Stephan C. Volker
Joshua A. H. Harris
Bridget A. Roberts
Shannon L. Chaney
Alexis E. Krieg
Stephanie L. Abrahams

Law Offices of
STEPHAN C. VOLKER
436 14th Street, Suite 1300
Oakland, California 94612
Tel: 510/496-0600 ❖ FAX: 510/496-1366
e-mail: svolker@volkerlaw.com

11.141.01

July 9, 2009

VIA CERTIFIED MAIL AND FACSIMILE

Abigail R. Kimbell, Chief
Hank Kashden, Associate Chief
United States Forest Service
1400 Independence Ave., SW
Washington, D.C. 20250-0003
Ph: (202) 205-1661
Fax:(202) 205-1765

James M. Kelly, Acting General Counsel
Thomas Millet, Associate General Counsel
Office of the General Counsel
United States Department of Agriculture
1400 Independence Ave., SW
Washington, D.C. 20250-1400
Ph.: (202) 720-3351, 720-2063
Fax: (202) 720-8666, 690-2730

William Metz
Forest Supervisor
Cleveland National Forest
10845 Rancho Bernardo Rd., Suite 200
San Diego, CA 92127
Ph: (858) 673-6180
Fax: (858) 673-6192

Randy Moore, Regional Forester
Pacific Southwest Region
United States Forest Service
1323 Club Drive
Vallejo, CA 94592
Ph: (707) 562-8737
Fax: (707) 562-9130

Re: The Sunrise Powerlink Project Violates the Cleveland National Forest Plan and Applicable Environmental Laws

Dear Forest Service Officials:

We write on behalf of Backcountry Against Dumps, The Protect Our Communities Foundation, East County Community Action Coalition and Donna Tisdale to advise of our opposition to Forest Service approval of the Sunrise Powerlink Transmission Line Project ("Powerlink" or "Project"). The Powerlink is proposed to be located in San Diego and Imperial Counties, and will have many significant environmental impacts. We urge the Forest Service to reject the Powerlink because it would violate the Land and Resource Management Plan for the Cleveland National Forest ("Forest Plan") and contravene the requirements for adequate environmental and scientific analysis, the public notice and comment procedures, and the planning criteria set forth in the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600, et seq., the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.*, the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.,* and implementing Forest Service regulations. We also oppose issuance of the interrelated Master Special Use Permit for SDG&E's power lines on the Cleveland National Forest (the "Master Permit") for the reasons stated in our attached letter of April 8, 2009, as summarized below.

The fundamental problem with the location of the Powerlink on the Cleveland National Forest is that although the Project would cause remarkable harm to Forest resources, the environmental review for the Project treated this area as an afterthought. The vast majority of attention during preparation of the EIR/EIS was focused on northern route alternatives because SDG&E and reviewing agencies believed selection of a northern route was a foregone conclusion. But following years of debate on the northern routes political opposition to building a major transmission line through the heart of California's largest state park reached a boiling point. At the last minute the Governor and the Public Utilities Commissioners decided to avoid Anza-Borrego Desert State Park by selecting the so-called "Environmentally Superior Southern Route" (southern route). Staff at the Bureau of Land Management ("BLM") and the California Public Utilities Commission ("CPUC") couldn't keep pace with this unexpected change, in part because SDG&E had previously claimed that this route was infeasible. As a result, the analysis and disclosure of environmental impacts of the Powerlink along the southern route was cursory at best and mostly conducted haphazardly and at the last minute to justify a highly political decision.

This is no way to treat consideration of impacts to treasured resources on the Cleveland National Forest. Special landscapes and communities in one area must not be sacrificed to protect those in another.

A careful review of the Sunrise Powerlink Final EIR/EIS reveals that the document contains nowhere near the necessary level of disclosure and analysis of impacts from the Project on resources of the Cleveland National Forest. A review of the Powerlink EIR/EIS, the Cleveland National Forest Land Management Plan and other related documents also shows that the Powerlink is patently inconsistent with several elements of the Forest Plan including Place-Based Programs; Riparian Conservation Areas; Aesthetic Management Standards / Scenic Integrity Objectives, and Fish and Wildlife Standards. Yet despite these glaring conflicts, at no point does the EIR/EIS specifically articulate a proposed and necessary amendment to the Forest Plan or adequately analyze and present the specific effects on the environment that would result from such an amendment.

The Powerlink EIR/EIS contains no overarching systematic analysis of the many conflicts between the Project and the Forest Plan. Instead, mention of Forest Plan conflicts is scattered and buried in sections of the EIR/EIS addressing various possible Project alternatives, information is inaccurate or unavailable, and analysis is arbitrarily provided in one section while omitted in others. In just a few examples, Figure E.2.1-3 shows an outdated BCD Alternative in relation to Forest land-use zones, no similar map is provided for the Modified Route D Alternative, and Table E.4.4-3 conveniently neglects to disclose that the Powerlink would impermissibly cross the Forest's Back Country Motorized Use Restricted land-use zone.

To date, the Forest Service has ignored the elephant under the rug – that the Powerlink and the SDG&E Master Permit are two sides of the same coin. As yet, the Forest Service has failed to acknowledge the close relationship between and disclose the significant interconnected impacts from these two clearly related projects and seems on course to make totally separate decisions on

them. We consider the separation of consideration of these two projects to be unlawful and that such treatment of these actions defies common sense. Neither the BLM's existing EIS for the Powerlink nor the Forest Service's draft EA for the Master Permit acknowledges the existence nor addresses the interrelated and cumulative effects of the other project. These omissions deny disclosure to the public of the obvious interrelationship of these two actions as well as the intertwined resulting impacts to the environment, especially from power line-ignited wildfire.[1]

The sum of these problems makes it is clear that, prior to any decision on construction of the Powerlink across the Cleveland National Forest or reauthorization of existing power lines on the Forest, the Forest Service must fully analyze and disclose the Forest-specific impacts of the Powerlink and Master Permit on people and nature as part of a new or supplemental EIS. The new EIS must carefully document and disclose each potential conflict between the Powerlink and the Forest Plan and Forest resources and describe the relationship between the Powerlink, impacts, and Forest Service mandates.

To ensure the integrity of NEPA and the new EIS, the Forest Service must not merely conduct new biological and cultural surveys to remedy the deficiencies in BLM's EIR/EIS. BLM's incomplete and deficient EIR/EIS's analyses and disclosure of impacts to Forest resources necessitates Forest Service consideration of alternatives to the Powerlink that were ignored or wrongfully dismissed by BLM, including the "New In-Area All-Source Generation Alternative" and "New In-Area Renewable Generation Alternative" that were ranked *above* the southern route in the EIR/EIS, an alternative route across the Forest underground within the Interstate 8 easement, and a no action alternative.[2] To do otherwise would sacrifice irreplaceable Forest resources and the public interest to reflexive deference to the grossly negligent decisions of another agency.

In sum, the Forest Service must conduct an independent environmental analysis of the Powerlink, pursuant to NEPA, and actively involve the public in any attempted amendment of the Forest Plan to accommodate the Powerlink and/or to authorize a new Master Permit. Thus far, it has done neither. Unless and until it has done both, and assured compliance with all applicable environmental laws and regulations including the Forest Plan, the Forest Service must reject both the Powerlink and the Master Permit.

---

[1] The three organizations named in this letter have previously submitted comments on the Environmental Assessment for the SDG&E Master Special Use Permit by letter dated April 8, 2009. In many cases the concerns of the groups articulated in that letter are directly applicable to the Powerlink. Their April 8 letter is fully incorporated by reference, and is attached.

[2] Expert local engineer Bill Powers has prepared a peer-reviewed report detailing local energy alternatives to the Powerlink titled *San Diego Smart Energy 2020: The 21st Century Alternative* (http://www.sdsmartenergy.org/smart.shtml), which we incorporated by this reference.

I. BACKGROUND

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

BLM initiated environmental review of SDG&E's proposal jointly with the CPUC in August 2006. In October 2008, BLM and the CPUC rejected the original Anza-Borrego routing proposal, selecting an alternative southern route in the Final Environmental Impact Report/Environmental Impact Statement and Proposed Land Use Amendment ("FEIR/FEIS"). The preferred route, styled the "Environmentally Superior Southern Route" ("Southern Route"), passes through the Cleveland National Forest, El Monte Valley, McCain Valley, and the mountain communities of Boulevard and Alpine. On January 20, 2009, BLM entered a Record of Decision approving the FEIR/FEIS and granting two rights-of-way for the proposed transmission lines through BLM land in eastern San Diego County. We are informed that the Forest Service is currently considering approval of the Project. For the reasons set forth in this letter, the Forest Service should not approve this Project.

II. AN AMENDMENT TO THE FOREST PLAN AND ADEQUATE OPPORTUNITY FOR PUBLIC COMMENT ARE REQUIRED BEFORE THE POWERLINK MAY BE CONSIDERED FOR APPROVAL.

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

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

effects of the proposed amendment. 36 C.F.R. §§ 219.2, 219.8.

When amending an existing plan, the responsible official must actively engage the public, interested organizations, and private and other interested parties in the stewardship of National Forest system lands. 36 C.F.R. § 219.9. The public must be duly notified and allowed an "open and meaningful" opportunity to participate in the planning process in accordance with 36 C.F.R. § 219.9. The public also has a right to file an objection to a proposed amendment, pursuant to 36 C.F.R. § 219.13.

The Powerlink FEIR/EIS ignores this mandate. It entirely fails to acknowledge that the Powerlink would require amendments to the Cleveland National Forest Plan because of its many conflicts with that Plan, discussed below. Section D.17 of FEIR/FEIS merely hints at the possibility of a Forest Plan amendment. It fails to disclose what that proposed amendment would entail. Because BLM and CPUC did not contemplate the impacts of an amendment to the Cleveland National Forest in conducting their environmental review, the Forest Service must step in to fulfill its own responsibility under NFMA and NEPA to clearly articulate the required amendments, conduct an independent, supplemental NEPA analysis with full public participation pursuant to NEPA and 36 C.F.R. § 219.9, and ensure that proposed plan amendments do not violate other environmental laws including ESA, NHPA and FLPMA.

III. THE PROJECT CANNOT BE APPROVED BECAUSE IT VIOLATES THE FOREST PLAN.

Before the Project can be built, the Forest Service must approve an amendment to the Forest Plan. FEIR/EIS D.17-7. "The Forest Service cannot approve any of the route alternatives without first ensuring their consistency with the Forest Plan." *Id*. However, the Project violates many of the Forest Plan's land use standards and zones. These conflicts have not been addressed, much less resolved, by any agency to date. Impacts on the Cleveland National Forest not addressed by BLM and CPUC include but are not limited to the Project's effects on fire danger, land-use zones, aesthetics, riparian resources, endangered species, cultural and historic resources, and management design criteria, as identified in the Forest Plan.

One of the most significant conflicts between the Forest Plan and the Powerlink is that the Project violates Forest Plan standards to protect the public and Forest resources from wildfire. The Forest Plan compiles in its Appendix B the program strategies and tactics for achieving the desired conditions and goals laid out earlier in the Plan. One key strategy is to prevent "human caused wildland fires and associated human and environmental impacts." Forest Plan, p. 116.

The construction and presence of the Powerlink would be in clear violation of this crucial public health and safety goal. According to the EIR/EIS, the Powerlink would create a significant risk of wildfire along the BCD and Modified Route D alternatives across the Forest as a result of

construction activities, the presence of overhead Powerlink transmission lines, and interference with firefighting activities:

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

EIR/EIS at page E.2.15-8, emphasis added.

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

EIR/EIS at page E.4.15-11, emphasis added.

> The Wildfire Containment Conflict Model (Figures E.4.15-14 through E.4.15-17) for the Modified Route D Alternative identifies two specific areas where the overhead transmission line would restrict wildfire containment to a very high degree. …The nearby access roads and moderate topography indicate that the conflict exists in a defensible landscape where firefighting resources would be able to access and suppress a fire *if there were no obstacles present*. However, *effective wildfire containment in this area would be obstructed by the presence of the overhead transmission line and the proximity of parallel existing lines.* Firefighting suppression tactics, maneuverability and approach distances are greatly restricted by the indefensible island created between collocated and parallel transmission lines. This indefensible landscape is a swath of land where firefighting is tactically very difficult or simply too dangerous (due to a combination of minimum approach distances and rates of wildfire spread that can reach up to 300 feet per minute).
>
> The outcome of not fighting a wildfire in an otherwise defensible landscape under favorable weather conditions is that it is able to build in size and intensity unchecked by firefighters who are forced to wait until the fire passes through the area. Delays in containment allow for rapid fire perimeter growth. With the increase in the fire perimeter comes the potential for wind-blown embers to ignite spot fires ahead of the fire front, which further complicates fire suppression activities. The creation of wildfire containment conflict areas by the Modified Route D Alternative and Revisions is considered a *significant impact* (Class I).

EIR/EIS at page E.4.15-14, emphasis added.

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

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

Id., emphasis added.

These significant risks of Powerlink-related wildfire don't even take into account other pending Forest Service activities that would cumulatively and significantly increase the risk of wildfire above the already extreme risk described in the Powerlink EIR/EIS. For example and as discussed in the introduction to this letter, the Forest Service is currently conducting NEPA review on the closely related Master Permit for all existing SDG&E power lines on the Forest. The agency's proposed action there would maintain and potentially exacerbate the unacceptably high existing risk of power line-related wildfire ignitions on the Forest. According to the Forest Service's Master Permit EA, the number of fires that might result from the Master Permit is:

> approximately 8 fires per decade. Predicting the size of the fires is difficult given the skewed size distribution of the fire data, but it would be likely that there would be one large (>5,000 acre) fire within the 20 year permit period.

EA page 10.

Since the Master Permit would allow this many fires, obviously the Powerlink's *additional* power lines would make fire risks much worse.[3] *Exacerbating* the existing high risk of power line-related fire conflicts sharply with the Forest Service's duties to "Reduce the number of human-caused wildland fires and associated human and environmental impacts" and to "avoid or minimize impacts to threatened, endangered, proposed and candidate species and their habitats, cultural and scenic resources, and open space values" as required by the Forest Plan and to

[3]Strangely, no mention is made of the Powerlink in the Master Permit EA. Neither is the Master Permit mentioned in the Powerlink EIR/EIS, thereby illustrating the depth of a major disconnect between the BLM analysis in the EIR/EIS and actual impacts to the Cleveland National Forest.

"minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment" as required by FLPMA, 43 U.S.C. § 1765(a)(ii).

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

> The Witch, Guejito and Rice Fires were determined to be caused by powerlines. The Witch Fire burned 197,990 acres, destroyed 1,650 structures, valued at over $236 million, costing taxpayers $18 million in suppression costs. There were two civilian fatalities, 40 firefighters injured. The Witch Fire burned together with the Guejito Fire. The Rice Fire burned 9,472 acres, destroyed 248 structures, valued at over $30 million, costing taxpayers $6.5 million in suppression costs. There were six firefighters injured.[4]

Wildfires sparked by power lines are relatively common and are responsible for a significant portion of acreage burned in southern California wildfires. In October of 2007, 9 out of the 20 devastating wildfires that burned across southern California were ignited by power lines.[4] Prior to the October 2007 fires, 17% of all areas burned in San Diego County since 1960 were from fires that originated from power lines.[5] In 1970 the Laguna Fire on the Cleveland National Forest burned westward 30 miles into Alpine and El Cajon. It was ignited by a downed power line and, until the 2003 Cedar Fire and the 2007 Zaca Fire, was the worst fire in state history. *See* http://www.cccarto.com/cal_wildfire/laguna/fire.html. A recent study shows that "power line fires tend to be larger than wildland fires from other sources."[6] The Forest Service acknowledges in the EA that 30% of all land burned on the Cleveland National Forest since 1970

---

[4] CalFire news release October Fire Causes, November 16, 2007 (available upon request).

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

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

[6] Power Lines and Catastrophic Wildland Fire in Southern California, *supra*.

was the result of power line fires originating on National Forest land[7] (EA at Table 2) and that "[P]ower line related vegetation fires . . . are responsible for a significant amount of the burned acreage [on Cleveland National Forest lands], and include some of the state's largest historic fires . . . ."

Yet despite this clear connection between power lines and devastating wildfires, the Forest Service's proposed action for the SDG&E Master Permit would essentially maintain the status quo as it relates to the risk of power line-related wildfire ignitions on the Cleveland National Forest.

Under the right conditions (notably conditions that are common during much of the year in San Diego and Orange counties on the Cleveland National Forest), any one power line-related wildfire ignition can quickly grow to thousands of acres and become a significant menace to public health and safety. The Forest Service has admitted in the Master Permit EA that power lines on the Forest could result in approximately 8 fires per decade and that one of these fires would likely become a large fire. This extreme risk would be exacerbated by construction of the Powerlink. This single paragraph in the Master Special Use Permit EA alone demonstrates that a single EIS must be prepared for both Powerlink and the Master Permit and that, to reduce this enormous and unacceptable wildfire risk to the public and the environment, the Forest Service must consider seriously (1) the no action alternative recommended by the CPUC Administrative Law Judge who presided over the Powerlink proceeding, (2) the local and renewable energy generation alternatives ranked above the Southern route in the EIR/EIS, and (3) an underground Interstate 8 easement alternative.[8]

B. <u>The Project Conflicts with the Land-Use Zone Designations of the Forest Plan</u>.

The selected Project route passes through and conflicts with the Forest Plan's designation of several areas of the Back Country Motorized Use Restricted ("BCMUR") land-use zone. The BCMUR zone includes undeveloped areas within the Forest with few to no roads. Forest Plan, p. 7. "The level of human use and infrastructure is low to moderate." *Id*. The only motorized use allowed is administrative, and even then access is "limited to existing roads or to temporary roads needed for resource management purposes." *Id*. The management intent for this zone is "to retain

---

[7] Based on the fact that SDG&E is the only operator of power lines on the Cleveland National Forest and the Master Permit would authorize all SDG&E power lines on the National Forest, it follows that 30% of all land burned on the Cleveland National Forest since 1970 was from fires *ignited by SDG&E power lines* that are the subject of this SDG&E Master Permit.

[8] *See* discussion of alternatives in *San Diego Smart Energy 2020: The 21st Century Alternative* (http://www.sdsmartenergy.org/smart.shtml).

the natural character of the zone and limit the level and type of development. Some roads will be constructed and maintained, but the intent is to manage the zone for no increase or a very low level of increase in system development." *Id*.

Contrary to these limitations, several portions of the Project route cross the BCMUR land-use zone, including a segment of the BCD Alternative Revision near MP-53 and several areas of the Western Modified Route D Alternative between MRD-22 and the Modified Route D Substation, and a segment of the Star Valley Option Revision between approximately SVO-1 and SVO-2.

Major utility corridors, such as the Project, are allowed in the BCMUR land-use zone only in "designated areas," and the Valley/Serrano and West-wide Energy Corridor are the only such designated areas in the Cleveland National Forest. Forest Plan, Table 2.2.3 at p.4. The selected Project route does not run through the Valley/Serrano corridor, and several miles of the Project are located outside of the West-wide Energy Corridor. Thus, construction of the Project through the Cleveland National Forest would clearly violate the Forest Plan land-use zones. Yet these violations were never disclosed, much less analyzed and rectified, in the existing NEPA documents.

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

The Sunrise FEIS/EIR openly concedes that "[t]he high level of change that would result from [the Project] would not be consistent with Aesthetics Management Standard S9 of the [Forest Plan] requiring activities to meet the applicable [scenic integrity object]." FEIR/EIS p. E.4.3-11. The FEIR/EIS admits further that the transmission lines and poles would be "prominent features in the landscape" and that

> there is no mitigation available to reduce the significant visual impact to a level that would be less than significant in this corridor, aside from selection of an entirely different route (alternative) and landscape setting.

Id.

Included among the strategies that the Cleveland National Forest managers intend to emphasize are three that focus on landscapes and aesthetics. Forest Plan, pp. 83, 105. The first landscape strategy is aesthetic, and requires the managers to

> [m]anage landscapes and built elements in order to achieve scenic integrity objectives: Use the best environmental design practices to harmonize changes in the landscape and to advance environmentally sustainable design solutions.

Forest Plan, p. 105. The powerlines and poles/towers will not be in harmony with the surrounding landscape; instead, they will stick out like sore thumbs. The Project route is a direct affront to the very scenic values the Forest Plan seeks to protect.

The second landscape strategy is restoration, calling for the rehabilitation of landscapes "to reduce visual effects of management activities and nonconforming features." *Id*. The installation of powerlines and poles/towers will adversely affect any overall attempts to restore landscapes to their natural status.

The Project will also violate the third landscape strategy, to "[m]aintain the character of National Forest System lands in order to preserve their intact nature, valued attributes, and open space." *Id*. To implement this strategy, the Forest Plan calls for planning infrastructure "along scenic travel routes to meet scenic integrity objectives." *Id*. The Project does not meet this requirement, as it will cut through the Cleveland National Forest's most scenic areas. The vast majority of the selected Powerlink route across the Forest would be located in areas designated with "high" scenic integrity objectives.[9] According to the Powerlink EIR/EIS, the project would clearly be in significant conflict with these scenic integrity objectives:

> Under the current Cleveland National Forest Plan, the Modified Route D Alternative would also result in significant (Class I) visual impacts on Forest lands. …Long-term, operational visual impacts would be experienced by viewers throughout the length of this alternative including travelers on roads and nearby residents. *Backcountry recreationists in the northern portion of the Hauser Mountain WSA*, *Hauser Canyon*, *and on the Pacific Crest Trail would also experience significant visual impacts* as the route passes east-west through these areas.

EIR/EIS at page E.4.3-9 (emphasis added).

> …[The Modified Route D Alternative] would introduce prominent built structures with substantial industrial character into a predominantly natural landscape absent similar features. The resulting visual contrast would be substantial. The openness of the terrain and large scale of the structures would allow foreground to distant views of the transmission line (structures and conductors) from Lyons Valley Road and adjacent Forest lands. View blockage of the surrounding slopes and ridges would also occur, as would skylining (extending above the horizon), where the line crosses ridges and crests hills. Skylining would exacerbate structure prominence and the transmission line would

[9] Portions of the Powerlink route located adjacent to the Forest would also be clearly visible from areas within the Hauser Wilderness designated with "very high" scenic integrity objectives and this must be considered a significant indirect effect of any Forest Service authorization of the Project on the southern route.

> substantially reduce the integrity of the existing landscape. The resulting level of change would be high. … *Specifically, the transmission line would not repeat the form, line, color, texture, and pattern common to the landscape character so completely and at such scale that it is not evident, as required by the applicable "HIGH" SIO.* Indeed, the structures would be quite prominent features in the landscape. …The resulting visual impact would be significant (Class I) . . . *there is no mitigation available to reduce the significant visual impact to a level that would be less than significant in this corridor, aside from selection of an entirely different route (alternative) and landscape setting*. The relatively open terrain, close viewing opportunities, and consistent backdrop along this route segment do not offer opportunities to either better screen the structures from view or blend them more effectively with a different background.

EIR/EIS at page E.4.3-11 (emphasis added).

New projects like the Powerlink must also protect the Forest character of the Forest landscape according to the Forest Plan (at page 105):

> LM 3 – Landscape Character
>
> Maintain the character of National Forest System lands in order to preserve their intact nature, valued attributes, and open space. Maintain the integrity of the expansive, unencumbered landscapes and traditional cultural features that provide the distinctive character of places. Plan, design, and improve infrastructure along scenic travel routes to meet scenic integrity objectives.

This Forest Plan standard is very similar in turn to the location-specific text for desired conditions and program emphasis in the Forest's Place-Based programs:

> Desired Condition: The Morena Place is maintained as a *natural appearing landscape* that functions as … *a natural appearing viewshed along the Interstate 8 corridor.* The valued landscape attributes to be preserved over time are the…*natural appearance of areas that can be viewed from the Interstate 8 corridor . . . and Pacific Crest National Scenic Trail.*
>
> Program Emphasis: . . . *Protect scenic values along the Interstate 8 corridor and the Pacific Crest National Scenic Trail.*
>
> Desired Condition: The Pine Creek Place is maintained as a predominantly naturally evolving area that functions as a remote, undeveloped, wilderness landscape *where only ecological changes are evident.* The valued landscape attributes to be preserved or developed over time are pristine canyon woodland communities; [and] . . . *the natural appearance of the landscape.*

> Program Emphasis: Maintain the *current* character and level of development within the Pine Creek Place. Management activities are to *promote wilderness values*.
>
> Desired Condition: Sweetwater Place is maintained as a *naturally appearing landscape* . . . . The valued landscape attributes to be preserved or developed over time are the *undeveloped character of the Forest Service lands* that remain in this otherwise highly developed rural area; *opportunities for unobstructed, panoramic views from the Interstate 8 corridor . . . ; the scenic integrity of important local landmarks; and built elements that are unobtrusive*. . . .
>
> Program Emphasis: Minimize . . . resource degradation. Emphasize species conservation . . . . *Minimize private encumbrance of public land.* Manage development within the Interstate 8 corridor *to conserve panoramic views from the highway.*

A Forest Plan standard specific to the Cleveland National Forest also calls for protection of views from the Pacific Crest Trail:

> CNF S12 - Pacific Crest National Scenic Trail – Protect scenic values in accordance with adopted scenic integrity objectives. Protect foreground views from the footpath as well as designated viewpoints. Where practicable avoid establishing unconforming land uses within the viewshed of the trail (Morena, Laguna, Aguanga Places).

Forest Plan, page 68.

Common sense and the text of the EIR/EIS show that the Project would result in significant impacts to Forest views, aesthetics, and character. The Powerlink clearly would not maintain a natural appearing landscape that functions as a natural appearing viewshed, protect scenic values, or preserve unobstructed panoramic views along the Interstate 8 corridor or Pacific Crest Trail. The Powerlink would radically alter the current natural appearance of the largely undeveloped Pine Creek Place. Approving huge and ugly industrial transmission line towers off the National Forest but yet clearly visible from within designated Wilderness would significantly undermine Wilderness values. And the scenic integrity of important local landmarks would be destroyed.

Yet despite these impacts the EIR/EIS contains only the most cursory analysis and disclosure of Powerlink impacts to Forest views, aesthetics, and character. For example:

- Two visual simulations were provided in the Morena Place (E.2.3-5B) but the one of these provided for the La Posta Valley at Interstate 8 appears to show the *rejected* BCD Alternative South Option and *not* the selected BCD South Option Revision, and neither of these accurately shows a perspective from areas

emphasized in the Forest Plan such as the Interstate 8 corridor and Pacific Crest Trail.

- The Powerlink EIR/EIS appears to contain only one visual simulation of the Project in the Pine Creek Place but this does not provide a perspective of the route from key viewpoints emphasized in the Forest Plan such as the Pacific Crest Trail or the Hauser Wilderness;

- Two visual simulations of the Powerlink in the Sweetwater Place were provided in the EIR/EIS. However, neither of these shows the potentially severe impacts to the important scenic views from Interstate 8 that are emphasized in the Forest Plan. One of the most obvious omissions is a visual simulation of the transmission lines that would be prominently visible from the scenic viewpoint located on eastbound Interstate 8 just east of Alpine. The Modified Route D substation might also be visible from the viewpoint but this is difficult to determine without simulations. Nor is any visual simulation provided for the Powerlink as it crosses prominent local landmark Gaskill Peak.

No legitimate siting decision can be based on such cursory information.

In sum, common sense and the text of the FEIR/FEIS show that the Project will result in unacceptably severe impacts to Forest views, aesthetics and character. The FEIR/FEIS fully admits the significant visual impact that the Project will have on aesthetic resources within the Cleveland National Forest, and even characterizes the resulting visual contrast as "substantial." FEIR/FEIS E.4.3-11. The FEIR/FEIS also admits that the impact cannot be mitigated to a level below significance. *Id*. The Project will not maintain the appearance of a natural landscape that functions as a natural viewshed along the Interstate 8 corridor and the Pacific Crest Trail. The project will radically alter and degrade the current natural appearance of many largely undeveloped recreational resources such as Pine Creek Place. The Project will also impact Wilderness areas from which it will be visible, such as Hauser and Pine Creek Wildernesses. Approving huge and ugly industrial transmission line towers within the Forest and clearly visible from designated Wilderness areas and the Pacific Crest Trail will significantly undermine the core values of these areas. It will also destroy the scenic integrity of important local landmarks such as El Capitan and Gaskill Peak.

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

The Forest Plan lays out standards for special use authorization, including specific standards for Non-Recreation Special Use Authorizations. Forest Plan p. 112. Existing special-use authorizations are required for development in the habitats of threatened, endangered, proposed and candidate species to avoid or minimize impacts to their habitats, to cultural and

scenic resources, and to open space values. *Id*. Further, special-use authorization requires that utilities be co-located with existing utilities where possible to minimize the encumbrance of National Forest System land. *Id*. Contrary to this directive, the Project is not co-located within the existing Southwest Powerlink transmission line corridor between Jacumba and the Miguel Substation near Chula Vista. Nor does the Project avoid significant harm to Forest resources. The FEIR/FEIS for the Project concluded that the route will have at least 41 significant and unmitigatable impacts. FEIR/FEIS ES-6. These significant impacts violate the Forest Plan, as this letter documents in detail.

Better alternatives, of course, are readily available. The FEIR/FEIS for the Project ranked two local energy generation alternatives[10] as far less harmful to the environment than the route ultimately selected. The CPUC Administrative Law Judge who reviewed the Project concluded that its construction was not justified, as less impactful alternatives such as locally generated and distributed power are feasible. Expert local engineer Bill Powers has prepared a peer-reviewed report detailing local energy alternatives to the Powerlink titled *San Diego Smart Energy 2020: The 21st Century Alternative* (http://www.sdsmartenergy.org/smart.shtml). Where, as here, less impactful alternatives are available, it would be an abuse of discretion for the Forest Service to disregard them and instead approve an unnecessarily destructive alternative such as the Project.

E. The Project Conflicts with Riparian Conservation Area Standards.

The Project will cause significant harm to designated riparian conservation areas in the Forest through construction of tower pads, staging areas, access roads, pull sites, and other project activities in imperiled species riparian habitat. See FEIR/FEIS Figure E.2.2-1.

According to the Forest Plan, new projects must either have a neutral impact or improve the condition of riparian areas. (*See* step 3 of the *Five-Step Project Screening Process for Riparian Conservation Areas*, Forest Plan part 3, page 66; *See also,* Strategic Goal 5.2, Forest Plan part 1, page 41.) Also according to the Forest Plan:

> In the riparian conservation areas that include perennial and intermittent streams, lakes, and wetlands allow only those actions that maintain or improve long-term aquatic and riparian ecosystem health including quantity, quality, and timing of stream flows.

Forest Plan part 3, page 65.

[10] The "New In-Area All-Source Generation Alternative" and the "New In-Area Renewable Generation Alternative" were both ranked environmentally superior to the southern route alternative that was selected.

> WAT 1 – Watershed Function …Manage Riparian Conservation Areas (RCA) to maintain or improve conditions for riparian dependent resources.

Forest Plan part 2 at page 95.

Yet contrary to Forest Plan direction, the Powerlink EIR/EIS finds that impacts from the southern route on Riparian Conservation Areas would be *significant and unmitigable*, a far cry from having a neutral or beneficial effect:

> The Modified Route D Alternative would impact RCAs through the construction of access roads, pull sites, and towers . . . . Even with implementation of [mitigation], however, the impacts would be considered *significant and not mitigable* (Class I) . . . .

EIR/EIS at page E.4.2-6, emphasis added. Further, the Project threatens arroyo toad habitat:

> A portion of the BCD South Option Revision, which is described in Section 3.3.2 of the RDEIR/SDEIS and is a component of the Final Environmentally Superior Southern Route, would be constructed within an RCA that is considered occupied arroyo toad upland habitat (see Fig. E.2.2-1). Following the publication of the RDEIR/SDEIS, SDG&E and the USDA Forest Service began working to resolve the siting of project features within this RCA. However, at the time the Final EIR/EIS was published, the siting of project features within this RCA had not been fully resolved . . . the BCD South Option would result in a [significant and unmitigable] impact to RCAs.

EIR/EIS at page E.2.2-22. The EIR/EIS requires, in attempted mitigation for impacts to this particular Riparian Conservation Area, that "SDG&E shall continue to coordinate with the USDA Forest Service until the impacts to this RCA are fully resolved to the satisfaction of the USDA Forest Service." But without disclosure in a new EIS the public will be unlawfully denied the opportunity to understand how and whether this issue has been resolved and whether the Project would comply with Riparian Conservation Area standards.

No explanation is provided in the EIR/EIS for the lack of analysis of Powerlink impacts to many other Riparian Conservation Areas across the Forest. For example:

- Two new access roads to two towers would be constructed through RCAs with suitable habitat for arroyo toads, red-legged frogs, and Southwestern willow flycatchers in the La Posta Valley;

- A new access road would be constructed to multiple towers through an RCA with suitable habitat for Southwestern willow flycatchers in Cameron Valley;

- A pull site and access roads would be constructed in an RCA with suitable habitat for California gnatcatchers, Least Bell's vireos, arroyo toads, red-legged frogs, and Southwestern willow flycatchers near Japatul Road;

Many other riparian conservation areas with intermittent streams not containing habitat for imperiled species would also be impacted. Accordingly, the Forest Service must prepare its own thorough analysis of impacts to Riparian Conservation Areas, identify alternatives that would only result in neutral or beneficial impacts, and disclose this information in a new EIS.

F. <u>The Project Conflicts with Forest-Specific Design Criteria</u>.

The Forest Plan adopts 21 design criteria specific to the Cleveland National Forest. The Project violates many of these criteria, including but not limited to:

- CNF S5 - "Consolidate major transportation and utility corridors by co-locating facilities and/or expanding existing corridors." *Id*. The Project does not run through any of the pre-existing utility corridors, and is not co-located, thus violating this design criteria.

- CNF S9 - "Avoid or mitigate, following consultation, activities resulting in direct trampling or erosion problems to Laguna Mountain skipper suitable and occupied habitat and adjacent areas." *Id*. The construction and maintenance of the Project may have direct trampling or erosion effects on Laguna Mountain skipper habitat, thus violating this design criteria. Furthermore, since species surveys have not been performed yet, there is no way for the Project proponents to assure the Forest Service that the Project will not adversely affect the Laguna Mountain skipper.

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

- CNF S13 - "Avoid or mitigate activities that may negatively affect San Diego thornmint occupied habitat (Sweetwater Place)." *Id.* The construction and maintenance of the Project may negatively affect the San Diego thornmint. Although the species was not observed in the Project area, a complete survey of the suitable habitat has not been performed. U.S. FWS Sunrise Powerlink Biological Opinion (FWS-2008B0423-2009F0097), p. 56. Without a complete survey, the Forest Service cannot determine whether or not the Project violates this design criteria.

- CNF Forest Plan, page 68 - "Prevent the introduction of new [invasive species] . . . ." The Powerlink would do the exact opposite of preventing the introduction of new invasive species. According to the Powerlink EIR/EIS (Table E.2.2-1), "Construction and operation/maintenance activities *would result in the introduction of invasive, non-native, or noxious plant species."* (Emphasis added.)

- CNF Forest Plan, page 91 - Her 1 - "Heritage Resource Protection . . . . Document known significant cultural properties to identify any activity that does or has the potential to adversely affect the site, or that does not complement the site. Develop measures to mitigate the adverse effects or impacts." The Powerlink threatens significant harm to cultural resources, but the Forest Service is prevented from mitigating those effects because they have not been surveyed and identified. Prior to any Forest Service decision on the Powerlink, the results of the required but omitted surveys for these resources as well as proposed measures to avoid or minimize harm should be fully disclosed in a new EIS.

G. The Powerlink Conflicts with Forest Plan Species Protection Standards.

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

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

Also, to protect golden eagles the Forest Service must: "Restrict human access during critical life stages . . . ." Forest Plan, page 89.

Contrary to these Forest Plan standards, the Powerlink would move listed species closer to extinction, move unlisted species closer to listing as threatened or endangered, and greatly increase human access and disturbance at golden eagle nest sites. For example, according to the EIR/EIS the BCD and Modified Route D Powerlink alternative portions of the "environmentally superior southern route" would cause significant and *unmitigable* harm to the state listed barefoot banded gecko, to the federally listed quino checkerspot butterfly, and to three nests or pairs of golden eagles. *See* EIR/EIS sections E.2.2 and E.4.2) "Unmitigable" means that *no* amount of mitigation will reduce impacts to below a level of significance. This in turn means that construction of the Powerlink will directly defy the Forest Plan species standards and move these listed species *closer* to extinction or closer to listing under state or federal endangered species acts, and cause significant disturbance to golden eagles.

IV. THE POWERLINK AND THE MASTER PERMIT CANNOT BE APPROVED BECAUSE THE PROJECT VIOLATES THE FEDERAL LAND POLICY AND MANAGEMENT ACT.

The Federal Land Policy Management Act ("FLPMA") grants the Secretary of Agriculture the authority to issue rights-of-way for the "transmission, and distribution of electric energy." (43 U.S.C. § 1761(a)(4)) provided that "[e]ach right-of-way shall contain – (a) terms and conditions which will . . . (ii) *minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment.*" 43 U.S.C. § 1765(a)(ii). As discussed in detail above, were the Forest Service to adopt the BLM EIS and approve the Powerlink, enormous harm to irreplaceable Forest resources and greatly increased wildfire risk would result. By failing to consider the EIS alternatives ranked higher than the southern route, and other less harmful alternatives such as an underground route inside the Interstate 8 easement, the Forest Service would not have minimized harm as required by FLPMA.

V. THE PROJECT CANNOT BE APPROVED BECAUSE IT VIOLATES NEPA.

As documented throughout this letter, neither the BLM Powerlink EIS, nor the Forest Service Master Permit EA, justifies a decision by the Forest Service not to prepare a combined EIS for the two projects and required Forest Plan amendments. Therefore an EIS is required. Contrary to NEPA, the Master Permit EA fails to offer any information on the Forest Service will prepare an EIS. This omission significantly impairs the public's ability to provide meaningful comments on the agency's required environmental analysis and compliance with NEPA.

The very purpose of an EA is "to determine whether to prepare an environmental impact statement." *See* 40 C.F.R. §§ 1501.4, 1508.9. An EA is thus meant to lead to either a more detailed EIS, if the EA determines that there may be significant impacts, or a "finding of no significant impact." *Id*. If the agency decides, based on the EA, not to prepare an EIS, it must "supply a convincing statement of reasons why potential effects are insignificant." *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

The Forest Service Master Permit EA fails to accomplish this simple task. Contrary to this NEPA mandate, the EA provides no indication about whether the Forest Service intends to prepare an EIS or a "finding of no significant impact." This omission in turn forces the public to provide extensive information in support of preparation of an EIS, describing how the proposed action will in fact result in significant impacts to the environment. Such information would be unnecessary in the event the agency has already decided to acknowledge the obvious conclusion that an EIS is required for this action. Ultimately, resources expended by the public in arguing for preparation of any EIS would be better spent in assisting the Forest Service in identifying the details of environmental impacts in the EIS itself.

For this reason, the Forest Service violated NEPA by failing to disclose whether or not an EIS will be prepared for the Master Permit. Its failure to provide such fundamental information concerning the anticipated level of environmental review as part of the EA greatly reduces the effectiveness of the EA and does a disservice to the interested public.

Furthermore, when a plan amendment such as that necessary to accommodate either the Powerlink or Master Permit may create a significant environmental effect, the Forest Service must develop an environmental impact statement, providing the public notice and an opportunity to comment on the draft environmental impact statement. 36 C.F.R. § 219.4(b). Section D.17 of the Powerlink FEIR/FEIS merely mentions, without disclosure of the Powerlink's violations of the Forest Plan, the *possibility* of a Forest Plan amendment. This passing reference does not disclose what the amendment would actually entail. Because BLM and CPUC did not contemplate the impacts of an amendment to the Cleveland National Forest in conducting their environmental review, the Forest Service must conduct an independent, supplemental NEPA analysis, and ensure as well that the proposed plan amendment does not violate the consultation requirements of the ESA, 16 U.S.C. § 1531 *et seq*., or other environmental laws.

A. Preparation of an EIS is Required.

Preparation of a new or supplemental Powerlink EIS is required for at least three reasons. First, the BLM Powerlink EIS cannot suffice under NEPA for a decision by the Forest Service because that EIS fails to articulate any specific proposed amendment to the Forest Plan. Second, the BLM EIS fails to address several significant impacts that would occur as a result of amending the Forest Plan and corresponding reductions in Forest resource protection. The BLM EIS fails to address the undeniably closely related SDG&E Master Permit and the cumulative effects of other similarly harmful activities on the Cleveland National Forest.

NEPA's fundamental purposes are to guarantee that agencies: (1) take a hard look at the environmental consequences of their actions before these actions occur; and (2) make the relevant information available to the public so that it may also play a role in both the decision-making process and the implementation of that decision. *See*, *e.g*., 40 C.F.R. § 1500.1. To assure transparency and thoroughness, agencies also must, "to the fullest extent possible . . . [e]ncourage and facilitate public involvement" in decision-making. 40 C.F.R. §1500.2(d). The public must be given adequate information about the project, alternatives, and their environmental effects, to be able to provide informed input prior to the agency's decision.

The purpose of an EA is to assist the action agency in determining whether the project *may* significantly affect the environment and therefore require a full EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §1508.9. NEPA requires federal agencies to prepare an EIS for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4. A full EIS is required if "substantial questions are raised as to whether a

project . . . *may* cause significant degradation of some human environmental factor." *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1998), emphasis added. To trigger this requirement, the plaintiff "need not show that significant effects *will* in fact occur;" rather, "raising substantial questions whether a project *may* have a significant environmental effect is sufficient." *Id*. (emphases in original).

Whether an action may have "significant" impacts on the environment is determined through consideration of the "context" and "intensity" of the action. 40 C.F.R. § 1508.27. "Context" means that the significance of the project "must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." *Id*. § 1508.27(a). Intensity of the action is determined by considering the following ten factors:

1. Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial;

2. The degree to which the proposed action affects public health or safety;

3. Unique characteristics of the geographic area such as proximity to ecologically critical areas;

4. The degree to which the effects on the quality of the human environment are likely to be highly controversial;

5. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks;

6. The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration;

7. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts;

8. The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources;
9. The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the federal Endangered Species Act ("ESA");

10. Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27(b)(1)-(10) (emphasis added).

In the case of the Powerlink and Master Permit, at least eight of these significance factors clearly indicate that the Forest Service must prepare a full EIS, as shown below. *See*, *e.g.*, *National Parks & Conserv. Ass'n. v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001) (either of two significance factors considered by the court "may be sufficient to require preparation of an EIS in appropriate circumstances"); *Anderson v. Evans*, 350 F.3d 815, 835 (9th Cir. 2003) (presence of one or more factors can necessitate preparation of a full EIS). As discussed in detail in our attached comment letter on the Master Permit EA, that project alone would:

- Cause impacts that may be both beneficial and adverse;
- Significantly harm public health and safety;
- Be highly controversial;
- Impact unique characteristics of the geographic area such as ecologically critical areas;
- Involve unique risks;
- Establish a precedent for future actions with significant effects or represent a decision in principle about future consideration;
- Adversely affect districts, sites, highways, structures or objects listed in or eligible for listing on the National Historic Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources;
- Adversely affect endangered or threatened species or critical habitat, and;
- Result in other significant adverse impacts, including cumulatively significant impacts.

Of course the harmful effects of the Master Permit would be exponentially increased with the approval of the Powerlink across the Forest. In just a few examples:

- As discussed in section IIIA above, the Powerlink would require an amendment to the Forest Plan to allow a unique risk and significant increase in harm to public health and safety from wildfire;

- The Powerlink is extraordinarily controversial;

- The Powerlink would require a Forest Plan amendment to cross through unique Cleveland National Forest "places," landmarks, and ecologically critical areas such as designated critical habitat;

- Depending on the timing of approval, either the Powerlink or the Master Permit could establish a precedent for either project or future actions with significant effects or represent a decision in principle about future consideration;

- The Powerlink may adversely affect districts, sites, highways, structures or objects listed in or eligible for listing on the National Historic Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources. The Powerlink may also require a Forest Plan amendment to accommodate such harm. However, the potential for this harm or a related Forest Plan amendment has yet to addressed or disclosed to the public in any NEPA document because surveys were not completed prior to adoption by the BLM of the Powerlink EIS; and

- The Powerlink may adversely affect endangered or threatened species or critical habitat. The Powerlink may also require a Forest Plan amendment to accommodate such harm. However, the potential for this harm or a related Forest Plan amendment has yet to addressed or disclosed to the public in any NEPA document because surveys were not completed prior to adoption by the BLM of the Powerlink EIS;

Therefore, the sum of the significant impacts of the Powerlink and Master Permit must be considered in a new, supplemental EIS for both projects.

B. Additional Alternatives and Mitigation Measures Should be Considered.

As the Forest Service considers whether to authorize the Powerlink and/or the Master Permit it will be crucial for the agency to treat seriously in a new supplemental EIS several alternatives and mitigation measures suggested in our April comments on the Master Permit including more undergrounding of power lines, replacement of power lines to remote facilities or communities with alternative energy sources including local generation and distribution of energy as proposed by engineer Bill Powers and others,[11] and measures to improve the integrity of investigations of power line related fires. For the Powerlink the Forest Service must not blindly accept the BLM's unlawful dismissal of two local energy generation alternatives in the EIR/EIS ranked as much less harmful to resources, and the Forest Service should give serious consideration to an alternative Powerlink route constructed underground inside the easement for Interstate 8 that would dramatically reduce harm to Forest resources and communities.

VI. THE PROJECT CANNOT BE APPROVED BECAUSE IT WOULD VIOLATE THE NATIONAL HISTORIC PRESERVATION ACT.

Congress enacted the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq*., to "accelerate federal historic preservation programs" and to foster cooperation between federal, state, and local authorities. 16 U.S.C. § 470. NHPA requires federal agencies to consider the effects of an "undertaking" on a site or object included, or eligible for inclusion, in the

[11] *See*, *San Diego Smart Energy 2020: The 21st Century Alternative* (http://www.sdsmartenergy.org/smart.shtml).

National Register, and requires that the Advisory Council on Historic Preservation administering the Act be given an opportunity to comment upon the proposed undertaking. 16 U.S.C. § 470. "The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties." 36 C.F.R. § 800.1(a).

NHPA implementing regulations establish a three-step process for consultation between federal agencies and the Advisory Council on Historic Preservation pursuant to which the agency must: (1) in consultation with the State Historic Preservation Officer ("SHPO"), identify properties within a federal program or activity which are included, or eligible for inclusion, in the National Register of Historic Places, prior to making an agency decision undertaking the activity, 36 C.F.R. § 800.4; (2) determine whether the proposed undertaking adversely affects the identified property and if so, (3) then enter consultation with the Advisory Council involving an onsite inspection, public information meeting, and consideration of alternatives to avoid or mitigate the adverse effects. 36 C.F.R. §§ 800.3, 800.6. Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands, consultation for undertakings occurring on tribal land or for effects on tribal land is with the Tribal Historic Preservation Officer ("THPO") for the Indian tribe in lieu of the SHPO. 36 C.F.R. § 800.3(c)(1).

Where, as here, alternatives being considered consist of large corridors, "the agency official may use a phased process to conduct identification and evaluation efforts." 36 C.F.R. § 800.4(b). "The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a . . . programmatic agreement executed pursuant to § 800.14(b) . . .." *Id*. The process, however, must still:

> establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties.

Id. In the present case, the Forest Service has failed to investigate the likely presence of historic properties along the Project route.

The NHPA recognizes public input as being "essential to informed Federal decision-making in the 106 process." Its regulations direct at 36 C.F.R. § 800.2(d) that "[t]he agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties . . . ." The BLM has failed to meet this mandate.

A. The Forest Service and BLM Failed to Comply with the NHPA Section 106 Process by Failing to Provide Public Notice of the Programmatic Agreement Prior to its Execution.

It appears that the Forest Service may intend to sidestep its responsibilities under the NHPA by relying on BLM's purported compliance with this law. Any such reliance is misplaced because BLM has not complied with the NHPA. The BLM has created a programmatic agreement ("PA") under 36 C.F.R. § 800.14(b)(3). This PA is not immune from the participation requirements laid out in section 800.2. Section 800.2(d) characterizes public involvement as "essential." Section 800.2(d)(3) allows the agency to satisfy the public involvement requirement by using "the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, *if they provide adequate opportunities for public involvement consistent with this subpart.*" Emphasis added.

BLM failed to provide an adequate opportunity for public involvement. First, it failed to notify the public of this issue in a manner calculated to be noticed. It buried the barely over one page of text discussing its intent to create a PA within the more than 7,500 pages of the DEIR/DEIS for the Sunrise Powerlink Project. Committing just over one page out of thousands does not fairly alert the public nor present an adequate opportunity for public comment or involvement. Second, BLM never notified the public of the contents of the PA. The Final EIR/EIS for this Project was published in October of 2008, two months *before* the PA was created. The public could not participate in the decision-making process for the PA when the PA was *never circulated* to the public. The public was thus never presented with an opportunity to become involved in or comment on the PA. Therefore the BLM's approval of the right of way for the Powerlink Project violates the NHPA. So too, any reliance by the Forest Service on BLM's flawed process would likewise fail.

VII. THE PROJECT CANNOT BE APPROVED BECAUSE IT WOULD VIOLATE THE ENDANGERED SPECIES ACT.

Congress enacted the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*., to halt the extinction of species in the United States and abroad. 16 U.S.C. § 1531. Section 7 of ESA, 16 U.S.C. § 1536, mandates federal agencies to ensure through consultation with the Fish and Wildlife Service ("FWS"), or alternatively, the National Marine Fisheries Service, that no federal action will jeopardize the survival of species listed as threatened or endangered, or adversely modify their designated and proposed critical habitat. 16 U.S.C. § 1536(a)(2). A federal action that places the future survival or recovery of a threatened or endangered species at risk violates ESA. *Center for Biological Diversity v. Bureau of Land Management*, 422 F.Supp.2d 1115, 1144 (N.D. Cal. 2006). The section 7 consultation requirement applies to all discretionary actions undertaken by federal agencies. *National Ass'n of Home Builders v. Defenders of Wildlife*, 127

S.Ct. 2518, 2534 (2007) (interpreting 50 C.F.R. § 402.03). Interagency consultation must be based on the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). This requirement prohibits an agency from disregarding available scientific evidence that is better than the evidence on which it relies. *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir.2006).

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

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

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

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

BLM's ESA consultation for the Project is inconsistent with its ESA's obligations. BLM failed to provide FWS with sufficient data to render its opinion. The incidental take statements ("ITSs") issued pursuant to the BiOp fail to assure that the level of destruction associated with the Project will not, in fact, jeopardize the survival of listed species or adversely modify their critical habitat. BLM's reliance on this deficient interagency record places BLM in violation of ESA, as

shown below.

A. Section 7 Consultation History

BLM requested formal section 7 consultation on November 5, 2008, and on that same day transmitted a Biological Assessment ("BA") for the Project to FWS. BLM's BA was prepared by the project applicant, SDG&E, and purports to address the effects of the issuance of rights of way for the construction of the selected route on threatened and endangered species and their critical habitat. BA, pp. 87-134; BiOp, pp. 3-4. BLM requested that FWS complete its BiOp on an expedited schedule to meet the expected completion date of BLM's NEPA process for the Project. BiOp, p. 4. FWS was able to accommodate this request, providing its BiOp on January 16, 2009. *Id*. BLM approved the Project rights of way just four days later, on January 20, 2009, minutes before the Obama Administration's inauguration.

FWS's BiOp for the Project is a foundational, conference opinion. It is intended to cover lands under the jurisdiction of the Forest Service, BLM, and the County and City of San Diego. The document is also supposed to serve as a baseline conference opinion for the Army Corps of Engineers with regard to SDG&E's Clean Water Act section 404 permit. *Id*.

1. BLM's Biological Assessment

BLM requested formal consultation with regard to ten federally listed species and their designated and proposed critical habitat. These include eight federally endangered species[12] and two federally threatened species.[13] At the time of FWS' completion of its BA, and at the time of FWS's issuance of its BiOp, *SDG&E and BLM had not yet surveyed the majority of the selected route for the existence of threatened and endangered species, or their suitable habitats*. BiOp, p. 2.

BLM also failed to complete scientifically reliable surveys of the ten federally listed species known to occur in the project area, *and such surveys had not been completed at the time of the FWS's issuance of its BiOp*. BiOp, p. 24. According to FWS, further surveys for this species would need to be conducted by SDG&E prior to the commencement of construction activities in

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

[13] The San Diego Thornmint (*Acanthomintha ilicifolia*) and the Coastal California Gnatcather (*Polioptila californica californica*).

order to ensure no jeopardy or adverse modification of critical habitat.

2. FWS' Biological Opinion

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

Notably, *the BiOp fails to identify the precise number, extent, location or timing of such incidental takes*, stating that such specifications will be made following site-specific surveys prior to the construction of the Project. This omission is not surprising, since few or no *special status species surveys have been conducted* on the selected alternative route. Draft EIR/EIS Appendix 8C, Special Status Species Surveys, Figure Ap8C-07, Survey Locations - Quino Checkerspot Butterfly.

In addition to addressing the impacts of the Project right of way, the BiOp identifies four other actions deemed "connected" to the Project under NEPA: (1) SDG&E's plans for future expansion of the Project, consisting of four more 230 kV lines and two more 500kV lines that would connect to one of the substations of the Project; (2) the La Rumorosa wind farm, proposed to be constructed by Sempra Energy, SDG&E's parent company, in northern Mexico; (3) a solar facility, proposed by Stirling Energy Systems, to be located in the Imperial Valley; and (4) the Esmeralda-San Felipe Geothermal Project, to be located in Truckhaven, California. BiOp, pp. 2-3. The geothermal and solar projects alone would result in the permanent loss of 2,500 acres of habitat. California Public Utilities Commission, Decision Granting Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project (Dec. 08-12-058) at 225 (citing FEIS, Ch. D.2-15; FEIS, Sec. 2) (hereinafter "CPUC Order"). The mitigation

[14] PBS have been sighted by U.S. Border Patrol along Interstate 8 near the Mountain Springs Road Exit, north of the westbound lanes, south of the westbound lanes within Devil's 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 Project. *See* FEIS, Fig. ES-4.

measures proposed by the BiOp do not address the impacts of these four connected actions. BiOp, pp. 2-3. Both the BiOp and the BA omit discussion of the Project's effects on the San Diego fairy shrimp, the mountain plover and the desert pupfish. FEIS, Ch. 2 pp. 3, 22-23. In fact, no scientifically reliable surveys had been conducted on these species prior to BLM's approval of the Project right of way. FEIS, Ch.D2 p. 22. The BiOp and the BA also omitted discussion of the impacts from Iberdrola's proposed Tule Wind project in McCain Valley despite BLM's receipt in 2004 and 2008 of applications for the MET Towers and their Plan of Development.

The mitigation measures proposed by FWS incorporate, in large part, those measures that were proposed by SDG&E and BLM. FWS did make certain minor revisions to SDG&E's proposals, including a different ratio of compensation for permanently destroyed designated critical habitat of the QCB, more detailed helicopter flight parameters for construction within the proposed and designated critical habitat of PBS, and more detailed survey and monitoring instructions for the remaining threatened and endangered species that would be adversely affected by the Project. Compare, BA, pp. 30-41 and BiOp, pp. 24, 29-39. FWS' no jeopardy/adverse modification determination hinges on SDG&E's commitment to conduct additional surveys prior to initiating construction and to replace, through purchase of new habitat, permanently destroyed designated critical habitat within the project area. BiOp, pp. 2, 24, 29-39. However, *the BiOp fails to identify whether suitable habitat is available for purchase, or to reconcile Project approval with SDG&E's estimate that the approximately 600 acres of habitat permanently lost due to the Project "may not be available for replacement in the quantities and specific types that are affected*." *See* FEIS, ES-29, emphasis added.

B. BLM and FWS Violated Section 7 of ESA.

1. FWS's BioOp is Inadequate Under ESA

The BioOp prepared by FWS is arbitrary and capricious and therefore inadequate to satisfy the requirements of ESA because it fails to analyze the biological impacts of the Project, is not based on the best available data, and fails to consider the adverse impacts of the Project on recovery of listed species. For these reasons, discussed in detail below, the Project violates ESA.

a. FWS' BiOp Is Arbitrary and Capricious and Violates ESA Because it Fails to Analyze the Biological Impacts of the Proposed Action.

A biological opinion which is not coextensive in scope with the agency action is contrary to law. *North Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980) (requiring a BiOp to analyze the effect of the entire agency action); *Greenpeace v. National Marine Fisheries Service*, *supra*, 80 F.Supp.2d at 1147. An agency "action" under ESA is to be construed broadly, and must include the full action and all mitigation measures adopted in pursuance thereof. *TVA v. Hill*, 437

U.S.153, 173 (1978); *North Slope Borough v. Andrus*, 642 F.2d at 609. The Ninth Circuit has set aside biological opinions that fail to present a comprehensive discussion of all stages of a project, even when there is uncertainty about the location and scope of such future phases of the proposed action. *See Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988).

When evaluating a large-scale and complex project such as the Powerlink, the FWS must identify all the relevant components of the project, and explain how these components will individually, and in combination, affect listed species. *Greenpeace v. National Marine Fisheries Service*, *supra*, 80 F.Supp.2d at 1148; 50 C.F.R. § 402.14(g)(2)-(3). The BiOp fails to address the entire action, which includes SDG&E's plans for future expansion, as well as the three renewable energy projects deemed to be actions "connected" to the Project under NEPA. FWS claims that these aspects of the Project did not have to be considered at this stage of the project because separate NEPA and CEQA reviews would be conducted for each of these components of the Project. BiOp, pp. 2-3. However, "incremental-step consultation does not vitiate the ESA requirement that the Secretary prepare a comprehensive biological opinion." *Conner v. 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 BiOp violates ESA's general mandate that federal agencies need ensure that no federal action will jeopardize the future survival of listed species. 16 U.S.C. § 1536.

b. FWS' BiOp Is Arbitrary and Capricious and Violates ESA Because it Is Not Based on the Best Available Scientific and Commercial Data.

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

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

The BiOp omits a discussion of SDG&E's plans for future expansion, as well as the three connected renewable energy generation projects that were considered in detail during the Project EIR/EIS process.[15] These projects are also known to have destructive effects on the desert ecosystem in the Imperial Valley on federally listed endangered species on both sides of the U.S.-Mexican border. CPUC Order at 225. The La Rumorosa wind farm will likely jeopardize the recovery of the PBS, whose prospects for recovery are dependent on re-establishing connectivity between populations on both sides of the U.S.-Mexican border. Peninsular Bighorn Recovery Plan 2000 at 79.

The BiOp also omits discussion of the Project's impacts on the endangered San Diego fairy shrimp, the mountain plover, and the critical habitat of the desert pupfish. These omissions are arbitrary and capricious because the FEIS highlighted the existence of these species within the Project area. For example, engineering conducted for the originally proposed Project showed that fairy shrimp habitat would be affected, as critical habitat for the shrimp was just 0.3 miles from the original Project route. FEIS, Ch. 2, pp. 3, 22. The proposed routing for the original Project likewise crossed the designated critical habitat of the desert pupfish. FEIS, Ch. 2, p. 23. Neither the BA nor the BiOp reviewed the route of the ultimately approved Project to ascertain whether it impacts these endangered species.

The Forest Service cannot simply take FWS's word that the listed species will be protected under the planned operations. *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917 , 935 n. 16 (9th Cir. 2008). The BiOp is inadequate because it flatly fails to consider available data, and is not based on scientifically reliable data. Therefore, the BiOp violates ESA, 16 U.S.C. § 1536(a)(2).

c. The BiOp Is Arbitrary and Capricious and Violates ESA Because it Fails to Consider the Recovery Impacts of the Project.

The FWS is required to consider both the survival and the recovery chances of listed species in evaluating adverse modifications to their critical habitat. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069-70 (9th Cir. 2004). A BiOp that relies on uncertain short-term and long-term improvements to critical habitat to offset short-term and long-term degradation violates ESA. *National Wildlife Federation v. National Marine Fisheries Service*, *supra*, 524 F.3d at 934. Similarly, a BiOp that relies on insufficient data, or that fails to provide a statement of incidental take that permits the agency to assure that the level of

[15] These projects are described in the following Project NEPA documents: DEIS, Figures 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.

destruction will not, in fact, jeopardize the survival of listed species, is arbitrary and capricious and violates ESA. *Id*; *Center for Biological Diversity v. Bureau of Land Management*, 422 F.Supp.2d 1115, 1131 (N.D. Cal. 2006).

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

2. BLM's BA Is Inadequate Under ESA.

a. The Biological Assessment Fails to Include the Basic Elements of a Biological Assessment: the Proposed Action, the Environmental Baseline, and an Analysis of the Effects of the Action.

ESA requires federal agencies to prepare a Biological Assessment (BA) for any project that is likely to affect any listed species. 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.12, 402.14; Species Manual at .1F5a. BLM's Species Manual provides additional guidance with regard to what is required of BLM during interagency consultation under section 7 of ESA. The BA must contain an accurate description of the proposed action; the Species Manual directs that "it is critical to properly characterize the proposed action, the action area, the environmental baseline and the effects." Species Manual at 1F1c(2), 1F1e. The "action" includes actions that are interrelated and interdependent. Species Manual at 1F1c(2). These are in turn defined as "actions that depend on the larger action for their justification" or "that have no independent utility," respectively. *Id*.

The environmental baseline is defined as "the condition of a species or critical habitat at a specific time within the action area." *Id*. This requirement exists to determine the status of listed species, including their breeding habitat, potential critical habitat, distribution and density throughout the action area prior to project approval. BLM is required to use the best scientific and commercial data in establishing the environmental baseline of listed species within the action area.

BLM is specifically "required to consider the effects of interrelated or interdependent

actions" in addition to the proposed action. *Id*. at 1F1e (emphasis added). An additional effects analysis requirement applies to BLM's issuance of rights of way. The Species Manual provides that "[if the Federal action is an authorization for a right-of-way to private land . . . [and] there is no alternative access, effects from both the Federal action and private action need to be analyzed in the consultation." Species Manual at 1F2c. Therefore, even though some of the related projects will be undertaken as private actions, BLM is still required to analyze the effects of those projects. Since BLM neglected to do so here, it has failed to include all of the basic elements required in its BA, thereby violating the ESA. Consequently the Forest Service may not rely on BLM's faulty procedure.

b. The Biological Assessment Fails to Provide an Accurate Description of the Action Area.

The Species Manual provides that a "but for" test should be used to assess whether an action is interrelated or interdependent to the proposed Federal action. Species Manual at .1F1c(2)(c); *see also* BA, p. 41. During the Project's EIR/EIS process, BLM determined that the Stirling Energy System solar facility, the Esmeralda-San Felipe Geothermal Project, substation upgrades, and Sempra's La Rumorosa project in northern Mexico were projects that are so closely related to the Project, as to be considered part of the action. EIS at B-83 and B-96; CPUC Order at 224. The CPUC found that these projects are "unlikely to proceed unless either a Northern or Southern Route is constructed." The La Rumorosa project is deemed an indirect effect of the Project because it is located outside of the United States. CPUC Order at 224 . FWS mentioned these actions in its BiOp but failed to provide an analysis of their effects. The error is even more stark in the case of BLM because the BA omits all discussion of these projects, as well as the Tule Wind Project, and all of their related and cumulative impacts. BioOp, p. 2 and BA, pp. 1, 41. BLM's error with regard to the description of the proposed action is highlighted by FWS's mention of these projects, evincing the Service's tacit opinion that actions interrelated and interdependent with the Project ought be given some consideration. *See Daniel T. Cooper*, 154 IBLA 81, 85 (2000) (analyzing the merits of appellants' claims on the ground of whether BLM's action was consistent with a biological opinion).

Further, the recently announced MOU between SDG&E, the Campo Band, and Invenergy for a 160 MW wind turbine project that will connect to the Powerlink Project through SDG&E's proposed ECO Substation (through the to-be-expanded Boulevard Substation and new and upgraded transmission lines) and the existing Southwest Powerlink have never been addressed, even though they clearly constitute connected projects with foreseeable cumulative and indirect effects. BLM's failure to include the entire action in its description of the proposed action and the action area greatly understates the biological impacts of the Project and violates ESA and BLM policy. Therefore the Forest Service may not rely on BLM's flawed process.

c. The Biological Assessment Fails to Include an Analysis of

Actions Taking Place on Private Land.

The BA states that private parcels of land lie along certain portions of each of the alternatives, but it does not separately discuss actions that will take place on private lands, and their direct impacts. *See* BA, pp. 1-4. Similarly, the BA fails to specify whether the Project rights of way provide the only means of access to the private land parcels that will be used for the Project. Furthermore, as discussed above, the Species Manual provides that "[if the Federal action is an authorization for a right-of-way to private land . . . [and] there is no alternative access, effects from both the Federal action and private action need to be analyzed in the consultation." Species Manual at 1F2c. Without an adequate analysis of actions taking place on private land it is impossible to discern whether pre-construction and construction activities that will take place on private lands connected by the Project rights of way have been adequately considered in the BA, as is required in the Species Manual and for the purpose of section 7 consultation. This omission renders the BA contrary to BLM policy, and in violation of ESA. Therefore the Forest Service may not rely on BLM's flawed BA.

d. The Biological Assessment Fails to Include an Adequate Environmental Baseline.

BLM's ESA consultation responsibility does not end with 50 C.F.R. § 402.12. BLM must also comply with 50 C.F.R. § 402.14, which requires BLM to provide the FWS with data "which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat." 50 C.F.R. § 402.14(d) (emphasis added); *accord* Species Manual at 1F5a. If an agency fails to initiate studies that are feasible and necessary to evaluate the impacts on affected species, as BLM has omitted here, the best available data requirement has not been met and review is deemed inadequate. *Roosevelt Campbell Intern. Park Com'n v. U.S. EPA,* 684 F.2d 1041, 1055 (1st Cir. 1982) (requiring the EPA, when faced with inconclusive data, to conduct all tests and simulations "practicable prior to approving a project.").

A fair reading of the BA reveals that surveys were initiated on the previously proposed northern Project route, *but not on the selected route.*[16] Neither SDG&E nor BLM attempt to

[16] "[A]pproximately 4, 304 acres of the route within the QCB [Quino Checkerspot Butterfly] Survey Area 2 *have yet to be surveyed due to changes in the route after the surveys had been completed*." BA, p. 53, emphasis added. With regard to the Laguna Mountains Skipper, the BA provides that surveys were conducted in 2007 but only as to half of the proposed transmission line. *Id*. at 56. With regard to the Southwestern Willow Flycatcher, surveys were conducted in 2007 for the "then described Alternatives Portion of the Sunrise Powerlink Project" and because of "changes to the route after surveys had been completed, *not all areas with suitable habitat were surveyed* and some of those that were are no longer part of the action area." *Id*. at 64-65, emphasis added. The same is true of BLM's treatment of the Least Bell's Vireo and the

explain this inconsistency in the interagency record. What is clear, is that BLM now plans to conduct surveys, but as a mitigation measure because the Project has already been approved. However, as pointed out by Ileene Anderson in her testimony concerning BLM's assessment of impacts on botanical resources within the Project area, surveys conducted *after* Project approval do not substitute for pre-approval planning. *See* CPUC Phase II Direct Testimony of Ileene Anderson on Behalf of the Center for Biological Diversity and the Sierra Club, p. 2. BLM's mitigation measures, as reflected in the BA and incorporated by FWS in its BiOp, focus on future survey activities. However, preconstruction surveys are necessary to assess the Project's impact on baseline biological conditions. *Id*. "Without understanding the scope of the harm before it occurs, it is difficult to quantify an appropriate amount of mitigation." *Id*. It is clear from the mitigation measures developed jointly by BLM and FWS, that the agencies concur that surveys are a more definitive means to assess the Project's impacts than the "modeling data" on which SDG&E relies to substantiate its claim of adequacy of consultation.

Any uncertainty as to what constitutes the best available scientific information tips in favor of protecting the species because in drafting ESA, Congress intended "to give the benefit of the doubt to the species." *Center for Biological Diversity v. Bureau of Land Management*, 422 F.Supp.2d 1115, 1127 (N.D.Cal.2006)(quoting *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir.1988) (quoting H.R. Conf. Rep. No. 96-697, 1st Sess. 12, reprinted in 1979 U.S.C.C.A.N.). Data that is relevant and necessary is deemed "unavailable" if existing science cannot support a more precise determination. *See Sierra Club v. Bosworth*, 352 F.Supp.2d 909, 920-21 (D. Minn 2005) (citing *Fishermen's Dock Coop*., *Inc*. *v*. *Brown*, 75 F.3d 164, 172 (4th Cir.1996)); *Natural Resources Defense Council, Inc. v. Evan*, 279 F.Supp.2d 1129, 1179-1180 (N.D.Cal. 2003). The action agency may not ignore available biological information, however. *Conner v*. *Burford*, 848 F.2d at 1454 (1988).

Moreover, agency action must, at all times, be based on well-reasoned analysis. Although the agency need not always conduct new studies, it must to do so when there is not enough evidence on which a determination can be made. *Heartwood, Inc. v. U.S. Forest Service*, 380 F.3d 428, 436 (2004); 50 C.F.R. § 402.14(d). In the case of ESA, the requisite level of certainty focuses on whether the action will likely jeopardize the recovery or survival chances of listed species. Here, *BLM left segments of the final route unsurveyed while individual sightings of listed species confirmed their presence within the action area*. BLM nevertheless elected to proceed with approval of the Project prior to its completion of Project area surveys. Thus, BLM made a no jeopardy determination absent information on the density of distribution and breeding habitat

---

Stephen's Kangaroo Rat. *Id*. at 76, 80-81. Most conspicuously – because the Project area will cross through two areas of critical habitat of the Peninsular Bighorn Sheep and because helicopter construction is slated to begin in critical habitat later this fall – BLM provides no evidence of survey efforts for the purpose of a baseline analysis of the status of the Peninsular Bighorn Sheep. *Id*. at 84.

of listed species within the Project area. Plainly, those *omitted* pre-approval surveys were necessary to determine the type of impact that the Project would have on listed species within the Project area. Finally, if an agency elects to rely on incomplete data, it must provide a rationale justifying its decision to do so. *See National Wildlife Federation v. Norton*, 332 F.Supp.2d 170, 180 (D.D.C. 2004). BLM failed to explain why survey efforts were initiated in 2007 with regard the *proposed* routing for the Project, and later *abandoned* with regard to the *selected* route.

Contrary to ESA, the BA fails to provide the following information:

- No modeling data was used for the un-surveyed portions of suitable habitat for the San Diego Thornmint. BA, p. 47.

- Only certain portions of the route coincide with the Forest Service's modeling data for the San Bernardino bluegrass. *Id*. at 50 ("The USFS has modeled habitat for San Bernardino bluegrass within a portion of the Action Area, specifically on a parcel of land on Mt. Laguna in eastern San Diego County.").

- BLM did not rely on modeling data for the un-surveyed portions of suitable and critical habitat of the Quino checkerspot butterfly. *Id*. at 53.[17]

- No modeling data was used for the un-surveyed portions of potential habitat of the Laguna Mountains Skipper. *Id*. at 56 ("A site assessment was conducted in September 2008 along the route containing potential habitat (personal communication, D.K. Faulkner). The absence of larval host plants along the route would preclude LMS in the action area.").

- No modeling data was used for the Coastal California Gnatcatcher. According to the BA, suitable habitat of the Coastal California Gnatcatcher exists outside USES land, between mileposts 87 and 120 along the selected southern route. BA, p. 70.

- No modeling data was used for the Peninsular Bighorn Sheep. *Id*. at 84.

The catalogue of maps and figures and BLM's analysis generally arise from four sources: (1) literature review; (2) surveys conducted by SDG&E consultants in 2007 and 2008 on a project route *different from* the one approved, and surveys that were later deemed scientifically

[17] This section of the BA also cites to surveys conducted in 2007 that BLM deemed inadequate during NEPA review. FEIS/FEIR at D.2-9 ("Exceptionally dry weather conditions in 2007 made the results of some surveys (i.e. Quino checkerspot butterfly and special status species) either inconclusive and questionable.").

inadequate; (3) critical habitat designations; and (4) unpublished Forest Service modeling data that happens to correlate with certain – but not all – portions of the approved Project.

Conspicuously absent are surveys of the *selected* Project route. Although surveys are not the sole means of complying with the statutory "best available" data standard, it is incumbent on the action agency to insure no jeopardy to listed species, or adverse modification to their critical, or potential, critical habitat. The Forest Service and BLM have failed to do that here.

C. BLM Failed to Determine that Its Action of Approving the Project was Consistent with ESA.

BLM and FWS failed to create an adequate record of consultation under section 7 of ESA.

1. BLM's Approval of the Incidental Take Statements Violates ESA and Agency Policy.

ESA requires that an Incidental Take Statement ("ITS") specify "the impact of such incidental taking on the species." 16 U.S.C. § 1536(b)(4)(I); 50 C.F.R. § 402.14(i)(1). This impact should be expressed as a specific number of individuals taken whenever possible. *Oregon Natural Resources Council v. Allen,* 476 F.3d 1031, 1037 (9th Cir. 2006); *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management*, 273 F.3d 1229, 1249 (9th Cir. 2001). If the agency is not able to provide a specific number it must provide justification for not doing so. *ONRC v. Allen,* 476 F.3d at 1037. However, under no circumstances can the agency quantify "take" in terms of acreage of habitat. *Id*. at 1037-38 ("Contrary to the FWS' argument, "quantifying" take in terms of habitat acreage lost is simply not the type of numerical limitation on take contemplated by Congress or this court's precedent.").[18] Such an approach provides no possible trigger for the re-initiation of consultation because it is impossible to know when the number of species so taken rises to the level of adverse modification or jeopardy. *See id*. at 1038.

To that same end, BLM policy requires that the ITS contain terms and conditions that will "provide[] the agency protection from any and all prohibited takings under Section 9 of the Act that are reasonably certain to occur." Species Manual at .1F5d(4). The Species Manual clearly provides,

> Incidental take statements should comport with the Department of the Interior policy, specifically:

[18] That is especially true here, because BLM failed to provide an environmental baseline prior to approving the action.

(a) If there is no reasonable certainty of take, there should be no ITS . . .

(b) Terms and conditions must give clear guidance to the holder of the ITS of what is expected of him or her and how the condition can be met, and must provide a clear standard for determining when the authorized level of take has been exceeded.

Species Manual at .1F5d(2).

Here, the BiOp relies on habitat-based rather than population-based thresholds to trigger re-initiation of consultation with regard to the Coastal California Gnatcatcher, the Least Bell's Vireo, the Arroyo Toad, the Quino Checkerspot Butterfly, and the Peninsular Bighorn Sheep. BioOp, pp. 147-148. As explained above, this methodology is forbidden under ESA. BLM violated ESA and its own policy in approving the Project notwithstanding this significant error in the inter-agency consultation record. The Forest Service therefore cannot rely on BLM's faulty consultation, and instead must conduct its own.

VIII. CONCLUSION

The Forest Service should prepare a single EIS addressing the interrelated impacts of the Master Permit and the Sunrise Powerlink Project. Any proposed amendment to the Cleveland Forest Plan to accommodate the Sunrise Powerlink Project would be inconsistent with the Forest Plan's management standards and irreparably harm the Cleveland National Forest and its resources. It should be denied because it would violate the NFMA, NEPA, ESA, FLPMA, NHPA and their regulations.

We thank you for reviewing our concerns, and request that the public be notified of any proposed plan amendment for the Powerlink Project in time to meaningfully participate in the amendment process. We also incorporate into this letter all comments previously submitted by the undersigned groups and their members on the Master Special Use Permit and the Sunrise Powerlink Project, and all additional materials including expert declarations subsequently submitted by them in support of this letter. If you have any questions, please contact our offices.

Sincerely,

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

SCV:taf

Encl.: Letter from Stephan C. Volker to William Metz dated April 8, 2009

cc w/encl.: Jeff Moulton, Regional Attorney
Office of the General Counsel
United States Department of Agriculture
33 New Montgomery St., 17th Floor
San Francisco, California 94105-1924
Ph.: (415) 744-3011
Fax: (415) 744-3170