



**TABLE OF CONTENTS**

NOTICE OF APPEAL..... 1

REQUESTED RELIEF..... 4

REQUEST FOR STAY..... 5

STATEMENT OF REASONS..... 6

    I.    INTRODUCTION..... 6

    II.   BACKGROUND..... 9

    III.  THE SUNRISE POWERLINK PROJECT VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT, AND A SUPPLEMENTAL EIS SHOULD BE PREPARED... 11

        A.    The Substantial Changes to the Project and Surrounding Circumstances Require Preparation of a Supplemental EIS. .... 12

            1.    Changes to Project Alignment..... 12

            2.    Increased Helicopter Use.. .... 16

            3.    Increased Impacts to Jurisdictional Waters and Riparian Conservation Areas.. .... 17

            4.    Increased Impacts to Special Status Species..... 18

                a.    Special Status Animal Species.. .... 18

                    i.    Arroyo Toad..... 18

                    ii.   Golden Eagle. .... 19

                    iii.  Bald Eagle. .... 20

                b.    Sensitive Vegetation Communities. .... 20

                c.    Special Status Plant Species..... 21

            5.    Increased Impacts to Cultural Resources.. .... 21

            6.    Increased Visual Impacts... .... 22

            7.    Impacts of Infrared Lighting. .... 23

8.	Temporary Work Areas’ Extensive Cut and Fill Areas. ....	24
9.	Additional Construction Yard. ....	25
10.	Increased Size of Access Pads. ....	25
11.	Giant Helicopter Use. ....	25
12.	Conclusion. ....	26
B.	To Further the Purpose of NEPA, the Forest Service Should Have Prepared a Supplemental EIS Rectifying on the Extensive Inadequacies and Informational Gaps of the Original FEIS. ....	26
1.	The FEIS Prepared for the Project is Inadequate. ....	27
a.	The FEIS Does Not Clearly and Concisely Describe and Analyze the Selected Route. ....	27
b.	The FEIS Fails to Adequately Address the Impacts of the Project. ....	30
i.	Growth Inducing Impacts. ....	30
ii.	Fire. ....	32
iii.	Biological Impacts. ....	33
iv.	Climate Change. ....	34
v.	Viewsheds. ....	35
vi.	Wilderness and Recreational Resources. ....	36
vii.	Increased Public Access. ....	36
c.	The FEIS Fails to Consider the Cumulative Impacts of the Project. ....	37
d.	The FEIS Fails to Consider a Reasonable Range of Alternative. ....	40
2.	The Project’s True Number of Significant Impacts Was Not Disclosed in the FEIS. ....	41
3.	The PMR Reveals Substantial Gaps in the FEIS. ....	43

IV.	THE APPROVAL PROCESS FOR THE SUNRISE POWERLINK PROJECT VIOLATED THE NATIONAL FOREST MANAGEMENT ACT.....	44
V.	THE SUNRISE POWERLINK PROJECT IS INCONSISTENT WITH THE CLEVELAND NATIONAL FOREST LAND MANAGEMENT PLAN.....	46
A.	The Project Conflicts with the Fire Prevention Standards of the Forest Plan.....	46
B.	The Project Conflicts with the Land-Use Zoning Designation of the Forest Plan..	51
C.	The Project Conflicts with the Visual Resource Standards of the Forest Plan .....	53
D.	The Project Conflicts with the Special Use Standards of the Forest Plan.....	55
E.	The Project Conflicts with Riparian Conservation Area Standards.....	56
F.	The Project Conflicts with the Forest-Specific Design Criteria..	57
G.	The Project Conflicts with Forest Plan Species Protection Standards.....	58
VI.	THE SUNRISE POWERLINK PROJECT IS INCONSISTENT WITH THE FEDERAL LAND POLICY AND MANAGEMENT ACT.....	59
VII.	THE FOREST SERVICE’S APPROVAL OF THE PERMIT VIOLATES ESA AND THE BALD AND GOLDEN EAGLE PROTECTION ACT.....	60
	<u>CONCLUSION</u> .....	62

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Baykeeper v. U.S. Army Corps of Engineers</i> 36 Env. L. Rep. 20,202, 2006 WL 2711547 (E.D.Cal. 2006). . . . .	38
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*Mira Monte Homeowners Assn. v. County of Ventura*  
(1985) 165 Cal.App.3d 357. . . . . 17

**STATUTES**

Code of Federal Regulations

Title 36, Park Forests and Public Property

§ 215.10(b).	5
§ 215.14.	1
§ 219.1.	44
§ 219.2.	44
§ 219.7.	44
§ 219.8.	44
§ 219.9.	44
§ 219.11.	44
§ 219.13.	45

Title 40, Protection of Environment

§ 1500.1.	26
§ 1500.2(b).	27
§ 1500.4(e).	27
§ 1501.4.	26
§ 1502.1.	27, 30
§ 1502.2(a).	27
§ 1502.8.	27
§ 1502.9(c).	11, 27
§ 1502.10.	27
§ 1502.14.	40
§ 1508.7.	39
§ 1508.8.	30
§ 1508.25.	30, 39

United States Code

Title 16, Conservation

§ 470 <i>et seq.</i> (NHPA).	5
§ 1521 <i>et seq.</i> (ESA).	<i>passim</i>
§ 1600 <i>et seq.</i> (NFMA).	<i>passim</i>
§ 1600(6).	44
§ 1602.	44
§ 1604.	44
§ 1604(i) (National Forest Management Act).	<i>passim</i>

Title 42, The Public Health and Welfare	
§ 4321 <i>et seq.</i> (NEPA).....	<i>passim</i>
§ 4332.....	40
§ 4332(2)(C).....	26

Title 43, Public Lands	
§ 1701 <i>et seq.</i> (FLPMA).....	<i>passim</i>
§ 1761.....	5
§ 1761(a)(4).....	59
§ 1763.....	60
§ 1764.....	59
§ 1765.....	60
§ 1765(a)(ii).....	59

OTHER

Forest Plan

Part 2, Cleveland National Forest Strategy	
Page 4 (Table 2.2.3).....	51
Page 7.....	50, 51
Page 8.....	51
Page 68 (Design Criteria Standards S5, S9, S12, and S13).....	57, 58
Page 83 <i>et seq.</i> (Appendix B).....	46, 47
Page 83.....	53
Page 87.....	58
Page 89.....	58
Page 95.....	57
Page 105.....	53
Page 112.....	48, 55, 56
Page 116.....	46
Part 3, Design Criteria for Southern California National Forests	
Page 11 (Riparian Conservation Area Standard S47).....	56

## LIST OF DOCUMENTS CITED IN APPEAL

The following documents are cited in this appeal, yet are too voluminous to include as email attachments. Appellants therefore provide below the web addresses for the documents and specifically incorporate them by reference into the present appeal. All other documents referred to in this appeal are provided as exhibits hereto.

1. Bill Powers, *San Diego Smart Energy 2020: The 21<sup>st</sup> Century Alternative*, October 2007:  
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4. Final Project Modification Report, SDG&E:  
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5. Programmatic Environmental Impact Statement for the West-Wide Energy Corridor, BLM and USFS:  
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6. Decision Granting a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project, Decision 08-12-058:  
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8. Phase 1 Direct Testimony in the CPUC of Joseph W. Mitchell, PhD. presented by the Mussey Grade Road Alliance Fire Analysis:  
[http://www.mbartek.com/cpucspl/MGRA\\_Mbar\\_SPL\\_TESTIMONY.pdf](http://www.mbartek.com/cpucspl/MGRA_Mbar_SPL_TESTIMONY.pdf)
  
9. Power Lines and Catastrophic Wildland Fire in Southern California, Powerpoint presentation by Joseph W. Mitchell, Ph.D:  
[http://www.mbartek.com/cpucspl/cpuc\\_index.html](http://www.mbartek.com/cpucspl/cpuc_index.html)

**NOTICE OF APPEAL**  
2002 (36 C.F.R. Part 215)

On July 9, 2010, Forest Supervisor William Metz issued a Record of Decision (“ROD”) for the Sunrise Powerlink Project (the “Project” or “Powerlink”) proposed by San Diego Gas & Electric (“SDG&E”), approving the construction, operation and maintenance of the Sunrise Powerlink within the Cleveland National Forest (“CNF” or “Forest”). Notice of this decision was published in the *San Diego Union Tribune* on July 13, 2010, within 45 days of this appeal.

Notice is hereby given pursuant to 36 C.F.R. § 215.14 that The Protect Our Communities Foundation, Backcountry Against Dumps, East County Community Action Coalition and Donna Tisdale (collectively referred to herein as “Appellants”) appeal to the Regional Forester, USDA Forest Service, from the Forest Supervisor’s ROD purporting to approve a Special Use Permit for construction, operation and maintenance of the Project on CNF lands on the grounds that this Project violates the National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*) (“NEPA”), the National Forest Management Act (16 U.S.C. § 1600 *et seq.*) (“NFMA”), the Cleveland National Forest Land Management Plan (“CNFLMP” or “Forest Plan”), the Federal Land Policy and Management Act (43 U.S.C. § 1701 *et seq.*) (“FLPMA”), and the Endangered Species Act (16 U.S.C. § 1521 *et seq.*) (“ESA”).

The Sunrise Powerlink Project directly, significantly and adversely affects Appellants. Appellants and their members enjoy the outstanding scenic, biologic, geologic and cultural resources of the Cleveland National Forest. Appellants utilize the Forest to study nature, view wildlife, recreate, hike, and meditate, in addition to other activities. The Forest is presently mostly undeveloped and serves as a scenic area for hiking, photography and wildlife study, as well as habitat for endangered and threatened species. The location of the Project across CNF

lands will cause substantial harm to Forest resources. Appellants have actively engaged in the Forest Service decisionmaking process through the submission of comment letters and requests for public hearings. A brief description of each of the Appellants follows. The Appellants may be contacted through their undersigned counsel, whose name, address and phone number appear on the cover page of this Notice of Appeal.

Appellant The Protect Out Communities Foundation (“POC”) is a non-profit organization dedicated to the promotion of a safe, reliable, economical, renewable and environmentally responsible energy future for San Diego County. POC’s members use the affected lands for aesthetic, scientific, historic, cultural, recreational and spiritual enjoyment. Approval of the Project threatens the use and enjoyment of these public resources by POC’s members.

Appellant Backcountry Against Dumps (“BAD”) is a community organization comprising many individuals and families residing in East San Diego County who are directly affected by the Forest Service’s land use and resource planning and management of the CNF because that is where they live, work and recreate. Backcountry Against Dumps and its members are vitally interested in maintaining and enhancing the ecological integrity, scenic beauty, wildlife, recreational amenities, watershed values and groundwater resources of San Diego County.

Appellants The East County Community Action Coalition (“ECCAC”) is a coalition of community groups, individuals and organizations in East San Diego County with a mission of protecting and enhancing the quality of life of residents in East San Diego County by promoting coordinated community action. ECCAC’s members use the Forest for aesthetic, scientific, historic, cultural, recreational and spiritual enjoyment. Approval of the Project threatens to harm the use and enjoyment of these public resources by ECCAC’s members as well as the public at large.

Appellant Donna Tisdale lives on Morningstar Ranch, located two miles west of Tierra Del Sol Road in Boulevard, California. Her residence and ranch rely exclusively on well water. She is an active member of multiple community groups, including co-appellants BAD, POC, and ECCAC, and is a sitting member of the County of San Diego's Boulevard Planning Group. Donna Tisdale advocates for the preservation of rural areas of Southern California and was featured on the front page of the *Washington Post* as a voice against the Powerlink Project. The Project will adversely affect Donna Tisdale's interests by introducing industrial development into the McCain Valley and surrounding areas including the Forest, thereby harming her use and enjoyment of the public natural resources in the area including the Forest. She has spoken at public meetings related to the Powerlink Project and authored multiple letters opposing the Project on behalf of community groups and herself and submitted them to the Forest Service and other reviewing agencies.

The quality of the air and water and the ecological health of the San Diego backcountry, including CNF, directly embodies the recreational, aesthetic, scientific, cultural and conservation interests of Appellants and their members. Appellants' rural communities and homes abutting CNF land face a significant fire threat and a risk that firefighters, particularly retardant tankers, spotter planes and water dropping helicopters, will justifiably refuse to fight fires near their homes due to their proximity to the dangerous powerlines of the Sunrise Powerlink. Further, appellants are harmed by both the potential increase in SDG&E rates and the possibility of cancellation of fire insurance policies due to the new fire risks and increased rates.

Unless this appeal is granted, Appellants' interests will be adversely affected by the Forest Service's failure to comply with federal statutory and regulatory requirements for adequate environmental review. Appellants and their members are beneficially interested in the Forest

Service's compliance with these laws and submitted numerous letters to the Forest Service during its review of the Project. Each Appellant also has an organizational interest in providing its members and the public with the information that NEPA requires the Forest Service to compile and to disclose in a proper environmental review of SDG&E's Sunrise Powerlink Project. These interests of Appellants and their members have been adversely affected by the Forest Service's failure to comply with NEPA and other federal laws whose violation is documented herein.

### **REQUESTED RELIEF**

Appellants request a decision granting this appeal and setting aside the Forest Service's approval of the Project pending rectification of the errors and omissions noted herein. In particular, Appellants request that the Forest Supervisor be directed to:

- (1) set aside his July 9, 2010 decision to approve SDG&E's Special Use Authorization ("Permit") for the Sunrise Powerlink Transmission Line Project;
- (2) assure compliance with the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.*, by preparing a supplemental environmental impact statement ("SEIS") that (1) addresses the threshold question whether the Project approvals should be granted at all, (2) considers a reasonable range of alternatives including undergrounding of transmission lines and alternative routes, (3) cures the informational voids, erroneous assumptions, and factual errors of the FEIS that are identified in this Statement of Reasons, and (4) analyzes the impacts of the Project caused by changed circumstances and project modifications;
- (3) uphold the standards in the National Forest Management Act, 16 U.S.C. §1600 *et seq.*, in the respects set forth below, including protection of biological diversity, preservation of the roadless area characteristics of the CNF, utilization of complete and accurate plant and

wildlife surveys in accordance with applicable protocols required by law, and protection of significant scenic, recreational and cultural resources;

(4) comply with the CNFLMP in the respects set forth below;

(5) comply with the Federal Land Policy and Management Act , 43 U.S.C. § 1701 *et seq.*, in the respects set forth below;

(6) comply with Endangered Species Act, 16 U.S.C. § 1521 *et seq.*, by providing an adequate and timely biological assessment and biological opinion to assure proper consultation with the U.S. Fish and Wildlife Service as required under section 7 of the Endangered Species Act;

(7) conduct the essential reviews required by NEPA, NFMA, CNFLMP, FLPMA, ESA, and the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (“NHPA”) to assess the potential adverse impacts of the Project on significant environmental and cultural resources as necessary to ensure that approval of the Project is in the “public interest” as required by section 501 of the Federal Land Policy and Management Act, 43 U.S.C. §1761.

A detailed explication of the grounds for this appeal of the Forest Supervisor’s approval of the Project appears in the accompanying Statement of Reasons.

### **REQUEST FOR STAY**

In accordance with 36 C.F.R. section 215.10(b), Appellants request a stay, as required by this regulation, during this appeal and any ensuing court review, of the Forest Service’s implementation of the Sunrise Powerlink Project. Specifically, Appellants request that the Forest Service stay all approvals and activities that implement this Project, including the awarding of any contracts and any ground or vegetation disturbing activities including grading and

construction of any access roads, helicopter pads, transmission lines, staging areas, and related resource-disturbing actions, pending final disposition of this appeal and any ensuing litigation.

Implementation of the Project would cause significant environmental harm that was never adequately disclosed in the FEIS nor otherwise mitigated, contrary to NEPA, NFMA, CNFLMP, and the ESA, as discussed below. The Project's proposed clearing of vegetation, grading of roads, construction of pads for helicopters, erection of electrical transmission lines and discharge of air and water pollutants, and the resulting fragmentation of wildlife habitat, watershed degradation, soil erosion and loss of vegetation, would significantly increase the risk of wildfire, harm water quality, and destroy habitat connectivity and refuges essential to many sensitive species within the project area, in addition to other impacts.

For the foregoing reasons, implementing the Project while this appeal and any ensuing litigation is pending could moot proper resolution of the meritorious issues raised by Appellants, and cause irreparable harm to public health and safety, the natural and cultural environment and the public interest. Therefore this request for stay should be granted.

## **STATEMENT OF REASONS**

### **I. INTRODUCTION**

Although the Project would cause profound harm to CNF resources, the environmental review for the Project treated the CNF as an afterthought. The vast majority of attention during preparation of the FEIS by the Bureau of Land Management ("BLM") was focused on northern route alternatives, including the proposed, but ultimately rejected, route. The southern route that *was* ultimately chosen (hereinafter the "selected route") received minimal analysis and review because SDG&E and BLM believed that selection of a northern route was a foregone conclusion.

Indeed, SDG&E misled regulators and the public by stating that southern alternatives were infeasible and was later fined by the California Public Utilities Commission (“CPUC”) for its misrepresentations.

But then, following years of debate focused on the northern route and its plan to build a major transmission line through the heart of Anza-Borrego Desert State Park, California’s largest state park, political opposition to the Project reached a boiling point. At the last minute, Governor Schwarzenegger and the CPUC decided to avoid the destructive consequences – both environmental and political – of bisecting Anza-Borrego by selecting the inadequately studied “Environmentally Superior Southern Route,” which through untold permutations became the selected route. Staff at the Bureau of Land Management (“BLM”) and the CPUC were caught off guard by this dramatic and completely unexpected change in the Project’s routing. As a result, the analysis and disclosure of environmental impacts of the Powerlink along the southern route was cursory at best and, to the extent that environmental review occurred, it was conducted haphazardly and at the last minute to justify this highly political change in course. Further, review of the Project’s effects on endangered species under the ESA was rushed and therefore lacked the specific information required by that act. Special landscapes, habitats, and communities in one area, however, must not be sacrificed to protect those in another.

A careful review of the Sunrise Powerlink FEIS reveals that the document contains nowhere near the necessary level of disclosure and analysis of impacts from the Project on resources of CNF. A review of the Powerlink FEIS, the CNFLMP and other related documents also shows that the Powerlink is patently inconsistent with several elements of the Forest Plan. Yet despite these glaring conflicts, at no point does the FEIS specifically articulate a proposed and necessary amendment to the Forest Plan or adequately analyze and present the specific effects on

the environment that would result from such an amendment. The Powerlink FEIS contains no overarching systematic analysis of the many conflicts between the Project and the Forest Plan. Instead, mention of Forest Plan conflicts are scattered and buried in sections of the FEIS addressing various possible Project alternatives, information is inaccurate or unavailable, and analysis is arbitrarily provided in one section while omitted in others. None of these problems were remedied in SDG&E's Project Modification Report ("PMR") or the Forest Service's Supplemental Information Report ("SIR").

The sum of these problems makes it is clear that, prior to any decision on construction of the Powerlink across the CNF, the Forest Service should have fully analyzed and disclosed the Forest-specific impacts of the Powerlink and Permit in an SEIS that carefully documents and discloses each potential conflict between the Powerlink and the Forest Plan and describes the relationship between the Powerlink, its impacts, and Forest Service mandates.

To ensure the integrity of the NEPA process, the Forest Service should have not have merely conducted new biological and cultural surveys in an attempt to remedy the deficiencies in BLM's FEIS. Instead the Forest Service should have considered alternatives to the Powerlink that were ignored or wrongfully dismissed by BLM, including the "New In-Area All-Source Generation Alternative" and "New In-Area Renewable Generation Alternative" that were ranked *above* the southern route in the FEIS, as well as an alternative underground route across CNF within the Interstate 8 easement, and a no action alternative.<sup>1</sup> To do otherwise would sacrifice irreplaceable Forest resources and the public's interest to reflexive deference to the grossly negligent decisions of another agency.

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<sup>1</sup> Expert local engineer Bill Powers has prepared a peer-reviewed report detailing local energy alternatives to the Powerlink titled *San Diego Smart Energy 2020: The 21<sup>st</sup> Century Alternative* ([http://www.etechninternational.org/new\\_pdfs/smartenergy/52008\\_SmE2020\\_2nd.pdf](http://www.etechninternational.org/new_pdfs/smartenergy/52008_SmE2020_2nd.pdf)), which we incorporated by this reference.

In sum, the Forest Service should have conducted an independent environmental analysis of the Powerlink, pursuant to NEPA, and must now actively involve the public in any attempted amendment of the Forest Plan to accommodate the Powerlink and/or to authorize a new Permit.

## **II. BACKGROUND**

On November 2, 2005, SDG&E submitted an application for a right-of-way from BLM and on December 15, 2005 it applied for a Certificate of Public Convenience and Necessity to the CPUC for the Project. The proposal includes the construction of a new 500kV transmission line, and two new 230kV transmission lines, that would connect Imperial and San Diego counties.

BLM initiated environmental review of SDG&E's proposal jointly with the CPUC in August of 2006. On January 3, 2008, BLM, in collaboration with the CPUC, published a Draft Environmental Impact Statement ("DEIS") on the Powerlink project. The DEIS focused on SDG&E's proposed – but later withdrawn – Northern Anza-Borrego Alternative.

On July 11, 2008, BLM issued the Powerlink Supplemental Draft EIS ("SDEIS") on two connected actions: (1) proposed industrial wind farm development; and (2) additional transmission and substation upgrades. The SDEIS also analyzed several route revisions to each of the alternatives in the DEIS.

In October of 2008, BLM and CPUC rejected the original Anza-Borrego routing proposal, selecting an alternative southern route in the Final Environmental Impact Report/Environmental Impact Statement and Proposed Land Use Amendment ("FEIS"). The preferred route, styled the "Environmentally Superior Southern Route" ("Southern Route"), stretches 120 miles from Imperial Valley to San Diego, passing through the CNF, El Monte Valley, McCain Valley, and the communities of Boulevard and Alpine.

Confusingly, like the DEIS, the FEIS focuses on the Anza-Borrego Alternative as if it were still the proposed Project, and fails to describe and analyze the *selected* route in its entirety. Consequently, the selected route has never been addressed in its entirety in any NEPA documents, precluding public understanding of the Project and its impacts. The selected route comprises a confusing array of separate alternative segments conflated with multiple smaller scale route and reroute alternatives. Information about each piece of the selected route was scattered throughout the DEIS, SDEIS, FEIS, and the responses to comments. The *chosen* route “is described in Chapter H as the FEIS, in various sections of Chapter E, on detailed map sheets in Appendix 11, the response to comments, and revised Chapter 3 of the Recirculated Draft EIR/Supplemental EIS.” Forest Service’s SIR, p. 3. Further, the precise alignment of the Project within the wide corridors presented in the FEIS as the selected route was never identified in the EIS, precluding site-specific assessment of the Project’s environmental impacts.

On November 5, 2008, BLM requested formal ESA section 7 consultation with FWS. FWS rushed to issue its Powerlink BiOp on January 16, 2009 so BLM could approve the Project before the Obama Administration was sworn in 4 days later. Neither the BA nor BiOp contained adequate surveys of substantial portions of the selected route for the existence of threatened and endangered species or their suitable habitats. Just four days after completion of the BiOp, and hours before the Obama Administration was sworn into office, on January 20, 2009, BLM approved the Powerlink EIS, the rights of way, and the temporary use permit.

In addition to violating NEPA and ESA, BLM’s approval ignored FLPMA requirements that BLM condition approval of transmission lines in ways that minimize damage to the environment and that lines must be co-located to the extent possible.

Just two days after BLM’s approval of the FEIS, SDG&E prepared a draft PMR,

articulating numerous significant changes to the Project that had *not* been addressed in the FEIS. On May 14, 2010, SDG&E issued the Final PMR, further describing those changes, including significant alterations to the Project route, and revealing numerous substantial impacts not previously disclosed. On July 9, 2010 the Forest Supervisor for the CNF issued a Record of Decision on the Project, approving construction, operation and maintenance of the Project on CNF lands. At that time, the Forest Service also issued an SIR and changes to the mitigation measures proposed in the FEIS.

### **III. THE SUNRISE POWERLINK PROJECT VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT, AND A SUPPLEMENTAL EIS SHOULD BE PREPARED.**

The Forest Service's approval of the Project is based on the FEIS jointly prepared by the CPUC and BLM, with the CNF, Department of Defense Marine Corps Air Station (MCAS) Miramar and Bureau of Indian Affairs as cooperating agencies, and the SIR prepared by the Forest Service in response to the PMR issued in May 2010.

The NEPA requirements for further environmental review are clearly triggered by the substantial changes in the Project and new impacts revealed in the PMR.

NEPA requires agencies to prepare a supplement to an EIS if:

- (I) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9(c). Further, agencies “may [] prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.” *Id.*

Here, as we discuss below, supplemental environmental review is required for two primary

reasons. First, the Project and the surrounding circumstances have changed to such an extent as to require further review under NEPA. Second, the purposes of NEPA will be furthered by supplemental environmental review due to the inadequacies of the original FEIS. In reviewing the entire review process, it is clear that most if not all of the new information provided in the PMR and discussed in the SIR could and should have been gathered and presented in the original FEIS, or failing that, an SEIS. This unnecessary delay in conducting the proper and required environmental review violates NEPA. Without analysis of this new information in an SEIS, the public will not have an opportunity to fully address the Project's impacts and the decisionmakers will be deprived of all of the information necessary to foster informed decision making.

**A. The Substantial Changes to the Project and Surrounding Circumstances Require Preparation of a Supplemental EIS.**

As evidenced by the Forest Service's own SIR, the Project has changed substantially since the original FEIS was issued. SIR, pp. 3-8. Those changes are not only relevant, but central to the environmental concerns triggered by the Project.

**1. Changes to Project Alignment**

After the CPUC and BLM approved the FEIS, SDG&E modified the Project's route as belatedly revealed in SDG&E' May 2010 Project Modification Report. These changes significantly harm the CNF in ways that were not examined in any EIS nor the Forest Service's SIR.

The Forest Service acknowledges that the original FEIS analyzed and evaluated a completely different route than the final route alignment which was described in the PMR. SIR at 3. The chosen route is "a composite of segments from four Southern Route alternatives," rather than the Northern route originally proposed and analyzed in the FEIS. *Id.*

The chosen composite route was further amended *after* BLM’s approval of the FEIS. *Id.* at 3-4. “SDG&E provided a revised project design in April 2009.” *Id.* at 4. “SDG&E provided a proposed final project design in September 2009 for Forest Service review, and provided this same design in October 2009 to the CPUC and BLM.” *Id.* “SDG&E filed a Draft and Final [PMR] with the CPUC, BLM, and other agencies that documents the changes from the [FEIS] approved route.” *Id.*

Changes in the route alignment are central to a thorough evaluation and analysis of the environmental impacts of the Project. For example, without knowledge of the final route alignment wildfire-related impacts to public health and safety, and impacts to plants and animals, cultural resources, and visual resources cannot be accurately reviewed. The public and decisionmakers are placed at a significant disadvantage by the lack of information and their ability to articulate their concerns is therefore limited.

Furthermore, in at least 12 locations – some many miles in length – SDG&E moved the Project’s route substantially outside the West-Wide Energy Corridor despite assurances in the FEIS that it would not do so. The FEIS states that the Powerlink “crosses 19.2 miles of National Forest land but within acceptable land use zones and [the] proposed [Energy Policy Act of 2005] Section 368 Utility Corridor.” FEIS at p. ES-6. It repeated the same assurance with respect to alternative routes that were ultimately included within the adopted project, such as the “Modified Route D” alternative, which the FEIS stated “has also been identified as a [Section] 368 Corridor by the Department of Energy’s Draft West-Wide Corridor Programmatic EIS.” *Id.* at p. C-56. The FEIS referred the reader to Figures depicting the Project’s route as following the Section 368 West-Wide Energy Corridor.<sup>2</sup> Each of these representations was false. As revealed in

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<sup>2</sup> See, FEIS, Figure ES-17, p. C-56 (Map showing alignment for the Project route which is identical to the Section 368 Energy Corridors).

SDG&E's PMR, the Project's route has been modified substantially to cross many miles of CNF land outside of the Section 368 Corridor. None of these changes in the Project's location, nor their impacts on CNF resources, have been disclosed and addressed in an EIS. This omission violates NEPA.

The impacts to CNF resources from SDG&E's last-minute revision of the Project route are enormous, but they have never been disclosed to the public for its review and comment. To the contrary, the public was misled by, and based all of its comments on, the FEIS's representation that the Project route would follow the Section 368 Corridor.<sup>3</sup>

In approving the route of the Powerlink outside the West-Wide Energy Corridor the Forest Service has effectively established two major energy corridors in the southern CNF along with a myriad of corresponding environmental impacts. No government agency, neither state nor federal, has yet studied or addressed the impact of the creation of two separate, parallel energy corridors running through much of the CNF. Not only will these two distinct energy corridors create two separate ignition sources for fires, but the removal of vegetation from most of the length of these corridors and the construction of access roads and tower pads within these corridors will double the impacts of the Project on the scenic, biologic and hydrologic resources of the affected areas. Two separate energy corridors create a much higher fire risk, many more access roads, and far greater sedimentation, loss of habitat, and aesthetic scars. These roads as well as the corridors themselves will further increase fragmentation of wildlife habitat for the many species that occupy the affected lands. Yet no analysis has been performed by the Forest Service, or any government agency for that matter, of these substantially increased impacts.

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<sup>3</sup> The substantial differences in these routes can be discerned by comparing Figures ES-17 from the FEIS (website provided) with the Sunrise Powerlink: Land Ownership Map dated May 20, 2010 (Ex. 1 hereto). An example of the extensive deviation from the Section 368 Corridor, and consequent severe impacts on CNF land, appears in Figure 25 to the PMR (website provided).

The impacts on aesthetic resources of SDG&E's proposal to create two parallel energy corridors are obviously enormous. The anticipated width of Section 368 Corridors is 3,500 feet, as explained in the Programmatic Environmental Impact Statement for the West-Wide Energy Corridor (see, e.g., <http://corridoreis.anl.gov//faq/index.cfm>). It is anticipated that vegetation will be removed from at least a 2,000-foot wide corridor for the Sunrise Powerlink. Examples of the huge swaths of cleared areas that the Powerlink will create appear in photographs of the Southwest Powerlink attached to this comment letter.

Since the PMR substantially altered the Project alignment causing it to significantly diverge from the West-Wide Energy Corridor, and impacts of these duplicative energy corridors have never been examined in any environmental document, the Forest Service's Permit approval should be set aside and the Forest Service should undertake a thorough review of the environmental impacts of these two divergent lines. The obviously unnecessary adverse impacts caused by SDG&E's decision to create separate utility corridors rather than to follow the Section 368 routes presents compelling grounds for setting aside the Forest Service's decision. Preparation of an SEIS is essential to address these previously undisclosed and unexamined impacts.

These changes to the Project alignment have also caused changes in the number of structures proposed for CNF land. SIR, p. 5. Additional towers and structures will be placed on CNF land under this new alignment, potentially impacting the Forest resources. Due to these substantial modifications, tower staging access pads will now impact 8.7 acres of CNF land, as compared to the .99 acres evaluated in the FEIS – *nine times greater*.

Additionally, other significant changes described throughout the PMR and discussed below, make it obvious that the Project has changed in ways that pose significant new impacts on

the environment and that therefore, an SEIS is needed. Neither the PMR nor the SIR suffice for an EIS and therefore fail to satisfy NEPA's requirement for a SEIS where, like here, there are substantial changes in the proposed action that are relevant to environmental concerns.

## **2. Increased Helicopter Use**

The PMR indicates that more structures have been designated "for helicopter construction." PMR, p. 3-3. 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, which must be analyzed and described in a proper NEPA document for public review and consideration by the decisionmakers prior to approval of construction activities.

For example, increased helicopter use will cause increased air emissions. Neither the FEIS, the PMR, nor the SIR includes any significant analysis of the shift to more intense helicopter construction on air emissions. In fact, the PMR concludes, without support, that the original Project and the modified Project "would result in similar air quality impacts." PMR, p. 3-6. But transportation of the towers by helicopter will create a significant increase in greenhouse gas emissions.<sup>4</sup> This increase in air pollution and its impact on the CNF should be analyzed in an SEIS.

Additionally, the increased use of helicopters may significantly increase fire danger. First, increased helicopter-based construction may exacerbate the risk of construction-sparked fire. Second, the lack of access roads along significant portions of the Powerlink route will impede fire

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<sup>4</sup> See, <http://www.rapportsysteem.nl/artikel/index.php?id=491&action=read>; and [http://www.gov.bc.ca/igrs/down/PNWER\\_GreenhouseGas\\_Factsheet\\_PRESS.pdf](http://www.gov.bc.ca/igrs/down/PNWER_GreenhouseGas_Factsheet_PRESS.pdf) (Ex. 2 hereto).

fighting due to the inaccessibility of the modified Project. This impediment to fire fighting presents a new significant impact that should be analyzed in an SEIS.

### **3. Increased Impacts to Jurisdictional Waters and Riparian Conservation Areas**

The PMR discloses an increase in permanent impacts to “herbaceous wetlands, freshwater, and streams (non-vegetated channel)” from .01 acres in the FEIS to .06 acres resulting from the modified Project. PMR, p. 3-43. These areas are all Riparian Conservation Areas identified in the Forest Plan. As under CEQA, this increase in impact should be analyzed under further NEPA environmental review. *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 361-64. In *Mira Monte*, the court held that the discovery of a Project’s unexpected encroachment onto approximately 1/4 acre of wetlands represented a significant adverse environmental impact, requiring preparation of an EIR. In reaching this conclusion, the court reiterated the California 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, just as in *Mira Monte*, the Project’s increase in wetland destruction violates the State Resources Agency’s policy of preserving wetlands in perpetuity, in direct contradiction with NEPA’s stated purpose of protecting the environment. Therefore the modified Project presents a new, significant impact to wetlands that must be analyzed in a further environmental review under NEPA.

The PMR further discloses increased permanent impacts to both “chaparral” communities, and to “non-native vegetation, developed areas, and disturbed habitat.” PMR, p. 3-43. The impact to chaparral communities will approximately *double*, from 2.44 acres under the FEIS to 4.66 acres under the PMR. *Id.* The impact to non-native vegetation and disturbed communities will increase to 8.51 acres, more than *13 times* the originally proposed figure of .64 acres. *Id.*

This increase in impacts to jurisdictional waters and riparian conservation areas must be analyzed in an SEIS, as required under NEPA.

#### **4. Increased Impact to Special Status Species**

The Project’s impacts to special status species have also substantially changed, significantly affecting the environmental concerns articulated in the FEIS. The PMR indicates that the Project will impact numerous special status species, as demonstrated below, and therefore the Forest Service should prepare an SEIS under NEPA.

##### **a. Increased Impacts to Special Status Animal Species**

##### **i. Arroyo Toad**

The Arroyo Toad is an imperiled species significantly threatened by the new Project impacts disclosed only *after* issuance of the FEIS. The extent of Arroyo Toad habitat destruction caused by the Project was unknown until the precise Project route was finalized. Prior to SDG&E’s disclosure of the Project route, there was little information on tower location and therefore, little information on the Project’s significant impact on Arroyo Toad habitat. Because the Arroyo Toad is most significantly affected by the Project’s tower foundations, its impacts from the Project are only now being revealed. The PMR discloses that, contrary to the FEIS’ assertion that only 1.3 acres of suitable habitat will be affected, in fact 2.83 acres of suitable

habitat will be permanently ruined. PMR, p. 3-42. That conflict should have been fully analyzed under the NEPA review processes, but never was.

Furthermore, as the Forest Service admits in its SIR, the extensive temporary impacts on Arroyo Toads on approximately 44 acres of private lands adjacent to the CNF “will affect toad populations on the Cleveland NF.” SIR, p. 10. Yet the SIR never provides any analysis of how these increased impacts would harm the endangered toads. *Id.* Rather, the SIR simply concludes that because the original FEIS stated that project impacts on the Arroyo Toads would be significant, then no further analysis is needed. Yet, the Forest Service cannot hide behind the original finding of significance. It must evaluate the impacts of the new Project alignment and determine just *how* significant the impacts will be. Otherwise, a project could be modified in ways that would wipe out an endangered species and as long as the original project claimed that the original route would have significant impacts, then no further analysis would be required. NEPA demands more.

## **ii. Golden Eagle**

The SIR admits that the Project will potentially affect 9 Golden Eagle nest sites, more than *double* the 4 nest sites disclosed in the FEIS. SIR, p. 9; see also PMR, Table S-1. The Golden Eagle is fast becoming one of the most imperiled species in southern California and this more than doubling in the number of nest sites of this sensitive species that will be impacted by the Project requires preparation of a SEIS. The PMR acknowledges that the Project’s construction and helicopter use may also impact the species. *Id.* It is also unclear to what extent the new ultraviolet lights (discussed below) will affect the Golden Eagles of the area. SIR, p. 10. These combined and substantially increased impacts of the Project on the eagles must be fully disclosed

and analyzed during an environmental review process, so that the public and decisionmakers can benefit from a robust evaluation of the Project's impacts on the Golden Eagles.

### **iii. Bald Eagle**

The SIR admits that “[t]he [FEIS] does not include [any of the CNF project areas] as bald eagle habitat and concludes that there will be no effect on bald eagles.” SIR, p. 10, citing FEIS p. E 4.2-16. It goes on to state that “[t]he new regulations define take to included disturbance, and the powerline construction could disturb wintering or nesting eagles” in the Project area. These are newly identified impacts that have never undergone *any* NEPA review. The Forest Service therefore is under an obligation to address these impacts in an SEIR.

### **b. Sensitive Vegetation Communities**

The PMR also reveals increased impacts to Sensitive Vegetation Communities, in addition to the impacts to fauna described above. “Impacts to five vegetation subtypes . . . would be greater under the modified project than the [Final Environmentally Superior Southern Route (“FESSR”).]” PMR, p. 3-7. In the CNF, there will be 11.54 acres of permanent ground disturbance to non-native vegetation, developed areas, and disturbed habitat. *Id.* at 3-41. This acreage is nearly *eight times greater* than the 1.48 acres of permanent impact that were analyzed in the FEIS. *Id.* The PMR dismisses these increases as inconsequential, claiming there are no significant changes in impact to vegetation. *Id.* at 3-7. However, no evidence is offered to support that conclusion. 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.

### **c. Special Status Plant Species**

Special Status Plants will also be significantly impacted by the changes in the Project alignment and, like the impacts to Sensitive Vegetation Communities, these potentially significant impacts were not disclosed to the public or decisionmakers during the environmental review process and are barely discussed in the PMR. According to Table 3-15, impacts to the Payson's Jewelflower, and the Tecate tarplant will be significantly worse. PMR, p. 3-44. Yet, the PMR glosses over these increased impacts as if they do not exist, contrary to the requirements of NEPA.

The PMR indicates that 1,350 Payson's Jewelflowers will be temporarily impacted, where the FEIS hadn't considered *any* impact to the Jewelflower on CNF land at all. *Id.* Additionally, the PMR claims that 8 Tecate tarplants will be temporarily impacted. *Id.* Like the Jewelflower, the FEIS also failed to recognize any impact to the tarplant on CNF land. The Forest Service must therefore prepare an SEIS to address these issues prior to any approval for work on CNF land.

### **5. Increased Impacts to Cultural Resources**

Table S-1 of the PMR highlights the extent of the Project's previously *undisclosed* impacts on cultural resources. PMR, p. S-6. The SIR confirms this deficiency; it reveals that the FEIS entirely failed to disclose the number and type of Cultural Resource Sites that will be affected by the Project. SIR, p. 10. It specifies that there are 33 culturally significant sites on CNF land that may be affected by the Project, 22 of which are newly discovered. SIR, p. 11; See also RMP, pp. 3-37 to 3-38. This huge increase in the extent of the Project's cultural impacts must be analyzed in an SEIS.

The PMR chapter dedicated to cultural resources includes an extensive list of all of the Cultural Resource Sites that will be affected by the Project, sorted by category. PMR, p. 3-31

through 3-37. It also includes a discussion of the types of resources at stake and mitigation measures belatedly proposed – long after Project approval – to reduce the Project’s impacts. PMR, pp. 3-30 through 3-31. The SIR relies on the PMR’s analysis and 12th-hour mitigation. This is exactly the type of information that should have been included in the FEIS, and its belated disclosure in the PMR demonstrates that an SEIS must be prepared to remedy that deficiency. Without such a process, the public will never have a chance to review and comment on this critically important information, and the Forest Service decisionmakers will be deprived of essential information on the Project’s cultural resource impacts.

## **6. Increased Visual Impacts**

The PMR and SIR reveal numerous substantial changes to the Project, which will both directly and indirectly impact CNF visual resources. These impacts should have been analyzed during the NEPA environmental review process, but were illegally omitted from that discussion, and therefore must be taken up by the Forest Service in an SEIR. First, the PMR admits that the modified Project will “have greater visual impacts than” the FEIS in some locations, including the CNF. PMR, pp. 3-53 and 4-2 through 4-4. However, the PMR concludes that because these impacts will be similar “in type [and] scale” to those of the FEIS, no further discussion is necessary. *Id.* Both the FEIS and the PMR, however, fail to specifically analyze the visual impact to CNF land and how those changes will affect CNF land uses. The Forest Service must include such an analysis in an SEIS.

The PMR also proposes to add numerous components to the Project, greatly worsening its visual impact. For example, the modified Project reveals for the first time the use of marker balls as required by the FAA, a disclosure entirely omitted from the FEIS. PMR, pp. 2-12 through 2-14. The placement of red balls on transmission wire spans where wire might otherwise be nearly

invisible will undoubtedly have a significant visual impact on CNF land that must be analyzed under NEPA.

The PMR also proposes the construction of new telecommunication towers and equipment at *seven* locations, at least three of which are within the CNF. PMR, p. 2-16. It proposes replacement of wooden poles with ugly steel structures, the addition of microwave antennae on top of those structures, and construction of microwave communication equipment housing facilities. *Id.* Yet this information was never included in any NEPA review process, in violation of the statute. Presenting this information a mere month prior to the Forest Service Permit approval only further confirms the deficiencies of the FEIS and the need for the Forest Service to set aside its decision and prepare an SEIS.

And finally, the Forest Service fails to address the vastly increased visual impacts of the project caused by the 10-20 foot cut and fill areas that are proposed and discussed for the first time in the PMR and SIR. SIR, p. 4-5. These cut and fill areas will be addressed more fully below.

## **7. Impact of Infrared Lighting**

The SIR discloses the substantial changes in the Project with regard to infrared lighting that are highly relevant to environmental concerns. SIR, p. 10; see also PMR, pp. 3-25 through 3-26. According to the SIR:

“The addition of infrared lights to most towers is a new action that was not analyzed in the [FEIS]. A large number of bird species migrate at night, and some forage during migration. Adding lights to most or all towers is likely to significantly increase risk of collisions. The magnitude of this effect has not been quantified.”

SIR, p. 10. As the Forest Service recognizes, the addition of infrared lights to towers is a

substantial change having significant impacts on both biological and visual resources. This discussion was erroneously omitted from the FEIS. Including this information in the SIR and PMR does not vitiate the obligation to present this information to the public and decisionmakers under NEPA. Its inclusion in the SIR and PMR merely highlights its unlawful omission from the FEIS. Further, the information provided is still not complete. “The likelihood that concentrations of . . . insects would occur in the vicinity of towers with infrared lights and the potential that foraging birds (or bats) would collide with towers in such circumstances is not known.” PMR, p. 3-26; *See also* SIR, p. 10. This information must be gathered and presented to the public and the decisionmakers in an SEIS.

#### **8. Temporary Work Areas’ Extensive Cut and Fill Areas**

As noted above, the SIR discusses new, unanalyzed design changes that include so-called “temporary work areas” with cut and fill areas of 10-20 feet. The Forest Service explains that “[b]ased on the scale and extent of [this new level] disturbance . . . , these temporary work areas will result in longer term impacts and will be counted as permanent impacts for mitigation and compensation purposes.” SIR, p. 4. The Forest Service thus identifies new potentially significant impacts to Forest resources and at the same time attempts to mitigate them to insignificance – *all within one sentence in a non-NEPA document*. This analysis must be contained in an SEIS. An agency may not evade its duty under NEPA to explain how it proposes to avoid or mitigate a project’s adverse impacts by deferring that required analysis until *after* the project is approved. The SIR’s belated disclosure of the new cut and fill areas – and the utter failure to address their impacts and mitigation in the FEIS – thus demonstrates that an SEIS is required.

## **9. Additional Construction Yard**

Similarly, the SIR identifies an additional construction yard to be built in CNF. The yard will occupy 400,000 square feet – the equivalent of six football fields – and will require the removal of 40,000 cubic yards of earth. This construction yard alone is a massive project. The SIR does not reveal where the new yard will be located, where the excavated dirt will be dumped, or what the impact of the activities at the yard will have on all of the Forest resources in the area. In another setting, such an undertaking could require the preparation of an EA or EIS just by itself. Here, however, the Forest Service simply mentions this new Project component and fails entirely to discuss its impacts. Clearly, the public and the decisionmakers would benefit from more information related to the construction yard.

## **10. Increased Size of Access Pads**

Table 3-15 of the PMR reveals that the Project will construct a smaller number of tower staging access pads, but that these pads will disturb more acreage of the CNF. The FESSR called for the disturbance of 0.99 acres to construct 70 access pads. *Id.* The modified project calls for the destruction of 8.70 acres of CNF lands – *nine times* more acreage – to construct 52 pads. *Id.* This increase in acreage 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 NEPA for further environmental review in an SEIS.

## **11. Giant Helicopter Use**

According to a recent press account, SDG&E plans to use the *world's largest* heavy-lifting

helicopter in construction of the Project.<sup>5]</sup> However, the use of this helicopter had not been disclosed within the environmental review process. The FEIS, the PMR, and the SIR all fail to mention this helicopter or analyze its impacts. The PMR calls for increased helicopter use as noted above, and therefore the use of this very large and noisy machine must be analyzed in conjunction with this overall increased helicopter use. SDG&E's attempted evasion of this required discussion violates NEPA.

## 12. Conclusion

The above changes in the Project are not minor inconsistencies, but rather distinct and substantial departures from the assertions and mitigation measures relied upon by both the public and BLM in approving the FEIS and the Project. The Forest Service is therefore required to prepare an SEIS to address the "substantial changes in the proposed action that are relevant to environmental concerns."

### **B. To Further the Purpose of NEPA, the Forest Service Should Have Prepared a Supplemental EIS Rectifying the Extensive Inadequacies and Informational Gaps of the Original FEIS.**

NEPA's fundamental purposes are to guarantee that agencies: (1) take a hard look at the environmental consequences of their actions before these actions occur; and (2) make the relevant information available to the public so that it may also play a role in both the decisionmaking process and the implementation of that decision. *See, e.g.*, 40 C.F.R. § 1500.1. NEPA requires federal agencies to prepare an EIS for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4. NEPA also allows agencies to "prepare supplements when the agency determines that the purpose of the Act

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<sup>5</sup> *SDG&E to Bring 2,500-Gallon Firefighting Helicopter to San Diego Region*, East County Magazine, May 25, 2010, <<http://eastcountymagazine.org/node/3403>> last visited, June 2, 2010 (Ex. 3 hereto).

will be furthered by doing so.” 40 C.F.R. § 1502.9(c). In the present case, the Forest Service should have prepared an SEIS before approving the Permit to further the purpose of NEPA.

**1. The FEIS Prepared for the Project Is Inadequate.**

**a. The EIS Does Not Clearly and Concisely Describe and Analyze the Selected Route.**

NEPA requires that an EIS “must be organized and written so as to be readily understandable by governmental decisionmakers and by interested non-professional laypersons likely to be affected by actions taken under the EIS.” *Oregon Environmental Council v. Kunzman* 817 F.2d 484, 494 (9th Cir. 1987). The CEQ regulations require EISs to be “written in plain language . . . so that decisionmakers and the public can readily understand them.” 40 C.F.R. § 1502.8 (1986). *see also id.* § 1500.2(b) (stating that an EIS “shall be concise, clear, and to the point”); *id.* § 1502.1 (same); *id.* § 1502.2(a) (stating that an EIS “shall be analytic rather than encyclopedic”); *id.* § 1500.4(e) (“clear format”); *Id.* § 1502.10 (“[a]gencies shall use a format . . . which will encourage . . . clear presentation of the alternatives”). Not only did the EIS for the Powerlink fall far short of these standards, but the alignment of the Project route was changed after the FEIS was approved. Therefore an SEIS should be prepared that clearly, concisely and accurately describes and analyzes the Project route that was ultimately selected.

First, neither the DEIS nor the SDEIS described the selected route as it was presented in the FEIS. *Compare* DEIS, ES-62, *and* SDEIS, 5-8, *with* FEIS, ES-5 to 6, ES-8, ES-69, *and* H-2. In the DEIS and SDEIS, the selected route and sections thereof were variously called the Interstate 8 Alternative (FEIS, E.1.1-1), the Southwest Powerlink Alternative (FEIS, C-48), the BCD Alternative (FEIS, C-54), the BCD South Option (FEIS, C-55), the Route D Alternative (FEIS, C-55), and the Modified Route D Alternative (FEIS, C-56). To mask this inherently confusing mix-

and-match potpourri of names, the FEIS belatedly rechristened the entire selected route the “Environmentally Superior Southern Route (SWPL) Alternative.” FEIS, ES-5 and H-2. This name, however, does little to clear away the confusion as to what route has been selected because the FEIS contains descriptions that (1) are conflicting and imprecise (*Compare, e.g.,* FEIS, H-2 *with* FEIS, ES-5) and (2) fluctuate throughout the FEIS. Therefore, a reader must do a considerable amount of leg work just to try to figure out where the selected route may or may not be constructed. *Id.* And even then, it is impossible to determine from the FEIS where the final location of the Project will be. NEPA requires more. In addition to the mental gymnastics required to determine the actual alignment of the route, the alignment was actually changed *after* the FEIS was published.

Second, the FEIS does not contain a summary of the impacts of the *selected* project. While the Executive Summary contains a comprehensive list of all of the impacts of the *proposed* project – the rejected Northern route – *it fails to provide such a summary for the selected route* (FEIS, ES-80 to ES-121) and thereby utterly stymies a reader’s attempts to comprehend the nature and scope of the Project’s environmental impacts. Since the route was further modified after the FEIS, neither the DEIS nor the FEIS includes an accurate and complete list of the impacts of the actual alignment of the Project that will be built. The FEIS therefore violates NEPA, and an SEIS must be prepared.

Third, the scant analyses of the impacts of the selected route are scattered throughout the EIS. In order to attempt to discern a complete picture of the impacts of the selected route, the reader is required to locate and then page through multiple chapters of multiple documents that relate in some way to the final selected route. Some of the impacts of the selected route are analyzed in Chapters 3 and 4 of the SDEIS. SDEIS, 3-23 to 3-26 (impacts of the BCD Alternative

and BCD South Option Revision); 3-36 to 3-38 (impacts of the “Western Modified Route D Alternative (MRDA) Reroute”). Other impacts are located in the original DEIS, a completely different document. Even here the impacts are divided into separate chapters. DEIS, E.1 (description and analysis of Interstate 8 Alternative); E.2 (description and analysis of BCD Alternative); E.4 (description and analysis of Modified Route D Alternative). The subdivision of these impacts into different chapters requires the reader to go through each impact section for each route alternative to try to decipher what resources will be most intensely affected by the selected route. *Id.*

As if it were not hard enough to gather together the EIS’s analysis of the selected project from the SDEIS and DEIS, much of the impact analysis was omitted from the EIS proper and only surfaced in BLM’s subsequent responses to comments. As stated, for example, in the SDEIS: “In addition to the analysis presented here, additional information and existing view photographs and simulations pertaining to the BCD South Option Revision . . . and the BCD South Option Revision . . . are presented in *Response to Comment A0009-5.*” SDEIS, 3-23, italics added. *See also, e.g.,* “EIS Responses to Comment Set B0002, B0002-20 at 3-702 to 3-703,” “Responses to Comment Set B0002, B0002-38 at 3-710,” and “EIS Responses to Comment set B0002, B0002-11 at 3-699. Finally, even more impacts were disclosed and analyzed in the PMR and the SIR, which both came out long after the FEIS.

In sum, the FEIS fails as an informational document. Not only is its description of the Project muddled, confusing, and inaccurate, no coordinated and complete presentation of the impacts of the Project is provided.

In its SIR, the Forest Service admits that SDG&E’s proposed final Project designs that were presented in September 2009 and October 2009 to the CPUC and BLM were not consistent

with the requirements of the FEIS. The Forest Service pointed out the inconsistencies which led to the draft and final PMRs that document the changes from the FEIS to the approved route. In the SIR the Forest Service attempts to address several issues that arise from the changed Project route, but the SIR does not address the fact that no thorough analysis of the approved route has ever been done.

**b. The EIS Fails to Adequately Address the Impacts of the Project.**

NEPA requires federal agencies to take a “hard look” at the environmental impacts of proposed major actions and “provide a full and fair discussion of significant environmental impacts” for the public’s review. 40 C.F.R. §1502.1; *National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (general statements about “possible” effects and “some risk” do not constitute a hard look). Here, the EIS failed to adequately address many of the impacts of the Powerlink, and the SIR similarly fails to address the impacts that were either not addressed in the FEIS or arose later due to the changes in the final Project route.

**i. Growth Inducing Impacts**

The EIS ignores the key growth inducing impacts that the increased transmission capacity will create, in violation of NEPA. 40 C.F.R. §§ 1508.25, 1508.8. The EIS here concludes that construction of the Project *would not have any growth inducing impacts*. FEIS, F-29. The EIS thereby ignores the *very purpose of the Project* – to induce industrial development of renewable energy generation facilities (i.e. “growth”) in the Imperial Valley and other areas of Eastern San Diego County. FEIS, ES-21 to 22. For example, in the growth inducing impacts analysis, the EIS states:

The CAISO's interconnection queue lists generation facilities that would like access to California's transmission system. There are currently thousands of megawatts of wind and solar facilities in the Imperial Valley, Mexico, and eastern

San Diego County listed in the queue, and there is not adequate transmission capacity for these projects to be constructed. This information, and the identification of connected actions (see Section B.6) shows that *other projects would be constructed as a result of the construction of the Sunrise Powerlink*. While the development of renewable energy sources has the benefit of reducing the use of older and more polluting conventional generation facilities, *the renewable facilities could not be constructed without adequate transmission*. So while the SRPL [the Powerlink] may not induce urban growth, *it would encourage the development of renewable projects in the Imperial Valley, Mexico, and eastern San Diego County*.

FEIS, F-31 (emphasis added). Despite these admissions, the section concludes, “No growth inducing impacts would occur along the alternative routes at any point.” FEIS, F-29. Thus, the EIS admits that construction of the project would cause the construction of other projects, but refuses to analyze the impacts of those projects as growth inducing impacts.

Furthermore, the EIS completely fails to discuss the likely construction of fossil fuel-based power plants due to the increased capacity provided by Project. *Id.* Yet such a consequence is very probable and therefore should have been considered a growth inducing impact. CPUC Decision D.09-07-024, Dissent of Commissioner Gruenich at 2. An adequate discussion of growth inducing impacts would disclose, at a minimum, the likely size and location of the future projects expected to “be constructed as a result of the construction of the Sunrise Powerlink” (*id.*) and the natural resources that would be affected by such development. The EIS’s failure to adequately acknowledge and address the growth inducing impacts of the Project violates NEPA.

The Project’s growth inducing impacts will likely have direct or indirect impacts on CNF resources. The many dramatic vistas from CNF viewpoints, for example, could be extensively degraded by wind and solar farms on adjacent lands. The extent of these impacts is unknown, however, because the FEIS never addressed the Project’s growth inducing impacts. Therefore an SEIS must be required before the Forest Service can legally approve the Permit.

## ii. Fire

The EIS fails to adequately analyze the impacts of the new transmission line on the increased risk of wildfires. First, the EIS fails to discuss the fire risks posed by the selected route. While there are over 200 pages within Section D.15 that discuss the risk of fire, these discussions are useless in that they discuss the fire risks for the *proposed* Project, *which was not selected*. FEIS, D.15. The scattered references to fire impacts of the various alternatives that were cobbled together as the selected route are far too confused and confusing to patch together into any type of meaningful analysis. *See, e.g.*, FEIS, E.1.15-1; E.2.15-1; E.4.15-2; DEIR, Attachment 1a to Appendix 1; Responses to Comments, Set A0037, A0037-1 and A0037-2 at 3-544.

In addition, the FEIS fails to analyze the significant wildfire risk posed by the construction and operation of industrial wind energy developments as connected actions and elsewhere along the selected route. There is no mention of wind turbines within the Fire and Fuels Management sections E.1.15, E.2.15, E.3.15 or E.4.15, despite BLM's erroneous statements to the contrary in its Responses to Comment Set B0002, B0002-21 at 3-703 to -704. Although the comment response states that the fire impacts posed by wind farms are significant and unavoidable, there is no discussion of this issue within the EIS. *Id.*

Finally, the FEIS fails to analyze the ways in which the selected route will pose obstacles to effective firefighting. The EIS discusses firefighting, but does not address the hazard the transmission lines will create for low-flying firefighting, spotter, and bomber aircraft that apply aerial retardant. FEIS, E.1.15, E.2.15, E.3.15 or E.4.15. It will be impossible to see these power lines in smoke-filled canyons. Either pilots will be forced to risk their lives by flying when the lines are not clearly visible, or aerial fire suppression will be stymied. Either way, nature is harmed by unnaturally frequent fire and the public pays a steep price in lives and property.

Further, because the FEIS fails to specify the Project's specific route, the discussion of the transmission line's impacts on firefighting from the ground is incomplete. Although the EIS discusses multiple areas that will be affected by the creation of this transmission line, there is no site-specific discussion of firefighter access to the transmission line, and how that access to the transmission line will be maintained. *See, e.g.*, FEIS, E.1.15-24 (mitigation F-1c to reduce fire impacts by maintaining unidentified "unobstructed access roads").

Furthermore, firefighter safety is a serious concern but may prohibit close access to powerlines, limiting the ability of firefighters to combat these fires and creating greater potential for fires caused by these lines to flair up. Instead the EIS merely provides a general discussion of each fire shed in the context of past fires. *See, e.g.*, FEIS, E.1.15-7, E.1.15-10, E.1.15-13.

The alignment of the powerline in the FEIS is not the alignment that was ultimately approved. The *location* of the line creates a specific risk that must be, but is not, discussed in the EIS. The dangers and impacts of increased fire risk due to the Project was not thoroughly analyzed in the FEIS, and the impacts of this increased fire risk have not been analyzed on the biological, cultural and visual resources of the CNF. Therefore an SEIS must be prepared.

### **iii. Biological Impacts**

No environmental review was performed of the selected route of the Project. The FEIS failed to address the impacts of the *entire* selected route on affected endangered species and other biological resources. While some FEIS sections touch on the impacts of the line on these listed species, they only address limited lengths of the selected route. *E.g.*, FEIS, Figure ES-4, at p. ES-12 (analyzing the I-8 alternative only); E.2.2-15 (Quino checkerspot butterfly analysis of BCD alternative only). The other segments are ignored. *Because these species exist along portions of the entire chosen route*, the EIS' failure to address the project's collective impacts of all segments

for each species violates NEPA.

Even the segmented review sections are flawed. For example, Section E.1.2, the Biological Resources section for the I-8 alternative, addresses potential affected species posed by many different possible routes, *without differentiating between the routes*. See, e.g., FEIS, E.1.2-1. This stymies public review. Furthermore, Section E.1.2's biota analysis does not address the project's final design. For example, section E.1.2's discussion of tree removal *concedes that the actual impacts will remain unknown until SDG&E has sited and designed the Powerlink's transmission towers*. FEIS, E.1.2-6, E.1.2-13, E.1.2-17, E.1.2-40, E.1.2-48, E.1.2-49, E.1.2-58, E.1.2-60, E.1.2-69. Throughout, section E.1.2 repeats the disclaimer that "[t]hese impacts and the corresponding mitigation requirements . . . are based on preliminary project design and would likely be *revised* during final project design." FEIS, E.1.2-13, E.1.2-40, E.1.2-48, E.1.2-58, E.1.2-69, emphasis added. With significant aspects of the Powerlink still to be designed, the EIS fails to determine the actual impacts to biota posed by the Project.

Even with the publication of the PMR and the SIR, no analysis has been done of the impacts that the Project's route will have on sensitive plant and animal species. This is a clear violation of NEPA. The SIR admits that field studies were performed for the April 2009 route and that "SDG&E is preparing the Biological Evaluation (BE) and Management Indicator Species (MIS) reports required by Forest Service Policy." SIR, p. 9. The fact that no studies have been completed on the approved route, and that the BE and MIS have not already been completed, before Project approval, shows a clear violation of NEPA.

#### **iv. Climate Change**

While it is true that the EIS discusses some of the greenhouse gases (GHGs) associated with construction related activities (FEIS at D.11-47 to 55; FEIS, Appendix 10), it fails to address

the *primary* GHG emissions associated with the Project: the fossil-fueled plants whose power the Project may transmit. *Id.* Further, the climate change section failed to address adequately the GHG emission advantages of various alternatives. *Id.* It did not analyze the impact on global warming of the non-wire alternatives when compared with the Powerlink's impacts over the anticipated life of the transmission line. *Id.* Because the transmission line may carry only fossil fuel generated power, its potential GHG emissions are enormous. The profoundly reduced emissions of non-wire alternatives should have been fully analyzed. The EIS also failed to analyze a renewable-only transmission line alternative as well as alternatives that call for different percentages of renewable energy,<sup>6</sup> and their differing impacts on climate change. It is undisputed that the transmission line can be used to transmit energy from fossil fuels only, from renewable resources only, or from some mix of the two. Yet the EIS never examined how these different flow models would affect GHG emissions. This omission must be rectified in an SEIS.

#### **v. Viewsheds**

The EIS contains a 247-page section on visual impacts. It pertains, however, to the proposed route, *not the route ultimately selected*. FEIS, D.3. The selected route is miles away and has far different elevations, topographic features, and visual impacts. To the extent that the EIS contains discussions of visual impacts of the selected route, such analysis is sparse and disjointed and thereby effectively obscures the visual impacts of the chosen route as a whole. FEIS, E.1.3, E.2.3, E.3.3, and E.4.3. Without a thorough and concise discussion of visual impacts of the chosen route, the FEIS is deficient. Further, the FEIS fails to adequately compare the visual impacts of the chosen route with the other route options, analyze the impacts of proposed and existing McCain Valley wind farm projects on visual resources, or include the effect of

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<sup>6</sup> See discussion below of deficiencies in the Alternatives section of the EIS.

construction pads, roads, helicopter landing sites, towers, and industrial wind turbines on prominent ridgetops visible for miles as is required by NEPA. FEIS, H.2; Table H-17; G-114 to 117.

The Forest Service admits in its SIR that the grading called for in the PMR exceeds the minor grading that was analyzed in the FEIS and that the grading will cause long-lasting disturbance. SIR, p. 15. The SIR also admits that “the Final PRM design will have significant impacts on visual resources.” *Id.* Since these significant visual impacts of the PMR were never assessed, they must now be analyzed in an SEIS to adhere to the requirements of NEPA.

#### **vi. Wilderness and Recreational Resources**

The EIS fails to adequately address the impacts of the Project on the wilderness experience of hikers and campers using area parks and hiking trails. FEIS, D.5-1 to 102. It does not analyze the direct, adverse effect of the presence of industrial-scale development in what are presently untouched natural landscapes. *Id.* Additionally, the EIS fails to analyze the impact on visitors’ and local residents’ wilderness experience of the foreseeable development of wind farms in the McCain Valley. County Protest, Exhibit 7, pp. 4-5. The EIS’ failure to address these impacts violates NEPA. The SIR fails to address the change in impacts to the vast and important wilderness and recreational resources within the CNF. Since no adequate analysis has been performed, an SEIS is necessary.

#### **vii. Increased Public Access**

Because the development of the Powerlink will involve the cutting of new roads into previously inaccessible areas, public use of these areas, whether authorized or unauthorized, will increase dramatically. This increase in use is likely to result in increased fire dangers, invasive species distribution, vandalism, and disruption of habitat in remote, currently unaltered natural

resource areas. Volker Dec., Exhibit 1, pp. 7-8. This impact was not adequately addressed in the FEIS or the SIR, and must be analyzed in an SEIS.

**c. The FEIS Fails to Consider the Cumulative Impacts of the Project**

The cumulative impacts section provides inadequate information about the risks associated with the cumulative projects in the area; it merely lists them and then generally describes possible effects not specific to any Project. FEIS, G-1 to 164. “A proper consideration of the cumulative impacts of a Project requires some quantified or detailed information; . . . [g]eneral statements about possible effects and some risk do not constitute a hard look.” *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 993-994 (9th Cir. 2004), citations omitted. The list-style analysis of cumulative impacts in the FEIS does not satisfy NEPA. Further, the EIS does not include many projects that should have been analyzed along with the Project as cumulative projects.

First, the “list approach” to cumulative impact analysis only satisfies NEPA where it provides quantified or detailed information with regard to the listed projects, which the FEIS for the Project fails to do. *Klamath-Siskiyou*, 387 F.3d at 993. In *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005), the Court found a cumulative impacts analysis for a proposed timber sale invalid when the FEIS lacked “discussion of the connection between individual harvests and the prior environmental harms.” 395 F.3d at 1027-28. The Court held that an EIS “must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment.” *Id.* The EIS there “generally describe[d] the past timber harvests, [gave] the total acres cut, with types of cutting, per decade, and assert[ed] that timber harvests have contributed to the environmental problems in the Project area,” but included “no discussion of the environmental impact from past projects on an *individual basis*.” *Id.* (emphasis added); *see also Great Basin*

*Mine Watch v. Hankins*, 456 F.3d 955, 973, 972 (9th Cir. 2006) (finding cumulative impacts analysis for mining project inadequate because it “merely list[ed] other mines in the area without detailing impacts from each one” and was “[n]owhere . . . supported by data broken down by mine”); *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379 (9th Cir.1998) (holding that FEIS should have provided more specific information on individual future projects); *Baykeeper v. U.S. Army Corps of Engineers*, 36 Env. L. Rep. 20,202, 2006 WL 2711547 (E.D.Cal. 2006) (cumulative impacts analysis “must identify and discuss the impacts that will be caused by each successive project”); *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997) (finding an FEIS’s cumulative impacts analysis inadequate when the analysis presented referred only generally to cumulative impacts from “development projects” and “ongoing urbanization”).

The EIS challenged herein lists a number of projects, provides a minimal description of each project and asserts that “past, present and reasonably foreseeable projects” will generally contribute to environmental problems. FEIS, G-94 to 164. As in *Lands Council*, such a presentation of cumulative impacts fails to afford the public the necessary information to make informed decisions on the Project. 395 F.3d at 1027-28. The EIS later presents a vague and generalized discussion of expected cumulative impacts from “construction activities” but there is no causal connection between this project list and the cumulative impacts discussed. *Id.* Undoubtedly, not all projects would cumulatively impact the Project area in the same way or to the same degree, yet the FEIS presents a discussion of cumulative impacts with no way to discern their relationship to any given related project. *Id.* This is not the approach envisioned by NEPA. *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1133 (9<sup>th</sup> Cir. 2007) (cumulative impacts analysis “must not only describe related projects but also enumerate the

environmental effects of those projects” and “consider the interaction of multiple activities” on the overall impact of the project). Furthermore, given the post-FEIS change in the alignment of the Project, there is no way the FEIS could have adequately analyzed the impacts of the now chosen route.

Additionally, the EIS fails to include all “past, present, and reasonably foreseeable future actions” in the area that would cumulatively impact the environment and are therefore required to be considered along with the Powerlink, as required by NEPA. 40 C.F.R. § 1508.7. For example, the EIS fails to discuss any past or present actions. FEIS, G-3, G-4 to 22, G-94 to 164. It instead only includes a list of actions in various stages of environmental review or beginning construction. *See* FEIS, G-4 to 22, Table G-1. For example, BLM failed to include cumulative impacts analysis for the operation and maintenance of existing distribution and transmissions lines and associated facilities located in the CNF. While agencies do not have an obligation to consider every possible existing structure near the proposed Project area, agencies do have a duty to consider “germane” and “comparable” existing projects to the proposed action. *Bering Strait Citizens for Responsible Dev. v. U.S. Army Corps of Engineers*, 524 F.3d 938, 955 (9th Cir. 2008). Existing transmission lines and their operational facilities are obviously comparable to the proposed transmission lines and their operational facilities. Existing transmission lines are also germane to the proposed project; common-sense dictates that nearby transmission lines would impact the environment in substantially similar ways as the proposed Project, *e.g.* cumulatively increasing fire danger. Impacts should therefore be cumulatively considerable. 40 C.F.R. § 1508.25(a)(2-3). Prior courts have invalidated EISs which did not “note in detail” past related projects. *Lands Council*, 395 F.3d at 1027. By failing to provide even a general discussion of past related projects, BLM failed to take the requisite hard look at the cumulative impacts of the Project. *Id.*

The FEIS also fails to consider numerous reasonably foreseeable projects that are both “germane” and “comparable” to the proposed Project, including projects that will be constructed pursuant to BLM’s recent revision to the Eastern San Diego County Resource Management Plan (RMP). The RMP opens vast tracts of public land up to the development of wind and geothermal energy development. RMP ROD, 2. While the RMP may not identify any specific future development projects, it “allow[s] for additional lands in the Planning Area to be available for wind energy and geothermal development.” RMP ROD, 2. The RMP FEIS and accompanying ROD both include discussions and maps of where energy development projects would be allowed to occur. *See e.g.*, ROD, Map 5 (“Lands Available for Geothermal Leasing and Wind Energy Development”). Further, the lengthy RMP FEIS discusses RMP revisions that would cumulatively contribute to the same environmental impacts identified in the Project FEIS. *See generally* RMP FEIS Section 4.0 “Environmental Consequences” (identifying many of the same impacts as the project including impacts to air quality, soil erosion, invasive species introduction, increased wildfire, habitat destruction, etc.). Furthermore, the RMP was substantially amended during the approval process, making any consideration of cumulative impacts extremely difficult. The Visual Resource Management classifications were downgraded, allowing greater disturbance to areas that should be protected, and making the cumulative impacts of projects permitted by the RMP appear less impactful.

**d. The FEIS Fails to Consider a Reasonable Range of Alternatives**

NEPA requires that an FEIS “[r]igorously explore and objectively evaluate all reasonable alternatives” in order to provide a choice that includes environmentally preferable options “so that reviewers may evaluate their comparative merits.” 42 U.S.C. § 4332; 40 C.F.R. § 1502.14. Here, feasible alternatives were dismissed as infeasible and other viable alternatives were not

considered. First, the FEIS dismissed as infeasible the In-area Renewable Alternative. FEIS ES-8. This alternative considers the construction of renewable energy sources closer to the population center of San Diego and meets all three of the project objectives. *See* FEIS at ES-21. Despite its economic and environmental advantages over the transmission line alternatives and its feasibility, the EIS dismissed this alternative. Powers Dec., p. 8-11. Second, the EIS failed to include alternatives that would require a certain percentage of the transmission capacity to be dedicated exclusively to the transportation of renewable energy. FEIS, Section H; Volker Dec., Exhibit 6, p. 9. This alternative – or range of alternatives (0-100% renewable energy) – would have greatly informed the decisionmakers and the public about the Project’s potential to fulfill its stated goal of encouraging renewable energy development. Its absence is remarkable. Third, the EIS failed to adequately consider another environmentally beneficial option – undergrounding of the Project lines. *See* FEIS, ES-34 to 36. This option was proposed by the California Botanical Habitat Institute but was not reviewed in the EIS. Volker Dec., Exhibit 8, pp. 2-14. Because this alternative is feasible and avoids many of the significant impacts related to the Project, including impacts on biological and visual resources and fire safety, it should have been evaluated in the EIS. *Id.*

## **2. The Project’s True Number of Significant Impacts Was Not Disclosed in the FIER/EIS**

EPA documentation prepared by BLM for the Powerlink is hopelessly confused and replete with contradictions regarding the significant environmental impacts that will result from the Project. BLM neither fully understood nor publicly disclosed the true magnitude of harm the Project would cause the CNF. Because the exact number and extent of significant impacts to the CNF have never been disclosed in BLM’s NEPA record, a supplemental NEPA review and

disclosure by the Forest Service is necessary.

According to the Executive Summary in the FEIS, the Final Environmentally Superior Southern Route Alternative will result in 41 Class I (“significant, unmitigable”) impacts. *See* FEIS at page ES-6. Yet 46 Class I impacts are listed in Table H-24 where a separate summary is presented for each of SDG&E’s proposed northern route, the Environmentally Superior Southern Alternative, and the LEAPS Transmission-Only Alternative. *See FEIS* at pages H-124-125. And perhaps most importantly, the CPUC’s Order Modifying Decision 08-12-058 and Denying Rehearing of Decision, as Modified identifies 100 Class I impacts including, long after the closure of the NEPA record, a first time-ever summary and disclosure of 57 Class I cumulative impacts associated with the Final Environmentally Superior Southern Route Alternative.

As a result of these conflicting statements and omissions, the public, BLM, and now the Forest Service have been denied an important and timely opportunity to review and comment on the number and type of significant impacts anticipated from the adopted Environmentally Superior Southern Route Alternative. Because it is now impossible to determine how many significant impacts on the CNF may have been omitted from BLM’s analysis, the Forest Service should have prepared an SEIS for the Project.

SDG&E has mischaracterized in its PMR the true extent of Powerlink impacts to thousands of acres of native vegetation on the CNF and elsewhere by dismissing the majority of impacts to vegetation as “temporary.” SDG&E’s claims that extensive construction impacts to many vegetative communities should be considered “temporary” are contrary to science and completely unsupportable. SDG&E asserts that certain impacts would be limited to the duration of construction, followed by restoration activities, thereby making them temporary. In fact, “temporary” disturbances to sensitive and vulnerable native vegetation communities such as

chaparral, coastal sage scrub, desert scrub, native grasslands, riparian scrub, oak and riparian woodlands and others most often result in *permanent* harm to those natural communities. Some permanent impacts resulting from temporary construction activities are very obvious. For example, the cutting of mature oaks, cottonwoods, willows, sycamores, and other native trees and the related loss of mature tree habitat for dependent species clearly have a permanent effect through loss of the native habitat. Other permanent impacts are less obvious and include the destruction of crucial microbiotic soil crust vegetation and/or the nearly inevitable colonization of any disturbed areas with exotic invasive weeds. Replacement of mature native vegetation with immature native vegetation cannot replicate the habitat values of the lost mature vegetation. *See* Testimony of Ilene Anderson, Jerre Ann Stallcup, Richard W. Halsey, Travis Longcore, Ph.D., included in the record for the Sunrise Powerlink proceeding at the CPUC (itemized on the attached exhibit list and hereby incorporated by reference).

### **3. The PMR Reveals Substantial Gaps in the FEIS.**

As described throughout the discussion of the substantial changes made to the Project and surrounding circumstances, the PMR and SIR both revealed significant new information that was not included in the original FEIS. This information could have, and should have, been included in the FEIS. The provision of that information to the public and decisionmakers long after the approval of the FEIS only further shows the inadequacies of the FEIS.

Furthermore, neither the PMR nor an SIR is required by NEPA and neither meets the requirements for appropriate environmental review under the statute. Therefore, even if this information could be considered in addition to the FEIS, the purposes and requirements of NEPA still have not been fulfilled. An SEIS is necessary to rectify these deficiencies under NEPA.

#### **IV. THE APPROVAL PROCESS FOR THE SUNRISE POWERLINK PROJECT VIOLATED THE NATIONAL FOREST MANAGEMENT ACT.**

The NFMA grants the Forest Service a leading role in “assuring that the Nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity.” 16 U.S.C. § 1600(6). Land management plans guide the Forest Service in fulfilling its role as the steward of the National Forest system, pursuant to the Multiple-Use Sustained-Yield Act of 1960, NEPA, and the goals of the Renewable Resource Program, set forth in sections 2 and 5 of the NFMA, 16 U.S.C. §§ 1602, 1604, and the implementing regulations. 36 C.F.R. § 219.1. Land management plans provide for balanced and sustainable use of forest and grassland resources for outdoor recreation, forage, timber, wildlife and fish, biological diversity, productive soils, clean air, water and minerals. 36 C.F.R. § 219.1. “Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C. § 1604(i).

The formulation of a land management plan requires the responsible official to consider specific criteria, such as the relationship of possible actions to the Forest Service National Strategic Plan, existing conservation strategies, and biological opinions applicable to the planning area. 36 C.F.R. § 219.7. The Forest Service must also evaluate the merit of the scientific basis of all available analysis on which it relies. 36 C.F.R. § 219.11. While the Forest Service may amend an existing plan at any time, the decision to amend an existing plan must be based on the identification and consideration of new or changed circumstances, together with the analysis of the effects of the proposed amendment. 36 C.F.R. §§ 219.2, 219.8.

When amending an existing plan, the responsible official must actively engage the public, interested organizations, private and other interested parties in the stewardship of National Forest

system lands. 36 C.F.R. § 219.9. The public must be duly notified and allowed an “open and meaningful” opportunity to participate in the planning process in accordance with 36 C.F.R. § 219.9. The public also has a right to file an objection to a proposed amendment, pursuant to 36 C.F.R. § 219.13.

The Powerlink FEIS and subsequent decision by the Forest Service adopting the FEIS ignore this mandate. The FEIS entirely fails to acknowledge that the Powerlink would require amendments to the CNF Plan because of its many conflicts with that Plan in violation of 16 U.S.C. § 1604(i), discussed below. Section D.17 of FEIS merely hints at the possibility of a Forest Plan amendment. It fails to disclose what that proposed amendment would entail.

The Forest Service's May 15, 2010 legal notice and comment period informed the public that Forest Service approval of the Project would require a Special Use Permit and amendments to the Forest Plan, yet neither a draft permit nor draft plan amendments were available for review during the comment period. The short summary of *possible* elements of a Forest Plan amendment contained in the notice is insufficient to disclose the Forest Service's intent or justification for such amendments and fails to address all amendments that would be necessary to accommodate the Powerlink. Similarly, the Forest Service indicated in the notice that it would be preparing an SIR addressing Project changes as they relate to the CNF subsequent to approval of the Project by the BLM and CPUC. Again, no SIR was available during this comment period. Further, the Forest Service failed to afford the public the opportunity to comment at a public hearing, despite repeated requests by Appellants that a hearing be held. The public must be afforded the opportunity to review these crucial documents in order to provide the Forest Service with input during the NEPA process.

**V. THE SUNRISE POWERLINK PROJECT IS INCONSISTENT WITH THE CLEVELAND NATIONAL FOREST MANAGEMENT PLAN.**

“The Forest Service cannot approve any of the route alternatives without first ensuring their consistency with the Forest Plan.” FEIS D.17-7. However, the Project violates many of the Forest Plan’s land use standards and land use zones. Despite these inconsistencies, the Forest Service authorized SDG&E’s special use of Forest lands. These conflicts have not been addressed, much less resolved, by any agency to date. In fact, the Forest Service has denied all requests by Appellants to hold public hearings on these inconsistencies. Instead, the Forest Service approved amendments to the Forest Plan in order to allow the Sunrise Powerlink to proceed unfettered by Forest Service restrictions.

In its SIR, the Forest Service describes the CNFLMP and then goes on to state that the FEIS summarized CNFLMP consistency in a table in Chapter D.16 and the PMR did so for those criteria that were not clearly met in the FEIS. SIR, p. 17. However, nowhere in the SIR does the Forest Service address those conditions that are still not met, nor the impacts on CNF lands of the failure to satisfy those criteria. Impacts on the CNF that were not addressed include but are not limited to the Project’s effects on fire danger, land-use zones, aesthetics, riparian resources and management design criteria, as identified in the Forest Plan.

**A. The Project Conflicts with the Fire Prevention Standards of the Forest Plan.**

Appendix B of the Forest Plan contains program strategies and tactics for achieving the desired conditions and goals laid out earlier in the Plan. One such strategy is to prevent “human-caused wildland fires and associated human and environmental impacts.” Forest Plan, p. 116. This program is aimed at protecting public health and safety and the habitat of threatened,

endangered, proposed, and candidate species among many other Forest resources. *Id.* One way in which the Forest Plan implements this program is by restricting activity and access to certain lands. *Id.*

The construction and presence of the Powerlink would be in clear violation of this crucial public health and safety goal by increasing the risk of wildfire and interfering with firefighting activities. FEIS p. E.4.15. According to the EIS, the presence of overhead powerlines, and the construction and maintenance of those lines as well as many related projects, will increase the probability of a wildfire, a risk that cannot be mitigated to less than significance. *Id.*; SIR, p. 16. Furthermore, the introduction of non-native plants, which is likely to occur during Project activities, will increase the risk of ignition and rate of fire spread. FEIS p. E.4.15. The presence of overhead powerlines will also pose a danger to low-flying aircraft dropping fire retardant or water into smoke-filled canyons, curtailing use of one of the most effective fire suppression techniques for remote areas. *Id.* These substantial fire risks extend beyond CNF lands onto Appellants' members' properties abutting the Forest, and should be considered in an SEIS.

The Powerlink would create a significant risk of wildfire along the BCD and Modified Route D alternatives (which are part of the selected route):

Due to the potential for unavoidable ignitions related to the presence of the overhead transmission line to occur during extreme fire weather, the presence of the project would significantly increase the likelihood of a catastrophic wildfire (Class I). The risk of ignitions and the risk of damage from a project-related ignition can be reduced, though *not to a less than significant level*.

FEIS at page E.2.15-8, emphasis added.

The impact of project construction on the potential for a wildfire to have damaging consequences to communities, firefighter health and safety, and natural resources is considered significant, and it *cannot be mitigated to a less than significant level*

(Class I).

FEIS at page E.4.15-11, emphasis added.

The Wildfire Containment Conflict Model (Figures E.4.15-14 through E.4.15-17) for the Modified Route D Alternative identifies two specific areas where the overhead transmission line would restrict wildfire containment to a very high degree. ... The nearby access roads and moderate topography indicate that the conflict exists in a defensible landscape where firefighting resources would be able to access and suppress a fire *if there were no obstacles present*. However, *effective wildfire containment in this area would be obstructed by the presence of the overhead transmission line and the proximity of parallel existing lines*. Firefighting suppression tactics, maneuverability and approach distances are greatly restricted by the indefensible island created between collocated and parallel transmission lines. This indefensible landscape is a swath of land where firefighting is tactically very difficult or simply too dangerous (due to a combination of minimum approach distances and rates of wildfire spread that can reach up to 300 feet per minute).

The outcome of not fighting a wildfire in an otherwise defensible landscape under favorable weather conditions is that it is able to build in size and intensity unchecked by firefighters who are forced to wait until the fire passes through the area. Delays in containment allow for rapid fire perimeter growth. With the increase in the fire perimeter comes the potential for wind-blown embers to ignite spot fires ahead of the fire front, which further complicates fire suppression activities. The creation of wildfire containment conflict areas by the Modified Route D Alternative and Revisions is considered a *significant impact* (Class I).

FEIS at page E.4.15-14, emphasis added.

There are many reasons why the Powerlink's increased fire risks would be inconsistent with other elements of the Forest Plan. For example, the Forest Plan forbids development that increases fire risk to wildlife habitat, cultural and scenic resources, and other natural values. The Forest Plan directs in Lands 2 - Non-Recreation Special Use Authorizations (LMP Part 2, Cleveland Strategy, page 112) that the Forest Service shall:

Administer existing special-use authorizations in threatened, endangered, proposed and candidate species habitats to ensure they *avoid or minimize impacts to threatened, endangered, proposed and candidate species and their habitats, cultural and scenic resources, and open space values*.

*Id.*, emphasis added.

Unless it is undergrounded throughout its length, the Powerlink would create a severe new fire hazard. According to the CalFire agency, three fires sparked by power lines in 2007 alone caused enormous harm:

The Witch, Guejito and Rice Fires were determined to be caused by powerlines. The Witch Fire burned 197,990 acres, destroyed 1,650 structures, valued at over \$236 million, costing taxpayers \$18 million in suppression costs. There were two civilian fatalities, 40 firefighters injured. The Witch Fire burned together with the Guejito Fire. The Rice Fire burned 9,472 acres, destroyed 248 structures, valued at over \$30 million, costing taxpayers \$6.5 million in suppression costs. There were six firefighters injured.<sup>1]</sup>

Wildfires sparked by power lines are relatively common and are responsible for a significant portion of acreage burned in southern California wildfires. In October of 2007, 9 out of the 20 devastating wildfires that burned across southern California were ignited by power lines.<sup>4]</sup> Prior to the October 2007 fires, 17% of all areas burned in San Diego County since 1960 were from fires that originated from power lines.<sup>5]</sup> In 1970 the Laguna Fire on the CNF burned westward 30 miles into Alpine and El Cajon. It was ignited by a downed power line and, until the 2003 Cedar Fire and the 2007 Zaca Fire, was the *worst fire in state history*. See

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<sup>1</sup> CalFire news release October Fire Causes, November 16, 2007 (Ex. 4 hereto).

<sup>4</sup> Power Lines and Catastrophic Wildland Fire in Southern California, Powerpoint presentation by Joseph W. Mitchell, Ph.D, M-bar Technologies and Consulting, LLC (available at [http://www.mbartek.com/cpucspl/cpuc\\_index.html](http://www.mbartek.com/cpucspl/cpuc_index.html)).

<sup>5</sup> Testimony of Joseph W. Mitchell, Ph.D on behalf of the Mussey Grade Road Alliance, pages 18-19, submitted to CPUC May 31, 2007, Exhibit MG-1in A.06-08-010 (available at [http://www.mbartek.com/cpucspl/cpuc\\_index.html](http://www.mbartek.com/cpucspl/cpuc_index.html)). The testimony, prepared before the October 2007 fires, obviously does not take into account the additional acreage burned in those fires.

[http://www.cccarto.com/cal\\_wildfire/laguna/fire.html](http://www.cccarto.com/cal_wildfire/laguna/fire.html) (Ex. 5 hereto). A recent study shows that “power line fires tend to be larger than wildland fires from other sources.”<sup>6</sup>]

Under the right conditions (notably conditions that are common during much of the year in San Diego and Orange counties on the CNF), any one power line-related wildfire ignition can quickly grow to thousands of acres and become a significant menace to public health and safety. This extreme risk would be exacerbated by construction of the Powerlink. The Forest Service must consider seriously (1) the no action alternative recommended by the CPUC Administrative Law Judge who presided over the Powerlink proceeding, (2) the local and renewable energy generation alternatives ranked above the Southern route in the FEIS, and (3) an underground Interstate 8 easement alternative.

Since approval of the FEIS, significant changes have been made to the Project. However, none of those changes remedy the inconsistencies between the Forest Plan fire management guidelines and the impact of the Project. The PMR, which significantly altered the route alignment, contains one short paragraph on fire risk that claims that the “review determined that modifications in 38 of the PMR units [of the Powerlink] resulted in *no change* to fire impacts.” PMR, p. 3-52, emphasis added. In fact, the SIR clearly shows that the fire impacts anticipated in the FEIS were an underestimate. SIR, p. 16. The San Diego County Fire Authority assessed the number of assets at risk at 3,217, while the FEIS only identified 1,380. *Id.* The Forest Service also notes that the FEIS specifically failed to account for “modeled fire spread outside of the [FEIS] fireheds.” *Id.*

Since none of the inconsistencies between the CNFLMP fire safety guidelines and the Project have been remedied, the Forest Service’s Permit approval should be set aside as a

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<sup>6</sup> Power Lines and Catastrophic Wildland Fire in Southern California, *supra*.

violation of the Forest Plan and the National Forest Management Act, 16 U.S.C. § 1604(i), which mandates that “[r]esource plans and permits, contracts and other instruments for the use and occupancy of National Forest System lands shall be consistent with land management plans.”

**B. The Project Conflicts with the Land-Use Zoning Designation of the Forest Plan.**

The selected Project route passes through and conflicts with the Forest Plan’s designation of several areas of the Back Country Motorized Use Restricted (“BCMUR”) and Back Country Non-Motorized (“BCNM”) land-use zones.

The BCMUR zone includes undeveloped areas within the Forest with few to no roads. Forest Plan, p. 7. “The level of human use and infrastructure is low to moderate.” *Id.* The only motorized use allowed is administrative, and even then access is “limited to existing roads or to temporary roads needed for resource management purposes.” *Id.* The management intent for this zone is “to retain the natural character of the zone and limit the level and type of development. Some roads will be constructed and maintained, but the intent is to manage the zone for no increase or a very low level of increase in system development.” *Id.*

The BCNM zone comprises undeveloped land “with few, if any roads.” *Id.* at 8. Human use and infrastructure in this area is very limited and vehicle access is only allowed for administrative emergencies and short duration management activities. *Id.* “The intent is to use temporary routes while management is occurring and then close and remove the route.” *Id.*

Major utility corridors, such as the Project, are allowed in the BCMUR land-use zone only in “designated areas,” and the Valley/Serrano and West-Wide Energy Corridor are the only such designated areas in the CNF. Forest Plan, Table 2.2.3 at p. 4; ROD, p. 12. However, no major utility corridors are allowed in BCNM zones. The selected Project route does not run through the

Valley/Serrano corridor, and many miles of the Project are located outside of the West-Wide Energy Corridor. Thus, construction of the Project through the CNF would clearly violate the Forest Plan land-use zones. The Forest Supervisor, however, approved a plan amendment to allow the Powerlink to run through BCNM zones on the grounds that it avoids private property and sensitive vegetation. ROD, p. 12. However, the avoidance of private property does not relieve the Forest Service of its duty to restrict the development of utility corridors in BCNM zones. Furthermore, this amendment has never been circulated to the public for review. These issues should have been presented to the public for review prior to any CNFLMP amendment approvals.

Further, the Forest Service's special use authorization directly contradicts previous arguments and comments presented by the Forest Service and Supervisor. According to the Forest Service's March 12, 2008 comment letter to the CPUC and BLM, several of the chosen alternatives comprising the selected route cross designated BCNM zones *in violation of the Forest Plan*. FEIS, Response to Comments, Comment Set A0009, Comments A0009-4 (BCD Option), -5 (BCD Option in Thing Valley), -6 (I-8 Option), -7 (Route D Option), pp. 3-142 to 3-143. The BCD South Option, for example, "utilizes a portion of . . . 'Thing Valley' between milepost 12 and 14 that crosses an area designated as" BCNM. *Id.* at Comment A0009-5, p. 3-142. "Major power lines are not consistent with this zone." *Id.* In fact, the Forest Supervisor specifically stated that this route "would not meet the screening criteria and *would not be accepted* as an application for a special use on NFS lands." *Id.* at Comment A0009-4, p. 3-142, emphasis added.

Despite his clear and unwavering commitment to deny a special use application should the Project pass through Thing Valley and the BCNM zone, the Forest Supervisor flip-flopped and allowed SDG&E's Project to invade Thing Valley and the BCNM zones, in direct violation of the

Forest Plan. The SIR prepared by the Forest Service directly contradicts the commitment made by Supervisor Metz in his March 12 letter as it purports to allow two structures within Thing Valley, one of which is in a designated BCNM zone, increasing the temporary *and* permanent impact on CNF and directly violating the Forest Plan. SIR, p. 5. While the PMR and ROD attempt to justify this decision by citing the Forest Plan guideline to minimize impacts to private property, blaming JAM Investments Inc., a private land owner, for opposing the Project, this does not excuse the Forest Service from its duty under NFMA and the Forest Plan to maintain BCNM zones in their pristine condition and deny special use authorization to applicants seeking to build powerlines through them. PMR, pp. 3-46 to 3-47; ROD, p. 12.

**C. The Project Conflicts with the Visual Resource Standards of the Forest Plan.**

The Sunrise FEIS openly admits that “[t]he high level of change that would result from [the Project] would not be consistent with Aesthetics Management Standard S9 of the [Forest Plan] requiring activities to meet the applicable [scenic integrity object].” FEIS p. E.4.3-11. The Project also fails to meet Standard S10, allowing a drop of only one Scenic Integrity Objective (“SIO”) level, and even then, the Forest Supervisor’s approval is necessary. ROD, p. 11. Both the FEIS and the ROD go on to admit that the transmission lines and poles would be “prominent features in the landscape” and that “even with implementation of mitigation measure[s] . . . the project will *not meet these requirements.*” *Id.*; FEIS p. E.4.3-11.

Included among the strategies that the CNF managers intend to emphasize are three that focus on landscapes and aesthetics. Forest Plan, p. 83, 105. The first landscape strategy requires the managers to “[m]anage landscapes and built elements in order to achieve scenic integrity objectives: Use the best environmental design practices to harmonize changes in the landscape

and to advance environmentally sustainable design solutions.” Forest Plan p. 105. The second landscape strategy calls for the rehabilitation of landscapes “to reduce visual effects of management activities and nonconforming features.” *Id.* The third landscape strategy “[m]aintain[s] the character of National Forest System lands in order to preserve their intact nature, valued attributes, and open space.” *Id.* The powerlines and poles/towers will not be in harmony with the surrounding landscape; instead, they will stick out like sore thumbs and will therefore violate these three strategy guidelines.

Because the Project fails to meet the Aesthetic Management Standards and Landscape strategies set forth in the Forest Plan, the Forest Supervisor approved “exceptions to these requirements.” ROD, p. 11. No explanation for this decision was provided in the ROD or the SIR, and the exact details of that exception are vague. *Id.* This exception to the Forest Plan was approved outside of the public eye and for all of the above reasons should be set aside.

Furthermore, the changes to the Project, described above, significantly increase the visual impact of the Project, increasing the divide between the Aesthetic Management Standards of the Forest Plan and the Project. Both the red marker balls along the transmission line and the “temporary work areas” that will actually cause permanent effects due to significant cutting and filling increase the impact to the visual resources of CNF land. The scenic integrity of the area is diminished by the addition of these new Project components and without the proper environmental review of these new impacts, any amendment to the Forest Plan allowing them is arbitrary and should be set aside.

Common sense and the text of the FEIS, the ROD and the SIR show that the Project would result in significant impacts to Forest views, aesthetics, and character. Approving huge and ugly industrial transmission line towers within CNF and the exceptions in the Forest Plan necessary to

proceed with the Project is contrary to the goals of the Forest Service and the CNFLMP. Therefore, the Forest Service must set aside its Special Use Authorization and Forest Plan exception, and conduct supplemental NEPA analysis to address the enormous visual resource impacts from the Project. Appellants believe that the Forest Plan's *existing* visual resource standards are essential to protect the Forest's visual integrity, and should *not* be weakened to accommodate this destructive and unnecessary Project.

**D. The Project Conflicts with the Special Use Standards of the Forest Plan.**

The Forest Plan lays out standards for special use authorization, including specific standards for Non-Recreation Special Use Authorizations. Forest Plan p. 112. Existing special-use authorizations are required for development in the habitats of threatened, endangered, proposed and candidate species to avoid or minimize impacts to their habitats, to cultural and scenic resources, and to open space values. *Id.* Contrary to this directive, the Project fails to avoid significant harm to Forest resources. The FEIS for the Project concluded that the route will have at least 41 significant and unmitigatable impacts. FEIS ES-6. These significant impacts violate the Forest Plan, as this appeal documents in detail.

Better alternatives, of course, are readily available. The FEIS for the Project ranked two local energy generation alternatives<sup>7</sup> as far less harmful to the environment than the route ultimately selected. The CPUC Administrative Law Judge who reviewed the Project concluded that its construction was not justified, as less impactful alternatives such as locally generated and distributed power are feasible. Expert local engineer Bill Powers has prepared a peer-reviewed

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<sup>7</sup> The “New In-Area All-Source Generation Alternative” and the “New In-Area Renewable Generation Alternative” were both ranked environmentally superior to the southern route alternative that was selected.

report detailing local energy alternatives to the Powerlink titled *San Diego Smart Energy 2020: The 21<sup>st</sup> Century Alternative*

([http://www.etechnologyinternational.org/new\\_pdfs/smartenergy/52008\\_SmE2020\\_2nd.pdf](http://www.etechnologyinternational.org/new_pdfs/smartenergy/52008_SmE2020_2nd.pdf)). Where, as here, less impactful alternatives are available, it would be an abuse of discretion for the Forest Service to disregard them and instead approve an unnecessarily destructive alternative such as the Project.

Further, special-use authorization requires that utilities be co-located with existing utilities where possible to minimize the encumbrance of National Forest System land. Forest Plan p. 112. However, the Project is not co-located with the West-Wide Energy Corridor. Sunrise Powerlink: Land Ownership Map, attached hereto, dated May 20, 2010. This deviation clearly violates the Forest Plan Special Use Standards, and therefore it violates the NFMA, 16 U.S.C. § 1604(i). The Forest Service's Permit approval must therefore be set aside.

**E. The Project Conflicts with Riparian Conservation Area Standards.**

Like the Aesthetic Management Standards described above, the Project will violate the Riparian Conservation Area Standards set forth in the Forest Plan. Standard S47 calls for a Five-Step Project Screening Process that requires "activities within Riparian Reserves to be either neutral or move the area closer towards the desired conditions." ROD, p. 11. The Project will cause significant harm to designated riparian conservation areas in the Forest through construction of tower pads, staging areas, access roads, pull sites, and other project activities in imperiled species riparian habitat. See FEIS Figure E.2.2-1. Both the FEIS and the ROD conclude that the Project will not meet these standards and therefore, the Forest Service included an exception to the rule in its Special Use Authorization ROD. FEIS, §§ E.1.2, E.2.2, E.3.2, E.4.2, Appendix Q;

ROD, p. 11. However, the mere inclusion of one sentence in the ROD that the Forest Supervisor's "decision includes an exception to this requirement" does not fully resolve the issue. ROD, p. 11. No explanation of this exception is provided in the ROD. *Id.* Without appropriate environmental review and disclosure in an SEIS, the public will be unlawfully denied the opportunity to understand what the impacts of such an exception will be.

Also among the strategies and tactics adopted by the CNF is WAT 1, which requires the Forest managers to "[p]rotect, maintain and restore the natural watershed functions including slope processes, surface water and groundwater flow and retention, and riparian area sustainability." Forest Plan p. 95. WAT 1 calls for RCAs to be managed in such a way as to "maintain or improve conditions for riparian dependent resources." Forest Plan p. 95. The impacts of the Project on RCAs are admitted significant and unmitigatable. FEIS, §§ E.1.2, E.2.2, E.3.2, E.4.2, Appendix Q; ROD, p. 11. These significant adverse impacts on Riparian Conservation Areas violate the Forest Plan guideline WAT 1. Unlike Standard D47, however, there is no exception approved for this guideline and the Project is therefore still in conflict with the Forest Plan, and the NFMA, 16 U.S.C. § 1604(i).

#### **F. The Project Conflicts with the Forest-Specific Design Criteria.**

The Forest Plan lays out 21 design criteria specific to the CNF. The Project violates many of these criteria, including but not limited to:

CNF S5 - "Consolidate major transportation and utility corridors by co-locating facilities and/or expanding existing corridors." *Id.* The Project is not co-located with the West-Wide Energy Corridor, thus violating this design criteria.

CNF S9 - "Avoid or mitigate, following consultation, activities resulting in direct trampling or erosion problems to Laguna Mountain skipper suitable and occupied habitat and adjacent areas." *Id.* The construction and maintenance of the Project may have direct trampling or

erosion effects on Laguna Mountain skipper habitat, thus violating this design criteria.

CNF S12- “Pacific Crest National Scenic Trail - Protect scenic values in accordance with adopted scenic integrity objectives. Protect foreground views from the footpath as well as designated viewpoints. Where practicable avoid establishing unconforming land uses with the viewshed of the trail (Morena, Laguna, Aguanga Places.)” *Id.* As discussed above, the Project will have a significant adverse affect on views within the area, thereby violating this design criteria.

CNF S13 - “Avoid or mitigate activities that may negatively affect San Diego thornmint [] occupied habitat (Sweetwater Place).” *Id.* The construction and maintenance of the Project may negatively affect the San Diego thornmint.

The Project’s violation of the above criteria makes clear that the Forest Service’s Special Use Authorization should be set aside. Unless and until the Project meets Forest Plan requirements, it should not be approved by the Forest Service.

#### **G. The Project Conflicts with Forest Plan Species Protection Standards.**

The Powerlink would cause significant harm to imperiled species in the Forest in conflict with the Forest Plan. According to the Forest Plan (page 87) the Forest Service must:

Manage habitat to move listed species toward recovery and de-listing. Prevent listing of proposed and sensitive species.

Also, to protect Golden Eagles the Forest Service must: “Restrict human access during critical life stages . . . .” Forest Plan, page 89.

Contrary to these Forest Plan standards, the Powerlink would move listed species closer to extinction, move unlisted species closer to listing as threatened or endangered, and greatly increase human access and disturbance at Golden Eagle nest sites. ROD, p. 5. “Even with [mitigation] measures the analysis concludes that the impacts cannot be mitigated to a level that is less than significant.” *Id.*; FEIS, §§ E.1.2, E.2.2, E.3.2, E.4.2.

“Unmitigable” means that *no* amount of mitigation will reduce impacts to below a level of significance. This in turn means that construction of the Powerlink will directly defy the Forest Plan species standards and move these listed species *closer* to extinction or closer to listing under state or federal endangered species acts, and cause significant disturbance to Golden Eagles.

Additionally, the Project is contrary to Special Use Standard IS1, which requires the Forest Service to “[p]revent the introduction of new [invasive species]” onto CNF lands. However, According to the Powerlink FEIS (Table E.2.2-1), “Construction and operation/maintenance activities *would result in the introduction of invasive, non-native, or noxious plant species.*” (Emphasis added.) This language in the FEIS makes it clear that the Project not only violates requirements for animal species, but invasive species standards as well.

The Project’s violations of the Forest Plan and the NFMA are obvious. These violations clearly show the need for additional review and the need to set aside the Forest Service’s Special Use Authorization and subsequent Forest Plan amendments and exceptions.

## **VI. THE SUNRISE POWERLINK PROJECT IS INCONSISTENT WITH THE FEDERAL LAND POLICY AND MANAGEMENT ACT.**

The Federal Land Policy and Management Act (“FLPMA”) grants the Secretary of Agriculture the authority to issue rights-of-way for the “transmission, and distribution of electric energy.” (43 U.S.C. § 1761(a)(4)) provided that “[e]ach right-of-way shall contain – (a) terms and conditions which will . . . (ii) *minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment.*” 43 U.S.C. § 1765(a)(ii). Finally, FLPMA requires that “[e]ach right-of-way shall be limited to the ground which the Secretary concerned determines [. . .] will do no unnecessary damage to the environment.” 43 U.S.C. § 1764. By granting the Permit for the Project, the Forest Service has not only authorized damage to the

scenic and aesthetic values of the CNF, but also greatly increased the risk of wildfire.

Approving the Permit for the Project will perpetuate – if not substantially *exacerbate* – the existing high risk of power line-related fire over the period of the special use permit. Such an action cannot by any stretch of the imagination be considered to “avoid or minimize impacts to threatened, endangered, proposed and candidate species and their habitats, cultural and scenic resources, and open space values” as required by the Forest Plan, or to “minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment” as required by FLPMA. By failing to consider (1) reducing the number and extent of power lines occupying the Forest as part of an action alternative and (2) undergrounding more than the tiny percentage of power lines described in alternative 4, the Forest Service has not “minimize[d] the encumbrance of National Forest System land” as required by the Forest Plan.

FLPMA also states that “[i]n order to minimize adverse environmental impacts and the proliferation of separate rights-of-way, the utilization of rights-of-way in common shall be required to the extent practical.” 43 U.S.C. § 1763. As explained above, the Project is not collocated with the West-Wide Energy Corridor, creating significantly greater impacts to the CNF. The Project should have been collocated “to minimize adverse environmental impacts and the proliferation of separate rights-of-way” (*id.*) and to “minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.” 43 U.S.C. § 1765. The Forest Supervisor’s failure to do so violated FLPMA.

## **VII. THE FOREST SERVICE’S APPROVAL OF THE PERMIT VIOLATES ESA AND THE BALD AND GOLDEN EAGLE PROTECTION ACT**

A biological opinion which is not coextensive in scope with the agency action is contrary to law. *North Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980) (requiring a BiOp to

analyze the effect of the entire agency action); *Greenpeace v. National Marine Fisheries Service*, 80 F.Supp.2d 1137, 1147 (W.D. Wash. 2000). Further, an agency “action” under ESA is to be construed broadly, and must include the full action and all mitigation measures adopted in pursuance thereof. *TVA v. Hill*, 437 U.S.153, 173 (1978); *North Slope Borough v. Andrus*, 642 F.2d at 609. Additionally, when evaluating a large-scale and complex project, such as the Powerlink, the FWS must identify all the relevant components of the project, and explain how these components will individually, and in combination, affect listed species. *Greenpeace v. National Marine Fisheries Service*, *supra*, 80 F.Supp.2d at 1148; 50 C.F.R. § 402.14(g)(2)-(3).

The SIR reveals that the Project may have new potentially harmful effects on protected species – effects that have never been analyzed in a proper consultation with the FWS. For example, as discussed above, the PMR and SIR reveal that the Project would increase some impacts to the Arroyo Toad on CNF lands. Additionally, the SIR reveals that the “addition of infrared lights to most towers” is “likely to significantly increase the risk of collisions” by migrating and foraging birds. This new increase in collisions could significantly affect migrating birds that are either threatened or endangered species, yet no analysis was conducted by FWS regarding this possibility. Also, the SIR admits that the Project will have a vastly increased impact on Golden Eagle populations in the area. And finally, the SIR reveals entirely new impacts on Bald Eagles in the area, concluding that “SDG&E will be required to consult with the FWS to determine if a permit or further mitigation measures are necessary.” SIR, p. 10. But ESA requires the consultation to precede, not *follow*, approval of the Project.

Despite these potential new or increased effects on protected species in the Project area, the Forest Service blindly relied on FWS’s BiOp in approving the Project. This reliance was unwarranted and the Forest Service should either engage in a new consultation process with FWS

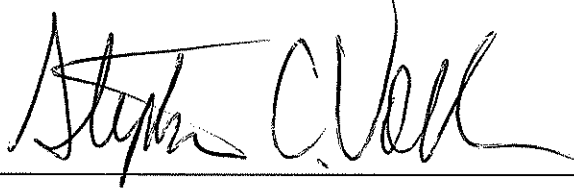
or wait to approve the Project until these issues are properly addressed by FWS in conjunction with BLM.

**CONCLUSION**

For each of the foregoing reasons, the Forest Supervisor's approval of the Project is contrary to law and the evidence in the record and must be set aside.

DATED: August 26, 2010

LAW OFFICES OF STEPHAN C. VOLKER

A handwritten signature in black ink, appearing to read "Stephan C. Volker", written over a horizontal line.

STEPHAN C. VOLKER  
Attorney for Appellants  
Backcountry Against Dumps, et al.

# EXHIBIT

1



# EXHIBIT

2

*We consider many things when making our everyday travel choices, from comfort and speed to cost and accessibility. Whatever the method of transportation we choose, a Carbon Footprint is left behind - the amount of greenhouse gases produced, measured in units of carbon dioxide.*

*How does your choice of travel to the PNWER conference measure up? Take a moment to review our fact sheet to discover how your method of transportation affects your Carbon Footprint, and how you can reduce it.*

## *Did you know that...*

1. When driving, you can reduce your carbon emissions by avoiding hard acceleration and unnecessary idling, keeping tires properly inflated, and traveling outside of rush hour to avoid congestion.
2. Travelling by helicopter creates more greenhouse gas emissions per person than travelling by float plane, airplane or jet plane over the same distance.
3. Travelling as a single occupant in a car creates almost the same amount of greenhouse gas emissions per person as being a passenger in a fully occupied flight—carpooling or ride-sharing greatly decreases the per-person carbon footprint of road vehicle travel.
4. Public transit (including bus, train, sea bus, etc) is generally more carbon-friendly than hybrid vehicles.
5. Biking, walking and running are the most carbon-friendly and healthy travel choices of all!

## **Travel Emissions Calculator: Making PNWER Carbon Neutral**

The Province of British Columbia is a leader in North America with its commitment to reduce greenhouse gas emissions. The *Greenhouse Gas Reduction Targets Act*, signed in November 2007, made B.C. the first jurisdiction in North America to legislate carbon neutral government operations by 2010.

The Province developed Smart**TEC** (**T**ravel **E**missions **C**alculator) to track government's travel-related emissions and help travelers better understand the carbon footprint of their travel choices. The tool was officially launched across government on April 1<sup>st</sup>, 2008.

SmartTEC has received overwhelmingly positive feedback. It is easy to use, accurate, efficient, and a climate action innovation born in British Columbia.

As the host jurisdiction of PNWER 2008, British Columbia has adapted SmartTEC to calculate the travel emissions associated with the summit. SmartTEC kiosks will be located in the conference space for PNWER attendees to use.

*We encourage you to visit a SmartTEC kiosk during the summit to calculate your carbon footprint. Navigate an innovative new tool and help us make PNWER 2008 a carbon neutral event!*



## Towards Carbon Neutrality by 2010

- Government's most important role in reducing greenhouse gas emissions is to encourage and enable positive actions by people, communities, business and industry.
- Like the rest of us, government also needs to pay attention to its own choices and make the kinds of "lifestyle" changes that give our planet a break.
- The B.C. government has committed to being "carbon neutral" by 2010.

## Getting There

- To become carbon neutral, an organization or an individual must do three things:
  1. measure its GHG emissions to determine the amount produced annually;
  2. reduce those GHG emissions where ever possible; and,
  3. purchase carbon offsets to make up any difference to reach carbon net zero.
- In 2004, B.C. government operations generated 104,000 tonnes of GHGs through such things as transportation, heating and operating buildings. These figures do not include emissions from health care and education institutions.
- Premier Gordon Campbell has challenged B.C.'s local governments to become carbon neutral by 2010 as well.
- The B.C. government is taking three major steps to move toward carbon neutral operations:
  1. First, the carbon neutral by 2010 goal has been enshrined in legislation and all public sector organizations must now report annually on progress toward that goal.
  2. Second, travel reduction is a major thrust to help government reach carbon neutrality. In

a province as vast as B.C., a certain amount of travel will always be necessary, but wherever possible, we're going to reduce travel and use more videoconferencing and perhaps desktop technology that enables "face-to-face" communication without leaving the office.

3. When work does require travel, government will offset the resulting greenhouse gas emissions in a way that works right here in B.C.
- For every tonne of emissions we generate from travel, the Province will direct \$25 to the new Pacific Carbon Trust. That money will then be used to invest in offset projects here in B.C. — projects that do things like increase energy efficiency or produce clean, renewable energy.

### *Pacific Carbon Trust*

The Pacific Carbon Trust will be launched in 2008.

For every tonne of greenhouse gas created by essential government travel, the Province will deposit \$25 in the trust. The money deposited in the trust will then be reinvested in made-in-B.C. carbon offset projects, helping the province offset its GHG emissions.

Trust money will only be invested in green projects in British Columbia.

The Pacific Carbon Trust is expected to eventually be opened to deposits by individuals, companies and all levels of government to help them become carbon neutral and help reduce emissions by supporting offset projects across the province.

Offset projects supported by the trust must provide additional reductions from those of existing activities and be measurable and verifiable. Projects funded by the trust may include enhanced energy efficiency, produce clean, renewable energy or sequester carbon through additional forestation (tree planting).

Examples of valid offset projects in B.C. that may be funded by the Pacific Carbon Trust include: replacing the use of dirty diesel fuel in rural and remote communities through electrical generation using micro-hydro plants, facilitating geothermal heat exchanges in buildings and greenhouses, and encouraging integrated environmental building design.

# EXHIBIT

3



Thursday, August 26, 2010

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## SDG&E TO BRING 2,500-GALLON FIREFIGHTING HELICOPTER TO SAN DIEGO REGION

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**Should a blood test for drugs and alcohol be mandatory for a driver who causes a fatality accident?:**

- Yes, the public and the victim's family should have a right to know if a driver was impaired.
- No, law enforcement should decide whether or not to order testing.

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## UTILITY ALSO PRESENTS ITS ENERGY RESOURCE PLAN FOR OUR REGION AT ECEDC COMMUNITY LEADERS SPOTLIGHT



SDG&E president Michael Niggli

May 25, 2010 (San Diego's East County) – San Diego Gas & Electric (SDG&E) has announced that the company will bring the world's largest heavy-lifting helicopter in the world to our region to construct Sunrise Powerlink, which SDG&E hopes to begin constructing this summer. "It can also be used for firefighting—and it can bring up to 2,500 gallons of water," said Michael R. Niggli, president and chief operating officer of SDG&E. By contrast, the largest firefighting helicopter previously in San Diego had a capacity of 300 gallons, he said.

Niggli made the remarks during the East County Economic Development Council's Community Leaders Spotlight at Cuyamaca College in Rancho San Diego yesterday. The company's executives also presented business and education

leaders with its plans for economic revitalization and sustainable energy that SDG&E indicated will benefit East County.

The \$30 million helicopter is being built in Oregon and is anticipated to arrive here mid-summer, Niggli told East County Magazine. Pilots are trained for precision dropping to target power line fires but will also be available to assist in fighting wildfires on request throughout our region to battle fires unrelated to power lines, he said. SDG&E will also have a wildfire strike team to assist its crews.

Asked if the helicopter would remain after Powerlink Construction is completed (assuming the project is built; Powerlink still faces court challenges and is awaiting approval from the U.S. Forest Service), Niggli said he would like to see the helicopter remain here if resources were available to pay for it.

Also at the event, SDG&E's new chairman and CEO, Jessie Knight Jr., out lined plans for "being a utility of the future." He said the San Diego region will be in the forefront of a "revolution" to include technology such as smart grid and sustainable energy sources. He also pledged greater transparency under his leadership. "Don't be afraid to ask the tough questions," he said, adding that the company is "serious about economic development" for East County.

Niggli noted that Knight had a lesson in emergency response on his first day on the job—when a 7.2 earthquake struck in Mexico, damaging utility infrastructure in Imperial Valley.

Niggli credited AB 32 with "driving a lot of what we are doing for the future" to transition to renewable energy sources including wind, solar and biofuels as well as energy conservation.



He said SDG&E is installing 5,000 to 7,000 smart meters daily into the market, which enables the utility to read bills online and tell instantly if power is lost to a home or business. Consumers will soon be able to view their information online as well, he noted.

The utility wants to expand its ECO substation substation to connect to wind and solar projects transmitted via

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### SDG&E in error, again

On May 26th, 2010 throw the bums out says:  
Actually, the Forest Service has a 2500 gal. firefighting helo and has used it in the area for years on fires. If Michael R. Niggli, president and chief operating officer of SDG&E. can't get something as simple as this correct what do you believe from him on the need for the power line? Question? Do you believe anything coming from a company who has paid out over 800 Million Dollars in fines for ripping you off?

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# EXHIBIT

4

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# CAL FIRE NEWS RELEASE

California Department of Forestry and Fire Protection



## San Diego Unit

**CONTACT:**

(619) 590-3160

**RELEASE**

**DATE:** November 16, 2007

### **October Fire Causes**

**San Diego County** – Investigators for CAL FIRE have released the following causes for the rash of wind driven fires that started between October 21<sup>st</sup> and October 23<sup>rd</sup>.

The Harris Fire cause is undetermined. The Harris Fire burned 90,440 acres, destroyed 548 structures, valued at over \$28 million, costing taxpayers \$21 million in suppression costs. There were eight civilian fatalities and 40 firefighter injuries.

The Witch, Guejito and Rice Fires were determined to be caused by powerlines. The Witch Fire burned 197,990 acres, destroyed 1,650 structures, valued at over \$236 million, costing taxpayers \$18 million in suppression costs. There were two civilian fatalities, 40 firefighters injured. The Witch Fire burned together with the Guejito Fire. The Rice Fire burned 9,472 acres, destroyed 248 structures, valued at over \$30 million, costing taxpayers \$6.5 million in suppression costs. There were six firefighters injured.

The Poomacha Fire was started by a structure fire, which spread into the brush. The cause of the structure fire is undetermined. The Poomacha Fire burned 49,410 acres and destroyed 217 structures, valued at over \$5 million. Suppression costs totaled \$21 million for the Poomacha Fire. There were injuries to 15 firefighters.

The Witch Fire is the second largest in San Diego County history, the Harris Fire is the fifth largest and the Poomacha Fire is the twelfth largest county. The 2003 Cedar Fire remains the largest fire in County history as well as California history.

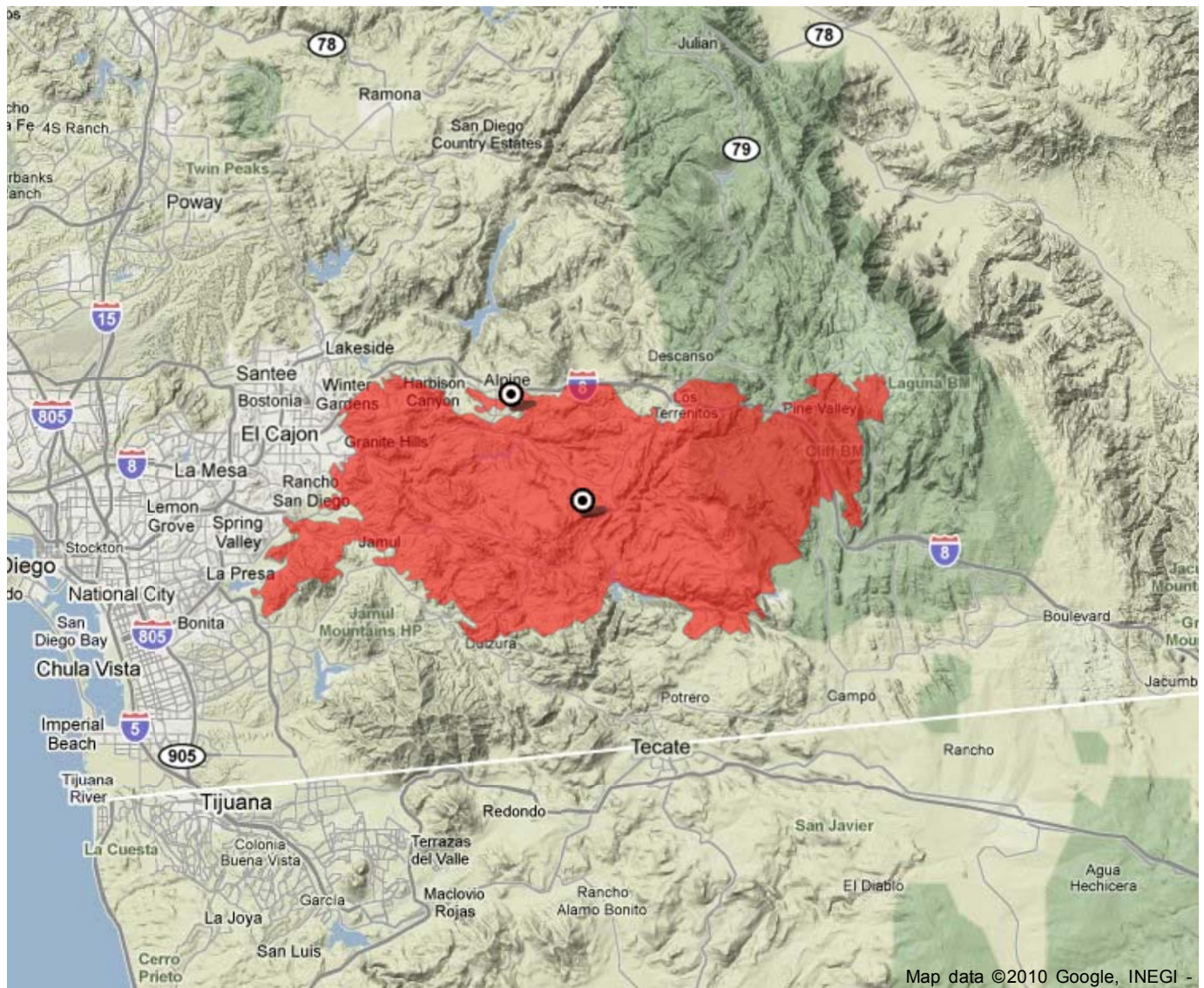
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# EXHIBIT

5

## Laguna Fire - 1970

California's worst wildfires...



hide  R

**The Laguna Fire, previously known as the Kitchen Creek Fire and the Boulder Oaks Fire, was, at its time, the largest wildfire in the history of California.**

**The Laguna fire was started by downed power lines during Santa Ana winds in the Kitchen Creek area of the Laguna Mountains in eastern San Diego County on the morning of September 26, 1970. In only 24 hours it burned westward about 30 miles (50 km) to the outskirts of El Cajon and**

**Spring Valley. The fire devastated the communities of Harbison Canyon and Crest. In the end the fire burned 175,425 acres (710 km<sup>2</sup>) and 382 homes killing eight people.**

**Note: The Laguna Fire was surpassed as the largest fire in California history by the 280,278 acre (1,134 km<sup>2</sup>) Cedar Fire in October 2003, and the July 2007 Zaca Fire which burned 240,207 remote acres in Santa Barbara County.**

Text Source: Wikipedia

Disclaimer: Data source USDA. Use this map and borders for reference only. CCCarto is not responsible for data errors or omissions.

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