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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; SPENCER ABRAHAM, in his official capacity; CARL MICHAEL SMITH, in his official capacity; ANTHONY J. COMO, in his official capacity; BUREAU OF LAND MANAGEMENT, Defendants.	Case No.: 02-CV-513-IEG (POR) PLAINTIFF'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[1] Date: April 18, 2003 Time: 9:00 a.m. Courtroom: 13 The Honorable Irma E. Gonzalez

[1] NOTE TO THE CLERK: Pursuant to the March 13, 2003 stipulation and order, Plaintiff files this combined memorandum, totaling 30 pages, on reply in support of its motion for summary judgment and in opposition to the Federal Defendants' motion for summary judgment.

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TABLE OF AUTHORITIES

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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
BACT	Best available control technology
BCP	Baja California Power, Inc.
Border Group	Border Power Plant Working Group
BLM	Bureau of Land Management
CEQ	Council on Environmental Quality
CO	Carbon monoxide
DOE	Department of Energy
EA	Environmental Assessment
EIS	Environmental Impact Statement
EAX	Energia Azteca X
EBC	Energia de Baja California
FONSI	Finding of No Significant Impact
INTERGEN	Intergen Aztec Energy, Inc.
LAER	Lowest Achievable Emission Rate
LRPC	La Rosita Power Complex
MW	Megawatt
NEPA	National Environmental Policy Act
NOx	Oxides of nitrogen
PM_{10}	Particulate matter less than 10 microns in diameter
SCR	Selective catalytic reduction
SEMPRA	Sempra Energy Resources, Inc.
TDM	Termoelectrica de Mexicali
T-U.S.	Termoelectrica U.S.
U.S. EPA	United States Environmental Protection Agency

Note: All citations to the record refer to document number (DOE or BLM) and bates number.

INTRODUCTION

This case is about the duty of a federal agency to consider, analyze and disclose the potentially significant environmental impacts of permitting an activity in the United States, which allows companies to enter California's deregulated electricity market by generating power in Mexico and importing it into the United States. This case is not about regulating foreign activities. This case *is* about ensuring that before our federal government considers permitting imports into the United States, it is fully informed of the impacts of those imports on our air, our water, our environment and our children, and has considered all reasonable alternatives that may minimize potential environmental effects. That is NEPA's purpose. The Border Power Plant Working Group ("Border Group") has sued the Department of Energy, et al. ("DOE") to enforce the public's right to fully informed decision-making, which must take into account the public's interest in protecting our environment.

DOE consistently failed to evaluate the totality of the projects it authorized under the Presidential permits at issue in this case. Those permits authorize two companies each to import between 1000 and 1400 MW of electricity into the United States. But the EA only analyzed the impacts of importing a portion of that amount of electricity. For instance, for Sempra's permit, the EA only analyzed impacts from 500 MW of electricity even though the permits would authorize a transmission line that accommodates significantly more, and Sempra intends to use that additional capacity. Consequently, the full impacts to air and water have never been assessed. Further, DOE failed to perform any evaluation of impacts to human health. It also ignored impacts from ammonia and carbon dioxide emissions and never performed a modeling analysis of impacts on ozone formation. And while it estimated increases in salinification of the Salton Sea, it did not meaningfully evaluate how increased salinity would affect that protected ecosystem. Perhaps most significantly, DOE ignored NEPA's mandate to consider cumulative impacts from all past, present and future actions in addition to the current project.

In spite of evidence of this project's environmental impacts in a region out of attainment with clean air standards, containing waterbodies listed as degraded, and with the highest rate of

childhood asthma in the state, DOE failed to consider a *single* alternative that would have minimized or eliminated environmental impacts.

DOE's cursory treatment of the recent Ninth Circuit case, *Public Citizen v. Dept. of Transportation*, is illustrative of its persistent attempt to avoid taking the "hard look" at these factors required by law.

FACTS

The Border Group relies on its original statement of facts and responds here only to clarify certain inaccuracies in DOE's statement of facts.

Related to air impacts, DOE claims that the emission levels achieved by the Sempra (TDM) plant "are the same as those being routinely permitted in the United States and specifically in California." Def. Mem., p.4. However, a newly permitted natural gas plant in San Diego will achieve 2.0 ppm for NOx, compared to Sempra's 2.5 ppm, and it will also achieve 1.2 to 1 offsets for all of its remaining emissions. DOE-056, 203096; DOE-058, 203335; Fox Dec., ¶¶ 24-25. Further, while DOE has accurately represented the levels of emissions disclosed in the EA for NOx, PM_{10} and CO, these emissions do not represent the full potential for project emissions because DOE only analyzed a portion of the capacity of the transmission lines, as permitted, to import electricity from Mexico, i.e. 500 MW for Sempra line.

On water impacts, DOE suggests that after the treated water is used by the power plants it will be "recovered" and discharged into drains which lead to the New River. Def. Mem., p.5. This is an oversimplification. Wet cooling uses millions of gallons of water each day. DOE-092, 203785; Fox Dec., ¶¶ 19, 33-34. According to the EA, the facilities together will evaporate 10,570 acre-feet of water per year, reducing flows to the Salton Sea by 0.78 percent. DOE-101, 204432. Operating at only 70 percent capacity, the plants will use just over 12,000,000 gallons of water per day. Fox Dec., ¶ 32. However, at full capacity, the combined cooling water demand of the two plants would be approximately 18,000,000 gallons per day, or 20,000 acre-ft/yr. Approximately 80 percent of the water will be evaporated, up to 16,000 acre-ft/ yr, while the remaining 20 percent (roughly 4,000 acre-ft/yr) will be discharged as high salinity cooling

tower blowdown "brine" into the New River. Fox Dec., ¶ 34. Dr. Fox explains what the EA means when it states that TDS levels in the New River and Salton Sea will increase:

> The New River flow rate at the border is 182,000 acre-ft/yr, with a total dissolved solids (TDS or salinity) of 2,600 milligrams/liter (mg/l). Mexicali wastewater flowing into the New River serves as a low salinity fresh water supply for the Salton Sea. At continuous rated power output, the two plants will divert a quantity of water that represents more than 10 percent of the New River's flow at the border, and all of the diversion will consist of low TDS (~1,000 mg/l) Mexicali treated/untreated wastewater flow. The Salton Sea is classified as impaired due to high salinity. The two plants will return 20 to 30 percent of the diverted flow to the New River as high salinity cooling tower blowdown, with a TDS ranging from 3,400 mg/l to 4,800 mg/l. Discharge of high salinity cooling tower blowdown into the New River, combined with the reduction in flow, will increase the salinity of the River by 6 to 10 percent. The percentage varies depending on whether the estimated actual discharge is assumed, as is done in the EA, or whether the maximum potential discharge is used, as assumed in paragraph 33 [of Dr. Fox's declaration].

Fox Dec., ¶ 35. Thus, the New River's salinity levels will increase by six to ten percent. Any discussion of removing TDS or salt is meaningless without knowing the ratio of salt to water. Salinity is a factor of concentration, not TDS, which is a measure of quantity. Last, because 80 percent of the treated water used in the plants will be evaporated, the New River will not obtain the benefits of the removal of concentrations of pathogens because the water will be permanently lost.

ARGUMENT

I. This Court Has Jurisdiction to Review the Border Group's Claims

DOE does not challenge this Court's jurisdiction to hear plaintiff's claims. Nor does DOE contest Border Group's standing to bring this case. Accordingly, this Court should affirm its jurisdiction and Border Group's standing, as set forth in Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment (Pl. Mem,), p.8-9.

II. Standard of Review

DOE is incorrect that the standard of review of an agency NEPA analysis is "highly deferential." Federal Defendants' Memorandum in Support of Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment (Def. Mem.), p. 8. While a court may not substitute its own judgment for that of the agency, the arbitrary and capricious standard requires a court "to ensure that an agency has taken the requisite 'hard look' at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the

agency decision is 'founded on a reasoned evaluation of the relevant factors.'" *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1114 (9th Cir. 2000) (citations omitted); *see also Morongo Band of Mission Indians v. Federal Aviation Admin.*, 161 F.3d 569, 573 (9th Cir. 1998) (stating same standard).

A. Plaintiff's Extra-Record Evidence is Properly Before the Court on Review of the Legality of the EA and FONSI

While the general rule in APA cases limits the Court's review to the administrative record that was before the agency at the time of its decision, the Ninth Circuit has held that:

> it is both unrealistic and unwise to 'straightjacket' the reviewing court with the administrative record. It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters.

Asarco v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980); *see also Bunker Hill v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977) (reviewing supplementary materials which would help the court understand technical matters but which contained no new rationalizations for the agency's actions). Exceptions to the general rule limiting judicial review to the administrative record include allowing expert declarations to show that the agency failed to consider all relevant factors and to explain complex or technical subject matter. *See Animal Defense Council v. Hodel*, 840 F. 2d 1432, 1436 (9th Cir. 1988), amended, 867 F. 2d 1244 (9th Cir. 1989) *citing Public Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir.1982); *see also National Audubon Society v. U.S. Forest Service*, 46 F.3d 1437, 1447 (9th Cir.1993); *Hells Canyon Preservation Council v. Jacoby*, 9 F.Supp.2d 1216, 1222-3 (D. Or. 1998) (citations omitted). These exceptions are particularly applicable in NEPA cases. *See County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1384-85 (2nd Cir. 1977) (emphasis added), *adopted in Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *amended* 867 F.2d 1244 (9th Cir. 1989); *see also Environment Now! v. Espy,* 877 F. Supp 1397, 1403-04 (E.D. Cal. 1994) (extra-record evidence allowed in a challenge to an EIS to show failure to address significant impacts); *see also Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (extra-record declarations should be

considered particularly in NEPA cases where the fundamental issue is whether agencies have considered relevant environmental impacts).

DOE cites cases which state that a Court should not consider post-decisional material submitted during litigation for the purpose of raising an issue for the first time or to create a controversy over a project's impacts, when the information could have been submitted during the public comment period. However, those cases also state that courts should defer to an agency's analysis and choice of scientific methodology only if it is "reasonably thorough." *Laguna Greenbelt Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 526 (9th Cir. 1999); *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985); *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.,* 123 F.3d 1142, 1151-52 (9th Cir. 1997). The Ninth Circuit has clearly stated that when an agency's analysis is shown to be arbitrary and capricious, the Court owes it no deference. *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.,* 123 F.3d at 1151-52. "Although a court should not take sides in a battle of the experts, it must decide whether the agency considered conflicting expert testimony in preparing its FONSI, and whether the agency's methodology indicates that it took a hard look at the proposed action by reasonably and fully informing itself of the appropriate facts. See Idaho Sporting Congress, 137 F.3d at 1150 (precluding the agency from relying on expert opinion in the absence of hard data)." *NPCA v. Babbitt*, 241 F.3d 722, 736, n.14 (9th Cir. 2001) (citations omitted).

In a separate motion, DOE has moved to strike all eight of the Border Group's declarations filed in support of its motion for summary judgment. Essentially ignoring these well-settled exceptions to the general rule that a Court must confine itself to reviewing the administrative record, defendants seek to have the declarations stricken simply because they are not part of the administrative record in this case. However, Border Group's three expert declarations fall squarely within several of these exceptions. For instance, Drs. Fox, Tesche and English explain relevant factors that DOE failed to consider and provide explanations of complex or technical subject matter. None of the expert declarations is used to raise new issues that were not already before the agency or to create a scientific controversy. The remaining five declarations are admissible to prove standing. All of the declarations are properly before the

Court on review of DOE's Environmental Assessment and Finding of No Significant Impact. *See* Plaintiff's Opposition to Federal Defendants' Motion to Strike, filed herewith.

III. DOE Violated NEPA and the APA

A. Potentially Significant Project Impacts Mandate Preparation of An EIS

"If the EA establishes that the agency's action '*may* have a significant effect upon the ... environment, an EIS must be prepared.'" *Nat'l Parks & Conservation Assn. v.* Babbitt, 241 F.3d 722, 730 (9th Cir. 2001) (emphasis in original) *quoting Foundation for N. Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir.1982); *see also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). Thus, this Court need not find, and the Border Group need not prove, that the project *will* in fact have a significant impact before an EIS is required. *Foundation for N. Am. Wild Sheep*, 681 F.2d at 1178.

"Significance" is explicitly defined by the CEQ regulations, not by any other agency. 40 C.F.R. § 1508.27. When the Ninth Circuit referred to "environmentally significant" actions in *Public Citizen*, it referred to significance as defined by the CEQ regulations. 316 F.3d at 1023. Contrary to DOE's assertion (Def. Mem., p.25), Ninth Circuit cases demonstrate that a potentially significant impact under any one of the CEQ factors requires preparation of an EIS. *Id.*; *see e.g. Nat'l Parks*, 241 F.3d at 731, 732-733 (EIS required for lack of data and uncertainty of impacts); *see also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213-14 (9th Cir. 1998) (uncertainty about sedimentation impacts "alone" raises substantial questions requiring an EIS).

1. The Project May Have Significant Effects on Public Health

NEPA requires that in evaluating the intensity of potentially significant impacts to determine whether an EIS is required, DOE must consider "the degree to which the proposed action affects public health or safety." *See* Pl. Mem., p. 10-11; 40 C.F.R. § 1508.27(b)(2). As explained in Plaintiff's opening memorandum, DOE's EA and FONSI completely ignored potentially significant health impacts that require preparation of an EIS, despite clear record evidence that the project will result in the degradation of air quality, and despite the health-related comments it received during the public comment period. *See* Pl. Mem., p. 11-12. For the reasons explained in Plaintiff's

opening memorandum, the health impacts of the project should have been considered and mandate the preparation of an EIS. *See* Pl. Mem., p. 11-12, 24.

DOE argues that "[t]he EA adequately accounted for potential health effects because it determined that the emissions from the generating facilities would fall within the EPA-designated SLs [significance levels], which themselves protect public health.." *See* Def. Mem., p. 34-36. DOE's argument is entirely a *post hoc* rationalization for what DOE failed to analyze in the EA and explain in its FONSI. *NRDC v. U.S. Dept. of Interior*, 113 F.3d 1121, 1126-1127 (9th Cir. 1997) (rejecting government's "post hoc [rationalization] to justify the Service's failure to designate critical habitat"). As the Ninth Circuit has stated, it is in the EA and final decision where the agency's "defense of its position must be found." *Blue Mountains*, 161 F.3d at 1214 (rejecting the declaration of an agency project manager) *citing* 40 C.F.R. § 1508.9(a). DOE's failure to address public health impacts in any manner in the EA precluded the public's fully-informed participation. This Court must reject DOE's *post hoc* arguments because these rationalizations are not found in the EA and FONSI. *See* DOE-101, 204445-46 (***no explanation*** that its analysis of emissions under significance levels equates to no health impacts); *Save the Yaak Committee v. Block,* 840 F.2d 714, 717 (9th Cir. 1988) (statement of reasons not to prepare an EIS must be in the EA and FONSI).

In addition, DOE's argument has no merit, primarily because it relies entirely on the incorrect assumption that "potentially significant health impacts" for NEPA purposes are the same as "significance levels" for Clean Air Act purposes. DOE has offered absolutely no legal authority to support the notion that an analysis of Clean Air Act significance levels can properly substitute for the NEPA health effects inquiry required by 40 C.F.R. § 1509.27(a). DOE's assumption is wrong because, *inter alia*, it fails to account for shortcomings in DOE's significance level analysis and controlling Ninth Circuit case law. However, even if significance levels from air pollution laws were the appropriate measure of significant health impact under NEPA, a full assessment of those laws demonstrates that the Project's emissions exceed those levels.

a. The Project's Emissions Exceed Clean Air Act PSD Significance Levels and Local Levels to Protect Air Quality

DOE argues *post hoc* that the EA health inquiry is complete because it determined that the project would not exceed Clean Air Act significance levels for ambient pollutant. Def.

Mem., p. 34; *see also* Def. Mem., p. 11 (*citing* DOE-101, 204404, 204406); 42 U.S.C. § 7409(b)(1); 40 C.F.R. § 51.165(b)(2) (establishing Clean Air Act ambient significance levels for major sources in non-attainment areas). However, DOE's reliance on ambient significance level determinations is inadequate because DOE ignored both EPA PSD significance levels and local Imperial County emissions standards.

EPA "prevention of significant deterioration" or "PSD" significance levels establish thresholds of emissions allowed from new "major" sources in "moderate" non-attainment areas like Imperial Valley and Mexicali before certain permitting and emissions offsetting requirements are triggered. *See* 42 U.S.C. § 7503; DOE-101, 204364; Tesche Dec., ¶ 5; Fox Dec., ¶ 8. Under these EPA significance levels, which should have been part of DOE's "hard look," a stationary source (*e.g.*, a power plant) located in a "moderate" PM_{10} non-attainment area is considered a "major" source for purposes of the Clean Air Act if it emits, or has the potential to emit, 100 tons per year or more of PM_{10}. 42 U.S.C. § 7602(j) (defining "major stationary source" as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant"); 57 Fed. Reg. 13498, 13538 col. 3 (1992). Projected PM_{10} emissions from the project far exceed 100 tons per year, and health effects of such significant emissions should have been considered. *See* Def. Mem., p. 4-5 (annual emissions of PM_{10} projected at 216 tons from the TDM facility, 410 tons from the EBC and EAX export turbines, and 314 tons from the EAX domestic turbines). Such projected emissions, even ignoring the EAX domestic turbines, clearly exceed the 100 tons/year PSD significance level for PM_{10}, and the failure to consider their health impacts is arbitrary and capricious. Also, if DOE chooses to rely on statutory emissions levels to comply with its duty to assess health impacts under NEPA, DOE must also examine Imperial County air pollution regulations, which are stricter than federal standards.[2] Imperial County requires "no net increase in emissions" from any new source which has the "Potential to Emit 137 pound[s] per day or

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[2] *See* Rules and Regulations of the Imperial County Air Pollution Control District, available at http://www.arb.ca.gov/drdb/imp/cur.htm (visited March 20, 2003), attached to Pl. Mem. as Exhibit A.

more of any Nonattainment Pollutant or its Precursors." Pl. Mem., Ex. A. As Plaintiff stated in its opening memo, based upon the figures in the EA, Sempra's plant alone will emit 1,184 pounds of PM_{10} per day, well over the 137 pound maximum limit set by the District. Pl. Mem., p.17. Thus, by the District's standards for regulating emissions, these emissions are significant.

Moreover, the entire data set relied upon in the EA analysis of ambient significance levels under 40 C.F.R. § 51.165(b)(2) fails to account for either the anticipated maximum production capacity of 1400 MW from the Sempra plant[3] or the anticipated use of diesel as a back-up fuel. *See* DOE-035, 202196, 202188. Sempra's stated intent to increase power generation capacity, would dramatically increase the project's emissions, and would obviously alter significantly DOE's Clean Air Act significance levels analysis. DOE's failure to consider these factors in its analysis renders DOE's conclusions arbitrary and capricious.

b. Clean Air Act Significance Differs from NEPA Significance

Even if Project emissions did not exceed statutory air pollution significance levels, those levels would not be an appropriate measure of significance for NEPA purposes. The Ninth Circuit recently recognized this in *Public Citizen*, 316 F.3d 1002, (9th Cir. 2003), a case DOE all but ignores. In that case, the Court made clear that the purpose of the NEPA health inquiry has nothing to do with Clean Air Act significance levels, but rather is intended to ensure that the government take a hard look at the potentially significant health effects of certain federal actions.

The Court in *Public Citizen* held that even a "marginal degradation" of the quality of the air we breathe can be "environmentally significant" for purposes of the NEPA health effects inquiry. *Public Citizen,* 316 F.3d at 1024. In fact, *Public Citizen* held that NO_x and PM_{10} emissions *per se* constitute a "marginal degradation" in air quality that mandates an EIS health effects analysis. *Id.* (Because "a wealth of government and private studies" show that NO_x and PM_{10} emissions "constitute a major threat to the health of children, contribute to respiratory illnesses such as asthma and bronchitis, and are likely carcinogenic, such effects *must* be

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[3] As described in more detail below, the Ninth Circuit has held that permitting a development that obviously leaves room for an increase in activity that would have environmental effects requires the EA to consider those effects. *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975).

considered [under NEPA]." (Emphasis added.)). Notably, *Pubic Citizen* also considered whether the agency's Clean Air Act conformity analysis was adequate. However, the Court did not even mention Clean Air Act considerations in its discussion of NEPA health effects analysis. *See id.* at 1029 *et seq.*

The health impacts of particulate emissions in the instant case demonstrate the importance of the *Public Citizen* holding. In 1997, EPA found that "a large body of compelling evidence demonstrates that exposure to particulate matter pollution, in general, is associated with premature death, aggravation of heart and lung diseases, increased respiratory illness and reduced lung function." 62 Fed. Reg. 38652, 38657 (1997). The Agency further found that these serious health effects associations "are observed *in areas or at times when the levels of the current PM_{10} standards are met*." *Id.* (emphasis added). EPA's conclusion on this score was supported by a group of 27 scientific and medical experts on the health effects of air pollution, who stated that levels of PM pollution below the PM_{10} standards "exacerbate serious respiratory disease and contribute to early death." *Id.* Similar conclusions were reached in a letter signed by more than 1,000 scientists, clinicians, researchers, and health care professions, who argued that tens of thousands of hospitals visits and premature deaths could be prevented if the PM standards were strengthened. *Id.* It is thus clear that the Clean Air Act significance levels used by DOE are not an adequate basis for concluding that the Project's air emissions, including PM emissions, will not have a significant impact on human health for purposes of a NEPA analysis.

2. The Project May Have a Significant Adverse Effect on the Salton Sea

DOE fails to respond to the Border Group's arguments that the geographic proximity of the project to an ecologically critical area such as the Salton Sea also mandates preparation of an EIS. *See* 40 C.F.R. § 1508.27(b)(3) ("proximity to . . . ecologically critical areas" is a factor in significance determination); Pl. Mem, p. 12-13. In fact, DOE cannot cite any explanation from the record as to why an EIS was not necessary when there is conclusive evidence that there will be adverse impacts to an ecologically protected area. The FONSI provides *no explanation* or analysis of this significance factor. *See* 40 C.F.R. § 1508.27(b)(3); *compare* DOE-103. In light of the geographic proximity of the project to the Salton Sea and the admitted impacts to it,

without a convincing statement of reasons, DOE's FONSI is arbitrary and capricious. *See Public Citizen*, 316 F.3d at 1021.

In its brief, DOE repeats the conclusory statement of the EA and FONSI that the magnitude of the impacts of increasing salinity and decreasing water of the Salton Sea is insignificant because it "is minimal and below the threshold of detection of most measuring instruments." Def. Mem., p.26-27; DOE-103, 204605. DOE then argues that Plaintiff "is simply unwilling to accept the agencies' reasoning that immeasurable impacts on salinity and inflow are insignificant." Def. Mem., p.27:1-2. There are several problems with this line of reasoning. First, nothing in the record, other than the conclusion itself, supports DOE's assertion that these impacts are "immeasurable." Rather, the record states that "most" instruments cannot measure the impact. The second problem is that DOE draws an illogical and unscientific conclusion from the facts. That an impact is measurable by only some instruments is irrelevant to whether it is significant. What is relevant is how the changes might impact the ecosystem, not how a "measuring instrument" might respond to such an impact. DOE provides no evidence, analysis or scientific support for its conclusion that the impacts are not significant.

The record evidence also contradicts DOE's unsupported conclusion. The Border Group cited evidence in its opening memorandum that shows that the Salton Sea's health is already declining because of a high salt concentration and expensive efforts are underway to try to remove already existing salt concentrations. Pl. Mem., p.13 *citing* DOE-035, 200943-949, 200952, 200959. Further, controlling salinity levels is "critical" to maintaining the Salton Sea's biodiversity. Pl. Mem., p.13 *citing* DOE-035, 200959. And, according to EPA, water shortages in this arid region are becoming "increasingly significant." Pl. Mem, p.13 *citing* DOE-092, 203785 (emphasis added). These facts from the administrative record are supported by the letter of the California Regional Water Quality Control Board for the Colorado River Basin Region , which noted that "[a]ny reduction in present flow*s* [to the Salton Sea] or increase in total dissolved solids makes [restoration of the Seat] more costly and less practical." Fox, Dec., Ex. B, p.1 (emphasis added). DOE did not address these issues in its EA or FONSI and ignored this

evidence in its brief.[4]

DOE also tries to defend its FONSI by arguing that the power plants will reduce levels of other contaminants in the New River. Def. Mem., p.16. However, the benefits to the New River are illusory because in removing certain pollutants, Sempra and Intergen will also remove substantial quantities of water. Fox Dec., ¶¶ 34-35 (roughly 80 percent of the treated water will be evaporated). The used water that is subsequently discharged from the plants will have substantially higher concentrations of TDS (salt) than it did previously. *Id.* DOE cannot mask the significant impacts of salinification on the Salton Sea by focusing on the fact that significant quantities of water, and with it other pollutants, will be eliminated.

DOE also offers, as a *post hoc* rationalization, that because the reduction in flow to the Salton Sea falls within the range of flow variations of the Salton Sea, it is somehow insignificant. The fault in this "logic" is that the water withdrawals from this project are *not* variable; they are permanent reductions in flow. Thus, these *permanent* reductions will shift the variable inflows to the Salton Sea downward.

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[4] Instead of addressing the record evidence, DOE attacked the Border Group's reference to the Regional Board letter, which postdates the FONSI and decision notice. Def. Mem., p.28. DOE suggests that the Border Group used this letter to create a "controversy" *post hoc*. As the Border Group sets forth in its opposition to DOE's motion to strike, the Border Group does not use the Regional Board's letter to create a *post hoc* controversy over the project's impacts. *See* Plaintiff's Opposition to Federal Defendants' Motion to Strike, p. 7-9, filed herewith, and Pl. Mem., p. 14-15 (no reference to letter in discussing "controversy"). Rather, the Border Group cites this evidence only to demonstrate the utter arbitrariness of DOE's unsupported and unscientific conclusion in the Final EA and FONSI that the impacts on water quality and the Salton Sea are "minimal." *See* Pl. Mem., p. 12-13. As noted in the Border Group's opposition to DOE's motion to strike, the letter should be considered because it helps explain the arbitrariness of DOE's conclusion and because the lack of disclosure in the draft EA constitutes an exceptional circumstance which precluded the Regional Board from commenting during the public comment period. *See Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (post-decision evidence can be considered in exceptional circumstances). Further, the significance of water impacts was not raised for the first time through the Regional Board's letter, but was presented to the agency during the public comment period. *Cf. Havasupai Tribe v. Robertson*, 943 F.2d at 34; *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 811-812 (9th Cir. 1980) (Court considered evidence, but held that post-decision evidence cannot provide "new rationalizations"). However, even if this Court decides not to consider the letter, DOE's lack of analysis and the clear record evidence speak for themselves.

Last, because DOE ignored the evidence that Sempra will eventually produce up to 1400 MW of energy, its assessment of decreased water and increased salinity in the Salton Sea is significantly underestimated. The potential for significant impacts to an ecologically protected area requires an EIS.

3. The Project's Effects are Highly Controversial

NEPA requires that in evaluating the intensity of potentially significant impacts to determine whether an EIS is required, DOE must consider "the degree to which the effects on the quality of the human environment are likely to be highly controversial." *See* 40 C.F.R. § 1508.27(b)(4). As explained in Plaintiff's opening memo, DOE received approximately 412 comments on the proposed project, all but two of which raised substantial concerns about air, water quality and/or human health impacts; most commenters stated that an EIS was necessary. *See* Pl. Mem., p. 14-15. This "outpouring of public protest" constitutes a "controversy" for NEPA purposes, *see Public Citizen*, 316 F.3d at 1027; *Nat'l Parks*, 241 F.3d at 736, and DOE's decision not to prepare and EIS was therefore arbitrary and capricious.

In opposition, DOE makes two arguments. First, DOE argues that:

> [t]welve 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').

Def. Mem., p. 26. DOE offers no authority to support the notion that public comment should be ignored or devalued because it is in e-mail form or similar to most of the other letters. The fact that a private citizen expresses his or her views to the agency by means of an electronic "form" letter does not mean that the views are any less sincerely held than other commenters' views, or justify the agency in ignoring or devaluing the citizen's views.[5] To hold otherwise would deny

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[5] In fact, federal agencies including DOE and BLM routinely solicit public comment in electronic form for NEPA purposes. *See, e.g.,* www.epa.gov/fedrgstr/EPA-IMPACT/1997/June/Day-04/i14508.htm (visited March 18, 2003) ("Commenters may transmit comments electronically via the Internet"); www.energy.gov/HQPress/releases01/junpr/pr01092.htm and www.oakridge.doe.gov/media_releases/2002/r-02-015Pad.htm (visited March 18, 2003) (DOE requesting public comment by e-mail).

the public of their right to be involved "in preparing and implementing [the agency's] NEPA procedures." *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1115-1116 (9th Cir. 2002). Rather, as in *National Parks*, the 410 letters received by DOE before publication of the EA that raised concerns about environmental and human health impacts (99.5% of the 412 total comments received) constitute an "outpouring of public protest" mandating an EIS.

Second, DOE argues that "any indication of a controversy over the potential environmental effects was addressed by the agencies' consideration of and response to the comment letters before finalizing the EA." Def. Mem., p. 26. In support of this argument, DOE states that as to air impacts and health effects, any controversy was removed because the EA found that the project emissions will fall below Clean Air Act significance levels. Def. Mem., p. 27. DOE further states that any controversy surrounding potential impacts to the Salton Sea and other water-related issues was removed when DOE modified "the EA to include discussions of water use/quality and potential impacts on water use/quality and potential impacts from the proposed actions." *Id.* However, neither of these arguments changes the requirement that an "outpouring of public protest," even if addressed in an EA, mandates an EIS under the CEQ regulation. *See* 40 C.F.R. § 1508.27(b); *Public Citizen*, 316 F.3d at 1027; *Nat'l Parks*, 241 F.3d at 736. Moreover, the controversy created by the letters was not eliminated by any changes between the draft and final EA because neither the project nor its impacts changed during the draft and final EA.

4. The Project's Effects on Ozone are Uncertain

Because the project's effects on ozone are highly uncertain, DOE was required to prepare an EIS. *National Parks*, 241 F.3d at 731. DOE relies primarily on the EA's discussion of ozone formation to support its position that its no significant impact determination on ozone impacts is "well-reasoned, detailed, and supported by the Record." Def. Mem., p.29 *citing* DOE-101, 204407-09. A review of those pages and other evidence in the record shows that the conclusion is in fact arbitrary and unsupported by any evidence.

The EA is internally inconsistent. First, in explaining factors affecting ozone formation, DOE states that "the entire process is much more complex and is also *non-linear* (*i.e., output is not*

necessarily proportional to input)." DOE-101, 204407 (emphasis added). However, in addressing potential effects of NOx emissions on ozone formation, DOE assumes a linear result. For example, because ozone formation in Imperial County "does generally tend to be NOx-limited—i.e., adding more NOx increases [ozone]," DOE *assumes* that any increase in ozone formation will be *de minimis* because NOx increases at the border are allegedly beneath EPA's significance levels.[6] *Id.* at 204407-204408. Thus, after stating that ozone formation is a complex process and that one cannot assume a proportional output of ozone from input of NOx, DOE makes that very assumption. *Id.* Experts agree that this is an unscientific and inaccurate way to measure impacts on ozone formation. Tesche Dec., ¶¶ 13-19 (DOE ignored many other relevant factors).

DOE's own expert stated that "[n]o modeling analysis was conducted to substantiate the applicant's claim that the NOx emissions from the proposed power plants will not contribute to significant [ozone] impacts in Imperial County designated ozone non-attainment areas." DOE-058, 203335 (emphasis in original). DOE does not respond to this evidence. Further, the EA's only explanation of why no modeling was conducted is also inconsistent with DOE's expert's advice. The EA stated that there was no EPA-approved modeling procedure for determining impacts on individual emission sources on downwind ozone levels. DOE-101, 204408. This excuse was used by the permit applicants during preparation of the draft EA. In response to this *precise* excuse, DOE's expert consultant countered:

> Taken at face value this might seem to be a reasonable rationale for not doing the required assessment. However, a closer look at USEPA guidance and specific historical state and/or local regulatory actions involving these sources show the opposite to be true . . . there is a clear distinction between what may be required for an environmental assessment conducted in support of a Federal NEPA action and what may be required for a regulatory permit under the USEPA new source review/PSD regulations. NEPA assessments not only cover state and/or federally approved methods and approaches, but may also include specialized tools needed to address unique or special circumstances that may not be typically applied in support of a regulatory permit. The assessment of impacts in the non-attainment area for a new source review permit would typically require the permit applicant obtain emission offsets.

DOE-058, 203335. He also told DOE that models have been used to measure impacts on ozone from individual emission sources, including another plant owned by Sempra:

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[6] In addition to the argument presented herein, DOE's reliance on EPA's significance levels is also flawed for the reasons stated *supra*, p.6-10. "Significance" under NEPA is defined according to the factors set forth by the CEQ, not by levels set by EPA for different purposes.

> Finally, with regard to the claim that no new projects proposed in the U.S. have ever been required to demonstrate point source precursor impacts on ozone non-attainment, examples can be given to the contrary . . .[in Arizona] applicants for five power plants and one oil refinery were required [to] conduct photochemical modeling to demonstrate that point source precursor emission from these plants would not significantly exacerbate the current ozone non-attainment status in Phoenix. One of the power plants involved in the modeling just happens to be a Sempra owned facility.

DOE-058, 203336 (also stating that EPA's modeling guidance recommends an Urban Air Shed model).

The Ninth Circuit has found agency action to be arbitrary and capricious when it runs counter to the advice of the agency's own experts. *See Pacific Coast Federation of Fishermen's Assn, Inc. v. National Marine Fisheries Service*, 265 F.3d 1028, 1037-38 (9th Cir. 2001) (agency acted arbitrarily by ignoring its own experts' advice); *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002) (same). As here, when an agency's analysis is shown to be arbitrary and capricious, the Court owes it no deference. *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.,* 123 F.3d 1142, 1151-52 (9th Cir. 1997).

Again, DOE focuses its defense on attacking the Border Group's experts and argues that Drs. Tesche and Fox raise merely disagreement over "methodology." This could not be more inaccurate. Drs. Tesche and Fox explain for the Court what the record makes clear: DOE performed *no* scientifically-defensible analysis of impacts to ozone. Neither Dr. Fox nor Dr. Tesche prescribes which ozone model DOE should have used; they merely explain why modeling must be conducted. The cases cited by DOE in this regard all hold that a court need not resolve scientific disputes where the agency's impacts analysis is "reasonably thorough." *See Laguna Greenbelt Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 526 (9th Cir. 1999) (as long as the analysis of impacts was reasonably thorough, there was no requirement to use the "best scientific methodology available"); *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985) (same); *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.,* 123 F.3d 1142, 1151-52 (9th Cir. 1997) (in case where agency's analysis was "reasonably thorough," disclosing that impacts to wetlands would be significant, and where any inaccuracies in the assessment of impacts would be remedied by the proposed mitigation measures requiring 1:1 replacement of any wetlands destroyed by project, agency may rely on its own evidence in face of scientific conflict). Where,

however, scientifically supported analysis is absent, deference to the agency is inappropriate. *See City of Carmel*, 123 F.3d at 1151-52 (agency cannot rely on "stale scientific evidence or ignore reputable scientific criticism" (quotations omitted)).

DOE's alleged analysis of impacts to ozone cannot be deemed "reasonably thorough" in the absence of modeling. Further, there is no record basis for disputing that the further collection of data through ozone modeling would resolve uncertainty as to impacts on ozone and would prevent the unscientific speculation of potential impacts. DOE-101, 204407 (ozone formation is complex, non-linear and is affected by sunshine, stagnant air, CO, OH and HO2 radicals, etc., none of which is analyzed in the EA); s*ee Nat'l Parks*, 241 F.3d at 732.

Because of DOE's failure to perform modeling, impacts on ozone formation in a nonattainment area remain uncertain and such unnecessary uncertainty in an EA mandates that the agency prepare an EIS.

5. The Project's Effects are Cumulatively Significant

DOE does not dispute that it failed to analyze the cumulative impacts of the project's effects on health, water quality or quantity, the Salton Sea or ozone. *See* Def. Mem., p. 33-34; *cf.* Pl. Mem., p.16. That lack of analysis alone, in the face of clear evidence of potentially significant cumulative impacts, makes the EA deficient and an EIS necessary. Further, DOE does not dispute that the FONSI fails to provide any explanation of why the project does not have cumulatively significant impacts, even though that is where NEPA requires such a finding to be explained. *See* Def. Mem., p. 33-34; *cf.* Pl. Mem., p. 17 *citing* DOE-103, 204600.

DOE's brief completely ignores its failure to analyze the cumulative health, water quality or ozone impacts, or cumulative impacts to the Salton Sea. Def. Mem., p.33-34. DOE's only mention of cumulative impacts concerns its so-called air quality cumulative effects discussion for NOx, PM_{10} and CO. DOE argues that it properly concluded that there were "no cumulatively significant impacts" because it found that the combined air emissions of the transmission lines and power plants would not exceed EPA's significance levels for NOx, CO and PM_{10}. Def. Mem, p.34.

Again, EPA's significance levels do not define "cumulatively significant impacts" under NEPA. A cumulative impacts analysis requires DOE to consider, analyze and disclose "the

impact on the environment which results from the incremental impact of the action *when added to* other past, present and reasonably foreseeable future actions." 40 C.F.R. §1508.7 (emphasis added). Thus, for example, DOE should have analyzed the additional air emissions from this project as a whole on top of existing emissions in the airshed, as well as estimated future emissions from reasonably foreseeable future actions. *Id.*; *Blue Mountains*, 161 F.3d at 1216 *citing* 40 C.F.R. § 1508.27(b)(7); *Save the Yaak*, 840 F.2d at 721, 722 (failure to consider cumulative impacts made EA deficient). The EA's cumulative impacts discussion does not disclose past or present levels of air emissions or impacts to air quality. *See* DOE-101, 204436-40. Nor does the EA disclose reasonably foreseeable future emissions. *Id.* DOE asserts that evidence of other power plant proposals in the region were only rumors, but cites no communication or other evidence in the record to suggest that it even looked at the issue. In contrast, the record reflects that the Imperial County Air Pollution Control District received information on three potential electric projects: "American Electric Power, 257 MW; Energia Industrial Rio Colorado . . . 940 MW, and EnviroPower, 500 MW. All [of] these facilities will burn natural gas as a primary fuel with exemption [sic] of EnviroPower which will be a coal burning facility." DOE-071, 203687; *see also* DOE-079, 203714.

In addition, whether Sempra's expansion of its power plant to produce 1400 MW is viewed as a direct result of DOE's decision to issue the Presidential Permit or as a reasonably foreseeable future action, it should have been included in the EA's cumulative impacts analysis. DOE cannot argue that it is not reasonably foreseeable that Sempra will double its production capacity, and therefore its emissions, when Sempra stated *in its permit application* that it needed a transmission line that would accommodate its "eventual 1000 MW [and up to 1400 MW] of electrical energy imports," to the U.S. DOE-035, 202196, 202188.

DOE cannot reasonably assert that the combined past, present and future air emissions in the Salton Sea Air Basin are not cumulatively significant when those cumulative emissions result in nonattainment status under the Clean Air Act and have contributed to the highest childhood asthma rates in the State of California.

6. The Project Threatens a Violation of Law and Requirements Meant to Protect Air Quality

NEPA requires that in evaluating the intensity of potentially significant impacts to determine whether an EIS is required, DOE must consider "[w]hether the action threatens a violation of Federal, State or local law or requirements imposed for the protection of the environment." *See* Pl. Mem., p. 11, 17-18; 40 C.F.R. § 1508.27(b)(10). As explained in Plaintiff's opening memorandum, DOE failed to determine or even consider whether this project was consistent with state and local air quality laws, regulations and other requirements aimed at achieving and maintaining healthy ambient air conditions. *See* Pl. Mem., p. 17-18.

In opposition, DOE first argues that it is not required to address local law because the power plants are located in Mexico, and because neither the United States nor the State of California has direct jurisdiction over the plants. *See* Def. Mem., p. 31-33. However, contrary to DOE's assertion, Plaintiff's position on this point is not that the plants must comply with California and Imperial County laws. It is rather, quite correctly, that NEPA requires DOE to determine in its EA whether the project is consistent with *U.S.* state and local law.

Consideration of state and local laws is important for reasons having nothing to do with jurisdiction to enforce those laws. An action that contributes to or facilitates a violation of state or local laws intended to protect the environment would obviously have an environmental impact considered significant by the entities that enacted and enforce those laws. Such actions would interfere with the ability of those entities to achieve the level of environmental health and protection they have determined necessary.

In fact, DOE has admitted that the EA must address the environmental impacts of the plants on the United States, despite their physical location in Mexico. DOE prepared an EA including an analysis (though inadequate) of the impacts of the plants' emissions on the United States. DOE also admitted that "NEPA . . . dictate[s] that . . . DOE and BLM . . . [focus] . . . much of the NEPA review on the related potential environmental impacts from operation of the associated power plants in Mexico." *See* Def. Mem., p. 19. It is not only incorrect, but also disingenuous, for DOE to now argue that it should not consider the power plants' emissions for purposes of this CEQ regulation based upon the plants' physical location.

DOE next argues that "Plaintiff . . . does not point to any provision of state law that the project will violate." Def. Mem., p. 32. First, even if this were true, and even if the project were in compliance with state and local law, NEPA nonetheless requires that for purposes of determining whether an EIS is required, the EA must consider state and local law. 40 C.F.R. § 1508.27(b)(10). DOE cannot now avoid this requirement through a *post hoc* conclusion that there is no threatened state law violation. Nor can DOE shift the burden on this point to Plaintiff. Rather, it was and remains DOE's burden under NEPA to examine state and local law in the EA. *See Public Citizen*, 316 F.3d 1026 (federal agency "had an obligation to consider whether its regulations *might* violate these rules") (emphasis in original).

Second, although it is DOE's burden under 40 C.F.R. § 1508.27(b)(10) to examine state and local law, DOE's assertion that Plaintiff does not point to any provision of state law that the project will violate is simply incorrect. Plaintiff's opening memorandum clearly states that "based upon the figures in the EA, Sempra's plant alone will emit 1,184 pounds of PM_{10} per day, well over the 137 pound maximum limit set by the District." *See* Pl. Mem., p. 18. The memorandum continues by noting, based upon the record, that "this project also threatens to prolong and exacerbate Imperial County's violations of state and federal ambient air quality standards." *Id.*

B. The Environmental Assessment Is Legally Deficient

1. DOE Did Not Evaluate Reasonable Alternatives to the Proposed Action

In preparing an EA or EIS, NEPA requires all federal agencies "to the fullest extent possible" to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E); *see also* 40 C.F.R. § 1501.2. As explained in Plaintiff's opening brief, the EA failed to adequately examine alternatives because it only examined the proposed action and the "no action" alternatives, completely ignoring a variety of other reasonable and feasible alternatives presented during the public comment period. *See* Pl. Mem., p. 18-22. DOE presents several faulty and misleading arguments in support of its

alternatives analysis. Notably, DOE never denies that it has the authority to place conditions in the Presidential Permits.

a. Jurisdiction

Although not completely clear, DOE's first argument appears to be that because the power plants are physically located in Mexico, outside DOE's direct jurisdiction, an assessment of alternatives which would reduce their emissions is beyond the "purpose and need" of the Presidential Permits.[7] Def. Mem., p. 18. This argument, unsupported by any legal authority, is without merit for several reasons. First, CEQ regulations explicitly provide that an agency's jurisdiction is irrelevant to the scope of the required NEPA alternatives analysis. According to 40 C.F.R. § 1502.14(c), DOE is required to "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency." Jurisdiction is simply irrelevant to the alternatives analysis, which is intended to analyze the full range of reasonable alternatives, "thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *See* 40 C.F.R. § 1502.14.

Second, DOE's argument falls flat upon the simple observation that DOE has already considered the plant's emissions in the EA, notwithstanding their physical location.

Third, alternatives such as conditioning the permits on the use of certain environmentally protective processes at the plants in no way interferes with foreign interests. Such conditions would not *require* the plants to use such processes, but rather would prohibit them from exporting electricity *into U.S. territory* if they do not. Moreover, creating an incentive to use protections greater than those required by Mexico does not interfere with Mexico's interests. Part of the project is already designed to use pollution prevention equipment that keeps emissions levels lower than required by Mexico, yet that facility has been approved by Mexico. *See* Def. Mem., p. 4-5.

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[7] DOE argues that its alternatives analysis was adequate because "the . . . 'purpose and need' for the proposed action was to obtain Presidential Permits for the construction and operation of electric transmission lines . . ., not . . . for power plants in a foreign country over which DOE has no jurisdiction." Def. Mem., p. 18.

Finally, international law supports the notion that the United States can condition access to *U.S. territory* on the taking of precautions against harming the *U.S. environment*. It is a fundamental principle of international law that nations have jurisdiction to act to protect their territorial interests.[8] *See* L. Henkin, et al., *International Law*, 839-40 (2d ed. 1987) (nations customarily assert extraterritorial criminal jurisdiction based upon victims' possessing their nationality); *see also* RESTATEMENT (THIRD) FOREIGN RELATIONS § 402 cmt. g (1987).

In addition, one of the most fundamental principles of international environmental law is that nations may not use their territory, or allow their territory to be used, in a way that may harm the interests of another state. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS § 601 (1987). This rule, derived from the common law principal of *sic utere tuo ut alienum non ladus* (do not use your property to harm another), was established in the *Trail Smelter Case* (United States v. Canada), Arbitral Tribunal, 3 U.N. Rep. Int'l Arb. Awards (1941).

In that case, fumes from a Canadian smelter were damaging U.S. citizens and property. After the two countries agreed to arbitration, the U.S.-Canada International Joint Commission opined that:

> No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the property or persons

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[8] This situation arises frequently with respect to the admission into U.S. territory of ships under the jurisdiction of foreign nations. The UN Convention on the Law of the Sea (UNCLOS), the relevant provisions of which the United States has accepted as a binding expression of international law, *see* Presidential Proclamation No. 7219, 64 Fed. Reg. 48701 (Aug. 2, 1999) (UNCLOS reflects international law), explicitly permits each nation to establish "particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters." UNCLOS, Dec. 10, 1982, art. 211(3), UN Doc. A/Conf.62/122, reprinted in 21 I.L.M. 1261 (1982) (entered into force 1994). In the Oil Pollution Act of 1990 (OPA), the United States conditioned the entry of vessels carrying oil into U.S. territory to on their having double hulls to protect the environment by preventing oil spills. *See* 46 U.S.C. § 3703a(a). *See also Patterson v. Bark Eudora*, 190 U.S. 169, 178 (1903) (Under international law "the implied consent to permit [merchant ships under the jurisdiction of foreign nations] to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn, it may be extended upon such terms and conditions as the government sees fit to impose."); Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* 101 (1998) (International law permits a port nation "not only to deny in principle access [to ports] but also to prescribe non-discriminatory laws and regulations that determine conditions for the entry into its ports.").

> therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Id. This holding has been confirmed in several rulings by the International Court of Justice, and demonstrates that DOE' jurisdictional arguments regarding "purpose and need" are empty. *See, e.g.,* Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. Rep. 4, 22-23 (Judgment of April 9).

Because DOE also raised the issue of the presumption against extraterritorial application of statutes in its brief, the Border Group provides a brief summary of that issue here. The presumption of extraterritoriality is not applicable when the regulated conduct of the government occurs within the United States or when the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States. *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993); *see also NORML v. U.S. Dept. of State*, 452 F.Supp. 1226, 1232 (D. D.C. 1978) (EIS required to assess impacts in the United States of federal participation in herbicide spraying in Mexico); *cf NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466, 467, n.5, 468 (D. D.C. 1993) (holding that in one fact-specific context, NEPA did not apply to Dept. of Defense operations in Japan when there was no direct effects in the United States). The presumption against extraterritoriality does not apply here because NEPA is designed to regulate conduct occurring within the United States, such as the issuance of Presidential permits, and does not impose substantive requirements on actions abroad. *See Massey,* 986 F.2d at 533. Significantly, the D.C. Circuit has acknowledged that NEPA's purpose is to take into account environmental crises worldwide and in the "biosphere" as well as domestic problems facing the environment. *Id.* at 536.

b. NEPA and Regulation of Private Enterprises

DOE's second argument is that "[a]bsent a federal approval, NEPA does not cover private enterprises, such as a private company's construction of a power plant." Def. Mem., p. 19. It is beyond dispute, however, that NEPA covers government permitting of private enterprise, which is at issue here. *See Friends of the Earth v. Hintz*, 800 F.2d 822, 832 (9th Cir.

1986) (agency's permitting of private activity reviewed under NEPA).[9] More importantly, however, DOE itself admits that although NEPA does not directly regulate purely private activity:

> 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).

Def. Mem., p. 19. Therefore, DOE should have analyzed reasonable and feasible alternatives to the proposed action, including issuing permits conditioned upon reduced emissions from the power plants, because power plant emissions are clearly activities that will result from the permitting at issue here.

c. Presentation of Reasonable and Feasible Alternatives

DOE's third argument is Plaintiffs "point to no evidence in the record where they even presented their suggestion of alternatives to DOE or BLM, let alone references to 'specific evidentiary facts showing that the alternatives were reasonable and viable.'" Def. Mem., p. 20-21. This argument is just plain wrong. Plaintiff clearly pointed to a range of reasonable and viable alternatives proposed by Plaintiff, the American Lung Association, U.S. Congressman Filner, and the California Air Resources Board and contained in the record. *See* Pl. Mem., p. 19-20. Plaintiff also demonstrated the feasibility of attaching conditions to the issuance of presidential permits pursuant to valid Executive Orders. *See* Pl. Mem., p. 20.

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[9] In support of the proposition that the plants are beyond the purpose and need of the permit applications, DOE also incorrectly relies on *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). DOE notes that *Burlington* held that "the agency should take into account the needs and goals of the parties involved in the application" and that an agency "cannot redefine the goals of the proposal . . . ." *See* Def. Mem., p. 20. However, this case also holds that "an agency may not define the objectives of its actions in terms so unreasonably narrow that only one alternative from among the environmentally benign ones [*e.g.* the "no action" alternative in this case] . . . would accomplish the goals . . . ." *Burlington*, 938 F.2d at 196. In any case, DOE's reliance on this case is misplaced because it deals with the scope of an EIS, not an EA. An EIS is by definition more thorough, and therefore more costly, than an EA, and the purpose and need at the EIS stage, based upon consideration of a legally complete EA, might in certain circumstances be more narrowly drawn than at the EA stage to conserve agency resources. *City of Carmel-by-the-Sea v. United States Department of Transportation*, 123 F.3d 1142 (9th Cir. 1997), also relied upon by DOE, is similarly inapposite as it deals with the scope of an EIS, not an EA. *See* Def. Mem., p. 20.

The Court must similarly reject Defendant's arguments that the alternatives requiring conditional permitting are precluded by "international sensitivities." *See* Def. Mem., p. 21. The cases cited by Defendant to support this argument, *Greenpeace USA v. Stone*, 748 F.Supp. 749, 760 (D. Haw. 1990), and *NEPA Coalition of Japan v. Aspin*, 837 F.Supp. 466, 467-8 (D.D.C. 1993), in addition to not being controlling for this Court, deal with extraterritorial *effects* of extraterritorial activities. As described above, the environmental assessment in the instant case deals with a very different scenario in which U.S. and extraterritorial activities threaten direct domestic effects on people and property located squarely within DOE's jurisdiction. Moreover, as noted previously, the EA already establishes that Mexico has no objection to Project facilities emitting *less* pollutants than Mexican standards permit.

d. Conditional Permitting

DOE's fourth argument is that NEPA "cannot be read to turn a Presidential Permit into a vehicle for regulating a private power plant in a foreign country." Def. Mem., p. 22. In support of this argument, DOE cites several cases that holding that only feasible alternatives must be considered. Plaintiffs do not dispute such proposition. However, Defendant never explains, factually or legally, why the proposed alternatives are not feasible. Not one of the cited cases holds that an alternative is not feasible because it requires conditioning a permit upon the modification of extraterritorial behavior. *See Id.*

Further, as explained above, the physical location of the plants, and DOE's jurisdiction over the plants, is wholly irrelevant to DOE's NEPA duty to consider alternatives. *See* 40 C.F.R. § 1502.14(c) (DOE required to "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency."). Also, Presidential permits are routinely issued conditionally, and the President has authorized such practice. *See* Pl. Mem., p. 20; 18 Fed. Reg. 5397 (Sept. 3, 1953) Executive Order 10485, § 1(A)(3) *as amended by* 43 Fed. Reg. 4957 (Feb. 3, 1978) Executive Order 12038 § 2(A). In fact, the Presidential Permits at issue here contain a number of conditions already. *See, e.g.,* DOE-104, 204610-204611. Therefore, DOE's argument regarding conditional permitting must be rejected.

e. Potential Impacts and Required Range of Alternatives

DOE's fifth and final alternatives argument is that the range of alternatives it needed to analyze was reduced by the "minimal environmental impacts of the proposed action." Def. Mem., p. 23. This argument must fail because it relies upon the erroneous assumption that the EA was adequate. However, for all of the reasons discussed in Plaintiff's opening memorandum and herein, the EA did not adequately assess the environmental impacts of the proposed action, so DOE could not have reasonably concluded that such impacts were "*de minimis*."

Therefore, the discussion regarding the required range of alternatives in *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1558 (2d Cir. 1992), does not apply here because in that case the subject EA was adequate. Similarly, *Sierra Club v. Espy*, 38 F.3d 792, 796 (5th Cir. 1994), relied upon by DOE, does not apply because that case holds that the range of alternatives to be considered by an EIS can be expanded or limited by the findings of the EA. Unlike *Sierra Club*, the instant case does not deal with whether an EIS should be limited by an otherwise valid EA. Moreover, unlike the instant EA, the EA found adequate in *Sierra Club* considered alternatives other than completely abandoning the project. *Sierra Club,* 38 F.3d at 803.

Finally, DOE mistakenly relies on *Missouri Mining, Inc. v. ICC*, 33 F.3d 980, 984 (8th Cir. 1994), in support of the proposition that "[i]t 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." *See* Def. Mem., p. 23-24. This holding does not apply here because (i) the project will have significant environmental effects, (ii) the agency need not "search" for alternatives because reasonable and feasible alternatives have been presented to it, and (iii) it is disingenuous to argue that the agency need not consider alternatives when in fact the agency did consider alternatives, namely the "no action" alternative. Therefore, DOE's argument that the range of alternatives it was obligated to consider in the EA was limited by the presumed "*de minimis*" impacts of the project is without merit and must fail.

2. DOE Did Not Consider, Analyze and Disclose All of the Potentially Significant Impacts of the Proposed Action

a. The EA Grossly Underestimates Emissions

DOE does not dispute that Sempra's (and now T-U.S.'s) Presidential permit authorizes, and the transmission lines can accommodate, the import of up to 1400 MW of power from the Sempra power plant. Def. Mem., p. 12-14. Since that is what it authorized, DOE has a duty to evaluate the environmental impacts of the production of that amount of energy. If the capacity is there, it is reasonably foreseeable that it will be used. The Ninth Circuit long ago resolved this issue in a similar case, where the agency argued that future development impacts resulting from the construction of a highway interchange were unforeseeable:

> We reject CDHW's position that the uncertainty of development in the Kidwell area makes the "secondary" environmental effects of the interchange too speculative for evaluation. Certainly the assertion that there may be no development even if the interchange is built taxes credulity (as well as being inconsistent with the assertion that development is inevitable). What we have here, after all, is a proposal to build a major interchange in an agricultural area near the edge of urban development, and the purpose of the project is to connect a freeway with a road which does not yet exist. If the interchange is built, development will occur. And regardless of its nature or extent, this development will have significant environmental consequences for the surrounding area, including Davis. It is true that the development potential which the interchange will create comprehends a range of possibilities. The ultimate outcome will depend on the plans of private parties and local government outside the direct control of state and federal government. In this context the purpose of an EIS/EIR is to evaluate the possibilities in light of current and contemplated plans and to produce an informed estimate of the environmental consequences. That the exact type of development is not known is not an excuse for failing to file an impact statement at all. Uncertainty about the pace and direction of development merely suggests the need for exploring in the EIS/EIR alternative scenarios based on these external contingencies. Drafting an EIS/EIR necessarily involves some degree of forecasting.
>
> While "foreseeing the unforeseeable" is not required, an agency must use its best efforts to find out all that it reasonably can:
>
> It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry."

City of Davis v. Coleman, 521 F.2d 661, 676 (9th Cir. 1975) (citations omitted).

DOE defends its failure to evaluate the reasonably foreseeable impacts of the Sempra expansion by arguing that the EA relied upon information provided by the permit applicants; that "SER has not indicated it has any plans to expand the TDM facility"; and that Mexico has only permitted the 500 MW facility. Def. Mem, p.12-13. Each of these arguments fails. First, DOE is required to gather information and perform its own analysis and cannot simply rely upon the

analysis of the permit applicant. 40 CFR § 1506.5(a)-(b); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000) (it is the agency's duty under NEPA to gather and evaluate information); *Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1393-94 (9th Cir. 1985) (NEPA requires an agency to "*independently* assess the consequences of a project" (emphasis added).). Second, Sempra *has* indicated in its permit application that it plans to expand its facility to 1000-1400 MW. DOE-035, 202196, 202188. Third, Sempra has stated that it received a Mexican permit for the proposed 500 MW facility, but does not state whether that permit does or does not permit the proposed expansion. Nothing in the record answers that question. Further, the fact that an amendment or supplement to the Mexican permit *might* be needed, does not support a "not reasonably foreseeable" finding. *See City of Davis*, 521 F.2d at 676. It is undisputed that no additional Presidential permit is needed before the increased imports could begin.

DOE cites *City of Angoon v. Hodel*, 803 F.2d 1016, 1020 (9th Cir. 1986), for the proposition that it need not consider remote or speculative "alternatives" whose effects cannot be readily ascertained. That case pertains to the agency's consideration of reasonable alternatives, not whether the agency addressed reasonably foreseeable impacts. However, the same holding implies that where potential effects are not remote or speculative or can be readily ascertained, as here, then there is no reason why DOE should not have evaluated the impacts of Sempra's future expansion. *See City of Davis*, 521 F.2d at 676. The two cases from other circuits cited by DOE support the Border Group's position. In *Sierra Club v. Lujan*, the Tenth Circuit held that the agency did not need to consider potential impacts of the project proponent's future goals because that proposal was not before the agency or the court. 949 F.2d 362, 368 (10th Cir. 1991). Similarly, in *United States v. Southern Florida Water Management Dist.*, the Eleventh Circuit held that NEPA did not apply at all because there was not sufficient federal involvement in the action. 28 F.3d 1563, 1573-1574 (11th Cir. 1994) ("It would be premature and serve no useful purpose to now require the preparation of an EIS when no specific federal action has been proposed"). In contrast, here, DOE has issued Presidential permits that allow transmission of up to 1400 MW of power. Thus, the proposal is very much before the agency and the time to

evaluate it is now. *See Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 327 (9th Cir.1975) (NEPA requires an agency to evaluate a project's impacts at the earliest possible time).

b. No Evaluation of Other Pollutants: CO2 and Ammonia

DOE does not dispute that the project will result in emissions of CO2 and ammonia and that those pollutants may have a potentially significant impact on the environment. Def. Mem., p.14-15; *cf.* Pl. Mem., p.23-24. Instead, it argues that it need not analyze them because they are not "criteria pollutants" under the Clean Air Act and EPA did not tell them to analyze those pollutants.[10] Just because EPA does not regulate those pollutants does not mean that there is no potential for a significant impact under NEPA standards. Moreover, DOE cannot rely on EPA to tell it how to conduct its NEPA analysis. *Steamboaters v. F.E.R.C.*, 759 F.2d at 1393-94.

Further, DOE is incorrect that ammonia is not a toxic air contaminant. Ammonia is listed as an air toxic compound in California. Title 17 Cal. Code Regs. § 93300.5, App. A-1 (listing ammonia as a substance for which emissions must be quantified). As noted above, NEPA requires evaluation of the impacts of agency actions on State laws and those laws are relevant to determining significance of impacts. Further, record evidence shows that ammonia causes acute and chronic health impacts. DOE-023, 200819.

Neither the EA nor FONSI provides any explanation for why these pollutants were not considered. DOE cannot create that rationale for the first time during litigation.

c. No Evaluation of Health Impacts

DOE raised no additional argument in defending the validity of its EA to this challenge by the Border Group. Thus, as discussed in the Border Group's opening memorandum and *supra*, p.6-10, the EA is inadequate for failing to address human health impacts.

3. The EA's Cumulative Impacts Discussion Is Inadequate

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[10] The three cases from other circuits cited by DOE are not on point. *Johnston v. Davis*, does not support DOE's position because there the agency had considered the relevant five areas of impacts, whereas here, DOE performed no analysis of impacts from ammonia and CO2 emissions. 698 F.2d 1088, 1092 (10th Cir. 1983). *National Helium Corp. v. Morton*, 486 F.2d 995, 1004 (10th Cir. 1973), is completely inapposite. *Sierra Club v. U.S. Forest Service* merely states that EA's can be concise, not that they can ignore potentially significant impacts to air quality in order to conserve paper. 46 F.3d 835, 840 (8th Cir. 1995).

Similarly, DOE raised no additional argument in defending the validity of its EA to this challenge. The only argument made with respect to the adequacy of it cumulative effects analysis is on pages 33-34 of DOE's brief.

In reviewing this claim, this Court should consider the invaluable purpose of the cumulative effects analysis as explained recently by the Ninth Circuit: "The importance of analyzing cumulative impacts in EAs is apparent when we consider the number of EAs that are prepared . . . '[I]n a typical year, 45,000 EAs are prepared compared to 450 EISs.... Given that so many more EAs are prepared than EISs, adequate consideration of cumulative effects requires that EAs address them fully." *Kern v. BLM*, 284 F.3d 1062, 1076, 1079 (9th Cir. 2002) (citation omitted) (holding EA inadequate for insufficient cumulative impacts analysis). In the absence of a consideration of individually minor but cumulatively significant effects "it would be easy to underestimate the cumulative impacts of [individual projects], and of other reasonably foreseeable future actions, on the [environment]." *Kern*, 284 F.3d at 1078 (reviewing multiple timber sales); *see also Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 897 (9th Cir. 2002) (holding that future road density amendments are reasonably foreseeable and are required to be considered in a cumulative impacts analysis).

CONCLUSION

For all of the foregoing reasons, the Border Group respectfully asks this Court to find that the FONSI and permits were illegally issued, that an EIS is required and that the EA is inadequate for its failure to consider a reasonable range of alternatives and fully consider, analyze and disclose the potentially significant impacts of the proposed action.

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Respectfully submitted,

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