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August 31, 2009

VIA E-MAIL AND U.S. MAIL

Ms. Vicki Wood, Field Manager
Bureau of Land Management
El Centro Field Office
1661 South 4th Street
El Centro CA 92243
Fax 760 337-4490

Jim Bartel, Field Supervisor
Carlsbad Fish & Wildlife Office
6010 Hidden Valley Road, Suite 101
Carlsbad, California 92011
Fax 760 431-9618

Re: **Expedited Freedom of Information Act Request for documents concerning
SDG&E compliance with mandatory conservation measures required in
Biological Opinion for Sunrise Powerlink project**

Dear Ms. Wood and Mr. Bartel:

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on behalf of The Protect Our Communities Foundation, Backcountry Against Dumps, the East County Community Action Coalition, and Donna Tisdale. We are requesting documents under the Freedom of Information Act *on an expedited basis* in an effort to determine the extent of compliance by San Diego Gas & Electric ("SDG&E") with certain mandatory conservation measures described in the biological opinion for the Sunrise Powerlink ("Powerlink") prepared by the U.S. Fish and Wildlife Service ("FWS"). We ask that you expedite your response to this request given the relatively short period of time between now and when Powerlink construction is expected to begin in October 2009.

The three organizations and one individual we represent are vitally concerned about proper management of San Diego County's fragile backcountry environment. The Protect Our Communities Foundation (POC) is dedicated to the promotion of a safe, reliable, economical, renewable, and environmentally responsible energy future for San Diego County. Backcountry Against Dumps is a community organization comprising many individuals and families residing in East San Diego County who are directly affected by planning, management, and use of nearby federal lands and are keenly interested in maintaining and enhancing the ecological integrity, scenic beauty, wildlife, recreational amenities, watershed values, and groundwater resources of these lands. The East County Community Action Coalition is a newly formed coalition of community groups, individuals, and organizations in East San Diego County. Its mission is to protect and enhance the quality of life for residents of East County by promoting coordinated community action, including monitoring planning, management, and use of nearby federal lands.

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SDG&E intends to begin construction on two segments of the Powerlink in designated critical habitat for the Peninsular bighorn sheep in October 2009. According to SDG&E documents filed with the Interior Board of Land Appeals:

...because BLM limited all activities on some portions of BLM-administered land to three months per year to protect against any impact on Peninsular bighorn sheep, SDG&E must begin minor construction within two segments of Sunrise from October 2009 to December 2009.

SDG&E, therefore, intends to install foundations for the 22 to 25 towers within these segments [10A and 9C] in 2009.

Please see page 20 of SDG&E's Motion to Intervene and Opposition to Request for Stay dated April 6, 2009 in *Backcountry Against Dumps, et al., v. Bureau of Land Management, et al.*, Interior Board of Land Appeals Docket No. 2009-153.

It is our understanding that, in advance of these and any other construction activities, SDG&E must undertake a number of actions and prepare several documents in accordance with required conservation measures contained in the biological opinion. According to the BO (emphasis added):

G-CM-17 ... A Habitat Management Plan(s) will be required for all offsite parcels and must be approved, in writing, by the CPUC, BLM, USFS, and Wildlife Agencies *prior to the initiation of any vegetation clearing activities.* ...

All off-site compensation parcels will be approved by the CPUC, BLM, USFS, and Wildlife Agencies and must be acquired or their acquisition must be assured through a mechanism such as a performance bond *prior to ground disturbing activities.* ... SDG&E will submit a Habitat Acquisition Plan *at least 120 days prior to any ground disturbing activities.* ...

G-CM-20 SDG&E will prepare and implement a comprehensive, adaptive Weed Control Plan for *pre-construction* and long-term invasive weed abatement.

... A *pre-construction* weed inventory will be conducted by surveying the entire ROW and areas immediately adjacent to the ROW (where access and permission can be secured), as well as at all ancillary facilities associated with the Project, for

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weed populations that: (1) are considered by the San Diego County Agriculture Commissioner as being a priority for control and (2) aid and promote the spread of wildfires (such as cheatgrass [*Bromus tectorum*], Saharan mustard [*Brassica tournefortii*] and medusa head [*Taeniatherum caput-medusae*]). ... These plant species will be treated (where access and permission can be secured) *prior to construction* or at a time when treatments will be most effective

For areas directly impacted by the Project, a *pre-construction* weed inventory will be conducted for those weed populations rated 'High' or 'Moderate' for negative ecological impact in the California Invasive Plant Inventory Database (Cal-IPC, 2006). These weed species will be treated *prior to construction* or at a time when treatments will be most effective

SS-CM-24 A biological consultant approved by the Wildlife Agencies shall be retained by SDG&E to collect data on bighorn sheep movements in the area during the construction phase. *Prior to construction* the biologist shall submit a bighorn sheep monitoring plan that meets the approval of the Wildlife Agencies. ...

G-CM-32 *Prior to construction activities*, SDG&E will conduct on-the-ground surveys (following Service protocols where they exist) for the following listed species where such surveys had not been conducted in 2007 and 2008, or for those species for which surveys in 2007 and 2008 were not reliable due to lack of sufficient rainfall.

- San Diego Thornmint (*Acanthomintha ilicifolia*)
- San Bernardino Bluegrass (*Poa atropurpurea*)
- Willow Monardella (*Monardella viminea*)
- Quino Checkerspot Butterfly (*Euphydryas editha quino*)
- Arroyo Toad (*Bufo californicus*)
- Southwestern Willow Flycatcher (*Empidonax traillii extimus*)
- Least Bell's Vireo (*Vireo bellii pusillus*)
- Coastal California Gnatcatcher (*Polioptila californica californica*)
- Stephen's Kangaroo Rat (*Dipodomys stephensi*)

In light of the foregoing requirements and consistent with FOIA, we request the following documents prepared or received by your agencies:

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- Any Habitat *Management* Plans approved by BLM or FWS. In the event that Habitat Management Plans have not been approved please provide the latest draft Habitat Management Plans and please provide final plans as soon as they are approved.
- Any documentation of BLM or FWS approval of the Habitat Management Plans
- Any Habitat *Acquisition* Plans. In the event that Habitat Acquisition Plans have not been approved please provide the latest draft Habitat Acquisition Plans and please provide final plans as soon as they are approved.
- Any documentation of BLM or FWS approval of off-site compensation parcels
- Any documentation that off-site compensation parcels have been acquired or that acquisition is otherwise assured
- Any Weed Control Plan
- Documentation of evidence of completion of any weed inventories
- Documentation of evidence of completion of any weed treatments. To the extent that weed treatments will occur following initiation of construction please provide documentation of any communications addressing the timing of treatments.
- Any bighorn sheep monitoring plan approved by BLM or FWS. In the event that a bighorn sheep monitoring plan has not been approved please provide the latest draft bighorn sheep monitoring plan and please provide the final plan as soon as it is approved.
- Any reports documenting the conclusions of surveys for federally listed species
- Documentation of any communications addressing the adequacy of rainfall to complete reliable species surveys

The terms “documentation” and “documentation of communications” mean any reports, letters, email messages, faxes, meeting notes, meeting agendas, phone call notes, or any other

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written documents recording the subject matter or conclusions of communications.

Please expedite your response to this request for documents. The Department of Interior's FOIA regulations set forth in 43 C.F.R. § 2.14(a) direct that the department "will provide expedited processing when [a requester] demonstrate[s] to the satisfaction of the [department] that there is a compelling need for the records." 67 Fed.Reg. 64530 (October 21, 2002), as amended at 74 Fed.Reg. 17092 (April 14, 2009). For example, a compelling need for expedited processing exists where there is "[a]n urgency to inform the public about an actual or alleged Federal Government activity if the request is made by a person primarily engaged in disseminating information." *Id.* at 43 C.F.R. § 2.14(a)(2). The courts have recognized that expedited processing is required in instances where, as here, the requester might lose "substantive due process rights" if the requested information is delayed. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976). Since the requesters in this case are vitally interested in protecting Peninsular bighorn sheep and their designated critical habitat, a delay in providing the requested information that would result in potentially less protection for the Peninsular bighorn sheep and its habitat would impair the substantive due process rights of the requesters. Accordingly, we are entitled to expedited provision of the documentation we request.

In the event that you believe that any of the above conservation measures and related documents are not yet prepared or due to be prepared, please provide an explanation and any supplemental information on when BLM or FWS believe these measures and documents will become due and will be prepared.

REQUEST FOR FEE WAIVER

We request that you waive all fees in connection with this matter. As shown below, the three organizations and Donna Tisdale meet the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the Department of Interior's fee waiver regulations. In particular, the three organizations and Donna Tisdale have demonstrated that the disclosure of this information will significantly contribute to public understanding of the operations or activities of the government.

In considering whether the three organizations and Donna Tisdale meet the fee-waiver criteria, it is imperative that the Bureau of Land Management and Fish and Wildlife Service remember that FOIA carries a presumption of disclosure and that the fee-waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as POC access to government documents without the payment of fees. As stated by one of FOIA's Senate

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sponsors, “[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has also explicitly pointed out that the amendment’s main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Id.* Thus, both Congress and the courts that the main legislative purpose of the amendments is to facilitate access to agency records by “watchdog” organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the District of Columbia Circuit Court of Appeals has stated, this waiver provision was added to FOIA “*in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,*” in clear reference to requests from journalists, scholars, and non-profit public interest groups. *Better Gov’t Ass’n v. Department of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984) (emphasis added).

I. The subject of the requested records concerns “the operations or activities of the government”

The subject matter of this request relates to implementation of mandatory conservation measures for the Powerlink transmission line. BLM and FWS oversight of implementation of the Powerlink biological opinion is a clear and identifiable activity of the government, in this case two agencies under the U.S. Department of Interior. See *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted).

II. The disclosure is “likely to contribute” to an understanding of government operations or activities (the informative value of the information to be disclosed)

The information requested will help provide the three organizations and Donna Tisdale with insight into the progress of implementation of mandatory conservation measures for the Powerlink. These documents are not currently in the public domain. Their release is not only “likely to contribute,” but is in fact certain to contribute to better public understanding of BLM and FWS decision making for this project. The information requested will likely contribute to an understanding of whether or not SDG&E is fulfilling its obligations and the extent to which BLM and FWS are monitoring SDG&E activities to comply with the biological opinion. The

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public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted. See *Judicial Watch*, 326 F.3d at 1314 (“[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.”).

III. The disclosure of the requested information will contribute to “public understanding”

In *McClellan Ecological Seepage Situation v. Carlucci*, *supra*, 835 F.2d at 1286, the court made clear that “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....” In this instance, all the requested documents potentially provide new information on implementation of mandatory conservation measures for the Powerlink. Moreover, the information will provide important oversight of SDG&E, BLM, and FWS activities that is otherwise unavailable to the public, namely, the extent to which SDG&E is implementing mandatory Powerlink conservation measures and the extent to which FWS and BLM are overseeing such implementation. See *Western Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); see also *Community Legal Services v. HUD*, 405 F.Supp.2d 553 (D. Pa. 2005) (“Thus, as in *Forest Guardians*, the CLS request would likely shed light on information that is new to the interested public.”); see also *Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F.Supp.2d 1226, 1230 (D. Or. 2003), (finding that the FOIA request was informative of government operations because “there is substantial public interest in agency activities relating to endangered species.”)

IV. The disclosure is likely to contribute significantly to public understanding of government operations or activities

Public oversight and enhanced understanding of the progress of mandatory Powerlink conservation measures is absolutely necessary. The three organizations and Donna Tisdale’s track record of active participation in oversight of governmental agency activities and their consistent contribution to the public’s understanding of agency activities is well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994) (emphasis added).

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The documents requested in this FOIA request will be used to determine whether and how SDG&E, FWS and BLM are complying with and implementing mandatory Powerlink conservation measures as well as the extent to which such implementation is being monitored by BLM and FWS. Concurrent with any action which the three organizations and Donna Tisdale may take after obtaining the requested documents, they will publicize the reasons for the action and the underlying actions of SDG&E, BLM, and FWS that have prompted the action. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of BLM and FWS activities. The three organizations and Donna Tisdale intend to utilize the requested information to enforce or publicize SDG&E and BLM compliance with the provisions of the biological opinion.

In addition, the informational publications of the three organizations and Donna Tisdale supply information not only to their membership, but also to the memberships of many other local and regional conservation organizations. Our informational publications continue to contribute information to public media outlets, as well. For example, information such as that presently requested is often disseminated through the three organizations and Donna Tisdale's e-mail updates and web pages. The Protect Our Communities Foundation and Donna Tisdale routinely distribute email updates to their lists. The East County Community Action Coalition publishes a regular newsletter where it also disseminates important information to concerned citizens. Representatives of each organization and Donna Tisdale also routinely speak with the news media and make public presentations on issues concerning the Powerlink and other regional energy issues. Information concerning implementation of mandatory Powerlink conservation measures will likely be disseminated through all of these means. *See Forest Guardians v. DOI*, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

V. **Obtaining the information is of no commercial interest to POC**

Access to government documents and similar materials through FOIA requests is essential to the three organizations' and Donna Tisdale's role in educating their members, contacts, and the general public. None of the requesters has any commercial interest nor will any realize any commercial benefit from the release of the requested information.

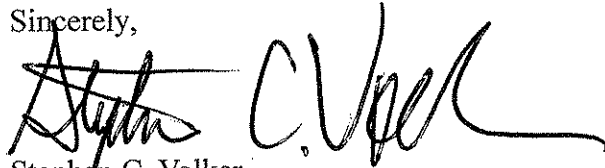
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I hope that this letter has demonstrated to your satisfaction that the three organizations and Donna Tisdale qualify for a full fee-waiver, and that you will immediately begin to search for, copy, and deliver the requested material on *an expedited* basis. Please send all materials to me at the address on the letterhead of this letter:

Thank you very much for your consideration. Please call me at 510-496-0600 if you have any further questions about this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephan C. Volker". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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

SCV:taf

cc: Clients