impacts.

Recommendation: If the grant applicant is unable to provide this information because it does not exist or because they are unaware of how to obtain the require information, their application should be placed on hold pending a satisfactory response. Again, as per our first comment, this may be another appropriate opportunity for independent scientific review by credible experts.

5. Amend Appendix – Habitat Management Program-Part 1: This proposed amendment will ensure all areas affected by Project activities are addressed by the HMP. The grant applicant will have to certify the project does not include any risk factors to Special Status Species and/or sensitive habitats [emphasis added], including the indirect impacts associated with OHV recreation directly facilitated by these activities; and provide documentation of the analysis of potential project

impacts to Special Status Species and/or sensitive habitats. Professional, scientific sources of information will be required in preparing the HMP, including identification of the affected Special Status Species and their habitats, their population status and trends, risks posed by OHV recreation use, and measures proposed to eliminate risks.

Comment/Recommendation: We fully support this amendment and have witnessed first-hand how OHV recreation facilitated by grant-funded Projects has resulted in direct and indirect adverse impacts to Special Status Species and their habitats, including the threatened desert tortoise and its designated critical habitat, and the threatened MGS and its key population centers and habitat linkages in the Western Mojave Desert (CDFW 2019²). Impacts extending beyond the footprint of designated and marked routes to include those associated with 1) parking and camping adjacent to routes, 2) noise, 3) dust and 4) unauthorized OHV use cross-country and on closed routes facilitated by the extensive network of open routes.

6. Amend Appendix – Habitat Management Program-Part 2: This proposed amendment will clearly identify the requirement to address direct and indirect impacts due to OHV recreation activities that are supported or facilitated by the grant funds, and will ensure that all areas affected by Project activities are addressed in the HMP Part 2.

Comment/Recommendation: We fully support the proposed amendments to the HMP Part 2 because they clarify that all impacts to Special Status Species and their habitats from OHV recreation activities supported or facilitated by grant funding throughout the entire Project area must be addressed in Part 2 of the HMP. These amendments will eliminate the loophole caused by ambiguity in the requirements that implied the effects of the OHV recreation activities were limited to “open” areas.

7. Amend Appendix – Habitat Management Program-Part 2, Table 8: Table 8 requires the grant applicant to state any HMP-related concerns raised by the public and what corrective actions have been proposed or implemented by the applicant to resolve those concerns.

Comment/Recommendation: We have expressed concerns over ongoing OHV impacts occurring on federal lands managed by the BLM in the Western Mojave Desert to the desert tortoise and its critical habitat. Our concerns have never been reported by BLM in Table 8 in its grant applications. BLM typically holds public open houses to provide information to the public, but does so for the purposes of seeking support for maintaining ongoing OHV recreation use opportunities. Defenders submitted comments to the BLM on its last grant application identifying concerns about ongoing impacts to the desert tortoise and its critical habitat, and provided recommendations on how to minimize those impacts. The comments and recommendations were submitted in writing immediately following its public open house to provide information to the public on activities it would propose in its grant application. Those comments and recommendations were not included in the preliminary application. Due to this omission, Defenders submitted the letter to the OHMVR Division, which was subsequently posted on Grants and Cooperative Agreements website.

²California Department of Fish and Wildlife. 2019. A Conservation Strategy for the Mohave Ground Squirrel. Headquarters. Sacramento, California.

https://www.dropbox.com/s/0u0lkqgn5zw060v/%23Approved_MGS_ConservationStrategy_Final_HighRes_July2019.pdf?dl=0.

We recommend the OHMVR Division take responsibility for addressing public concerns over ongoing OHV impacts or on Projects and activities proposed in preliminary grant applications, and specifically on any HMP-related resources and impacts. This would require making all HMP reports available to the public at the time preliminary grant applications are made available for public review. We recommend that this action be implemented. It appears the existing procedure to satisfy the requirements in Table 8 generally does not produce the desired information.

8. Amend Appendix – Soil Conservation Plan, Item 1: Information required by the grant applicant in Item 1 will be used to determine if a Full Soil Conservation Plan will be required due to Project area actions that include Ground Disturbing Activities. In addition, it provides for an applicant to certify that none of the Project area activities included in the grant application would result in soil loss that exceeds restorability or impacts areas outside the Project area due to transport by water or wind.

Recommendation: We recommend, at a minimum, that grants supporting OHV recreation use in open riding areas where unlimited OHV use is allowed are defined as a Ground Disturbing Activity. Examples of areas that have been impacted by unlimited long-term OHV use where soil erosion has exceeded restorability and which is transported outside the Project area includes Jawbone and Dove Spring Canyon OHV Open Areas located in the Western Mojave Desert on federal land managed by the BLM. See Attachments 1 and 2 for photographs of several locations showing areas where vegetation has been lost, soils displaced by physical pressure of OHVs, and subsequent erosion by wind and water, among other adverse impacts.

9. Amend Appendix – ERDS, Project Evaluation Criteria: Project Evaluation Criteria amendments are proposed that prohibit any entity from being listed as a Project Partner that is also an applicant for grant funding for activities located within the same Project area. This prohibition applies to Projects that include Development, Education and Safety Programs, Ground Operations, Planning and Restoration.

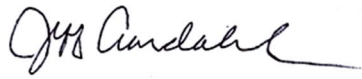
Comment/Recommendation: We are aware that in some Project areas there are entities receiving grants for Ground Operations and Restoration that are in addition to grants from the corresponding land management agency and authorized under a formal agreement within the same Project area. Although those non-federal entities are not listed as Partners in the grant applications, they appear to be functioning as partners of the federal agency but not identified as such. Specifically, we are aware that the Friends of Jawbone and Friends of El Mirage each have formal agreements with the BLM to perform Ground Operations and Restoration activities within the same areas the agency performs similar work funded by grants.

We recommend the OHMVR Division investigate these situations to ensure they are in compliance with the regulations and do not constitute giving unfair advantage to either entity.


Conclusion

Defenders and the Council fully support the amendments proposed in the regulations governing the Program, and amendments to the Appendix containing the ERDS, HMP and SCP. We have offered additional recommendations in this letter to address additional potential issues and based on our experience as advocates for Special Status Species and their habitats in California. Please contact us if we can be of further assistance as the OHMVR Division proceeds with finalizing the Regulations and Appendix pertaining to the Program.

Sincerely,



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Attachment 1. Soil erosion and vegetation loss at Jawbone Open Off-highway Vehicle Area managed by the U.S. Bureau of Land Management (BLM) in the western Mojave Desert.



Attachment 2. Relatively recently created vehicle use route within the Mojave Fishhook Cactus Area of Critical Environmental Concern designated as open in the Bureau of Land Management's (2019) West Mojave Plan Amendment to its 1980 California Desert Conservation Area Plan.