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BORDER POWER PLANT WORKING GROUP

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) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT Date: April 18, 2003 Time: 9:00 a.m. Courtroom: 13 The Honorable Irma E. Gonzalez

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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

Through this lawsuit, Plaintiff Border Power Plant Working Group ("Border Group") seeks a determination that the Department of Energy and Bureau of Land Management (collectively "DOE") violated the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"), its implementing regulations, and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, when they issued their Decision Notices and Findings of No Significant Impact ("FONSI") on the December 2001 Environmental Assessment ("EA") for Presidential Permit Applications for Baja California Power, Inc. ("BCP"), Sempra Energy Resources ("Sempra") and Termoelectrica U.S. ("T-U.S."). The decisions violate NEPA because they were not supported by an environmental impact statement ("EIS") and the environmental assessment ("EA") is wholly inadequate for failing to consider all reasonable alternatives and for its failure to properly disclose and analyze environmental impacts.

The project that was evaluated in the EA, and ultimately resulted in the issuance of two Presidential Permits, allows two companies incorporated under the laws of the United States to build electric transmission lines in Imperial County, California that cross the international border with Mexico, enabling the same companies (or their parent company) to import power to California from power plants they are constructing in the Mexicali region of Mexico, three miles south of the international border. Most of the turbines being constructed at these power plants in Mexicali are being built to supply the United States with power and their ability to do so hinges on DOE's issuance of these two Presidential Permits.

This project will further degrade air quality in a region that already fails to meet air quality standards set to protect human health. Presently, children in Imperial County have the highest rate of asthma among children in the State of California. Asthma and other serious illnesses are directly linked to polluted air.

Also, in one of the most arid regions of the country, the project will decrease the quantity of water in the New River and the Salton Sea and simultaneously increase their salinity. Both water bodies already have impaired water quality and increasing salinity threatens to devastate the Salton Sea's value as one of the most important habitats for migratory birds in the country.

All of these impacts are unnecessary to achieve the goals of this project. However, DOE failed to consider and evaluate technologies and permit conditions that might have ameliorated adverse effects to air and water quality and human health. The people and the entire ecosystem of the border region deserve – and U.S. law requires – a full exploration of alternatives and a full disclosure of potential impacts in an EIS before this project may proceed.

FACTS

This project is located in the southern region of Imperial County, a largely undeveloped county in which farming is the primary industry. DOE-101, 204356. As part of the vast Colorado Desert, it is one of the hottest and driest parts of California, rated second only to Death Valley in total aridity. Average annual precipitation in Calexico, California is only 2.8 inches, and summer temperatures rise to well over 100 degrees Fahrenheit. DOE-101, 204360, 204368.

This project and all of Imperial County are located in the Salton Sea Air Basin. DOE-101, 204364. The Salton Sea Air Basin is a non-attainment area for state and federal standards for ozone and particulates in the inhalable range of 10 microns or less (PM_{10}). *Id*; Declaration of Thomas Tesche, Ph.D., ("Tesche Dec."), ¶ 5; Fox Dec., ¶ 8. Part of the basin, near Calexico, is a federal non-attainment area for CO. *Id.* The air basin "experiences unhealthy levels of air pollution." DOE-087, 203773. "Peak levels of smog and carbon monoxide on the Imperial County side of the border are more than double the health-based federal standards, and inhalable particles can exceed three-times the standard." *Id.*, 203773-203774.

Imperial County contains the Salton Sea, one of the desert's most fecund natural features and the largest inland body of water in California. DOE-025, 200956, 200960. The Salton Sea covers roughly seven percent of the county, at 365 square miles. DOE-101, 204356; DOE-025, 200943. The sea is a terminal lake, which was formed when flood flows in the Colorado River breached the Imperial Canal in 1905. *Id.*, 204391. Most of the watershed of the Salton Sea is in Imperial County, but it also receives significant drainage from the Mexicali Valley via the New River. DOE-026, 201708-201709. Water shortages in this region are a significant problem and are expected to worsen. DOE-092, 203785. Today, the New River flowing north from Mexico into the United States contributes 32.1 percent of the water entering the Salton Sea. DOE-101,

204391. The Salton Sea hosts hundreds of thousands, or even millions of migratory, wintering and breeding birds. DOE-026, 201708; DOE-025, 201114. "Several endangered species, including the desert pupfish, brown pelican, and the Yuma clapper rail, inhabit the Salton Sea or adjacent habitats." DOE-025, 200943. With the loss of 90 percent of California's interior wetlands, the Salton Sea serves an important role in conserving these migratory birds on a local, national and international scale. *Id.*, 200960.

Currently, the Salton Sea "is 25% saltier than the ocean . . . with salinity increasing at approximately 1% per year." DOE-026, 201709. Because the high salinity threatens to devastate this critical ecosystem, a coordinated strategy is underway to stabilize salinity levels. *Id.* The only way to remove salt from a closed lake such as the Salton Sea is through deposition and entrapment in sediments or removal through aeolian forces. DOE-008, 200141. If no action is taken to protect and restore the Salton Sea from decreasing inflows and increasing salinity, experts project that the existing fishery will deteriorate and disappear, bird species will be threatened, and local economic conditions and recreational opportunities will suffer. DOE-025, 200952, 200959. "Controlling salinity is a critical need if the Salton Sea is to support biodiversity similar to what currently exists." *Id.*, 200959. The California Regional Water Quality Control Board has listed the Salton Sea and the New River as impaired water bodies in accordance with section 303(d) of the Clean Water Act. *Id.*, 201050.

On February 27, 2001, BCP, a wholly-owned subsidiary of Intergen Aztec Energy, applied to DOE for a Presidential Permit to construct and operate an electric transmission line (the "BCP transmission line"), which would connect the Imperial Valley electric substation in Imperial County to a new power plant under construction just west of Mexicali, Mexico (the "Intergen plant"). DOE-33, 202165-202167. This power plant, also known as La Rosita Power Complex, is being constructed by two other wholly-owned subsidiaries of Intergen Aztec Energy, Energia de Baja California ("EBC") and Energia Azteca X ("EAX"). DOE-33, 202167. The BCP transmission line would be able to transport power generated by any of the EAX or EBC turbines located at the Intergen plant to the Imperial Valley electric substation. *Id.*; DOE-101, 204320 n.2. At least half of the total generating capacity of the Intergen plant (1060 MW)

would be imported into the United States. DOE-101, 204344. The remainder is intended for use by Mexico. *Id.* However, the Presidential Permit issued to BCP allows the BCP transmission lines to "deliver electric energy from the new EBC powerplant (and possibly other Mexican electric powerplants) onto the southern California electrical grid." DOE-104, 204608; Fox Dec., ¶ 6. Each of BCP's double circuit transmission lines have the capacity to transport 600 MW of energy. DOE-033, 202168.

On March 1, 2001, Sempra also filed an application for a Presidential permit to construct and operate a separate electric transmission line (the "Sempra transmission line"), which would connect the Imperial Valley electric substation to a separate power plant under construction near Mexicali, Mexico (the "Sempra plant"). DOE-36, 202186-202187. Termoelectrica de Mexicali ("TDM"), a wholly-owned subsidiary of Sempra Energy, owns the Sempra plant, which would dedicate 100 percent of its net generating capacity (allegedly 600 MW) for import into the United States. DOE-36, 202188; DOE-41, 202364; DOE-101, 204344. Sempra has indicated in its DOE permit application that it eventually intends to import 1000 MW (or up to 1400 MW) of electrical energy into the United States via the Sempra transmission line. DOE-36, 202196; DOE-035, 202188; Fox Dec., ¶¶ 10-11.

Both the Intergen and Sempra facilities will be combined-cycle combustion turbine power plants. DOE-101, 204344. At the Intergen plant, one EAX turbine and the single EBC turbine will be built with emissions control technology (selective catalytic reduction or SCR) for oxides of nitrogen (NOx). *Id.* The remaining two Intergen EAX turbines will not be built with SCR for NOx, and none of the four turbines at the Intergen plant will use control technology for carbon monoxide (CO). *Id.*; DOE-101, 204321. The Sempra plant will use emissions control technology for NOx and CO on both of its turbines. DOE-101, 204345, 204321.

According to the EA, the Sempra plant will limit its total emissions to 2.5 parts per million (ppm) for NOx and 4 ppm for CO. DOE-101, 204321. The Intergen plant's export-only turbines will achieve 4.0 ppm for NOx and 30 ppm for CO. *Id.* The Intergen plant's other turbines will only achieve 25 ppm for NOx and 30 ppm for CO. *Id.* In contrast, a newly permitted plant in San Diego, Otay Mesa, will achieve 2.0 ppm for NOx. Fox Dec., ¶24. Also

according to the EA, based on 600 MW of energy output, the Sempra plant will emit 170 tons of NOx, 165 tons of CO and 216 tons of PM_{10} each year. DOE-101, 204401. Based on 1060 MW of energy output, the Intergen plant will emit 1,785 tons of NOx, 1,881 tons of CO and 744 tons of PM_{10} each year. *Id.* According to the Imperial County Air Pollution Control District, the NOx emissions levels at the Intergen plant are on average *60 percent higher than what would be permissible in California*. DOE-071, 203688. The EA does not disclose the levels of emissions for any other pollutants that may be emitted, such as ammonia and carbon dioxide. Fox Dec., ¶¶ 13, 14. The EA did not perform modeling for ozone impacts. DOE-101, 204408; Fox Dec., ¶ 12.

To cool the turbines, both plants will use wet condensate cooling systems. DOE-101, 204390. Wet cooling uses millions of gallons of water each day and results in increased PM_{10} emissions. DOE-092, 203785; Fox Dec., ¶¶ 19, 33-34. Both plants intend to use water, which would otherwise flow into the New River and ultimately the Salton Sea, to cool their turbines. DOE-080, 203717; Fox Dec., ¶ 35. 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. In addition, after evaporating most of the water they use, the facilities will also discharge industrial waste in the form of "brine" (a highly saline discharge) into the New River. Fox Dec., ¶¶ 35-36 The combined discharge of brine will increase salinity in the Salton Sea by 0.142 percent annually. DOE-101, 204432.

Both plants intend to obtain natural gas from the Baja North Pipeline, which was recently permitted for construction by the Federal Energy Regulatory Commission and the BLM. DOE-056, 202872, 202884, 202897. However, Intergen stated that it may use diesel fuel as a backup if it is unable to obtain a reliable supply of natural gas. DOE-071, 203692. Although DOE never analyzed the potential impacts on air quality if the Intergen plant uses diesel, nothing in the FONSI or Presidential Permits requires Intergen to use natural gas only. If Intergen uses diesel, emissions of NOx, PM_{10}, and CO would increase substantially. DOE-102, 204575; Tesche Dec., ¶ 21.

On September 14, 2001, DOE issued a draft EA on the project and requested public comments by October 9, 2001. DOE-064, 203436; DOE-068, 203673. In December, 2001, DOE issued a final EA and FONSI and both Presidential Permits and BLM issued rights-of-way. DOE-101, 204310; DOE-103, 204600-204606; DOE-104, 204607; DOE-105, 204613; DOE-186; DOE-189. After this litigation began, Sempra Energy created a new subsidiary, T-U.S., and applied to DOE to transfer Sempra's Presidential Permit to T-U.S. DOE-125S, S204897; BLM-207S, S102612 (T-U.S. formed on March 1, 2002). On October 28, 2002, relying on the original EA, DOE issued a FONSI on the transferred permit and right-of-way. DOE-127S, S204900-01. On October 30, 2002, BLM assigned Sempra's right-of-way to T-U.S (BLM-210S, S102618) and on November 12, 2002, DOE issued a new Presidential Permit to T-U.S. in place of Sempra (DOE-129S, S204904, 204907).

In the EA, DOE considered and evaluated only the proposed action and a "no action" alternative. DOE-101, 204322, 204328. DOE defines the proposed action as issuing Presidential Permits and rights-of-way to allow the construction, operation, maintenance and connection of two double-circuit, 230 kV transmission lines to connect the Imperial Valley substation to transmission lines in Mexico for the import of electrical power generated at the Intergen and Sempra plants. DOE-101, 204328. According to the EA, "[t]he primary purpose of the proposed transmission lines is to import power into the United States[;] relatively small amounts of power would also be exported through the proposed transmission lines into Mexico." DOE-101, 204322. DOE also considered and rejected as "unreasonable" three alternative locations for the transmission lines. *Id.*; DOE-101, 204352-204354.

During the public comment period, DOE received 12 comment letters from government entities, organizations, and individuals. DOE-101, 204442. Shortly after the comment period closed, DOE received nearly 400 substantially alike electronic comment letters opposing the project, raising concerns about air and water quality impacts and requesting an EIS. DOE-103, 204602. Of the timely filed comments, nearly all of the commenters raised serious concerns about the air and water quality impacts of the proposed action on the environment. DOE-072, 203693-94, 203699 (Imperial County Planning/Building Department); DOE-079, 203713-714

(American Lung Association); DOE-080, 203717-203719 (Congressman Bob Filner); DOE-085, 203768-769 (International Boundary and Water Commission); DOE-082, 203724-765 (Border Group); DOE-086, 203771 (U.S. Environmental Protection Agency (EPA)); DOE-087, 203773 (California Air Resources Board); DOE-071, 203686 (Imperial County Air Pollution Control District). Nearly all commenters wanted a more detailed environmental analysis, and nearly all wanted the agency to consider alternatives to the proposed action, including requiring all turbines to use emissions control technology for NOx and CO and to offset all emission increases for NOx, CO and PM_{10}. *See e.g.* DOE-071, 203685-3686; DOE-079, 203714-203715; DOE-087, 203773. For example, the Imperial County Air Pollution Control District stated that it believed that air emissions from the power plants,

> would have a significant adverse impact on the air quality for the Imperial County/Mexicali air basin, if unmitigated, due to the fact that these emissions will exacerbate the non-attainment ozone and PM_{10} status of the Imperial County/Mexicali border region. Additionally, due to the proximity of these power plants to the border, the carbon monoxide (CO) emissions from these power plants will have an adverse impact on the non-attainment status for Calexico if these emissions are not mitigated.

DOE-071, 203686. The U.S. EPA commented that it was "concerned about the potentially significant impacts to air quality from the two new power plants in Mexicali, Mexico." DOE-086, 203771. California's Air Resources Board told DOE that "[i]t is clear that the issuance of a Presidential permit in this instance will result in significant adverse impacts to the air quality of the region. Accordingly, we believe that an environmental impact statement (EIS) should be prepared." DOE-087, 203773. Similarly, noting the border region's high rates of asthma, the American Lung Association wrote that "[t]hese power plants will be significant new sources of air pollution that will impact the health of border residents for years to come." DOE-079, 203714-203715.

EPA also commented that the proposed action is connected to the North Baja Pipeline project, and that the two projects should be comprehensively evaluated and analyzed together because of their cumulative impacts. DOE-086, 203771.

Plaintiff Border Group submitted detailed comments, with over 30 pages of exhibits. DOE-082. It raised issues related to the significant increase in emissions in the air basin, the lack of ozone modeling in the EA and water quality impacts from wet cooling technology. *Id.*,

203725-203727. The Border Group also requested that the EA consider requiring state of the art emissions control technology, emission offsets and dry cooling technology on the power plants to which the transmission lines would connect. *Id*., 203765, 203725-203727.

It is reasonably foreseeable that other power plants will be constructed in the border region. Three already-named projects include American Electric Power (257 MW), Energia Industrial Rio Colorado (940 MW) and EnviroPower (500 MW). DOE-071, 203687; DOE-079, 203714.

The Sempra and Intergen plants, and the connected transmission lines, are expected to be in service by June 1, 2003. DOE-095, 203798.

ARGUMENT

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

This Court has subject matter jurisdiction under 28 U.S.C. § 1331, because this action arises under the laws of the United States. Plaintiff asserts claims against DOE under NEPA. NEPA does not independently provide for judicial review. However, Congress provided for review of agency action under the Administrative Procedure Act ("APA"). 5 U.S.C. § 702, 706; *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998). DOE's decision to issue the EA and FONSI constitutes final agency action that is subject to judicial review under the APA. 5 U.S.C. §§ 702, 704; *Bennett v. Spear*, 520 U.S. 154, 177 (1997).

The Border Group has established constitutional and prudential standing, because DOE's actions to authorize the construction and operation of the transmission lines will cause it and its members cognizable injuries that are also within the zone of interests of NEPA. *See, e.g.,* Declarations of Kimberly Collins, Marie Barrett, Carlos Yruretagoyena Ugalde; Fernando A. Medina-Robles and William E. Powers; *see also Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-181, 120 S.Ct. 693, 705 (2000); *Hall v. Norton*, 266 F.3d 969, 976-977 (9th Cir. 2001). Further, this Court has authority to redress Plaintiff's injuries, because it must set aside agency action illegally issued. 5 U.S.C. § 706(2)(A). The Border Group also has representational standing as a nonprofit group whose purpose is to protect the border environment of the United

States and Mexico from adverse impacts to air, water, other natural resources and people from energy production in that region. *See* Declaration of William Powers, ¶¶ 2-6; *see Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434 (1977).

II. Standard of Review

Summary judgment must be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. PRO. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-27 (1986). An agency's decision not to prepare an EIS is governed by the arbitrary and capricious standard. *Native Ecosystems Council v. Dombeck*, 304 F.3d, 886, 891 (9th Cir. 2002). This standard requires this Court to ensure that DOE has taken a "hard look" at the environmental consequences of its actions, and to examine the record carefully to determine whether the agency's decisions are "founded on a reasoned evaluation 'of the relevant factors.'" *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (citations omitted); *see also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d at 1211.

"[A]n agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant." *Save the Yaak Committee v. Block,* 840 F.2d 714, 717 (9th Cir. 1988); *see also The Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1985). The statement of reasons is "crucial" to determining whether the agency took the requisite "hard look" at the potential environmental impacts of the proposed project. *Save the Yaak*, 840 F.2d at 717; *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718 (1976). The Court may defer to an agency's decision not to prepare an EIS only when that decision is "well informed and well considered." *LaFlamme v. FERC*, 852 F.2d 389, 398 (9th Cir. 1988).

III. DOE Violated NEPA and the APA

A. An Environmental Impact Statement Is Required

To promote environmentally-sensitive government decision-making, NEPA requires that agencies prepare an EIS for all "major Federal actions significantly affecting the . . . environment." 42 U.S.C. § 4332(2)(C); *Public Citizen v. Dept. of Transportation*, --F.3d--, 2003

WL 124764, *13 (9th Cir. 2003). In certain circumstances, as here, an agency will first prepare an EA to preliminarily determine whether the proposed action may have a significant environmental effect. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (citing 40 C.F.R. § 1501.4). "If the EA establishes that the agency's action '*may* have a significant effect upon the . . . environment, an EIS must be prepared.'" *Id.* (emphasis original; citations omitted). Thus, "the [Ninth] Circuit has established a relatively low threshold for preparation of an EIS." *Natural Resources Defense Council v. Duvall*, 777 F. Supp. 1533, 1537 (E.D. Cal. 1991); *see also Save the Yaak*, 840 F.2d at 717. Plaintiff does not need to establish that the proposed project will have a significant impact on the environment. *Greenpeace*, 14 F.3d 1324, 1332; *Sierra Club v. U.S. Forest Service,* 843 F.2d 1190, 1193 (9th Cir. 1988).

The proposed federal action to issue presidential permits and rights-of-way for transmission lines to cross the border and connect with two new power plants to import energy into the United States is a major federal action as defined by the Council on Environmental Quality ("CEQ") regulations. *See* 40 C.F.R. § 1508.18. Approval of specific projects, including those "approved by permit" by a federal agency are considered federal actions subject to NEPA. *Id.*, § (b)(4). The federal action is also "major" because, as discussed in detail below, it has "effects that may be major" or significant. *See* 40 C.F.R. § 1508.18; *see also* 10 C.F.R. § 1021, Subpt. D, App.D (designating transmission facilities as actions normally requiring an EIS).

The CEQ regulations outline factors the agency must consider to determine whether the action may have a "significant" impact on the environment within the meaning of section 102(2)(C) of NEPA. *See* 40 C.F.R. § 1508.27. Both context and intensity must be considered when evaluating the significance of an impact. *Id.* For context, DOE must consider the significance of the project at the local, regional and national levels and with respect to both short and long-term effects. *Id.* § 1508.27(a). In evaluating intensity, DOE must consider:

> (2) The degree to which the proposed action affects public health or safety.
> (3) Unique characteristics of the geographic area such as proximity to . . . ecologically critical areas.
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
> (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 . . . 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. § 1508.27(b). The presence of even *one* of these factors is sufficient to require preparation of an EIS. *See National Parks & Conservation Ass'n*, 241 F.3d at 731; *Public Citizen*, 2003 WL 124764, *15. "[T]he statement of reasons [in the FONSI] is crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." *Save the Yaak*, 840 F.2d at 717.

1. The Project May Have Significant Adverse Effects on Public Health

DOE's EA and FONSI completely ignored potentially significant health impacts that require preparation of an EIS. *See, e.g.,* DOE-103, 204600-204606 (no discussion of health impacts). In evaluating impacts to public health, the Ninth Circuit has held that the "marginal degradation" of the quality of the air we breathe is environmentally significant for the purposes of NEPA. *Public Citizen*, 2003 WL *16 (citing *United States v. 27.09 Acres of Land*, 760 F.Supp. 345, 353 (S.D.N.Y. 1991) (holding that a marginal degradation of drinking water is environmentally significant)).

As in *Public Citizen*, 2003 WL *16, the pollutants at issue here include NOx and PM_{10}, compounds that are particularly harmful to the health of children, senior citizens, disabled people, outdoor workers and people who exercise outdoors. DOE-079, 203715; DOE-025, 201085; Declaration of Paul Brian English, Ph.D. ("English Dec."), ¶¶ 3-8. Even before DOE prepared the EA, Imperial County warned DOE of the serious threat the project posed to the health of its citizens. DOE-043, 202372. The American Lung Association explained in its comments on the EA:

> The border region is experiencing high rates of asthma. Air pollution is harmful to everyone, but children are particularly sensitive when exposed to air pollution during outdoor exercise. Children inhale greater amounts of air per surface area of the lungs when compared to adults, which increases their risks to air pollutants. Children under two are at even greater risk because their lung protection mechanisms are not fully developed, increasing the risk of respiratory tract infection and lung damage. Senior citizens and the disabled, especially those with chronic lung or heart disease are at a higher risk for complications and premature death. The outdoor worker and exercisers are also at greater risk for health impacts caused by current border pollution.

DOE-079, 203715. The California Air Resources Board confirms that:

> Ozone impedes lung growth in children and aggravates respiratory illnesses. Particles have been linked to premature death in people with heart and lung ailments. Carbon

> monoxide impairs cognitive functions and high levels can also be life threatening for individuals with heart or lung disease.

DOE-087, 0203774. These health concerns in Imperial County are serious because, according to EPA, "Imperial County, California has one of the highest childhood asthma rate[s] in the state." DOE-092, 203785; *see also* English Dec., ¶¶ 3, 5. Even the State Department commented that "transboundary air pollution emanating from Mexico already contributes to serious environmental and health concerns for many U.S. border communities." DOE-097, 204293.

Despite the unequivocal recommendations of agencies with expertise on human health issues, DOE failed to even evaluate potential impacts on human health in the EA, much less account for those impacts in its decision to issue a FONSI, in violation of its own regulations.[1] *See* 10 C.F.R. § 1021.322 (EA must support FONSI). To the people of Imperial County who breathe polluted air, any further degradation of their air quality is a significant issue and it warrants an EIS. *See Public Citizen*, 2003 WL *16 ("failure to even consider whether any negative health effects could be associated with increased diesel exhaust emissions" violated NEPA).

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

The Salton Sea is an ecologically critical area for birds and other wildlife and is geographically linked to the impacts of this project via the New River. The potential impacts to it are significant and require an EIS. *See* 40 C.F.R. § 1508.27(a).

The draft EA entirely failed to consider, disclose or analyze the impacts of the project on water quality or quantity in the New River and the Salton Sea. DOE-101, 204446. In response to public comments on this issue, the Final EA conceded that the project would result in a decrease of water and an increase in salinity in the New River and the Salton Sea. *Id.*, 204431-204432, 204446. However, in spite of these effects, DOE posited that the decreased water and increased salinity would not have a significant impact on either water body. DOE explained its position that the project would have no significant impact on the Salton Sea as follows:

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[1] There is no analysis of human health effects in the EA or the FONSI. The only mention of this issue is in an Appendix to the EA, prepared by Sempra, which concludes in two pages that project related health effects for cancer risk and acute and chronic health effects are below thresholds. DOE-102, 204486; English Dec., ¶¶ 9-10.

> Operation of the associated Mexican generating units . . . will reduce water flow into the Salton Sea by 0.79 percent and increase the salinity of the Salton Sea by 0.142 percent. The magnitude of both of these impacts is minimal and below the threshold of detection of most measuring instruments.

DOE-103, 204605.

That one sentence constitutes DOE's entire analysis of the impacts of increasing salinification on the Salton Sea. However, DOE's conclusory statement is not a "'convincing statement of reasons'" sufficient to support a decision not to prepare an EIS. *See Public Citizen*, 2003 WL, *20 (citation omitted). Without data to support DOE's analysis and conclusions, this Court owes the agency no deference. *Ober v. Whitman*, 243 F.3d 1190, 1195 (9th Cir. 2001). Indeed, DOE failed to consider that the Salton Sea is already suffering from too much salt and that expensive efforts are underway to *remove already existing* salt concentrations. DOE-035, 200943-949, 200952, 200959. Other agencies charged with protecting the Salton Sea assert that "[c]ontrolling salinity is a critical need if the Salton Sea is to support biodiversity similar to what currently exists." *Id.*, 200959. DOE failed to explain why any reduction in water in an extremely arid region is "insignificant." EPA distilled the potentially significant impacts to these critical water resources as follows: "These plants are located in a growing, arid region where water shortages will be an *increasingly significant problem* in the coming years." DOE-092, 203785 (emphasis added). After learning of the project's potential water implications, the California Regional Water Quality Control Board for the Colorado River Basin Region stated that it believes that the power plants are at odds with the proposed efforts to restore the Salton Sea. Fox Dec., Ex. B, p.1. "[Restoration] efforts, if they are to be successful, are highly dependent upon maintaining a sufficient flow of freshwater into the Salton Sea. *Any reduction in present flows or increase in total dissolved solids makes the restoration more costly and less practical*." Fox, Dec., Ex. B, p.1 (emphasis added).

DOE cannot rely upon an unsupported conclusion, which is based upon a "threshold of detection of most measuring instruments" standard, instead of a well-reasoned analysis by experts of how water quality and quantity impacts will affect an ecologically critical area and the wildlife dependent upon it. *See Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1462, 1463 (9th Cir. 1996) (court must find that evidence before the agency provided ample basis for decision).

3. The Project's Effects are Highly Controversial

"'Controversy' sufficient to require preparation of an EIS occurs 'when 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.'" *Public Citizen*, 2003 WL *19 (quoting *Nat'l Parks and Conservation Ass'n. v. Babbitt*, 241 F.3d at 736). A substantial dispute exists when evidence submitted prior to the preparation of a FONSI casts serious doubt on the reasonableness of an agency's conclusions. *Id.* NEPA then places the burden on the agency to come forward with a "well-reasoned explanation" demonstrating why the comments disputing the EA's conclusions "do not suffice to create a public controversy based on potential environmental consequences." *Nat'l Parks and Conservation Ass'n.*, 241 F.3d at 736 (citations omitted).

DOE received approximately 412 comments on the proposed project.[2] DOE-103, 204601-204602; DOE-101, 204442. With the exception of two comment letters from agencies concerned with transportation issues, *all* of the comment letters raised substantial concerns about air, water quality and/or human health impacts and most commenters stated that an EIS was necessary. DOE-103, 204601-204602; DOE-101, 204442; BLM-127, 101602-101603; DOE-072, 203693-94, 203699; DOE-079, 203713-714; DOE-080, 203717-203719; DOE-085, 203768-769; DOE-082, 203724-765; DOE-086, 203771; DOE-087, 203773; DOE-071, 203686. Thus, more than 99 percent of the comments submitted to DOE were critical of the EA's analysis, its lack of mitigation measures and/or alternatives to the proposed action. *Id.* The controversy over this project's impacts is manifestly illustrated by the county on which it will have the most profound effects. *See* BLM-090, 101429; DOE-071, 203686 (Imperial County's APCD stating project's significant adverse effects).

The Ninth Circuit has held that this type of "outpouring of public protest" constitutes a "controversy" for NEPA purposes. *Nat'l Parks*, 241 F.3d at 736 (controversy existed where 85

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[2] Four hundred of the comment letters were received via electronic mail just after the close of public comment. However the comments were received months before the final EA and FONSI were issued and DOE "duly noted their existence" in the FONSI. *See Public Citizen*, 2003 WL *19.

percent of 450 public comments opposed the proposed agency action); *see also Public Citizen*, 2003 WL *19 (90 percent of comments opposed the regulations and raised meritorious criticisms). As in *Foundation for North American Wild Sheep v. U.S. Dept of Agriculture*, where the agency "received numerous responses from conservationists, biologists, and other knowledgeable individuals" critical of the EA and its conclusions, many critical comments here were made by specialists in air, water, or human health issues. 681 F.2d 1172, 1182 (9th Cir. 1982) (finding controversy over project required preparation of an EIS); *see also Sierra Club v. U.S. Forest Service*, 843 F.2d at 1193 (same). Here, comments on the draft EA indicate a substantial scientific controversy over the significance of the impacts.

In light of the level of concern raised in comments by other agencies about air quality and other environmental issues, a consultant who assisted DOE on the EA advised that "this EA might now need be escalated to an EIS." DOE-091, 0203783. DOE failed to heed its consultant's advice and never responded to the issue of substantial public controversy in the final EA or FONSI. *See* DOE-103, 204601-204606. DOE has not met its burden to supply a "'convincing' explanation why no controversy exists" and has, therefore, acted arbitrarily and capriciously. *See Public Citizen*, 2003 WL *19 (citation omitted).

4. The Project's Effects on Ozone are Uncertain

Because DOE did not analyze in a meaningful way the impacts of the project on ozone formation in the air basin, it cannot support its conclusion that there will be no significant impact. "Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data." *Nat'l Parks*, 241 F.3d at 732 (EIS was required where there was an absence of information about the effects of increased vessel traffic on Glacier Bay and its inhabitants, combined with a failure to present adequate proposals to offset environmental damage through mitigation measures). DOE's consultant 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). The same consultant agrees that "[s]everal modeling approaches, consistent

with USEPA guidance, exist for assessing the significance of the proposed power plant NOx emissions on ozone concentrations in Imperial County." *Id.*, 203338; *see also* Tesche Dec., ¶ 14.

DOE is required to perform an adequate modeling analysis of ozone impacts and address adequate mitigation measures to offset such impacts. Until it does so, there is uncertainty as to the significance of the impacts on ozone. Tesche Dec., ¶¶ 13-20; Fox Dec., ¶ 12. This uncertainty requires an EIS because the air basin is already designated as a non-attainment area for ozone. *See Nat'l Parks*, 241 F.3d 732 n.10 (EIS required because of uncertainty over intensity of impacts, including air pollution where the tolerance for air pollution in Glacier Bay was low).

5. The Project's Effects are Cumulatively Significant

"Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. 1508.27(b)(7). A cumulative impact "is 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.

The evidence shows that this project has cumulatively significant impacts. *Supra*, pp.7, 11-13, 15. However, the EA avoids taking a hard look at cumulative effects. The EA contains no cumulative impacts analysis for effects on health, water quality or quantity, the Salton Sea or ozone. *See* DOE-101, 204436-204440. For air quality, DOE lists other possible sources of impacts, but does not analyze the combined effect of this project with other present and future emissions sources. Moreover, as discussed above, it is reasonably foreseeable that other power plants will be constructed in the border region. DOE-071, 203687; DOE-079, 203714. DOE's consultant advised that the EA would not be able to show that impacts from the proposed action would not be significant after considering the non-attainment status of Imperial County combined with the projected emissions of CO and PM_{10}. DOE-055, 202850-202851. He noted that if the proposed power plants were located in California, "the projected emissions . . . would rank it as the 2nd largest NOx point source in Imperial County." *Id.*; *compare* DOE-101, 204401 (Sempra and Intergen emissions) *with* DOE-115, 204793 (existing facilities in Salton Sea Air Basin). Internal agency comments on the EA stated that potentially significant cumulative impacts on air quality are not discussed in the cumulative impacts section. P-052,102697. "It

would seem that the incremental addition of NOx to an ozone non-attainment area is exactly the kind of impact that discussions of cumulative impacts are intended to address." *Id*.

DOE's explanation of why it believes the project does not have cumulatively significant impacts should be in the FONSI, but that document says nothing about cumulative impacts to any resource. *See* DOE-103, 204600. For these reasons, an EIS is required to analyze the cumulatively significant impacts of the project.

6. The Project Threatens to Violate Laws and Requirements Meant to Protect Air Quality

DOE failed to determine 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. The Ninth Circuit recently held that an agency's failure to take into account California's emissions regulations, which are "more stringent than the federal standards," in addressing whether its proposed action might lead to a violation of law or other requirements and therefore be significant, violated NEPA. *See Public Citizen*, 2003 WL *18; s*ee also, Sierra Club v. U.S. Forest Service*, 843 F.2d at 1195 (failure to prepare EIS arbitrary and capricious where proposed timber harvest may violate state water quality standards); *U.S. v. 27.09 Acres of Land*, 760 F. Supp. at 353 (failure to prepare EIS arbitrary and capricious where proposed action would violate zoning restrictions); *National Audubon Society v. Hoffman*, 917 F.Supp. 280, 288 (D. Vermont 1995) (failure to prepare EIS arbitrary and capricious where Forest Service did not consider Town Plan), *aff'd in relevant part, rev'd in part*, 132 F.3d 7 (2nd Cir. 1997).

California has set specific limits for airborne pollutants that are, in some cases, more stringent than federal standards. *See* Cal. Code Regs., Title 17 § 70200 (2002); *see* DOE-056, 203007; DOE-023, 200893; Fox Dec., ¶ 15. California has also vested local air pollution control districts with the primary responsibility for controlling emissions from all sources except motor vehicles. *See* Cal. Health & Safety Code § 40000. Each district must adopt and enforce rules and regulations to achieve and maintain state and federal ambient air quality standards. *Id.* § 40001(a). Consequently, the Imperial County Air Pollution Control District adopted rules to address emissions from new stationary sources. Rule 207 prohibits any net increase in emissions

from a new source which has the potential to emit 137 pounds per day or more of any non-attainment pollutant. Rule 207(A) (1999), attached hereto as Exhibit A. Non-attainment pollutants include PM_{10}, CO and ozone (of which NOx is a precursor). Fox Dec., ¶ 8. DOE did not address whether the project would violate California's air quality limits or the District's rules. However, 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.[3]

DOE only addressed air impacts in terms of EPA's significance levels. DOE-101, 204445-204446. Significance levels are used to determine whether a major source will be considered to cause or contribute to a violation of a national ambient air quality standard ("NAAQS") at any locality that does not meet NAAQS. DOE-101, 204400; 40 C.F.R. § 51.165. DOE's finding that project emissions are beneath the numeric significance levels for EPA's NAAQS does not translate into a no significant impact finding under the CEQ regulations, 40 C.F.R § 1508.27, and NEPA. The two regulatory definitions are entirely different.

EPA stated unequivocally that the lack of emission control technologies at the Intergen plant and "the lack of mitigating offsets for both plants will likely increase the burden on the [Imperial County Air Pollution Control District] and its community, one of the poorest counties in the state, to attain clean air standards." DOE-096, 204289. Thus, this project also threatens to prolong and exacerbate Imperial County's violations of state and federal ambient air quality standards. DOE-045, 202374.

B. The Environmental Assessment Is Legally Deficient

Even if an EIS were not required, the EA is invalid for two fundamental reasons: (1) it fails to evaluate all reasonable alternatives to the proposed action and (2) it fails to consider, disclose and analyze all of the direct, indirect and cumulatively significant impacts of the proposed action.

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

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[3] PM_{10} emissions at Sempra's TDM plant are estimated at 216 tons per year – or 1,184 lbs/day – if Sempra produces only 600 MW of energy for export. DOE-101,204401.

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. "[C]onsideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process." *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988). Indeed, section 102(2)(E) "applies whether a proposal has an enormous environmental impact or none at all." *Surfrider Foundation v. Dalton,* 989 F. Supp. 1309, 1325 (S.D. Cal. 1998) (citing *Bob Marshall Alliance*, 852 F.2d at 1229); 40 C.F.R. §§ 1507.2, 1508.9.

The alternatives analysis is the heart of the environmental analysis. *See* 40 C.F.R. § 1502.14. DOE must rigorously explore and objectively evaluate all reasonable alternatives, "particularly those that might enhance environmental quality or avoid some or all of the adverse environmental effects." 40 C.F.R. § 1500.8(a)(4). "[B]ased upon consideration of the affected environment, 40 C.F.R. §1502.15, and the environmental consequences, 40 C.F.R. §1502.16," the alternatives "should present the environmental impacts in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmakers and the public" 40 C.F.R §1502.14; *California v. Block*, 690 F. 2d 753, 766 (9th Cir. 1982). "The existence of a viable but unexamined alternative renders an [environmental analysis] inadequate." *Alaska Wilderness Recreation & Tourism v. Morrison*, 67 F.3d 723, 729 (9th Cir.1995).

In both the draft and final EAs, DOE examined only the "no action" alternative and the proposed action, which Sempra and BCP submitted to DOE in their applications for Presidential Permits. DOE-064, 203450; DOE-101, 204328. DOE considered two alternate locations for the transmission lines, but rejected these alternatives as unreasonable. DOE-101, 204352.

DOE never considered or evaluated the reasonable alternatives proposed by the Border Group and other agencies and organizations. For instance, the Border Group proposed that DOE consider an alternative 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[4] by reductions in emissions from an existing source; and that the power plants use dry cooling or parallel dry-wet cooling. DOE-082, 203725-203727, 203765. Similarly, the American Lung Association recommended that the Permits be conditioned upon: the power plants only using natural gas and no diesel; the power plants meeting federal, state and local air quality standards; adequate emissions monitoring; and air emissions offsets. DOE-079, 203714-203715. U.S. Congressman Filner asked DOE to consider conditioning the permits on the requirement that catalytic emission controls be used on all turbines at the plants and that the plants use dry-cooling or dry-wet parallel cooling technology. DOE-080, 203718-203719. The California Air Resources Board also requested that DOE ensure that "all facilities associated with these transmission lines use the best available air pollution control technologies." DOE-087, 203773-203774. Despite all of these recommendations, DOE failed to consider any alternative to issuing the permits as requested that would have placed conditions in any permits to ensure that the project minimized air and water quality impacts to the extent possible.

These recommended alternatives are reasonable and feasible for both DOE and the power companies. DOE may attach to the issuance of a presidential permit any conditions necessary to protect the public interest. *See* Executive Order 10485, § 1(A)(3), 18 Fed. Reg. 5397 (Sept. 3, 1953) *as amended by* Executive Order 12038 § 2(A), 43 Fed. Reg. 4957 (Feb. 3, 1978). The Presidential Permits at issue, in fact, contain a number of conditions already. *See, e.g.,* DOE-104, 204610-204611. Thus, it would have been reasonable for DOE to consider as an action alternative issuing the Presidential Permits with certain conditions aimed at protecting the public's interest in clean air and water. Moreover, installing best available control technology,[5] offsetting any remaining emissions and using only natural gas and dry cooling technology are feasible measures for a power generating company. For example, power plants built in California must comply with New Source Review, a program requiring best available control

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[4] Emission offsets are "emission reductions at the project location, or at a nearby location, to compensate for the expected increases in emissions from the project." DOE-023, 200830; *see also* DOE-36, 202233; Fox Dec., ¶ 20.

[5] Best available control technology is the most stringent limitation or control technique which has been used in practice, is contained in any EPA approved State Implementation Plan or any other emission control technique determined to be technologically feasible and cost effective. DOE-023, 200811.

technology for controlling air emissions and emission offsets. DOE-023, 200793, 200839. Otay Mesa, a 510 MW power plant that was recently approved for construction in San Diego County, will comply with strict emission limits of 2.0 ppm for NOx and will offset remaining emissions at a 1.2:1 ratio. DOE-056, 203096; DOE-058, 203335; Fox Dec., ¶¶ 24-25. The EA's estimate for NOx emissions from the Intergen plant alone vastly exceeds the allowable NOx emissions for the Otay Mesa power plant. DOE-096, 204289. EPA confirms that achieving a 2.0 ppm NOx emissions rate is "technically feasible." *Id*.

Further, both Sempra and Intergen's parent company use dry cooling technology in other power plants in Mexico and the U.S. Fox Dec., ¶ 28. EPA agrees that "[d]ry cooled systems are an economically feasible alternative in such an arid climate, and have been successfully used in many other arid locations in the U.S. Dry cooled systems also significantly reduce emissions of PM_{10}." DOE-092, 203785; *see also* Fox Dec., ¶¶ 26-38. Last, given that natural gas is the preferred fuel source for both plants, DOE could have easily conditioned the permits on a requirement that the transmission lines connect to natural gas-only power plants.

Rather than substantively addressing these viable alternatives, the record shows that DOE allowed Sempra and Intergen to control the environmental analysis process. For example, after the public raised these issues in response to the draft EA, one DOE employee questioned whether "Sempra and Intergen [would] consider mitigation (switching to dry cooling)." DOE-107, 204629. Whether or not dry cooling technology should be required as a permit condition should have been analyzed in the EA. Instead of actually analyzing the reasonable alternatives recommended by many commenters, DOE responded to the public comments by stating:

> DOE and BLM believe that the owners of the TDM, EBC, and the EAX export turbines have taken substantial measures to mitigate the impacts from their facilities by voluntarily agreeing to equip them with pollution control technology that would significantly reduce emissions.

DOE-101, 204447. Notably, these "voluntary measures" do *not* include the use of dry-cooling technology and do *not* include offsets to address the remaining emissions. Only for Sempra's plant do these measures include best available control technology to meet emissions standards established by California. *See id*. At the Intergen plant, only the export-only turbines will use best available emissions control technology for NOx and none of the turbines will control for CO

emissions. DOE-101, 204321. Moreover, NEPA does not sanction DOE's reliance on "voluntary measures" as a substitute for a rigorous environmental analysis of all reasonable alternatives. In responding to comments, DOE never demonstrated that the alternatives proposed were unreasonable. It simply refused to evaluate them.

The Ninth Circuit recently stated that "the policy of NEPA is first and foremost to protect the natural environment." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1123 (9th Cir. 2002). "By its own terms, NEPA intended to reorganize the priorities of the federal government, to integrate 'environmental amenities and values' alongside more traditional 'economic and technical considerations.'" *Public Citizen*, 2003 WL at *13 (quoting 42 U.S.C. § 4332(2)(B)). By its failure to consider a single alternative that would have mitigated the adverse air and water impacts of the proposed action, DOE has turned a blind eye to NEPA's purpose. *See also* 40 C.F.R. § 1500.8(a)(4). Consequently, DOE has deprived itself of informed decision-making and the public of full participation in that decision-making process. By failing to make a reasoned choice, founded on a hard look at alternatives to the proposed action, DOE acted arbitrarily and capriciously. *See California v. Block*, 690 F. 2d at 766 (held that without a full range of alternatives a reasoned choice could not be made).

The alternatives recommended by the Border Group, EPA, California's Air Resources Board, the American Lung Association, Congressman Filner, and Imperial County are reasonable and should not have been ignored by DOE. The absence of a single environmentally preferable alternative makes this EA deficient. *See Public Citizen*, 2003 WL *20 (by not considering an alternative that would have proposed more stringent controls on Mexican trucks to control air pollution, agency violated NEPA).

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

DOE's failure to identify and disclose key information about the proposed action is fatal to the EA. It is well settled that one of the primary purposes of NEPA is to "guarantee that the relevant information will be made available to the larger audience" so that the public can "play a role in both the decisionmaking process and the implementation of that decision." *Robertson v.*

Methow Valley Citizens Council, 490 U.S. 332, 349 (1989); *see also* 40 C.F.R. § 1500.1(b) (requiring disclosure of environmental information before actions are taken).

a. The EA Grossly Underestimates Emissions

By basing its air quality analysis on an assumption that Sempra will produce and export only 600 MW of energy on the permitted transmission lines, DOE ignores Sempra's own statements that it ultimately intends to export up to ***1400*** MW of energy to the United States via the transmission lines. *See* DOE-36, 202196; DOE-035, 202188 (Sempra's application for permit); *cf.* DOE-101, 204401 (EA analyzing only 600 MW for Sempra plant). DOE failed to disclose this information to the public or evaluate the emission impacts of *more than twice* the amount of energy production that was disclosed in the EA. *Id.*

If Sempra constructs additional turbines with the same emissions control technology it says it is using on the first two turbines, the emissions from a 1400 MW plant would be roughly double the emissions disclosed in the EA. However, without conditioning the Presidential Permits on such emissions control technology, Sempra is under no obligation to use it. Fox Dec., ¶ 11. Thus, the potential emissions could be even greater than double those disclosed in the EA.

NEPA requires full disclosure of all of these impacts *before* the decisions are made. *See Nat'l Parks*, 241 F.3d at 733 ("the 'hard look' must be taken before, not after, the environmentally-threatening actions are put into effect").

b. No Evaluation of Other Pollutants: Carbon Dioxide and Ammonia

DOE failed to consider, analyze and disclose air quality impacts from pollutants other than the criteria pollutants. The EA only considers and discloses emissions levels for PM_{10}, NOx and CO. DOE-101, 204401. DOE's consultant advised it that "all criteria and non-criterion air pollutants relevant to the proposed action should be assessed," even though the focus should be on PM_{10}, CO and ozone. DOE-055, 202850. In terms of quantity, carbon dioxide is the single largest emission produced during natural gas combustion in gas turbines. DOE-017, 200640; Fox Dec., ¶ 14. A Ph.D. chemical engineer familiar with these projects estimates that the two power plants will emit over 6,000,000 tons of carbon dioxide annually. Fox Dec., ¶ 14. Carbon

dioxide is a significant global warming gas and its impacts should have been evaluated in the EA. *Id.*

Ammonia is also an emitted pollutant with known acute and chronic health effects. DOE-023, 200819. Ammonia emissions result from SCR technology. *Id.*, 200818; *see also* Fox Dec., ¶ 13 . The EA failed to disclose the quantities and effects of ammonia emissions that the turbines using SCR technology will emit. Fox Dec., ¶ 13.

c. No Evaluation of Health Impacts

DOE failed to consider, analyze and disclose any potential human health impacts from the proposed action even though American Lung Association, California Air Resources Board and EPA advised DOE of the serious health risks associated with air pollution. DOE-078, 203715; DOE-087, 0203774; DOE-092, 203785; s*upra*, p.11-12. Even confronted by these expert comments from two agencies and one organization, DOE still did not address health impacts in the Final EA or FONSIs.

A Ph.D. environmental epidemiologist summarizes the EA's deficiency as a complete failure "to analyze the potentially significant health impacts resulting from cumulative air quality deterioration in a region already in nonattainment with air quality requirements and already suffering some of the highest rates of respiratory illness hospitalizations in children in the state." English Dec., ¶¶ 9-10.

3. The EA's Cumulative Impacts Discussion Is Inadequate

Recent Ninth Circuit cases stress the importance of cumulative impacts discussions in NEPA analyses, and have remanded assessments to the agencies for failure to complete adequate cumulative effects analysis. *See Blue Mountains Biodiversity*, 161 F.3d at 1214-16 (reversing and enjoining timber sale evaluated under EA for failure to consider cumulative impacts); *Carmel by-the-Sea v. U.S. Dept. of Transp*., 123 F.3d 1142, 1160-61 (9th Cir. 1997) (ordering Federal Highway Administration to re-evaluate its cumulative impacts analysis for a highway project in California because EIS "fails both to catalogue adequately past projects in the area, and to provide useful analysis of the cumulative impacts of past, present and future projects and the [proposed project]"); *Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800, 811 (9th Cir. 1999)

(enjoining Forest Service land exchange for failure to consider cumulative impacts, and rejecting Forest Service analysis which amounted to "very broad and general statements devoid of specific, reasoned conclusions"). In *Neighbors of Cuddy Mountain v. USFS*, 137 F.3d 1372 (9th Cir. 1998), the court enjoined Forest Service timber sales for deficient cumulative impacts analysis. The Ninth Circuit stated in plain terms what NEPA requires of cumulative impacts analysis:

> To 'consider' cumulative effect, some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the Forest Service's decisions, can be assured that the Forest Service provided the hard look that it is required to provide.

Id at 1379.

For all of the reasons discussed above, *supra* p. 16-17, the EA is deficient for failing to adequately analyze cumulative impacts.

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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Exhibits Page: