



DESERT TORTOISE COUNCIL

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Via email only

15 April 2021

Contact Person: Logan Raub
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Andrew Archuleta, District Manager
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RE: Oberon Renewable Energy Project – Draft Environmental Impact Report

Dear Mr. Raub,

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 Bureau of Land Management (BLM). Please accept, carefully review, and include in the relevant project file the Council's following comments and attachments for the proposed project. 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.

The notice of preparation (NOP), dated 18 March 2021, does not disclose how many acres of desert tortoise critical habitat would be affected by the proposed project. It is not until Figure 2 at the end of the document that it is revealed that critical habitat would be lost to this development. To our knowledge, the Bureau of Land Management (BLM) has not authorized a single solar project anywhere in California that has resulted in the development of tortoise critical habitat. Although the Desert Renewable Energy Conservation Plan (DRECP) is mentioned in several places, the NOP fails to indicate how much, if any, of the proposed site is in a Development Focused Area (DFA). We expect that the Draft Environmental Impact Report (Draft EIR) will reveal this acreage, particularly whether or not the critical habitat that would be lost to site development would be in a DFA. Although not revealed in the NOP, we understand from a public meeting on the project that 600 acres of critical habitat would be lost if the proposed configuration were adopted, which certainly must be revealed in the environmental documents.

The Council strongly advises BLM against authorizing the unprecedented loss of critical habitat to solar development, even if it is within a designated DFA. The DRECP was structured to locate energy development on lands with impaired habitats while conserving critical habitat. It is counterintuitive that the project would be developed on lands essential to the survival of a species that has declined by as much as 50% throughout much of its range. We also request that there be a new Land Use Plan Amendment (LUPA) that eliminates tortoise critical habitats from DFAs; i.e., that all DFA delineations be removed from all tortoise critical habitat areas.

Page 12 of the NOP indicates that a Draft EIR would be completed. Given that the project would occur primarily on BLM-administered lands, could result in the unprecedented adverse modification of tortoise critical habitat by energy development, and any project of this acreage in the CDCA is unlikely to have been adequately analyzed in the programmatic DRECP, the Council questions why the project's impacts are not being assessed in a combined EIR/EIS (Environmental Impact Statement)? The Council believes that the adverse modification of critical habitat is sufficient to trigger preparation of an EIS.

Whether the Proponent and/or BLM disagree with this conclusion or not, 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. We believe that the project has been arbitrarily situated in tortoise critical habitats without regards to both the precedent of that decision if the site is developed and the Proponent's failure to identify alternative, impaired habitats more suitable for this kind of discretionary development.

The Draft EIR/EIS should include a thorough analysis and discussion of the status and trend of the tortoise in the action area, tortoise conservation area, recovery unit, and range wide. Tied to this analysis should be a discussion of all likely sources of mortality for the tortoise and degradation and loss of habitat from implementation of leasing the area for solar development including construction, operation and maintenance, decommissioning, and restoration of the leased lands.

The Draft EIR/EIS should include appropriate mitigation for all direct, indirect, and cumulative effects to the tortoise and its habitats; the mitigation should use the best available science with a commitment to implement the mitigation commensurate to impacts to the tortoise and its habitats. Mitigation should include a fully-developed desert tortoise translocation plan; raven management plan; weed management plan; fire management plan; compensation plan for the degradation and loss of tortoise habitat that includes protection of the acquired, improved, and restored habitat in perpetuity for the tortoise from future development and human use; a plan to protect tortoise translocation area(s) from future development and human use in perpetuity; and habitat restoration plan when the lease is terminated and the proposed project is decommissioned.

These mitigation plans should include an implementation schedule that is tied to key actions of the construction, operation, maintenance, decommissioning, and restoration phases of the project so that mitigation occurs concurrently with or in advance of the impacts. The plans should specify success criteria, include a monitoring plan to collect data to determine whether success criteria have been met, and identify actions that would be required if the mitigation measures do not meet the success criteria.

Page 3 of the NOP indicates “The Project is located on BLM-administered lands in Riverside County just east of Desert Center, California, north of I-10. The Project site and surrounding lands are part of BLM-administered lands designated for renewable energy development. There are solar facilities in the surrounding area in various stages of development, including operational (Desert Sunlight, Desert Harvest, Palen solar projects), currently under construction (Athos project), and under permitting (Arica and Victory Pass solar projects). The Project would operate for a minimum of 35 years and up to 50 or more years. At the end of the Project’s useful life, the Project would be decommissioned and the land returned to its pre-Project contours. Revegetation would be attempted, though revegetation success would be subject to the microclimatic conditions in the area at the time of decommissioning. The Project application covers approximately 4,700 acres project area of BLM-administered land within which fewer than 3,000 acres would be developed with solar panels”

The NOP indicates “The Project gen-tie lines would be constructed with either monopoles, lattice steel structures, or wooden H-frame poles. Gen-tie structures would be on average 120 feet tall, with a maximum height up to approximately 200 feet for dead-end structures near the Red Bluff Substation.” In the raven management plan prepared for this project, we ask that the Proponent choose a pole type least likely to be used by ravens for nesting. For example, the tubular design with insulators on horizontal cross arms is preferable to lattice towers, which should not be used. Additionally, the BLM should require monitoring, nest removal, and depredation permits if tortoise depredation is documented. Additionally, the BLM should require the Proponent to contribute identified funds to the National Fish and Wildlife Foundation’s Raven Management Fund for regional and cumulative impacts.

Page 7 of the NOP indicates that resource surveys should be performed. For the Draft EIR to fully assess the effects and identify potentially significant impacts, the following surveys must be performed to determine the extent of rare plant and animal populations occurring within the impact area. Results of the surveys will determine appropriate permits from California Department of Fish and Wildlife (CDFW) and USFWS and associated minimization and mitigation measures.

- Prior to conducting surveys, a knowledgeable biologist must perform a records search of the California Natural Diversity Data Base (CNDDDB; CDFW 2021) for rare plant and animal species reported from the region. The results of the CNDDDB review would be reported in the Draft EIR with an indication of suitable and occupied habitats for all rare species reported from the region based on performing species specific surveys described below.
- Formal protocol surveys for Mojave desert tortoise (USFWS 2019) must be conducted at the proper times of year. As per this protocol, since the impact area is larger than 500 acres, the surveys must be performed in the time periods of April-May or September-October so that a statistical estimate of tortoise densities can be determined for all impact areas and reported in the Draft EIR. If any tortoise signs are found, formal Section 7 Consultation must occur and a state incidental take permit must be obtained from CDFW prior to ground disturbance. We strongly recommend that the County require that only experienced biologists perform protocol surveys, which means that CDFW and USFWS biologists should review their credentials prior to the surveys.
- To determine the full extent of impacts to tortoises and to facilitate compliance with the federal endangered species act (FESA), qualified biologist(s) should consult with the Palms Springs office of the USFWS to determine the action area for this project. The USFWS defines “action area” in 50 Code of Federal Regulations 402.2 and their Desert Tortoise Field Manual (USFWS 2009) as “all areas to be affected directly or indirectly by proposed development and not merely the immediate area involved in the action (50 CFR §402.02).”
- A jurisdictional waters analysis should be performed for all potential impacts to washes, streams, and drainages. This analysis should be reviewed by the CDFW as part of the permitting process and a Streambed Alteration Agreement acquired, if deemed necessary by CDFW.
- If there are any loose, shifting sands within the impact areas of the panels, along the gen-tie lines, or improved access routes, focused surveys for Mojave fringe-toed lizards (*Uma scoparia*) should be performed (University of California Riverside, Center for Conservation Biology 2005). Results and pertinent mitigation measures, as needed, should be published in the Draft EIR.
- Protocol surveys for western burrowing owl (*Athene cunicularia*) (CDFG 2012) should be completed. Note that the protocol (CDFG 2012) requires that peripheral transects be surveyed at 30-, 60-, 90-, 120-, and 150-meter intervals in all suitable habitats adjacent to the subject property to determine the potential indirect impacts of the project on this species. If burrowing owl sign is found, CDFG (2012) describes appropriate minimization and mitigation measures that would be required.
- There are likely to be special status plant species found in the region of the Project area as determined by a CNDDDB (CDFW 2021) literature review that should be sought during field surveys and their presence/absence discussed in the Draft EIR. Surveys must be completed at the appropriate time of year by qualified biologists (preferably botanists) using the latest acceptable methodologies (CDFG 2009). Any protected plant communities must also be sought and mapped as per CDFW (2010).

Page 9 of the NOP states “Following the completion of major construction, temporarily disturbed areas would be revegetated for the operations phase pursuant to an approved Restoration Plan.” In 2016, the Council completed a best management practices document on desert restoration (Abella and Berry 2016), which is available for the Proponent’s use at the following link: <https://www.dropbox.com/s/hm3acf57sg1zpg0/Abella%20and%20Berry%202016.pdf?dl=0>

The Council supports alternatives to reduce the need for additional solar energy projects in the Mojave Desert. That alternative is rooftop solar. The City of Los Angeles has implemented a rooftop solar Feed-in Tariff (FiT) program, the largest of its kind in America. The FiT program enables the owners of large buildings to install solar panels on their roofs, and sell the power they generate back to utilities for distribution into the power grid. This approach puts the generation of electricity where the demand is greatest, in populated areas. It may also reduce transmission costs, greenhouse gas emissions from constructing energy projects far from the sources of power demand and materials for construction, the number of affected resources in the desert that must be analyzed under the California Environmental Quality Act (CEQA), and mitigation costs. The Draft EIR should include an analysis of where the energy generated by this project would be sent and the needs for energy in those targeted areas that may be satisfied by rooftop solar. We contend that rooftop solar should be analyzed as one of the action alternatives.

In 1976, Congress passed the Federal Land Management Policy Act (FLPMA) and established the California Desert Conservation Plan (BLM 1980, as amended) “to provide for the immediate and future protection and administration of the public lands in the California desert within the framework of a program of multiple uses and sustained yield, and the maintenance of environmental quality.” Congress further declared “the California desert environment is a total ecosystem that is extremely fragile, easily scarred, and slowly healed; the use of all California desert resources [including rare and endangered species of wildlife, plants, and fishes] can and should be provided for in a multiple use and sustained yield management plan to conserve these resources for future generations...”

Congress wrote a lengthy definition of “multiple use” for the management of public lands and their various resource values. The definition included “... the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.”

Congress defined “sustained yield” as the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use. The Mojave desert tortoise and its habitats are renewable resources.

The definition of “environmental quality” is a set of properties and characteristics of the environment, either generalized or local, as they impinge on human beings and other organisms. It is a measure of the condition of an environment relative to the requirements of one or more species and or to any human need or purpose. Thus, BLM must consider the quality or condition of the environment of the Mojave desert tortoise with respect to the species’ requirements for persistence and must maintain this habitat quality.

The Council believes that BLM’s management of the Mojave desert tortoise and its habitats in California is not in compliance with FLPMA or the purposes for establishing the CDCA. The large number of non-viable populations and downward trend in population densities for the Mojave desert tortoise in the CDCA are the data that confirm non-compliance with the “immediate and future protection of public lands,” “conserving resources for future generations,” and definitions of multiple use, sustained yield, and environmental quality.

Section 7(a)(1) of the Endangered Species Act states that all federal agencies “...shall... utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of this Act.” In Section 3 of the FESA, “conserve,” “conserving,” and “conservation” mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition...”

The Council believes that the data above demonstrate that BLM’s management of the Mojave desert tortoise and its habitat under the CDCA Plan and Plan Amendments has not been effective in meeting BLM’s Section 7(a)(1) mandate of carrying out programs for its conservation. To meet its Section 7(a)(1) responsibilities, the BLM needs to adopt and implement the management actions of the one population of the Mojave desert tortoise in California that is increasing. This population is managed by the National Park Service. The NPS’ land management practices are closer to managing areas of land as reserves, which is what the 1994 Recovery Plan (USFWS 1994) described as part of the recovery strategy for the Mojave desert tortoise. While BLM designated Desert Wildlife Management Areas (DWMAs) (the term was replaced by “Tortoise Conservation Areas” or “TCAs” in the DRECP) as one part of the recovery strategy, it did not implement the other parts of the recovery strategy. According to the Recovery Plan, DWMAs were to be managed as reserves; that is, they were areas of land to keep, save, preserve, or protect. BLM did not identify and implement needed recovery actions within each DWMA to manage the DWMAs as protected areas for the Mojave desert tortoise.

In the cumulative effects analysis of the Draft EIR/EIS, please ensure that the Council on Environmental Quality’s (CEQ) “Considering Cumulative Effects under the National Environmental Policy Act” (1997) is followed, including the eight principles, when analyzing cumulative effects of the proposed action to the tortoise and its habitats. CEQ states, “Determining the cumulative environmental consequences of an action requires delineating the cause-and-effect relationships between the multiple actions and the resources, ecosystems, and human communities of concern. The range of actions that must be considered includes not only the project proposal but all connected and similar actions that could contribute to cumulative effects.” The analysis “must

describe the response of the resource to this environmental change.” Cumulative impact analysis should “address the sustainability of resources, ecosystems, and human communities.” For example, the Draft EIR should include data on the estimated number of acres of tortoise habitats and the numbers of tortoises that may be lost to growth-inducing impacts as a result of project development.

We understand that the cumulative impacts analysis in the Draft EIR must follow the Council on Environmental Quality (CEQ) (1997) guidance on how to analyze cumulative environmental consequences, which contains eight principles listed below:

1. Cumulative effects are caused by the aggregate of past, present, and reasonable future actions.

The effects of a proposed action on a given resource, ecosystem, and human community, include the present and future effects added to the effects that have taken place in the past. Such cumulative effects must also be added to the effects (past, present, and future) caused by all other actions that affect the same resource.

2. Cumulative effects are the total effect, including both direct and indirect effects, on a given resource, ecosystem, and human community of all actions taken, no matter who (federal, non-federal, or private) has taken the actions.

Individual effects from disparate activities may add up or interact to cause additional effects not apparent when looking at the individual effect at one time. The additional effects contributed by actions unrelated to the proposed action must be included in the analysis of cumulative effects.

3. Cumulative effects need to be analyzed in terms of the specific resource, ecosystem, and human community being affected.

Environmental effects are often evaluated from the perspective of the proposed action. Analyzing cumulative effects requires focusing on the resources, ecosystem, and human community that may be affected and developing an adequate understanding of how the resources are susceptible to effects.

4. It is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.

For cumulative effects analysis to help the decision maker and inform interested parties, it must be limited through scoping to effects that can be evaluated meaningfully. The boundaries for evaluating cumulative effects should be expanded to the point at which the resource is no longer affected significantly or the effects are no longer of interest to the affected parties.

5. Cumulative effects on a given resource, ecosystem, and human community are rarely aligned with political or administrative boundaries.

Resources are typically demarcated according to agency responsibilities, county lines, grazing allotments, or other administrative boundaries. Because natural and sociocultural resources are not usually so aligned, each political entity actually manages only a piece of the affected resource or ecosystem. Cumulative effects analysis on natural systems must use natural ecological boundaries and analysis of human communities must use actual sociocultural boundaries to ensure including all effects.

6. Cumulative effects may result from the accumulation of similar effects or the synergistic interaction of different effects.

Repeated actions may cause effects to build up through simple addition (more and more of the same type of effect), and the same or different actions may produce effects that interact to produce cumulative effects greater than the sum of the effects.

7. Cumulative effects may last for many years beyond the life of the action that caused the effects.

Some actions cause damage lasting far longer than the life of the action itself (e.g., acid mine damage, radioactive waste contamination, species extinctions). Cumulative effects analysis need to apply the best science and forecasting techniques to assess potential catastrophic consequences in the future.

8. Each affected resource, ecosystem, and human community must be analyzed in terms of its capacity to accommodate additional effects, based on its own time and space parameters.

Analysts tend to think in terms of how the resource, ecosystem, and human community will be modified given the action's development needs. The most effective cumulative effects analysis focuses on what is needed to ensure long-term productivity or sustainability of the resource.

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 **BLM** projects that may affect species of desert tortoises, and that any subsequent environmental documentation for this particular project is provided to us at the contact information listed above. We also ask that you acknowledge receipt of this letter as soon as possible so we can be sure our concerns have been received by the appropriate parties.

Regards,



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

cc: California State Clearinghouse, state.clearinghouse@opr.ca.gov

Literature Cited

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