FOIA-2009-000329
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PROTECT OUR COMMUNITIES FOUNDATION

VIA FACSIMILE AND CERTIFIED MAIL

May 11, 2009

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U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
(FAX) (202) 586-0575

FREEDOM OF INFORMATION ACT REQUEST

Formed in 2006 and incorporated as a non-profit organization in 2009, the Protect Our Communities Foundation (POC) is dedicated to the promotion of a safe, reliable, economical, renewable, and environmentally responsible energy future for San Diego County. POC was initially focused on organizing property owners and communities into an effective and unified opposition to the Sunrise Powerlink transmission line project. Since then POC has continued this role and has coalesced into a positive and effective regional voice for smart energy – local generation and distribution of renewable and clean energy.

The purpose of this FOIA request is to determine the extent and content of communications between the Department of Energy, San Diego Gas and Electric, Sempra Energy, and other government agencies since December 2008 regarding construction of the Sunrise Powerlink across the Cleveland National Forest in San Diego County and the extent of supplemental environmental review. Consistent with the POC mission and consistent with the Freedom of Information Act (FOIA), 5 U.S.C. § 552, I respectfully request the following information on behalf of POC:

- Documentation of any communications between San Diego Gas and Electric and any office of the Department of Energy regarding the Sunrise Powerlink;
- Documentation of any communications between consultants, lobbyists, or any other agents of SDG&E and any office of the Department of Energy regarding the Sunrise Powerlink;
- Documentation of any communications between Sempra Energy and any office of the Department of Energy regarding the Sunrise Powerlink;

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- Documentation of any communications between consultants, lobbyists, or any other agents of Sempra Energy including but not limited to Latham & Watkins and any office of the Department of Energy regarding the Sunrise Powerlink;

- Documentation of communications between David J. Hayes and any office of the Department of Energy regarding the Sunrise Powerlink;

- Documentation of any communications between the Department of Interior and any office of the Department of Energy regarding the Sunrise Powerlink;

- Documentation of any communications between the USDA Forest Service and any office of the Department of Energy regarding the Sunrise Powerlink;

- Documentation of any communication between any other federal government official and any office of the Department of Energy regarding the Sunrise Powerlink;

- Documentation of any Department of Energy internal communications regarding supplemental environmental analysis to the Sunrise Powerlink environmental impact statement.

The term "documentation of communications" means any letters, email messages, faxes, meeting notes, meeting agendas, phone call notes, or any other written documents recording the subject matter or conclusions of communications.

REQUEST FOR FEE WAIVER

The Protect Our Communities Foundation requests that you waive all fees in connection with this matter. As shown below, POC meets the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the Department of Energy's fee waiver regulations. In particular, POC has demonstrated that the disclosure of this information will significantly contribute to public understanding of the operations or activities of the government.

In considering whether POC meets the fee-waiver criteria, it is imperative that the Department of Energy remember that FOIA carries a presumption of disclosure and that the fee-waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as POC access to government documents without the payment of fees. As stated by one Senator, "[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . ." 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute "is to be liberally construed in favor of waivers for noncommercial requesters." McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has also explicitly pointed out that the amendment's main purpose was "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny

waivers or reductions of fees under the FOIA." Id. Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by "watchdog" organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the District of Columbia Circuit Court has stated, this waiver provision was added to FOIA "*in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests*," in clear reference to requests from journalists, scholars, and, most importantly for our purposes, non-profit public interest groups. Better Gov't Ass'n v. Department of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting Ettlinger v. FBI, 596 F. Supp. 867, 876 (D. Mass. 1984) (emphasis added).

I. The subject of the requested records concerns "the operations or activities of the government"

The subject matter of this request relates to the effects the proposed Sunrise Powerlink transmission line on natural resources and public safety. The powerlink is a clear and identifiable activity of the government, in this case the executive branch agencies U.S. Department of Interior Bureau of Land Management and the U.S. Department of Agriculture Forest Service. See Judicial Watch, 326 F.3d at 1313 ("'[R]easonable specificity' is 'all that FOIA requires' with regard to this factor.") (internal quotations omitted).

II. The disclosure is "likely to contribute" to an understanding of government operations or activities (the informative value of the information to be disclosed)

The information requested will help provide POC with insight into the status of a decision on the powerlink by Bureau of Land Management and Forest Service officials with input by the Department of Energy. These documents are not currently in the public domain. Their release is not only "likely to contribute," but is in fact certain to contribute to better public understanding of government decision making for this project. The information requested will likely contribute to an understanding of whether or not the Forest Service is fulfilling its obligations. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted. See Judicial Watch, 326 F.3d at 1314 ("[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.").

III. The disclosure of the requested information will contribute to "public understanding"

In McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286, the court made clear that "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations...." In this instance, all the requested documents potentially provide new information about the status of a Forest Service

decision on the powerlink with input by the Department of Energy in relation to natural resources and public safety. Moreover, the information will provide important oversight of Forest Service and Department of Energy activities that is otherwise unavailable to the public, namely, the extent to which the Forest Service is appropriately implementing environmental laws and regulations and planning supplemental environmental review with respect to the powerlink with input by the Department of Energy. See Western Watersheds Project v. Brown, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding."); see also Community Legal Services v. HUD, 405 F.Supp.2d 553 (D. Pa. 2005) ("Thus, as in Forest Guardians, the CLS request would likely shed light on information that is new to the interested public."); see also Institute for Wildlife Protection v. U.S. Fish and Wildlife Service, 290 F.Supp.2d 1226, 1230 (D. Or. 2003), (finding that the FOIA request was informative of government operations because "there is substantial public interest in agency activities relating to endangered species.")

IV. The disclosure is likely to contribute significantly to public understanding of government operations or activities

Public oversight and enhanced understanding of Forest Service and Department of Energy activities considering authorization of the Sunrise Powerlink is absolutely necessary. POC's track record of active participation in oversight of governmental agency activities and POC's consistent contribution to the public's understanding of agency activities are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994)(emphasis added).

The documents requested in this FOIA request will be used to determine whether and how the Forest Service is complying with and implementing its obligations with regard to the Sunrise Powerlink and environmental laws with input from the Department of Energy. Concurrent with any action which POC may take after obtaining the requested documents, POC will publicize the reasons for the action and the underlying actions of the Forest Service or Department of Energy that have prompted the action. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of Forest Service and Department of Energy activities. POC has enforced or publicized agency compliance with the provisions of various environmental laws many times through information gained from government agencies. POC intends to use the documents requested in this request in a similar manner. In addition, the informational publications of POC and affiliated organizations Backcountry Against Dumps and East County Community Action Coalition supply information not only to our membership, but also to the memberships of many other local and regional conservation organizations. Our informational publications continue to contribute

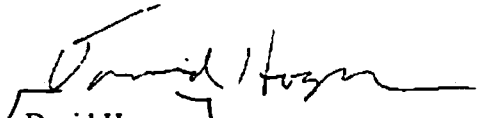
information to public media outlets, as well. For example, information such as that presently requested is often disseminated through our e-mail Updates and our web page. POC affiliate East County Community Action Coalition publishes a regular newsletter where it also disseminates important information to concerned citizens. POC representatives also routinely speak with the news media and make public presentations on issues concerning the powerlink and other regional energy issues. Information concerning the relationship of a Forest Service decision on the Sunrise Powerlink with input from the Department of Energy to natural resources and public safety will likely be disseminated through all of these means. See Forest Guardians v. DOI, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

V. Obtaining the information is of no commercial interest to POC

Access to government documents and similar materials through FOIA requests is essential to POC's role of educating its members, affiliated groups, and the general public. As a non-profit organization, POC has no commercial interest and will realize no commercial benefit from the release of the requested information.

I hope that this letter has demonstrated to your satisfaction that POC qualifies for a full fee-waiver, and that you will immediately begin to search, copy, and deliver the requested material. Please send all materials to the address below. Please call me at 760 809-9244 if you have any further questions about this request.

Sincerely,



David Hogan
Consultant to the Protect Our Communities Foundation

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