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VIA E-MAIL

CPUC/BLM
c/o Aspen Environmental Group
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Re: Comments on SDG&E Sunrise Powerlink RDEIR/SDEIS

Dear CPUC/BLM:

This office represents JAM Investments, Inc. ("JAM") which is beneficially interested in the proposed San Diego Gas & Electric Co. ("SDG&E") Sunrise Powerlink Project ("Project"). Specifically, JAM owns several adjoining parcels in San Diego County ("Property") which would be directly affected by BCD Alternative Revision ("BCD Revised Alternative" or "Alternative"). Attached as **Exhibit "A"** is a diagram depicting the JAM property and the proposed BCD Revised Alternative bisection of the Property. In short, JAM objects to the approval of this Alternative for the reasons set forth below.

Discussion

Should CPUC elect to approve a revised version of the Project that includes that BCD Revised Alternative, in lieu of the proposed Project, it must prepare, circulate, and certify a new EIR document before granting any approvals.

1. The Project Description Does Not Include the BCD Revised Alternative.

The EIR's project description fails to describe the BCD Revised Alternative as the actual Project under consideration nor does the EIR consider impacts to properties caused by the reroute. In particular, nothing in the EIR indicates that the actual Project would cross the JAM Property. This omission precludes approving a Project that employs this Alternative. "An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity." *Burbank-Glendale-Pasadena Airport Authority v. Hensler*, (1991) 233 Cal. App. 3d 577, 592. Indeed, "[a]n accurate, stable and finite project description is the *sine qua non* of an inform[ative] and legally sufficient EIR. The defined project and not some different project must be the EIR's bona fide subject."

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County of Inyo v. City of Los Angeles (1977) 71 Cal. App. 3d 185, 199. Because the EIR's *Project Description* does not include the BCD Revised Alternative, and rather this Alternative is merely included to determine whether lower impact alternatives to the Project exist, the Project cannot be approved with this revision without, at a minimum, revising the EIR to reflect a new project description that includes the Alternative as the actual Project.

2. The EIR Does Not Adequately Discuss the Environmental Setting of the BCD Revised Alternative.

Moreover, although agencies are generally encouraged to adopt alternatives that would lessen a project's significant environmental impacts, it would be improper for CPUC to adopt the offsite BCD Revised Alternative without evaluating the impacts of that alternative project in its own EIR. No authority supports an alternative course of action and, in fact, the Project cannot be approved with the BCD Revised Alternative because neither the initial nor revised EIRs accurately describe the setting or impacts of the BCD Revised Alternative.

According to the EIR, the revised route "would diverge from the BCD Alternative at MP BCD-9. It would head to the northwest for just over four miles and then turn and head south-southwest for two miles to where it would cross the original BCD Alternative." RDEIR/SDEIS at 3.3.2.1, p.29. An EIR's environmental setting must describe the actual conditions on the ground (see, *Woodward Park Homeowners Assoc. v. City of Fresno* (2007) 149 Cal.App.4th 892) and the failure to adequately describe the environmental setting is a failure to proceed in the manner required by law. *Friends of the Eel River et al., v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859. Moreover, this information must be included in the draft EIR and the exclusion cannot be cured through a subsequent CEQA document such as an addendum or supplemental EIR. *Galante Vineyards et al., v. Monterey Peninsula Water Management District* (1997) 60 Cal. App. 4th 1109.

The EIR's environmental setting discussions for the Project and the Alternative fails to disclose that this Alternative would run through the heart of the picturesque Thing Valley – much of which lies within the Property – and would require erecting four towers on the Property identified as Str. ## 159, 160, 161, and 162, as well as one fly yard and two construction and maintenance pads (see **Exhibit "A."**) It also fails to disclose that the Property includes several structures ("Structures"). These structures include a long-standing ranch house regularly used by JAM's owners and their guests for residential purposes. Attached as **Exhibits "B," "C," and "D"** are three satellite images from Google Earth showing (1) an overhead of the Property and the Structures at the north end of the image; (2) a view of the Property looking north up Thing Valley from the southern edge of the Property; and (3) a view of the Property looking south down Thing Valley from the Structures. The BCD Alternative would slice through the view with four towers. The EIR also fails to disclose that the Property includes numerous oak trees that would be significantly affected by the tower and fly-yard construction.

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In so doing, the EIR fails to adequately address impacts to visual, biological, recreational and other resources on the Property that would be affected by the towers, fly yard, and construction pads if the BCD Revised Alternative were selected. Accordingly, the EIR is inadequate to serve as the environmental document for any project that includes the BCD Revised Alternative.

3. The EIR's Conclusion that the BCD Alternative Revision is Environmentally Superior to the Project is Fundamentally Flawed.

The EIR indicates that the Environmentally Superior Southern Route would include the BCD Revised Alternative (see RDEIR/SDEIS at Section 3.3.2) and this route is environmentally superior to the Project. This indication, however, is insufficient to support adopting a project that includes this Alternative. This is because the BCD Revised Alternative is only generally measured against the Project and to some extent the initial BCD Alternative – but it does not adequately, describe, analyze, or mitigate the impacts from the BCD Revised Alternative.

To this end, the EIR asks and answers the wrong question to authorize adopting the BCD Revised Alternative; it does not evaluate and mitigate the impacts of the BCD Revised Alternative – it simply, generally compares that Alternative's impacts to those of the proposed Project. The significance of this shortcoming is further evidenced by (1) the fact that “only 6 percent of the BCD Alternative and BCD South Option Revisions have been intensely surveyed for cultural resources compared to 70 percent of the original alternatives” (RDEIR/SDEIS at p. 30) and (2) the fact that the Property and BCD Alternative Route were never inspected prior to publishing the conclusions in the RDEIR/SDEIS. The SDG&E surveyors and environmental consultants only initially inspected the Property on August 13-14, 2008 – well after the RDEIR/SDEIS was circulated for comment. See August 12, 2008 e-mail from Mark Chomyn to Bill Kuenzinger attached hereto as **Exhibit “E”**. Indeed, JAM only became aware of this Project and its potential to impact the Property in or around July 2008 upon contact from SDG&E staff to arrange this entry onto the Property.

At this time, the surveyors' and consultants' results from those inspections are not yet available for review.

Thus, any conclusions regarding the environmental impacts of the Alternative are insufficient to approve a project that includes this Alternative. “CEQA places the burden of environmental investigation on government rather than the public.” *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296. Nor can this omission be cured through the Final EIR – in short allowing an agency to reach a conclusion in a draft EIR before gathering the evidence to support that conclusion reflects a case of results-oriented environmentalism to the extreme. The evidence must first be gathered, and then the conclusions reached. Otherwise, the studies merely become post-hoc rationalizations to support the EIR's conclusions. “By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible

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stage in the planning process... If any substantial changes are proposed in a project after review of a draft EIR, it is necessary to prepare a supplemental EIR subject to the same scrutiny.” *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296

4. The EIR fails to Consider an Alternative that would Lessen Impacts to JAM Property.

As noted above, the BCD Revised Alternative would significantly bifurcate the JAM Property and would run along the valley floor for significant length of the Property. The EIR fails to explain why only this high-impact route is considered, rather than alternative routes that would limit encroachment onto the Property. These could include (1) avoiding the Property altogether by running the Alternative to the South of the Property; (2) limiting impact to the property by following the path of the La Posta Truck Trail; or (3) limiting impact to the property by following the western boundary of the Property to the “turn.” Each of these alternatives would presumably create less impact to JAM and its Property and should be considered in the EIR. After all, the purpose of the EIR “is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official.” *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713,722.

5. The EIR fails to Correlate Air Quality Impacts to Human Health Effects

Health problems caused by a project are recognized environmental effects to be considered in an EIR, including health effects caused by increases in air pollution. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1220. Specifically, CEQA requires an EIR to discuss “health and safety problems caused by the physical changes” a proposed project may cause. Guideline §15126.2(a). In discussing and analyzing health problems caused by the physical changes a project will precipitate, an EIR must “correlate the identified adverse air quality impacts to resultant adverse health effects.” *Bakersfield* at 1219 (emphasis added). The EIR fails to comply with this necessary informational disclosure requirement.

The EIR merely observes that air pollutants cause health effects (DEIR/DEIS at D.11-2), and that the Project would increase air pollutant emissions. The EIR, however, fails to correlate the increase in air emissions to adverse health effects as required by CEQA. Thus, neither the decision-makers nor the public are informed of the nature and magnitude of the public health effects flowing from the Project.

The EIR’s health effects discussion is nearly identical to that deemed legally insufficient by the court in *Bakersfield*. Relevant excerpts from the two *Bakersfield* EIRs are attached to this letter as a part of **Exhibit “F”**. Both the Project’s EIR’s air quality analysis and the two *Bakersfield* air quality analyses merely list respiratory ailments caused by types of air pollution. For example, the Gosford EIR acknowledged, “[o]zone is a respiratory irritant and an oxidant that increases susceptibility to respiratory infections and can cause substantial damage to vegetation and other materials. Ozone is a severe eye, nose, and

throat irritant...The ozone precursors, ROG and NO_x, are emitted by mobile sources and by stationary combustion equipment.” Exhibit “G” at Gosford AR 850. The Panama EIR stated “[h]igh ozone levels can adversely affect plants, and in humans, can cause respiratory irritation.” Exhibit “G” at Panama AR 1817. Similarly, the Project’s EIR briefly describes ozone and states that, “aggravation of respiratory and cardiovascular diseases; impairment of cardiopulmonary function; and eye irritation.” DEIR/DEIS at D.11-2. The EIR, however, does not disclose the probability that members of the public will be afflicted with air pollution caused ailments due to the increase in air emissions. The EIR does not provide enough information to tell the reader the increase in air emissions by type of pollutant and the anticipated increase in public health problems resulting from this increase. As such, the EIR does not disclose the magnitude of the significant and unavoidable effect and suffers the same fatal defect as the *Bakersfield* EIRs. Such a generalized discussion violates CEQA because it does not correlate the adverse air quality impacts to resultant adverse health effects. In short, generally telling the reader that air pollution can cause health impacts without identifying the magnitude of the actual impact is akin to announcing that increased vehicle trips can cause traffic congestion – without ever quantifying and describing the magnitude of the impact.

It is critical that the EIR provide the public with sufficient information regarding the potential adverse health effects related to this Project, especially considering the high level of respiratory ailments in California. “Emergency rooms crowded with wheezing sufferers are sad but common sights in the San Joaquin Valley and elsewhere. Air quality indexes are published daily in local newspapers, schools monitor air quality and restrict outdoor play when it is especially poor and the public is warned to limit their activities on days when air quality is particularly bad.” *Bakersfield* at 1219-1220. Because air quality is a significant concern in California, and CEQA requires health impacts disclosure, the Air Quality section in the EIR must be revised and re-circulated in a manner that allows the reader to understand the correlation between the increase in air emissions in the affected air basins, and adverse health effects in those basins.

Several studies, attached to this letter as **Exhibit “G”**, demonstrate the scientific or technical capability of studying the causal link between the quantity of air pollution that a project will directly or indirectly emit and the potential magnitude of certain public health effects. For example, one study from The Journal of the American Medical Association concludes: “Each 10- μ g/m³ elevation in fine particulate air pollution was associated with approximately a 4%, 6%, and 8% increased risk of all-cause, cardiopulmonary, and lung cancer mortality, respectively.” Accordingly, the EIR must be significantly revised to properly analyze the Project’s adverse air quality impacts to resultant adverse health effects.

6. The EIR fails to Adequately Address Climate Change

The RDEIR/SDEIS notes that despite several comments challenging the EIR’s treatment of greenhouse gas emissions and global climate change (“GHG”), the issues are not included in the publicly circulated RDEIR/SDEIS and, instead, will be addressed in the Final EIR/EIS

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including adding “feasible mitigation” in the form of GHG offsets. Specifically, the RDEIR/SDEIS notes “New GHG mitigation will be included in the Final EIR/EIS, so recirculation [of the] Draft EIR/EIS for this reason is not required.” See RDEIR/SDEIS at Introduction, p. 1-4.

In short, this approach fails to pass legal muster for two reasons.

First, declaring in a draft EIR that additional mitigation measures will be included in the final EIR but excluding information about those mitigation measures fails to satisfy CEQA’s fundamental policy of information disclosure.

“The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' [Citation.] ... 'It is, of course, too late to argue for a grudging, miserly reading of CEQA.' [Citation.] The Legislature has emphasized that 'It is the intent of the Legislature that all agencies of the state government which regulate activities ... which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage....' ” *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390. “The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' [Citation.] The EIR is therefore 'the heart of CEQA.' [Citations.] An EIR is an 'environmental “alarm bell” whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.' [Citations.] The EIR is also intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.' [Citations.] Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. [Citations.] The EIR process protects not only the environment but also informed self-government.” *Id.* at p. 392. Moreover, for public projects such as this Project, environmental review must begin at conceptualization of the project. CEQA Guideline §15004.

“The later the environmental review process begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project.” *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390. “Under CEQA, the agency must consider the cumulative environmental effects of its action before a project gains irreversible momentum.” *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325,1333. Dispensing with CEQA compliance at the earliest possible moment in turn, “generate[s] substantial economic and psychological

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pressures in favor of” a development proposal. *Bakersfield Citizens for Local Control v City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1203.

Withholding disclosure and discussion of mitigation during the public comment period, combined with a declaration that this information will be released as part of the final – but not publicly reviewed – EIR impermissibly truncates the environmental analysis and keeps the public in the dark. This error is exacerbated by the fact that CPUC will not hold public hearings on the EIR; the RDEIR/SDEIS is the only document upon which the public, including JAM, is provided opportunity to comment. Deliberately excluding information from the public draft document simply turns CEQA on its head and, in the end, unlawfully bifurcates CEQA from the project approval process.¹ In short, “[p]ublic participation is an essential part of the CEQA process.” CEQA Guideline §15201. The CPUC’s decision to deliberately exclude known or anticipated information and mitigation from the revised draft EIR violates this principle and reflects a failure to proceed in the manner required by law.

Second, the RDEIR fails to discuss, incorporate, or apply “Technical Advisory: CEQA and Climate Change Through California Environmental Quality Act (CEQA) Review” (“Technical Advisory”) published by the Governor’s Office of Planning and Research (“OPR”) on June 19, 2008 – several weeks prior to the release of the RDEIR/SDEIS. A true and correct copy of this document is attached hereto as **Exhibit “H.”** In short, this document was published by OPR to assist public agencies in addressing GHG/climate change issues in CEQA review. It was available at the time the EIR was recirculated. CPUC offers no reason for ignoring the guidance of this State of California publication. Accordingly, the EIR should be revised to incorporate the requirements and suggestions set forth in the Technical Advisory and recirculated to the public for further review.

Conclusion

At the end of the day and even after CPUC resolves its CEQA issues, a Project involving the BCD Revised Alternative should not be selected. While this route may avoid certain government lands and tribal reservations, it will significantly impact private property rights and will result in costly and unnecessary eminent domain proceedings. Any such project would significantly impact JAM’s use and enjoyment of the Property which was purchased at significant cost less than two years ago. Rather than substantially impacting personal property rights, CPUC should approve a Project that does not include the BCD Revised Alternative, or, at a minimum, avoids the JAM Property.

¹ JAM notes that this issue is not limited to subsequent mitigation. Rather, a broader issue arises from the fact that, as JAM understands the situation, the CPUC hearing process on the Project/EIR is not necessarily open to the public. Nevertheless, these processes are to work in an integrated manner and segregation of the processes may reflect an unlawful approval process. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1201-2.

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Request for Notice

As a procedural point, JAM also respectfully requests timely notice of any and all public hearings related to this project be sent to the undersigned, as well as any staff reports prepared for those hearings. Moreover, Pursuant to Public Resources Code Section 21092.2, please provide me with copies of any "notices required pursuant to Sections 21080.4 [notice of determination], 21083.9 [scoping meeting], 21092 [notice of any public hearings regarding a negative declaration or EIR], 21108 [notice of determination filed by state agency], and 21152 [notices filed with county clerk including notices of determination and notices of exemption]", as well as any other notices for this Project.

Very truly yours,



BRETT S. JOLLEY

Attorney-at-Law

cc: Client
Bill Kuenzinger, Brown Hall Shore & McKinley