UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PROTECT OUR COMMUNITIES FOUNDATION, *et al.*,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Defendants.

CASE NO. 11-CV-00093 BEN (BGS)

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[Docket No. 16]

Presently before the Court is Plaintiffs' Motion for Preliminary Injunction. (Docket No. 16.) For the reasons stated below, Plaintiffs' Motion for Preliminary Injunction is **DENIED**.

BACKGROUND

This case arises from the "Sunrise Powerlink Project," a 117-mile transmission line projected to run Northwest from Imperial County to San Diego County, in California. On January 20, 2009, the Bureau of Land Management ("BLM") approved Sunrise Powerlink in a Record of Decision ("ROD") after circulating a draft environmental impact statement ("DEIS"), a supplemental draft environmental impact statement ("SDEIS"), and final environmental impact statement ("EIS"). On July 9, 2010, the U.S. Forest Service ("USFS") approved Sunrise Powerlink's route through the Cleveland National Forest in a separate ROD. As a cooperating agency, USFS adopted the EIS prepared by BLM without recirculating it. The transmission line, which is supported by massive towers, except for an

underground segment in Alpine, runs along the Final Environmentally-Superior Southern Route ("FESSR"). Plaintiffs The Protect Our Communities Foundation, Backcountry Against Dumps, East County Community Action Coalition, and Donna Tisdale seek to preserve the serene rural community in East San Diego County. SDG&E intervened on the grounds that it is building the $1.9 billion transmission line.

Plaintiffs have previously challenged decisions issued by BLM and the Fish and Wildlife Service ("FWS") in the related action, *Backcountry Against Dumps v. Abbott*, Case No. 10-CV-1222 BEN (BGS). In that action, Plaintiffs contended that the defendants violated several federal statutes, including the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-70; Federal Land Policy Management Act, 43 U.S.C. §§ 1701-87; Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44; and National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq*. Plaintiffs challenged several stages of the environmental review process by BLM and FWS. On June 30, 2011, the Court granted the defendants' motion for summary judgment, and denied both Plaintiffs' and SDG&E's motions for summary judgment as moot. The Court also denied Plaintiffs' motion for preliminary injunction as moot. Plaintiffs appealed (1) the order denying Plaintiffs' motion for a preliminary injunction as moot, and (2) the order granting the defendants' motion for summary judgment and denying Plaintiffs' motion for summary judgment. On August 12, 2011, the Court denied Plaintiffs' Motion for Injunction Pending Appeal. On August 20, 2011, the Ninth Circuit denied Plaintiffs' Emergency Motion for Injunctive Relief Pending Appeal.

On January 14, 2011, Plaintiffs filed the present action. Plaintiffs now challenge USFS' approval of Sunrise Powerlink's route through the Cleveland National Forest. The Complaint asserts six claims: (1) the Forest Service violated NEPA by approving Sunrise Powerlink and the related Forest Plan amendments based on an inadequate EIS; (2) BLM and the Forest Service violated NEPA by failing to prepare a SEIS to address substantial post-EIS project changes, new information, and new circumstances; (3) the Forest Service's approval process for Sunrise Powerlink violated the National Forest Management Act ("NFMA"); (4) the Forest Service's approval of Sunrise Powerlink violated the Forest Plan and thus NFMA; (5) the Forest Service's approval of Sunrise Powerlink violated the Federal Land Policy Management Act ("FLPMA"); and (6) FWS violated the ESA by failing to

reinitiate Section 7 consultation.

Presently before the Court is Plaintiffs' Motion for Preliminary Injunction. In conjunction with this Motion, Plaintiffs filed an Ex Parte Motion to Shorten Time for Briefing and Hearing of Plaintiffs' Motion for Preliminary Injunction ("Ex Parte Motion"), requesting that an order be issued before September 16, 2011. (Docket No. 17.) In the Ex Parte Motion, Plaintiffs requested that the Court "direct[] that plaintiffs' motion be decided on the papers without a hearing," *i.e.*, that the hearing be cancelled. (Docket No. 17, at 1.) The Court granted the Ex Parte Motion in part, scheduling a hearing for September 12, 2011. The Court then vacated the hearing pursuant to Local Civil Rule 7.1.d because (1) Plaintiffs extensively briefed the issues, and (2) Plaintiffs The Protect Our Communities Foundation, Backcountry Against Dumps, East County Community Action Coalition, and Donna Tisdale requested that the hearing be vacated.

DISCUSSION

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, *and* that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added).

An injunction is "not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 129 S. Ct. 1749, 1760 (2009) (internal quotation marks omitted). Instead, an injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 21. The determination whether to grant an injunction is "an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken*, 129 S. Ct. at 1760 (internal quotation marks omitted). Furthermore, there is no presumption that an injunction should issue, even in environmental cases. *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc) ("Our law does not . . . allow us to abandon a balance of harms analysis just because a potential environmental injury is at issue."), *overruled in part on other grounds by Winter*, 555 U.S. at 20, *as recognized by Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009); *id.* ("[W]e decline to adopt a rule that *any* potential environmental injury *automatically* merits an injunction, particularly where . . . the plaintiffs

are not likely to succeed on the merits of their claims.").

I. LIKELIHOOD OF SUCCESS ON THE MERITS

A. USFS' Adoption of the EIS

As a cooperating agency, USFS was allowed to adopt the EIS prepared by BLM without recirculating it for comment if, "after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied." 40 C.F.R. § 1506.3(c). A cooperating agency, however, may adopt an EIS only if it "meets the standards for an adequate statement under these regulations." 40 C.F.R. § 1506.3(a). Plaintiffs argue that USFS has violated NEPA by "adopt[ing] the Powerlink EIS despite the fact that it is riddled with errors and omissions." (Pl. Mot. at 2.) Specifically, Plaintiffs argue that (1) the EIS fails to clearly describe and analyze the selected route of Sunrise Powerlink, (2) the EIS fails to consider a renewable energy transmission requirement alternative, (3) the EIS fails to adequately address growth inducing impacts, (4) the EIS' analysis of environmental impacts is inadequate, (5) the EIS fails to establish the need for additional capacity, and (6) USFS and BLM failed to prepare a SEIS to address substantial post-EIS project changes, new information, and new circumstances.

1. Description and Analysis of the Selected Route

"[A]n EIS must be organized and written so as to be readily understandable by governmental decisionmakers and by interested non-professional laypersons likely to be affected by actions taken under the EIS." *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 494 (9th Cir. 1987). On the other hand, "[i]t is not for this court to tell the Forest Service what *specific* evidence to include, nor how *specifically* to present it." *League of Wilderness Defenders-Blue Mountain Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008). It is also permissible to revise a route in response to comments. 40 C.F.R. § 1503.4(a) (stating that a possible response to comments is to "[m]odify alternatives including the proposed action"). Plaintiffs argue that the EIS is misleading because it describes and analyzes a route different from the one that was approved, it does not describe and analyze the selected route in its entirety, and the lack of information in the DEIS and SDEIS stymied public participation in the issuance of the final EIS.

The DEIS presented Sunrise Powerlink's route through the Cleveland National Forest. (Frueh

Decl., Exh. 17 [DEIS] § C.4.8.4, at C-61 (Modified Route D Alternative ("MRDA") through Cleveland National Forest, as proposed by USFS on April 6, 2007); Volker Decl., Exh. 2 [USFS ROD], at 9.) Moreover, the SDEIS again presented and analyzed Sunrise Powerlink's route, with a 45-day public comment period. (AR:A:1237:48921-22, 49177-99 (proposed reroutes for MRDA, BCD Alternative, and BCD South Option).[1]) The public commented on the proposed northern route, as well as the alternatives analyzed in the DEIS, including the southern routes. (*See, e.g.*, AR:A:1056:SPL38243 (comment noting impact of FESSR alternatives); SPL41613 (comments on southern route).) In addition, the EIS fully and consistently described the FESSR both textually and graphically. (AR:A:1057:SPL42076 (Fig. ES-4), SPL42089 (Fig. ES-17); AR:A:1052:42163-71 (describing FESSR segments), 42171 (FESSR alternative route segments, referencing Fig. ES-4), 45796-97 (describing FESSR segments), 42107-08 (modifications to FESSR since DEIS publication); AR:A:1054:SPL24841-995 (maps with alternative routings).)[2] The EIS also contains detailed analysis of each FESSR segment, and summarizes potential impacts. (AR:A:1052:45886-6339 (analysis of I-8 Alternative), 46340-478 (same for BCD Alternative), 46597-806 (same for MRDA), 42107-08 (identifying impacts), 42177-81, 45803-04 (tables), 45679-841 (alternatives comparison).) The route revisions to the FESSR implemented mitigation measures in the ROD and reduced impacts along the FESSR. (*See, e.g.*, AR:A:722 (BLM ROD listing mitigation measures); AR:A:263 (Final Mitigation Monitoring, Compliance, and Reporting Program).)

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[1] Plaintiffs request that the Court take judicial notice of the Administrative Record lodged by the parties in the related case, *Backcountry Against Dumps v. Abbott*, Case No. 10-CV-1222 BEN (BGS). (Docket No. 17.) This request is **GRANTED**. *See* FED. R. EVID. 201(b); *Interstate Natural Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) ("[The Court] may take judicial notice of records and reports of administrative bodies.").

In addition, SDG&E requests that the Court take judicial notice of the USFS' ROD, Designation of Section 368 Energy Corridors on National Forest System Land in 10 Western States (Jan. 14, 2009), available at http://corridoreis.anl.gov/documents/docs/WWEC_FS_ROD.pdf. (SDG&E Opp. at 24 n.34.) This request is **GRANTED**. *See* FED. R. EVID. 201(b).

[2] Plaintiffs argue that the EIS states that a section containing a description of the selected route exists, but points the reader to a non-existent section, ES.2.4. This is a typographical error—the correct citation is ES.2.1.4, on page ES-5 of the EIS. (AR:A:1052:42107.)

2. Renewable Energy Transmission Requirement Alternative

An EIS must "[r]igorously explore and objectively evaluate all *reasonable* alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a) (emphasis added); *see also Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1180 (9th Cir. 1990) (explaining that an agency need not consider alternatives that are "infeasible" or "ineffective"). Plaintiffs argue that the EIS fails to analyze the viable alternative of requiring Sunrise Powerlink to convey a minimum percentage of renewable energy, as well as dismisses as infeasible both the In-Area Renewable Alternative and undergrounding of the transmission line.

The EIS analyzed almost 100 alternatives, and rejected Plaintiffs' alternative as speculative and impractical. (AR:A:1056:SPL41794 (BLM Response); AR:A:1052:42400 ("There is no guarantee that the renewable projects now expected to generate power carried by Sunrise will be successfully developed."); 44585-87 (expressing uncertainty).) Moreover, the California Public Utilities Commission ("CPUC") confirmed that it "cannot impose a 33% renewable requirement" on Sunrise Powerlink because regulatory constraints make the condition unworkable. (AR:A:406:31801, 31808 ("[I]t is uncertain what renewables will be available in the Sunrise area and, therefore, to what extent SDG&E will be able to carry renewables on the Sunrise line.").) In addition, the EIS considered the In-Area Renewable Alternative, and found that it did not meet Sunrise Powerlink's goal to reduce congestion and power supply costs and would have significant impacts. (AR:A:1052:46807-7065 (discussing alternative), 42138, 42600; AR:A:722:38465-66 (rejecting same).) Lastly, the FESSR route undergrounds some of the transmission line in Alpine. (AR:A:1057:SPL42076; AR:A:1052:42107-08 (explaining FESSR route).) The EIS also reviewed the impacts of undergrounding Sunrise Powerlink through the Cleveland National Forest, and determined that an All Underground 230 kV or 500 kV Alternative was technically infeasible. (*See, e.g.*, AR:A:1052:42138, 42618-22, 42624-27, 42630-34, 45889; AR:A:1052:45765 (underground route through Cleveland National Forest would "create[] the greatest associated ground disturbance impacts" and greater temporary and permanent impacts to vegetation communities); AR:A:1052:42674, 42676-78, 42683-84, 42688-92, 42716 (rejecting the All Underground 230 kV or 500 kV Alternative as technically

infeasible); AR:A:1056:SPL41602-06 (response to undergrounding proposal by California Botanical Habitat).)

3. Analysis of Growth Inducing Impacts

An EIS must analyze "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate." 40 C.F.R. § 1508.8(b). Plaintiffs argue that the EIS failed to adequately analyze growth inducing impacts. In fact, the EIS analyzed Sunrise Powerlink's potential for "growth inducing effects," and found that Sunrise Powerlink and the "five connected actions/indirect effects" would "not induce growth." (AR:A:1052:45500-03.) Projects relating to the development of renewable energy resources are evaluated as connected actions, indirect effects, or cumulative projects, and were analyzed as such in the EIS. (*See, e.g.*, AR:A:1052:42115-16 (analyzing a solar facility, a geothermal project, and a 1,250 MW wind project in Mexico); AR:A:1056:SPL38384-85 (Crestwood wind project), SPL38392 (Iberdrola (a.k.a. Tule) wind project).) Requiring the EIS to "replicate its entire analysis under the heading" of growth inducing impacts would "impermissibly elevate form over substance." *Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, __ F.3d __, No. 10-35646, 2011 WL 3629907, at *7 (9th Cir. Aug. 19, 2011).

4. Analysis of Environmental Impacts

"The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. Plaintiffs argue that the EIS contained an inadequate analysis of biological and cultural resources, risk of wildfires, and climate change.

First, the EIS provides baseline biological studies, special status plant surveys, and FWS protocol surveys for the project alternatives. (AR:A:1052:42743-53, 42748-50 (table detailing wildlife surveys).) The EIS contains surveys of the endangered, threatened, and sensitive species that would be impacted by Sunrise Powerlink along the chosen southern route. (*See, e.g.*, AR:A:1052:42752-53 (Quino checkerspot butterfly surveys located in southern route); AR:A:1054:SPL26044 (2008 Quino checkerspot butterfly surveys); AR:A:1052:45928-29 (arroyo toad surveys along FESSR), 45920-02 (sightings of Peninsular bighorn sheep and flat-tailed horned lizard), 46618-23 (surveys for the coastal California gnatcatcher, southwestern willow flycatcher, and least Bell's vireo conducted along the

FESSR); 45930-31, 46359-60 (assuming that the barefoot banded gecko was present because surveys would likely be negative due to its elusive nature).) Moreover, contrary to Plaintiffs' claims, "all structure pads, roads and other impact features were plotted on . . . maps" to determine "anticipated impacts." (AR:A:1052:42432.) In addition, the fact that additional biological surveys were completed after the EIS was issued in order to comply with required mitigation measures is permissible. *Wilderness Soc'y v. Salazar*, 603 F. Supp. 2d 52, 62 (D.D.C. 2009) ("That defendants may continue to assess impacts as more information becomes available does not indicate that defendants failed to take a 'hard look' at the environmental consequences of its proposed action in the EIS."); *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1220-21 (11th Cir. 2002) (compliance with mitigation measures is not a NEPA violation); AR:A:232:18765 (summarizing impact reductions).

Second, the EIS thoroughly analyzes cultural resource impacts. (*See, e.g.*, AR:A:1052:46129-66, 46411-20, 46696-714 (analysis of southern route).) Requiring preconstruction surveys under the programmatic agreement is proper under legal phased identification of historic resources. 36 C.F.R. § 800.4(b)(2); AR:A:700 (programmatic agreement). In addition, Sunrise Powerlink will not impact any of the thirty-three cultural resource sites on the Cleveland National Forest lands that Plaintiffs identify. (Frueh Decl., Exh. 8 [Supplemental Information Report], at 12 (SDG&E's Project Modification Report refinements create "no potential for effects to historic properties associated with the implementation of ground disturbing construction" within the Cleveland National Forest).)

Third, the EIS adequately analyzes fire risk on a site-specific basis. The EIS analyzes topography, slope, vegetation, precipitation, and proximity to fire suppression as key factors when it analyzes fire risk for each of the route's thirteen firesheds. (*See, e.g.*, AR:A:1052:46302-19, 46466-78, 46790-96 (describing each key factor for firesheds along the FESSR).) The EIS identifies five areas by milepost markers where wildfire containment would be restricted to "a very high degree." (AR:A:1052:46327, 46803.) Each FESSR fireshed is analyzed both textually and graphically, including impacted areas such as firefighting. (AR:A:1052:46302-18, 45804 (table summarizing fire related impacts).) In addition, the EIS analyzes cumulative fire impacts from "[n]umerous construction activities," including new energy generation facilities. (*See, e.g.*, AR:A:1052: 45659-69 (cumulative fire risks); AR:A:1056:SPL38385-86 (wind turbine fire risk analysis); AR:A:1052:42409-

13 (comparison of alternatives' fire risks).)

Fourth, potential climate change impacts are adequately reviewed. (*See, e.g.*, AR:A:1052:44587-90, 46225, 46443, 46748.) The EIS explains that it was not possible to predict with certainty future emissions from renewables (AR:A:1052:44584-87), and NEPA does not require agencies to guess, *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1192 n.1 (9th Cir. 1989) (finding that "speculative information" was properly omitted from the EIS). Even so, the EIS quantifies emissions of carbon dioxide, basing its findings on U.S. EPA, SDG&E, and California Independent System Operator ("CAISO") forecasts and modeling. (AR:A:1052:42399-403, 44582-90.) The EIS also analyzes climate change impacts of the alternatives and compared these impacts to FESSR impacts. (AR:A:1052:46995 (New In-Area Renewable Generation Alternative would reduce fossil fuel-fired plant emissions), 47216 (quantifying net increase of GHG emissions for New In-Area All-Source Generation Alternative), 47406 (analyzing GHG emissions for LEAPS Transmission Only Alternative), 47513-14 (quantifying annual GHG emissions for LEAPS alternative), 45812 (comparing air quality impacts for project and alternatives, ranking each).)

Fifth, the EIS adequately analyzes visual resource impacts. The EIS analyzes visual impacts along the entire FESSR, and includes 25 visual simulations. (AR:A:1057:SPL42409-38, 42501-06, 42555-61 (visual simulations).) In addition, the EIS discusses the visual impact of the red marker balls that will be placed on the lines. (AR:A:1057:42425, AR:A:1052:42513.) The EIS also analyzes impacts from construction, increased structure contrast, view blockage, and land disturbance. (AR:A:1052:46011-63, 46376-91, 46639-63.) Furthermore, the EIS addresses cumulative impacts on visual resources, including all reasonably foreseeable cumulative impacts and impacts of renewable energy facilities. (*See, e.g.*, AR:A:1052:45628-31 (analyzing reasonably foreseeable project impacts), 45666 (citing Tule wind project as "within close enough proximity to [FESSR] to be affected by it"), 45592 (La Rumorosa Wind Area a cumulative project), 45530-31 (projects with tall, highly visible vertical elements have cumulative impacts to visual resources); AR:A:1056:SPL38392-93 (Crestwood Wind Project a cumulative project).)

5. Purpose and Need Statement

The purpose and need statement of an EIS "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. Plaintiffs argue that the EIS' purpose and need statement fails to establish the need for additional capacity.

The EIS briefly specifies the underlying purpose and need to which the agency is responding. (AR:A:1052:42441-43.) In addition, California's expert agencies concluded that a need existed for Sunrise Powerlink (AR:A:568:35834 ¶ 6 (discussing CAISO deficit estimates), 35834 ¶ 7 (discussing CPUC findings); AR:A:1056:SPL38122 (CAISO determination of need for additional infrastructure to meet long-term reliability needs in San Diego area)), and these conclusions are entitled to deference, *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.").

6. Preparation of a SEIS

NEPA requires agencies to prepare a SEIS when "(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). In regards to the first prong, a "substantial change" is one that "presents a seriously different picture of the environmental impact of the agency's actions." *In re Operation of Mo. River Sys. Litig. v. U.S. Army Corps of Eng'rs*, 516 F.3d 688, 693 (8th Cir. 2008) (internal quotation marks omitted). Project modifications that "unquestionably mitigate adverse environmental effects of the project . . . generally do not require a supplemental EIS." *Twp. of Springfield v. Lewis*, 702 F.2d 426, 436 (3d Cir. 1983) (internal quotation marks omitted); *Sierra Club*, 295 F.3d at 1221 (holding that "[g]iven the mitigation and the beneficial alterations to the project, the Corps did not act arbitrarily and capriciously in determining that a supplemental environmental impact statement was not required"). In regards to the second prong, a SEIS is also not required where circumstances or information pertain to impacts already reviewed in an EIS. *Headwaters*, 914 F.2d at 1180. Plaintiffs argue that USFS and BLM both had a duty to complete a SEIS for Sunrise

Powerlink.

After reviewing the Project Modification Report ("PMR"), USFS concluded that "the changes in the selected alternative that are relevant to environmental concerns are not substantial, and there are no significant new circumstances or information relevant to environmental concerns and bearing the on [sic] selected alternative or its impacts." (Volker Decl., Exh. 2 [USFS ROD], at 2.) This Court agrees.

First, Plaintiffs argue that new information was revealed in regards to the Project's cultural resources impacts. Specifically, Plaintiffs argue that the PMR, conducted after the EIS was issued, revealed previously undisclosed impacts to 33 cultural resource sites on Cleveland National Forest lands. As discussed above, however, none of these sites are impacted by Sunrise Powerlink.

Second, Plaintiffs argue that the PMR modifies Sunrise Powerlink's location through the Cleveland National Forest, which will result in additional impacts to the environment and higher fire risk. The modified route moving Sunrise Powerlink 4,650 feet to the South, however, was analyzed in the EIS. (AR:A:722:38518 (mitigation measure WR-2a requiring reroute); AR:A:1057:SPL42495; AR:A:232:18765.) This modified route was chosen in order to "avoid Back Country Non-Motorized land use zones of the Cleveland National Forest, while also minimizing towers and disturbance on private property." (AR:A:722:385518.) In addition, the route's deviations from the West-Wide Energy Corridor that Plaintiffs identify were (1) intended to avoid environmental impacts (*see e.g.*, AR:A:232:18958), (2) requested by USFS (*see, e.g.*, *id.* at 18958), and/or (3) identified and analyzed in the DEIS and EIS (*see, e.g.*, AR:A:1057:SPL42496). In addition, the modifications to Sunrise Powerlink's route result in an overall decrease in impacts. (AR:A:232:18764; 18772.) As originally approved, Sunrise Powerlink would have consisted of 481 structures along 119 miles; as modified, the Project will consist of 443 structures along 117 miles. (AR:A:232:18765.) Moreover, the modifications in the PMR will result in fewer new access roads, fewer construction yards, and a 46% decrease in permanent and temporary ground disturbance. (AR:A:232:18764.)

In addition, although Plaintiffs argue that the route modifications create new locations of higher fire risk, Plaintiffs in fact present an analysis of the same risks analyzed in the EIS using a different model. (Volker Decl., Exh. 3 [Supplemental Information Report], at 16; *id.*, Exh. 11 [PMR Mem.],

at 1:28-29; AR:A:1052:42408-09.) The EIS contains an extensive analysis of Sunrise Powerlink's potential impacts on fires and imposed multiple mitigation measures to reduce fire risks. (*See, e.g.*, AR:A:1052:46302-28, 46466-78; AR:A:722:38541-45.)

Third, Plaintiffs argue that the PMR indicates for the first time that SDG&E must install 1,345 red marker balls on the Project's transmission lines, resulting in significant new visual impacts. In fact, the EIS' visual impact analysis provided that marker balls would be placed on the transmission lines at major roadways and canyon crossings in order to ensure public safety. (AR:A:1052:42513; AR:A:1057:SPL42423.) The EIS found that visual impacts would be significant. (*See, e.g.*, AR:A:1052:46378.) The PMR simply identifies where the marker balls will be located. (AR:232:18794-95.) This is not a new impact.

Fourth, Plaintiffs argue that another substantial change to Sunrise Powerlink is the use of infrared lighting on transmission towers, which will significantly impact both night flying birds and bats. The EIS, however, analyzed the impacts of lighting on night flying birds and bats, and concluded that the impacts would be significant. (AR:A:232:18824.) In fact, infrared lighting was chosen to address these impacts. (AR:A:1052:42780-94, 42891-93 (describing impact B-10 and mitigation measure B-10a, requiring tower and line design, diversion devices, and effectiveness monitoring, reporting, and analysis to minimize collision); AR:A:232:18824 (describing implementation of mitigation for impact B-10, including the use of infrared lighting, and explaining that infrared lighting was chosen because it is invisible to birds).)

Fifth, Plaintiffs argue that FWS designated new areas of critical habitat for the arroyo toad along the Project route. The EIS, however, analyzed impacts on the arroyo toad and its occupied habitat. (*See, e.g.*, AR:A:1052:45950, 46634, 46359.) In addition, the EIS found that impacts to the arroyo toad are mitigable to less than significant through implementation of Mitigation Measures B-1a, B-1c, B-2a, and B-7j. (AR:A:1052:45950, 46634, 46359.) Because this finding was not premised on the habitat's designation as occupied, as opposed to critical, the determination that the habitat is critical does not amount to new information requiring a SEIS. *Cf. Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 344 (9th Cir. 1996) (finding that because the Forest Service's previous determination that the proposed project would not likely have a negative impact on salmon "was not premised on the

salmon's non-threatened status, the determination that the salmon were in fact threatened did not constitute new information" requiring the preparation of a SEIS).

B. USFS' Approval of Sunrise Powerlink Under NFMA

NFMA directs that "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. § 1604(I). NFMA encourages "'multiple use' and 'sustained yield of products and services," and USFS "is obligated to balance competing demands on national forests." *Lands Council v. Powell*, 395 F.3d 1019, 1025 n.2 (9th Cir. 2005) (quoting 16 U.S.C. § 1607). "Goal 4.1 [of the Forest Plan] is applicable to the proposed project [Sunrise Powerlink] and provides that energy development should be managed to facilitate energy production while protecting ecosystem health." (Volker Decl., Exh. 2 [USFS ROD], at 10.)

Plaintiffs argue that USFS' approval of Sunrise Powerlink violated the Forest Plan, and thus NFMA, because (1) Sunrise Powerlink conflicts with the Forest Plan's "fire-related standards," (2) Sunrise Powerlink conflicts with the Forest Plan's "species protection standards," and (3) Sunrise Powerlink conflicts with many of the Forest Plan's 21 forest-specific design criteria, such as Standard 5 (which requires the Forest Service to "[c]onsolidate major transportation and utility corridors by co-locating facilities and/or expanding existing corridors"). (Pl. Mot. at 16-18 (quoting Volker Decl., Exh. 12 [Land Management Plan, Part 2], at 68).)

First, in support of their argument that Sunrise Powerlink conflicts with the Forest Plan's "fire-related standards," Plaintiffs cite to Appendix B of Part 2 of the Forest Plan. Appendix B of Part 2 "describes the detailed program strategies that the national forest *may choose* to make progress toward achieving the *desired conditions and goals* discussed in Part 1." (Volker Decl., Exh. 12 [Land Management Plan, Part 2], at 83 (emphasis added); *see id.* at 116 (site specific actions should "*[r]educe* the risk from catastrophic wildland fire").) These "standards" are in fact goals, in that they are aspirational, rather than mandatory, in nature. (Frueh Decl., Exh. 15 [USFS Handbook 1909.12 § 11.4, at 13] ("It should not be expected that each project or activity will contribute to all desired conditions or objectives in every instance, but only to a selected subset."); Volker Decl., Exh. 2 [USFS ROD], at 10 ("Not every goal and desired condition is implemented by or applicable to every site-

specific project.").) Sunrise Powerlink is consistent with these goals, as it includes a Construction Fire Prevention Plan and other mitigation measures in order to reduce the risk of human-caused wildland fires. (Shreve Decl., Exh. 1; Volker Decl., Exh. 4 [USFS Clarifications and Revisions to Mitigation Measures], at 70-71.)

Second, in support of their argument that Sunrise Powerlink conflicts with the Forest Plan's "species protection standards," Plaintiffs again cite to Appendix B of Part 2 of the Forest Plan. (Pl. Mot. at 17 (describing USFS' strategy to "[m]anage habitat to move listed species toward recovery and de-listing" and to protect Golden Eagles during critical life stages (quoting Land Management Plan, Part 2, at 87, 89.) Again, these goals are aspirational, not mandatory. Sunrise Powerlink is consistent with these goals in that it includes mitigation measures to protect listed species, such as the Avian Monitoring and Mitigation Plan, a mitigation measure prohibiting construction during Golden Eagle nesting season, and the Habitat Acquisition Plan. (Colton Decl. ¶¶ 19, 28; *id.* Exhs. 9, 10; Volker Decl., Exh. 4 [USFS Clarifications and Revisions to Mitigation Measures], at 22.)

Third, in regards to co-location with the West-Wide Energy Corridor, the Forest Plan does not mandate strict co-location. (*See* Volker Decl., Exh. 12 [Land Management Plan, Part 2], at 112 (special-use authorization need only "maximize opportunities" to co-locate facilities).) Where Sunrise Powerlink deviates from the West-Wide Energy Corridor, it does so to minimize impacts to the environment, as discussed above. Accordingly, Plaintiffs have not shown that USFS' approval of Sunrise Powerlink likely violated the Forest Plan, and thus NFMA.

C. USFS' Approval of Sunrise Powerlink Under FLPMA

Plaintiffs argue that USFS' approval of Sunrise Powerlink violated FLPMA. First, Plaintiffs argue that USFS should have required undergrounding of selected portions of Sunrise Powerlink and required avoidance of the Cleveland National Forest's resources, such as the Back Country Non-Motorized Land Use Zone. FLPMA requires that approvals of rights-of-way contain terms and conditions that "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. § 1765(a)(ii). Here, USFS adopted extensive mitigation measures, which are outlined in the EIS and BLM ROD, as well as clarifications and revisions to tailor these measures to the needs of the Cleveland National Forest, including potential

impacts to visual resources, wildfire risks, and recreational resources. (*See, e.g.*, Volker Decl., Exh. 2 [USFS ROD], at 3; *Id.*, Exh. 4 [USFS Clarifications and Revisions to Mitigation Measures], at 32-38 (visual resources); *id.* at 70-76 (fire and fuel management).) In addition, USFS issued a Special Use Permit, which was conditioned on plans designed to minimize impacts to the environment, such as a Scenery Conservation Plan, Habitat Restoration and Re-vegetation Plan, Habitat Acquisition and Management Plan, a Conservation Fire Prevention Plan, and a Recreation Facilities Improvement Plan. (Colton Decl., Exhs. 6, 9, 12; Shreve Decl., Exh. 1; Frueh Decl., Exh. 13 [SDG&E's Special Use Permit], at 2, Exh. 14, Attach. B.) These requirements were found to "avoid or minimize environmental harm" from Sunrise Powerlink. (Volker Decl., Exh. 2 [USFS ROD], at 7.)

Second, Plaintiffs argue that USFS should have co-located Sunrise Powerlink with the existing West-Wide Energy Corridor. FLPMA requires "the utilization of rights-of-way in common . . . to the extent practical." 43 U.S.C. § 1763. Sunrise Powerlink is co-located with the West-Wide Energy Corridor for a part of its route through the Cleveland National Forest. Where it is not, it deviates from the West-Wide Energy Corridor in order to avoid or minimize impacts, as discussed above. Accordingly, Plaintiffs have not shown that USFS' approval of Sunrise Powerlink likely violated FLPMA.

Overall, Plaintiffs have not shown that they are likely to succeed on the merits.

II. LIKELIHOOD OF IRREPARABLE HARM

A. Plaintiffs' Delay in Bringing the Motion

Plaintiffs' delay in bringing this Motion weighs against finding that Plaintiffs would suffer irreparable harm if an injunction were not issued. *See Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) ("Equity demands that those who would challenge the legal sufficiency of administrative decisions concerning time sensitive public construction projects do so with haste and dispatch. To require any less could well result in costly disruptions of ongoing public planning and construction. . . . Where such disruptions could easily be avoided by promptly challenging administrative decisions, the denial of preliminary relief lies well within the sound discretion of a trial judge."); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) ("[A] particular period of delay may . . . indicate an absence of the kind of irreparable harm required to

support a preliminary injunction.").

This action was initiated on January 14, 2011, but Plaintiffs waited until August 16, 2011 to file the present Motion. There is evidence that Plaintiffs were notified that construction would begin in the Cleveland National Forest several months ago. For instance, SDG&E's filings with this Court in Case No. 10-CV-1222 informed Plaintiffs that construction would begin by August 2011. (*See, e.g.*, Woldemariam Decl. [Docket No. 147], ¶ 34 (declaration dated April 29, 2011, explaining that "only limited construction is currently expected to occur on U.S. Forest Service land (e.g., existing road improvements and three geotechnical borings) when the Forest Service issues its Notice to Proceed, with the rest of work not currently expected to begin until August 2011").) In addition, on April 8, 2011, counsel for SDG&E told Plaintiffs' counsel that construction would begin in the Cleveland National Forest in mid-August 2011. (Schneider Decl. ¶ 2.) This delay weighs against finding that Plaintiffs would suffer irreparable harm if an injunction were not issued.

B. Harm Caused by Sunrise Powerlink

As a preliminary matter, the parties disagree about whether there is a presumption of irreparable harm in environmental cases. In support of the proposition that irreparable harm is presumed, Plaintiffs cite *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987), *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011), and *McNair*, 537 F.3d at 1004. These cases, however, all confirm that there is no presumption that an injunction should issue, even in environmental cases. *See Amoco Prod.*, 480 U.S. at 545 (explaining that "the balance of harms will usually favor the issuance of an injunction to protect the environment" only when environmental injury is "*sufficiently likely*" (emphasis added)); *Cottrell*, 632 F.3d at 1135 (explaining that although "[t]he Supreme Court has instructed us that environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable," "this does not mean that any potential environmental injury warrants an injunction" (internal quotation marks omitted)); *McNair*, 537 F.3d at 1004 ("[T]he Supreme Court has not established that, as a rule, any potential environmental injury merits an injunction.").

In addition, Plaintiffs argue that "[i]rreparable damage is *presumed* when an agency fails to evaluate thoroughly the environmental impact of a proposed action." (Pl. Mot. at 19 (quoting *Save*

Our Ecosys. v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984)).) The Supreme Court, however, has rejected the presumption that irreparable damage is presumed when an agency fails to thoroughly evaluate the environmental impact of a proposed action as "contrary to traditional equitable principles." *Amoco Prod.*, 480 U.S. at 544–45.

First, Plaintiffs argue that Sunrise Powerlink will significantly impair their ability to view, experience, and utilize Cleveland National Forest lands. Plaintiffs argue that "construction and operation of the Project will directly impact numerous wildlands in the CNF, many of which, like the La Posta Valley, are considered by the Forest Service to be part of an unspoiled corridor with expansive views." (Pl. Mot. at 20 (internal quotation marks and citation omitted).) Specifically, Plaintiffs list the Hauser Mountain Wilderness Study Area, Hauser Canyon, and Pacific Crest Trail as areas that would experience significant visual impacts.

The areas that Plaintiffs claim are "unspoiled," such as the La Posta Valley, already contain manmade structures, such as Southwest Powerlink, Interstate 8 (a four-lane highway), three mining districts, and a right-of-way for wind energy site testing and monitoring. (AR:A:1445:59440, 59442; Woldemariam Decl., Exh. 5.) Sunrise Powerlink would in fact avoid all Wilderness Areas in the Cleveland National Forest. (Woldemariam Decl., Exh. 4 (map showing that Sunrise Powerlink will not cross Hauser or Pine Creek Wilderness Areas).) In addition, Sunrise Powerlink does not cross the Pacific Crest Trail on USFS land. (*Id.* ¶ 32.) Furthermore, USFS has required extensive mitigation[3] to reduce or off-set impacts to visual resources. The Scenery Conservation Plan addresses visual prominence and visual contrast. (Colton Decl. ¶ 36.)

In addition, Plaintiffs argue that Sunrise Powerlink would cause significant noise disturbances along portions of the Pacific Crest Trail and elsewhere in the Cleveland National Forest. Noise impacts, however, will be limited to within 500 feet of the activated transmission line. (AR:A:1052:46422.) Furthermore, noise from construction is temporary. Noise from an energized line is not expected to take place before June 2012, and is therefore not imminent.

Second, Plaintiffs argue that "project construction and operation will directly disturb nearly

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[3] Although it is sometimes true, as Plaintiffs argue, that "[m]itigation only reduces, rather than eliminates, the underlying harm" (Pl. Reply to SDG&E's Opp., at 3), mitigation does affect the total amount of environmental harm caused.

100 acres of pristine wildlands and important wildlife habitat in the CNF." (Pl. Mot. at 22.) Specifically, Plaintiffs argue that within the Cleveland National Forest, Sunrise Powerlink will impact approximately 80 acres of sensitive vegetation communities, 6 acres of occupied Quino checkerspot butterfly habitat, 3.5 acres of suitable arroyo toad habitat, 4 acres of suitable southwestern willow flycatcher habitat, and 1 acre of suitable California gnatcatcher habitat. As a preliminary matter, "suitable habitat" is habitat that USFS identified as being potentially suitable for a species; a particular species is not necessarily present on its suitable habitat. (Colton Decl. ¶ 42.) As for occupied habitat, there is no Quino checkerspot butterfly critical habitat in the Cleveland National Forest that will be impacted by Sunrise Powerlink, and only 3.89 acres of occupied Quino checkerspot butterfly habitat will be impacted. (*Id.* ¶ 40.) Only 0.25 acres of arroyo toad critical habitat in the Cleveland National Forest will be impacted, and of this, 0.18 acres are located on existing roads. (*Id.* ¶ 41.) Only 4.32 acres of suitable southwestern willow flycatcher habitat will be impacted in the Cleveland National Forest, and 3.13 of these acres consist of existing roads. (*Id.* ¶ 44.) There are only 2.05 acres of permanent and temporary impacts to California gnatcatcher suitable and critical habitat on USFS lands. (*Id.* ¶ 44.)

Third, Plaintiffs argue that Sunrise Powerlink will impact USFS-designated riparian conservation areas, and will have extensive erosion impacts on those and other sanative water resources in the Cleveland National Forest. The EIS, however, addresses impacts to water resources, including erosion and sedimentation, and outlines mitigation measures that will reduce such impacts to levels that are less than significant. (AR:A:1052:46753, 46754; Woldemariam Decl. ¶¶ 71–89.) In addition, USFS has adopted a vegetation restoration plan in order to encourage re-vegetation within five years. (Colton Decl. ¶ 19.)

Fourth, Plaintiffs argue that Sunrise Powerlink will increase the risk of wildfire and reduce the effectiveness of firefighting. Sunrise Powerlink does entail wildfire and fire suppression risks. (*See, e.g.*, Volker Decl., Exh. 2 [USFS ROD], at 4.) On the other hand, fire risks assume a strung and energized line, which will not occur until mid-2012. (Shreve Decl. ¶ 18.) These fire risks are therefore not imminent. In addition, there will be extensive fire prevention and mitigation measures during the construction and operation of Sunrise Powerlink. (*Id.* ¶¶ 7–23.) Overall, the Court finds that some environmental harm is likely to result if an injunction is not issued.

III. BALANCE OF EQUITIES AND THE PUBLIC INTEREST

Plaintiffs argue that the balance of equities and the public interest favor granting an injunction because (1) Sunrise Powerlink will cause environmental injury, (2) SDG&E "will not experience a shortfall of transmission capacity if Sunrise [Powerlink] is delayed or never built," (3) "[e]njoining Powerlink would not prevent development of less impactful renewable energy," (4) money would be saved if Sunrise Powerlink were not built, and (5) "it is in the public interest for [sic] enjoin construction of the project until USFS has undertaken a careful consideration of its environmental impacts." (Pl. Mot. at 23–24 (internal quotation marks omitted).)

First, the harm to the environment that Plaintiffs argue will result has been discussed above. Second, in regards to providing electricity, Plaintiffs argue that SDG&E will not experience a shortfall of transmission capacity if Sunrise Powerlink is delayed, Sunrise Powerlink will create a power surplus, and the additional generation from Sunrise Powerlink is not needed until 2020 at the earliest, citing Powers' Declaration, ¶¶ 4–20. Mr. Powers' arguments, however, were rejected by the CPUC. (Strack Decl. ¶¶ 13–18, 25.) The CPUC found that Sunrise Powerlink will be needed to ensure reliable delivery of electricity to the San Diego area "by 2014 and perhaps sooner given the many uncertainties inherent in" its analytical model. (AR:A:789:39550, 39552.)

Third, in regards to the development of renewable energy, "[Sunrise Powerlink] . . . will facilitate the development of renewable resources, thus advancing state policy to reduce GHG emissions." (AR:A:789:39552; *see also* AR:A:789:39274 ("[A]pproval of [Sunrise Powerlink] will help to unlock the potential of one of the richest renewable energy regions in California."); AR:A:722:38464; Strack Decl. ¶¶ 39–44, 46.) Plaintiffs' argument to the contrary was also rejected by the CPUC. (*See* Strack Decl. ¶ 25.) The development of renewable energy is a national energy priority. *See* Energy Policy Act of 2005, Pub. L. 109-58, § 211, 119 Stat. 594, 660 (2005) (requiring 10,000 MW of renewable energy on public land by 2015).

Fourth, in regards to the cost of Sunrise Powerlink, Plaintiffs' argument that money would be saved if Sunrise Powerlink were not built has already been rejected by the CPUC. (*See, e.g.*, Strack Decl. ¶ 45-56 ("[T]he addition of Sunrise would be effective in mitigating the cost-consequences of transmission congestion that would otherwise exist."); *id.* ¶ 57 ("The CPUC determined that building Sunrise is more economical than pursuing an alternative with higher levels of local PV generation (the

All Source Generation alternative).").)

Fifth, in regards to USFS' consideration of environmental impacts, Plaintiffs cite *Cottrell* for the proposition that there is a "public interest in careful consideration of environmental impacts before major federal projects go forward." *Cottrell*, 632 F.3d at 1138 (citing *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009)). In *Cottrell*, however, the Forest Service concluded that the project at issue would not have a significant effect on the quality of the human environment and that an EIS was not required. *Id.* at 1130. Such is not the case here.

The completion of Sunrise Powerlink has additional benefits. "[Sunrise Powerlink] will generate over $115 million per year in net benefits" to consumers in the form of reduced energy costs. (AR:A:789:39552; AR:A:568:35836, 35837; AR:A:1052:42443.) Furthermore, additional delay would increase the costs of constructing Sunrise Powerlink by $16 to $22 million per month. (Woldemariam Decl. ¶ 93.) In addition, SDG&E has employed over 700 people to construct Sunrise Powerlink, and enjoining construction could cause hundreds of layoffs. (*Id.* ¶¶ 91, 95.) Maintaining jobs is in the public interest. *See McNair*, 537 F.3d at 1005.

Plaintiffs argue that the Court should not consider economic harm when deciding whether injunctive relief is appropriate, citing *The Wilderness Society v. Tyrrel*, 701 F. Supp. 1473 (E.D. Cal. 1988), *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152 (9th Cir. 1988), and *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975). These cases instruct agencies to not consider a party's preexisting investments when approving an EIS; they do not instruct courts to not consider economic harm when determining whether to issue an injunction. *See Hodel*, 851 F.2d at 1157; *Morton*, 527 F.2d at 798; *Tyrrel*, 701 F. Supp. at 1490-91. On the contrary, courts may consider economic harm when determining whether to grant injunctive relief. *See, e.g.*, *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) ("Economic harm may indeed be a factor in considering the balance of equitable interests."); *McNair*, 537 F.3d at 1005 (balance of harms did not tip in environmental organization's favor where a Forest Service project would "further the public's interest in aiding the struggling local economy and preventing job loss"). Overall, Plaintiffs have not shown that the balance of equities and public interest favor granting an injunction.

IV. OVERALL BALANCE OF HARMS ANALYSIS

The Court finds that some environmental harm is likely to result if an injunction is not issued. The Court also finds, however, that Plaintiffs have not shown that they are likely to succeed on the merits or that the balance of equities and the public interest favor granting an injunction. In addition, Plaintiffs' delay in bringing this Motion weighs against granting a preliminary injunction. Accordingly, the overall balance of harms analysis does not favor granting Plaintiffs an injunction. *See McNair*, 537 F.3d at 1005 ("[W]e decline to adopt a rule that *any* potential environmental injury *automatically* merits an injunction, particularly where . . . the plaintiffs are not likely to succeed on the merits of their claims.").

CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Preliminary Injunction is **DENIED**.

IT IS SO ORDERED.

DATED: September 15, 2011

HON. ROGER T. BENITEZ
United States District Court Judge