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10 BORDER POWER PLANT WORKING GROUP

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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14 BORDER POWER PLANT WORKING)
GROUP,)

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Plaintiff,

v.

DEPARTMENT OF ENERGY; SPENCER)
ABRAHAM, in his official capacity; CARL)
19 MICHAEL SMITH, in his official capacity;)
20 ANTHONY J. COMO, in his official capacity;)
BUREAU OF LAND MANAGEMENT,)

Defendants.

Case No.:

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

(National Environmental Policy Act, 42
U.S.C. §§ 4321 *et seq.*)

1 INTRODUCTION

2 1. This action is brought under the National Environmental Policy Act, 42 U.S.C. §§
3 4321 *et seq.* ("NEPA"), its implementing regulations and the Administrative Procedure Act, 5
4 U.S.C. §§ 701 *et seq.* Plaintiff challenges the Department of Energy's ("DOE") December 2001
5 Environmental Assessment ("EA") for Presidential Permit Applications for Baja California
6 Power, Inc. ("BCP") and Sempra Energy Resources ("Sempra"), the December 2001 Finding of
7 No Significant Impact ("FONSI") and the resulting two Presidential Permits, Order Nos. PP-234
8 and PP-235.

9 2. The Presidential Permits that were evaluated in the EA, and ultimately issued,
10 allow two companies incorporated under the laws of the United States to build electric
11 transmission lines in California that cross the international border with Mexico, enabling the
12 same companies (or their parent company) to export power to California from power plants
13 (hereinafter collectively "border power plants") they are constructing in the Mexicali region of
14 Mexico, three miles south of the international border. The turbines being constructed in
15 Mexicali for export are being built only to supply the United States with power and their ability
16 to do so hinges on the DOE's issuance of these two Presidential Permits. The ability of these
17 border power plants to export power to the United States also hinges on a reliable fuel source.
18 Under the proposed action, DOE assumes that the border power plants would be fueled by
19 natural gas imported from the United States via a not yet approved, nor constructed, North Baja
20 Pipeline, also requiring a Presidential Permit. In sum, this project as a whole is about the export
21 of natural gas from the United States to two American corporation-constructed power plants in
22 Mexico for the production of power that will be exported from the Mexico-based power plants to
23 the United States for American consumption.

24 3. In addition to generating power for export to California, the American
25 corporations will also generate significant amounts of pollution and other environmental impacts
26 that will affect California. At the same time, by constructing the plants just south of the border,
27 the companies evade compliance with the environmental protection laws of the United States.
28 The border power plants will emit pollutants to Southern California's Salton Sea Air Basin,

1 which is already in non-attainment under the federal Clean Air Act, 42 U.S.C. §§7401 *et seq.*
2 The border power plants will also discharge wastewater with high concentrations of pollutants
3 that will further impair the New River and the Salton Sea, California waterbodies that already
4 violate the water quality standards in the federal Clean Water Act, 33 U.S.C. §1251 *et seq.*, and
5 are therefore designated by the State of California as “water quality limited” under that Act.
6 These air and water impacts cumulatively threaten the health of humans, wildlife and the
7 environment of California.

8 4. In its EA and FONSI, DOE failed to adequately consider, disclose and evaluate
9 these potentially significant impacts. DOE also failed to consider, disclose and evaluate any
10 alternative to the proposed action. Finally, DOE failed to prepare an EIS to address the
11 individual and cumulatively significant impacts of the proposed action and the connected action
12 of the North Baja Pipeline project.

13 5. Plaintiff brings this action to ensure that the federal government complies with
14 NEPA and its implementing regulations by considering, analyzing and disclosing all of the
15 environmental impacts associated with and any reasonable alternatives to the proposed action.

16 JURISDICTION

17 6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 as this action arises
18 under the laws of the United States.

19 7. An actual controversy exists between the parties within the meaning of 28 U.S.C.
20 § 2201(a). This Court may grant declaratory relief and additional relief, including and
21 injunction, pursuant to 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. §§ 705, 706.

22 8. The December 5, 2001 issuance of the FONSI and the two Presidential Permits
23 constitutes the final administrative determination of the Department of Energy related to the
24 Presidential Permit applications by Sempra and BCP. Final agency action exists that is subject to
25 this court's review under the APA. 5 U.S.C. § 702.

26 9. Venue lies in this judicial district by virtue of 28 U.S.C. § 1391(e) because the
27 events or omissions giving rise to the claim arise, and the plaintiff is located, in this district.

28 PARTIES

1 10. Plaintiff BORDER POWER PLANT WORKING GROUP ("BPPWG") is a
2 coalition of nonprofit public interest groups and citizens in both the United States and Mexico
3 who are concerned with and affected by the environmental impacts from an ever-increasing
4 concentration of power plants situated along the international border with Mexico. BPPWG was
5 formed to monitor the proposed power plant projects, to ensure full public disclosure of potential
6 environmental impacts, to ensure involved public participation and to use political, economic,
7 legal and other tools to ensure that power plants constructed along the international border meet
8 environmental standards which are necessary to safeguard human health in BPPWG members'
9 communities. BPPWG recognizes that the air quality along the international border is generally
10 poor and that water is in short supply. Thus, it seeks to advance the use of available technologies
11 to minimize and offset air emissions, minimize water use and minimize wastewater generation
12 from power plants. BPPWG and its members are actively involved in local, regional, national
13 and international governmental and regulatory processes concerning power generation along the
14 U.S.-Mexico border, and the resultant impacts on air and water quality and other biological and
15 ecological resources.

16 11. The Border Ecology Project ("BEP") is one participating member of the BPPWG.
17 BEP is a private non-profit organization, based in southeastern Arizona along the international
18 border, which advocates for solutions to environmental problems specific to the U.S.-Mexico
19 border and, to a lesser extent, the interior of Mexico and other parts of Latin America. BEP's
20 staff, board of directors and members consist of both U.S. and Mexican residents who are
21 concerned with environmental issues as part of broader social dynamics in the border region.

22 12. Members of BPPWG live and work in Imperial Valley. Their health and well-
23 being depends in large part on the health of the water and air and the productivity of surrounding
24 ecosystems, including public lands, which comprise at least 50 percent of Imperial Valley.
25 Every minute of every day, members of BPPWG breathe the air in Imperial Valley, which is
26 contaminated with carbon monoxide, particulate matter, nitrogen oxides and ozone. BPPWG
27 members also observe, study, recreate or otherwise enjoy the biologic, scientific, and aesthetic
28

1 benefits of Imperial Valley, including the project area. Members especially enjoy the benefits of
2 the New River and the Salton Sea Wildlife Refuge, within Imperial Valley.

3 13. The health, recreational, scientific, cultural, inspirational, educational, aesthetic
4 and other interests of plaintiff have been and will be adversely and irreparably injured by
5 defendants' failure to comply with NEPA and its implementing regulations, unless the relief
6 requested here is granted. These are actual, concrete injuries to plaintiff that would be redressed
7 by the relief sought. Plaintiff has no other adequate remedy at law.

8 14. In order to safeguard its interests, BPPWG has actively participated with the local,
9 regional and federal governmental entities' regulatory processes. Specifically, BPPWG
10 participated in the formal public comment period for the EA. It has also written numerous letters
11 to government officials regarding the border power plants.

12 15. Defendant UNITED STATES DEPARTMENT OF ENERGY is the agency
13 responsible for issuing the Presidential Permits at issue here, Order Nos. PP-234 and PP-235.

14 16. Defendant SPENCER ABRAHAM is the Energy Secretary and is sued in his
15 official capacity.

16 17. Defendant CARL MICHAEL SMITH is the Assistant Secretary for Fossil
17 Energy, as of February 5, 2002, and is sued in his official capacity. Defendant Smith's
18 predecessor, ROBERT S. KRIPOWICZ signed the FONSI.

19 18. Defendant ANTHONY J. COMO is the Deputy Director of Electric Power
20 Regulation Office of Coal & Power Import & Export, Office of Coal & Power Systems, Office
21 of Fossil Energy, and is sued in his official capacity. Defendant Como issued the Presidential
22 Permits to SEMPRA and BCP.

23 19. Defendant BUREAU OF LAND MANAGEMENT is the agency responsible for
24 protecting and managing the public lands at issue here and is a cooperating agency on the EA.

25 FACTS

26 Background

27 20. A large number of power plants are currently planned or are under construction in
28 Mexico within the "border region" near the United States. In most cases, these power plants are

1 being constructed in air basins that are shared by both countries and are in non-attainment with
2 U.S. and Mexican ambient air quality standards for ozone, particulate matter less than 10
3 microns in diameter (PM₁₀), and carbon monoxide (CO). These new plants would add air
4 pollution to regions that are already suffering from levels of pollution that are considered
5 hazardous to human health. In addition, these power plants would use a wet condensate cooling
6 technology that requires the intake of enormous quantities of water, resulting in massive
7 evaporation and water loss in an arid region. The wastewater discharged from these power
8 plants would contain high concentrations of salts (total dissolved solids or TDS). The air and
9 water resources impacts from "border power plants" will not only affect Mexicans, but will cross
10 the border and affect the environment of residents of the United States.

11 21. Imperial County, in the southeastern corner of California, is a border region
12 particularly impacted by the proliferation of border power plants. It is bordered on the west by
13 San Diego County, on the north by Riverside County, on the east by the Colorado River which
14 forms the Arizona boundary, and on the south by the 84 miles of International Boundary with
15 Mexico. Approximately 50 percent of the county is undeveloped and under federal ownership.
16 Approximately seven percent of the county is covered by the Salton Sea. The entire county is
17 within the Salton Sea Air Basin, which also includes a portion of Riverside County. The U.S.
18 Environmental Protection Agency ("EPA") has determined that the Salton Sea Air Basin is a
19 non-attainment area for state and federal ozone standards and PM₁₀, and that part of the basin is
20 in non-attainment for CO standards. This non-attainment status triggers requirements for New
21 Source Review and Conformity Review analyses. The conformity review requires, among other
22 things, that federal actions conform to the provisions of the State Implementation Plan under the
23 Clean Air Act.

24 22. The Salton Sea Wildlife Refuge is the largest body of water in Imperial County,
25 with an estimated 7,400,000 acre-feet of water. The Salton Sea is a terminal lake with no outlet
26 to the ocean. The Salton Sea receives its water from the Alamo River, the New River and
27 agricultural drains. Nearly one-third of the Salton Sea's inflow comes from the New River in
28 Mexico. Total annual inflow to the Salton Sea is approximately 1,363,000 acre-feet, which is

1 approximately equal to the water evaporation rate of the Salton Sea. The Salton Sea Wildlife
2 Refuge is home and habitat for over 400 species of birds. In some years, as many as 95 percent
3 of the total population of eared grebes, 80 percent of the American white pelicans, 50 percent of
4 ruddy ducks, and 40 percent of the American population of Yuma clapper rails may use the
5 Salton Sea. Nearly 40 percent of California's breeding by black skimmers takes place at the
6 Salton Sea, and the Sea's nesting colony of gull-billed terns is the largest in the western United
7 States. The Salton Sea is home to many sensitive species. In 1998, the State of California
8 Regional Water Quality Control Board for Region 7 ("RWQCB") listed the Salton Sea as an
9 impaired water body under section 303(d) of the Clean Water Act. Among other pollutants, the
10 Salton Sea is listed as an impaired water body because of its salinity. The RWQCB also listed
11 the New River, which feeds the Salton Sea, as a 303(d) impaired water body. Increasing salinity
12 of the Salton Sea threatens its ability to act as habitat for the approximately 400 species of birds
13 that visit or permanently reside at the Salton Sea Wildlife Refuge.

14 23. Currently, two new border power plant complexes are under construction in
15 Mexicali, a region that is approximately three miles south of the United States-Mexico border,
16 and approximately 16 miles southwest of El Centro, Imperial County, California. Sempra
17 Energy Resources ("Sempra"), a corporation under the laws of the United States, began
18 construction of the Termoelectrica De Mexicali Facility ("Sempra Plant") in 2001. InterGen,
19 also a corporation under the laws of the United States, began construction of La Rosita Power
20 Complex ("InterGen Plant") in 2001.

21 24. Once constructed, the Sempra Plant will consist of two turbine sets that are
22 intended to export 600 megawatts of energy to the United States. The Sempra Plant is a
23 speculative "merchant plant," being constructed solely to meet projected increased power
24 demand in the United States. The Sempra Plant will not provide any power to Mexico.

25 25. The InterGen Plant will be located one and one-half miles east of the Sempra
26 Plant. Once constructed, the InterGen Plant will consist of four turbine sets with a combined
27 output of 1060 megawatts. Two of the turbine sets would provide 560 megawatts of energy to
28 the United States. The other two turbine sets would provide 500 megawatts of energy to Mexico,

1 though under certain market conditions at least a portion of the power produced for the use in
2 Mexico could be marketed to the United States.

3 26. The ability of the Sempra and InterGen Plants to export power to the United
4 States depends upon the construction of electric power transmission lines from the international
5 border with Mexico to the Imperial Valley Substation owned and operated by San Diego Gas and
6 Electric Company. A DOE Presidential permit is required before transmission lines may be
7 constructed across the U.S. border. DOE has the legal authority to approve, condition, or deny
8 the issuance of a Presidential permit.

9 27. Thus, Sempra and BCP, a subsidiary of InterGen, applied to the DOE for
10 Presidential permits to construct, operate, maintain, and connect electric power transmission
11 facilities between the Imperial Valley Substation, in Imperial County, California, and
12 transmission lines that would be constructed on the Mexican side of the international border,
13 leading to the border power plants being constructed by Sempra and InterGen respectively.
14 Sempra and BCP each sought separate Presidential Permits to construct individual transmission
15 lines extending approximately six miles south from the Imperial Valley Substation, across public
16 lands managed by the Bureau of Land Management, to the U.S.-Mexico border. The Sempra-
17 owned lines would import power from the Sempra Plant. The BCP-owned lines would import
18 power from the InterGen Plant, its parent company.

19 28. In addition to importing power from the Mexicali power plants, the transmission
20 lines would also serve as a conduit to export power from the United States to the Sempra and
21 InterGen Plants. The plants require the importation of power from the United States to initiate
22 their generation capacities. For example, they require the power from the United States to begin
23 operation of the cooling towers. The plants would also import power from the United States to
24 provide "black start" capability, i.e., any start-up of the plants when they are not generating
25 electricity to supply their own needs. The plants would also import power from the United
26 States to provide ancillary equipment power when the plants' electrical generating equipment
27 does not operate, such as during weekend plant shutdowns.

1 29. The Department of Energy and the Department of Interior, through the Bureau of
2 Land Management, jointly prepared an Environmental Assessment (“EA”) ostensibly to
3 consider, analyze, and disclose the environmental impacts of the proposal to issue the
4 Presidential permits to Sempra and BCP. The EA considers only the two proposed transmission
5 line applications as "the project." The Final EA, FONSI and two Presidential permits were all
6 issued on December 5, 2001.

7 30. The Sempra and InterGen Plants are proposed to be constructed as natural gas-
8 fired power plants. The ability of the Sempra and InterGen Plants to operate as natural gas
9 power plants requires the importation of natural gas to the plants from a reliable source. To that
10 end, both companies propose to import natural gas from the United States via a not yet permitted,
11 nor constructed, pipeline called the “North Baja Pipeline.” The InterGen Plant will also have the
12 ability to fire diesel as a back-up fuel if natural gas is temporarily unavailable.

13 31. The North Baja Pipeline is a joint venture between Sempra and PG&E. The
14 North Baja Pipeline, if constructed, would be a 79.9 mile pipeline system extending from an
15 existing natural gas pipeline in Arizona to an existing pipeline in Baja California, Mexico,
16 crossing the international border at Algodones, Mexico. The North Baja Pipeline would
17 transport up to 500 million cubic feet per day of natural gas to the international border. Another
18 Presidential Permit is required to construct and operate the North Baja Pipeline at the
19 international border for the exportation of natural gas to Mexico.

20 32. If the North Baja Pipeline is not constructed to supply natural gas to the Sempra
21 and InterGen Plants, the plants would have to obtain an alternative fuel source in order to operate
22 and export power to the United States. Sempra and BCP assert that there are two other
23 "technically feasible" potential sources for natural gas, which would require additional
24 construction of pipelines and/or system upgrades, lengthy approval processes, and delays. In
25 addition, the supplies from these alternative sources may be unreliable, causing curtailments in
26 the operation of the plants, and economically infeasible. BCP has stated that if natural gas
27 through the North Baja Pipeline was unavailable, the InterGen Plant could burn diesel fuel
28 supplied by Pemex. BCP has stated that this option is disfavored because emissions would be

1 substantially higher than emissions from combusting natural gas. However, BCP considers this
2 an alternate method of operating its plant if the North Baja Pipeline is not constructed. Sempra
3 also has not eliminated diesel fuel as an optional fuel source for its plant. Both Sempra and BCP
4 believe that the proposed North Baja Pipeline fuel source is the cleanest, most efficient and most
5 economical fuel source available for the power plants.

6 33. In July 2001, FERC and the Bureau of Land Management issued a Draft
7 Environmental Impact Statement and Draft Land Use Plan Amendment for the North Baja
8 Pipeline Project. In January 2002, the Final EIS was issued. The proposed action evaluated in
9 the EIS is the construction and operation of a new natural gas transmission pipeline system from
10 Arizona across the U.S.-Mexico border. A Record of Decision has not been issued. The
11 Presidential permits have not been issued. None of the other approvals necessary for the project
12 has been made.

13 34. In its formal comments on the EA for the cross-border transmission lines, U.S.
14 EPA told DOE that the proposal to issue permits for the transmission lines is a “connected
15 action” to the proposal to issue permits for the North Baja Pipeline. As connected actions, EPA
16 advised that pursuant to NEPA, the full scope of the cumulative environmental impacts from
17 these interdependent actions (which include the proposed power plants) should be
18 comprehensively evaluated. No comprehensive evaluation has been performed.

19 Impacts of the Proposed Project

20 35. The potential impacts from the import of power from the Sempra and InterGen
21 Plants in Mexicali to California via the Sempra and BCP transmission lines are environmentally
22 significant. At a minimum, they include potentially significant adverse impacts to air quality,
23 water quality, the Salton Sea wildlife refuge and its inhabitants, the New River and human
24 health.

25 36. In generating power for the United States, both the Sempra and InterGen Plant
26 emissions would cause an increase in the amounts of nitrogen oxides (NO_x), CO, PM₁₀, ozone
27 and other pollutants in the Salton Sea Air Basin. Emissions generated at these plants will cross
28 the international border, moving into the airshed of Imperial County. The EA estimates that in

1 producing power to export to the United States on the permitted transmission lines the Plants will
2 generate 452 tons of NO_x, 1,089 tons of CO and 626 tons of PM₁₀ annually. These emissions
3 exceed the “significance levels” for net emission increases established by the EPA in its
4 regulations under the Clean Air Act. The two turbines destined to provide power primarily to
5 Mexico will emit an additional 1,502 tons of NO_x, 957 tons of CO and 314 tons of PM₁₀
6 annually. Oxides of nitrogen (NO_x) contribute to the formation of ozone and inhalable particles
7 in the atmosphere. The Salton Sea Air Basin already contains pollutants at levels deemed unsafe
8 for human health. Thus, the basin is in non-attainment status for PM₁₀, ozone and in some places
9 CO. The additional influx of pollutants, directly resulting from the United States' importation of
10 power from the plants in Mexico, will exacerbate already harmful levels of pollutants and make
11 it even more difficult for the U.S. air quality districts in the border region to attain compliance
12 with clean air standards.

13 37. Already, Imperial County has the highest rate of hospitalization for children with
14 asthma of any county in California. Ozone impedes lung growth in children and aggravates
15 respiratory illnesses. PM₁₀ has been linked to premature death in people with heart and lung
16 ailments. CO impairs cognitive functions and high levels of this pollutant can also be life
17 threatening for individuals with heart or lung disease.

18 38. If the Sempra and InterGen Plants were constructed in California, they would be
19 considered “new sources” of pollution under the Clean Air Act. ”New sources” are required to
20 use the best available conventional technology (“BACT”) to control and minimize emissions of
21 pollutants. In the United States, the plants would also be required by EPA to offset emissions of
22 non-attainment pollutants in the non-attainment areas. However, apparently because these new
23 plants are sited just three miles across the American-Mexican border, neither the FONSI, nor the
24 Presidential Permits require that BACT be used, or that the American corporations building the
25 plants provide any offsets for emissions of non-attainment pollutants in non-attainment areas.
26 Based upon information disclosed in the EA, neither Sempra nor InterGen/BCP will provide
27 offsets for emissions of non-attainment pollutants in non-attainment areas. Based upon
28 information in the EA, Sempra intends to use BACT for controlling NO_x and CO emissions at

1 the Sempra Plant. Based upon information in the EA, InterGen intends to use BACT for
2 controlling NOx on the two export turbines at the InterGen Plant, but will not use BACT for
3 controlling CO emissions and will not use BACT on the turbines to supply power to Mexico.

4 39. The EA underestimates the potential environmental impacts from these methods
5 of exporting power to the United States. For example, the EA fails to evaluate in any meaningful
6 way the impact of the project's emissions' sources on downwind ozone levels, possibly one of
7 the most significant impacts of the project. In fact, the EA's entire discussion of ozone is
8 inconsistent with current scientific knowledge. Even relatively low ambient concentrations of
9 NOx can be quite influential in producing high ozone concentrations in the Salton Sea Air Basin
10 of Southern California and there is a high potential for short-duration, high ozone formation in
11 that region. The EA ignores significant short-term impacts and focuses only on impacts to ozone
12 levels on an annual basis. Also, the modeling used by DOE to estimate certain impacts to air
13 quality failed to take into account the potential emissions from the project as a whole. If the
14 Sempra and InterGen Plants use natural gas to generate power for export to the United States and
15 if they actually construct the Plants with some of the emission-control technology described
16 above, the impacts on air quality will still be significant.

17 40. The potential impacts from air pollution that would be generated at the border
18 power plants is far worse than the EA analyzed or disclosed. The EA assumes, without basis,
19 that the turbines at the Sempra and InterGen Plants will run on natural gas. In fact, the entire
20 impacts analysis hinges on the assumption that the exclusive fuel for the plants will be natural
21 gas. However, it is reasonably foreseeable that at least one of the plants will use diesel fuel to
22 produce electricity. BCP, InterGen's subsidiary, stated that the InterGen Plant would consider
23 using diesel fuel from Pemex if it was unable to obtain natural gas via the North Baja Pipeline.

24 41. The FONSI does not require the plants to operate on natural gas. The Presidential
25 Permits do not require the plants to operate on natural gas. In its EA, DOE analyzed no
26 alternatives in which the proposed electric transmission lines would connect to a diesel-powered
27 plant to import power to the United States. Yet, it is possible that at least one of these plants will
28

1 be fueled with diesel, and consequently generate significantly increased air emissions that will
2 move into the Salton Sea Air Basin above Imperial County.

3 42. The cumulative air impacts from other sources than the turbines that would export
4 power to the United States have not been adequately evaluated by DOE. In the EA, DOE only
5 considers the impacts of the "export turbines" in making a finding that there will be no
6 significant impact. DOE does not consider the cumulatively significant impacts on air quality of
7 other new sources of air emissions in the area, including the two turbines being constructed as
8 part of the InterGen plant to provide power to Mexico. The combined emissions from natural
9 gas burning plants will exceed EPA's established "significance levels" for non-attainment areas.

10 43. The Air Pollution Control District of Imperial County formally commented on
11 DOE's proposal to issue the Presidential Permits to Sempra and BCP. The Air District believes
12 that the emissions resulting from the project would have significant adverse impacts on the air
13 quality in the Salton Sea air basin. The Air District confirms that the emissions will exacerbate
14 the non-attainment ozone and PM₁₀ status of the region. Similarly, the California Air Resources
15 Board formally commented that the issuance of the Presidential permits would result in
16 significant adverse impacts to the air quality of the region and requested the preparation of an
17 EIS. EPA also commented that it was concerned about the potentially significant impacts to air
18 quality from the two new power plants in Mexicali because of their contribution of emissions to
19 airsheds that are in non-attainment with National Ambient Air Quality Standards and Mexican
20 air quality standards.

21 44. The adverse impacts to water quality arise from the Plants' use of wet condensate
22 cooling technology instead of dry cooling technology. The Plants intend to use wastewater from
23 the Zaragoza wastewater treatment facility in Mexicali (Mexicali I) for their power generation
24 operations. After use by the Plants, the wastewater, diminished significantly in quantity, but
25 with an increased concentration of pollutants (total dissolved solids or TDS), would be
26 discharged to drainage channels that enter the New River in Mexico. The New River flows
27 north, crosses the international border, and eventually ends in the Salton Sea in California. The
28 decrease in quantity of surface water reaching the Salton Sea, combined with discharges of high

1 concentrations of TDS, will result in increased salinity of an already impaired water body. This
2 impact is significant individually and cumulatively. Experts project that within 20 to 40 years,
3 the Salton Sea may be too saline for many of the 400 species of birds that use the Sea as
4 breeding, feeding, migrating and other habitat. Increasing salinification threatens to permanently
5 destroy one of the most important bird sanctuaries in the United States. This project will
6 contribute to that end. In addition, the overall concentration of parameters for which the New
7 River is “water quality limited” under Section 303(d), specifically sediment, pesticides, nutrients,
8 bacteria, and volatile organics, will increase as a result of the proposed action. The power plants
9 will take water that is currently treated by an existing Mexicali I wastewater treatment plant and
10 evaporate most of this water (up to 80 percent) in the power plant cooling towers. The effect of
11 this rate of evaporation will be to reduce the overall flow of the New River by as much as 10 to
12 12 percent, without reducing the flow or concentration of the predominant untreated wastewater
13 discharge entering the New River from the Mexicali II collection system. The result will be an
14 increase in the concentration of the parameters for which the New River is water quality limited.

15 45. The U.S. EPA has invested nearly 20 million dollars in grant funding to improve
16 the Mexicali wastewater collection and treatment system so that the quality of freshwater flow
17 from the New River, which eventually reaches the Salton Sea, would be improved. Thus,
18 previously funded mitigation measures could be for naught if significant flows are redirected to
19 the power plants for cooling and never enter the New River.

20 46. In the EA, DOE evaluated only one action alternative, the proposed project. It
21 also considered a "no action" alternative. The EA dismissed without evaluation alternative
22 locations for the proposed transmission lines as unreasonable.

23 47. DOE should have considered other reasonable alternatives to issuing the
24 Presidential Permits as proposed in the only action alternative. For example, it should have
25 considered an alternative that conditioned the issuance of the Presidential Permits on
26 transmission lines that connected to natural gas powered plants, which used selective catalytic
27 reduction for NOx control and oxidation catalyst for CO control, provided offsets for all
28 remaining emissions and used dry-cooling technology with zero wastewater discharge, or any

1 combination thereof. The lack of a range of alternatives prevented the public and the decision-
2 makers from being able to evaluate in comparative form the impacts of the proposed action.

3 48. Executive Order 10485, as amended, requires that Presidential Permits be issued
4 only after a finding that they are consistent with the public interest. A finding of consistency
5 with the public interest requires a full evaluation and consideration of environmental impacts.
6 Executive Order 10485, as amended, also gives the issuing agency the authority to attach to any
7 Presidential Permit and to the exercise of the rights granted thereunder any conditions necessary
8 to protect the public interest.

9 FIRST CAUSE OF ACTION

10 NEPA: DOE Failed to Prepare an EIS

11 49. Plaintiff hereby realleges and incorporates paragraphs x through x, above.

12 50. NEPA, 42 U.S.C. § 4332(2)(c), and its implementing regulations require all
13 federal agencies to prepare an EIS for all major projects significantly affecting the quality of the
14 human environment.

15 51. The FONSI and decision notice to issue the Presidential Permits to SEMPRA and
16 BCP constitute a major federal action significantly affecting the human environment within the
17 meaning of 42 U.S.C. § 4332(2)(c). The federal defendants violated 42 U.S.C. § 4332(2)(c) by
18 failing to prepare an Environmental Impact Statement that discusses all relevant impacts and
19 effects of the project.

20 52. If a required DOE EA does not support a FONSI, DOE shall prepare an EIS and
21 issue a ROD before taking action on the proposal addressed by the EA. 10 C.F.R. § 1021.322.
22 DOE violated its own regulations implementing NEPA by issuing a FONSI when the EA did not
23 support a finding of no significant environmental impact. *See also* 10 C.F.R. § 1021, Subpt. D,
24 App. D.

25 53. Defendants failed to consider cumulatively significant impacts on the
26 environment and failed to prepare an EIS when it was reasonable to anticipate a cumulatively
27 significant impact on the environment. 40 C.F.R. §§ 1508.27(b)(7); 1508.25(a). When the
28 proposed agency action is related to other actions, which might together have a cumulatively

1 significant impact, the “significance” of the impact to the human environment, “cannot be
2 avoided by . . . breaking it down into small component parts.” *Id.* Cumulative impacts are those
3 that result from the "incremental impact of the action when added to other past, present, and
4 reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or
5 person undertakes such other actions. Cumulative impacts can result from individually minor
6 but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

7 54. The impacts of issuing the Presidential Permits for the construction, operation and
8 maintenance of the electrical transmission lines must be evaluated in terms of the cumulative
9 effects of it and other environmentally adverse impacts in the area.

10 55. An EIS is required even if the significant impacts are short term and even if
11 defendants believe that on balance the effect will be beneficial. 40 C.F.R. § 1508.27.

12 56. Defendants failed to take into account the degree to which the effects on the
13 quality of the human environment are likely to be highly “controversial” in determining the
14 “significance” of the effects of the action for the purpose of ascertaining whether or not to
15 prepare an EIS. 40 C.F.R. § 1508.27. There is significant controversy over the cumulative
16 impacts of issuing the Presidential Permits to Sempra and BCP.

17 57. Defendants failed to take into account the “unique” characteristics of the
18 geographic area, such as the Salton Sea Wildlife Refuge, in determining the “significance” of the
19 effects of the action in deciding whether or not to prepare an EIS. 40 C.F.R. § 1508.27(b)(3).

20 58. Defendants failed to account for the precedential value of this decision for other
21 similar projects, which will cumulatively have a significant environmental impact. 40 C.F.R. §
22 1508.27(b)(6).

23 59. Defendants did not give consideration to the likelihood that the project would
24 threaten a violation of federal, state, or local law. 40 C.F.R. § 1508.27(b)(10).

25 60. Defendants failed to prepare an EIS to fully evaluate potentially significant
26 impacts to air and water quality, wildlife, public safety and human health.

27 SECOND CAUSE OF ACTION

28 NEPA: The transmission line and North Baja Pipeline Presidential permits Are Connected
Actions That Should Have Been Comprehensively Evaluated in an EIS

