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November 10, 2010

VIA U.S. MAIL

Colonel R. Mark Toy, District Commander
U.S. Army Corps of Engineers
Los Angeles District
P.O. Box 532711
Los Angeles, CA 90053-2325

Re: San Diego Gas & Electric's Application for a Clean Water Act Section 404 Nationwide Permit for Its Sunrise Powerlink Transmission Project

Dear Colonel Toy:

INTRODUCTION

On September 17, 2010 we wrote on behalf of Backcountry Against Dumps, The Protect Our Communities Foundation, East County Community Action Coalition and Donna Tisdale (hereinafter "Conservation Groups") to advise you of their opposition to the Sunrise Powerlink Transmission Line Project ("Powerlink" or "project") and to ask the Army Corps of Engineers ("Army Corps'") to deny San Diego Gas & Electric's ("SDG&E's") Clean Water Act ("CWA") Section 404 permit applications for that project because its watershed impacts have not been adequately studied and mitigated. We also asked that, in the event that the Army Corps elects to proceed with consideration of Section 404 permits for the project, that you provide us with notification of all opportunities to participate in that review decision.

To date we have received no response. Therefore we write again to advise you that Conservation Groups and their members are vitally concerned about the significant environmental impacts of the construction and operation of the Powerlink, including erosion of steep and unstable slopes, sedimentation and filling of watercourses, loss of aquatic and terrestrial habitat and reduced abundance of wildlife, increased risk of wildfire, destruction of scenic natural landscapes and viewsheds, and diminution of rural quality of life and community character. Conservation Groups have actively participated in all phases of the multiple state and federal agencies' permitting processes for the Powerlink and have filed a lawsuit challenging the project's approval by the U.S. Bureau of Land Management and U.S. Fish and Wildlife Service. Conservation Groups wish to fully participate in any decision on the Powerlink by the Army Corps and therefore request notification from the Army Corps of any opportunity to provide comments during the agency's decisionmaking process.

BACKGROUND STATEMENT

SDG&E's proposed Sunrise Powerlink project would construct a massive electrical transmission line from the Imperial Valley to western San Diego County. The 123-mile transmission line includes a 500kV main line from the Imperial Valley to Alpine and two smaller 230kV spur lines from Alpine to western San Diego County. SDG&E apparently intends eventually to extend either the 500kV main line or a smaller spur line north to Riverside County through wilderness areas, the Anza Borrego State Park, and rural communities. SDG&E successfully opposed proposals by regulators to require that the Powerlink carry renewable energy. In fact, the Powerlink would provide a highly profitable connection between an enormous natural gas and export power plant infrastructure in northern Baja California that is owned by SDG&E's parent company, Sempra Energy, and the southern California electricity market.

Construction of the Powerlink would result in at least 41 significant unmitigable impacts to the environment, according to the FEIR/EIS for the project. Many more significant impacts were identified following surveys and analysis of impacts long after completion of the FEIR/EIS and some were documented in SDG&E's *Project Modifications Report*, dated May 14, 2010. For example, the report reveals that the project will result in additional impacts to waters of the United States, impacts that were never disclosed or considered in the FEIR/EIS. Also according to the report, the Powerlink would result in impacts to endangered wildlife dependent on waters of the United States, including but not limited to impacts to nearly 47 acres of Arroyo Toad proposed critical habitat and nearly 5 acres of Southwestern willow flycatcher habitat. *None of these impacts were disclosed or considered in the FEIR/FEIS.*

The record also shows that there are practicable, less environmentally destructive alternatives to the proposed Powerlink project. Intervenors in the California Public Utilities Commission ("CPUC") administrative proceeding for Powerlink proved that the project was not necessary to meet San Diego's near-term energy needs or California's renewable energy requirements, leading the presiding Administrative Law Judge to recommend *against* CPUC approval. An independent energy expert presented a plan that identifies practical, local, renewable energy alternatives to the Powerlink with an emphasis on distributed solar generation. The plan is entitled *San Diego Smart Energy 2020: The 21st Century Alternative* and is located at: http://www.sdsmartenergy.org/smart.shtml. The FEIR/EIS ranked four alternatives *ahead of* the proposed project because they had fewer adverse effects on the environment, with the first two alternatives being locally generated power from roof-top photovoltaic cells and other sources within the urban energy demand centers. Following more than a year of testimony, briefing, and hearings on the project, the Administrative Law Judge overseeing the CPUC proceeding found that the project was *unnecessary* and recommended that the CPUC commissioners *reject* SDG&E's application. However, driven by political pressure from the California Governor, four of the Commissioners ignored this recommendation and approved the project in spite of the overwhelming evidence that less destructive alternatives could easily serve the project's stated objectives.

Equally important, recent improvements in solar technology confirm that rooftop solar in the

urban demand centers is far more cost effective and reliable than the importation of power over long transmission lines. The Phase 2B Renewable Energy Transmission Initiative ("RETI") Report demonstrates that commercial and residential rooftop solar and ground-mounted distributed generation photovoltaic arrays already produce lower cost energy than desert solar plants at the projected installed cost of these plants.[1]

The Powerlink is also unnecessary because renewable energy generation in the west is anticipated to displace fossil-fuel generation, which in turn means that renewable energy will replace fossil-fuel energy on *existing* transmission lines like the *Southwest* Powerlink.[2] Further, it is doubtful that new transmission capacity is needed to spur development of renewable energy projects. It is clear, however, that investor-owned utilities are motivated in large part by the promise of vastly increased profits contingent on their participation in the ongoing rush to build new transmission projects.[3]

The cumulative impacts of the many power projects that would be built to deliver energy to the Sunrise Powerlink, including the Tule wind project in the McCain Valley north of Interstate 8 and the Energia Suarez Project and the Sempra Energy LNG facilities south of the Mexican border, as well as the related infrastructure including the Eco-Substation near Boulevard south of I-8, have *not been addressed in any EIS or EIR to date*.

DISCUSSION

As stated above, Conservation Groups ask the Army Corps to deny SDG&E's permit applications. As summarized above, the project is ill-conceived, environmentally destructive, and unnecessary. As to issues specific to the Army Corps' jurisdiction and deliberations related to SDG&E's Section 404 Permit Application, Conservation Groups have the following concerns.

I. NATIONWIDE PERMITS ARE NOT APPROPRIATE

We understand that SDG&E has applied to the Army Corps for Nationwide Permits ["NWPs"] 3 and 12. It qualifies for neither, due to the Nationwide Permit General Conditions 17 and 24. Pursuant to General Condition 17, "No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species . . . under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species. Furthermore, "[n]o activity is authorized under any NWP which 'may affect' a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed." NWP

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[1] http://www.energy.ca.gov/2010publications/RETI-1000-2010-002/RETI-1000-2010-002-F.PDF
[2] "Transmission in Short Supply or Do IOUs Want More Profits?" *Natural Gas and Electricity*, pp. 9-14, July 2010, available at: http://firoozconsulting.com/files/firooz.pdf
[3] *Id*.

General Condition 17(a). Here, the Corps has never completed Section 7 consultation.[4] Therefore, the project may not be authorized under an NWP. Moreover, as discussed more fully below, the Project will adversely affect *over 45 acres of proposed Arroyo Toad critical habitat,* which also renders NWPs inapplicable. NWP General Condition 17(a).

General Condition 24 specifies that "[t]he use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit." Here, SDG&E proposes to utilize both NWP 3 and NWP 12. NWP 12 does not prescribe a "specified acreage limit." NWP 12 specifies a maximum of ½ acre loss of waters of the United States. Thus, the "highest specified acreage limit" is ½ acre.[5] Because the project will permanently impact 3.86 acres of waters of the United States and will temporarily impact 7.25 acres of waters of the United States, which is more than ½ acre, NWPs 3 and 12 may not be used.

Because the project may adversely affect the Arroyo Toad, but Section 7 consultation has not been undergone, and because the project's 11.11 acres of total impacts to waters of the United States far exceed the applicable maximum of ½ acre, the Corps must reject SDG&E's NWP application.

II. METHODOLOGY

Statutory waters of the United States are defined in 40 C.F.R. § 230.3(s) and are the subject of some regulatory imprecision.[6] In the case of eastern San Diego County and Imperial County, the Salton Sea is the primary navigable water body to which many of the washes impacted by the project are tributary. Farther west, in the watersheds of the Tijuana River, San Diego River and other ocean-going streams, the Pacific Ocean is navigable. Because the project has hydrologic connectivity with these and other perennial and intermittent watercourses, its adverse impacts on these downstream receiving waters must be fully addressed.

The impacts of the project on watershed stability can be considerable, as the erosive power of

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[4] *See* U.S. Fish and Wildlife Service memorandum transmitting "Biological and Conference Opinion on Construction and Long-term Operation and Maintenance Program for the Sunrise Powerlink Project" to BLM El Centro Field Manager, dated 01/16/09 ("Consultation with the Service to address potential impacts to listed species in association with [404] permits has not been initiated by the U.S. Army Corps of Engineers. . . . Thus, this biological and conference opinion does not satisfy the section 7 consultation requirements of the Corps of Engineers for the [Powerlink] Project").

[5] *See also* General Condition 24 (using example of a project using NWPs 13 and 14; NWP 13 specifies no maximum acreage, so 1/3 acre maximum specified in NWP 14 is maximum).

[6] The current EPA and Army Corps guidance for wetlands regulation appears at http://www.epa.gov/wetlands/guidance/CWAwaters.html

these waterways is substantial during extreme weather events. When the washes of eastern San Diego and Imperial Counties carry water, they may extend more than one-eighth mile from bank to bank. For example, the tropical storm of September 7-12, 1976 generated a broad, braided wash extending over one-eighth mile in width. An overview of the effects of that storm is available with contemporaneous photographs at http://www.scribd.com/doc/9354989/Tropical-Storm-Kathleen and a photograph of the town of Ocotillo is shown below:

The path taken by the runaway waters *Credit: Rick McCarthy, Union-Tribune*

Fig 1. Ocotillo Flooding, Tropical Storm Kathleen, September, 1976

In previous submissions, SDG&E has based its determinations of the actual volumes of water on flow in defined channels. While these are useful for sizing culverts and other basic hydrologic engineering evaluations, they also reveal that the methodology for projecting local rainfall-runoff-frequency is flawed. This methodology ignores two of the larger recorded local storms. Storms that serve to define channels and establish watercourses have been recorded in Southern California since the 1850's with the most notable in the Powerlink route being September 1939, September 1976, and September 1997.

In these previous submissions, SDG&E has chosen to use the published runoff intensity values based on the respective counties' published 100-year magnitude volumes. These runoff values do not reflect the actual magnitude of the largest storms. Typically, the rare tropical storms that define the magnitude of the largest events are overlooked because their high water marks are short-lived and thus evade documentation by traditional streambed and stream bank definitions. Yet it is these larger storms that define the hydrologic impacts of the project.

We are particularly concerned about the erosive impacts of the project's access roads (and the wide swaths of cleared areas under the lines) in steep and remote areas. The project's potential to cause erosion and sedimentation into waters and wetlands arises from the steep slopes and highly erodible soils formed in decomposed granitic bedrock that characterizes the central half of the transmission line route. San Diego County's soil surveys[7] reveal that the soils of the arid granitic bedrock areas such as the La Posta soils and La Posta –Sheephead Complex that characterize the areas of extensive new access road construction are extremely erodible (erodibility class *severe*). New roads will potentially destabilize the soils upslope and therefore generate runoff that will carry sediment to watercourses in excess of the one-half acre loss limit under the Nationwide 12 Permit. Over 3806 acres of new roads and work areas are anticipated in this project, to which we must add the 6763+ acres of defined right-of-way. It is improbable that cumulative losses will be limited to one-half acre of waters of the United States and to date SDG&E has not provided enough information to evaluate anticipated losses and/or mitigations. The destabilization of steep slopes, erosion and loss of topsoil and sedimentation of watercourses are *permanent* impacts that cannot be mitigated with short-term revegetation measures.

In this geographic region that is subject to infrequent large tropical hurricanes and tropical storms, the magnitude of runoff from storms of less than a 20-year return frequency is not proportional to the magnitude of runoff from larger, less-frequent tropical storms. The 10-year storm event is usually associated with standard Pacific frontal wintertime rainfall, while the late summer tropical storms generate the 25-year and larger events. This means that the standard statistical methods that can be used to determine storm runoff should not be used to lump all storms into the same time series. Tropical

[7] Soil Survey, San Diego County, Pt II, 1973, U.S.D.A. Soil Conservation Service includes the eastern county and granitic soils of the Sunrise Powerlink route.

storms have a distinct set of characteristics and Pacific frontal storms have a different set of characteristics, and the two are not related to each other in terms of magnitude-frequency-duration relationships. What this means is that designs for a 10-year storm will not withstand the 25-year events nor can they be scaled-up using the design criteria of San Diego County or Imperial County. Using statistically scaled design criteria based on Pacific frontal storms is logical for the urban, western parts of San Diego County, but not for the eastern mountainous areas or for Imperial County. The result of such a miscalculation will be infrequent major wash-out damage to access roads, critical periods of inaccessibility for repairs, and intensive erosion and sedimentation downstream.

For all of these reasons, neither a category 3 nor a category 12 Nationwide/General Permit can be utilized for the CWA section 404 permit approval process for the Powerlink.

III. NATIONAL ENVIRONMENTAL POLICY ACT

The Army Corps should not address the merits of SDG&E's applications unless and until a complete environmental review of all of the adverse impacts of the project is completed. The initial FEIR/EIS did not address with the requisite specificity any of the impacts of the project on the waters of the United States. This was due in large part to the fact that the route selected in the FEIR/EIS had not been finalized; rather the analysis only contained a vague description of where the right-of-way may be located. No specifics were provided about the locations of towers, staging areas, or any other ground-disturbing activities. Without this level of specificity, neither the Army Corps nor the public was able to ascertain the actual impacts of the project on the waters of the United States. Now that SDG&E has finalized the location of the project, BLM must prepare – with input from the Army Corps – a subsequent EIR/EIS ("SEIR/EIS") prior to any decision by the Army Corps on SDG&E's CWA section 404 applications.

The need for a further environmental review is demonstrated both by the changes to the project and the long overdue and recently compiled watershed and environmental surveys that are referenced in the Project Modification Report.[8] In that report, SDG&E admits that the project has changed in many significant ways, and previously overlooked impacts have been identified including the following changes and impacts that direct affect SDG&E's pending application to the Army Corps:

A. **Impacts to Waters of the United States –** Table S-1 reveals that the project will have permanent impacts to 3.86 acres, and temporary impacts to 7.25 acres of waters of the United States. Only now, after the PMR, has the final project alignment been described in detail. "[T]he jurisdictional delineation has been completed, and the total estimated project impacts to all jurisdictional waters, wetlands, and dry washes have been calculated for this PMR with a very high degree of precision." PMR 3-54. But the project and its impacts should have been discussed with this "high degree of precision" in

[8] http://www.cpuc.ca.gov/environment/info/aspen/sunrise/pmr/sdge_final_pmr_051410.pdf

the FEIR/FEIS. The failure to do so violates CEQA and NEPA. Since that information was not initially included in the environmental review process, it must be analyzed in an SEIR/SEIS. Further, the model used to determine which jurisdictional waters will be impacted fails to take into account the surrounding and downstream resources that may be affected. The PMR only evaluated water features that were within the project right of way, or those that were within 100 feet of an impact area for the project. PMR 3-55. Limiting the analysis of water quality impacts to 100 feet ignores downstream impacts from erosion and sedimentation caused by the project. The FEIR/FEIS failed to disclose and discuss *any* of these impacts. Therefore a Subsequent EIR/EIS must be prepared to address these impacts.

B. **Increased Wetlands Impacts –** The PMR discloses an increase in permanent impacts to "herbaceous wetlands, freshwater, and streams (non-vegetated channel)" from .13 acres in the FEIR/FEIS to 1.1 acres, an *eight-fold increase* resulting from the modified project. PMR S-3. Because the modified project presents a new, significant impact to wetlands, the project must be analyzed in a further environmental review.

C. **Access Roads –** Table S-1 of the PMR reveals that the project would construct far more Tower Staging Access Pads than was disclosed in the FEIR/FEIS. The number of such access pads has increased from 108 to 162, *a 53.8 percent increase*. Each of these additional pads poses potentially significant adverse impacts on slope stability, soil erosion, sedimentation of water bodies, aesthetic values, recreational resources and wildlife habitat. This undeniably substantial increase in these impacts triggers the requirement under both CEQA and NEPA for further environmental review in a Subsequent EIR/EIS.

D. **Ground Disturbance in Developed Areas and Disturbed Habitat –** Table S-1 reveals that the project's impacts on non-native vegetation, developed areas, and disturbed habitat is substantial, and was never addressed in the FEIR/FEIS. This table shows that the project's construction will cause 43.65 acres of permanent disturbance, and 197.16 acres of "temporary" disturbance. It also reveals that these impacts were ignored in the FEIR/FEIS. This omission must be rectified through preparation of a Subsequent EIR/EIS. Most of these "temporary" disturbances will be long-lived if not permanent, because of the decades required to revegetate these thin and arid soils.

E. **Arroyo Toad – T**able S-1 reveals that the modified project will have permanent impacts on 2.46 acres, and "temporary" impacts on 44.23 acres, of occupied Arroyo Toad habitat. Neither of these impacts was ever disclosed, much less analyzed, in the FEIR/FEIS. The Table also reveals that the modified project will have permanent impacts on 3.49 acres, and temporary impacts on 0.01 acres, of suitable habitat for the Arroyo Toad within the Cleveland National Forest. *Neither* of these impacts was disclosed and discussed in the

FEIR/FEIS. Accordingly, these impacts must be addressed in a Subsequent EIR/EIS.

Furthermore, in 2009, the USFWS proposed a revised critical habitat for the Arroyo Toad which would designate critical habitat along the project route. 74 Fed.Reg. 52611-52664; PMR 3-20. If the proposed rule is adopted, the project would impact *over 45 acres of Arroyo Toad critical habitat*. PMR 3-20. Further, "an additional category of habitat impacts would require mitigation." *Id.* Despite the disclosure of this new and unquestionably significant project impact, the PMR dismisses the impact as insignificant, claiming the impact to *critical* habitat will be similar to the impact to occupied habitat. PMR 3-18 and 3-20 through 3-21. Its claim ignores settled law differentiating occupied habitat from critical habitat. While occupied habitat should be protected for the benefit of the species, critical habitat is "*essential* to the conservation of the species," and therefore requires "special management considerations." 16 U.S.C. §1532(5)(A)(I), emphasis added. It clear from the plain language of the Endangered Species Act that impacts to occupied habitat and critical habitat are not the same and therefore, the impact to critical habitat must be analyzed in the CEQA and NEPA review process.

F. **Vegetation –** The PMR reveals increased impacts to Sensitive Vegetation Communities. "Impacts to five vegetation subtypes . . . would be greater under the modified project than the [Final Environmentally Superior Southern Route ("FESSR")]." PMR 3-7. The PMR dismisses these increases as merely "temporary" and thus inconsequential, claiming there are no significant changes in impact to vegetation. *Id.* However, no evidence is offered to support that conclusion. To the contrary, it is clear that the impacts claimed to be "temporary" will be permanent, as thousands of acres of land will be permanently disturbed by removal of vegetation for the Powerlink's 3000-foot wide corridor and for its many construction and maintenance roads. The following photograph of vegetative clearing for the existing Southwest Powerlink is illustrative of this severe, permanent loss of vegetation:

Further, many of the increased impacts occur in already disturbed areas that require even greater care and protection than those areas not already in distress. To increase impacts to sensitive vegetation that is already in peril is clearly a significant impact that must be analyzed *during*, not *after*, the environmental review process.

G. **Mitigation Plans –** Despite numerous requests for this information from Conservation Groups and the USFWS,[9] the "Habitat Management Plan" and the "Scenery

[9] USFWS commented as follows: "The Wildlife Agencies do *not* think it is reasonable to postpone identification of commensurate mitigation lands until the time of project approval. The Final EIR/EIS should identify the specific location where impacts for each species and/or habitat would take place and the acreage of mitigation available for each potential mitigation site. Without this information, an assessment of the habitat quality and suitability of the proposed replacement habitat is not possible, which would prevent the determination of whether the proposed mitigation would function as claimed or intended." FEIR/FEIS, Responses to Comments, p. 3-341, emphasis added.

> Conservation Plan" have not even been drafted, much less approved. At most, SDG&E proposes only a plan to make a plan, not specific, enforceable mitigation as required by CEQA Guidelines sections 15126.4, 15146 and 15147 and the corresponding NEPA guidance. These mitigation plans should have been spelled out and included in the FEIR/FEIS for review by both the public and decision makers. Since they were not, the omitted mitigation measures should be completed and then evaluated for effectiveness in an SEIR/SEIS.

As a consequence of the major defects in the environmental review process, the Army Corps, as a coordinating agency, cannot rely on the FEIR/EIS for its approval of SDG&E's application. The Corps should wait until BLM determines whether to prepare a SEIR/EIS. If BLM determines that it will not prepare such further review, the Army Corps must undertake further NEPA review of the project prior to taking any action on the application.

IV. ENDANGERED SPECIES ACT

In a parallel context, the PMR also demonstrates the inadequacies of the Biological Opinion ("BiOp") required under the Endangered Species Act. The PMR presents a discussion of the Arroyo Toad and its habitat, conceding that the project will impact them. PMR 3-19 through 3-21. But the BiOp for the project includes *no such discussion*. BiOp, USFWS, January 2009, pp. 54-146. The purpose of a BiOp is to provide a comprehensive written analysis by the USFWS regarding a project's impacts on a listed species and its critical habitat. 16 U.S.C. 1536(b)(3)(A). The omission of the Arroyo Toad from the BiOp confirms that neither BLM nor the CPUC had the information it needed to make an informed decision regarding this project's impacts on listed species. This omission demonstrates that the BiOp is inadequate and that the Army Corps cannot rely on the BiOp for its approval of SDG&E's application.

CONCLUSION

For the foregoing reasons we request that the Army Corps disapprove SDG&E's applications for CWA section 404 permits for the Powerlink project. Should the Army Corps conduct further environmental review of these applications, we request notice so that we can participate fully in that review.

Thank you for your consideration of our comments. Please call me at 510-496-0600 if you have any questions about our position and this request.

Sincerely,

Stephan C. Volker
Attorney for Protect Our Communities Foundation, Backcountry Against Dumps, East County Community Action Coalition, and Donna Tisdale

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