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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BORDER POWER PLANT WORKING GROUP, Plaintiff, v. DEPARTMENT OF ENERGY, et al., Federal Defendants.	Civ. No. 02-0513-IEG (POR) **FEDERAL DEFENDANTS' MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** **AND** **OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**[1]/ Date: April 18, 2003 Time: 9:00 a.m. Courtroom 13, 5th Floor The Honorable Irma E. Gonzalez

[1]/ NOTE TO THE CLERK: Pursuant to direction from the Honorable Irma E. Gonzalez on March 6, 2002, Federal Defendants file this combined memorandum in support of their motion for summary and opposition to Plaintiff's January 31, 2003 motion for summary judgment with a page limit of 40 pages. A stipulated order allowing this combined motion/opposition is submitted herewith.

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LIST OF ACRONYMS

APA	Administrative Procedure Act
APCD	Air Pollution Control District
AFPY	Acre-feet per year
BACT	Best Available Control Technology
BCP	Baja California Power, Inc.
BLM	U.S. Department of Interior Bureau of Land Management
BOD	Biological Oxygen Demand
CO	Carbon Monoxide
COD	Chemical Oxygen Demand
DOE	U.S. Department of Energy
EA	Environmental Assessment
EAX	Energía Azteca X, S. de R.L. de C.V.
EBC	Energía de Baja California
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
FONSI	Finding of no significant impact
IV	Imperial Valley
LRPC	La Rosita Power Complex
mg/m3	Micrograms per cubic meter
MW	Megawatt
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act
NO2	Nitrogen dioxide
NO	Nitric oxide
NOx	NO + NO2 + other oxides of nitrogen
O3	Ozone
PM10	Particulate matter (less than10 microns in size)
PPM	Parts per million
PPY	Pounds per year
ROW	Right-of-way
SCR	Selective catalytic reduction
SER	Sempra Energy Resources
SL	Significance level
TDM	Termoeléctrica de Mexicali
TDS	Total Dissolved Solids
TSS	Total Suspended Solids
VOC	Volatile organic carbon compound

INTRODUCTION

In its motion for summary judgment, Plaintiff asserts that the Department of Energy ("DOE") violated various requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, when the agency issued two Presidential Permits allowing the construction and operation of power lines for the movement of electricity from two power plants in Mexicali, Mexico across the international border into the United States near El Centro, California. Plaintiff argues that the environmental assessment ("EA") that DOE prepared in cooperation with the Bureau of Land Management ("BLM") (which provided the necessary rights-of-way for the power lines) did not sufficiently address the water and air impacts of the proposed Presidential Permits, and should have considered alternatives conditioning the Permits on stringent requirements on the power plants in Mexico to reduce the alleged water and air impacts. Plaintiff also contends that the environmental impacts from issuing these Presidential Permits are "significant," and that therefore NEPA required DOE to complete a more detailed environmental impact statement ("EIS").[2]/

Plaintiff's claims must fail. DOE completed a detailed EA--supported by an extensive Administrative Record--that thoroughly examines the potential environmental effects of issuing the Presidential Permits. Although Plaintiff may disagree with the methods DOE used to assess environmental impacts and with DOE's conclusion that the potential environmental impacts are not significant,[3]/ it has failed to meet its burden of demonstrating that DOE's conclusion was not

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[2]/ Plaintiff's NEPA challenges focus exclusively on potential effects of the project within the United States, as they must, because NEPA does not apply to potential actions and effects located outside the United States. See, e.g., NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993).

[3]/ As addressed in Federal Defendants' accompanying motion to strike and below, Plaintiff has improperly filed a number of declarations in support of its arguments concerning DOE's methodologies and conclusions. These materials are not part of the Administrative Record on which this Court must base its review of Plaintiff's claims and, even if they were, they do not establish that DOE did not take the requisite "hard look" at the potential environmental impacts of issuing the Presidential Permits in accordance with NEPA.

based on a sufficient assessment of the relevant environmental impacts or that the agency's conclusion was not reasonable. On the contrary, the exhaustive analysis evidenced in the EA and multi-volume Administrative Record lodged with the Court demonstrate that DOE (and BLM) fulfilled, and likely exceeded, their obligations under NEPA for a project with such minimal environmental impacts.

As discussed below, Plaintiff has failed to demonstrate that DOE's "finding of no significant impact" was "arbitrary and capricious," as Plaintiff is required to do pursuant to the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, nor can it make such a showing. Therefore, pursuant to Federal Rule of Civil Procedure 56, Federal Defendants respectfully request that the Court deny Plaintiff's motion for summary judgment and grant summary judgment in favor of Federal Defendants.

FACTUAL BACKGROUND

I. ADMINISTRATIVE DECISIONS BY DOE AND BLM

In February and March, 2001, Baja California Power, Inc. ("BCP") and Sempra Energy Resources ("SER") each submitted applications to the DOE for Presidential Permits[4]/ to construct and operate electric power transmission lines across the international border between the United States and Mexico, near El Centro, California.[5]/ DOE-101, 204322. The transmission lines would be constructed from the Imperial Valley ("IV") Substation, California, to the United States/Mexico international border and would traverse approximately six miles of federal land managed by BLM. DOE-101, 204318. Both lines would run parallel to and within 240 feet of an

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[4]/ Because the proposed project would involve the operation of "an electric power transmission or distribution facility crossing the border of the United States, for the transmission of electric energy between the United States and a foreign country," SER and BCP were required to obtain such permits prior to constructing the transmission lines. See 10 C.F.R. § 205.320(a); see also Executive Order 10485,18 Fed. Reg. 5397 (Sept. 3, 1953), amended by Executive Order 12038, 43 Fed. Reg. 4957 (Feb. 3, 1978) (authorizing the Secretary of Energy to issue such permits).

[5]/ Around the same time, BCP and SER each submitted applications to BLM for rights-of-way ("ROWs") on which to construct the transmission lines. DOE-101, 204322. BLM, therefore, was a cooperating agency on the EA issued by DOE. Id. at 204324.

existing transmission line, owned and operated by San Diego Gas and Electric Company under a separate Presidential Permit issued in 1983. Id.

Prior to the issuance of these Presidential Permits, DOE and BLM prepared a 135-page environmental assessment ("EA") with an additional 147 pages in seven appendices that considered the potential environmental effects of the transmission lines. See generally DOE-101, DOE-102. In addition to analyzing direct impacts at the site of the transmission lines, DOE also considered potential impacts to the United States which might result from two power generating facilities planned to be constructed in Mexico and connected to the transmission lines: (1) the La Rosita Power Complex ("LRPC"), which will contain turbines owned and operated by Energía Azteca X, S. de R.L. de C.V. ("EAX") and Energía de Baja California ("EBC"), subsidiaries of InterGen, Inc. ("Intergen"); and (2) the Termoeléctrica de Mexicali ("TDM") Facility, which is owned and operated by TDM , a subsidiary of SER.

After considering potential impacts detailed in the EA, DOE and BLM each issued a Finding of No Significant Impact ("FONSI") in December 2001. See generally DOE-103; BLM - 182 (FONSI for BCP ROW); BLM 183 (FONSI for SER ROW). DOE issued the Presidential Permits to BCP and SER on December 5, 2001. DOE-104, 204612; DOE-105, 204618. BLM granted a ROW to BCP which became effective on December 28, 2001. BLM-189, 102333. The ROW conveyed to SER became effective on December 31, 2001. BLM-186, 102290. The Presidential Permit and ROW for SER were subsequently transferred to Termoeléctrica U.S. ("T-U.S.") in the fall of 2002. DOE-129S, S204904, S204907; BLM-210S, S102618.

II. RELATIONSHIP BETWEEN THE CHALLENGED TRANSMISSION LINES AND THE GENERATING FACILITIES

The transmission lines permitted by DOE's Presidential Permits and BLM's ROWs connect to two electric generating plants being constructed in Mexico.[6]/ The SER line connects

[6]/ Since the issuance of the Presidential Permits and ROWs, construction of the transmission lines has been completed and the lines are currently operational.

with a transmission line constructed in Mexico by TDM, which in turn connects to the TDM facility approximately three miles south of the international border. DOE-35, 202187; DOE-101, 204318, 204320. The TDM facility consists of two gas-fired General Electric Model 7FA combustion turbines dedicated to exporting 600 MW of total power to the United States. Electrical power will be exported from the TDM facility by transmitting it along the TDM line to the border, then along the SER (now T-U.S.) line to the IV Substation. DOE-101, 204320.

The TDM facility will use emission control technology and would be equipped with dry low-NO_x combustor technology to minimize NO_x and CO emissions. DOE-101, 204402. The TDM facility would also be equipped with selective catalytic reduction and oxidizing catalyst systems to further reduce NO_x and CO emissions, respectively. DOE-101, 204402. The TDM facility is proposed to have emissions rates of 2.5 parts per million ("ppm") for NO_x and 4.0 for CO. DOE-101, 204402. These emission levels are the same as those being routinely permitted in the United States and specifically in California. Id. Annual emissions from the TDM facility of NO_2, CO, and PM_{10} would be 170 tons, 165 tons, and 216 tons, respectively. Id. at 204401.

The BCP line connects with a transmission line being constructed in Mexico by EBC, which itself connects to the LRPC. The LRPC will be geographically separate from the TDM facility and will contain four gas-fired Siemens-Westinghouse Model 501F combustion turbines: one owned by EBC and three owned by EAX. Two EAX turbines, totaling approximately 500 MW, will provide power to the Mexican market, while a third EAX turbine and the single EBC turbine will export up to 560 MW of power to the United States. Id. at 204320. This power will be transmitted from the LRPC along the EBC transmission line to the border, then along the BCP line to the IV Substation. Id.

The EBC turbine and the EAX export turbine utilize dry low-NO_x combustor technology to reduce NO_2 emissions. DOE-101, 204402. The EBC turbine and the EAX export turbine utilize selective catalytic reduction technology that would further reduce NO_x emissions to approximately 4 ppm. DOE-101, 20404. These levels are below the Mexican standards (Norma

Oficial Mexicana – 085) of 139 ppm, and the World Bank's latest guidelines (published in July 1998) for new power plants, which are 155 ppm. Id. The CO emissions would be 30 ppm. Annual emissions from the EBC turbine and the EAX export turbine, both dedicated to providing power to the U.S., would be 282 tons of NO_2, 924 tons of CO, and 410 tons of PM_{10}. Id. at 204401. Annual emissions from the two EAX turbines used to generate power for Mexico only were listed in the EA as up to 1,502 tons of NO_2, 957 tons of CO, and 314 tons of PM_{10}.[7]/ Id.

As part of the cooling process, both the TDM facility and the LRPC will withdraw, treat, and recycle water from the Zaragoza lagoons, which are located west of Mexicali, Mexico. DOE-101, 204394. The primary source of water entering the Zaragoza lagoons is residential sewage. Id. at 204393. Ordinarily, these lagoons discharge into a drain, which in turn discharges into the New River. Id. As a result of this, New River carries biological pathogens, industrial contaminants (trace metals and VOCs), and agricultural waste such as unwanted nutrients and pesticides. Id. at 204394.

The LRPC has begun construction of a sewage treatment plant to process the wastewater it will need for power generation. Id. at 204430. The plant will treat the raw sewage from the lagoons via a "screening, degritting, degreasing, biological treatment by way of an extended aeration activated sludge process, nitrification-denitirification, final clarification, and disinfection." Id. The resulting water will then be piped to the LRPC, where it will be further treated to reduce phosphates, organics, and heavy metals. Id. After the water is treated, it will be used by the facility, recovered, and discharged into drains which ultimately flow to the New River. Id.

Treatment at the LRPC will result in a net reduction of pollutants currently discharged into the New River. The weight of total dissolved solids ("TDS"), a measure of salinity, will be reduced at the LRPC by 3.5 million pounds per year ("PPY"). Id. at 204431. Total suspended

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[7]/ Since publication of the EA, selective catalytic reduction technology has been applied to the two EAX turbines that provide power to Mexico. This will result in lower NOx emission levels from those turbines, similar to emission levels from the two turbines providing power to the U.S.

solids ("TSS") will be reduced by 1.590 million PPY, while biological oxygen demand ("BOD") will be reduced by 1.23 million PPY. Id. Chemical oxygen demand ("COD") will also be reduced by 4.23 million PPY, and iron will be reduced by 4,400 PPY. Id.

Similarly, the TDM facility will also eliminate biological contaminants and reduce other chemical contaminants such as unwanted nitrogen, phosphorous, heavy metals, and agricultural and industrial chemicals such as pesticides. Id. The TDM facility will include secondary and tertiary treatment of recycled sewer water from the Zaragoza lagoons. Id. at 204430. Treatment at the TDM facility will result in a net benefit to water quality in the New River, since BOD will be reduced by approximately 1.5 million PPY; COD will be reduced by 1.76 million PPY, TSS will be reduced by 850,000 PPY; TDS will be reduced by 2.6 million PPY, and iron will be reduced by 225 PPY. Id. at 204431.

The New River flows northward, crossing the international border near Calexico, California, and discharges into the Salton Sea about 60 miles north of the location of the generating facilities. Id. The Salton Sea is a terminal lake with no outlet to the ocean, and is a repository for agricultural and municipal wastewater. Id. at 204391. Total yearly inflow to the Salton Sea is approximately1.36 million AFPY, which is approximately equal to its evaporation rate. Id. The Salton Sea "is a sump not only for the water that flows into it but also for all the salts, sediments, and other constituents dissolved in or transported by that water." Id. at 204393. A common indicator of the salt load is TDS, measured either as a concentration or as a total mass. Id. The Salton Sea currently has a TDS of 44,000 milligrams per liter (mg/L), although salinity continues to rise and is expected to exceed 50,000 mg/L by 2009. Id.

The New River flow at the border is approximately 182,000 acre-feet per year ("AFPY"). Id. The concentration of TDS in the New River at the border is 2,600 mg/L, while the BOD is 20 mg/L, and the COD is 30 mg/L. Id. Both the Salton Sea and the New River are listed as impaired surface waters in accordance with Section 303(d) of the Clean Water Act ("CWA"). Id. at 204391-92.

LEGAL BACKGROUND

I. THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA was enacted to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321. The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before the action is implemented. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). NEPA provides that federal agencies should prepare a detailed Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C).

NEPA's mandate to agencies is "essentially procedural . . . It is to insure a fully informed and well-considered decision . . . ." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978). "It is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); see also Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1355-56 (9th Cir. 1994).

In order to determine whether an action is one requiring an EIS, the agency may prepare an Environmental Assessment ("EA"). 40 C.F.R. § 1501.4(b). An EA is a concise public document that should briefly describe the proposal, examine alternatives, consider environmental impacts, and provide a listing of individuals and agencies consulted. 40 C.F.R. § 1508.9.[8]/ If a

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[8]/ See also River Road Alliance, Inc. v. Corps of Engineers of U.S. Army, 764 F.2d 445, 449 (7th Cir. 1985) ("The purpose of an [EA] is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement."); Park County Resource Council, Inc. v. Department of Agriculture, 817 F.2d 609, 621 (10th Cir. 1987) (stating that preparation of an EA "allows the agency to consider environmental concerns, while reserving agency resources to prepare full EIS's

finding of no significant impact is made after the matter is adequately analyzed in an EA, then NEPA does not require preparation of an EIS. Salmon River, 32 F.3d at 1356. "NEPA's EIS requirement is governed by the rule of reason . . . an EIS must be prepared only when significant environmental impacts will occur as a result of the proposed action." Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982); see also Salmon River, 32 F.3d at 1356. Although plaintiff need not show that significant effects will in fact occur, it must raise "substantial questions whether a project may have a significant effect" on the environment. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998).

II. JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

Because NEPA does not provide a cause of action, a federal agency's decision to prepare an EA rather than an EIS is reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* See Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105, 1114 (9th Cir. 2000). Under the APA, an agency's decision not to prepare an EIS may be overturned only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Native Ecosystems Council v. Dombeck, 304 F.3d 886, 891 (9th Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)). Specifically, a court "must determine whether the agencies that prepared the EA took a hard look at the environmental consequences of the proposed action." See Anderson v. Evans, 314 F.3d 1006, 1015 (9th Cir. 2002) (internal quotations omitted).

The standard of review of an agency NEPA analysis under the APA is highly deferential, and the agency's decision "will only be overturned if the agency committed a clear error in judgment." Wetlands Action Network, 222 F.3d at 1114-15 (internal quotations omitted); see also Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569, 573 (9th Cir. 1998) (considerable deference must be accorded to the agency with regard to the manner in which it examines the environmental consequences of a project). The APA does not require–or even

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for appropriate cases").

allow–a court to overturn an agency action because it disagrees with the agency's decision or even with its conclusions about the scope, breadth or effect of the environmental impacts of the project at issue. Vermont Yankee, 435 U.S. at 553. Once a reviewing court is "satisfied that a proposing agency has taken a hard look at a decision's environmental consequences, [its] review is at an end." Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992). Thus, as the Supreme Court has admonished, the Court's task is simply "to ensure a fully-informed and well considered decision, not necessarily a decision that [the court] would have reached had [it] been a member of the decisionmaking unit of the agency." Vermont Yankee, 435 U.S. at 558.

"The National Environmental Policy Act does not require that we settle disputes between scientists, it dictates that we defer to agency opinion if it is not otherwise shown to be arbitrary and capricious." City of Carmel-by-the-Sea v. U.S. Dept. of Transp., 123 F.3d 1142, 1151-52 (9th Cir. 1997); see also Laguna Greenbelt Inc. v. U.S. Dept. of Transp., 42 F.3d 517, 526 (9th Cir. 1999) ("NEPA does not require us to decide whether an EIS is based on the best scientific methodology available or to resolve disagreements among various experts.").[9]/ "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." Marsh, 490 U.S. at 378. "Because analysis of the relevant documents 'requires a high level of expertise,' we must defer to the 'informed discretion of the responsible federal agencies.'" Id. at 378 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)).

Judicial review of federal agency actions under the APA is restricted to the administrative record lodged by the agency, with limited exceptions. The APA expressly directs that "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The APA makes no provision for extra-record review. See 5 U.S.C. §§ 551 *et seq.* The Supreme Court has

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[9]/ See also Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985) ("NEPA does not require that we decide whether an [environmental review] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology.").

held that "in cases where Congress has simply provided for review [under the APA], . . . [judicial] consideration is to be confined to the administrative record and . . . no *de novo* proceedings may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citations omitted).[10]/ See also Camp v. Pitts, 411 U.S. 138, 142 (1973) (holding that the "focal point for judicial review [of an agency decision] should be the administrative record already in existence, *not some new record made initially in the reviewing court*") (emphasis added). "The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the court." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).

III. SUMMARY JUDGMENT STANDARD

The Ninth Circuit has endorsed the use of Rule 56 motions for summary judgment in reviews of agency administrative decisions, under the limitations imposed by the APA. See, e.g., Northwest Motorcycle Assn. v. U.S. Dept. of Ag., 18 F.3d 1468, 1471-72 (9th Cir. 1994) (discussing the standards of review under both the APA and Fed. R. Civ. P. 56). Pursuant to Rule 56, "[t]he moving party is entitled to summary judgment as a matter of law where, viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there are no genuine issues of material fact in dispute." Id. at 1472. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Because the role of the Court under the APA is not to "find facts" but is limited to reviewing the Administrative Record to determine whether DOE considered the relevant factors and reached a conclusion that is not arbitrary and capricious, there can be no genuine issue of material fact, and summary judgment is the appropriate resolution of

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[10]/ See Lodge Tower Condominium Ass'n v. Lodge Properties, Inc., 880 F. Supp. 1374 (D. Colo. 1995) (district court does not sit as a finder of fact because agency action is "reviewed, not tried," rather, "the issue is not whether the material facts are disputed, but whether the agency properly dealt with the facts").

this case.

ARGUMENT

I. IN COMPLIANCE WITH ANY OBLIGATIONS UNDER NEPA, DOE AND BLM TOOK A REASONABLE "HARD LOOK" AT THE POTENTIAL IMPACTS OF THE PROPOSED ACTIONS

A. The EA Adequately Addressed Potential Impacts to Air Quality in the Salton Sea Air Basin

1. The Effect On NO_x, CO, and PM_{10} Will Not Be Significant

Although the federal government does not have jurisdiction to regulate air pollutant emissions originating in Mexico, DOE used regulations promulgated by the Environmental Protection Agency ("EPA") governing non-attainment areas to assess the potential effects of air emissions from the LRPC and TDM facilities. DOE-101 at 204400. In the context of Clean Air Act permitting in the United States, EPA establishes significance levels ("SLs") below which major sources are deemed not to contribute to violations of the National Ambient Air Quality Standards ("NAAQS") in areas where those standards are already not being met. 40 C.F.R. § 51.165(b)(2); DOE-101, 204400. Where air dispersion modeling is performed, EPA does not require a full impact analysis so long as emissions will not increase the ambient concentrations above the SLs. DOE-101, 204402. Thus, the SLs provide a useful benchmark for NO_x, CO, and PM_{10}, below which DOE reasonably concluded emissions were not "significant." Id.

In this case, the combined emissions that will result from the generation of power to be exported along the transmission lines fall well below the SLs that EPA has set for NO_x, CO, and PM_{10}. DOE-101, 204404, 204406. Plaintiff contends that DOE "only addressed air impacts in terms of EPA's significance levels," and that somehow this makes the analysis flawed. Assessing the significance based on EPA standards that are set based on protecting human health and welfare, is a reasonable and objective method for DOE to have considered air impacts, and this Court's task is not to second-guess agency choices of methodology. See, e.g., Laguna Greenbelt, 42 F.3d at 526 ("NEPA does not require us to decide whether an EIS is based on the best

scientific methodology available or to resolve disagreements among various experts."). Moreover, the EA does not rely on SLs alone, but also on the voluntary emissions reductions measures that will be employed at the LRPC and TDM facility.

For example, both of the generating turbines at the TDM facility will utilize pollution control technology in the form of "dry, low-NO_x combustor technology to minimize NO_x and CO emissions from the combustion of natural gas, the exclusive fuel for the facility." DOE-101, 204402. The turbines will also employ selective catalytic reduction and oxidizing catalyst systems to further reduce NO_x and CO emissions, respectively. Id. The EBC and EAX export turbines at the LRPC will also employ dry, low-NO_x combustor technology and selective catalytic reduction technology. Id. at 204403, 204404. None of these measures are required by Mexican law, and they are thus steps that will make this one of the cleanest burning plants in Mexico. See, e.g., id. at 204404. In fact, levels of NO_x and CO emissions from the TDM facility "are the same as those being routinely permitted in the United States and specifically, in California." Id. at 204402.

Plaintiff makes much of the notion that if the generating facilities were built within the United States, they would have to employ the best available control technology and emissions offsets. Because the generating facilities are to be constructed in Mexico, however, the federal government does not have regulatory authority over them. Nonetheless, the TDM facility is employing such technology and the EBD and EAX turbines designated to export electricity to the United States are also equipped with emission control technologies that will reduce emissions of criteria pollutants below the significance levels established by the EPA. DOE-101, 204447. Because this project will not significantly contribute to the existing NO_x, CO, and PM_{10} levels in Imperial County, California, DOE was not arbitrary and capricious in concluding that the project will not significantly affect air quality in the United States.

2. Emissions Were Accurately Estimated

While Plaintiff argues that DOE underestimated emissions from the TDM facility, Pl. Mem. at 23, the EA fully discloses the potential emissions from that facility based on information

provided by the permit applicants. See DOE-101, 204446 ("estimated emissions from the generating facilities used in the analysis were taken from the information prepared to comply with Mexico's permitting requirements."). According to SER's application for its Presidential Permit, the transmission lines would carry a "nominal 500 MW of power (approximately 700 MW maximum peak) into the U.S., with the potential for an ultimate nominal 1000 MW (with an approximate 1400 MW peak) of power using a possible future, second circuit" on the same transmission line "to accommodate possible future expansion capability." DOE-36, 202201; DOE-35, 202188. At this time, however, SER has not indicated it has any plans to expand the TDM facility. Additionally, the Mexican government has only given TDM permission to construct a 500 MW facility. DOE-36, 202201. Thus, it is not reasonably foreseeable that merely because the transmission line is capable of delivering "an ultimate nominal 1000 MW" of power, that such an amount would in fact be transmitted.

The emissions data analyzed in the EA was taken directly "from the information prepared to comply with Mexico's permitting requirements," and was reviewed by the agencies and found to be accurate. DOE-101, 204446. The agencies determined that such "estimates were based on the operating characteristics of the facilities, including the pollution control equipment the applicants have agreed to install," and thus were more accurate than "the undocumented higher levels of emissions asserted by the commenters." Id. The agencies adequately explained their rejection of higher emissions levels asserted by commenters by noting that to the extent higher levels asserted by commenters "may include emissions from facilities other than those associated with the SER and BCP transmission lines, DOE and BLM do not agree that they are within the scope of this EA." Id.; see Wetlands Action Network, 222 F.3d at 1120-21 ("[W]hen the record reveals that an agency based a finding of no significant impact upon relevant and substantial data, the fact that the record also contains evidence supporting a different scientific opinion does not render the agency's decision arbitrary and capricious.").

Plaintiff's argument that the TDM facility would result in "roughly double the emissions

disclosed in the EA" is based on speculation that SER may "construct[] additional turbines with the same emissions control technology it says it is using on the first two turbines." Pl. Mem. at 23. The agencies adequately explained in the EA why they did not use higher emissions figures: Plaintiff has not pointed to anything in the record beyond SER's comments about "possible future expansion" of the TDM facility to demonstrate any actual plans for expanding that plant. See DOE-36, 202201. Moreover, the agencies are entitled to rely on SER's representation in its application that the TDM facility is "proposed to be a nominal 500 MW electric generating facility," and are not required to speculate about potential expansion absent hard evidence in the application that SER had obtained or was seeking to obtain permits from the Mexican government authorizing expansion. See, e.g., City of Angoon v. Hodel, 803 F.2d 1016, 1020 (9th Cir. 1986) (holding that a NEPA analysis "need not consider 'remote and speculative' alternatives whose effects cannot be readily ascertained") (citing Vermont Yankee, 435 U.S. at 551).[11]/ Because expansion of the TDM facility is not reasonably foreseeable, DOE was entitled to rely on the analysis submitted by SER for the 500 MW facility, and is not required to analyze additional, speculative emissions.

3. Other Air Quality Effects Were Adequately Considered

Plaintiff incorrectly asserts that DOE was obligated to consider the potential effects of carbon dioxide and ammonia, neither of which EPA has designated as "criteria pollutants." See Pl. Mem. at 23. Plaintiff, however, provides no legal authority for its proposition that DOE is required to consider the impacts of either ammonia or carbon dioxide emissions from power plants. See Pl. Mem. at 23-24.

Although Plaintiff cites to a consultant's report which stated that DOE should assess "non-

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[11]/ See also Sierra Club v. Lujan, 949 F.2d 362, 368 (10th Cir. 1991) ("NEPA does not require an agency to consider the environmental effects that speculative or hypothetical projects might have on a proposed project."); United States v. Southern Florida Water Management Dist., 28 F.3d 1563, 1573 (11th Cir. 1994) ("NEPA does not require evaluation of hypothetical proposals, impacts and alternatives concerning a nonexistent federal proposal.").

criterion [sic] air pollutants relevant to the proposed action," nowhere does that report specifically advise DOE that it should consider the impacts of carbon dioxide or ammonia emissions. See generally DOE-055. Moreover, EPA itself did not advise DOE to consider the impacts of either ammonia or carbon dioxide See generally DOE-086. Because of this, and because ammonia is neither a federal hazardous air pollutant nor a California-identified toxic air contaminant, DOE-023, 200819, it was not arbitrary and capricious for DOE not to address potential ammonia or carbon dioxide emissions from the generating facilities. Johnston v. Davis, 698 F.2d 1088, 1092 (10th Cir. 1983) (holding that a NEPA analysis "need not discuss every nuance of a proposed action, nor need it give various questionable effects the weight demanded by various proponents or opponents"); National Helium Corp. v. Morton, 486 F.2d 995, 1004 (10th Cir. 1973) (stating that a NEPA analysis "did not have to dwell on the imaginary horribles posed by the plaintiffs"). "An EA cannot be both concise and brief and provide detailed answers for every question." Sierra Club v. U.S. Forest Service, 46 F.3d 835, 840 (8th Cir. 1995).

B. The EA Adequately Addressed Potential Effects on Water Quality and the Salton Sea

The slight reduction in inflow and increase in salinity of the Salton Sea are consistent with Salton Sea restoration efforts and will not result in a significant effect upon that water body. Although Plaintiff asserts that DOE has not provided a "convincing statement of reasons" why an immeasurable change in salinity and inflow will be insignificant, DOE's conclusion is in fact soundly supported. Because the estimated decrease to inflow and change in salinity are within the natural range of variability of the water body and are accompanied by reductions in biological and chemical contaminants, the project "will have no measurable impact" on water quality. DOE-101, 204432. This impact, therefore, cannot be deemed significant.

The Salton Sea "is a sump not only for the water that flows into it but also for all the salts, sediments, and other constituents dissolved in or transported by that water." Id. at 204393. Thus, any decrease in the salts, sediments, and other contaminants to the waters flowing into the Salton

Sea potentially benefits the Salton Sea itself. See id. at 204432 ("Ultimately, the reduction of certain contaminants from Mexico that currently go into the Salton Sea will be a positive impact on its ecosystem."). The LRPC and TDM facilities combined will remove 6.12 million pounds of TDS per year. Id. Moreover, each facility will also reduce other undesirable biological and chemical contaminants in the New River. See id. at 204431.

For example, water returned to the New River will be "disinfected (i.e., treated to contain very low levels of biological pathogens–bacteria or viruses)." Id. Undesirable "nutrients (nitrogen species and phosphorus) and heavy metals will be reduced, and agricultural/industrial chemicals (VOCs and pesticides) will be substantially removed by the treatment process." Id. Because the treatment will result in improved water quality for the New River, it will also result in "a positive impact on [the Salton Sea] ecosystem." Id. at 204432. Moreover, the water quality improvements will also contribute to meeting international treaty standards between Mexico and the United States. See id. ("The improvement in water quality from a biological standpoint will greatly help achieve the bi-national water quality treaty standards as contained in [International Boundary Waters Commission] Minute 264 for the New River.").

Plaintiff's disagreement with DOE's conclusion that the Salton Sea would not be significantly affected stems from the fact that while the water treatment will result in a net decrease in the total *amount* of TDS in the Salton Sea, the slight decrease in water returned to the New River might result in an increased *concentration* of TDS. Plaintiff asserts that this increase in TDS concentration and any corresponding reduction to inflow are "at odds with the proposed efforts to restore the Salton Sea." Pl. Mem. at 13. Contrary to this assertion, the estimated reduction in flow that will result from operation of the power plants falls within the range of flow variations that the Salton Sea restoration project considered to be "reasonable future scenarios." See DOE-25, 200946 (considering modeled future inflows ranging from 0.8 million AFPY to 1.36 million AFPY). The reduction in water inflow modeled by the restoration project for future scenarios varies up to 41 percent, whereas the chosen alternative here will only reduce inflow by

0.78 percent. See DOE-101, 204432. In addition, proposed restoration efforts involve constructing evaporation ponds, which will evaporate 100,000 to 150,000 AFPY from the Sea. See id. at 200947, 200949. Because the LRPC and TDM facilities are only estimated to reduce the flow by 10,570 AFPY, much less than that of the restoration efforts, the transmission line project is consistent with those restoration efforts and would not significantly affect their success.

Moreover, the estimated reduction from the project falls within the historic variability of inflow, which generally varies between 1.19 and 1.55 million AFPY. See id. at 201228. Thus, it was reasonable for DOE to conclude that the reduction to inflow would not be significant.

Plaintiff argues that DOE did not "consider that the Salton Sea is already suffering from too much salt and that expensive efforts are underway to *remove already existing* salt concentrations." Pl. Mem. at 13 (emphasis in original). The EA, however, contains extensive discussions concerning the potential effects on the salinity of the Salton Sea, and thus plainly addresses this issue. See DOE-101, 204391 to 204394, 204431-32, 204446-47. The LRPC and TDM facility are consistent with these efforts, however, because they too "remove already existing salt" from the New River, a source for the Salton Sea. See id. at 204432 ("The LRPC and TDM facilities combined will remove 6,120,000 pounds of TDS per year."). According to the Draft EIS for the Salton Sea Restoration Project, the "Salton Sea ecosystem is under stress from increasing salinity, nutrient loading, oxygen depletion, and temperature fluctuations." DOE-25, 200943. Treatment of water at the LRPC and TDM facility will address the first three of these goals by removing 6.12 million pounds of TDS responsible for increased overall salinity, reducing excessive nitrogen and phosphorous, and reducing biological and chemical oxygen demands by 2.73 and 5.99 million pounds per year, respectively. See DOE-101, 204431. Thus, the project will be consistent with restoration efforts by removing TDS that will otherwise be deposited in the Salton Sea. The fact that the water inflow will be slightly reduced is negligible, since although it may result in a slight increase in TDS concentration, the overall effect is that salts are permanently removed from the sump-like ecosystem.

Although Plaintiff asserts that DOE's analysis of water quality is confined to two sentences, Pl. Mem. at 12-13, the EA in fact devotes four and a half pages to discussion and illustration of water quality in Chapter 3, DOE-101, 204390 to 204394; four additional pages to analyses of water quality impacts in Chapter 4, id. at 204429 to 204432; and addresses the issue again in the response to comments section. Id. at 204446-47. Plaintiff argues that although DOE determined that the impact will be undetectable by measuring instruments, it may still be significant. Pl. Mem. at 13. DOE's explanation for its conclusion that there would be no adverse effects on the Salton Sea went beyond that single statement, as DOE explained, any increase in salinity at the Salton Sea from operation of the power plants would be "essentially undetectable, since the salinity with the Salton Sea can vary beyond this amount." DOE-101, 204431. Since the normal variation of the salinity of the Salton Sea is greater than any impact from operation of the power plants, it was logical and reasonable for DOE to conclude that salinity effects on the Salton Sea were not significant.

C. The EA Addresses A Reasonable Range Of Alternatives For The Proposed Actions

Plaintiff contends that DOE violated NEPA by allegedly failing to consider and analyze in the EA "alternatives" to the proposed action that would have conditioned the Presidential Permits on implementation of measures at the power plants in Mexico to further minimize the effects that operation of these facilities may have on air and water quality. See Pl. Mem. at 18-22. Plaintiff's contention is wrong for the simple reason that the SER's and BCP's "purpose and need" for the proposed actions was to obtain Presidential Permits for the construction and operation of electric transmission lines across the United States border with Mexico, not to obtain a permit for power plants in a foreign country over which DOE has no jurisdiction. It is well-settled that NEPA does not require a federal agency to consider alternatives to a proposed action that extend beyond the purpose and need for the proposal, particularly when the action is proposed in an application for a permit by a private entity such as SER or BCP.

As part of the NEPA process, an agency is to examine alternatives to the project at issue. 42 U.S.C. § 4332(2)(E). An EA should include "brief discussions of the need for the proposal, of [reasonable] alternatives as required by sec. 102(2)(E) [of NEPA]," and "of the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(b). The alternatives examined in a NEPA analysis are guided by the stated purpose and need: "An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action." Northwest Environmental Defense Center v. Bonneville Power Admin., 117 F.3d 1520, 1538 (9th Cir. 1997). "The range of alternatives that must be considered need not extend beyond those reasonably related to the purposes of the project." Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974). The range of alternatives considered in a NEPA review "must be bounded by some notion of feasibility" and the statement of alternatives "cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man." Vermont Yankee, 435 U.S. at 551-52.

Absent a federal approval, NEPA does not cover private enterprises, such as a private company's construction of a power plant. See e.g., Friends of the Earth v. Heintz, 800 F.2d 822, 832 (9th Cir. 1986). NEPA does, however, dictate that an agency should analyze more than the potential environmental impacts of the actual federal action, and should analyze the major activities that will ensue as a result of the federal action, even if those activities are carried out wholly by private parties. Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 811 (9th Cir. 1999). Accordingly, DOE and BLM analyzed the effects flowing from the issuance of the Presidential Permits and ROWs, but also focused much of the NEPA review on the related potential environmental impacts from operation of the associated power plants in Mexico. Consequently, the agencies reviewed the environmental impacts of the power plants outside their jurisdiction[12]/ based on the private entities' description of how those plants would be constructed

[12]/ As DOE correctly stated in the EA, "Neither the U.S. nor agencies of the State of California, have jurisdiction over the regulation, permitting, or control of air pollutant emissions in

and operate, but properly considered alternatives based on the proposed *federal* actions--issuance of the Presidential Permits and ROWs. This is the correct approach under NEPA.

When an agency's NEPA process is undertaken in response to an application for some type of federal approval for a private project, the agency defines the purpose and need of the project in the context of the project being pursued by the applicant: "When an agency is asked to sanction a specific plan, . . . the agency should take into account the needs and goals of the parties involved in the application." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991) (finding that the Federal Aviation Administration ("FAA") did not have to study expanding regional air cargo capacity at airports other than the one where the project applicant sought FAA approvals, since the project proponent had no intention of locating such services at another airport). While the agency must also factor into the purpose and need statement "the agency's statutory authorization to act, as well as . . . other congressional directives," an agency "cannot redefine the goals of the proposal that arouses the call for action. . . ." Id. at 199.[13]/

As with other aspects of NEPA, "the 'rule of reason' guides both the choice of alternatives as well as the extent to which the [NEPA analysis] must discuss each alternative." City of Carmel-by-the-Sea, 123 F.3d at 1155; see also Presidio Golf Club v. National Park Service, 155 F.3d 1153, 1160 (9th Cir. 1998). A party claiming that the agency's analysis of alternatives in a NEPA analysis is arbitrary and capricious may not simply speculate that the agency should have considered other alternatives. The party has the burden of offering tangible evidence that the agency had other *reasonable and feasible* alternatives at its disposal. City of Angoon, 803 F.2d at 1022; see also Friends of the Earth v. Coleman, 513 F.2d 295, 298 (9th Cir. 1975). Plaintiff fails to satisfy this burden. Indeed, they point to no evidence in the record where they even presented

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Mexico--such as those from the LRPC and TDM facilities--regardless of any potential impact in the U.S." DOE-101, 204328.

[13]/ See also Louisiana Wildlife Federation v. York, 761 F.2d 1044, 1048 (5th Cir. 1985) ("[I]t would be bizarre if the [federal agency] were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable.").

their suggestions of alternatives to DOE or BLM, let alone references to "specific evidentiary facts showing that the alternatives were reasonable and viable." City of Angoon, 803 F.2d 1022.

Alternatives raised by Plaintiff in its brief, such as "granting the Presidential Permits on the condition that the power plants use state-of-the-art catalytic NOx and CO air emission control systems; that the remaining emissions be offset by reductions in emissions from an existing source; and that the power plants use dry cooling or parallel dry-wet cooling" (Pl. Mem. at 19-20), fall far short of the type of "reasonable and feasible" alternatives required to be analyzed pursuant to NEPA and offend the basic NEPA principles discussed above. The purpose and need of BCP's and SER's applications for Presidential Permits was to construct and operate power lines across the international border to import electricity into the United States to help address California's power supply crisis. DOE-101, 204324. The parties constructing and operating the power plants did not need permission to do so from DOE, as such authorizations come from the Mexican government and DOE has no authority to regulate private electrical power plants, particularly those under the jurisdiction of a foreign sovereign. The international sensitivities relating to Presidential Permits underscore the importance of limiting the range of alternatives to the actual purpose and need of the proposed action in this instance. See, e.g., Greenpeace USA v. Stone, 748 F. Supp. 749, 760 (D. Haw. 1990) ("An extraterritorial application of NEPA to the Army's action in [a foreign country] with the approval and cooperation of the [foreign country] would result in a lack of respect for the [foreign country's] sovereignty, authority and control over actions taken within its borders."); NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466, 467-8 (D.D.C. 1993) (holding that NEPA did not apply to Navy operations at three bases in Japan "because there are clear foreign policy and treaty concerns involving a security relationship between the United States and a sovereign power").

DOE--in consultation with the Departments of State and Defense as specified in Executive Order 10485 *as amended*--certainly retains the discretion to decline to issue a Presidential Permit if it concludes that the environmental costs outweigh the public interest in issuing the Permit, and

it considered this alternative in the EA by analyzing the "no action" alternative and by addressing alternatives in which it would issue only a single Presidential Permit to only one of the two applicants. See DOE-101, 204328-30. NEPA, however, cannot be read to require DOE to turn a Presidential Permit into a vehicle for regulating a private power plant in a foreign country, and Plaintiff offers no legal support for such an assertion. To intrude on the jurisdiction of a neighboring sovereign by using a Presidential Permit to regulate private actions beyond the United States' borders plainly exceeds the scope of the proposed action here and would raise serious policy implications concerning DOE's discretion in issuing the Permits, and thus was not a reasonable and feasible alternative that should have been considered pursuant to NEPA. See, e.g., Seattle Audubon Society v. Mosely, 80 F.3d 1401, 1404 (9th Cir. 1996) ("An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives."); Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180 (9th Cir. 1990) ("Nor must an agency consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives."); Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973) (holding that an "'alternatives' discussion is subject to a construction of reasonableness" and that NEPA "should not be employed as a crutch for chronic faultfinding. Accordingly, there is no need to consider an alternative whose effect cannot be reasonably ascertained and whose implementation is deemed remote and speculative."); City of New York v. DOT, 715 F.2d 732, 744 (2d Cir. 1983) (holding that "an agency need not consider 'alternatives which could only be implemented after significant changes in government policy or legislation'"). DOE analyzed the potential environmental effects of the power plants on the United States as those plants were reasonably expected to be operated, but NEPA did not require DOE to develop and analyze a hypothetical alternative under which DOE would regulate those facilities through conditions in the Presidential Permit.[14]/

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[14]/ In responding to the comments suggesting that DOE impose conditions on the power plants through the Presidential Permits, DOE properly noted that the owners of the power plants had

The range of alternatives that DOE needed to analyze was also reduced by the minimal environmental impacts of the proposed action. An EA need not examine as broad a range of alternatives as an EIS since the necessary range of alternatives diminishes as the expected impacts diminish. See Friends of the Ompompanoosuc v. FERC, 968 F.2d 1549, 1558 (2d Cir. 1992) (holding that the "range of alternatives an agency must consider is narrower when, as here, the agency has found that a project will not have a significant environmental impact"); Sierra Club v. Espy, 38 F.3d 792, 796, 802 (5th Cir. 1994) ("While an EA must contain a discussion of alternatives, the range of alternatives that the Forest Service must consider 'decreases as the environmental impact of the proposed action becomes less and less substantial.'"). "Because the EA concluded that the proposed rail line would have minimal environmental effect, the range of alternatives that the Commission needed to consider was narrow. * * * It would be something of an anomaly to require that an agency search for more environmentally sound alternatives to a project which it has determined . . . will have no significant environmental effects anyway."

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committed to implementing a number of mitigating technologies, instead of analyzing Presidential Permits conditions as a NEPA alternative. DOE-101, 204447. Plaintiff's criticism that DOE has no way of enforcing these "voluntary" measures is inapt. First, the Supreme Court has rejected Plaintiff's assertions that mitigation plans must be in place during the NEPA process. "[I]t would be inconsistent with NEPA's reliance on procedural mechanisms--as opposed to substantive, result-based standards--to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." Robertson v. Methow Valley, 490 U.S. at 353.

Second, it is basic NEPA law that an agency's obligation to consider environmental impacts continues beyond the original environmental analysis such that the agency, as long as it retains discretion to modify its action, may be required to supplement that analysis if new information or project modifications indicate that the original analysis may no longer be accurate. See, e.g., Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562, 569 n.2 (9th Cir. 2000) ("NEPA imposes on federal agencies a continuing duty to supplement existing EAs and EISs in response to 'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.'") (quoting 40 C.F.R. § 1509(c)(1)(ii)).

Thus, if the power plants did change the mode of operations in certain ways affecting the nature of the environmental impacts, such as by switching to diesel fuel, DOE may be required to revisit its NEPA analysis for these Presidential Permits. See, e.g., Northern Plains Resource Council v. Lujan, 874 F.2d 661, 666 (9th Cir. 1989) ("NEPA does not require Interior to make site-specific analysis of the impacts of all possible development alternatives. Instead, the NEPA merely requires that Interior estimate the impacts of a likely or probable development alternative; it need not prepare an EIS for speculative development alternatives, so long as it reserves the right to preclude or prevent actions with unacceptable environmental consequences.").

Missouri Mining, Inc. v. ICC, 33 F.3d 980, 984 (8th Cir. 1994). Plaintiff's assertion that DOE violated NEPA by failing to develop and analyze a complex alternative with numerous and expensive conditions on the power plants and international policy complications to mitigate impacts that the agency found were minimal is without merit, even were such conditions within the scope of the proposed actions.

DOE and BLM considered a reasonable range of alternatives in the EA, including denying the Permits and ROWs (the "no action" alternative), granting only one Permit and not the other, and looking at alternative locations for placement of the power lines. DOE-101, 204328-30. Plaintiff does not propose any alternatives to the placement of the power lines, but instead asserts only that DOE should have analyzed alternatives using the Presidential Permits as a tool to regulate power plants under the jurisdiction of the Mexican government. NEPA does not reuire such a result. Because Plaintiff has not identified any alternatives that are reasonable or feasible or that could be implemented, Plaintiff has failed to demonstrate that the EA did not consider a reasonable range of alternatives.

II. DOE AND BLM REASONABLY DETERMINED THAT THE TRANSMISSION LINE PROJECTS DO NOT REQUIRE AN EIS

NEPA requires the preparation of an EIS only for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The term "significantly" requires consideration of two broad factors: context and intensity. See 40 C.F.R. § 1508.27. The term "intensity" "refers to the severity of the impact." 40 C.F.R. § 1508.27(b). In evaluating intensity, agencies should consider ten criteria, including:

> (2) The degree to which the proposed action affects public health or safety.
> . . .
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
> . . .
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts . . . .
> . . .
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Id. It is not merely the "presence" of one of these factors which triggers the requirement to prepare an EIS, Pl. Mem. at 11, but a determination under at least one of the factors that DOE's action is environmentally significant. See Public Citizen v. Department of Transp., 316 F.3d 1002, 1023 (9th Cir. 2003) (EIS is required if an agency's "action is environmentally 'significant' according to any of these criteria") (emphasis omitted); see also National Parks & Conservation Assn. v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001) (noting that each factor "*may* be sufficient to require preparation of an EIS *in appropriate circumstances*") (emphasis added). In this case, DOE reasonably concluded that the above factors will not result in environmentally significant effects.

A. Potential Effects Of The Proposed Action Is Not Highly Controversial

Although Plaintiff disagrees with the government over the potential air and water quality impacts of the generating facilities, it has not demonstrated that the effects of the project are likely to be so controversial as to require an EIS. See 40 C.F.R. § 1508.27(b)(4). Although "[t]he existence of a public controversy over the effect of an agency action is one factor in determining whether the agency should prepare [an EIS]," Greenpeace Action v. Franklin, 14 F.3d 1332, 1333 (9th Cir. 1992), mere opposition to a particular use does not create public controversy. See Anderson v. Evans, 314 F.3d 1006, 1018 (9th Cir. 2002). Public controversy is insufficient to require an EIS unless "'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor,' or there is a 'substantial dispute [about] the size, nature, or effect of the major Federal action.'" National Parks, 241 F.3d at 736 (internal citations and quotations omitted) (alterations in original). A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI . . . casts *serious doubt* upon the reasonableness of an agency's conclusions." Id. (emphasis added). If Plaintiff satisfies this twofold showing, the burden then shifts to the government to provide a "well-reasoned explanation" demonstrating why those responses disputing the EA's conclusions "do not suffice to create a public controversy based on potential environmental consequences." Id. (citation

omitted).

Plaintiff here has not met its initial burden of showing a substantial dispute that raised substantial questions about the validity of the government's conclusions. Plaintiff points to comments DOE and BLM received regarding potential effects on air and water quality that will allegedly result from the construction of the generating facilities. Although Plaintiff claims that "more than 99 percent of the comments submitted to DOE were critical of the EA's analysis," it includes in its total four hundred identical electronic mail transmissions received after the close of the comment period. Pl. Mem. at 14 n.2; see also DOE-101, 20442. Aside from this, DOE received comments from only twelve organizations and individuals. Id. at 20442. Most of these comments were from state, federal, and local agencies, and only one commenter was a private individual.[15]/ See id. Twelve individually-written letters coming mostly from state and local agencies should not constitute an "outpouring of public protest." Cf. National Parks, 241 F.3d at 736 (450 comments received before publication of the EA and FONSI, 85% of which opposed the chosen alternative, was an "outpouring of public protest").[16]/ In addition, other than identifying them, Plaintiff fails to explain how any of the comment letter raise "substantial questions" about the validity of DOE's conclusions.

Moreover, any indication of a controversy over the potential environmental effects was addressed by the agencies' consideration of and responses to the comment letters before finalizing the EA. In accordance with NEPA, DOE and BLM addressed the comments by making corrections, explaining or clarifying its position, or by modifying the EA and expanding the

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[15]/ Two congressional representatives also commented in their official capacity. DOE-101, 204442.

[16]/ The court in National Parks did not consider the argument made here, namely that Plaintiff cannot rely on substantially identical comments to establish an outpouring of public protest. Although DOE did note the existence of the comments in the EA, similar to Public Citizen, 316 F.3d at 1027, Plaintiff's assertion that "more than 99 percent" of the commenters were critical of the EA must be viewed in light of the fact that 400 of 412, or 97 percent of these commenters provided their comments in the form of "substantially identical letters." DOE-101, 204442.

analyses. See DOE-101, 204442. DOE and BLM compiled the comments by category, and examined each of the issues in some detail. See id. at 204442-48.

With respect to potential air impacts and the potential health effects relating to those impacts, which were the focus of most of the comment letters, DOE explained the basis for its conclusions and the reasons for determining, based on air quality modeling, that emissions from the generating facilities will fall below the significance levels established by EPA for NO_x, SO_2, CO, and PM_{10}. DOE-101, 204445-46. DOE and BLM noted that the EPA significance levels, which are designed to protect the public health, see id. at 204361, "may generally be regarded as thresholds of impact below which impact is not viewed to be significant." id. at 204446. The EA indicated that some commenters suggested that emission levels might be higher than those predicted in the EA, but the agencies pointed out that those assertions were either "undocumented" or erroneously included emissions from sources other than those related to the export of electricity into the United States pursuant to the proposed Presidential Permits and ROWs that constituted the proposed action subject to review under NEPA. Id. at 204446 .

As for potential impacts to the Salton Sea and other water-related issues, DOE responded to comments by modifying the EA to include analysis of these potential impacts. Id. at 204446. "DOE and BLM have modified this EA to include discussions of existing water use/quality and potential impacts on water use/quality from the proposed actions." Id. The agencies thus addressed the comments by directly amending the EA. DOE determined that combined water use by the generating facilities will reduce water flow into the Salton Sea by only 0.78 % of the total inflow for that water body. Id. at 204432. Because such a small percent change in flow is below the level of sensitivity of most detection instruments, DOE determined the effect will not be significant. Id. at 204446-47. Likewise, DOE determined that the anticipated increase in salinity of the Salton Sea of 0.142 percent was negligible, since it, too, was virtually undetectable. Id. at 204447.

Plaintiff does not dispute the percent change in salinity or inflow calculated by DOE. See

Pl. Mem. at 13. Instead, it is simply unwilling to accept the agencies' reasoning that immeasurable impacts on salinity and inflow are insignificant. Plaintiff relies on a post-decisional letter from the California Regional Water Quality Control Board to the International Boundary & Water Commission expressing concern with Mexico's obligation to maintain water quality in the New River. See Pl. Mem. at 13 (citing Fox Decl., Ex. B., p. 1). This letter is dated more than three months after DOE issued its FONSI and Presidential Permits, and more than two months after BLM issued its FONSI and granted the ROWs. See Fox. Decl., Ex. B. to Pl. Mem. Because the letter was not before DOE or BLM at the time they made their decisions, it is outside the Administrative Record and should not be considered by this court. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (review to be "based on the full administrative record that was before the Secretary at the time he made his decision."). Not only is the letter outside the record, but it fails to mention the transmission line projects, DOE, or BLM at all. See generally Fox. Decl., Exh. B. to Pl. Mem. Plaintiff cannot rely on this letter to establish a controversy under NEPA, because "[t]he evidence establishing such a controversy must be brought to the agency's attention while the agency is conducting its deliberations, not *post hoc*." Public Citizen, 316 F.3d at 1027.

Nor can Plaintiff create controversy, as it attempts to do, by supplementing the record with its own experts' conclusions based on the facts considered by DOE. This does not create controversy, because "[i]f this type of disagreement were all that was necessary to mandate an EIS, the environmental assessment process would be meaningless." Greenpeace Action, 14 F.3d at 1335. Because Plaintiff merely attempts to recharacterize the potential effects on air and water quality that DOE has adequately disclosed and analyzed, its disagreement with DOE as to those effects cannot be the sort of public controversy that would require an EIS. See id. (agency's analysis of impacts "would be for naught if by simply filing suit and supplying an affidavit by a hired expert, predicated upon the same facts relied upon by the agency but reaching a different conclusion, a litigant could create a controversy necessitating an EIS"). Thus, Plaintiff has not

shown that public controversy requires an EIS.

B. The Potential Effects On Ozone Were Considered And Thoroughly Addressed

DOE's conclusion that potential effect of the project on ozone will not be significant is well-reasoned, detailed, and supported by the Record. See, e.g., DOE-101, 204407-09. Although Plaintiff contends that the effect on ozone is uncertain, Plaintiff merely disagrees with the method chosen by DOE to estimate the project's effect on ozone concentrations. Such disagreement about methodology, however, is not the type of uncertainty that warrants preparation of an EIS. See e.g., Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985) ("NEPA does not require that we decide whether an [environmental review] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology."). An EIS must be prepared "where uncertainty may be resolved by *further collection of data*, or where the collection of such data may prevent 'speculation on potential . . . effects.'" National Parks, 241 F.3d at 732 (internal citation omitted) (alteration in original) (emphasis added). This is not a case where "further collection of data" would make the potential effect on ozone any more certain, however. Instead, the alleged "uncertainty" about which Plaintiff complains stems from its disagreement with DOE's reasoned choice to use NO_x, a precursor to ozone formation, to estimate effects on ozone.

As explained in the EA, ozone is not directly emitted but is formed in the presence of sunlight and various other compounds, including NO_x, volatile organic compounds ("VOCs"), and carbon monoxide, CO. DOE-101, 204407. Ozone forms when NO_2 is broken down by sunlight to NO and O, followed by the oxygen atom, O, reacting with an oxygen molecule, O_2, to form O_3, or ozone. Id. Because compounds such as VOC and NO_x (which includes NO_2 and NO) lead to the formation of ozone in the presence of sunlight, they are called ozone precursors. See id. Where the ratio of concentrations of VOC to NO_x is high, as it is in rural areas such as Imperial County, ozone formation tends to be NO_x limited. Id. This means that adding more NO_x will

generally increase ozone production in such areas, including the border region in Imperial County. Id.; see also DOE-55, 202850 (NO_x emissions are the dominant ozone precursor group for the project).

DOE used NO_x emissions modeling to determine whether the export turbines associated with the project will result in increased ozone formation in Imperial County. See id. at 204407, 204408. The results revealed that the four export turbines will increase NO_x concentrations at the border by 0.33 $\mu g/m^3$ on an annual basis, well within the EPA significance limitation of 1.0 $\mu g/m^3$, which DOE used as a benchmark of impact. Id. at 204407, 204408. Similarly, the hourly estimate for NO_x from the four export turbines is 7.04 $\mu g/m^3$, only 1.5 % of the California standard[17]/ of 470 $\mu g/m^3$. Id. at 204407, 204408. Based on these comparatively small NO_x contributions associated with the transmission lines, DOE determined that any corresponding increases in ozone formation will also be very small. See id. at 204408; see also DOE-103, 204603 ("The calculated levels in the U.S. of NO_x . . . were so small that it can be concluded the associated impact on ozone levels in the U.S. would be minimal."). DOE thus employed very specific NO_x modeling results to determine there will be no potentially significant effect on ozone formation.

This is not a case where "further collection of data" would make the effect of ozone more certain. Plaintiff is simply critical of DOE's analytic method, not its lack of data. In fact the EA demonstrates a well-reasoned basis for estimating effects on ozone by modeling NO_x, since NO_x is a precursor to ozone that would influence its downwind formation at the border. See DOE-101, 204407. Although Plaintiff cites a government consultant's report to contend that ozone modeling should have been conducted, Pl. Mem. at 16, DOE determined in the EA that such models were not feasible because of limitations on their accuracy in estimating ozone contributions from a single source. See DOE-101, 204408. Plaintiff nevertheless would dictate DOE's analytic methods, even though EPA itself has not approved a modeling procedure for determining the

[17]/ EPA has not adopted an hourly significance limitation for NO_x. See 40 C.F.R. § 51.165(b)(1).

impact of individual emission sources on downwind ozone levels. See DOE-101, 204408.

The consultant's report cited by Plaintiff states that in the absence of an EPA-approved model, one option would be to employ a photochemical grid model such as UAM or CAMx. DOE-58, 203338. However, the report also states that this "may still be viewed as too much of a resource burden to implement for an EA." Id. In fact, DOE concluded as much and further explained the limitations of these unapproved ozone models:

> Regulators have used resource-intensive ozone modeling procedures to evaluate the combined impacts of numerous sources on regional ozone levels (e.g., the UAM-V and CAM-X reactive grid models). These grid models have limited resolution to estimate incremental impacts resulting from the relatively low levels of emissions of ozone precursors from an individual source, and there is no U.S. EPA-approved methodology for adjusting the parameters of these models to try to estimate small impacts from low-emitting sources. These modeling tools have therefore not been recommended for use in evaluating impacts from ozone sources.

DOE-101, 204408.

Although Plaintiff would have this Court believe that DOE's decision to use NO_x to model ozone makes the effect on ozone uncertain, that argument is a mere disguise for an attack on the adequacy of DOE's methodology. As stated previously, a court is not permitted to prescribe one particular methodology over another, but only to assess whether the agency's decision was based on a reasoned analysis. See Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1359 (9th Cir. 1994) (court is not required to decide whether EA "is based on the best scientific methodology available, nor does NEPA require [the court] to resolve disagreements among various scientists as to methodology"); see also Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170, 1177 (9th Cir. 2000) (agency's methodology need only satisfy the "rule of reason"). The EA explains DOE's method of analyzing ozone and the basis for the conclusion that potential ozone effects were not significant.

C. The Project Does Not Threaten To Violate Local, State, Or Federal Laws Meant To Protect Air Quality

Contrary to what Plaintiff alleges, the issuance of the Presidential Permits and ROWs do not threaten to violate local, state, or federal laws meant to protect air quality. As a preliminary

matter, Plaintiff does not assert that the construction or operation of the transmission lines themselves will threaten to violate such laws. Instead, Plaintiff argues that the LRPC and TDM facilities, both located in Mexico, must comply with California and Imperial County laws as if the facilities had actually been constructed in the United States. As DOE and BLM indicated, this plainly is not the law, and NEPA does not require the agencies to analyze the project in such terms. See, e.g., DOE-101, 204328 (stating that "[n]either the U.S. nor agencies of the State of California have jurisdiction over the regulation, permitting, or control of air pollutant emissions in Mexico--such as those from the LRPC and TDM facilities--regardless of any potential impacts in the U.S."). Because federal, state, local laws do not apply to these foreign facilities and because the facilities are not being authorized by the proposed actions that are the subject of the EA, their operation cannot threaten to violate such laws. The agencies therefore cannot be found to have been arbitrary and capricious in determining that this was not a factor affecting significance under NEPA.

Plaintiff notes that California has set emissions limits "that are, in some cases, more stringent than federal standards." Pl. Mem. at 17. Plaintiff, however, does not point to any provision of state law that the project will violate, but only refers generally to the table of state air quality standards in the state administrative code. See Pl. Mem. at 17 (citing the table of ambient air quality standards found at Cal. Code Regs. title 17 § 70200). In fact, a comparison of California ambient air quality standards with the estimated concentration increases in NO_x, CO, and PM_{10} disclosed in the EA fails to support Plaintiff's claim that the project will result in a violation of state standards. Compare DOE-101, 204362 (listing state standards) with id. at 204406 (listing concentration increases at the border predicted to result from the export turbines); see also id. at 204408 (noting that NO_x increases attributable to the export turbines will only amount to 1.5 percent of the California state standard). Thus, even if California law applied to the LRPC and TDM facilities, the project will not necessarily cause the state ambient air quality standards to be violated.

Moreover, DOE found that the owners of both LRPC and the TDM facility have taken substantial measures to reduce air emissions. The TDM facility will voluntarily employ Best Available Control Technology ("BACT"), including: dry low-NO_x combustor technology, a selective catalytic reduction system ("SCR"), and catalytic oxidizers to control CO emissions. DOE-101, 204447. This will allow air emissions from the TDM facility to meet California emissions standards. Id. at 204447. The EBC and EAX export turbines will also employ dry low-NO_x combustors and SCR. Id. These voluntary mitigating measures further ensure that operation of the power plants is consistent with United States' standards, even though those standards do not apply.

Nor will the project result in the violation of Imperial County Air District rules. Plaintiff asserts that because the Mexican generating facilities are located in the Salton Sea Air Basin, they must comply with the Air Pollution Control District ("APCD") rules for new stationary sources constructed in Imperial County. However, the reach of the Imperial County APCD Rules is limited to new sources under the APCD's jurisdiction. See Cal. Health & Safety Code § 40001(a) ("[D]istricts shall adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources *under their jurisdiction* . . . .") (emphasis added). Because the Mexican generating facilities do not fall within the legal jurisdiction of the APCD or California at all, the transmission lines do not threaten to violate state or local air quality laws. Thus, the federal agencies reasonably concluded that the potential environmental effects of the projects were not "significant" under 40 C.F.R. § 1508.27(b)(10), and an EIS is not required.

D. The Project Will Not Result In Cumulatively Significant Impacts

Plaintiff also contends that DOE failed to consider various cumulative effects related to other generating facilities that "will be constructed in the border region." Pl. Mem. at 16. DOE, however, considered the possibility that other power plants would be sited in the border region and found such "rumors . . . to be unsubstantiated." DOE-101, 204438 (noting that "DOE and

BLM are not aware of any electric generating facilities in the project area other than the LRPC and TDM facilities actually being planned."). Moreover, the cumulative impacts section of the EA analyzed not only the potential NO_x emissions that will result from turbines associated with export along the project transmission lines, but those associated with the entire LRPC, including turbines devoted exclusively to providing power to Mexico. See id. at 204438.

According to the air dispersion modeling analysis conducted for the entire LRPC facility, the projected increases in ambient concentrations of NO_x, CO, and PM_{10} that will result at the United States border "can be seen to remain below SLs established by the EPA." Id. at 204438, 204439. Thus, DOE reasonably concluded based on the ambient air quality modeling that any cumulative effect on air emissions will not be significant. The agencies conducted an extensive analysis of potential cumulative environmental impacts, and reasonably concluded that cumulative impacts were not a significant factor necessitating preparation of an EIS. Id. at 204436-40.

E. Health Impacts Were Adequately Considered

The EA adequately accounted for potential health effects because it determined that the emissions from the generating facilities would fall within the EPA-designated SLs, which themselves protect public health. See id. at 204402 (emissions from TDM facility would fall within SLs); id. at 204404 (same as to emissions from LRPC export turbines); id. at 204445 (response to comments that emissions would "cause serious health impacts"). Emissions below SLs are not considered to cause or contribute to violations of the NAAQS. See 40 C.F.R. § 51.165(b)(2). The NAAQS themselves are designed to protect public health. See 42 U.S.C. § 7409(b)(1) (NAAQS "shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health."). Thus, so long as the emissions related to the transmission lines do not contribute to violations of the NAAQS, DOE's and BLM's actions will not have significant effects on public health. See DOE-102, 204472 ("If measured or predicted concentrations of the criteria pollutants are below the ambient standard, no health effects

are expected.").[18]/

DOE articulated this reasoning in the EA in response to comments that emissions would "cause serious health impacts." See id. at 204445-46. Also, as Plaintiff acknowledges, Pl. Mem. at 12 n.1, a discussion of potential health effects is contained in the EA Appendix. Because the Appendix is part of the EA, there is no basis for Plaintiff to discount that discussion. See Found. for North American Wild Sheep v. U.S. Department of Agriculture, 681 F.2d 1172, 1176 n.12, 1178 (9th Cir. 1982) (court's review and opinion was based on "information . . . gleaned from the EA and its appendices").

As discussed in the EA Appendix, SER's application evaluated potential acute, chronic, and cancer health effects resulting from the TDM facility and found them to be "substantially below their relative thresholds of 10 in 1 million, 0.5 and 0.5, respectively." DOE-102, 204486. The methodology for this evaluation is fully set forth in the EA appendix. Id. at 204485-86. Potential health effects associated with hazardous air pollutants were also examined by estimating their ambient concentrations, then comparing the results to EPA "Reference Exposure Levels (RELs) and Unit Risk Factors (URFs)." Id. at 204485. It was determined from this analysis that theTDM facility "will not have a substantial impact on ambient pollutant on the region surrounding the project site." Id. at 204486. Modeling data for the LRPC export turbines also employed a "detailed analysis to ensure . . . that no negative health impacts are generated." Id. at 204468.

In sum, DOE employed detailed emissions modeling to determine that any emissions from the generating facilities would fall below the SLs, which themselves account for the effect of emissions on public health. See DOE-101, 204445-46 (responding to various commenters'

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[18]/ The Ninth Circuit's analysis of health effects in Public Citizen, 316 F.3d 1002, does not require preparation of an EIS in this case. The court in Public Citizen did not consider the circumstances here, where an agency adequately considers potential health effects when it makes a reliable determination that the proposed action would meet EPA SLs. For purposes of this case, there is no "marginal degradation" in air quality as discussed in Public Citizen because the emissions do not exceed the threshold of the SLs. Because emissions would not exceed the SLs, the health effects are not significant, and the agencies reasonably concluded that an EIS was not necessary.

assertions that emissions would "cause serious health impacts"). Moreover, the EA Appendix demonstrates chronic, acute, and cancer health effects were also considered. DOE took a hard look at health effects, and NEPA requires no more.

CONCLUSION

The detailed EA and FONSI and voluminous Administrative Record demonstrate that DOE and BLM took the requisite "hard look" at the environmental impacts of issuing the Presidential Permits and ROWs. Plaintiff has failed to show that the agencies' analyses or conclusions were "arbitrary and capricious." Therefore, Plaintiff's motion for summary judgment should be denied, and this Court should grant summary judgment in favor of Federal Defendants.

Respectfully submitted this _____th day of March, 2003

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CERTIFICATE OF SERVICE

I certify that I caused to be served a true and correct copy of the foregoing FEDERAL DEFENDANTS' MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT by Federal Express overnight courier (Saturday delivery) on the 7th day of March, 2003, addressed to the following:

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and by regular mail first class postage prepaid on the 7th day of March, 2003, addressed to the following:

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