



**DESERT TORTOISE COUNCIL**

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**Via email only**

Date: July 12, 2024

To: Attn: Matthew Klein, Beth Ransel  
Bureau of Land Management, Southern Nevada District Office  
4701 North Torrey Pines Drive  
Las Vegas, Nevada 89130  
[mklein@blm.gov](mailto:mklein@blm.gov); [bransel@blm.gov](mailto:bransel@blm.gov)

Re: Requested Categorical Exclusion for installing a tortoise exclusion fence for the unauthorized Purple Sage Solar Project

Dear Mr. Klein, Ms. Ransel,

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 to receive emails for 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."

It has come to our attention in a letter dated 5/1/2024<sup>1</sup>, that Primergy has requested that the Bureau of Land Management (BLM) authorize installation of a desert tortoise exclusion fence and allow geotechnical exploration activities to occur under a categorical exclusion (Cat-X) without the benefit of National Environmental Policy Act (NEPA) review, which necessarily includes public participation, or U.S. Fish and Wildlife Service Section 7 consultation.

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<sup>1</sup> [https://www.dropbox.com/scl/fi/c7flwwisvpx7kksp2v10v/PupleSage\\_DTEExclusionFenceGeoTech\\_Memo\\_Final.5-1-2024.pdf?rlkey=5rclzvfbwimhss4e7jclt2dds&dl=0](https://www.dropbox.com/scl/fi/c7flwwisvpx7kksp2v10v/PupleSage_DTEExclusionFenceGeoTech_Memo_Final.5-1-2024.pdf?rlkey=5rclzvfbwimhss4e7jclt2dds&dl=0)

“The Project proposes for (1) construction of desert tortoise exclusion fencing and (2) geotechnical exploration to provide critical information in the design of the project. Primergy requests that BLM consider approving these activities under a National Environmental Policy Act (NEPA) categorical exclusion (catex) to allow the project to initiate these activities to meet the preferred desert tortoise translocation schedule.” Further, Primergy indicated, “...that the Rough Hat Clark County Solar Project, located in same general vicinity as the Purple Sage project, was approved to conduct geotechnical work under a NEPA catex.” We note that neither the letter nor a series recent emails from the proponent to the BLM indicate the size of the area to be fenced<sup>2</sup>.

We are adamantly opposed to what appears to be backroom negotiations to approve activities that will indisputably result in the take of tortoises. It is our understanding from information in the email string that Primergy is preparing technical documents such as a plan of development, but that the solar project has not been considered in either an environmental assessment (EA) or an environmental impact statement (EIS), the latter of which is appropriate for a project of this size and scope, particularly given its location in Pahrump Valley with seemingly unrestricted solar development.

Among the numerous concerns expressed herein, our primary concern is that the solar project has not even begun to be analyzed in appropriate NEPA document(s) that would allow the public to provide both scoping comments AND subsequent formal comments on the draft EIS. It appears to us that the proponent assumes that the solar project will undoubtedly be approved (as so many others have been in the Pahrump Valley), which is predecisional, and if BLM concurs, a violation of NEPA. For the BLM to issue a Cat-X for early stages of a project that will clearly impact tortoises, and may or may not be approved pending NEPA analysis, would be inappropriately (if not illegally) collaborative and result in take for which U.S. Fish and Wildlife Service (USFWS) has not granted Section 7 authorization.

We hope that this sort of behind-the-scenes negotiations, without the benefit of public involvement, to irreversibly develop our public lands is unprecedented, and are discouraged to read in Primergy’s 5/1/2024 letter that BLM has already previously issued a Cat-X to Rough Hat Solar proponents to allow geotechnical exploration in tortoise-occupied habitats before take authorization was granted.

The Council recently provided extensive comments to the BLM on both appropriate and inappropriate uses of Cat-X authorizations on public lands it manages, which is available in the footnote and herein incorporated by reference<sup>3</sup>. It is our understanding that federal agencies may use programmatic and individual Cat-X authorizations only in those cases where the approved activity will not have a *may affect* determination on a federally-designated threatened or endangered species. Fence construction is not covered under the list of BLM Cat-X projects; therefore, preparation of an EA or EIS would be required prior to fence construction to comply with NEPA. Construction of a fence with the associated 9.5-foot wide disturbance does not meet the provisions of 43 CFR Part 46 § 46.205: Actions categorically excluded from further NEPA review<sup>4</sup>.

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<sup>2</sup> [https://www.dropbox.com/scl/fi/qz4vn3pcf9rsxubqlqaomi/Purple-Sage-2024-05-01\\_Email-Re-Geotech-and-DT-Fencing.pdf?rlkey=19jw2hhfef6gabc0c9i3pb4ea&dl=0](https://www.dropbox.com/scl/fi/qz4vn3pcf9rsxubqlqaomi/Purple-Sage-2024-05-01_Email-Re-Geotech-and-DT-Fencing.pdf?rlkey=19jw2hhfef6gabc0c9i3pb4ea&dl=0)

<sup>3</sup> <https://www.dropbox.com/scl/fi/ka92tffmztwthcuqtdl/BLM-Categorical-Exclusion-Additions-Removals.3-25-2024.pdf?rlkey=c7je675c35sb9xqn7vzlwjckn&dl=0>

<sup>4</sup> [https://bianepatracker2.doi.gov/doi\\_and\\_bureau\\_categorical\\_exclusions.pdf](https://bianepatracker2.doi.gov/doi_and_bureau_categorical_exclusions.pdf)

40 CFR 1508.4 states: “If a proposed action does not meet the criteria for any of the listed Departmental categorical exclusions or any of the individual bureau categorical exclusions, then the proposed action must be analyzed in an environmental assessment or environmental impact statement.” Two relevant citations from 43 CFR Part 46 are:

- “C. Actions Related to Development (20) Construction of fencing enclosures or boundary **fencing posing no effect on wildlife migrations.**
- “Shall require the treatment of temporary roads constructed or used so as to permit the reestablishment by artificial or natural means, of vegetative cover on the roadway and areas where the vegetative cover was disturbed by the construction or use of the road, as necessary to minimize erosion from the disturbed area. Such **treatment shall be designed to reestablish vegetative cover as soon as practicable, but at least within 10 years** after the termination of the contract” [bold emphasis added in both quotes].

Construction of a fence would affect wildlife migration (e.g., tortoise movements), and vegetative cover that cannot be reestablished in 10 years; therefore, would not be eligible for approval under a Cat-X because it would affect desert tortoise migration and fail to reestablish vegetative cover within 10 years. It is well documented that vegetative recovery in the Mojave Desert takes much longer. Recovery to pre-disturbance plant cover and biomass may take 50–300 years.

Primergy clearly anticipates that tortoises will be affected by the project, otherwise biologists would not be onsite to avoid direct impacts and tortoise shade structures would not be installed alongside the exclusion fences. However, we note that installing a tortoise-proof fence in and of itself would result in take because it impedes the movement of tortoises whose home ranges would be bisected by the fences, leaving inaccessible burrows on the outside of the fence while entrapping animals inside the fence. We also note that, whereas crushing vegetation (rather than blading it) in a 9.5-foot wide swath using heavy equipment, is an acceptable approach for a project *that has been authorized* after NEPA review and received a biological opinion from the USFWS, but it would be a form of unauthorized take to crush vegetation that tortoises rely on to escape predators, build burrows, and seek shade from lethal temperatures.

We are alarmed to have received this private information that was undoubtedly not intended for public review, as it specifically functions to, among other things, usurp public disclosure and involvement in what is supposed to be a transparent, collaborative planning process to fully analyze impacts before any deleterious impacts are authorized.

Please 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 inappropriate request for a right-of-way grant and Cat-X.

Respectfully,



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

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