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January 7, 2008

***VIA E-MAIL AND UNITED STATES POSTAL SERVICE
FIRST CLASS MAIL***
bhudgets@blm.gov and Brenda_Hudgets-Williams@blm.gov

Director (210)
Attention: Brenda Williams
P.O. Box 66538
Washington, D.C. 20035

**Re: Protest letter appealing Eastern San Diego County Proposed Resource
Management Plan and Final Environmental Impact Statement dated
November 2007**

Dear BLM Director:

**BACKCOUNTRY AGAINST DUMPS' CONTACT INFORMATION
AND INTEREST IN PROSECUTING THIS PROTEST**

On behalf of our client, Backcountry Against Dumps (BAD), and in accordance with the governing regulations, 43 C.F.R. section 1610.5-2, we hereby submit BAD's protest appealing the Bureau of Land Management's (BLM's) Eastern San Diego County Proposed Resource Management Plan ("RMP") and Final Environmental Impact Statement ("FEIS") dated November, 2007. Our firm represents BAD and is the contact for all communications to and from BLM on behalf of BAD in this matter. The name, mailing address and telephone number of our firm are stated on the above letterhead.

BAD is a community organization comprising numerous individuals and families residing in the Boulevard region of Eastern San Diego County who are directly effected by BLM's land use planning and management for its adjacent lands within the Eastern San Diego County Planning Area. BAD and its members are vitally interested in proper land use planning and management of BLM lands within this planning area in order to maintain and enhance their ecological integrity, scenic beauty, wildlife, recreational amenities, watershed values and groundwater resources. Members of BAD rely for their entire domestic, municipal and agricultural water supply on the vulnerable aquifers of Eastern San Diego County that are threatened with contamination and over drafting by ongoing and proposed land use development. BAD's members use the BLM lands within this Planning Area for aesthetic,

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scientific, historic, cultural, recreational and spiritual enjoyment. The development proposed by the RMP threatens to harm the use and enjoyment of these public resources by BAD's members as well as the public at large.

STATEMENT OF ISSUES BEING PROTESTED

BAD bases its protest on the following five grounds:

1. The RMP violates the Endangered Species Act, 16 U.S.C. section 1531 et seq., by failing to utilize the best scientific data available and by deferring consultation with the U.S. Fish and Wildlife Service regarding the RMP's impacts on endangered and threatened species.
2. The RMP violates the Federal Land Policy Management Act, 43 U.S.C. section 1701(a)(8), because it unnecessarily degrades ecological and environmental values, wildlife habitat, visual resources and recreational opportunities.
3. The RMP FEIS violates NEPA, 42 U.S.C. section 4321 et seq., by understating the RMP's significant adverse impacts on the visual resources of McCain Valley contrary to their long-standing classification as high value resources, solely to accommodate unsightly windpower development that would otherwise be impermissible in an area of such scenic importance.
4. The RMP FEIS violates NEPA by failing to fairly and fully disclose the RMP's impacts on the endangered Quino Checkerspot Butterfly and other threatened and endangered species.
5. The RMP FEIS violates NEPA by failing to fairly and fully disclose the RMP's impacts on other ecological, wildlife, scenic and recreational resources.

STATEMENT OF THE PARTS OF THE RMP BEING PROTESTED

BAD protests the entire RMP because it is based on deficient environmental reviews that violate the Endangered Species Act, the Federal Land Policy Management Act and the National Environmental Policy Act.

DOCUMENTS SUBMITTED BY BAD DURING THE PLANNING PROCESS

BAD submitted, or incorporated by reference, the following documents submitted during the RMP planning process:

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1. Comment letter submitted from the Center for Biological Diversity to BLM on November 11, 2005 and referenced in BAD's May 31, 2007 comment on the DRMP and its DEIS.

2. BAD's letter to BLM dated November 11, 2005 protesting BLM's grant of a Right of Way to PPM Energy for Wind Testing in the McCain Valley.

3. BAD's letter to BLM dated May 31, 2007 commenting on the DRMP and its DEIS.

4. The Boulevard Planning Group's letter dated May 31, 2007 commenting on the DRMP and its DEIS (incorporated by reference in BAD's comment letters of January 5, 2008 and herein).

5. BAD's letter to BLM dated January 5, 2008 commenting on the FRMP and its FEIS.

6. The within letter dated January 7, 2008 from BAD to BLM commenting on its FRMP and its FEIS.

CONCISE STATEMENT EXPLAINING WHY THE STATE BLM DIRECTOR'S DECISION TO APPROVE THE FRMP AND ITS FEIS IS WRONG

The BLM State Director's decision to approve the Proposed Resource Management Plan and its Final Environmental Impact Statement for Eastern San Diego County dated November 2007 is wrong for the five reasons summarized above and explicated below.

- 1. The RMP Violates the Endangered Species Act, 16 U.S.C. section 1531 et seq., by Failing to Utilize the Best Scientific Data Available and by Deferring Consultation with the U.S. Fish and Wildlife Service Regarding the RMP's Impacts on Endangered and Threatened Species.**

The U.S. Fish and Wildlife Service has identified ten federally listed species as occurring within the Planning Area: Peninsular bighorn sheep, least Bell's vireo, southwestern willow flycatcher, arroyo toad, Quino checkerspot butterfly, Laguna Mountains skipper, unarmored three spine stickleback, Mexican flannelbush, Nevin's barberry, and San Bernardino bluegrass. The Endangered Species Act establishes a 3-step consultation procedure to assure that federal agencies such as BLM adequately confer with the U.S. Fish and Wildlife Service respecting the potentially adverse impacts of proposed projects on federally-listed threatened and endangered species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.12; *Pacific Coast Federation*

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of Fishermen's Associations v. U.S. Bureau of Reclamation, 138 F.Supp.2d 1228, 1240-47 (N.D. Cal. 2001) (“PCFFA”). First the federal agency proposing an action which may effect endangered or threatened species must advise the Fish and Wildlife Service of the area in which the plan activities are proposed, and the Fish and Wildlife Service must provide the federal agency with a list of the endangered and threatened species in the plan area. Second, the federal agency – in this case, BLM – must “prepare a ‘[biological assessment]’ to determine whether such species ‘[are]’ likely to be affected’ by the action.” *PCFFA, supra*, 138 F.Supp.2d at 1240, quoting from *Pacific Rivers Council v. Thomas*, 753 F.2d 754, 763 (9th Cir.1985); 50 C.F.R. § 402.12(i). Third, if the biological assessment determines that the listed species are likely to be affected, then the Fish and Wildlife Service must prepare a formal biological opinion evacuating the project’s potential to adversely affect the species or its critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

Contrary to this mandatory consultation procedure, BLM never prepared a biological assessment for any of the listed species that may be affected by the RMP. Instead, “[o]ne Biological Assessment *will be* prepared to determine the effect of the [RMP] Preferred Alternative on all relevant listed, proposed, and candidate species, and associated critical habitat.” RMP FEIS, Volume 2, p. 5-1, emphasis added. In effect, BLM has placed the RMP “cart” before the biological assessment “horse.” By failing to following the ESA-mandated consultation steps, BLM failed “to reduce the likelihood of conflicts between listed species or critical habitat and proposed actions.” 50 C.F.R. § 402.11(a). BLM’s failure to prepare the required biological assessment in a timely manner renders “meaningless the consultation requirement and [is] completely at odds with the clear mandate of ESA.” *PCFFA, supra*, 138 F.Supp.2d at 1243-1244, citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184-85, 98 S.Ct. 2279, 2297 (1978).

Additionally, the DEIS and FEIS fail to utilize the best scientific information available for the purpose of assessing the RMP’s impacts on threatened and endangered species. As many commentors pointed out, the DEIS fails to describe the RMP’s impacts on listed species with sufficient specificity to permit informed public and agency assessment of those impacts and whether they can be adequately mitigated. For example, as the Center for Biological Diversity pointed out, the DEIS merely notes that “mineral entry could result in effects to this species [the Peninsular bighorn sheep]” without providing any information regarding the nature, scope and consequences of such effects. FEIS, Volume II, p. 5-18.

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2. The RMP Violates the Federal Land Policy Management Act, 43 U.S.C. section 1701(a)(8), Because It Unnecessarily Degrades Ecological and Environmental Values, Wildlife Habitat, Visual Resources and Recreational Opportunities.

The Federal Land Policy Management Act directs that:

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

43 U.S.C. § 1701(a)(8). Contrary to this mandate, the RMP approves industrial development in the McCain Valley, allows mineral entry throughout the Plan Area except within Wilderness Areas, Wilderness Study Areas, and the Table Mountain and In-Ko-Pah Mountains Areas of Critical Environmental Concern, and allows disposal of 490 acres of public land, among other development. FEIS, Volume I, pp. ES-30 and 2-109.

The RMP's approval of wind energy development in the McCain Valley violates this key FLPMA protection because it substantially degrades one of the most outstanding scenic resources within the Planning Area. As the photographs by Bill Parsons submitted as an attachment to the protest of the Boulevard Planning Group (which protest is incorporated herein by reference) attest, the McCain Valley is a spectacular viewshed whose unique granite monoliths and ruggedly beautiful ridge lines warrant the highest degree of scenic protection. Wind energy development, by contrast, has particularly pernicious effects on scenic quality because it would erect enormous, angular metal structures along these ridge tops. The RMP accordingly concedes, at page 3-136, that in siting wind energy facilities, "scenic areas, viewsheds, and non-development regions must be eliminated."

Contrary to this direction, and in direct conflict with FLPMA's mandate that "scenic" values be preserved and protected where appropriate, the RMP proposes the reclassification of 9,253 acres of the McCain Valley from Visual Resource Management II to III. FEIS, Volume I, p. 2-58 (Table 2-6). The FEIS provides no defensible justification for locating scenically destructive wind energy development within the McCain Valley's outstanding viewshed. Indeed, BLM admitted in the DEIS that Alternative E reclassified McCain Valley West as Class IV "to accommodate" energy development of this outstanding recreation area. DEIS at p. EIS-57. The fact that this area has been reclassified VRM Class III rather than Class IV does

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nothing to prevent the destruction of McCain Valley's outstanding scenic resources by the inappropriate siting of wind energy development in this visually sensitive area.

Installation of hundreds of industrial wind turbines standing hundreds of feet tall, with spinning blades and flashing strobe lights, would transform the extraordinary natural beauty and tranquility of the McCain Valley into an industrial sacrifice zone. Wind turbines kill migratory birds, both at night and during the day, further underscoring the ecological harm these machines wreak. The wind farms at Altamont Pass in Alameda County, for example, have killed thousands of birds, including golden eagles and other protected species. The FEIS makes no effort to disclose, much less seek effective alternatives to or mitigation measures for these facilities, unnecessarily harming the very scenic, wildlife and environmental resources that FLPMA was intended to protect.

The RMP also violates FLPMA because it unnecessarily reduces and degrades habitat for other wildlife species, including the Quino checkerspot butterfly. Contrary to FLPMA's mandate to protect wildlife from unnecessary harm, the FEIS fails to disclose and address reports recently received by BLM which document nearby sightings of this endangered species, including the Quino surveys for the Campo Landfill SEIS (2005), located on the Campo Reservation, and federal surveys for the Navy Seals Warfare training facility (2004) located on La Posta Road. Both locations are in proximity to the Planning Area. These sitings indicate that additional Quinos may inhabit adjacent lands within the Planning Area.

Further, the RMP fails to disclose and address the potential adverse impacts of mineral entry on Peninsular bighorn sheep that inhabit the Planning Area. As noted above, the DEIS merely notes that "mineral entry could result in effects to this species," without disclosing the nature, scope and consequences of such effects. This omission violates FLPMA's imperative that BLM avoid unnecessary harm to Peninsular bighorn sheep and its habitat.

3. The RMP FEIS Violates NEPA, 42 U.S.C. section 4321 et seq., by Understating the RMP's Significant Adverse Impact on the Visual Resources of McCain Valley Contrary to Their Long-Standing Classification as High Value Resources, Solely to Accommodate Unsightly Windpower Development That Would Otherwise Be Impermissible in an Area of Such Scenic Importance.

NEPA requires that an EIS must take a "hard look" at all potentially significant adverse environmental impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Additionally, "NEPA imposes an affirmative duty on federal agencies to 'ensure the professional integrity, including scientific integrity, of the discussions and analyses in the

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environmental impact statements.” *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1181-82 (10th Cir. 2003), citing 40 C.F.R. § 1502.24.

The FEIS violates NEPA’s lofty mandate. The FEIS attempts to trivialize the significant degradation of visual resources and recreational opportunities in the McCain Valley and surrounding areas and therefore fails NEPA’s “hard look” test. The FEIS fails to adequately disclose and discuss the significant and irreversible adverse impacts of wind energy development on the McCain Valley’s outstanding scenic resources and recreational opportunities. The FEIS refuses to acknowledge, despite public comments asking it to do so, that the creation of wind farms along the ridges in this valley will substantially degrade the visitor experience. The FEIS also fails to disclose and address the loss of currently unimpaired vistas from many locations around and outside of McCain Valley that wind energy development will cause. These vast, spectacular visual resources are critically important to residents and visitors alike and will be significantly impaired by the presence of wind turbines, access roads, and electrical transmission lines.

Nighttime vistas, both within and outside of the valley, will also be significantly degraded by flashing, bright lights. Where currently only dark, shadowy ridge lines separate the horizon from the darkness of the night sky, a line of intrusive lights – like a massive airport landing strip spread across the hills – will take its place. The DEIS failed to adequately address this impact, both on aesthetic values and on wildlife.

The FEIS also fails to provide the reader an accurate sense of how much land will be withdrawn from public use and put to industrial use. The RMP states:

Solar and wind facilities may alter access to some backcountry areas and may adversely impact recreational use of nearby areas as well. Both solar and wind facilities require a number of acres to be withdrawn from other uses, but this is small in comparison to the Planning Area as a whole. Based on informal comments from the public and anecdotal evidence, this is not a significant concern on the part of other user communities.

DEIS, pp. 4-92 through 4-93. The FEIS’ comparison of land withdrawn for industrial use to “the Planning Area as a whole” is not helpful or informative. How much land in areas of high recreational usage, such as the McCain Valley, would be removed from public access? How would such withdrawal affect the public’s experience in these areas, including the McCain Valley? Because these types of questions are answered, the FEIS fails to provide adequate information on the impacts of the Plan on recreational resources.

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Because the FEIS thus fails to adequately account for the impacts of the Plan on the recreational and visual resources in and around the McCain Valley, it violates NEPA.

4. The RMP FEIS Violates NEPA by Failing to Fairly and Fully Disclose the RMP's Impacts on the Endangered Quino Checkerspot Butterfly and Other Threatened and Endangered Species.

BLM claims that its "management activities would not adversely impact Quino Checkerspot Butterfly Critical Habitat under any alternative." DEIS, p. 4-30. Based on that assertion, BLM concludes that the RMP's proposed "actions would have no cumulative effect on this species." *Id.*

BLM, however, fails to consider the impacts of future windmill development on endangered species' habitat that has not yet been designated as "critical habitat." BLM's narrow focus on impacts only to critical habitat that is already designated ignores the substantial acreage of potential endangered species habitat within the McCain Valley. As discussed in the November 11, 2005 letter from the Center for Biological Diversity (CBD) to BLM, the Bureau has already admitted that the sites for potential future windmill development are located within *potential* habitat of the Quino checkerspot butterfly. CBD Letter, p. 2. BLM has also failed to adequately survey the Planning Area for this butterfly, despite historic and recent sightings of this endangered species in the area. *Id.* at p. 3. Thus, the RMP's proposed development of wind turbines in potential habitat areas of this endangered butterfly is not adequately addressed in the FEIS.

BLM's analysis also fails to discuss the fact that Quino checkerspot butterflies tend to congregate, perch, and mate on hilltops, the areas that will be most intensely disturbed by the construction of wind turbines in the McCain Valley. According to the *Recovery Plan for the Quino Checkerspot Butterfly*, "hilltops and ridgelines may be crucial for population survival." The FEIS' failure to consider this important constraint on, and critical impact of, wind farm development defeats NEPA's purposes.

In sum, BLM failed to consider the potentially devastating impacts of the development of wind turbines on endangered Quino checkerspot butterfly habitat. Therefore BLM failed to take a "hard look" at these impacts in violation of NEPA.

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5. The RMP FEIS Violates NEPA by Failing to Fairly and Fully Disclose the RMP's Impacts on Other Ecological, Wildlife, Scenic and Recreational Resources.

The FEIS either omits or understates the cumulative impact of the RMP in light of a number of recent developments, which we summarize below.

1. The FEIS ignores the October 2007 firestorms.

The FEIS describes the Pines Fire of 2002, which consumed over 61,000 acres including 15,000 acres of BLM land, as the “largest west-wind driven fire in San Diego County history.” Though this fire was significant, it is dwarfed by the hundreds of thousands of acres burned in the firestorms of October 2007. Much can be learned from these recent fires. Their explosive spread underscores the extent of the heavy and volatile fuel loads present throughout San Diego County, including the Planning Area. The fact that these fires traveled quickly from the northeast to the southwest due to Santa Ana winds underscores the severe threat posed by any fire commencing within the Planning Area (such as from transmission lines associated with the wind energy development proposed for the McCain Valley). Such fires could burn the residential areas west and southwest of McCain Valley, including the community of Boulevard, as well as the tribal communities on the Campo, La Posta and Manzanita Reservations. The loss of the hundreds of thousands of acres burned in the October 2007 firestorms also illustrates the high habitat value of those lands within the Planning Area that remain unburned, for wildlife that escaped the firestorms.

These firestorms should also serve as a warning that further development of natural areas through construction of rights-of-way and utility corridors facilitates the invasion of non-native grass and shrub species, creating unnaturally severe fire regimes that dramatically increase the risk of high intensity catastrophic fires with rapid rates of spread. Although the FEIS notes at page 2-46 that non-native species increase fire risks, it fails to make the connection between the proposed wind energy development of the McCain Valley and a consequential increase in fire danger within that valley and to nearby residential areas.

2. The FEIS ignores the threatened degradation and overdraft of groundwater resources.

The FEIS trivializes the importance of groundwater basins within the Planning Area, dismissing them as “low use basins.” FEIS, Volume I, p. ES-42. To the contrary, these groundwater basins provide the life's blood to the local communities. Boulevard and surrounding homes and ranches have no access to imported water, and must rely on their groundwater basins to provide all of their municipal, domestic, fire suppression and agricultural

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needs. The FEIS does not address the cumulative impact of other developments that may draw water from these basins, including a proposed residential development of approximately 2,200 acres known as “Big Country Ranch” at the north end of Ribbonwood Road in Boulevard, just west of McCain Valley. The owner of this project, Lansing Companies, claims to own a lease on 16,000 acres of adjacent BLM land. The FEIS fails to address the cumulative impact on the area’s shrinking groundwater resources of this project, coupled with the other development made available under the RMP.

3. Alternative E reduces the current acreage of Areas of Critical Environmental Concern by nearly half.

Despite its vague blandishments asserting that Preferred Alternative E represents “balanced” development, the FEIS fails to disclose and address the substantial adverse impacts on wildlife habitat and other environmental resources that will result from Alternative E’s proposed reduction in the acreage of Areas of Environmental Concern from 26,479 to just 14,956 acres. FEIS, Volume I, p. ES-27 and p. 4-81, Table 4-12. The resulting loss of over 11,000 acres of critical wildlife habitat and scenic and recreational resources is ignored in the FEIS’s scant 3-page discussion of the impacts of the five Alternatives on ACEC values. This omission strikes at the heart of NEPA’s primary purpose, to force mission-oriented agencies to consider alternatives that would reduce, rather than worsen, environmental harm. “Informed and meaningful consideration of alternatives . . . is . . . an integral part of [NEPA’s] statutory scheme.” *Bob Marshall Alliance v. Hodell, supra*, 852 F.2d at 1228. Contrary to this Congressional direction, the FEIS fails to disclose and discuss the broad implications of this stark reduction in the acreage of Areas of Critical Environmental Concern. This violates NEPA.

4. The impact of leasing mineral resources is understated.

Preferred Alternative E proposes designation of 7,607 acres of land for geothermal leasing, yet the FEIS provides no meaningful discussion of the significant adverse impacts of such development. Geothermal facilities require enormous quantities of water to produce steam, and discharge massive amounts of hazardous brine. Geothermal development would therefore pose a significant threat to both the quantity and quality of groundwater resources in the Planning Area. In view of this fact, the EIS should provide a detailed discussion of the potential adverse impacts of geothermal development within the Planning Area. The FEIS’s failure to do so violates NEPA.

5. The FEIS fails to address other potentially significant impacts of the RMP.

We incorporate by reference the detailed list of additional adverse impacts of the RMP discussed in the Protest filed by the Boulevard Planning Group on January 4, 2008.

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CONCLUSION

For the foregoing reasons, the RMP and its FEIS violate the Endangered Species Act, the Federal Land Policy Management Act and the National Environmental Policy Act. Accordingly, we urge BLM to set aside the State Director's approval of this RMP and its FEIS.

Respectfully submitted,

/s/ Stephan C. Volker

Stephan C. Volker
Attorney for Backcountry Against Dumps

SCV:taf