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VIA EMAIL, FACSIMILE AND U.S. MAIL
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Jeanine Townsend
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Re: Backcountry Against Dumps, The Protect Our Communities Foundation, East County Community Action Coalition, and Donna Tisdale's COMMENTS on the State Water Resources Control Board's Proposed Order Denying the Commenters' Petition for Reconsideration of the State Water Resources Control Board's November 18, 2010 Order for Clean Water Act Section 401 Water Quality Certification for the San Diego Gas and Electric Company Sunrise Powerlink Project (File No. SB09015IN; U.S. Army Corps of Engineers File No. 2007-00704-SAS).

I. INTRODUCTION

Pursuant to the State Water Resources Control Board's (the "Board's") September 1, 2011 letter transmitting its proposed Order denying the December 20, 2010 Petition for Reconsideration filed by Backcountry Against Dumps ("BAD"), The Protect Our Communities Foundation ("POC"), East Community Action Coalition ("ECCAC") and Donna Tisdale's (collectively, "petitioners'") challenging the Board's November 18, 2010 Clean Water Act Section 401 Water Quality Certification Order ("Certification") for San Diego Gas and Electric Company's ("SDG&E's") Sunrise Powerlink Project ("Powerlink" or "Project"), petitioners submit the following comments on the draft Order.

II. THE BOARD'S DISINGENUOUS CONDUCT

The Board's proposed Order is the latest in a long list of dismissive and disingenuous actions apparently intended to stifle petitioners' ability to voice their concerns about the Powerlink's devastating environmental and community impact, and to push the Project through the approval pipeline.

This regrettable chain of events began with the Board's failure – despite petitioners' *numerous* previous communications with the Board's staff regarding this Project – to copy petitioners or their counsel on its November 12, 2010 letter (mailed November 15) transmitting the Board's Certification to the Project applicant and numerous other individuals.[1] It was only through the due diligence of petitioners that they discovered – much belatedly, in a November 30, 2010 email from Board environmental specialist Clifford Harvey to POC's staff biologist, David Hogan – that the Certification had been issued and was publicly available. Even then, however, the Board did not send petitioners a copy of the Certification. Instead, Mr. Harvey instructed petitioners in his email to obtain the Certification from the Board's website. Yet therein lay another trap.

Following Mr. Harvey's instruction, petitioners and their counsel then independently accessed the Board's website later on November 30, 2010 via the link provided in Mr. Harvey's email. The website stated that the Certification had been "[i]ssued" on "11/18/2010." Based on the Board's publicly stated November 18, 2010 Certification issue date, petitioners calendared the filing of their Petition for Reconsideration for December 20, 2010, the last business day before the close of the 30-day period for filing, since the 30th day fell on December 18 (a Saturday). Petitioners timely filed their Petition for Reconsideration by email on December 20. Then the Board sprung its trap.

On January 6, 2011, the Board sent petitioners a letter refusing to accept the Petition for Reconsideration for review. In its letter, the Board alleged that the Certification was issued on November 9, 2010, *not* November 18, 2010, as it had openly represented on its website. Despite its misrepresentations as to the date the Certification was issued and its failure to serve petitioners with the Certification – or even timely notify petitioners of its availability – the Board

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[1] In failing to copy petitioners, the Board violated its *own* regulations requiring that "Copies of any certification . . . issued shall be sent to . . . all other parties known to be interested" in the certification action. 23 Cal. Code Regs. § 3859.

asserted in its January 6 letter that the deadline for receipt of petitions for reconsideration was December 9, 2010, and that petitioners' December 20, 2010 reconsideration petition was therefore untimely.

After receiving the Board's rejection letter, petitioners again accessed the Board's "Clean Water Act Section 401 – Certification and Wetlands Program" webpage and observed that the Board had made telling changes thereto. As of January 9, 2011, the Board had changed the "Date Issued" column heading to "Date Signed," crossed out the "11/18/10" issuance date and inserted "11/09/10 (corrected)" as the newly alleged signature date. But the Board cannot rewrite history.

The Board's backdating of its Certification was not the end of its misconduct. On March 28, 2011, the Board's Assistant Chief Counsel, Philip G. Wyels, added yet another misstatement to the Board's repeated attempts to rewrite history. In his letter to petitioners' counsel, Mr. Wyels claimed that "[w]hen I wrote my rejection letter, I believed that the State Water Board had sent notice of the certification action to all interested parties within three days of the certification action, as required by California Code of Regulations, title 23, section 3859, subdivision (a)." This statement is not credible. The Board's notice of its Certification action has a service list. Neither petitioners nor their counsel appear on that service list. Therefore Mr. Wyels could not have "believed" that the State Water Board had sent notice of its certification action to petitioners. His contrary claim defies credulity.

What did happen here is that the Board backdated the claimed date of issuance of its Section 401 Certification for the Project, apparently to avoid petitioners' timely Petition for Reconsideration. After petitioners documented the Board's backdating subterfuge, Mr. Wyels attempted to save face by claiming that when he rejected petitioners' Petition for Reconsideration, he had "believed" that petitioners had been served with the Board's notice of its certification decision. But Mr. Wyels would have had no basis for such a "belief," since neither petitioners nor their counsel was included in the service list for that notice.

The Board then sat on petitioners' Petition for Reconsideration for over eight months – from its filing on December 20, 2010 until the Board's September 1, 2011 Order. The Board sat on this Petition not because it was preparing a detailed elucidation of its response to the Petition's detailed factual and legal objections to the Board's Certification. No such detailed analysis was ever prepared. To the contrary, the Board's 5-paragraph Order never addresses any of the substantive factual and legal issues raised in petitioners' Petition for Reconsideration. Instead, it only briefly recites the history of the Project and then summarily declines to consider any of petitioners' substantive factual and legal objections to the Certification. In short, the Board's Order makes a mockery of the entire reconsideration process, allowing the underlying

Project to commence construction while petitioners patiently awaited the Board's decision on their Petition for Reconsideration.

In short, the Board's conduct throughout has been nothing less than a travesty of due process.

III. PETITIONERS' PETITION FOR RECONSIDERATION RAISES SUBSTANTIAL ISSUES APPROPRIATE FOR THE BOARD'S REVIEW

The California Environmental Quality Act ("CEQA") is a foundational statute, compliance with which is essential for "protect[ing] not only the environment but also informed self-government." *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. It is for this very reason that title 23, section 3856(f) of the California Code of Regulations requires that the "agency [making a water quality certification] shall be provided with and have ample time to properly review a final copy of *valid* CEQA documentation before taking a certification action" (emphasis added). Here, petitioners demonstrated in their Petition for Reconsideration that the Board was not provided with a *valid* CEQA document because the Project was substantially and repeatedly modified after its EIR was prepared. The lack of a valid CEQA document is a substantial issue warranting the Board's review.

The importance of the Board's proper CEQA review is underscored by the significant environmental impacts that the Project will have. As the Board's own CEQA Findings for the Sunrise Powerlink Project, Attachment D to the Certification, admit, the Project would have numerous substantial, permanent impacts on water resources:

> The Sunrise Powerlink Project will cause permanent impact to waters of the State by filling one wetland area, building numerous access roads which cross streams, and by constructing numerous tower pads in or immediately adjacent to streams. The Project will also cause temporary impacts to waters of the State by the installation of numerous temporary construction areas, temporary fly yards, and temporary access road crossings of streams. Potential temporary impacts from construction activities, such as spills and leaks, could also occur.

The Project's significant environmental degradation, the EIR's notable errors and omissions, and the Board's consequent failure to adequately address and mitigate the Project's impacts, present substantial issues appropriate for the Board's review.

IV. CONCLUSION

The Board's proposed denial of petitioners' Petition for Reconsideration fails altogether to address *any* of petitioners' factual and legal objections to the Project. Petitioners' Petition for Reconsideration *does* raise substantial issues appropriate for review and the Board should fully reconsider its Certification decision.

Respectfully submitted,

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cc: *VIA U.S. MAIL*

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