

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

In the Matter of the Application of San Diego )  
Gas & Electric Company (U 902-E) for a )  
Certificate of Public Convenience and Necessity )  
for the Sunrise Powerlink Transmission Project )  
\_\_\_\_\_)

Application 06-08-010  
(Filed August 4, 2006)

**APPLICATION OF THE CENTER FOR BIOLOGICAL DIVERSITY, BACKCOUNTRY  
AGAINST DUMPS, THE PROTECT OUR COMMUNITIES FOUNDATION, EAST  
COUNTY COMMUNITY ACTION COALITION, and DONNA TISDALE FOR  
REHEARING OF THE SUNRISE POWERLINK PROJECT MODIFICATION REPORT  
PROJECT MEMORANDUM, SEPTEMBER 2010**

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## I. INTRODUCTION

We write on behalf of the Center for Biological Diversity (“CBD”), Backcountry Against Dumps (“BAD”), The Protect Our Communities Foundation (“POC”), East County Community Action Coalition (“ECCAC”), and Donna Tisdale (collectively, “Conservation Groups”) to apply for a rehearing of this Commission’s and the federal Bureau of Land Management’s (“BLM’s”) Sunrise Powerlink Project Modification Report Project Memorandum (“Memorandum”)<sup>1</sup> dated September 2010, pursuant to Public Utilities Code section 1731 and Rule 16.1 of this Commission’s Rules of Practice and Procedure (“CPUC Rules”). The grounds for this application are that the conclusions in the Memorandum are contrary to the California Environmental Quality Act (“CEQA”), Public Resources Code §§ 21000, *et seq.*

Under CEQA, this Commission was required to produce a subsequent or supplemental environmental impact report (“SEIR”) for the newly revised Sunrise Powerlink Project (“Project”), rather than merely approving the Project Modification Report (“PMR”) issued by San Diego Gas and Electric (“SDG&E”) on May 14, 2010. Since the Project and the Project’s context changed substantially after the certification of the Final Environmental Impact Report / Final Environmental Impact Statement (“Final EIR/EIS”), this Commission erroneously utilized the PMR as a CEQA environmental review document to determine that no further environmental review was necessary. Instead, this Commission was required by law to release an SEIR before re-approving the Project subsequent to its modifications.

This Commission is mandated by CEQA to produce an SEIR in three circumstances, all of which are present here. First, the PMR proposes substantial changes in the Project that will require major revisions of the previously approved Final EIR/EIS due to the presence of new significant environmental effects and a substantial increase in the severity of previously identified environmental effects. Second, there have been substantial changes in the

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<sup>1</sup>The Commission decision includes three documents: (1) a September 22, 2010 cover letter, (2) the Memorandum, and (3) a Worksheet Determination of NEPA Adequacy (“DNA”).

circumstances surrounding the Project that require major revisions to the Final EIR/EIS due to the involvement of new significant environmental effects and a substantial increase in the severity of previously identified environmental effects. Finally, there is new information that was not known at the time the Final EIR/EIS was certified showing that the Project will have additional significant environmental effects not discussed in the Final EIR/EIS and will cause the environmental effects previously examined to be more severe. The changes set forth in the PMR trigger all three of these circumstances and therefore require additional review under CEQA.

## **II. CONSERVATION GROUPS' APPLICATION FOR REHEARING IS PROPER**

Pursuant to Public Utilities Code section 1731(b)(1), “[a]fter any order or decision has been made by the commission, any party to the action . . . may apply for a rehearing in respect to any matters determined in the action.” *See also*, CPUC Rule 16.1 *et seq.* For purposes of filing an application for rehearing in a formal proceeding, a “party” includes anyone who has filed an “application, petition, or complaint,” a “protest or response to an application or petition,” or “comment[ed] in a rulemaking” for a proceeding. CPUC Rules 16.2 and 1.4. To be complete, an application for rehearing must “set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful or erroneous, and must make specific references to the record or law.” CPUC Rule 16.1(c); Pub.Util.Code § 1732. The purpose of an application for rehearing is to “alert the Commission to a legal error, so that the Commission may correct it expeditiously.” CPUC Rule 16.1(c).

Here, the Commission’s September 2010 Memorandum constitutes a “decision” by the Commission that is subject to rehearing under Public Utilities Code section 1731 and CPUC Rule 16.1. Conservation Groups’ application for rehearing responds to the Commission’s decision by explaining why it is contrary to CEQA, thus satisfying Public Utilities Code section 1732 and CPUC Rule 16.1(c). Furthermore, Conservation Groups are a “party” to the proceeding because they have participated throughout the administrative process, thereby

exhausting their remedies and establishing standing to apply for rehearing on the Commission's Memorandum. CPUC Rules 16.2 and 1.4.

**A. The PMR Memorandum Constitutes a Commission Decision Subject to Rehearing**

In its Memorandum, the Commission "presents the agency findings" and concludes that "no supplemental [CEQA or] NEPA document is required," and "public involvement and interagency review . . . was adequate for the modifications." Memorandum 1, 10. Public Utilities Code section 1731 allows for applications for rehearing "[a]fter any order or decision has been made." Here, the PMR Memorandum issued by the Commission is a decision subject to rehearing.

The Memorandum is a decision subject to rehearing under both the Public Utilities Code and the CPUC Rules. It presents the findings of the agency as required for Commission decisions under Public Utilities Code section 1705, which states that Commission decisions "shall contain . . . findings of fact and conclusions of law by the commission on all issues material to the order or decision."<sup>2</sup> The Memorandum specifically states that it "presents the agency findings." Memorandum 1. The Memorandum's inclusion of findings of fact and conclusions of law with regard to CEQA review clearly indicates that it is a Commission decision subject to rehearing.

Furthermore, the Commission's decision not to prepare a subsequent or supplemental EIR is a decision subject to the requirements of Public Utilities Code section 1731 and CPUC Rule 16.1. Courts have heard challenges to decisions not to prepare subsequent or supplemental environmental review documents in the past, confirming that a decision not to pursue further

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<sup>2</sup>As acknowledged in *California Motor Transport Co. v. Public Utilities Com'n*, "[i]t was apparently the purpose of the Legislature, like that of the sponsors, to make the requirement of findings govern application as well as complaint proceedings . . . There is no merit in the commission's contention that the requirement of findings was met by the ultimate finding of public convenience and necessity." (1963) 59 Cal.2d 270, 273. Like *California Motor Transport*, here section 1705 applies to the application for a Certificate of Public Convenience and Necessity and the issuance of the PMR Memorandum.

environmental review is still a decision subject to rehearing and review. *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357 (holding that the discovery that one of the streets in a project would encroach into wetlands to a greater extent than disclosed in the environmental impact report posed a significant effect which required further evaluation in a subsequent or supplemental environmental impact report prior to any project approval); *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065 (upholding an agency decision not to prepare a subsequent or supplemental EIR).

For all of the above reasons, the PMR Memorandum is a decision subject to rehearing that should have been included in the CPUC docket.

**B. Conservation Groups Have Standing to Apply for Rehearing**

Public Utilities Code section 1731 allows “any party to the action” to apply for rehearing. CPUC Rule 16.2 further defines the parties eligible to file applications for rehearing, which include those parties, like Conservation Groups, who have participated in the Commission’s proceedings. Here, Conservation Groups have standing to apply for rehearing based on their past involvement in the Commission’s proceedings and the PMR.

CBD has fully participated in the Commission’s prior proceedings regarding the Sunrise Powerlink Project and Conservation Groups have commented on the inadequacies of the PMR. Therefore, not only are Conservation Groups party to the action as required under Public Utilities Code section 1731, they have met the exhaustion requirements of CEQA as well.<sup>3</sup>

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<sup>3</sup>Conservation Groups exhausted their administrative remedies under CEQA with regard to the Commission’s PMR Memorandum. Conservation Groups are not required to raise word-for-word the issue being litigated, but rather, must effectively inform the decisionmaker of their concerns. Pub.Res.Code § 21177; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536; *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1750. There are no magic words that guarantee standing and Conservation Groups’ involvement brought the inadequacies of PMR and Final EIR/EIS to the attention of the decisionmaker, fulfilling CEQA’s exhaustion requirement.

Conservation Groups have standing to apply for rehearing of the Memorandum. On November 25, December 1, December 8, and December 15, 2008, CBD filed comments on the alternate decisions of Commissioners regarding the Certificate of Public Convenience and Necessity for the Project. Then, on January 23, 2009, CBD requested a rehearing for Decision 08-12-058, which granted a Certificate of Public Convenience and Necessity for the Project. One month later, CBD requested intervenor compensation for substantial contributions to Decision 08-12-058 and filed a reply in support of that request on April 7, 2009.

CBD has also submitted motions requesting judicial notice of the Federal Energy Regulatory Commission (“FERC”) decision and the California Independent System Operator Corporation (“CAISO”) decision, both in regard to rehearing of Decision 08-12-058. Those motions were submitted on March 26, 2009 (FERC), June 16, 2009 (FERC) and July 1, 2009 (CAISO). Furthermore, CBD has noticed numerous ex parte communications with the Commissioners, showing that Conservation Groups’ have standing to apply for rehearing.

Conservation Groups have also exhausted their remedies with regard to the PMR. On June 7, 2010, Conservation Groups BAD, POC, ECCAC and Donna Tisdale submitted comments on the May 14, 2010 PMR for the Project. *See* Declaration of Stephan C. Volker, Exhibit 1. Those comments specifically informed the Commission of the deficiencies of the PMR, thereby notifying the Commission of issues that must be remedied.

For the aforementioned reasons, Conservation Groups have thoroughly exhausted their administrative remedies pursuant to CEQA and have standing to apply for rehearing under Public Utilities Code section 1731 and CPUC Rule 16.1.

### **III. ARGUMENT**

#### **A. CEQA Requires Preparation of a Subsequent EIR**

CEQA accords the fullest possible protection to the environment within the reasonable scope of the statutory language. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259; 14 Cal. Code Regs. § 15003(f) (“Guidelines”). Therefore, this Commission “can and

must. . .scrupulously enforce all legislatively mandated CEQA requirements.” *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435. “Full compliance with the letter of CEQA is essential to the maintenance of its important public purpose. . . . Failure to comply with the CEQA procedures is necessarily prejudicial.” *Resource Defense Fund v. Local Agency Formation Commission* (1987) 191 Cal.App.3d 886, 897-98.

Where an agency has failed to proceed in the manner prescribed by CEQA because it has omitted essential environmental review, this informational void is presumed to be a “prejudicial abuse of discretion” under CEQA. *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1237. In this context, an agency’s abuse of discretion exists “regardless of whether [agency] compliance [with CEQA] would have resulted in a different outcome.” *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428. This is because an agency’s failure to disclose essential environmental information in the CEQA review process “results in a subversion of the purposes of CEQA.” *Rural Landowners Ass’n. v. City Council of Lodi* (1983) 43 Cal.App.3d 1012, 1023.

CEQA requires agencies to prepare an SEIR if “substantial changes are proposed in the project” or “substantial changes occur with respect to the circumstances under which the project is being undertaken” and either of these “will require major revisions in the environmental impact report.” CEQA § 21166.<sup>4</sup> An SEIR is also required where new information that could not have been previously known subsequently becomes available. *Id.*

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<sup>4</sup>It is important to note that there is a difference between a *subsequent* and a *supplemental* environmental impact report. A “[s]upplement to an EIR” is prepared rather than a “subsequent EIR” if a subsequent EIR would be required by Guidelines section 15162, but “[o]nly *minor* additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation.” Guidelines § 15163(a) (emphasis added). In this case, Conservation Groups contend that this Commission failed to prepare a subsequent EIR as required by Guidelines section 15162, since the PMR reveals *major* changes to the Project and to the discussion of its impacts. In the alternative, if this Commission determines that a subsequent EIR is not necessary, a supplemental EIR must be prepared. Thus, petitioners use the term “SEIR” to encompass both subsequent and supplemental EIRs.

The SEIR requirement is refined in Guidelines section 15162, which specifies that a subsequent EIR is required whenever there are substantial changes to a project or to surrounding circumstances that will cause new or substantially increased significant impacts to the environment.<sup>5</sup> As stated in the Guidelines, a subsequent EIR is required whenever one or more of the following conditions exist:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the Negative Declaration was adopted, shows any of the following:
  - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
  - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
  - (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
  - (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

Guidelines § 15162(a). In contrast, an addendum to an EIR is appropriate only if “some changes or additions [to the Project] are necessary but none of the conditions described in section 15162 .

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<sup>5</sup>A “[s]ignificant effect . . .’ effect means a substantial, or *potentially* substantial, adverse change in the environment.” CEQA § 21068 (emphasis added).

. . have occurred.” *Id.* § 15164(a). The changes to the Project set forth in the PMR are significant as shown below, and therefore an EIR addendum will not suffice.

In reviewing an agency’s decision not to prepare a supplemental or subsequent EIR, “the applicable standard of review is the ‘substantial evidence’ test.” *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1072. With regard to whether the agency proceeded “in the manner required by CEQA,” the court must “determine *de novo* whether the agency has employed the correct procedures, ‘scrupulously enforcing all legislatively mandated CEQA requirements.’” *Vineyard Area Citizens for Responsible Growth, supra*, 40 Cal.4th at 435.

In this case, the Commission did not study the Project’s new environmental impacts in an SEIR. Instead, the Commission summarily dismissed the Project changes, changed circumstances, and new information identified in the PMR as not causing or exacerbating significant environmental impacts. SDG&E attempted to sweep aside the severe environmental impacts associated with the new transmission line route in its Project Modification Report. Since SDG&E’s project modifications created new and additional environmental effects that “require major revisions” to the Project’s Final EIR/EIS, CEQA requires this Commission to prepare an SEIR before proceeding with the Project.<sup>6</sup> CEQA § 21166.

**1. The PMR Proposes Substantial Changes to the Project That Will Require Major Revisions to the Previously Approved Final EIR/EIS Due to New Significant Environmental Effects and a Substantial Increase in the Severity of Previously Identified Environmental Effects**

As seen in the PMR and this Commission’s Memorandum, the modified

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<sup>6</sup>Further, it is not now too late to require preparation of an SEIR. While the Commission already voted to approve the Final Southern Route (Decision D.08-12-058) on December 18, 2008, and recently approved the modified Project in its September 2010 Memorandum, it still must issue many more approvals before the Project can proceed. *Cf. Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1597. As disclosed on the Commission’s website for the Sunrise Powerlink Project, there are at least 22 more Notices to Proceed that the Commission must issue before the Project can be completed. *See* <http://www.cpuc.ca.gov/environment/info/aspn/sunrise/sunrise.htm>, attached as Exhibit 2 to Declaration of Stephan C. Volker.

Project makes substantial changes to the alignment of the Sunrise Powerlink Transmission Line, altering considerably the scope and impacts of all project-related activities. According to the Memorandum, additional environmental review is not required because the modified Project has less impact “overall,” with fewer structures, fewer new access roads, fewer wire stringing areas, fewer construction yards, and a smaller Suncrest Substation, even though there are more structures designated for helicopter construction and other new environmental effects that are swept aside. Memorandum 1-10. However, CEQA requires the preparation of an SEIR whenever “[s]ubstantial changes are proposed in the project which will require major revisions of the previous EIR . . . due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects,” not when “overall,” the project changes cause more new and increased environmental effects than decreased environmental effects. Guidelines § 15162(a)(1); CEQA § 21166(a).

The purpose behind the requirement of an SEIR is to explore environmental impacts not considered in the original environmental document. CEQA § 21166. As discussed below, the changes to the Project create numerous new and increased environmental effects that are clearly “significant” and not explored in the Final EIR/EIS, mandating further environmental review under CEQA. *Id.*; Guidelines § 15162(a)(1).

**a. Transmission Line Rerouting**

The PMR contains 44 proposed modification subunits for the approved Project that were not addressed in the Final EIR/EIS. Of these 44 modification units, 37 units shift the alignment of the transmission line and alter the placement of towers. *See* PMR Table S-2; DNA Table 1; *see generally* Memorandum Section 2. Some of these proposed modification units will shift the location of the approved transmission line well over 1,000 feet. For example, Modification Subunit 9 would shift the alignment approximately 2,400 feet to the north, where one of the transmission structures will impact surface artifact cultural resources. Memorandum 2-26, 2-28. Modification Subunit 15 would shift the alignment 4,650 feet to the south, where an additional

2.15 acres of sensitive chaparral vegetation community will be temporarily disturbed.

Memorandum 2-45. Modification Subunit 23 would shift the alignment 2,000 to 4,000 feet to the north, where two cultural resources not identified in the Final EIR/EIS would be impacted and an additional 3.25 acres of non-native vegetation, developed areas, and disturbed habitat will be temporarily disturbed. Memorandum 2-68, 2-69. Finally, Modification Subunit 25 would shift the alignment up to 4,300 feet east, where 1.13 acres of coastal and montane scrub habitat, an additional 0.22 acre of grasslands and meadows, and an additional 1.8 acres of non-native vegetation, developed areas, and disturbed habitat will be permanently disturbed, and where seven rare rush-like bristleweed plants will be permanently disturbed. Memorandum 2-73.

Despite these dramatic changes, BLM's DNA concludes that "[t]he proposed modifications generally follow the approved route . . . as defined in the Final EIR/EIS and would not substantially change the location of the approved project." DNA 3. BLM makes this claim because it views these changes as "minor" since "most" changes are within 1000 feet of the approved Project alignment. DNA 3, 5. This rationale would not support a determination not to prepare an SEIR under CEQA because it fails to address the relevant criteria under Guidelines section 15162(a)(1) and CEQA section 21166(a) as noted above. In any event, the Commission does not rely on this deficient and inappropriate rationale. Indeed, the Commission does not advance *any* comprehensive rationale for why the route changes do not require supplemental environmental review. Instead of considering the environmental effects associated with shifting the alignment of the approved Project as a whole, the Commission only evaluates the effects of each modification unit individually, as if each existed in isolation. *See* Memorandum Section 2. But CEQA requires consideration of this Project's *cumulative* effects. Guidelines § 15130. Further, the Commission made the exact same conclusory claim for each of the four Modification Subunits described above, asserting that "this modification would not result in a new significant impact or a substantial increase in the severity of a previously identified significant impact." Memorandum 2-26, 2-45, 2-67, 2-72. The Commission's conclusions are unfounded because the

Final EIR/EIS does not evaluate the full environmental effects of these substantial shifts in the Project's alignment, and neither does the PMR nor the Memorandum.

These environmental effects are only briefly touched on in the PMR. Even had the PMR addressed these effects adequately, such would not satisfy CEQA. A PMR is not a CEQA document. Therefore it does not remedy the inadequacies of the Final EIR/EIS. Instead, the Commission should have and must now prepare an SEIR, which is required whenever "substantial changes" are proposed that "will require major revisions of the previous EIR" due to "new significant environmental effects," such as those caused by the route changes. Guidelines § 15162(a)(1). CEQA case law makes this point abundantly clear. For example, the Court of Appeal ruled that the City of San Jose violated CEQA by failing to "consider whether a subsequent EIR or an addendum to the final EIR was necessary" when the city redesigned a project by changing its water supply without conducting additional environmental review. *City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, 1017. The court concluded that the city's redesign substantially changed the nature of the project by changing the sources of the water supply. *Id.* Similarly, in this case, the modified Project "substantially changed" the approved Project by shifting the Project's alignment thousands of feet in all directions. This Project redesign will cause "new significant environmental effects" because the modified alignment will affect new areas of land not previously studied in the Final EIR/EIS. The PMR mentions *some* of these new environmental effects (such as impacts on biological, cultural, and visual resources), but ignores additional effects (such as the new location and number of transmission towers and poles, construction yards, and work areas), since the alignment shifts are purportedly being implemented to mitigate effects *previously-identified* in the Final EIR/EIS. However, even if the alignment shifts are intended as mitigation, the new impacts they cause must still be analyzed. Therefore, CEQA requires this Commission to conduct a full and complete analysis of the *new* environmental effects associated with the Project's modified alignment in an SEIR.

**b. Helicopter Construction**

The PMR indicates and the Memorandum confirms that the modified Project will rely on helicopters to construct approximately 230 transmission towers along the Sunrise Powerlink Transmission Line. PMR 3-3; Memorandum 1-22. The Final EIR/EIS assumed the use of helicopters to construct portions of the approved Project, “although no details were provided regarding the numbers of helicopters or the precise locations where helicopter construction would be used.” Memorandum 1-22. While an increase in helicopter-based construction may decrease the land disturbed by construction of new access roads, increased helicopter use has its own impacts, many of them potentially significant. These impacts must be analyzed and described in a proper CEQA document. Despite these unique impacts, the Commission concludes, “[i]ncreased helicopter use would not result in a substantial increase of an identified environmental impact or the creation of new significant environmental impacts” since the use of helicopter construction was already assumed and analyzed in the Final EIR/EIS, and because “[i]ncreased helicopter construction . . . would result in an overall decrease in the number of construction related vehicles accessing roadways.” Memorandum 2-5, 2-24.

The Commission’s conclusion is erroneous because the Final EIR/EIS did not specifically analyze the environmental effects associated with helicopter construction by taking into consideration the huge portion of the Project that will be constructed by helicopters. The Guidelines require a lead agency to prepare an SEIR whenever “substantial changes” are proposed that “will require major revisions of the previous EIR” due to “new significant environmental effects or a substantial increase in the severity of previously identified significant effects.” Guidelines § 15162(a)(1). The use of helicopters to construct 230 transmission towers is clearly a “substantial change” that will cause “new [and increased] significant environmental effects” because the helicopter construction will trigger additional impacts on wildlife species, noise, and air emissions.

One of the major new impacts associated with vastly increased helicopter-based construction is the corresponding need for many more graded pads and structures to support the helicopters as they construct the Project. The PMR shows and the Memorandum confirms that the modified Project increased the number of tower staging access pads from 108 to 162, a *52.8 percent increase*. PMR Table S-1; Memorandum 2. Each of these 54 additional pads may pose significant adverse impacts on slope stability, soil erosion, sedimentation of water bodies, aesthetic values, recreational resources and wildlife habitat. This undeniably substantial increase in environmental impacts triggers the CEQA requirement for further environmental review in an SEIR.

In regard to wildlife, helicopter noise will significantly impact Peninsular bighorn sheep (“PBS”). As the Commission itself recognizes, “construction activities would result in direct or indirect loss of listed or sensitive wildlife or a direct loss of habitat for listed or sensitive wildlife.” Memorandum 1-23. The PMR indicates that much of the increased helicopter construction will be conducted on Link 1 and Link 2, both of which impact designated critical habitat for the PBS. PMR 3-3. However, the Final EIR/EIS does not fully evaluate the impacts that helicopter construction will have on the PBS, including the effect of noise on foraging and lambing, thereby requiring this Commission to prepare an SEIR under CEQA.

In addition, the increased helicopter construction will amplify the noise impacts associated with the Project. According to the Memorandum, the “substantial” noise increase would be “significant and could not be reduced to less than significant levels, even with the implementation of mitigation.” Memorandum 1-23. Further, SDG&E recently announced that it will be using the “world’s largest heavy-lifting helicopter.” “SDG&E to Bring 2,500-Gallon Firefighting Helicopter to San Diego Region”, *East Country Magazine*, May 25, 2010, available at <http://eastcountymagazine.org/node/3403>. The increased noise from this helicopter and similar large helicopters used to build the Project would adversely impact the PBS and create a potentially dramatic increase in noise pollution in nearby communities – especially those that are

located near any staging yard that will service the enormous helicopters. These serious noise impacts must be fully evaluated in a proper CEQA document that reflects the modified location and structure of the Project.

Finally, increased helicopter use will cause increased air emissions. The PMR provides no significant analysis of the impact to air emissions caused by shifting to use of the world's largest helicopter. It concludes without support that the approved Project and the modified Project "would result in similar air quality impacts." PMR 3-6. The Memorandum dismisses any increase in air emissions by stating, "other changes in construction methods have resulted in a substantial reduction in air emissions." Memorandum 1-24. This superficial balancing of the positive and negative impacts associated with the modified Project is not sufficient analysis under CEQA. For all of the reasons stated above, this Commission is required to prepare an SEIR to ensure proper environmental review of the modified Project.

**c. Static Line Marker Balls**

The PMR also states for the first time that SDG&E must install 1,345 red marker balls covering the majority of the Project route. These marker balls will be located on top of static lines, which are suspended between the transmission line towers. *See* PMR Table 2-2; Memorandum 1-6. The Project Description in the Final EIR/EIS briefly noted the *possibility* that federal agencies may require the use of marker balls for the Project, but the Final EIR/EIS did not discuss the actual location of such markers. *See* Final EIR/EIS § B.3.2.4; Memorandum 1-6. Despite this lack of specificity, the Final EIR/EIS identified *seventeen* "significant and unmitigable [visual] impacts," with characteristics that are inconsistent with the Project's environmental setting, caused by the introduction of new *industrial apparatuses*, not static line marker balls. *See* Final EIR/EIS § E.1.3, E.2.3, E.4.3; Memorandum 1-7, 1-8. Even still, this Commission concluded that "the definition of marker sphere locations does not substantially increase [the] severity and is consistent with the conclusions of the Final EIR/EIS." Memorandum 1-8.

The Commission's conclusion is unwarranted because the Final EIR/EIS does not consider the full environmental effects associated with the significant number of marker balls that must be installed along the Sunrise Powerlink Transmission Line. The Guidelines require a lead agency to prepare an SEIR whenever "substantial changes" are proposed that "will require major revisions of the previous EIR" due to "new significant environmental effects." Guidelines § 15162(a)(1). The use of 1,345 marker balls is clearly a "substantial change" that will cause "new significant environmental effects." The markers will make the Transmission Line significantly more noticeable, thereby posing far greater visual impacts than anticipated in the Final EIR/EIS. These impacts must be analyzed within the CEQA process and prior to Project approval.

**d. Ground Disturbances**

The modified Project will cause new and increased ground disturbances that were not fully evaluated in the Final EIR/EIS. These ground disturbances are a result of multiple changes to the Project that are seen throughout the PMR, such as new and modified construction yards (*see, e.g.*, Memorandum 2-23, 2-36, 2-70, 2-91, 2-100, and 2-110), more construction access pads (*see, e.g.*, Memorandum 2-60), changed temporary work areas (*see, e.g.*, Memorandum 2-47), 6 additional reconductoring replacement poles (Memorandum 2), and a new 10.58 -acre field office headquarters (Memorandum 2-90). PMR Table 3-2. The grading and vegetative clearing associated with these disturbances can cause harmful environmental effects, such as "long-term visible scarring" and other associated visual impacts. *See, e.g.*, Memorandum 2-51 (discussing the environmental effects of Modification Subunit 16). However, despite the significant changes to the Project, this Commission concludes that additional environmental review is not required because "[w]hile not all modification subunits would result in a decreased [] ground disturbance, overall, the modified project would result in a decrease in permanent and temporary ground disturbance." Memorandum 10.

The Commission's conclusion is flawed because it unlawfully conflates the negative and positive impacts of the modified Project by purportedly offsetting them against each other to yield a "net" positive effect.<sup>7</sup> CEQA does not permit the aggregation of positive and negative impacts into a simplistic net impact. Guidelines § 15126.2. As seen above, the PMR proposes multiple changes to the Project that are "substantial" due the increased acreage and changed location of ground disturbances that would result. The law requires subsequent environmental review if, as here, "substantial changes . . . will require major revisions of the previous EIR," even if some of these changes are positive. Guidelines § 15162(a)(1).

Among the most significant changes to the Project are the sweeping modifications to the size and location of construction yards. The Final EIR/EIS acknowledged that "the exact locations [of the yards] had not yet been determined," and that the yards would "likely" be sited near the center, endpoints, and several potential in-between locations along the Project. Memorandum 1-8. In contrast, the PMR introduces specific information on the size and location of 19 construction yards that were *not previously identified in the Final EIR/EIS*. *Id.* These newly identified yards would cause nearly 430 acres of ground disturbance.<sup>8</sup> *Id.* All of these yards will have significant environmental effects, including visible construction activities, equipment, and night lighting, disturbances to wildlife, construction noise, and toxic dust and exhaust air emissions. Memorandum 1-9. Since the full range of environmental effects associated with each construction yard was not evaluated in the Final EIR/EIS due to a lack of design specificity, CEQA requires that these significant environmental effects be evaluated in an SEIR. CEQA § 21166; Guidelines § 15162(a)(1).

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<sup>7</sup>Here, the effects of the changes proposed in the PMR are combined and discussed as one overall "minimal" effect. In other areas of the PMR, the impacts are broken up so as to minimize the overall effect. The impacts of the Project must be analyzed consistently throughout the CEQA process and the PMR. Without such consistency, a reasonable decisionmaker could not fully understand the impacts of the approved or modified Project.

<sup>8</sup>The PMR's claim that these impacts are "temporary" is unsupportable. These construction yards will displace or kill species and destroy habitat, impacts that are permanent and irreparable.

**e. Infrared Lighting**

The PMR presents new information on infrared lighting to be used on project towers that was not proposed and evaluated in the Final EIR/EIS. *See* PMR Table 2-1. This new lighting system was requested by the Department of the Navy and the United States Border Patrol to promote helicopter safety in the vicinity of the transmission line towers. Memorandum 1-2. However, this infrared lighting could cause “indirect impacts to birds and bats that may be attracted to common, nighttime flying insects clustered around the infrared lights.” Memorandum 1-3. Despite this reality, this Commission concludes that no additional environmental review is required because “[t]he addition of infrared lighting is *not expected* to result in a significant impact or to substantially increase the severity of effect to bird or bat species.” Memorandum 1-5 (emphasis added). The Commission formed this conclusion because it plans to require SDG&E to implement Mitigation Measure B-10a, which imposes the utilization of “collision-reducing techniques” in “highly utilized bird flight paths.” Memorandum 1-4.

The Commission’s assertion that an SEIR is not necessary is unfounded because infrared lighting is a new environmental effect associated with the Project that was not fully evaluated at the time of Project approval. Despite the Commission’s claim, the use of infrared lighting on towers is clearly a “substantial change” that will cause “new significant environmental effects” because the lighting system is a new project component that has potential to severely harm migrating bird and bat species. *See* Memorandum 1-3, 1-4; Guidelines § 15162(a)(1). The utilization of Mitigation Measure B-10a is not sufficient to avoid harm to bird and bat species because this Measure has *not been specifically evaluated in respect to infrared lighting*. The use of infrared lighting was a completely unknown aspect of the Project when the Final EIR/EIS was certified and the Project was approved, rendering the effectiveness of Mitigation Measure B-10a in avoiding harm to bird and bat species unknown. This violates CEQA Guidelines section 15126.4, which mandates that the lead agency “identify mitigation measures for each significant

environmental effect identified in the EIR” and directs that “[f]ormulation of mitigation measures should not be deferred until some future time.” *Id.* at subd. (a)(1)(A) and (B). “Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments” imposed at the time of the project approval, not future measures imposed later. *Id.* at subd. (a)(2).

Moreover, the environmental review for infrared lighting is still incomplete. The Memorandum specifically notes that the amount of infrared lighting needed for the Project is still unknown: “[The Federal Aviation Administration’s] recommendations on marking and lighting may vary based on terrain features, weather patterns, and geographic location, and, depending on the hazard potential, may result in a recommendation for higher standards for increased visibility of towers to ensure safety to air navigation.” Memorandum 1-2. This missing information must be gathered and presented to the public and decisionmakers in a proper CEQA environmental review document, not a non-CEQA report like the PMR.

**f. New Imperial Valley Substation Storage Facility**

The PMR states that the modified Project includes a new “storage facility on . . . land within the existing Imperial Valley Substation.” PMR S-2, 4-5, and 4-6. This facility would consist of a new steel building approximately 60 feet by 120 feet by 30 feet in the southeastern portion of the substation to provide onsite storage for construction parts, equipment, and supplies. Memorandum 2-6. Despite the massive size of this new facility, the Memorandum concludes that it “would not result in new significant effects” because “[i]mpacts resulting from the proposed modifications [to the Substation] would remain within the same context and similar or reduced intensity as those resulting from the FSSR.” Memorandum 2-6.

This conclusion is erroneous because the Final EIR/EIS does not mention the inclusion of the Imperial Valley Substation Storage Facility in the Project and certainly does not evaluate the environmental effects that the new facility will have on biological, visual, and cultural resources. The addition of a new steel building to the Project is clearly a “substantial change” that will

cause “new significant environmental effects.” Guidelines § 15162(a)(1). Although this newly proposed storage structure will be located near an existing substation, unlike the existing substation this storage structure consists of a large, bulky metal box that will reflect sunlight and *not* blend into the landscape, thereby dramatically degrading the visual resources of the area. The Memorandum admits that the existing structures are “not as massive” as the new storage facility, but dismisses the facility’s visual impacts because they “would repeat the characteristics of the existing substation facilities” and would “blend in.” Memorandum 2-6. Despite the close proximity of the new storage facility to other buildings, CEQA still requires this Commission to fully evaluate environmental effects of the new facility because it is a “substantial change” to the Project. Therefore, this Commission must prepare an SEIR to analyze the new significant effects associated with the Imperial Valley Substation Storage Facility.

**g. Wildfire Risk**

Finally, the changes imposed by the modified Project would substantially increase the risk of wildfires. The modified Project includes transmission line re-routes that are well outside of the approved Project’s right-of-way. Memorandum 1-25. The Fire and Fuels Management Analysis in the Final EIR/EIS relied on wildfire behavior modeling that used the *approved* right-of-way as the point of ignition for potential wildfires, rather than the new location of the modified Project. *Id.* Despite this obvious data difference, this Commission concluded that “the project modifications would not significantly increase the project’s fire-related impacts.” Memorandum 1-31.

The Commission’s conclusion is faulty because the Final EIR/EIS does not evaluate the wildfire risks associated with the location of the *modified* Project. Since the alignment of the modified Project substantially differs from the alignment of the approved Project, the modified Project poses “substantial changes” to the calculated wildfire risks. Guidelines § 15162(a)(1). The modified Project will pass through new locations that have unique fire risks that were not analyzed. For discussion of Project fireheds, *see* Memorandum 1-28 to 1-30. Therefore, this

Commission is required to prepare an SEIR that accurately analyzes the full wildfire risks associated with the location of the modified Project.

Further, the modified Project would put 1,409 homes at risk of wildfires, when the approved Project put only 1,382 homes at risk. Memorandum 7, 1-26. The Commission calculated this 2 percent increase by “reprocessing both the Fire Behavior Trend Model and the Wildfire Containment Conflict Model” used for the Final EIR/EIS. Memorandum 1-30. This new information should have been presented in an SEIR, not the non-CEQA undocketed Memorandum.

The public and decisionmakers are entitled to review any new information in a proper CEQA document to evaluate the modified Project’s impacts. *Mira Monte Homeowners Association, supra*, 165 Cal.App.3d at 364 (“[T]he failure to prepare a subsequent or supplemental EIR deprive[s] the public, who relied on the EIR's representations, of meaningful participation”).

**2. The Circumstances of the Project Have Substantially Changed, Requiring Major Revisions to the Final EIR/EIS Due to New Significant Environmental Effects and a Substantial Increase in the Severity of Previously Identified Environmental Effects**

As seen in the PMR and this Commission’s Memorandum, there are several circumstances surrounding the Project that have changed since this Commission approved the Final EIR/EIS. The United States Fish and Wildlife Service (“USFWS”) has proposed and designated revised critical habitat for three species with special status under the Endangered Species Act, including the arroyo toad, Peninsular bighorn sheep (“PBS”), and Quino checkerspot butterfly (“QCB”), and has reinstated the proposed rule to list the flat tailed horned lizard (“FTHL”) as a threatened species. *See* PMR 3-19 to 3-22. According to CEQA, a lead agency must prepare an SEIR whenever one of three triggering circumstances exist, including when “[s]ubstantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR . . . due to the involvement of new significant environmental effects or a substantial increase in the severity of previously

identified significant effects.” Guidelines § 15162(a)(2); CEQA § 21166(b). As discussed below, the circumstances surrounding the Project have changed so significantly that the Final EIR/EIS no longer accurately reflects the conditions surrounding the Project location. Therefore, CEQA mandates this Commission to conduct additional environmental review in the form of an SEIR before moving forward with the Project.

**a. New Critical Habitat for Arroyo Toad**

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 modified Project would permanently impact 2.46 acres and temporarily impact 44.23 acres of proposed critical habitat for the arroyo toad. Memorandum 1-16; PMR Table 3-7. Further, “an additional category of habitat impacts would require mitigation.” PMR 3-20. Despite the disclosure of this new and unquestionably significant Project impact, the Memorandum dismisses the impact on arroyo toad habitat as insignificant, claiming the impact to *critical* habitat will be similar to the impact to occupied habitat, which has already been analyzed in the Final EIR/EIS. Memorandum 1-13, 1-17; PMR 3-18, 3-20, 3-21.

This Commission conclusion is erroneous because it is contrary to CEQA. CEQA § 21166(b); Guidelines § 15162(a)(2). In *Mira Monte*, the Court of Appeal concluded that county planners erred by failing to prepare an SEIR when they later discovered that a project would encroach on wetlands. *Mira Monte Homeowners Association*, *supra*, 165 Cal.App.3d at 364-65. This discovery, which occurred after the county approved the project EIR, was considered “a change in circumstances” because “the significant impact upon the wetlands would be more severe than previously recognized by the EIR.” *Id.* at 364. Similarly, in this case, this Commission discovered that the modified Project would permanently and temporarily impact additional arroyo toad critical habitat due to the USFWS’ new proposed rule. *See* Memorandum 1-16. Therefore, based on *Mira Monte*, CEQA requires the Commission to prepare an SEIR to analyze the new environmental effects of the modified Project.

In addition, the Commission's conclusion that no further environmental review is required because the impacts on critical habitat are similar to previously-analyzed impacts on occupied habitat is contrary to 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 is clear from the plain language of the Endangered Species Act that impacts to occupied habitat and critical habitat are not the same and thus, the impact to critical habitat must be analyzed in the CEQA review process.

**b. New Critical Habitat for Peninsular Bighorn Sheep**

The critical habitat for PBS was also revised in 2009, but by adoption of a final rule rather than a proposed rule. 74 Fed.Reg. 17288-17365. The modified Project would permanently impact 5.41 acres and temporarily impact 1.41 acres of the 2009 designated critical habitat for the PBS. Memorandum 1-17; PMR Table 3-7. Despite the disclosure of this new and unquestionably significant impact of the modified Project, the Memorandum dismisses the impacts on PBS critical habitat as insignificant. Memorandum 1-17.

As with the arroyo toad, this conclusion is erroneous because it is contrary to CEQA. CEQA § 21166(b); Guidelines § 15162(a)(2); *Mira Monte Homeowners Association, supra*, 165 Cal.App.3d at 364-65. Here, changes to PBS critical habitat must be analyzed within the CEQA environmental review process. The public and decisionmakers are entitled to this information when evaluating the modified Project's impacts. *Mira Monte Homeowners Association, supra*, 165 Cal.App.3d at 364 ("[T]he failure to prepare a subsequent or supplemental EIR deprive[s] the public, who relied on the EIR's representations, of meaningful participation").

**c. New Critical Habitat for Quino Checkerspot Butterfly**

New critical habitat was designated for the QCB in 2009. 74 Fed.Reg. 28776-28862. The modified Project would permanently impact 4.45 acres and temporarily impact 1.59 acres of the 2009 designated critical habitat for the QCB. Memorandum 1-13. The PMR concludes and

the Commission's Memorandum confirms that despite this change, under "both the initial and revised critical habitat designations . . . the modified Project would have fewer impacts to critical habitat than the FESSR." PMR 3-19; Memorandum 1-17.

As with the PBS, the Commission conclusion is erroneous because it is contrary to CEQA. CEQA § 21166(b); Guidelines § 15162(a)(2); *Mira Monte Homeowners Association, supra*, 165 Cal.App.3d at 364-65. Here, changes to QCB critical habitat must be analyzed within the CEQA environmental review process. The public and decisionmakers are entitled to this information when evaluating the modified Project's impacts. *Mira Monte Homeowners Association, supra*, 165 Cal.App.3d at 364.

Further, the analysis of the modified Project's impacts on the QCB is incomplete because there is no discussion of the Project's impact to occupied habitat or to the QCB food plants in the Final EIR/EIS. PMR 3-14, 3-19. The PMR admits that occupied habitat was not adequately considered in the Final EIR/EIS. *Id.* This information is now presented in the PMR and the Memorandum, but these documents are not appropriate for presenting environmental impact analysis under CEQA for the first time. *See* Memorandum 16; PMR Table 3-7. All impacts to QCB habitat must be presented to the public and decisionmakers *during* the environmental review process, not in reports prepared *after* the certification of the Final EIR/EIS. *Mira Monte Homeowners Association, supra*, 165 Cal.App.3d at 364.

**d. Proposed Listing of Flat Tailed Horned Lizard**

Finally, subsequent to approval of the Final EIR/EIS, the USFWS reinstated the proposed rule to list the FTHL as a threatened species. PMR 3-21, 3-22. According to the Memorandum, the modified Project would permanently impact a total of 35.89 acres and temporarily impact a total of 131.75 acres of FTHL habitat. Memorandum 1-16; PMR Table 3-7. Despite these significant impacts to a potentially listed species, this Commission cursorily concluded that the modified Project does not create additional significant environmental effects, but failed to specifically examine the newly revealed impacts to this special status species. Memorandum

1-17.

As with the QCB, this Commission conclusion is faulty because it is contrary to CEQA. CEQA § 21166(b); Guidelines § 15162(a)(2); *Mira Monte Homeowners Association, supra*, 165 Cal.App.3d at 364-65. Here, the modified Project's impacts on FTHL habitat must be analyzed within the CEQA environmental review process because its potential listing as "threatened" constitutes a changed circumstance.

**3. There Is New Information That Was Not Known When the Final EIR/EIS Was Certified Showing That the Project Will Have Additional Significant Environmental Effects Not Discussed in the EIR and Will Cause the Environmental Effects Previously Examined to Be More Severe**

Under CEQA, an SEIR is required if new information not known when the previous EIR was certified shows that a project will have new significant impacts, that significant effects previously examined will be more severe, or that feasible mitigation measures are newly available. Guidelines § 15162(a)(3). In *Mira Monte*, for example, the court required preparation of an additional EIR where the respondent agency's staff had discovered that the original EIR underestimated the extent of wetlands on the project site. 165 Cal.App.3d at 364-366. The court reasoned that an additional EIR had to be prepared because the new information showed that previously examined significant effects, i.e. destruction of wetland habitat for rare plants, would be more severe. *Id.* In so holding, the court stressed the informational value of EIRs and the fact that failure to prepare an SEIR in that case deprived the public of "meaningful participation regarding the issue of wetland degradation." *Id.* at 365; *cf. Fort Mojave Tribe v. California Department of Health Services, supra*, 38 Cal.App.4th at 1597 (holding that the post-approval release of two geologic analyses of the project site did not require preparation of an SEIR because similar information had been analyzed in the original EIR and because there was no longer a pending discretionary approval for the project).

Here, substantial new information has come to light since the certification of the Final EIR/EIS, requiring major revisions to that document. The new information shows both that the Project would have new significant impacts and that many of its previously examined impacts

would be more severe. Guidelines § 15162(a)(3). The “new information” stems largely from “pre-construction surveys” completed after certification of the Final EIR/EIS and approval of the Project, as described in the Memorandum and discussed below. Memorandum 1. As explained below, this new information includes the number and type of cultural resource sites that would be impacted by the Project, recent surveys of the numerous special status species, a quantification of impacts to the occupied habitat of most of the special status species studied, a quantification of impacts to the waters of both California and the United States, disclosure of new impacts to special status and sensitive plants, and disclosure of new traffic and transportation impacts. *See* PMR Table S-1; DNA 23-25; Memorandum 1-4 to 1-10, 1-12; *cf., e.g.*, Final EIR/EIS section D.2 Biological Resources. This information should have been gathered prior to preparation of the Draft EIR/EIS and subjected to public review and comment. Because it was not, however, the Commission must now prepare an SEIR in order to effectuate CEQA’s goals of meaningful public participation and informed decisionmaking. CEQA §§ 21000, 21002.1, 21006; Guidelines § 15002.

**a. Cultural Resources**

As discussed in the Final EIR/EIS and as the Commission admits in the Memorandum, complete baseline cultural resources information and analysis of cultural resources impacts for the selected route were omitted from the Final EIR/EIS. Final EIR/EIS D.7-3 to D.75; Memorandum 9. While the Final EIR/EIS identified some of the cultural resources that might be impacted by the Project, it could not and did not specify the exact sites that would be impacted or analyze the significance of those impacts because the “exact locations of impacts for towers, lay downs, yards, and roads were not known or well-defined.” Memorandum 1-36. Thus, the cultural resources impacts could not have been identified or analyzed until after the final route and structure locations were selected when the PMR was issued more than 19 months after the Final EIR/EIS was released.

To remedy this gross inadequacy, and “as required by mitigation presented in the Final EIR/EIS, SDG&E has completed a 100 percent cultural resources survey of the [project selected in the Final EIR/EIS] and Modified Project.” *Id.* The survey reveals that there would be significant cultural resources impacts. Table S-1 of the PMR shows that the Project would potentially affect 147 Cultural Resources Sites, each of which is identified and categorized by impact later in the document. PMR 3-31 to 3-37. The Cultural Resources Attachment to section 2 of the Memorandum further describes the specific impact, including some significant impacts that would not be mitigated. Memorandum Cultural Resources Attachments 1 to 9.

Because this information was developed after issuance of the Final EIR/EIS and has not been incorporated into any subsequent CEQA document, the public has *never* had the opportunity to review and comment on the information that CEQA requires. As in *Mira Monte*, the public was deprived of “meaningful participation regarding [an issue involving significant impacts],” i.e. cultural resources here. 165 Cal.App.3d at 365. Just as certain wetland sites that the project would impact were not identified until after publication of the Final EIR in *Mira Monte*, none of the cultural resources sites that the Sunrise Project would impact were known and discussed until the PMR was released. *Id.* at 364-366. Thus, as the court required in *Mira Monte*, the Commission must prepare an SEIR here. *Id.*

**b. Special Status Wildlife Species**

The Guidelines require that an agency “shall find that a project may have a significant effect on the environment” if the project “has the potential to . . . substantially reduce the habitat of a fish or wildlife species . . . [or] substantially reduce the number or restrict the range of an endangered, rare or threatened species.” Guidelines § 15065(a); *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 381. Here, the PMR presents new information showing that the Project would impact numerous listed and special status wildlife species in substantial ways that were not identified or analyzed in the Final

EIR/EIS. Thus, because the new information depicts significant impacts not previously analyzed, the Commission must prepare an SEIR that addresses those impacts. Guidelines § 15162(a)(3).<sup>9</sup>

As both the PMR and Memorandum make clear, the Final EIR/EIS contained inadequate baseline data on and analysis of the impacts to special status wildlife species, partly due to the fact that the location and intensity of the impacts could not be known until the final project route and design were chosen. *See* PMR 3-14 to 3-25; Memorandum at 1-12 (“As stated in the Final EIR/EIS . . . 100 percent [biological] survey data for the alternatives was not available at the time the Final EIR/EIS was published.”). To remedy this substantial and unacceptable knowledge gap, a large number of biological resources surveys and studies were recently completed, long after preparation of the Final EIR/EIS in December 2008. For example, the PBS were not monitored until 2009 (PMR 1-5), the arroyo toad was not surveyed until April through June of 2009 (with further protocol surveys to be completed in 2010) (PMR 3-20), and riparian bird surveys were not completed until 2009 and 2010 (PMR 1-5, 3-24). *See generally* PMR 3-14 to 3-25; *see also* Memorandum 1-12 to 1-14. More recent habitat assessments and/or protocol surveys have also been done for the golden eagle (PMR 3-23), the QCB (PMR 3-14 to 3-19), barefoot banded gecko (PMR 3-21) and coastal California gnatcatcher (PMR 3-22 to 3-23). *See also* Memorandum 1-12 to 1-14. These studies developed substantial new information that bears directly on the Project’s significant biological impacts and must be circulated for public review and comment.

For one, the surveys revealed for the first time the severity of the Project’s impacts on numerous imperiled species. The post-EIR/EIS surveys of the coastal California gnatcatcher, for

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<sup>9</sup>The Memorandum attempts to excuse the Commission’s decision to not prepare an SEIR by asserting that the overall wildlife impacts of the Project as described in the PMR would be less than those for the originally selected project design. *See* Memorandum 6. This argument, however, is mere sophistry. It does not matter that the newly identified impacts would be greater for the original versus modified Project; what matters is that *new impacts* have been identified that the public *has not had a chance to review and address in their comments*. Guidelines § 15162(a)(3).

instance, identified “11 gnatcatcher pairs, a single adult male and dispersing juveniles” in the area impacted by the Project. PMR 3-23. Recent surveys also disclosed *double* the number of active golden eagle nests that would be impacted near the Project site, 9 instead of 4.<sup>10</sup> These revelations of increased impacts on vulnerable species constitute significant new and/or increased impacts that must be discussed in an SEIR and circulated for public review and comment.

Furthermore, the studies revealed for the first time the Project’s direct encroachment onto imperiled species’ occupied habitat – as opposed to just critical habitat – as clearly depicted in Table S-1 of the PMR. PMR S-3 to S-6; Memorandum 1-16 to 1-17. For example, the PMR reveals for the first time that the Project would have permanent impacts on 15.16 acres of habitat occupied by the QCB, 2.46 acres occupied by the arroyo toad, 10.84 acres occupied by the barefoot banded gecko, and 0.16 acres occupied by the coastal California gnatcatcher. *Id.* The PMR also reveals for the first time “temporary” impacts to a substantial acreage of occupied habitat for those species. *Id.* In addition, the PMR reveals that the Project would permanently impact 3.88 acres of coastal California gnatcatcher critical habitat, a *57 percent increase* over the 2.22 acres identified in the Final EIR/EIS. *Id.* Similarly, the PMR discloses additional PBS critical habitat that the Project would impact, 5.41 acres permanently and 1.41 acres temporarily. *Id.* These substantial impacts on the habitat of special status species were entirely omitted from the Final EIR/EIS and as such constitute newly identified significant impacts that must be addressed in an SEIR.

**c. Special Status Plants and Sensitive Vegetation**

As mentioned, the Guidelines require an agency to “find that a project may have a significant effect on the environment” if the project “has the potential to . . . threaten to eliminate a plant or animal community. . . [or] substantially reduce the number or restrict the range of an

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<sup>10</sup>Even if this increase is due solely to an expanded survey radius (Memorandum 1-18), it still constitutes information regarding potential impacts to the golden eagle that should have been included in the Final EIR/EIS and must still be circulated for public review and comment.

endangered, rare or threatened species.” Guidelines § 15065(a). Here, the PMR presents new information showing that the Project as modified would have greater impacts than previously disclosed to three special status plants and three types of sensitive vegetation. Thus, because the new information reveals significant impacts not previously analyzed, the Commission must prepare an SEIR that addresses those impacts.

With respect to special status plants, Table 3-6 of the PMR reveals that the modified Project would have greater impacts on the Jacumba milk-vetch, the Nuttall’s scrub oak and the Tecate tar plant. PMR 3-12. As for the Jacumba milk-vetch, the modified Project would impact 394 more acres of habitat than the 593 acres identified for the selected design in the Final EIR/EIS, a *66 percent increase*. *Id.* Similarly, the PMR shows *70 percent* and *30 percent increases* in the acreage of habitat impacted for the Nuttall’s scrub oak and Tecate tar plant, respectively. *Id.*

As for sensitive vegetation, Table 3-4 of the PMR shows that the modified Project would have far greater impacts on chaparral, coastal and montane scrubs and desert scrubs. PMR 3-9. Specifically, the modified Project would have permanent impacts on 2.10 acres of semi-desert, disturbed chaparral, and temporary impacts on 56.1 acres, as compared to a total of 9.03 acres as described in the Final EIR/EIS, a *six-fold* increase. *Id.* In terms of coastal and montane scrubs, the PMR reveals that the modified Project would impact 27 percent more acres of Diegan coastal sage scrub and *900 percent* more flat-topped buckwheat scrub acres than the originally approved Project. *Id.* Similarly, the modified Project would impact *46 percent* more acres of Sonoran creosote bush scrub than the originally approved Project. *Id.*

These constitute substantial increases in the severity of significant impacts. *See* Memorandum 6 (“The severity of the impact to special status plant species in the FESSR project area was determined to be significant in the Final EIR/EIS”). As such, they must be addressed in an SEIR. Guidelines § 15162(a)(3).

**d. Wetlands**

The PMR discloses an increase in permanent impacts to “herbaceous wetlands, freshwater, and streams (non-vegetated channel)” from 0.13 acres in the Final EIR/EIS to 1.1 acres resulting from the modified Project, an *eight-fold increase*. PMR S-3. Under established CEQA jurisprudence, this enormous increase in the impact area must be analyzed in an SEIR. *Mira Monte Homeowners Association, supra*, 165 Cal.App.3d at 361-366. In that case, the court held that discovery of a project’s unexpected encroachment onto approximately 0.25 acres of wetlands represented a significant adverse environmental impact, requiring preparation of additional environmental review. In reaching this conclusion, the court reiterated the California Department of Fish and Game’s position that

the filling of wetlands conflicted with California’s wetlands protection policy. The “policy for preservation of wetlands in perpetuity” promulgated by the State Resources Agency provides: “It is the basic policy of the Resources Agency that this Agency and its Departments, Boards and Commissions will not authorize or approve projects that fill or otherwise harm or destroy coastal, estuarine, or inland wetlands.”

*Id.* Here, the increase in wetlands impacts was nearly one acre – *four times* the increase ruled significant in *Mira Monte*. Here, just as in *Mira Monte*, the Project’s increase in wetland destruction violates the State Resources Agency’s policy of preserving wetlands in perpetuity. *See* California Resources Agency, August 23, 1993, “California Wetlands Conservation Policy,” *available at* <http://ceres.ca.gov/wetlands/policies/governor.html>. Therefore, the modified Project presents a new, significant impact to wetlands that must be analyzed in an SEIR.

**e. Waters of California and the United States**

As the Commission admits, “[s]pecific acreages of impacts to jurisdictional waters were not calculated for the [project] in the Final EIR/EIS because a jurisdictional delineation had not yet been conducted . . . [and] jurisdictional areas cannot be clearly defined until a final route . . . is selected.” Memorandum 1-15. Thus, it was not until the PMR was released that the impacts to the waters of California and the United States were revealed. According to the PMR, the Project would have permanent impacts to 3.86 acres of federal jurisdictional waters and

temporary impacts to 7.25 acres. PMR S-6. Similarly, the PMR discloses that the Project would have permanent impacts to 4.14 acres of California waters and temporary impacts to 7.87 acres. *Id.*

Because this information was developed after issuance of the Final EIR/EIS and has not been incorporated into any subsequent CEQA document, the public has *never* had the opportunity to review and comment on the information that CEQA requires. As in *Mira Monte*, here the public was deprived of “meaningful participation regarding [an issue involving significant impacts],” harm to the United States’ jurisdictional waters. 165 Cal.App.3d at 365. Just as certain wetland sites that the project would impact were not identified until after publication of the Final EIR in *Mira Monte*, none of the jurisdictional waters that the Sunrise Project would impact were known with certainty until the PMR was released. *Id.* at 364-366. Thus, as the court required in *Mira Monte*, the Commission must prepare an SEIR here. *Id.*

#### **f. Traffic and Transportation**

The PMR reveals that “there are three [new] locations . . . where traffic impacts would require mitigation via preparation and implementation of traffic control plans and related measures” and that “these three locations would operate with poor levels of service and vehicular delay *exceeding the significance standards* to cause a potentially significant traffic impact.” PMR 3-52 (emphasis added); *see also* Memorandum 1-22.

Further, while the Final EIR/EIS merely *speculated* regarding the sources of water SDG&E would use for Project construction, it was not until the PMR that SDG&E finally revealed the *actual* sources. PMR 3-61; Memorandum 6. Thus, the impacts of transporting that water to the Project were not fully defined and analyzed in the Final EIR/EIS. Indeed, the PMR discloses that additional truck transport “would be required to distribute the water to construction sites.” PMR 3-61. This would compound the traffic impacts described above, as well as worsening air pollution impacts.

All of these potentially significant impacts must now be fully analyzed and subjected to public review and comment through preparation of an SEIR. The Commission asserts in the Memorandum that “impacts from the modified project would be reduced and mitigated through traffic planning and control measures in the MMCRP and applicable local regulations.” Memorandum 2-5. However, there is no analysis anywhere in the Memorandum of how the mitigation measures identified in the Final EIR/EIS would translate to the newly identified impacts. Without such an analysis, there is no substantial evidence to support the Commission’s determination that the new traffic impacts would be mitigated to an insignificant level and would therefore not require preparation of an SEIR.

**B. Conservation Groups’ Application for Rehearing Bolsters and Relates to CBD’s Application for Rehearing of Decision D.08-12-058 and Its January 23, 2009 Petition for Review of That Decision in the California Supreme Court**

On January 23, 2009, CBD filed its Application for Rehearing with the CPUC and its Petition for Review with the California Supreme Court (collectively, “January 23 filings”). Conservation Groups’ Application for Rehearing is related to and provides additional support for the arguments made by CBD in its January 23 filings.

In its January 23 filings, CBD argued that the Commission’s Decision D.08-12-058 on the Certificate of Public Convenience and Necessity for the Project violated CEQA in a number of respects. The January 23 filings addressed the Commission’s failure to consider the benefits to Greenhouse Gas (“GHG”) emissions of requiring renewable energy transmission as a condition of the Project and to mitigate the Project’s impacts through such a condition. The January 23 filings further argue that the Final EIR/EIS, and therefore the Commission, failed to analyze certain alternatives and failed to adopt other alternatives that were analyzed and deemed to be environmentally superior to the chosen route. The January 23 filings also assert that the Final EIR/EIS contains inadequate responses to comments and an inadequate Statement of Overriding Considerations. For all of these reasons, CBD requested rehearing of D.08-12-058 before the Commission and review by the California Supreme Court.

Conservation Groups' Application addresses the significant environmental impacts of the changes to the Project set forth in the PMR. While CBD was not aware of these changes at the time of its filings, many of the issues discussed in the current Application relate to the January 23 filing. At that time there had been no guarantee of renewable energy sources supplying the Project, a guarantee that would significantly lessen the impacts of the Project. The PMR also makes no guarantee of renewable energy use. Although Conservation Groups' Application primarily addresses the changes to the Project presented in the PMR, their previous criticism of the failure to condition the Project on a clean energy guarantee still stands, and still has many of the same impacts discussed in the January 23 filings. "The PMR did not recalculate the air emissions for the modified project." Memorandum 1-33.

The transmission line reroute discussed in Conservation Groups' Application relates to the discussion of alternatives in the January 23 filings. The January 23 filings discuss the four<sup>11</sup> environmentally superior alternatives that the Commission failed to adopt and for which the discussion in the Commission's Statement of Overriding Considerations was inadequate. CBD Application for Rehearing, January 23, 2009, pp. 13-18; CBD Petition for Review, January 23, 2009, pp. 28-37. The PMR's inclusion of new analysis should have been provided all along. By its decision to approve the PMR – essentially adopting an entirely new Project outside of the CEQA process – the Commission admits that it has full discretion to adopt conditions subsequent that avoid needless environmental harm. Therefore, the Commission erred in refusing to condition the Project on a clean energy guarantee, as CBD previously pointed out. CBD Application for Rehearing, January 23, 2009, pp. 3-10; CBD Petition for Review, January 23, 2009, pp. 19-28.

Conservation Groups' Application for Rehearing buttresses the arguments presented by CBD in its January 23 filings. The Commission's preparation of a PMR admits CBD's contention that the prior environmental review was not adequate. No additional report, such as

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<sup>11</sup>Three listed alternatives and no project alternative.

the PMR, would have been necessary if the initial review had been sufficient. Furthermore, the PMR, which is not a CEQA document, does nothing to remedy the inadequacies of the Final EIR/EIS, as discussed in the January 23 filings. The changes to the Project set forth in the PMR only further confirm CBD's point that the Project's environmental mitigations were inadequate as approved, and that feasible alternatives which avoided the Project's significant impacts should have been selected instead, as CEQA requires.

#### IV. CONCLUSION

For the foregoing reasons, Center for Biological Diversity, Backcountry Against Dumps, The Protect Our Communities Foundation, East County Community Action Coalition, and Donna Tisdale respectfully request a rehearing of this Commission's September 2010 Project Modification Report Determination Memorandum decision and ask that this Commission require the environmental review necessary under CEQA to address the changes set forth in the PMR.

Dated: October 22, 2010

Respectfully submitted,

By:

  
STEPHAN C. VOLKER

Attorney for the Center for Biological  
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County Community Action Coalition, and  
Donna Tisdale

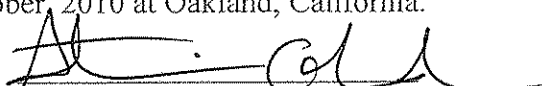
## CERTIFICATE OF SERVICE

I hereby certify that I have on this 22 day of October, 2010, served a copy of the  
**APPLICATION OF THE CENTER FOR BIOLOGICAL DIVERSITY, BACKCOUNTRY  
AGAINST DUMPS, THE PROTECT OUR COMMUNITIES FOUNDATION, EAST  
COUNTY COMMUNITY ACTION COALITION, and DONNA TISDALE FOR  
REHEARING OF THE SUNRISE POWERLINK PROJECT MODIFICATION REPORT  
PROJECT MEMORANDUM, SEPTEMBER 2010**

on each party named in the official service list for Application 06-08-010 by electronic service,  
and by U.S. mail for those parties who have not provided an electronic mail address.

Copies were also sent via United States Postal Service to Commissioners Peevey,  
Grueneich, Bohn, Simon, and Ryan and Administrative Law Judge Veith.

Executed this 22 day of October, 2010 at Oakland, California.

  
Stephanie L. Abrahams

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