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7 PROTECT OUR COMMUNITY FOUNDATION,  
8 EAST COUNTY COMMUNITY ACTION  
9 COALITION, DONNA TISDALE

10 BEFORE THE INTERIOR BOARD OF LAND APPEALS  
11 UNITED STATES DEPARTMENT OF THE INTERIOR

12 BACKCOUNTRY AGAINST DUMPS, PROTECT ) NO.  
13 OUR COMMUNITY FOUNDATION, EAST )  
14 COUNTY COMMUNITY ACTION COALITION, ) REQUEST FOR STAY  
15 DONNA TISDALE )  
16 Appellants, )  
17 v. )  
18 UNITED STATES DEPARTMENT OF THE )  
19 INTERIOR, BUREAU OF LAND MANAGEMENT, )  
20 KEN SALAZAR, in his official capacity as Secretary )  
21 of the Department of the Interior, JAMES L. )  
22 CASWELL, in his official capacity as the Acting )  
23 Director of the Bureau of Land Management, MIKE )  
24 POOLE, in his official capacity as California State )  
25 Director, United States, Bureau of Land Management, )  
26 and VICKI WOOD, in her official capacity as Field )  
27 Manager, El Centro Field Office, United States Bureau )  
28 of Land Management, )  
Deciding Officers. )

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## INTRODUCTION

1  
2 In the Notice of Appeal filed concurrently herewith, appellants Backcountry Against  
3 Dumps, Protect Our Community Foundation, East County Community Action Coalition, and  
4 Donna Tisdale (“appellants”) appeal the Bureau of Land Management’s (“BLM’s”) January 20,  
5 2009 decision to approve San Diego Gas & Electric’s (“SDG&E’s”) Sunrise Powerlink  
6 Transmission Project (hereinafter “SPTP” or the “project”). The project consists of a 150-mile  
7 transmission line from SDG&E’s Imperial Valley Substation to its Peñasquitos Substation in San  
8 Diego. SPTP is estimated to have a capacity of 500 kV and has been sold to the public as  
9 providing needed transmission capacity for the provision of green, renewable energy to the  
10 heavily populated areas of San Diego.

11 As discussed below, however, SDG&E does *not* currently have a transmission capacity  
12 shortfall, and nothing has been done to require SPTP capacity to be used for renewable energy.  
13 Further, it is likely that much of the project capacity will be used to transport fossil fuel based  
14 electricity produced by Sempra Energy, SDG&E’s parent company, at its multiple natural gas-  
15 fired plants in the area, including power plants in Mexicali, Mexico (600 MW), western Arizona  
16 (1,250 MW), Boulder City, Nevada (480 MW), and Kern County, California (550 MW). Thus,  
17 despite one of the key stated purposes of the project, to increase renewable energy development,  
18 the project as approved may have the *opposite* effect by increasing the output of Sempra’s  
19 polluting fossil fuel-based power plants.

20 BLM’s decision and its attendant Environmental Impact Statement (“EIS”) do not address  
21 many crucial impacts of the transmission line on important environmental resources along the  
22 proposed transmission line route, the Final Environmentally Superior Southern Route  
23 (hereinafter the “selected route”). Where the EIS does address the project’s adverse impacts, it  
24 contains inaccurate and misleading information. Additionally, the EIS is confusing and does not  
25 lay out the impacts of the selected project in a clear or concise manner. The EIS and BLM’s  
26 decision based on the EIS therefore violate the National Environmental Policy Act (“NEPA”), 42  
27 U.S.C. § 4321 *et seq.*, as explicated more fully below.

28 Also, the approval of the project violates the Federal Land Policy Management Act

1 (“FLPMA”) because it fails to manage the public lands “in a manner that will protect the quality  
2 of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource,  
3 and archeological values.” 43 U.S.C. § 1701(a)(8). Most egregiously, the SPTP will open up the  
4 McCain Valley, a currently undeveloped desert area filled with critically important natural  
5 resources, to intensive, industrial-scale development. BLM’s development of this sensitive area  
6 without adequate consideration of and protection for its unique environmental resources violates  
7 FLPMA.

8 In addition, BLM, U.S. Fish and Wildlife Service (“FWS”) and SDG&E are in violation  
9 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, because the parties failed to  
10 adequately consult with regard to the project’s impacts on listed species, and FWS’s Biological  
11 Opinion (“BiOp”) is legally inadequate because it fails to discuss the whole project and is not  
12 based on the best scientific and commercial data, as required by ESA. The project area is home  
13 to numerous federally listed species and their critical habitat, many of which, such as the Quino  
14 Checkerspot Butterfly and the Peninsular Bighorn Sheep, lie directly in the path of the proposed  
15 SPTP. The BiOp is a blank check to SDG&E and BLM; it permits the parties to proceed with  
16 one of the most biologically destructive projects in California history, potentially harming listed  
17 species in violation of ESA’s unyielding “no jeopardy” mandate.

18 And finally, BLM is in violation of the National Historic Preservation Act (“NHPA”), 16  
19 U.S.C. § 470 *et seq.*, which requires federal agencies to consult with the State Historic  
20 Preservation Officer, affected Native American tribes, the general public, and officials of the  
21 Mexican government, prior to approving an action which will effect sites included or eligible for  
22 inclusion in the National Register. BLM substantively failed to comply with NHPA when it  
23 failed to survey the project area, consult with all parties pursuant to NHPA’s mandate, and  
24 provide adequate notice to the public prior to the approval of the SPTP.

### 25 **REQUEST FOR STAY**

26 Appellants hereby request that no resource-disturbing activities, including but not limited  
27 to road building, clearing, surveying, and transmission line construction, be permitted on the  
28 subject lands pending final disposition of this appeal. Otherwise, such activities could cause

1 irreparable injury to environmental and cultural resources in the project area, including, but not  
2 limited to, harm to aesthetic values and historical and cultural resources, displacement of  
3 wildlife, loss of tranquility, disturbance of soil, and removal of vegetation. Appellants also  
4 request a stay of all contracting activities to avoid the project proponent's "painting itself into a  
5 corner" by bidding portions of the entire project prior to an unbiased hearing on the merits of  
6 appellants' appeal.

7 The Code of Federal Regulations states the standards for determining whether a stay  
8 pending appeal to this Board is necessary:

9 (i) The relative harm to the parties if the stay is granted or denied;

10 (ii) The likelihood of the appellant's success on the merits;

11 (iii) The likelihood of immediate and irreparable harm if the stay is not granted; and

12 (iv) Whether the public interest favors granting the stay;

13 43 C.F.R. § 4.21(b)(1). As discussed below, under the above standards, this Board should stay  
14 the project until it can complete its review of BLM's decision to approve the SPTP.

15 **I. The Harm of Denial of the Stay to Appellants Outweighs the Harm of Project Delay.**

16 First, if appellants' request is denied, the relative harm to the appellants would be greater  
17 than the harm of delay for the project proponent SDG&E. As has been frequently stated, "when  
18 environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of  
19 an injunction to protect the environment." *Save the Yaak Committee v. Block*, 840 F.2d 714, 722  
20 (9th Cir. 1988); *see also Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988).  
21 If this Board allows SDG&E to begin construction of the transmission line, the utility will begin  
22 to cut roads through sensitive habitats and start to create massive tower footprints in important  
23 ecosystems. Such construction will permanently eliminate irreplaceable natural resources,  
24 including endangered species in the area, prior to the completion of this appeal and, as appellants  
25 assert herein, the preparation of an adequate environmental review of the project by BLM. Such  
26 environmental destruction outweighs any delay that would be experienced by SDG&E during the  
27 pendency of this appeal. *Parker v. United States*, 309 F.Supp. 593, 601 (D. Colo. 1970), *aff'd*,  
28 448 F.2d 793 (10th Cir. 1971), *cert den sub nom United States v. Parker*, 405 U.S. 989 (1972)

1 (“we cannot give effect to [the project proponent's] interest, for the cutting of trees is . . . final  
2 and conclusive. It must await the process of law”).

3 The EIS identifies 41 significant, unmitigable impacts of the project. FEIR, p. ES-6.  
4 Thus, at a minimum, if construction is allowed to proceed, these 41 significant impacts will  
5 begin to harm appellants’ interests. These identified impacts include impacts to biological  
6 resources and fire dangers, among others.

7 For example, if construction of the project is allowed to proceed, currently undisturbed  
8 areas of San Diego County will be turned into massive construction sites and then will become  
9 permanent, industrial corridors. These corridors include 130-foot tall towers, ranging from 85 to  
10 105 feet at their base, transmission lines stretching across sensitive and undisturbed natural  
11 habitat and wilderness preserves, new substations and numerous maintenance roads necessary to  
12 support this colossal endeavor. The SPTP will fragment ecosystems and disrupt the species that  
13 call those ecosystems home.

14 As explained in the testimony of Terri Ann Stallcup, dated June 1, 2007 and submitted to  
15 the California Public Utilities Commission (“CPUC”) on June 1, 2007 (“Stallcup Testimony”)  
16 during its hearings on the SPTP:

17 Habitat fragmentation—breaking up contiguous natural habitats into small patches  
18 that are isolated from intact areas of habitat—and habitat loss are considered the  
19 single greatest threat to biodiversity at global and regional scales (Myers 1997,  
20 Noss and Csuti 1997, Brooks et al. 2002). Clearing for construction, staging, and  
21 building of access roads and structures will result in direct loss of habitat, division  
22 of the habitat into isolated habitat patches, and reduced size of habitat patches.  
23 These fragmentation impacts, when implemented across a large area, are almost  
24 invariably accompanied by extinction or extirpation of species. For example, in  
scrub and chaparral habitats, avian species richness typically decreases with size  
and age of isolation of habitat fragments, suggesting that many non-migratory bird  
species are sensitive to fragmentation (Soulé et al. 1988). Species sensitive to the  
*developed* or altered edge and species that have large area requirements are also  
among the first to disappear from habitat fragments, with cascading impacts to  
ecological communities (e.g., Crooks and Soulé 1999, Crooks 2002).

25 Exhibit 1, p. 4. The fragmentation of habitats inhibits movement of species and disrupts  
26 necessary interactions among species. *Id.* at 4-5. These adverse impacts decrease the viability of  
27 species in the area and degrade habitat value as species become more isolated in contained areas.

28 In addition to fragmentation, the construction of the SPTP will cause edge effects that

1 also degrade the local habitat near the power lines and maintenance roads:

2 Habitat fragmentation produces a habitat *edge*, where natural habitat conditions  
3 transition to a human-altered condition. This transition in habitat condition  
4 produces what are referred to as *edge effects* (Murcia 1995). Edge effects decrease  
the net, biologically functional area of habitats left undeveloped within landscapes  
fragmented by roads, cleared areas, or development structures.

5 *Id.* at 5. These edge effects further reduce available habitat for native species, while creating new  
6 habitats for non-native, human-tolerant species. *Id.* The construction of the project will cut  
7 directly through acres of important habitat currently undisturbed by human activity.

8 The imperiled species that could be harmed by the project include, among others:

9 Arroyo Toad  
10 Coastal California Gnatcatcher  
11 Least Bell's Vireo  
12 Quino Checkerspot Butterfly  
13 Peninsular Bighorn Sheep  
14 San Diego Thornmint

15 U.S. Fish & Wildlife Service, Biological Opinion, Sunrise Powerlink Project January 2009  
16 ("BiOp"), Exhibit 12, pp. 51-146; Testimony of Travis Longcore to the CPUC March 12, 2008  
17 ("Longcore Testimony"), Exhibit 4, p. 22.

18 Certain species will be impacted to a much greater degree than others. For example, the  
19 selected route would have highly significant impacts on Peninsular Bighorn Sheep because the  
20 transmission lines would "bisect critical habitat, fragment connectivity, and cause direct or  
21 indirect loss of bighorn sheep or their habitat." Testimony of Ester S. Rubin to the CPUC March  
22 12, 2008 ("Rubin Testimony"), Exhibit 3, p. 13. Avian mortality is identified as a major  
23 concern based on multiple hazards posed by the project, including collision, habitat  
24 fragmentation, EMF exposure, helicopter disturbance, noise, and electrocution. Longcore  
25 Testimony, Exhibit 4, pp. 1-16. Additionally, to the extent that the project would encourage the  
26 development of wind farms in Mexico and in the McCain Valley, the project presents another  
27 serious threat to birds in the area, as wind turbines are notoriously hazardous to birds. *Id.* at 22.  
28 Among the plant species listed under the Federal Endangered Species Act that will be  
particularly affected by the project is the San Diego Thornmint (*Acanthomintha ilicifolia*).  
Testimony of Ileene Anderson to the CPUC March 12, 2008 ("Anderson Testimony"), Exhibit 5,

1 p. 3. Appellants ask this Board for a stay to protect these and the other species that currently live  
2 along the selected route from unnecessary adverse impacts until the present appeal is resolved.

3 Appellants' request for stay should be granted also because, in addition to adversely  
4 affecting the biological resources of the area, construction of the project significantly increases  
5 the risk of fire storms for local residents and open space resources along the selected route.

6 Protest of Center for Biological Diversity, filed November 15, 2008 ("CBD Protest"), Exhibit 6,

7 p. 7. As discussed below, the new transmission line as well as all surveying and construction  
8 activities present new ignition sources that increase the risk of large-scale wildfires along the  
9 proposed route. *Id.* Further, the connected actions of wind farm development, and planned  
10 energy development along the Mexican-U.S. border and in the McCain Valley, greatly increase  
11 the risk of fire in Eastern San Diego County. The fire risk posed by the project is extreme in that  
12 fires that are ignited in remote areas have a tendency to grow into large-scale conflagrations due  
13 to the difficulty of and delay in access for firefighters. *Id.*

14 There is no harm to project proponents, as any delay caused by a stay is minimal. The  
15 EIS overstates the need for the project and the "limited" capacity of SDG&E's current  
16 transmission facilities. In fact, SDG&E has adequate transmission capacity to handle current  
17 transmission demands as well as all future currently contemplated projects that may come on-line  
18 in the next three years, including the La Rumorosa project. CBD Protest, Exhibit 6, pp. 2-3.

19 SDG&E does not have an electricity transmission capacity problem, and therefore a delay  
20 in the construction of the SPTP will not cause it harm. *Id.* On the other hand, if the project is  
21 allowed to proceed despite its faulty environmental impact analysis, the miles of unspoiled  
22 natural resources along the planned route will be unnecessarily disturbed by the construction of a  
23 power line, causing fragmentation of habitat, edge effects, and population declines of protected  
24 species, as well as increased fire dangers. Only an adequate EIS, and related ESA and NHPA  
25 reviews, would reveal the lack of any immediate need for this project and expose the real  
26 intensity of the adverse impacts on endangered species and critically important desert resources  
27 along the selected route. Thus far, BLM has failed to produce such a document. Because  
28 appellants' interests in preserving the desert environment outweigh any injury due to delay

1 claimed by the project proponent, the Board should issue a stay pending the resolution of this  
2 appeal.

3 **II. Appellants Are Likely to Succeed on the Merits.**

4 Appellants are likely to succeed on the merits; the Board should issue a stay of the project  
5 approval until the completion of the present appeal.

6 **A. The Project Approval Violates NEPA**

7 **1. The EIS Fails as an Informational Document.**

8 NEPA regulations require an EIS to be “concise, clear, and to the point.” 40 C.F.R. §  
9 1502.1. To accomplish clarity, “[a]gencies shall focus on significant environmental issues and  
10 alternatives and shall reduce paperwork and the accumulation of extraneous background data.”  
11 *Id.*; *Oregon Natural Desert Ass’n v. Bureau of Land Management*, 531 F.3d 1114, 1142 n. 24 (9th  
12 Cir. 2008) (“An EIS, to fulfill its role as an “action-forcing device,” . . . conducive to public  
13 analysis and agency reflection, must “be written in plain language ... so that decisionmakers and  
14 the public can readily understand it”); *accord. Sierra Club v. Babbitt*, 69 F.Supp.2d 1202, 1218  
15 (E.D. Cal. 1999).

16 Despite this requirement, the EIS is muddled and confusing and does not reveal to the  
17 reader the impacts of the selected project in a clear or concise manner. For example, the FEIS  
18 contains extensive discussions of the impacts of the “*proposed* project,” including a table of the  
19 expected impacts of that route alignment. FEIS, pp. ES-81 through ES-121. But, it does not  
20 contain such information about the *selected* project route. *Id.* A summary of the impacts of a  
21 project that is *not* going to be built is “extraneous background data” and does not provide helpful  
22 information if the same summary is not provided for the *selected* project. 40 C.F.R. § 1502.1.  
23 Furthermore, the minimal analyses of the impacts of the selected route are scattered throughout  
24 the EIS. For example, the section related to the selected route in the SDEIS states that “[i]n  
25 addition to the analysis present [in this chapter], additional information and existing view  
26 photographs and simulations pertaining to the [selected option] are presented in Response to  
27 Comment A009-5.” SDEIS, p. 3-23. To understand the impacts of the selected route, the EIS  
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1 asks the reader to page through multiple documents, looking for impact analyses that are  
2 scattered throughout the comments and the agencies' responses to those comments. NEPA  
3 requires more.

4 To add to the confusion, the selected route changes names throughout the process. In the  
5 SDEIS, the selected route (or as it came to be known in the FEIS, the "Final Environmentally  
6 Superior Southern Route") was called the "BCD Alternative and BCD South Option Revisions."  
7 SDEIS, p. 3-23. The route is not presented in a clear manner on any map; rather it is included on  
8 a map chock full of other alternatives and potential re-routings. FEIS, p. 3-24. Only in the  
9 FEIS, after the public has already commented on the proposals, does the BLM present the  
10 selected route in a remotely discernable way. *See, e.g.*, FEIS at ES-12.

11 Relatedly, BLM and the other participants in the EIS process primarily concentrated on  
12 the "proposed project," but then BLM selected at the last minute the selected route. *See, e.g.*  
13 FEIS, pp. ES81 through ES-121. The selected route received much less attention from comments  
14 and was reviewed in the EIS as only one of many complicated alternatives and sub-alternatives to  
15 the proposed project. The late selection of the selected route alternative, and the emphasis on the  
16 "proposed project" throughout the process, present a classic "bait and switch," wherein the public  
17 was distracted by a non-project from the evaluation of the final project. In this way, the EIS  
18 failed to provide the public with sufficient information to comment on the project at issue and in  
19 serving as a planning document for BLM, and its co-lead and consulting agencies.

20 Finally, the EIS contains a myriad of constantly changing alternatives that evade clear  
21 communication of the impacts of each alternative. Even at the late stage of BLM's production of  
22 the Supplemental Draft EIS ("SDEIS"), the transmission line routes were not finalized. SDEIS,  
23 Ch. 3 at 1-41. There simply is no way that the public could be expected to process and comment  
24 on all of the different routes proposed in the EIS and the SDEIS. Hidden among the shifting  
25 routes was the final selected project; the scant analysis of the final route was presented in unclear  
26 and hard-to-locate sections of the SDEIS among the many other revisions to alterantive route  
27 options.

28 Because the EIS fails to provide readers with a "concise, clear, and to the point" analysis

1 of the impacts of the project and its alternatives – including, most importantly, an analysis of the  
2 selected route – it fails as an informational document under NEPA. 40 C.F.R. § 1502.1.

3 **2. The EIS Fails to Establish the Need for the Project’s Additional**  
4 **Transmission Capacity.**

5 NEPA regulations require that an EIS provide a clear statement of “the underlying  
6 purpose and need to which the agency is responding in proposing the alternatives including the  
7 proposed action.” 40 C.F.R. § 1502.13. In developing such information, federal agencies “shall  
8 insure the professional integrity, including scientific integrity, of the discussions and analyses in  
9 environmental impact statements.” 40 C.F.R. § 1502.24. To this end, an EIS “shall identify any  
10 methodologies used and shall make explicit reference by footnote to the scientific and other  
11 sources relied upon for conclusions in the statement.” *Id.* An EIS must “be supported by  
12 evidence that the agency has made the necessary environmental analyses.” 40 C.F.R. §1502.1.

13 Contrary to these requirements, the EIS fails to support its conclusion that SDG&E needs  
14 additional capacity in order to increase its renewable energy usage with scientific evidence.  
15 Nonetheless, the EIS asserts that the project will “[p]romote [r]enewable [e]nergy” and discusses  
16 as “connected actions” the development of renewable energy sources. FEIS, ES-21, ES-13. The  
17 EIS thereby attempts to demonstrate the need for and benefits of the project by claiming that  
18 renewable energy production will not take place if the project is rejected. *Id.* But, as discussed  
19 in many comment letters, the current transmission capacity is sufficient to foster the development  
20 of all foreseeable green energy projects.<sup>1</sup> The EIS thus inaccurately connects future renewable  
21 energy production with the approval and construction of SPTP.

22 First, the EIS overstates the need for the project in terms of renewable energy  
23 development. At present, there is adequate capacity to transport all of the green electricity  
24 generation planned in the future. For example, the Green Path project is specifically designed to

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26 <sup>1</sup> *See, e.g.,* Protest of Final EIR/EIS Decision on Sunrise Powerlink Transmission Line  
27 Project, County of San Diego, filed November 14, 2008 (“County Protest”), Exhibit 7, p. 2 (“the  
28 project proponents still have not established the need for the project”); CBD Protest, Exhibit 6, p.  
3 (“The only connection between these projects and Sunrise is an assumed transmission need [–  
that] assumption is wrong, is not supported in the record, and is a fundamental flaw in the EIR  
analysis”).

1 deliver renewable energy from the Imperial Valley to the populated areas of coastal Southern  
2 California. CBD Protest, Exhibit 6, p. 2. Furthermore, certain contracts, including a large  
3 capacity contract with the California Department of Water Resources, will expire in the near  
4 future, freeing up more capacity for renewable energy. Id. at 3. The EIS fails to explain why the  
5 existing and foreseeable capacity already in the pipeline will not foster renewable energy  
6 development even without the SPTP. FEIS ES-41.

7       Second, the EIS dismisses the serious environmental impacts of the project by relying on  
8 its assumption that it will be carrying environmentally friendly, green house gas-reducing  
9 electricity from renewable power sources. *But nowhere in the approval does BLM require*  
10 *SDG&E to ensure that the transmission lines will be used for green energy transmission.* Rather,  
11 it seems clear that much if not all of the capacity will provide Sempra Energy with expanded  
12 capability to deliver *fossil fuel-based electricity* from area power plants. County Protest, Exhibit  
13 7, pp. 4-5.<sup>2</sup>

### 14                   **3.       The EIS Fails to Adequately Address the Impacts of the Project.**

15       NEPA requires federal agencies to take a “hard look” at the environmental impacts of  
16 proposed major actions and “provide a full and fair discussion of significant environmental  
17 impacts” for the public’s review. 40 C.F.R. §1502.1; *National Parks & Conservation Ass’n v.*  
18 *Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (general statements about “possible” effects and  
19 “some risk” do not constitute a hard look). Here, the EIS failed to adequately address many of  
20 the impacts of the SPTP.

#### 21                           **a.       Growth Inducing Impacts**

22       The EIS fails to adequately analyze the dramatic growth inducing impacts that excess  
23 transmission capacity will create by encouraging the development of additional energy  
24 production facilities (renewable and fossil fuel-based) in the rural and open space areas of San  
25 Diego and Imperial counties. The construction of the SPTP will foster intense financial  
26 incentives for development of power plants far from the populated coastal areas of Southern  
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28                   <sup>2</sup>Opening Brief of Powers Engineering submitted to CPUC May 30, 2008 (“Powers  
Brief”), p. 2.

1 California. County Protest, Exhibit 7, p. 3. The EIS fails to fully identify and analyze these  
2 growth inducing impacts of the project and fails to accurately portray the benefits of alternatives  
3 that would not cause such growth inducing impacts by encouraging energy production closer to  
4 and integrated into San Diego and its environs. FEIS, ES 72-73. These growth inducing impacts  
5 highlight the reasons why an in-basin, local generation alternative is highly environmentally  
6 superior,<sup>3</sup> yet the EIS skirts the issue by minimizing the growth inducing impacts of the proposed  
7 project.

8 **b. Fire**

9 The EIS fails to adequately analyze the impacts of the new transmission line on the  
10 increased risk of wildfires. FEIS, Ch. 2, section 7. No evidence was presented that fire service  
11 providers were consulted or that BLM considered all of the risks posed by the new transmission  
12 line. County Protest, Exhibit 7, p. 9.

13 First, the transmission line presents a new ignition source that increases the chances of  
14 large-scale wildfires along the propose transmission line route. The EIS does not adequately  
15 address the project's contribution to the already hazardous fire conditions in Eastern San Diego  
16 County. CBD Protest, Exhibit 6, pp. 7-8; County Protest, Exhibit 7, p. 3. Nor does the EIS  
17 adequately address the increase danger of fire due to the construction of wind farms along the  
18 transmission line route, including dangers posed by a planned wind farm in McCain Valley.

19 Additionally, the EIS does not adequately account for the fact that the transmission lines  
20 will traverse many remote areas that pose significant challenges to firefighting. *Id.* Fires started  
21 in remote areas pose significant hazards as they are much harder to access, and therefore to  
22 contain, before they spread out of control.

23 Finally, the EIS does not analyze the significant obstacle to effective wildfire  
24 management presented by the project's transmission lines. *Id.* These fire-related impacts should  
25 have been thoroughly reviewed in the EIS based on the substantial dangers posed by wide-spread  
26 fires that are often started by transmission lines.

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28 <sup>3</sup>Powers Brief, p. 17.

1 **c. Biological Impacts**

2 As stated above, under NEPA, agencies “shall insure the professional integrity, including  
3 scientific integrity, of the discussions and analyses in environmental impact statements.” 40  
4 C.F.R. §1502.24. An EIS must “be supported by evidence that the agency has made the  
5 necessary environmental analyses.” 40 C.F.R. §1502.1. NEPA requires agencies to take a “hard  
6 look” at the environmental impacts of proposed major actions and “provide a full and fair  
7 discussion of significant environmental impacts” for the public’s review. 40 C.F.R. §1502.1;  
8 *National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001). Here, BLM  
9 failed to provide adequate information on biological impacts and thereby violated NEPA.

10 First, the EIS failed to include necessary surveys of the sensitive species that would be  
11 affected by the SPTP, including endangered species such as the Quino Checkerspot Butterfly.  
12 The EIS relies instead on pre-construction surveys. But NEPA does not allow agencies to put off  
13 doing the required analysis until after the completion of the EIS. The scientific studies must be  
14 included in the EIS itself. County Protest, Exhibit 7, p. 6. For example, the EIS’s conclusions  
15 related to the Quino Checkerspot Butterfly are not based on any field studies. *Id.* This lack of  
16 analysis of biological resources violates NEPA by sidelining critically important impacts of the  
17 project. *Earth Island Inst. v. United States Forest Serv.*, 442 F.3d 1147, 1153-54 (9th Cir.2006)  
18 (quoting *Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir.2002)).  
19 Additionally, the public is pushed out of the process because it is not given a chance to comment  
20 on the methodology and results of the surveys because they are only scheduled and completed  
21 after the EIS is finished.

22 Similarly, the EIS does not adequately analyze the impacts of the selected route on  
23 Peninsular Bighorn Sheep, the Checkerspot Butterfly, the Golden Eagle, or the Arroyo Toad.  
24 The discussions of the impacts on these species focus almost exclusively on the proposed project  
25 and do not provide specific information as to the impacts of the selected route. *See* FEIS, Ch.  
26 D.2 at 271-537. Because this information is required by NEPA as part of the EIS’s hard look at  
27 the impacts of the project, the EIS violates NEPA.

28 Finally, the EIS fails to address the impacts of the proposed development of McCain

1 Valley wind farms on sensitive species in the area. *See* FEIS, Ch. D.5 at 1-102. This  
2 development will pose significant threats to the future viability of species in the area, especially  
3 the bird species, and should have been discussed and analyzed in the EIS.

4 **d. Climate Change**

5 The EIS fails to adequately discuss the impacts of the project on climate change. *Center*  
6 *for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1217  
7 (9th Cir. 2008) (“[t]he impact of greenhouse gas emissions on climate change is precisely the  
8 kind of cumulative impacts analysis that NEPA requires agencies to conduct.”). It should have  
9 estimated the amount of greenhouse gas emissions that the project will cause, either directly or  
10 indirectly and include a comparison of all of the alternative greenhouse gas emissions. These  
11 emission estimates should include all of the emissions from fossil fuel-based energy production  
12 that will flow through the SPTP. County Protest, Exhibit 7, p. 8. As discussed in the alternatives  
13 section, this analysis should have included an alternative that requires a certain percentage of the  
14 energy transported through SPTP to come from renewable energy resources.

15 Although much of the EIS presumes that a substantial portion of the electricity that will  
16 someday be transported by the SPTP will come from renewable sources, there is no analysis of  
17 the likelihood that much of the energy will in fact come from non-renewable sources. For  
18 example, the parallel Southwest Powerlink transmission line was purportedly constructed for  
19 transportation of renewable energy, but it has not fulfilled that goal as it relies on energy from  
20 fossil fuel power plants, including power plants in Mexico. Sempra’s planned construction of  
21 new natural gas-fired power plants will likely take advantage of the excess capacity provided by  
22 the SPTP, thereby *increasing* greenhouse gas emissions and contributing to global warming.  
23 These impacts were not adequately addressed in the EIS.

24 **e. Viewsheds**

25 The EIS minimizes the impacts of the project on local viewsheds in its scant, two-page  
26 discussion of this impact of the SPTP. *See* FEIS Ch. D.3 at 147-148. As discussed above, the  
27 analysis of the selected route’s impacts on viewsheds is not contained in the EIS, but rather  
28 hidden in the Response to Comments section of the FEIS. Moreover, the analysis does not

1 present an accurate or thorough comparison of the impacts of the selected route with the other  
2 alternatives. Without such a comparison, the reader is left without a means of evaluating the  
3 relative merits of each alternative in regard to the destruction of viewsheds throughout Eastern  
4 San Diego County.

5 Additionally, the EIS fails entirely to discuss the impact of the development of wind  
6 farms in the McCain Valley on the local viewsheds. County Protest, Exhibit 7, pp. 4-5. The  
7 massive wind farms currently being contemplated will obliterate the views from many spots  
8 within the McCain Valley and should have been studied as part of the EIS.

9 **f. Rural Character and Quality of Life of Backcountry**  
10 **Communities.**

11 The EIS did not adequately discuss the effects of the SPTP and its attendant industrial  
12 development on the rural character and quality of life of backcountry communities. FEIS Ch. D.4  
13 at 1-112. The industrialization of certain areas of Eastern San Diego County will adversely affect  
14 the lives of the residents who have chosen to live in rural communities in part because of their  
15 close connection to nature. Comments of Boulevard Planning Group dated August 25, 2008  
16 (“Boulevard Comments”), Exhibit 10, p. 2. The EIS does not address this issue and therefore  
17 violates NEPA.

18 **g. Wilderness Experience in Parks, Recreational Areas, and on**  
19 **Trails**

20 The EIS fails to adequately address the impacts of the project on the wilderness  
21 experience of hikers and campers using area parks and hiking trails. FEIS, Ch. D.5 at 1-102. It  
22 does not analyze the direct, adverse effect of the presence of industrial-scale development in  
23 what are presently natural landscapes. Hikers and campers seeking an escape from human-built  
24 environments will have a harder time finding access to unaltered natural vistas and surroundings  
25 if the project is constructed. This impact was not adequately analyzed in the EIS.

26 Additionally, the EIS fails to analyze the impact on visitors’ and local residents’  
27 wilderness experience of the foreseeable development of wind farms in the McCain Valley  
28 spurred by the construction of the SPTP. County Protest, Exhibit 7, pp. 4-5. The acres of

1 massive wind turbines will dramatically affect the sense of the untouched natural landscape that  
2 is currently experienced in the McCain Valley. The EIS failed to address this impact.

3 **h. Increased Public Access**

4 Because the development of the SPTP will involve the cutting of new roads into  
5 previously inaccessible areas, public use of these area, whether authorized or unauthorized, will  
6 increase dramatically. This increase in use is likely to result in increased fire dangers, invasive  
7 species distribution, vandalism, and disruption of habitat in remote, currently unaltered natural  
8 resource areas. Stallcup Testimony, Exhibit 1, pp. 7-8. This impact was not adequately  
9 addressed in the EIS.

10 **i. Groundwater**

11 The EIS failed to adequately address the impact of groundwater use associated with the  
12 project and its inducement of additional energy development along the selected route. The  
13 groundwater basins of Eastern San Diego County provide the life's blood to the local  
14 communities. Boulevard and surrounding homes and ranches have no access to imported water,  
15 and must rely on their groundwater basins to provide all of their municipal, domestic, fire  
16 suppression and agricultural needs. The FEIS does not address the cumulative impact of other  
17 developments that may draw water from these basins, including a proposed residential  
18 development of approximately 2,200 acres known as "Big Country Ranch" at the north end of  
19 Ribbonwood Road in Boulevard, just west of McCain Valley. The owner of this project, Lansing  
20 Companies, claims to own a lease on 16,000 acres of adjacent BLM land. The FEIS fails to  
21 address the cumulative impact on the area's shrinking groundwater resources of this project,  
22 coupled with the other development made available under BLM's revised RMP. This analysis is  
23 necessary under NEPA.

24 **4. The EIS Segmented Environmental Review of Connected Actions.**

25 NEPA requires that all connected actions be considered in the same document. *Thomas*  
26 *v. Peterson*, 753 F.2d 754, 757-758 (9th Cir. 1985) (timber sales to be considered along with  
27 logging road). Segmenting projects that are interrelated understates their combined  
28 impacts. *Id.*

1 The Draft EIS was recirculated primarily to assess the increase in potential output from  
2 the La Rumorosa wind project, deemed an indirect effect of the project. FEIS, ES-1. The EIS,  
3 however, ignored the massive increase in potential McCain Valley renewable energy  
4 development based on the change in BLM’s RMP for the area, allowing renewable energy  
5 development on 20,426 acres, up from 6,931 acres. County Protest, Exhibit 7, pp. 4-5. The  
6 rerouted southern alternative will induce the development of foreseeable wind farm projects,  
7 including projects already in the works such as plans to develop up to 17,000 acres in and around  
8 the McCain Valley. *Id.* Similarly, there is no reason why the La Rumorosa project was analyzed  
9 in the revised EIS, and the foreseeable development in McCain Valley was *not*. Such  
10 development must be considered a connected action with the project under NEPA, and the  
11 impacts from *both* projects should be analyzed collectively.

12 Additionally, the EIS focuses almost exclusively on the increased power flowing from  
13 Mexico from expanded renewable development. It is, however, just as likely that increased  
14 power generation will result from increased development of *fossil-fuel* based energy sources. *Id.*  
15 Sempra Energy has disclosed its plans to increase use of LNG in the California market.  
16 Furthermore, Sempra’s plant in Mexicali already exports electricity to the U.S. markets. *Id.*  
17 Increased capacity will spur expanded importation of fossil fuel-based energy from Mexico to be  
18 transported to San Diego along the project lines. This foreseeable increase in non-renewable  
19 energy production in Mexico should have been analyzed along with the project impacts as a  
20 connected action or indirect effect of the project.

21 **5. The EIS Failed to Consider the Cumulative Impacts of the Project**  
22 **Along with Other Foreseeable Project.**

23 A threshold questions in considering cumulative impacts is to determine the scope, or  
24 extent, of the cumulative impacts an agency must consider. The Ninth Circuit applies the CEQ  
25 regulation that all “reasonably foreseeable” actions that have potential cumulative impacts must  
26 be addressed in an impact statement or environmental assessment. *Blue Mountains Biodiversity*  
27 *Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (environmental assessment for timber  
28 sale must address cumulative effects of other “reasonably foreseeable” timber sales in the forest).

1 The Blue Mountain Court explained:

2 Cumulative impacts may result from “individually minor but collectively  
3 significant actions taking place over a period of time.” *Id.* In determining whether  
4 a project will have a “significant” impact on the environment, an agency must  
5 consider “[w]hether the action is related to other actions with individually  
6 insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7). If  
7 several actions have a cumulative environmental effect, “this consequence must  
8 be considered in an EIS.”

9 *Id.*, (quoting *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir.1990)). In *Border*  
10 *Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997, 1032-1033 (S.D. Cal.  
11 2003), the Court held that the EIS for a high voltage power line must consider the cumulative  
12 effects of reasonably foreseeable power plants.

13 The EIS here failed to analyze many foreseeable projects that will contribute to  
14 significant cumulative impacts. It did not fully assess the combined impacts of the project along  
15 with: (1) BLM’s Eastern San Diego County RMP revisions, including the amendments related to  
16 the McCain Valley; (2) Sempra’s planned transmission line border crossing; (3) SDG&E’s new  
17 substations, including the ECO Substation with its 14 miles of transmission lines in McCain  
18 Valley and two new substations in Jacumba; (4) the wind farm in McCain Valley; (5) BLM’s  
19 planned amendment to applicable land use plans to allow for development of large-scale solar  
20 energy projects and geothermal energy projects; and (6) the expansion of LNG-based energy  
21 development in Northern Mexico. County Protest, Exhibit 7, p. 3. These projects, along with  
22 the connected actions purportedly considered in the EIS,<sup>4</sup> will cause widespread cumulative  
23 impacts to the natural resources of San Diego and Imperial Counties, including the foreseeable  
24 industrialization of areas that have survived up until now as undisturbed habitat and open space.

### 25 **6. The FEIS Fails to Consider a Reasonable Range of Alternatives**

26 NEPA requires that an FEIS “[r]igorously explore and objectively evaluate all reasonable  
27 alternatives” in order to provide a choice that includes environmentally preferable options “so  
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29 <sup>4</sup> The EIS claims to consider the impacts of the Stirling Energy Systems solar facility, the  
30 Esmeralda-San Felipe Geothermal Project, and the 1,250 MW Sempra wind project in northern  
31 Mexico’s La Rumorosa (now called the Energia Sierra Juarez project). FEIS, ES-13.

1 that reviewers may evaluate their comparative merits.” 42 U.S.C. § 4332; 40 C.F.R. § 1502.14;  
2 *Oregon Natural Desert Ass’n v. Singleton*, 47 F.Supp.2d 1182, 1195 (1998). An agency may not  
3 limit its consideration to only those alternatives it believes it has the authority to implement.  
4 Rather, the alternatives should be wide-ranging and include options that may require additional  
5 approvals or participation by others. *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974);  
6 *Alaska Wilderness Recreation and Tourism Ass’n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995);  
7 *Simmons v. U.S. Army Corp. of Engineers*, 120 F.3d 664, 670 (7th Cir. 1997) (agency improperly  
8 refused to consider using multiple, rather than a single, water source for a project to increase a  
9 city’s water supply).

10 The requirement for consideration of alternatives is the “linchpin” of the NEPA process.  
11 *Monroe County Conservation Ass'n v. Volpe*, 472 F.2d 693, 697-698 (2nd Cir. 1972). This  
12 requirement was intended to force mission-oriented agencies to expand their horizons and to  
13 realize that from an environmental viewpoint, their particular choice of action might not be in the  
14 overall best interest of the public. S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969), p. 5. The  
15 repetition of the alternatives requirement of NEPA section 102(2)(C) in section 102(2)(E) is both  
16 empathetic and expansive: it demonstrates the importance Congress gave to exploration of less  
17 harmful alternatives, and places on agencies the duty to “study” and to “develop,” as well as to  
18 “describe,” alternative courses of action. In the words of the Ninth Circuit:

The consideration of alternatives requirement furthers that goal [of infusing environmental values in project planning] by guaranteeing that agency decisionmakers [have] before [them] and take[] all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance.' [Citation omitted, emphasis in original.] NEPA's requirement that alternatives be studied, developed, and described both guides the substance of environmental decisionmaking and provides evidence that the mandated decisionmaking process has actually taken place . . . . Informed and meaningful consideration of alternatives . . . is thus an integral part of the statutory scheme.

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26 *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988); *Alaska Wilderness*  
27 *Recreation & Tourism v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

28 In a consistent line of cases since the seminal decision in *Calvert Cliffs’ Coordinating*

1 *Committee v. U.S. Atomic Energy Comm'n*, 449 F.2d 1104, 1114 (D.C. Cir. 1971), the federal  
2 courts have employed a vigorous and expansive construction of NEPA's requirement for an  
3 independent analysis of alternatives, 42 U.S.C. § 4332(2)(E) (formerly (D)). In *Calvert Cliffs*’,  
4 the D.C. Circuit explained that by requiring the decisionmaker to study, develop and describe  
5 all possible approaches to a particular project (including total abandonment of the  
6 project) which would alter the environmental impact and the cost-benefit  
7 balance...[NEPA makes] it likely that the most intelligent, optimally beneficially  
8 decision will ultimately be made and, most importantly, *allows those removed*  
9 *from the initial process to evaluate and balance the factors on their own.*  
10 449 F.2d at 1114 (emphasis added).

11 Similarly in *Environmental Defense Fund v. Army Corps of Engineers*, 492 F.2d 1123  
12 (5th Cir. 1974), the court explained that NEPA's requirement for an alternatives analysis  
13 was intended to emphasize an important part of NEPA's theme that all change was  
14 not progress and to insist that no major federal project should be undertaken  
15 *without intense consideration of other more ecologically sound courses of action,*  
16 *including shelving the entire project, or of accomplishing the same result by*  
17 *entirely different means.*  
18 492 F.2d at 1135 (emphasis added). The court found that the Corps of Engineers had complied  
19 with this requirement by conducting studies of alternatives to the proposed Tennessee-  
20 Tombigbee Waterway, including transportation by rail, pipeline, truck and various combinations  
21 thereof, as well as the alternative of “no action.” *Id.*

22 To the same effect is *Trinity Episcopal School v. Romney*, 523 F.2d 88, 93 (2nd Cir.  
23 1975). In that case, the defendants sought to build a low-income housing project and argued that  
24 they were not required to consider any alternatives because the project would not harm the  
25 environment and there were no unresolved conflicts concerning resource use. The plaintiffs  
26 argued the defendants were obliged to consider *both* alternative sites *and* alternative uses, such as  
27 middle-income housing, of the proposed site. The court agreed with plaintiffs that NEPA's  
28 requirement for consideration of alternatives was triggered “where (as here) the objective of a  
major federal project can be achieved in one of two or more ways that will have differing impacts  
on the environment.” *Id.* at 93; *accord*, *Township of Lower Alloways Creek v. Public Service*

1 *Electric and Gas Co.*, 687 F.2d 732, 739-740, n. 14 (3rd Cir. 1982); *City of New York v. U.S.*  
2 *Department of Transportation*, 539 F.Supp. 1237, 1276-1277 (S.D.N.Y. 1982)(collecting cases),  
3 *aff'd*, 715 F.2d 732, 742-743 (2nd Cir. 1983), *cert den.* 465 U.S. 1055 (1984). Here, BLM  
4 dismissed feasible alternatives as infeasible and failed to consider other viable alternatives  
5 completely.

6 For example, the In-area Renewable Alternative is feasible and should not have been  
7 dismissed in the EIS. FEIS ES-8. This alternative considers the construction of renewable  
8 energy sources closer to the population center of San Diego and meets all three of the project  
9 objectives. *See* FEIS at ES-21. First, clearly, such a project would increase the use of renewable  
10 energy while decreasing fossil fuel-based energy production.<sup>5</sup> Second, the In-area Renewable  
11 Alternative will increase reliability by diversifying energy production throughout the region.  
12 Third and finally, the alternative will reduce energy costs in the long term by eliminating the cost  
13 of long-distance transmission from the Imperial Valley. The EIS, however, dismissed the  
14 alternative.

15 Also, the EIS should have included alternatives that required a certain percentage of the  
16 transmission capacity to be dedicated exclusively to the transportation of renewable energy.  
17 CBD Protest, Exhibit 6, p. 9. Yet the EIS failed to consider such an alternative despite the EIS's  
18 stated objective of increased renewable energy production and the general perception that the  
19 SPTP was being created to facilitate green energy usage and reduce greenhouse gas emissions.

20 Similarly, the EIS failed to adequately consider another environmentally beneficial option  
21 – undergrounding of the project lines. *See* FEIS, ES 34-36. This option was proposed by the  
22 California Botanical Habitat Institute but was not reviewed in the EIS. Comments of CBH to  
23 CPUC, February 26, 2008 (“CBH Comments”). Exhibit 8, pp. 2-14. Because this alternative is  
24 feasible and avoids many of the significant impacts related to the project, including impacts on  
25 biological and visual resources and fire safety, it should have been evaluated in the EIS.

26 **B. The Project Approval Violates FLPMA.**

27 The Federal Land Policy Management Act directs that:

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28 <sup>5</sup>Powers Brief, pp. 7-24.

1 the public lands be managed in a manner that will protect the quality of scientific,  
2 scenic, historical, ecological, environmental, air and atmospheric, water resource,  
3 and archeological values; that, where appropriate, will preserve and protect certain  
4 public lands in their natural condition; that will provide food and habitat for fish  
5 and wildlife and domestic animals; and that will provide for outdoor recreation  
6 and human occupancy and use.

7 43 U.S.C. § 1701(a)(8). Contrary to this mandate, the project approval will destroy precious  
8 viewsheds, dissect and degrade vitally important habitats, and pave the way for massive intensive  
9 industrial development in the McCain Valley.

10 First, the SPTP will allow for widespread, intensive wind energy development in the  
11 McCain Valley, development that violates the above-quoted, key FLPMA protection because it  
12 substantially degrades one of the most outstanding scenic resources within San Diego County.  
13 The McCain Valley is a spectacular viewshed whose unique granite monoliths and ruggedly  
14 beautiful ridge lines warrant the highest degree of scenic protection. Wind energy development,  
15 by contrast, has particularly pernicious effects on scenic quality because it would erect enormous,  
16 angular metal structures along these ridge tops. Installation of thousands of industrial wind  
17 turbines standing hundreds of feet tall, with spinning blades and flashing strobe lights, would  
18 transform the extraordinary natural beauty and tranquility of the McCain Valley into an industrial  
19 sacrifice zone. Wind turbines kill migratory birds and bats, both at night and during the day,  
20 further underscoring the ecological harm these machines wreak. The wind farms at Altamont  
21 Pass in Alameda County, for example, have killed thousands of birds, including golden eagles  
22 and other protected species. The EIS makes no effort to fully disclose, much less seek effective  
23 alternatives to or mitigation measures for these facilities, unnecessarily harming the very scenic,  
24 wildlife and environmental resources that FLPMA was intended to protect. *See e. g.* FEIS, D.2 at  
25 270.

26 The approval of the SPTP also violates FLPMA because, by facilitating the development  
27 of the McCain Valley, it unnecessarily reduces and degrades habitat for wildlife species,  
28 including the Quino Checkerspot Butterfly. Contrary to FLPMA's mandate to protect wildlife  
from unnecessary harm, the EIS fails to disclose and address reports recently received by BLM  
which document nearby sightings of this endangered species, including the Quino surveys for the

1 Campo Landfill SEIS (2005), located on the Campo Reservation, and federal surveys for the  
2 Navy Seals Warfare training facility (2004) located on La Posta Road. Both locations are in  
3 proximity to the selected route. These sitings indicate that additional Quinos may inhabit  
4 adjacent lands within McCain Valley. Similarly, the EIS fails to disclose and address the  
5 potential adverse impacts of wind energy development on Peninsular Bighorn Sheep that inhabit  
6 McCain Valley and other areas along the selected route. This omission violates FLPMA’s  
7 imperative that BLM avoid unnecessary harm to Peninsular Bighorn Sheep and their habitat.

8 **C. The Project Approval Violates The Endangered Species Act**

9 Congress enacted the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, to halt  
10 the extinction of species in the United States and abroad. 16 U.S.C. § 1531. Section 7 of ESA,  
11 16 U.S.C. § 1536, mandates federal agencies to ensure through consultation with the Fish and  
12 Wildlife Service (“FWS”), or alternatively, the National Marine Fisheries Service, that no federal  
13 action will jeopardize the survival of species listed as threatened or endangered, or adversely  
14 modify their designated and proposed critical habitat. 16 U.S.C. § 1536(a)(2). A federal action  
15 that places the future survival or recovery of a threatened or endangered species at risk violates  
16 ESA. *Center for Biological Diversity v. Bureau of Land Management*, 422 F.Supp.2d 1115,  
17 1144 (N.D. Cal. 2006). The section 7 consultation requirement applies to all discretionary  
18 actions undertaken by federal agencies. *National Ass'n of Home Builders v. Defenders of*  
19 *Wildlife*, 127 S.Ct. 2518, 2534 (2007) (interpreting 50 C.F.R. § 402.03). Interagency  
20 consultation must be based on the best scientific and commercial data available. 16 U.S.C. §  
21 1536(a)(2); 50 C.F.R. § 402.14(g)(8). This requirement prohibits an agency from disregarding  
22 available scientific evidence that is better than the evidence on which it relies. *Kern County*  
23 *Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir.2006).

24 The interagency consultation consists of three steps. First, the federal agency proposing  
25 the action – commonly referred to as the “action agency” – which may effect endangered or  
26 threatened species or their critical habitat, must advise the consulting agency – in this case, the  
27 FWS – of the area in which the plan activities are proposed in order to obtain a list of the  
28 endangered and threatened species in the project area. Second, the action agency must prepare a

1 Biological Assessment (“BA”), containing a description of the proposed action and an evaluation  
2 of whether federally listed species, or their proposed and designated critical habitat, are likely to  
3 be affected by the action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. An accurate description  
4 of the proposed action is critical to the section 7 consultation process because that description  
5 generally governs the scope of the consulting agency’s investigations of the project’s impacts.  
6 *Greenpeace v. National Marine Fisheries Service*, 80 F.Supp.2d 1137, 1145 (W.D. Wash. 2000).

7 Third, if the consulting agency determines that the listed species or their critical habitat  
8 are likely to be affected, the consulting agency must issue a Biological Opinion (“BiOp”), setting  
9 forth the information on which the opinion is based, detailing the effects of the proposed action  
10 on listed or threatened species, and suggesting reasonable and prudent alternatives and mitigation  
11 measures which would not violate ESA. 16 U.S.C. § 1536(b), (c)(1); 50 C.F.R. §§ 402.12,  
12 402.14 (2008). If the BiOp concludes that jeopardy is not likely and that there will not be  
13 adverse modification of critical habitat, the consulting agency can issue an “incidental take  
14 statement” which, if followed, exempts the action agency and the permit applicant from the  
15 prohibition on takings found in Section 9 of ESA. 16 U.S.C. § 1536(b)(4).

16 In making its jeopardy determination, the consulting agency must evaluate “the current  
17 status of the listed species or critical habitat,” and direct, indirect and cumulative effects of the  
18 action. 50 C.F.R. §§ 402.02, 402.14(g)(2)-(3). The issuance of a BiOp is considered a final  
19 agency action, and is therefore subject to judicial review under the Administrative Procedure Act.  
20 *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

### 21 **1. Section 7 Consultation History**

22 BLM requested formal section 7 consultation on November 5, 2008, and on that same day  
23 transmitted a Biological Assessment (“BA”) for the SPTP to FWS, attached hereto as Exhibit 11.  
24 BiOp, Exhibit 12, p. 4. BLM’s BA was prepared by the project applicant, San Diego Gas &  
25 Electric Company, and purports to address the effects of the issuance of rights of way for the  
26 construction of the selected route on threatened and endangered species and their critical habitat.  
27 BA, Exhibit 11, pp. 87-134; BiOp, Exhibit 12, pp. 3-4. BLM requested that FWS complete its  
28 BiOp on an expedited schedule to meet the expected completion date of BLM’s NEPA process

1 for the SPTP. BiOp, Exhibit 12, p. 4. FWS was able to accommodate this request, providing its  
2 BiOp on January 16, 2009. *Id.* BLM approved the SPTP rights of way just four days later, on  
3 January 20, 2009, minutes before the Obama Administration's inauguration.

4 FWS's BiOp for the SPTP is a foundational, conference opinion. BiOp, Exhibit 12, p. 1.  
5 It is intended to cover lands under the jurisdiction of the United States Forest Service, the Bureau  
6 of Land Management, and the County and City of San Diego. The document is also supposed to  
7 serve as a baseline conference opinion for the Army Corps of Engineers with regard to SDG&E  
8 section 404 permit. *Id.*

9 **a. BLM's Biological Assessment**

10 BLM requested formal consultation with regard to ten federally listed species and their  
11 designated and proposed critical habitat. These include eight federally endangered species<sup>6</sup> and  
12 two federally threatened species.<sup>7</sup> At the time of FWS' completion of its BA, and at the time of  
13 FWS's issuance of its BiOp, SDG&E and BLM had not yet surveyed the majority of the selected  
14 route for the existence of threatened and endangered species, or their suitable habitats. BiOp,  
15 Exhibit 12, p. 2. For example, notably absent from both, the BA and the BiOp, is any mention of  
16 SPTP's impacts on the golden eagle. However, the Forest Service has confirmed sightings of a  
17 nesting pair of golden eagles on El Cajon Mountain, which lies on the selected routes of the  
18 SPTP. United States Forest Service, Area Closures and Advisories to Protect Nesting Raptors,  
19 available at <http://www.fs.fed.us/r5/cleveland/projects/projects/seasonal-closures/> (last visited  
20 March 20, 2009.). Golden eagles are also mentioned in the FEIS; however, the document does  
21 not disclose their location in relation to the final route. *See generally* FEIS, Ch. D.2.

22 BLM also failed to complete scientifically reliable surveys of the ten federally listed  
23 species known to occur in the project area, and such surveys had not been completed at the time

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24 <sup>6</sup>The San Bernardino Bluegrass (*Poa atropurpurea*), Laguna Mountains Skipper (*Pyrgus*  
25 *ruralis lagunae*), Willowy Monardella (*Monardella viminea*), Quino Checkerspot Butterfly  
26 (*Euphydryas editha quino*), Arroyo Toad (*Bufo californicus*), Southwestern Willow Flycatcher  
27 (*Empidonax traillii extimus*), Least Bell's Vireo (*Vireo bellii pusillus*), Peninsular Bighorn Sheep  
(*Ovis canadensis nelsoni*) and the Stephen's Kangaroo Rat (*Dipodomys stephensi*).

28 <sup>7</sup> The San Diego Thornmint (*Acanthomintha ilicifolia*) and the Coastal California  
Gnatcatcher (*Polioptila californica californica*).

1 of the FWS's issuance of its BiOp. BiOp, Exhibit 12, p. 24. According to FWS, further surveys  
2 for this species would need to be conducted by SDG&E prior to the commencement of  
3 construction activities in order to ensure no jeopardy or adverse modification of critical habitat.  
4 BiOp, Exhibit 12, p. 24.

5 **b. The Biological Opinion**

6 FWS determined that the information it gained through consultation with BLM and  
7 through the SPTP NEPA process was sufficient to render an opinion with regard to the impacts  
8 of BLM's grant of a right-of-way to SDG&E. BiOp, Exhibit 12, p. 2. Upon receipt of BLM's  
9 BA, FWS proceeded to conduct its jeopardy/adverse modification analysis for the SPTP. The  
10 BiOp concludes that six of the ten species identified by BLM and SDG&E would be affected by  
11 the SPTP. *Id.*, p. 2. These include the Peninsular Bighorn Sheep<sup>8</sup> ("PBS"), the Quino  
12 Checkerspot Butterfly ("QCB"), the San Diego Thornmint ("Thornmint"), the Coastal California  
13 Gnatcatcher ("Gnatcatcher"), the Least Bell's Vireo ("LBV") and Arroyo Toad, and their critical  
14 habitat. *Id.*, p. 3. However, FWS concluded that if SDG&E complied with the BiOp's proposed  
15 mitigation measures, the SPTP was not likely to adversely affect these six listed species or their  
16 critical habitat. *Id.*, p. 3. FWS also provided an incidental take statement for the above six  
17 species and their critical habitat, immunizing SDG&E and BLM from liability under ESA. *See*  
18 16 U.S.C. § 1536(b)(4).

19 Notably, *the BiOp fails to identify the precise number, extent, location or timing of such*  
20 *incidental takes*, stating that such specifications will be made following site-specific surveys  
21 prior to the construction of the SPTP. BiOp, Exhibit 12, p. 147. This omission is not surprising,  
22 since few or no *special status species surveys have been conducted* on the selected alternative  
23 route. Draft EIR/EIS Special Status Species Survey Locations, Exhibit 13.

24 In addition to addressing the impacts of the SPTP right of way, the BiOp identifies four

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26 <sup>8</sup> PBS have been sighted by U.S. Border Patrol along Interstate 8 near the Mountain  
27 Springs Road Exit, north of the westbound lanes, south of the westbound lanes within Devil's  
28 Canyon, and east of the first Devil's Canyon Bridge. These locations are located in the Jacumba  
Wilderness, and align with the "I-8 Alternative: Overhead Portion" of the SPTP. *See* FEIS, Fig.  
ES-4.

1 other actions deemed “connected” to the SPTP under NEPA: (1) SDG&E’s plans for future  
2 expansion of the SPTP, consisting of four more 230 kV lines and two more 500kV lines that  
3 would connect to one of the substations of the SPTP; (2) the La Rumorosa wind farm, proposed  
4 to be constructed by SDG&E in northern Mexico<sup>9</sup>; (3) a solar facility, proposed by Stirling  
5 Energy Systems, to be located in the Imperial Valley; and (4) the Esmeralda-San Felipe  
6 Geothermal Project, to be located in Truckhaven, California. BiOp, Exhibit 12, p. 2-3. The  
7 geothermal and solar projects alone would result in the permanent loss of 2,500 acres of habitat.  
8 California Public Utilities Commission, Decision Granting Certificate of Public Convenience and  
9 Necessity for the Sunrise Powerlink Transmission Project (Dec. 08-12-058) at 225 (citing FEIS,  
10 Ch. D.2-15; FEIS, Sec. 2) (hereinafter “CPUC Order”). The mitigation measures proposed by  
11 the BiOp do not address the impacts of these four connected actions. BiOp, Exhibit 12, pp. 2-3.  
12 Both the BiOp and the BA omit discussion of the SPTP’s effects on the San Diego fairy shrimp,  
13 the burrowing owl, the mountain plover and the desert pupfish. FEIS, Ch. 2 pp. 3, 22-23. In  
14 fact, no scientifically reliable surveys had been conducted on these species prior to BLM’s  
15 approval of the SPTP right of way. FEIS, Ch.D2 p. 22.

16 The mitigation measures proposed by FWS incorporate, in large part, those measures that  
17 were proposed by SDG&E and BLM. FWS did make certain minor revisions to SDG&E’s  
18 proposals, including a different ratio of compensation for permanently destroyed designated  
19 critical habitat of the QCB, more detailed helicopter flight parameters for construction within the  
20 proposed and designated critical habitat of PBS, and more detailed survey and monitoring  
21 instructions for the remaining threatened and endangered species that would be adversely  
22 affected by the SPTP. Compare, BA, Exhibit 11, pp. 30-41 and BiOp, Exhibit 12, pp. 24, 29-39.  
23 FWS’ no jeopardy/adverse modification determination hinges on SDG&E’s commitment to  
24 conduct additional surveys prior to initiating construction and to replace, through purchase of  
25 new habitat, permanently destroyed designated critical habitat within the project area. BiOp,  
26 Exhibit 12, pp. 2, 24, 29-39. However, the BiOp fails to identify whether suitable habitat is

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28 <sup>9</sup> The La Rumorosa wind farm was proposed by Sempra Generation, the parent company  
of SDG&E.

1 available for purchase, or to reconcile SDG&E’s estimate that the approximately 600 acres of  
2 habitat permanently lost due to the SPTP “may not be available for replacement in the quantities  
3 and specific types that are affected.” See FEIS, ES-29 .

4 **2. BLM and FWS Violated Section 7 of ESA**

5 **a. FWS’ BiOp Is Arbitrary and Capricious and Violates ESA**  
6 **Because it Fails to Analyze the Biological Impacts of the**  
7 **Proposed Action.**

8 A biological opinion which is not coextensive in scope with the agency action is contrary  
9 to law. *North Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980) (requiring a BiOp to  
10 analyze the effect of the entire agency action); *Greenpeace v. National Marine Fisheries Service*,  
11 *supra*, 80 F.Supp.2d at 1147. An agency “action” under ESA is to be construed broadly, and  
12 must include the full action and all mitigation measures adopted in pursuance thereof. *TVA v.*  
13 *Hill*, 437 U.S.153, 173 (1978); *North Slope Borough v. Andrus*, 642 F.2d at 609. The Ninth  
14 Circuit has set aside biological opinions that fail to present a comprehensive discussion of all  
15 stages of a project, even when there is uncertainty about the location and scope of such future  
16 phases of the proposed action. See *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988); *Bob*  
17 *Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988).

18 When evaluating a large-scale and complex project, such as the SPTP, the FWS must  
19 identify all the relevant components of the project, and explain how these components will  
20 individually, and in combination, affect listed species. *Greenpeace v. National Marine Fisheries*  
21 *Service, supra*, 80 F.Supp.2d at 1148; 50 C.F.R. § 402.14(g)(2)-(3). The BiOp fails to address  
22 the full action, which includes SDG&E’s plans for future expansion, as well as the three  
23 renewable energy projects deemed to be actions “connected” to the SPTP under NEPA. FWS  
24 claims that these aspects of the SPTP did not have to be considered at this stage of the project  
25 because separate NEPA and CEQA reviews would be conducted for each of these components of  
26 the SPTP. BiOp, Exhibit 12, pp. 2-3. However, “incremental-step consultation does not vitiate  
27 the ESA requirement that the Secretary prepare a comprehensive biological opinion.” *Conner v.*  
28 *Burford, supra*, 848 F.2d at 1455. FWS was required to consider the full action and its failure to  
do so violates ESA. *North Slope Borough v. Andrus, supra*, 642 F.2d at 609. Accordingly, the

1 Board should set aside the BiOp pursuant to section 706 of the Administrative Procedure Act  
2 (“APA”), 5 U.S.C. § 706, because it is in violation of ESA’s general mandate that federal  
3 agencies need ensure that no federal action will jeopardize the future survival of listed species.  
4 16 U.S.C. § 1536.

5 **b. FWS’ BiOp Is Arbitrary and Capricious and Violates ESA**  
6 **Because it Is Not Based on the Best Available Scientific and**  
7 **Commercial Data.**

8 ESA’s requirement that section 7 consultation be based on the best available scientific  
9 and commercial data prohibits agencies from disregarding available scientific evidence that is in  
10 some way better than the evidence on which they rely. *Kern County Farm Bureau v. Allen*, 450  
11 F.3d 1072, 1080-81 (9th Cir.2006). “The obvious purpose of the requirement that each agency  
12 “use the best scientific and commercial data available” is to ensure that the ESA not be  
13 implemented haphazardly, on the basis of speculation or surmise.” *Bennett v. Spear, supra*, 520  
14 U.S. at 176. FWS’s BiOp can best be described as an exercise in speculation. It also fails to  
15 incorporate relevant data that was developed through the NEPA and CEQA process for the  
16 SPTP.

17 FWS’s no jeopardy determination is based, in its entirety, on SDG&E’s commitment to  
18 conduct future surveys prior to commencing construction. However, ESA requires that the BiOp  
19 be based upon the best “scientific” and “commercial” data. 16 U.S.C. § 1536(a)(2). FWS  
20 squarely failed to comply with this requirement when it rendered an opinion in the absence of  
21 surveys of the entirety of the affected project area for the existence of listed species and their  
22 designated and potential critical habitat.

23 The BiOp omits a discussion of SDG&E’s plans for future expansion, as well as the three  
24 connected renewable energy generation projects that were considered in detail during the SPTP  
25 EIR/EIS process.<sup>10</sup> These projects are also known to have destructive effects on the desert  
26 ecosystem in the Imperial Valley on federally listed endangered species on both sides of the U.S.-

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27 <sup>10</sup> These projects are described in the following SPTP NEPA documents: DEIS, Figures  
28 B-44 through B-46, depicting the location of these various connected actions; RDEIS, Figures 2-  
1, 2-2, 2-3, 2-4 and 2-5 illustration, depicting the La Rumorosa Wind Energy Document; and  
RDEIS, Figures B-12(a) and B-12(b), depicting SDG&E’s expansion plans.

1 Mexican border. CPUC Order at 225. The La Rumorosa wind farm will likely jeopardize the  
2 recovery of the PBS, whose prospects for recovery are dependent on re-establishing connectivity  
3 between populations on both sides of the U.S.-Mexican border. Peninsular Bighorn Recovery  
4 Plan 2000 at 79.

5 The BiOp also omits discussion of the SPTP's impacts on the endangered San Diego fairy  
6 shrimp, the golden eagle, the burrowing owl, the mountain plover, and the critical habitat of the  
7 desert pupfish. These omissions are arbitrary and capricious because the FEIS highlighted the  
8 existence of these species within the project area. For example, engineering conducted for the  
9 proposed project showed that fairy shrimp habitat would be affected, as critical habitat for the  
10 shrimp is just 0.3 miles from the SPTP route. FEIS, Ch. 2, pp. 3, 22. The proposed routing for  
11 the SPTP also crosses the designated critical habitat of the desert pupfish. FEIS, Ch. 2, p. 23.

12 The Board cannot simply take the agency's word that the listed species will be protected  
13 under the planned operations. *National Wildlife Federation v. National Marine Fisheries*  
14 *Service*, 524 F.3d 917 , 935 n. 15 (9th Cir. 2008). The BiOp is legally inadequate because it  
15 flatly fails to consider available data, and is not based on scientifically reliable data. Therefore,  
16 the Board should set aside the BiOp as arbitrary and capricious, under section 706 of the APA, 5  
17 U.S.C. § 706, for violation of ESA, 16 U.S.C. § 1536(a)(2).

18 **c. The BiOp Is Arbitrary and Capricious and Violates ESA**  
19 **Because it Fails to Consider the Recovery Impacts of the SPTP.**

20 The FWS is required to consider both the survival and the recovery chances of listed  
21 species in evaluating adverse modifications to their critical habitat. *Gifford Pinchot Task Force*  
22 *v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069-70 (9th Cir. 2004). A BiOp that relies on  
23 uncertain short-term and long-term improvements to critical habitat to offset short-term and long-  
24 term degradation violates ESA. *National Wildlife Federation v. National Marine Fisheries*  
25 *Service, supra*, 524 F.3d at 934. Similarly, a BiOp that relies on insufficient data, or that fails to  
26 provide a statement of incidental take that permits the agency to assure that the level of  
27 destruction will not, in fact, jeopardize the survival of listed species, is arbitrary and capricious  
28 and violates ESA. *Id*; *Center for Biological Diversity v. Bureau of Land Management*, 422

1 F.Supp.2d 1115, 1131 (N.D. Cal. 2006).

2 In this case, the BiOp fails to evaluate the efficacy of the mitigation measures in ensuring  
3 the future recovery and survival of listed species within the project area. For instance, the BiOp  
4 fails to identify the existence of suitable habitat that may be purchased to replace permanently  
5 destroyed critical habitat due to the construction and operation of the SPTP, and to address the  
6 perceived lack of such habitat. *See* FEIS, ES-29. The BiOp also fails to provide a statement of  
7 incidental take, thus making it impossible to determine the true destructive impacts of the SPTP  
8 and the related recovery and survival chances of listed species extant within the project area.  
9 These flaws render FWS' determination that the SPTP will not jeopardize listed species or  
10 adversely modify their critical habitat flawed on its face. Accordingly, the Board should hold the  
11 BiOp arbitrary and capricious under section 706 of the APA, 5 U.S.C. § 706, and in violation of  
12 ESA, 16 U.S.C. § 1531 *et seq.*

13 **D. The Project Violates The National Historic Preservation Act**

14 Congress enacted NHPA, 16 U.S.C. § 470 *et seq.*, to “accelerate federal historic  
15 preservation programs” and to foster cooperation between federal, state, and local authorities. 16  
16 U.S.C. § 470. NHPA requires federal agencies to consider the effects of an “undertaking” on a  
17 site or object included, or eligible for inclusion, in the National Register, and requires that the  
18 Advisory Council on Historic Preservation administering the Act be given an opportunity to  
19 comment upon the proposed undertaking. 16 U.S.C. § 470.

20 NHPA implementing regulations establish a three-step process for consultation between  
21 federal agencies and the Advisory Council on Historic Preservation: (1) the agency must, in  
22 consultation with the State Historic Preservation Officer (“SHPO”), identify properties within a  
23 federal program or activity which are included, or eligible for inclusion, in the National Register  
24 of Historic Places, prior to making an agency decision undertaking the activity, 36 C.F.R. §  
25 800.4; (2) next, the agency must determine whether the proposed undertaking adversely affects  
26 the identified property and if so, (3) the agency must then enter consultation with the Advisory  
27 Council involving an onsite inspection, public information meeting, and consideration of  
28 alternatives to avoid or mitigate the adverse effects. 36 C.F.R. §§ 800.3, 800.6. Where an Indian

1 tribe has assumed the section 106 responsibilities of the SHPO on tribal lands, consultation for  
2 undertakings occurring on tribal land or for effects on tribal land is with the Tribal Historic  
3 Preservation Officer (“THPO”) for the Indian tribe in lieu of the SHPO. 36 C.F.R. § 800.3(c)(1).

4 The above consultation process should occur at the earliest stages of NEPA review, and is  
5 intended to supplement environmental impact review conducted pursuant to NEPA. 36 C.F.R. §  
6 800.8. The action agency is also required to seek input from the public with regard to its initial  
7 decision to identify cultural and historic sites, and to mitigate and resolve any adverse effect on  
8 such sites from the proposed action. 36 C.F.R. §§ 800.8 (e), 800.4.

9 NHPA regulations permit the action agency to develop alternative consultation and public  
10 notice procedures to those described above. *See* 36 C.F.R. § 800.14(a). In this event, the agency  
11 must consult with the Advisory Council for Historic Preservation (“Council”), the National  
12 Conference of State Historic Preservation Officers, or the SHPO and THPO, in the development  
13 of alternative procedures. 36 C.F.R. § 800.14(a)(1). The agency is also required to seek public  
14 input during the development of alternative procedures. *Id.* If after the statutorily-mandated 60  
15 day review period the Council approves the procedures, the agency must notify all consulting  
16 parties and publish a notice of final alternate procedures in the Federal Register. 36 C.F.R. §  
17 800.14(a)(2)-(3).

18 As part of the alternative procedures set out above, the agency and the Council may  
19 develop a programmatic agreement (“PA”) to govern the implementation of a particular program  
20 or in order to resolve the adverse effects of certain complex projects. 36 C.F.R. § 800.14(b).  
21 The development of a PA must be done in consultation with the SHPO or THPO, other federal  
22 agencies, and members of the public. 36 C.F.R. § 800.14(b)(2)(i)-(ii). The agency must notify  
23 the public of its intent to develop a PA and involve the public in the development of the terms.  
24 36 C.F.R. § 800.14(b)(2)(iv). A PA does not take effect until (1) the public has been given the  
25 opportunity to comment and (2) it has been executed by the agency, the Council, and the SHPO  
26 or THPO, as appropriate. 36 C.F.R. § 800.14(b)(2)(iii).

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1                                   **1.       Section 106 Consultation History**

2           BLM’s section 106 consultation history is haphazard and insufficiently documented in the  
3 NEPA process for the SPTP. The NEPA documentation reflects that SDG&E’s consultants  
4 conducted a “Class I” inventory of cultural and historical resources for a one-mile-wide study  
5 area encompassing the full length of the SPTP pursuant to NHPA, 16 U.S.C. § 470. DEIS Ch.  
6 D.7 at 2. It is unclear when this inventory was performed. A Class I inventory review involves  
7 literature search through previously conducted surveys and studies. Subsequently, a Class II  
8 inventory, involving actual reconnaissance of the effected area, was initiated by SDG&E in  
9 April 2008. *Id.* Ch.D.7 at 4. Class II surveys are defined by BLM as “probabilistic sample  
10 surveys” which are “designed to aid in characterizing the probable density, diversity, and  
11 distribution of cultural properties in an area, to develop and test predictive models, and to answer  
12 certain kinds of research questions.” *Id.*, Ch. D7 at 3. SDG&E completed this survey in July 27,  
13 2007 *Id.*, Ch. D.7 at 4. However, SDG&E was not able to survey the entirety of any of the  
14 proposed alternative routes for the SPTP, and the SHPO had not made eligibility determinations  
15 during the NEPA/CEQA process. *See id.* Ch. D.7 at 4, 9.

16           Native American consultation was conducted by SDG&E’s consultants, Gallegos &  
17 Associates. *Id.* Ch. D7 at 9-10. BLM also sent out form letters, seeking consultation with  
18 potentially effected Native American tribes on July 5, 2006, July 13, 2006, September 5, 2007,  
19 and January 23, 2008. On September 4, 2008, BLM sent a letter to representatives of 60 tribal  
20 governments, announcing a series of four meetings that would take place on September 29, 2008  
21 through October 2, 2008. FEIS at ES-26.

22           The NEPA documentation for the SPTP reflects that BLM did not initiate consultation  
23 with the SHPO during NEPA review. *See generally* FEIS, Vol.2 Ch. 2, Ch. D.7. Instead, and  
24 due to the complexity of the project, BLM opted to employ the alternative regulatory mechanism  
25 for section 106 compliance, pursuant to 36 C.F.R. 800.14 and to develop a PA. FEIS Ch. D.7, p.  
26 14. The PA would be jointly implemented by BLM, the California SHPO, the Advisory Council  
27 and any affected Native American tribes. FEIS, Ch. D.7 p.14. The PA was executed by BLM and  
28 the California SHPO, Milford Wayne Donaldson, on December 23, 2008, attached hereto as

1 Exhibit 14. The THPO of the Agua Caliente Band of Cahuilla Indians signed on to the PA on  
2 January 29, 2009, nine days *after* BLM had approved the SPTP right of way. At the time of  
3 writing, no notice has been published in the Federal Register, announcing BLM’s election of  
4 alternative procedures, pursuant to § 800.14(a)(2)-(3).

5 **2. BLM is in Violation of NHPA.**

6 **a. BLM Failed to Comply with the NHPA Section 106 Process by**  
7 **Failing to Provide Public Notice of the PA Prior to its**  
8 **Execution.**

9 If the agency elects to proceed with alternative compliance procedures, NHPA  
10 implementing regulations require the agency to provide notice to the public at two discrete points  
11 of the consultation process. 36 C.F.R. § 800.14. The agency is required to first publish a notice  
12 in the Federal Register, informing the public that the agency intends to develop alternative  
13 compliance procedures with regard to a particular undertaking. 36 C.F.R. § 800.14(a)(2)-(3).  
14 Then, if the agency develops a programmatic agreement to deal with complex and continuing  
15 survey efforts under section 106 of NHPA, the agency is required to give the public a reasonable  
16 opportunity to comment on proposed terms of the PA. 36 C.F.R. § 800.14(b)(2)(iv).

17 The public notice requirement is “the heart of the NHPA,” and only after “consideration of  
18 any public comments and reaching final agreement, the agency and ACHP may then execute the  
19 PA, thereby satisfying the agency's Section 106 responsibilities.” *Walsh v. U.S. Army Corps of*  
20 *Engineers*, 757 F.Supp. 781 (W.D.Texas 1990). The D.C. Circuit has held that a “[programmatic  
21 agreement] has no legal force” until after the agency has provided public notice of its terms and  
22 allowed for public comment. *CTIA-Wireless Ass'n v. F.C.C.*, 466 F.3d 105, 107 (D.C. Cir. 2006).

23 BLM failed to comply with the public notice requirements of NHPA and its implementing  
24 regulations. The agency never published a notice in the Federal Register, nor did it use any other  
25 valid means of informing the public that alternative section 106 compliance procedures were put  
26 in place, or that the agency intended to develop a PA for the SPTP. Although the agency did send  
27 out form letters to Native American tribes that may be effected by the SPTP, that form of notice is  
28 insufficient to meet NHPA’s “reasonable opportunity to comment” standard. *Pueblo of Sandia v.*  
*U.S.*, 50 F.3d 856, 860 (10th Cir. 1995). BLM’s intent to proceed with a PA appears on one page

1 of the DEIR/DEIS, buried in more than 7,500 pages of the six volume document. This sort of  
2 notice cannot be deemed reasonable by any standard, and does not meet the “reasonable  
3 opportunity to comment” standard of NHPA. Because BLM failed to comply with NHPA’s  
4 public notice requirements, BLM’s approval of a right of way for the SPTP is in violation of  
5 NHPA, 16 U.S.C. § 470, and should be set aside by the Board as arbitrary and capricious under  
6 section 706 of the APA, 5 U.S.C. § 706.

7 **b. BLM Failed to Comply with the NHPA Section 106 Process by**  
8 **Failing to Execute a Programmatic Agreement Prior to**  
9 **Approving the SPTP.**

9 A PA takes effect after the public has had an opportunity to comment and after it has been  
10 executed by the agency, the Council, and the SHPO or THPO, as appropriate. *CTIA-Wireless*  
11 *Ass'n v. F.C.C.*, 466 F.3d 105, 107 (D.C. Cir. 2006); 36 C.F.R. § 800.14(b)(2)(iii). A federal  
12 project cannot be approved, under NHPA, without first securing a programmatic agreement. *Mid*  
13 *States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 554 (8th Cir. 2003).

14 BLM failed to execute a PA prior to its approval of the SPTP rights of way on January 20,  
15 2009. (See Record of Decision for the Sunrise Powerlink Transmission Project and Associated  
16 Amendment to the Eastern San Diego County Resource Management Plan 8 (2009).)  
17 Even though BLM and the SHPO executed a PA on December 23, 2008, the THPO did not  
18 execute the agreement until January 29, 2009. The BLM also failed to obtain public comment on  
19 the PA prior to its execution. As such, the PA is not deemed to have gone into effect under 36  
20 C.F.R. § 800.14(b)(2)(iii). BLM’s failure to “execute” a PA prior to its approval of the SDG&E  
21 right-of-way for the SPTP project is in violation of NHPA and its implementing regulations, and  
22 the Board should set aside BLM’s approval as arbitrary and capricious under section 706 of the  
23 APA, 5 U.S.C. § 706.

24 **c. BLM Failed to Comply with the NHPA Section 106 by**  
25 **Independently Defining the Scope of Their Survey Effort**

26 As argued above, BLM failed to institute an alternative consultation procedure under 36  
27 C.F.R. §800.14, and was therefore required to comply with the three-step consultation process set  
28 forth in section 106 of NHPA. The section 106 process requires BLM to determine and document

1 the area of potential effects in consultation with the SHPO. 36 C.F.R. § 800.4(a)(1) (2004). Only  
2 after consultation with the SHPO, and on the basis of the SHPO’s comments, can the agency  
3 proceed to a decision with regard to further necessary survey efforts. 36 C.F.R. § 800.4(b) (2004).  
4 Absent the SHPO’s consultation, the agency has no reasonable basis on which to determine the  
5 appropriate scope of its investigation.

6 BLM failed to request the SHPO’s consultation with regard to the survey efforts of  
7 SDG&E’s consultants. Therefore BLM is in violation of NHPA and its implementing regulations.  
8 Accordingly, the Board should set aside BLM’s approval of the SDG&E right of way as arbitrary  
9 and capricious under section 706 of the APA, 5 U.S.C. § 706, because it is in violation of NHPA,  
10 16 U.S.C. § 470, and its implementing regulations.

11 **d. Defendants Failed to Comply with NHPA by Ignoring the Effect**  
12 **of the Undertaking on Property Listed in the Equivalent of the**  
13 **National Register.**

14 Section 402 of the NHPA provides, “[p]rior to the approval of any Federal undertaking  
15 outside the United States which may directly and adversely affect a property which is on the  
16 World Heritage List or on the applicable country’s equivalent of the National Register, the head of  
17 a Federal agency having direct or indirect jurisdiction over such undertaking shall take into  
18 account the effect of the undertaking on such property for purposes of avoiding or mitigating any  
19 adverse effects.” 16 U.S.C. § 470a-2. NHPA conveys the clear congressional intent that an  
20 agency act in cooperation with relevant nations, parties, and organizations in fulfilling NHPA’s  
21 mandate. *Okinawa Dugong v. Gates*, 543 F.Supp.2d 1082, 1103-1104 (N.D. Cal. 2008). BLM  
22 failed to conduct consultation with Mexican officials regarding the impacts to cultural sites within  
23 the project area of the La Rumorosa wind farm. BLM also failed to make any findings concerning  
24 the cultural resource impacts in Mexico. *See* FEIS, Ch. D.7, p. 161. The La Rumorosa wind farm  
25 is an indirect effect of the SPTP. FEIS, ES-34. As such, it is deemed to be within the affected  
26 project area, and BLM was required to identify historic properties in that area prior to approving  
27 the SPTP rights of way. 36 C.F.R. §§ 800.16(d), 800.4(b). Therefore, BLM is in violation of  
28 Section 402 of the NHPA, and the Board should set aside BLM’s approval of the SDG&E right of  
way as arbitrary and capricious under section 706 of the APA, 5 U.S.C. § 706.

1 **III. Appellants Will Suffer Immediate and Irreparable Harm If the Stay Is Not Granted.**

2 As stated above, the destruction of environmental resources is “final and conclusive” and  
3 usually considered an immediate and irreparable harm. *Parker, supra*, 309 F.Supp. at 601. As the  
4 Supreme Court has explained,

5 Environmental injury, by its nature, can seldom be adequately remedied by money  
6 damages and is often permanent or at least of long duration, i.e., irreparable. If  
7 such injury is sufficiently likely, therefore, the balance of harms will usually favor  
8 the issuance of an injunction to protect the environment.

9 *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). SDG&E’s plans include  
10 the construction of the SPTP through vast areas of untrammled desert wilderness, causing  
11 “[e]nvironmental injury” to endangered species and the fragile ecosystems through which the line  
12 will travel. These types of injuries are considered irreparable. *Id.*

13 In addition, BLM’s rushed and incomplete analysis not only fails the legal standard of the  
14 foregoing federal planning statutes, but also forecloses the possibility of a reasoned consideration  
15 of environmentally preferred renewable energy technology. With its approval of the SPTP, BLM  
16 commits to an environmentally-costly energy infrastructure project, while failing to compute the  
17 actual value of this particular use of BLM-managed resources. “As time passes and additional  
18 information becomes available concerning load growth, transmission expansion, generation  
19 retirements, generation additions, Automatic Metering Infrastructure (AMI) impacts, rooftop solar  
20 photovoltaic applications, energy efficiency programs, demand response initiatives, and other  
21 related matters, the timing of the need for additional 230 kV circuits” will become more clear.  
22 CBD Protest, Exhibit 6 at 8 (quoting report number CEC-600-2008-008 by the California Energy  
23 Commission). BLM’s approval of the SPTP harms appellants because, contrary to its very  
24 purpose, it dis-incentivizes the development of renewable energy projects by creating additional  
25 transmission capacity of 500kV for *fossil-fuel energy generators*.

26 SDG&E has given no indication that it will not immediately proceed with surveying and  
27 conducting other site preparation work. This could include, *inter alia*, erecting survey stakes,  
28 cutting access roads, and conducting land surveys. In fact, BLM has recently released a Finding  
of No Significant Impact that addresses “helicopter use for surveys along the Mountain Springs

1 Grade portion of the proposed Sunrise Powerlink project for the purposes of geotechnical and  
2 environmental surveys. BLM, Finding of No Significant Impact, December 16, 2008 (“FONSI”),  
3 Exhibit 9, p. 2. Such resource-disrupting activities harm appellants’ interests by disturbing and  
4 destroying the very resources that appellants seek to protect, including endangered species and  
5 their habitat.

6           Additionally, SDG&E may begin to collect bids and sign contracts for project  
7 components, committing itself and its ratepayers to the project prior to the hearing of this appeal.  
8 Such contractual commitments harm appellants by creating bureaucratic and financial momentum  
9 for the project despite BLM’s failure to conduct an adequate EIS and endangered species  
10 consultation. A stay would protect appellants’ right to a fair hearing from the Board and their  
11 ability to seek an injunction from the judiciary if necessary.

12 **IV. The Public Interest Favors Granting the Stay.**

13           For the reasons stated above, the public interest favors granting the stay. SDG&E has not  
14 demonstrated that it needs the capacity that would be provided by the SPTP in the near future.  
15 Further, construction of the power line will disturb many acres of critically important natural  
16 resources in Eastern San Diego County. Such environmental injury is irreparable and immediate.  
17 The public interest therefore requires the Board to stay the efficacy of BLM’s approval of the  
18 project until BLM conducts a thorough and adequate evaluation of alternatives to this project and  
19 of the impacts attendant to the SPTP. Only through such a study can the true costs and benefits of  
20 the various alternatives to the project be weighed and properly considered by decisionmakers.  
21 Any premature commencement of the project construction will harm the endangered species in the  
22 area and unduly disturb some of the last remaining wild lands in San Diego County.

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**CONCLUSION**

Based on the arguments contained herein, appellants respectfully petition this Board for a stay pending the Board's consideration of the present appeal.

Dated: March 23, 2009

Respectfully submitted,

/s/ Stephan C. Volker  
STEPHAN C. VOLKER  
Attorney for Appellants Backcountry Against Dumps,  
Protect Our Community Foundation, East County  
Community Action Coalition and Donna Tisdale

1 **PROOF OF SERVICE**

2 I HEREBY DECLARE:

3 I am over the age of eighteen years, work in the County of Alameda, California, and am  
4 not a party to the within cause. My business address is 436 14th Street, Suite 1300, Oakland,  
5 California 94612. On March 23, 2009, I served appellants' REQUEST FOR STAY in the above-  
6 entitled matter by placing a true copy thereof in envelopes with postage fully prepaid thereon for  
7 mailing with the U.S. Postal Service via certified mail, return receipt requested, addressed as  
8 follows:

9 Interior Board of Land Appeals  
10 Office of Hearings and Appeals  
11 U.S. Department of the Interior  
12 801 N. Quincy Street, Suite 300  
13 Arlington, VA 22203

San Diego Gas & Electric  
c/o Jennifer F. Jett  
101 Ash Street  
San Diego, CA 92101

12 Jim Abbott, Acting State Director  
13 Bureau of Land Management  
14 U.S. Department of the Interior  
15 2800 Cottage Way (Room E-2853)  
16 Sacramento, CA 95825

Sempra Energy  
c/o Randall L. Clark  
101 Ash Street  
San Diego, CA 92101

15 Mike Pool  
16 BLM Director  
17 1849 C Street NW, Rm. 5665  
18 Washington DC 20240

Jim Bartel  
Field Supervisor  
U.S. Fish and Wildlife  
Carlsbad Fish & Wildlife Office  
6010 Hidden Valley Road, Suite 101  
Carlsbad, California 92011

19 I declare under penalty of perjury that the foregoing is true and correct, and that this  
20 declaration was executed on March 23, 2009, at Oakland, California.

21 /s/ Teddy Ann Fuss  
22 Teddy Fuss