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Via email only

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RE: Oberon Renewable Energy Project Draft EIR Comments (SCH#2021-03-0462)

Dear Mr. Raub, et al.,

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.

We appreciate this opportunity to provide comments on the above-referenced project. Given the location of the proposed project in habitats likely occupied by Mojave desert tortoise (*Gopherus agassizii*) (synonymous with Agassiz's desert tortoise), our comments pertain to enhancing protection of this species during activities authorized by the Colorado River Basin Regional Water Quality Control Board (Water Board), which we assume will be added to the Decision Record as needed. Please accept, carefully review, and include in the relevant project file the Council's following comments and attachments for the proposed project. We also appreciate that Aspen Environmental Group extended a personal invitation to comment on this project, which was received by email on August 13, 2021.

Despite our numerous requests of the Bureau of Land Management (BLM) to inform the Council of projects that may affect desert tortoises[1], BLM did not contact us; rather we received notice of the BLM's solicitation for comments on an environmental assessment (EA) from a third party on August 13, 2021. It is unfortunate that comments were due to BLM by September 14, 2021, and then to the Water Board on the Draft Environmental Impact Report (EIR) by September 27, 2021. Although we have missed the August 13 deadline, we are still providing these comments to BLM before the September 27 deadline.

On April 15, 2021, the Council submitted scoping comments on the Notice of Preparation (NOP; Desert Tortoise Council 2021[2]), which are incorporated by reference. In the March 18, 2021 NOP we did not find the words, "critical habitat," although another member of the environmental community indicated that 600 acres of desert tortoise critical habitat is proposed for development and therefore adversely degraded or destroyed (and there are numerous places in Appendix A to the DEIR where this acreage is substantiated). The Council was very outspoken that this unprecedented intent to place a renewable energy project in critical habitat was unacceptable, and that the project should be redesigned to avoid critical habitat. We see that our concerns have not only been ignored, but that the proponent now intends to develop more acres in critical habitat than envisioned in March 2021. The project proponent now proposes to develop 817 acres of critical habitat, which is a discretionary action that could have been avoided, and we believe should still be avoided.

It is unconscionable that with thousands of acres of impaired habitats and Development Focus Areas (DFAs) designated by the Desert Renewable Energy Conservation Plan (DRECP; BLM 2016) for energy development, that the proponent, BLM, and the Water Board have disregarded the planning, science, and coordination that numerous federal and state agencies participated in to produce the DRECP. These entities are disregarding information in scientific journal articles, agency reports, and rulemaking documents that support our assertion that all critical habitat, which is deemed essential habitat for the recovery of tortoises (USFWS 1994a), is necessary given the persisting declines in tortoise populations in the region (Allison and McLuckie 2018). This assertion is further supported by the U.S. Fish and Wildlife Service's (USFWS) publication of the final critical habitat designation in which they said, "The [U.S. Fish and Wildlife] Service expects that proposed actions that are inconsistent with land management recommendations for DWMAs in the Draft Recovery Plan [for the desert tortoise] would likely be considered to adversely modify critical habitat" (USFWS 1994a). Critical habitat designations overlay DWMAs, now included in Tortoise Conservation Areas.

Range-wide, densities of adult Mojave desert tortoises declined more than 32% between 2004 and 2014 (USFWS 2015). In the Colorado Desert, the annual decline was 4.5% or 36.25% between 2004 and 2014 (Allison and McLuckie 2018). In the Chuckwalla DWMA/TCA/critical habitat unit, adult tortoise densities declined 37.43%. Densities of juvenile desert tortoises have been decreasing in all five recovery units since 2007 (Allison and McLuckie 2018). In addition, adult tortoise numbers or abundance declined in this recovery unit by 36% between 2004 and 2014 (Allison and McLuckie 2018).

[1] https://www.dropbox.com/s/mlwe60a9lcxhy56/BLM%20CDCA%20District%20Manager%20DTC%20as%20an%20Affected%20Interest.11-7-2019.pdf?dl=0
[2] https://www.dropbox.com/s/981zy5wnymmywu8/Oberon%20Solar.4-15-2021.pdf?dl=0

Like the NOP, the DEIR appears to minimize, even camouflage, that 817 acres of tortoise critical habitat would be destroyed because of the proposed development. The words "critical habitat" appear only one time in the Executive Summary; not in the context of a project impact, but as a statement as to how a dismissed alternative avoids critical habitat. The first-time critical habitat is mentioned is 161 pages into the document, where the following vague description is given: "The southern portion of the project site is within designated critical habitat for desert tortoise (Figure 3.4-1, Project Location)." For the first time, 185 pages into the document, the DEIR divulges that 817 acres of critical habitat would be lost to project development on page 3.4-25.

Even there, the loss of critical habitat, which at the very least comprises a CEQA-significant impact, is de-emphasized by the DEIR as not being in an Area of Critical Environmental Concern (ACEC) or Tortoise Conservation Area (TCA), is compromised by existing development, is within a designated DFA, and is isolated from other critical habitat south of Interstate 10. We see in Figure 2-2 in Appendix B that given the amount of tortoise habitat that has already been lost to solar development north of I-10, that it absolutely increases the importance of critical habitat located to the north, as between this and the Arica/Victory Pass, all critical habitat north of I-10 would be eliminated in this critical habitat unit. *But for* these two projects, and particularly Oberon, desert tortoise critical habitats, which were deemed essential in 1994 before the ongoing declines since before listing in 1990 and particularly the catastrophic declines documented since 2004, would be eliminated from areas immediately north of I-10.

Additionally, this statement about critical habitat not being in a TCA is incorrect. TCA is a term used by the USFWS in the 2011 Recovery Plan. It includes ACECs and DWMAs from the 1994 Recovery Plan (USFWS 1994b). The USFWS identified and designated critical habitat to follow the DWMA boundaries. Thus, the Chuckwalla DWMA/TCA and critical habitat unit includes land north of I-10.

On page 2 of our comment letter (Desert Tortoise Council 2021), we specifically asked that "the Draft EIR/EIS must adequately assess the status and trends of desert tortoise populations in the affected region, particularly in adjacent and nearby critical habitats located south of Interstate 10. At a minimum, data analyses in Allison and McLuckie (2018) and USFWS (2014, 2015, and 2017) must be reported in the draft document as baseline information. The Council believes that these status and trend data clearly show why **600** acres of critical habitat should not be sacrificed to this development" (**bold emphasis added**). So, not only is this requested analysis missing from the DEIR, but the amount of critical habitat has also increased since the March 2021 NOP, and rather than a realistic accounting of lost critical habitat, the loss is de-emphasized in the DEIR as inconsequential. In so doing, the DEIR fails to adequately and accurately assess impacts. Again, we request that the DEIR and NEPA document include an analysis of the direct, indirect, and cumulative impacts to the Chuckwalla tortoise population in the Chuckwalla TCA and critical habitat unit, the Colorado Desert recovery unit, and the Mojave desert tortoise (see *Union Neighbors United, Inc. v. Jewell* below).

For example, page ES-1 reveals that the site is in a DFA but not that it is also within critical habitat. Project Objectives in Section ES.2, point 4 claims, "Minimize environmental impacts and land disturbance associated with solar development," which is disingenuous when it is revealed, not until page 3.4-25, that this objective of minimizing impacts does not extend to

critical habitat, which should be and can be avoided *but for* the proponents unwillingness to avoid these essential habitats. In our comment letter (Desert Tortoise Council 2021), we dedicated three paragraphs expressing our concern with the unprecedented loss of critical habitat, yet there is no mention in Section ES.4.3 where "Areas of Controversy/Public Scoping Issues" are vetted that this loss would occur.

Section ES.5.1 Project Location identifies three constructed solar facilities, one currently being developed, and three more being planned (the Arica/Victory Pass facility would also develop critical habitat) in the immediate area, which brings into question the need for this eighth project. We conclude that the focus of solar energy development has changed to favor development anywhere the project proponent wants it. This conclusion is supported by the statement at the bottom of page ES-9, which states, "…because most of the land within the DFA is already in use." Finally, the No Action Alternative fails to reveal that *but for* this project, 817 acres of critical habitat would not be lost to solar development in a full DFA. Nor do we agree with the statement that the proponent's intent in Section ES.6.1 is to comply with the DRECP, which envisioned development on impaired habitats in DFAs, not designated critical habitat.

In our scoping comments (Desert Tortoise Council 2021), we asked that rooftop solar be analyzed as an alternative, which is given in Section ES.6.2 on pages ES-11 and ES-12, where the discussion is subjective and presents the proponent in an unrealistically favorable light. For example, the proponent indicates that the number of solar panels distributed across rooftops would "…be similar in size to the proposed project;" yes, but it would be in residential and commercial neighborhoods where 5,000 acres of tortoise habitat, including 817 acres of critical habitat, are not at risk. Development of rooftop solar may not benefit "…firms that are in the business of developing utility-scale facilities" but it does preserve intact the ecological resources of native public lands, including essential critical habitats. We find that this is one of many examples of pro-proponent rhetoric that fails to reveal the negative, long-term environmental impacts that would result with project development. We request that the CEQA and NEPA documents compare the loss of carbon sequestration from solar development in desert habitat to rooftop development with no loss of carbon sequestration.

Unless otherwise noted, the following page numbers refer to the draft environmental impact report (DEIR), entitled "IP Oberon LLC's Oberon Renewable Energy Project," dated August 2021.

In Section 1.4 Public Review and Noticing, pages 1-3 to 1-5, we expected to see an explanation for how a project like this that occurs exclusively on public lands managed by the Bureau of Land Management (BLM) can be certified in an EIR without explaining why the analysis is not in a combined EIR/EIS (environmental impact statement). It is our belief that a combined EIR/EIS would have garnered more public review and input, that an EIS component still needs to be added, and that the Final EIR/EIS should explain why an EIR-only analysis was pursued for this project. The statements on page 1-9 that the BLM "is not participating as a joint preparer of this document" and that an environmental assessment (EA) will be prepared instead, does not adequately address the serious nature of this project to plan for and facilitate the *adverse modification* of 817 acres of critical habitat, which crosses a significance threshold that warrants completion of an EIS.

Section 2.2.1.3 Off-site Habitation Mitigation on page 2-8 states that an "…off-site compensation package consists of a total of approximately 5,500 acres." Given that 5,000 acres of public lands would be lost (theoretical decommissioning notwithstanding), we ask if the California Department of Fish and Wildlife (CDFW) was consulted when this 1 to 1.1 compensation ratio was determined? We note that the compensation ratio given in the DRECP for loss of critical habitat is 5:1, which is tabulated on page 3.4-46, but that typical compensation ratios acceptable to CDFW for non-critical habitat are 3:1 at a minimum. The Council's 15-member Board includes five biological consultants and two recently retired agency biologists, and none of us has ever heard of a 1:1 compensation ratio for lost tortoise habitats in the last 10 years. We expect the Final EIR/EIS to report a realistic compensation ratio that documents agency-concurrence (with evidence that CDFW was consulted) on the final ratio decision. Also note that the 5,500 acres stated on page 2-8 for habitat compensation is different from the 6,808 acres shown on page 3.4-46.

Given the tone of the EIR to de-emphasize the impacts to critical habitat, it is a significant concern to us that the proponent may opt to fence approximately 12 miles of Interstate 10 (Option 1 on page 3.4-47) rather than purchase the 6,808 acres of compensation habitats (Option 2 on page 3.4-48). The Final EIS/EIR needs to estimate the costs associated with these options. Further, we know that the Recovery Implementation Teams (RITs) have identified fencing transportation corridors as a high priority, and that it may already be planned by Caltrans to complete this fencing, thereby making the fencing portion of Option 1 obsolete. Option 3 seems even less effective than the first two and perhaps less expensive, pending the cost estimates to be published in the Final EIS/EIR. If some form of fencing is to be used, the proponent would need to contact Caltrans to discuss right-of-way issues. Also, funds would need to be set aside for fence maintenance.

With regards to Section 2.2.2.1 Construction Schedule and Workforce, which states, "Construction is anticipated to occur over an approximately 15- to 20-month period dictated by the Applicant's Power Purchase Agreement (PPA) and financing requirements," we believe that this statement should be augmented in the Final EIS/EIR by a phrase like, "and issuance of a Section 2081 incidental take permit." One of our Board members submitted a 2081 permit application for a 160-acre solar project in March 2020, and that permit, 18 months later, has yet to be issued. Given this and similar experiences with delayed permit issuance, we question the proponent's unrealistic expectation that "high-voltage components of the project … be constructed and interconnected no later than April 30, 2023." This presumption seems to anticipate fast-tracking approval of this highly controversial project before its impacts can be fully assessed, and denies the possibility that the footprint should be modified to avoid development of critical habitats. Note that collapsing tortoise burrows as described in the middle of page 2-12 cannot occur until both the U.S. Fish and Wildlife Service (USFWS) biological opinion and CDFW 2081 permit are issued.

The project proponent may need to obtain a section 10(a)(1)B) incidental take permit (ITP) from the USFWS if the BLM has no regulatory authority over the proposed action on parcels that are not public land. This requirement should be discussed in the CEQA and NEPA documents for this proposed project. Again, the issue of when a federal ITP would be issued should be discussed in the timeline.

Mitigation requirements for a section 2081 permit from CDFW and ITP are similar. Page 3.4-22 states that impacts would be minimized by implementing mitigation measures. CDFW code section requires that impacts be both minimized and fully mitigated. So, we note that minimization measures are not mitigation. Section 2081(a)(2) of the California Fish and Game Code requires that the impacts of the authorized take shall be minimized and fully mitigated. All required measures shall be capable of successful implementation.

Section 783.2, Incidental Take Permit Applications requires the following information for an application to be considered – "An analysis of the impacts of the proposed taking on the species. An analysis of whether issuance of the incidental take permit would jeopardize the continued existence of a species. This analysis shall include consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (A) known population trends; (B) known threats to the species; and (C) reasonably foreseeable impacts on the species from other related projects and activities. (8) Proposed measures to minimize and fully mitigate the impacts of the proposed taking. (9) A proposed plan to monitor compliance with the minimization and mitigation measures and the effectiveness of the measures. (10) A description of the funding source and the level of funding available for implementation of the minimization and mitigation measures." We request that the project proponent obtain a section 2081 permit from CDFW before initiating any activity that may result in take of the tortoise. This commitment should be in the NEPA and CEQA documents for the proposed project.

Before the USFWS may issue an ITP, the permit applicant must demonstrate that their implementation of the Habitat Conservation Plan (HCP) would "minimize and mitigate to the maximum extent practicable" for the covered species. To do this, the HCP must first fully analyze the impacts of the take that it is requesting. In *Union Neighbors United, Inc. v. Jewell*, (2016 U.S. App. LEXIS 14377; D.C. Cir, August 5, 2016), the Court gave deference to the HCP Handbook, rejecting USFWS request to apply Chevron. The Court determined "that the term 'impacts' refers to the population or subpopulation of the species as a whole, rather than the discrete number of individual members of the species," rejecting Plaintiff argument to minimize impacts to individuals. On Maximum Extent Practicable, the Court again gave deference to the Handbook.

In *Friends of the Wild Swan v. Jewell*, 2014 U.S. Dist. LEXIS 116788 (D. Mont., Aug. 21, 2014) the court faulted USFWS's conclusion that take would be fully mitigated, finding that there was "limited scientific support" for that conclusion and providing deference to the HCP Handbook. Citing the HCP Handbook guidance that, where adequacy of mitigation is a "close call," the record must support a finding that the mitigation is the maximum practicable, the court found that USFWS made no independent analysis of whether more mitigation was impracticable. The court faulted USFWS for relying entirely on the applicant's representations as to practicability.

Consequently, we request that the project proponent develop and submit an HCP and application for an ITP for the proposed project that complies with the HCP handbook including fully mitigating the take (USFWS and NMFS 2016).

With regards to the fifth bullet on page 2-13, "Protective measures, including Best Management Practices [BMPs], being implemented to conserve the desert tortoise during construction activities," herein we provide the proponent with a set of BMPs[3] completed by the Council in 2017 that may be helpful. These BMPs reduce some direct and indirect impacts to tortoises; they do not eliminate these impacts or impacts not addressed. For example, the BMPs do not address the temporal degradation/loss of tortoise habitat that results from construction, operation and maintenance, and decommissioning activities.

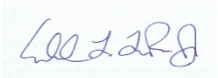
With regards to Section 2.2.5.1 Environmental Resources on page 2-24, which states, "Biological and cultural resources pedestrian surveys will be conducted after coordination with BLM, USFWS, and Native American tribes," we ask that this statement be augmented in the Final EIR/EIS to coordinate these and other actions with the CDFW.

With regards to the following statement on page 3.4-6, "They [larger creosote bush rings] are considered rare and 'sensitive' by federal and state agencies, including BLM, but they do not have any formal protections in place." It is our understanding that there are specific measures identified in the DRECP for protection of creosote bush rings larger than 15 feet (4.5 meters) in diameter, which the proponent is obligated to implement. We request that the Final EIR/EIS disclose applicable protective measures.

With regards to MM BIO-1, page 3.4-39, first bullet, "Lead Biologist: The Applicant shall assign a Lead Biologist, **approved by BLM**, as the primary point of contact for the BLM and resource agencies regarding biological resources mitigation and compliance" (**bold emphasis added**). Please note that the CDFW will also need to review and approve the Lead Biologist and must be given that opportunity before the BLM's approved person can implement certain actions, including collapsing tortoise burrows or handling tortoises. This comment also pertains to the statements at the top of page 3.4-52 identifying a "USFWS Approved Biologist."

We appreciate this opportunity to provide input and trust that our comments will help protect tortoises during any authorized project activities. Herein, we ask that the Desert Tortoise Council be identified as an Affected Interest for this and all other Water Board and BLM-authorized projects that may affect species of desert tortoises, and that any subsequent environmental documentation for this project 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.

Regards,



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[3] https://www.dropbox.com/s/fbx0uw43hs44i1w/%23DTC%20Construction%20Best%20Management%20Practices%20082117.pdf?dl=0

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