APPENDIX A:

COURT ORDERS

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This appendix contains the court orders issued on May 2, 2003, and July 8, 2003, by the United States District Court, Southern District of California (Case No. 02-CV-513-IEG (POR)), in the case of the Border Power Plant Working Group versus the U.S. Department of Energy and the Bureau of Land Management.

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BORDER POWER PLANT WORKING GROUP,

Plaintiff,

vs.

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)

ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; (2) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; (3) DENYING DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S DECLARATIONS; (4) DENYING DEFENDANTS' ORAL MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD; (5) GRANTING PLAINTIFF'S MOTION TO STRIKE SUPPLEMENTAL DECLARATION AND REQUEST FOR JUDICIAL NOTICE; and (6) SETTING BRIEFING SCHEDULE FOR THE REMEDY PHASE OF THE MOTIONS FOR SUMMARY JUDGMENT

[Doc Nos. 44, 56, 59, 85]

Presently before the Court are cross-motions for summary judgement, federal defendants' motion to strike plaintiff's declarations, defendants' oral motion to supplement the record, and

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plaintiff Border Power Plant Working Group's motion to strike amicus Termoelectrica U.S.'s request for judicial notice and supplemental declaration. For the reasons discussed below, the Court denies in part and grants in part both motions for summary judgment, denies federal defendants' motions to strike and to supplement the record, and grants plaintiff's motion to strike.

BACKGROUND

I. Factual Background[1]

This case involves two applications for Presidential Permits and federal rights-of-way to build electricity transmission lines within the United States and across the United States-Mexico border to connect new power plants in Mexico with the power grid in Southern California.

1. The BCP Permit and Right-of-Way

In February 2001, Baja California Power ("BCP"), a wholly-owned subsidiary of Intergen Aztec Energy ("Intergen"), applied to defendant U.S. Department of Energy ("DOE") for a Presidential Permit to construct and operate an electric power transmission line across the international border between the United States and Mexico near El Centro, California. (See Pla's Statement of Undisputed Facts ("PSUF") at ¶ 1; Defs' Statement of Undipsuted Facts ("DSUF") at ¶ 2).[2] In particular, the BCP transmission line will connect the Imperial Valley electric substation in Imperial County, California to a new power plant called the La Rosita Power Complex ("LRPC") under construction just west of Mexicali, Mexico. See DOE-33, 202165-202167, DOE-101, 204344.[3] The connection will be made via another transmission line being constructed in Mexico by Energía de Baja California ("EBC"), a wholly-owned subsidiary of Intergen. See DOE-101 at 204320; DOE-33 at 202167; PSUF at ¶ 2. The LRPC is being built by EBC and another

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[1]The administrative record ("AR" or "record") is a compilation of documents relied upon by the agencies in making their challenged decisions and sets forth the material facts in this case.

[2]BCP also applied to the Bureau of Land Management ("BLM") for a right-of-way across federal land to build the transmission line. Although the Presidential Permits at issue were issued by the DOE and the rights-of-way were issued by the BLM, both agencies relied upon the same environmental analysis documents. Additionally, the parties focused their briefing almost entirely on the DOE's issuance of the Presidential Permits. For convenience, the Court will follow suit and refer primarily to the DOE permits, although the Court's analysis applies to both agencies' decisions.

[3]The Court will cite to the Administrative Record by referring to either the DOE or Bureau of Land Management ("BLM") document number and then to a bates number.

wholly-owned subsidiary of Intergen, Energia Azteca X ("EAX"). DOE-33 at 202167; PSUF at ¶ 2. The LRPC will house four gas-fired combustion turbines. DOE-101 at 204320. EBC will own one of these turbines and EAX will own the remaining three. Id. Two of the EAX turbines, with a combined output of approximately 500 megawatts ("MW"), will provide power to Mexico, while the third EAX turbine and the single EBC turbine will export a combined, nominal[4] 560 MW of power to the United States. DOE-101 at 204320, 204402, 204404. However, the BCP transmission line will be able to transport power generated by any of the turbines at the LRPC. DOE-101 at 204320 n.2 (noting that while exported power may in limited circumstances from one of the two turbines designated for Mexican energy production, the total amount of power exported would not rise above a nominal 560 MW). Each of the double circuit lines proposed by BCP would have a capacity of 600 MW. DOE-033 at 202168. The lines are to be constructed in two phases, with the second circuit only strung when business or economic circumstances make possible the expansion of the EBC facility, or to meet the additional transmission needs of the EAX turbines. Id. at 202167-212168.

The EBC turbine and the EAX export turbine utilize dry low-NOx (oxides of nitrogen) combustor technology and selective catalytic reduction ("SCR") technology that reduce NOx emissions to 4 parts per million ("ppm"). DOE-101 at 204402, 204404. Carbon Monoxide (CO) emissions from the EBC turbine and the EAX export turbine would be not be controlled and would emit at 30 ppm. DOE-101, 204404, 204321, 204344. Annual emissions from the EBC turbine and the EAX export turbine would be 282 tons of NO_2 (nitrogen dioxide), 924 tons of CO, and 410 tons of PM-10 (particulate matter less than 10 microns in size). DOE-101 at 204401.

The administrative record does not suggest that the remaining two EAX turbines at the LRPC will be built with emissions control technology for NOx or CO. DOE-101 at 204321,

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[4]The parties explained at oral argument that "nominal" power output refers to the output of a plant when just the primary cycle of the plant is operating. Because these turbines are combined-cycle, they apparently achieve a "maximum" power output by using their secondary cycle.

204344.[5] Accordingly, these turbines will emit at 25 ppm for Nox and 30 ppm for CO. DOE-101, 204321. Annual emissions from these two EAX turbines would be 1,502 tons of NO_2, 957 tons of CO, and 314 tons of PM-10. DOE-101 at 204401.

2. The Termoelectrica-US ("T-US") Permit and Right-of-Way

On March 1, 2001, Sempra Energy Resources (SER) filed an application for a Presidential permit to construct and operate a separate transmission line that would facilitate the transmission of electricity across the U.S.-Mexico border. See DOE-35 at 202186-202187. In particular, the SER application sought permission to build a line that would connect the Imperial Valley electric substation to the Termoelectrica de Mexicali ("TDM") power plant under construction near Mexicali, Mexico. DOE-35 at 202186-202187. The connection will be made via another transmission line being constructed in Mexico by TDM. DOE-35 at 202187. TDM is a wholly-owned subsidiary of Sempra Energy. DOE-35 at 202188. The TDM plant would export 100 percent of its net generating capacity to the United States. DOE-101 at 204344. The TDM facility consists of two gas-fired combustion turbines. DOE-101 at 204320. Although the TDM facility is only permitted by Mexican authorities to generate a nominal 500 MW, DOE-35 at 202188,[6] SER indicated that it intended the possible second circuit of the transmission line to have the potential to export up to another nominal 500 MW. DOE-36 at 202196; DOE-35 at 202188.

The TDM facility would be equipped with emission control technology, including dry low-NOx combustor technology, SCR, and oxidizing catalyst systems, to reduce Nox and CO emissions. DOE-101 at 204402. The TDM facility would thus emit 2.5 ppm for NOx and 4.0 ppm for CO. DOE-101 at 204402, 204321. Based on 600 MW of energy output, the TDM facility would annually emit 170 tons of NOx, 165 tons of CO, and 216 tons of PM-10. DOE-101 at 204401.

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[5]Defendants argue that Intergen has announced since the issuance of the Presidential Permits that all of the Intergen turbines will use emissions control technology for NOx. (See DSUF at ¶ 23). However, based on defendants own arguments in their motion to strike, the Court will focus on the information available in the record as it stood at the time that defendants made the finding of no significant impact.

[6]The AR also indicates, however, that TDM is intended to export 600 MW to the U.S. DOE-101, 204321.

Concentrations of pollutants at the U.S. Mexico border due to emissions from the TDM facility are predicted to increase as follows: NOx (annual) 0.09 $\mu g/m^3$; CO (8-hour) 2.16 $\mu g/m^3$; PM-10 (hourly) 1.12 $\mu g/m^3$; PM-10 (annual) 0.11 $\mu g/m^3$. DOE-101 at 204403. When combined with total emissions predicted from the entire LRPC, the concentrations of pollutants at the U.S./Mexico border are expected to rise as follows: NO2 (annual) 0.8 $\mu g/m^3$; CO (1-hour) 70.0 $\mu g/m^3$; CO (8-hour) 30.8 $\mu g/m^3$; PM-10 (24-hour) 4.5 $\mu g/m^3$; PM-10 (annual) 0.3 $\mu g/m^3$. DOE-101 at 204439.

II. Procedural Background

After undertaking an environmental assessment of the applications for the Presidential Permits and the BLM rights-of-way, DOE and BLM each issued a Finding of No Significant Impact ("FONSI") in December 2001. DOE-103; BLM-182 (FONSI for BCP right-of-way); BLM-183 (FONSI for SER right-of-way). DOE issued Presidential Permits to BCP and SER on December 5, 2001. DOE-104 at 204612; DOE-105 at 204618. BLM granted a right-of-way to BCP that became effective on December 28, 2001, and another right-of-way to SER that became effective on December 31, 2001. BLM-189 at 102333; BLM-186 at 102290. The Presidential Permit and the right-of-way issued to SER were subsequently transferred to T-US, a subsidiary of Sempra Energy. DOE-125S at S24897; BLM-207S at S102612.

Plaintiff filed a motion for summary judgment, alleging various violations of the National Environmental ~~Protection~~ Policy Act ("NEPA") and the Administrative Procedure Act ("APA") on January 31, 2003. The federal defendants filed a cross-motion for summary judgment and an opposition to plaintiff's motion on March 13, 2003. Amicus curiae briefs were filed by BCP, T-US, and Imperial County and City of El Centro. Plaintiff responded to the BCP and T-US briefs on April 4, 2003, and both plaintiff and the federal defendants replied to the other's opposition brief. The federal defendants have also moved separately to strike extra-record materials. Finally, plaintiff's moved to strike T-US's request for judicial notice and supplemental declaration.

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DISCUSSION

III. Preliminary Issues

Before reaching the merits of the case, the Court must first determine whether it has jurisdiction and what evidence it can consider. First, the Court will briefly consider whether it has proper jurisdiction.

A. Standing

Although defendants do not challenge plaintiff's standing, the Court has an independent duty to assure itself that it has jurisdiction over the case. Plaintiff has submitted several declarations to demonstrate its standing.

1. Legal Standards

a. Traditional Standing

Because standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," the Court does not have jurisdiction in its absence. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum" of standing contains three elements. Id. First, the plaintiff must have suffered an "injury in fact." Id. The Supreme Court's opinions have defined such an injury as "an invasion of a legally protected interest which is (a) concrete and particularized. . .and (b) actual or imminent, not conjectural or hypothetical." Id. (internal quotations omitted). Second, the injury must be fairly traceable to the challenged action of the defendants. See id. Third, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. at 561 (internal quotations omitted). Each of these elements must be supported by the plaintiff with the same manner and degree of evidence required to show any other matter at the present stage of the litigation. Id.

With regard to the "imminence" of the injury in fact, the plaintiff must show that the injury is "*certainly* impending." Id. at 564, n.2 (emphasis in original). The goal is to avoid conferring standing on a party on which no injury would have occurred at all in the absence of judicial action. Id. In the end analysis, the Court warns that standing "is not 'an ingenious academic exercise in the conceivable.'" Id. at 566 (citing United States v. Students Challenging Regulatory Agency

Procedures, 412 U.S. 669, 688 (1973)).

The requirement that the injury is particularized means that "[t]he plaintiff must have a personal.stake in the outcome." Id. at 583. To be concrete, the injury must be more than "abstract." Id. Rather, plaintiff must demonstrate that it has "sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct." Id. (internal quotation omitted).

b. Procedural Standing

In Lujan v. Defenders of Wildlife, the Court recognized that its analysis would differ if it was faced with a case in which "plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*,. . .the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)." Id. at 572. Although the Court rejected the argument that the injury-in-fact requirement is satisfied by "congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law," id. (emphasis in original), it also recognized that "procedural rights" are special and should be accorded different treatment under the standing analysis:

> The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Id. at 572, n.7. The Lujan Court explained that the case before it differed from its hypothetical case because the Lujan plaintiffs sought procedural standing for persons who had no concrete interests affected. Id. In terms of the Court's hypothetical, these would be people who live on the other side of the country from where the proposed dam would be built. Id.. In sum, the Court held that an individual can enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." Id. at 573.

The Ninth Circuit has determined that the Lujan case requires a plaintiff to show two

essential elements for procedural standing: "(1) that he or she is a person who has been accorded a procedural right to protect [his or her] concrete interests. . . and (2) that the plaintiff has some threatened concrete interest ... that is the ultimate basis of [his or her] standing." Douglas County v. Babbitt, 48 F.3d 1495, 1500 (9th Cir. 1995) (internal citations omitted). Additionally, "plaintiffs must show that their interest falls within the 'zone of interests' that the challenged statute is designed to protect." Id. at 1500-01.

The Ninth Circuit has found in several cases that a procedural injury can form the basis for standing. See, e.g. Pacific Northwest Generating Coop. v. Brown, 25 F.3d 1443, 1450 (9th Cir.1994) (plaintiffs with an economic interest in preserving salmon have procedural interest in ensuring that the ESA is followed); Friends of the Earth v. United States Navy, 841 F.2d 927, 931-32 (9th Cir.1988) (residents who live near site of proposed port have procedural standing to sue for Navy's alleged failure to follow permitting regulations); State of California v. Block, 690 F.2d 753, 776 (9th Cir.1982) (state of California has procedural standing to challenge the adequacy of an EIS for forest service's land allocation); City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir.1975) (city located near proposed freeway interchange has procedural standing to challenge agency's failure to prepare an EIS).

c. Organizational Standing

An association has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

2. Application to This Case

Plaintiff claims that five of the eight declarations it submitted in conjunction with its motion for summary judgment support plaintiff's standing. (See Declarations of Marie Barrett, Carlos Yruretagoyena Ugalde, Fernando Armando Medina-Robles, Kimberly Collins, and William Powers). All five are members of the plaintiff organization. Four of the five live either in Imperial County, U.S.A., or Mexicali, Mexico, near the transmission lines and power plants at issue. Based

on their proximity to the project and the procedural requirement under NEPA to evaluate whether the project will have a significant impact on the environment, it seems clear that at least four of the members submitting declarations have procedural standing to sue in their own right. Furthermore the interest that the plaintiff seeks to protect - the public health and quality of the environment in that region - are germane to the plaintiff's purpose. (See Powers Decl. at 2 ("[Plaintiff organization's] membership is composed of United States and Mexican citizens who share a concern for the environmental health of the border region."). Finally, because the standing to sue is common to at least four of the members who submitted declaration, it is clear that no one member's participation is required in the lawsuit other than to supply the declaration that confers standing. Accordingly, it appears that plaintiff has satisfactorily demonstrated by a preponderance of the evidence that it has organizational standing to proceed in this suit.

B. Extra-Record Materials

As a second preliminary matter, the Court must determine what facts may properly form the basis of its decision. Plaintiff's cause of action arises under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. In general, actions under the APA are based on judicial review of the administrative record on which the agency relied in reaching the decision at issue. See 5 U.S.C. § 706. Defendants complain that plaintiff has filed eight extra-record declarations, each of which post-dates the final decision made by defendants in this case. (See generally Defs' Mem. in support of Motion to Strike). Accordingly, defendants move to strike these declarations. At the same time, Defendant-Intervenors T-US and BCP have submitted extra-record declarations in support of their respective amicus briefs. Finally, amici County of Imperial and City of El Centro have lodged several documents that they believe require judicial notice.[7]

The APA directs that "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The Ninth Circuit has interpreted this command in the following way:

> Generally, judicial review of agency action is limited to review of the administrative record. *Friends of the Earth v. Hintz*, 800 F.2d 822, 828 (9th Cir.1986). In *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985), the Supreme Court

[7]The Court discusses T-US's supplemental declaration and request for judicial notice separately to provide a fuller context for that discussion. See Section VI(A), infra.

> emphasized that when reviewing administrative decisions:
> "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court. *Id.* at 743-44, 105 S.Ct. at 1607 (quoting *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973)). This standard is applicable to review of agency action under NEPA. *Hintz,* 800 F.2d at 829.
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> However, certain circumstances may justify expanding review beyond the record or permitting discovery. *See, e.g., Public Power Council v. Johnson,* 674 F.2d 791, 793 (9th Cir.1982). The district court may inquire outside the administrative record when necessary to explain the agency's action. *Id.* at 793-94. When such a failure to explain agency action effectively frustrates judicial review, the court may "obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." *Camp v. Pitts,* 411 U.S. 138, 143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). The court's inquiry outside the record is limited to determining whether the agency has considered all relevant factors or has explained its course of conduct or grounds of decision. *Hintz,* 800 F.2d at 829.
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> The district court may also inquire outside of the administrative record "when it appears the agency has relied on documents or materials not included in the record." *Public Power Council [v. Johnson],* 674 F.2d [791] at 794 [9th Cir. 1982]. In addition, discovery may be permitted if supplementation of the record is necessary to explain technical terms or complex subject matter involved in the agency action. *Id.*

Animal Defense Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988) as amended by Animal Defense Council v. Hodel, 867 F.2d 1244 (9th Cir. 1989); see also Hells Canyon Preservation Council v. Jacoby, 9 F. Supp. 2d 1216, 1223 (D. Ore. 1998).

Plaintiff argues that its three scientific declarations fall within these exceptions. (See Pla's Opp'n to Defs' Mot. to Strike at 3).[8] First, plaintiff argues that the declarations demonstrate relevant factors (including impacts on air, water, and human health) that DOE did not adequately consider. (Id.). Second, they argue that the declarations help to explain technical terms essential to the case. (Id. at 4). Because it is not the Court's job to "resolve disagreements among various scientists as to methodology," the Court will not consider the declarations to the extent they seek to simply advocate a better or different methodology for assessing environmental impacts already analyzed in a reasonable manner by defendants. See Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985). Neither may post-decisional documents be used to

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[8]Plaintiff argues that the remaining five declarations are submitted only to preemptively demonstrate standing. The Court finds that this is a permissible use of these five declarations and will consider them only to the extent that they bear on plaintiff's standing.

object to or support the federal actions for the first time. See Havasupai Tribe v. Robertson, 943 F.2d 32, 34 (9th Cir. 1991); Association of Pacific Fisheries v. EPA, 615 F.2d 794, 811-812 (9th Cir. 1980). However, to the limited extent that these declarations provide information falling within one of the established exceptions to the general rule that the review will be confined to the record, the Court will consider them. See Sierra Club v. Babbitt, 69 F. Supp. 2d 1202, 1209 (E.D. Cal. 1999) (finding extra-record declarations permissible and helpful in understanding the factual complexities of the case). If the Court relies on any of these extra-record documents, it will provide a citation to that document and explain the exception under which it considers the document. The Court will treat the extra-record materials submitted by the amici in the same manner. Accordingly, the Court declines to adopt the bright line rule urged by defendants, and denies their motion to strike plaintiff's extra-record declarations.

IV. Threshold Question: Are the Power Plants Within the Scope of the NEPA Review?

As a threshold matter, the Court must first determine the scope of the environmental review required by NEPA to determine whether the construction of the power plants is within that scope. Plaintiff assumes in its arguments that the actions whose impacts must be analyzed include not only the construction and operation of the actual transmission lines, but also the operation of the power plants in Mexico to which the lines will be connected. In fact, all, or at least the vast majority, of the complaints of impacts to air quality, water quality, and human health set forth by plaintiff are actually caused by the power plants. (See generally Pla's Mem. at 1:21-28). Because of this, amicus BCP argues that if the "action" at issue here is narrowly limited to the construction and operation of the transmission lines, without regard to the generation of the power, and the emissions of the power plants are not "effects" of that action, then plaintiff's complaints are immaterial to the permits at issue.

NEPA requires a federal agency to prepare an environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Council for Environmental Quality (CEQ), which is charged with implementing NEPA, has defined a "major federal action" as including "actions with effects that may be major

and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Similarly, defendant Department of Energy has defined "action" for NEPA purposes as "a project, plan, or policy . . . that is subject to DOE's control and responsibility." 10 C.F.R. § 1021.104(b). BCP argues that the latter definition necessarily excludes the Mexican power plants from the scope of the action because these plants are outside the regulatory jurisdiction of the United States. (See BCP Brf. at 6).

The first key question under the regulatory definitions is whether the plants will be "projects" that are "subject to [Federal] control and responsibility." 10 C.F.R. § 1021.104(b). Clearly, they are not because they are outside the jurisdiction of the United States. Accordingly, defendants correctly did not include the power plants themselves when defining the scope of the proposed action. DOE-101 at 204328.

Nonetheless, the environmental analysis of the actions might still require consideration of the operation of the power plants if such operation constitutes an "adverse environmental effect" of the granting of the permit to construct and operate the transmission lines. 42 U.S.C. § 4332(C)(ii). NEPA's implementing regulations define "effects" and categorize them as "direct" or "indirect." 40 C.F.R. § 1508.8(a). "Direct effects" are those "which are caused by the action and occur at the same time and place." Id. "Indirect effects" are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." Id. Thus, as BCP notes, the question is one of causation. (BCP Brf. at 6).

The question of whether the power plants are effects of the proposed action is central to assessing both the legality of the FONSI and to assessing the adequacy of the environmental assessment (EA). First, in deciding whether to prepare an EIS, an agency must consider "significant indirect effects." Sylvester v. U.S. Army Corps of Engineers, 884 F.2d 394, 400 (9th Cir. 1989). Second, the question of the adequacy of the EA's analysis of the air impacts, water impacts, and alternatives of the proposed actions, depend on whether the plants' adverse environmental impacts are effects of the proposed transmission lines.

The Sylvester court created the following analogy to address the scope of "effects" of a

proposed action that must be discussed in environmental analyses:

> Environmental impacts are in some respects like ripples following the casting of a stone in a pool. The simile is beguiling but useless as a standard. So employed it suggests that the entire pool must be considered each time a substance heavier than a hair lands upon its surface. This is not a practical guide. A better image is that of scattered bits of a broken chain, some segments of which contain numerous links, while others have only one or two. Each segment stands alone, but each link within each segment does not.

Id. at 400. Employing this analogy, the Sylvester court held that in order for an agency to be required to consider secondary (indirect) and cumulative impacts (or effects) of an action other than the proposed action under NEPA, the proposed action and the second action must be "two links of a single chain." Id. In so holding, the Sylvester court collected and analyzed the prior cases discussing the question in the Ninth Circuit. Id. (citing Port of Astoria, Oregon v. Hodel, 595 F.2d 467, 480 (9th Cir.1979) (agency's EIS had to consider the supply of federal power and the construction of a private magnesium plant that used the power); Thomas v. Peterson, 753 F.2d 754, 761 (9th Cir.1985) (agency's EIS had to consider both a federal road and the federal timber sales that the road would facilitate); and Colorado River Indian Tribes v. Marsh, 605 F.Supp. 1425, 1433 (C.D.Cal.1985) (agency had to prepare an EIS that considered both the federal action of stabilizing a river bank and the private housing built as a result)); see also id. at 401 (citing Friends of the Earth v. Hintz, 800 F.2d 822, 832 (9th Cir.1986) (agency considered only filled wetlands and not other aspects of a harbor facility in deciding not to prepare an EIS); Enos v. Marsh, 769 F.2d 1363, 1371-72 (9th Cir.1985) (agency's EIS did not have to consider non-federal shore facilities for a new deep draft harbor); Friends of Earth, Inc. v. Coleman, 518 F.2d 323, 328 (9th Cir.1975) (agency did not have to prepare an EIS for state funded projects in a partially federally funded airport development)). The court concluded that these cases did not mandate a different result because "[t]he federal and private portions of the projects considered in these cases were joined to each other (links in the same bit of chain) in a way that the golf course [the proposed action under consideration in Sylvester] and the remainder of the resort complex (a separate segment of chain) are not." Id.

Importantly, the basis for the Sylvester court's determination of whether two related actions

constituted links of a single chain involved determining whether "each [action] could exist without the other." Id. It was not enough that the actions might be related or that each "might benefit from the other's presence." Id. Accordingly, the question in the present case narrows to whether the transmission lines and the power plants at issue would exist in the absence of the other.

Somewhat confusingly, the Sylvester court cites two other Ninth Circuit cases in a footnote, dismissing them because they involved "the impact of federal action rather than the scope of federal action." Id. at 401 n.3 (citing Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 816 (9th Cir.1987) and City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir.1975)). While it is clear, as the Sylvester court implies, that the scope of the proposed action and the impacts of that action are separate questions under NEPA, this appears confusing only because "scope" may also refer to the variety of impacts that a sufficient EA or EIS must address. It is helpful to differentiate then between the scope of the proposed action and scope of the NEPA review. Thus, in the present case, the proposed action does not include the operation of the Mexican power plants. The question remains, however, whether the operation and emissions of those plants must be included within the scope of the NEPA review because they are effects of the proposed federal action. It seems to the Court that many of the cases cited by Sylvester court involved both the impact (or effects) of a proposed federal action and the scope of the action. While those cases treated the two concepts as coextensive, this Court finds the cases relevant to the present inquiry only to the extent that they discuss the effects of the proposed action. Thus, the two additional cases cited by Sylvester dealing exclusively with the effects of federal action are central to the present analysis.

First, in Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 816 -817 (9th Cir. 1987), rev'd on other grounds, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989), the court first emphasized that NEPA does not recognize any distinction between primary and secondary effects when requiring environmental review of the effects. Id. at 816. In discussing how proximate any effects must be to the proposed action to require their inclusion in the NEPA analysis, the Court held:

> This court would not require the government to speculate on impacts in order to "foresee the unforeseeable". *See City of Davis v. Coleman,* 521 F.2d 661, 676 (9th Cir.1975). However, [i]t must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry". *Id.* at 676 (quoting *Scientists' Institute for Public Information v. A.E.C.,* 481 F.2d 1079, 1092 (D.C.Cir.1973)). Thus we find it imperative that the [agency] evaluate the reasonably foreseeable significant effects which would be proximately caused by implementation of the proposed action.

Id. at 816-817. Similarly, though perhaps more narrowly, the court in City of Davis v. Coleman, found that effects must be included in the environmental review when the action is an "indispensible prerequisite" or an "essential catalyst" to the effects. 521 F.2d 661, 674 (9th Cir. 1975).

More recently, the Ninth Circuit reaffirmed that an agency may "limit the scope of its NEPA review to the activities specifically authorized by the federal action where the private and federal portions of the project could exist independently of each other." Wetlands Action Network v. U.S. Army Corps of Engineers (WAN), 222 F.3d 1105, 1116 (9th Cir. 2000). In general that Court instructed that "deciding whether federal and non-federal activity are sufficiently interrelated to constitute a single federal action for NEPA purposes will generally require a careful analysis of all facts and circumstances surrounding the relationship." Id. (internal quotations omitted).[9]

The WAN court faced a situation, like here, where the federal agency did not have independent jurisdiction over the non-federal action that was a potential effect of the proposed action. See id. at 1117.[10] Furthermore, the court found that the non-federal action "certainly *could*

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[9]Although the WAN court describes the federal and non-federal activity as a "single federal action for NEPA purposes," this Court's understanding of the holding is not that the private activity may fall within the scope of the proposed action, but rather that the private activity might constitute an effect of the proposed action and therefore fall within the scope of NEPA review.

[10]For this reason, cases involving whether the impact of "connected actions" have to be considered together under NEPA are inapposite to the case at bar. Cf. Save the Yaak Committee v. Block, 840 F.2d 714, 719 (9th Cir. 1988) (analyzing whether separate federal actions involving logging

proceed without the [federal action] and. . .is currently proceeding without the [federal action]." Id. The non-federal action at issue in WAN, as here, was not financed by federal funding, and federal regulations did not control the design of the non-federal action. Id. Finally, the WAN court derived comfort from the fact that the non-federal action had already been subjected to extensive state environmental review. Id.

In sum, Ninth Circuit precedent makes clear that effects must be causally linked to the proposed federal action in order for NEPA to require consideration of those effects in an EA or EIS. In the present case, only BCP puts much weight on the argument that the power plant emissions are not effects of the transmission line project. BCP's principle argument is that the power transmission lines are not a but-for cause of the LRPC emissions because the LRPC would generate some of its power for the Mexican market without regard to whether the transmission lines are completed, and it could send its export power through the Mexican power grid to the United States via an alternative transmission line. (See BCP Brf. at 9-10). Amicus T-US does not make the same argument, presumably because the TDM plant will only be producing power for export to the United States, and the only planned transmission line connecting that plant is the one requiring the permit under consideration. The federal defendants appear to concede, both in the EA itself and their briefs, that they were required to analyze to some extent the impacts of the power plants,[11] although they argue, correctly, that the power plants are not within the scope of the proposed action.

Plaintiff argues that the BCP and T-US permits should not be separately analyzed because

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operations must be considered cumulatively under NEPA regulations governing "connected actions"); Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir.1985) (same). The EA concluded that a Federal Energy Regulatory Commission action involving a gas pipeline to fuel the plants under discussion was not a "connected action" pursuant to NEPA regulations. See DOE-101 at 204444-45. Plaintiff does not challenge that conclusion in the present action.

[11]See Defs' Reply at 1:15-17 ("DOE reasonably assessed the potential impacts of the actual proposed action and alternatives, and *also* reviewed impacts from the associated power plants."). This language suggests that federal defendants view the power plant impacts as secondary effects under NEPA. However, federal defendants also argue that NEPA does not require them to consider alternatives to the power plants, or to consider the cumulative impacts of the plants beyond that analysis contained in the EA. (Defs' Reply at 1:17-19).

the federal defendants opted to analyze the actions together. (See Pla's Reply at 10, n.10). Especially given the WAN court's instruction that the determination of effects is a fact-specific inquiry, the Court finds no reason why it should not consider the permits separately. This is even more important in this case because the record demonstrates that at least part of the LRPC plant is dedicated to providing power exclusively to the Mexican market, while all of the power of the TDM plant will be exported to the United States. Given these different factual circumstances, the Court finds it appropriate to consider the permits separately at the threshold level of analysis.

The LRPC plant is divided into three EAX turbines and one EBC turbine. Two of the EAX turbines are designed to produce power exclusively for sale to a Mexican utility, and it is reasonably foreseeable that very little of this power will flow through the BCP transmission line into the United States. DOE-101 at 204320. The EA does acknowledge the possibility that under limited circumstances, the domestic generation turbines may provide power to the BCP line. Id. at 204320, n.2. The record shows that the third EAX turbine is anticipated to produce power exclusively for export to the United States. Id. at 204320, n.1. However, the power produced by the EAX export turbine could be transmitted to the United States through an alternative interconnection site. Id. at 204328-29, 204395.[12] Finally, the EBC turbine is configured and licensed only to sell electricity over the BCP line. Id. at 204328-29, 204395, 204321; BCP Brf. at 9.

Although BCP cites to an extra-record declaration to support its claim that the two export turbines at the LRPC plant could be reconfigured to provide power for the Mexican market in the absence of the BCP transmission line, the Court finds that these extra-record materials were not before the agencies at the time that they made the challenged decisions and do not fall within any exceptions to the rule that the Court will limit its review to the record. Considering only the information that the federal defendants had before them at the time they made their final decisions, the Court finds that it was reasonably foreseeable that the two export turbines in the LRPC would

[12]Presumably, the Presidential Permit governing the alternative interconnection site would need to be modified and an appropriate environmental review performed in the event that the EAX export turbine was forced to export its power through the alternative line.

use the BCP transmission line to export the entirety of their power. Furthermore, given that the BCP line is the only current means evidenced by the record through which the EBC turbine could transmit its power, the Court finds that the BCP line was a but-for cause of the generation of power at the EBC turbine. Because the EBC turbine and the BCP transmission line are two links in the same chain, the emissions resulting from the operation of the EBC turbine are "effects" of the BCP transmission line that must be analyzed under NEPA. For the same reasons, the Court finds that the operation of the TDM plant is an effect of the T-US transmission line. See DOE-101 at 204321 (indicating that the only current means of transmission from the TDM plants are through the T-US line).

Conversely, the Court finds that the two turbines in the LRPC dedicated almost exclusively to the generation of power for the Mexican market are not causally linked to the BCP line in a way that makes the BCP line a necessary prerequisite or essential catalyst to their operation. Because the line of causation is too attenuated between these turbines and the federal action permitting the BCP line, Ninth Circuit authority makes clear that the emissions of the non-export turbines were not effects of the BCP line and that the federal defendants were therefore under no NEPA obligation to analyze their emissions as effects of the action.[13] Additionally, because the record makes clear that the EAX export turbine has an alternative to the BCP line to export its power, the BCP line cannot be considered the but-for cause of the EAX export turbine's operation. Indeed, the EA concludes that the EAX export turbine would be built regardless of whether the BCP line is permitted. DOE-101 at 204328-29, 204395. For this reason, the EAX turbine is also not an effect of the action.

Although NEPA does not explicitly limit the federal defendants' review of impacts to only those required by NEPA (and, indeed, agencies might be commended for erring on the side of precaution and inclusiveness when considering major actions affecting the environment), the Court does not believe that even an inadequate analysis of isolated impacts that are not effects of the

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[13]As discussed in more detail below, however, the EA must still analyze the cumulative impact of the proposed action when considered in conjunction with the impacts of other independent actions in the area.

proposed action can require the invalidation of an EA. Accordingly, the Court will not consider plaintiff's complaints regarding the EAX turbines at the LRPC except to the extent they relate to the cumulative impact analysis.

V. Did the Agencies Act Arbitrarily When They Issued a "Finding of No Significant Impact" (FONSI)?[14]

A. Standard of Review

Summary judgment is properly granted when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In an administrative review case, like this one, the administrative record provides the relevant facts, and the legality of the agency's decision based on those facts is a question of law. Accordingly, summary judgment is an appropriate vehicle for resolving a case like the one at bar. See Northwest Motorcycle Assn. v. U.S. Dept. of Ag., 18 F.3d 1468, 1471-72 (9th Cir. 1994).

Under NEPA, an agency must prepare an EIS for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA's regulations provide that an agency may prepare an EA to determine whether the proposed action is one that requires a full EIS. 40 C.F.R. § 1501.4(b). The EA must briefly describe the proposal, examine alternatives, consider environmental impacts, and provide a listing of individuals and agencies consulted. 40 C.F.R. § 1508.9. After preparation of the EA, an agency may decide to issue a "finding of no significant impact" (FONSI), which relieves the agency of its obligation to prepare a full EIS. If, however, the EA establishes that the agency's action may have significant environmental impacts, the agency must prepare an EIS. National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001) (internal quotations omitted).

An agency's decision not to prepare an EIS under NEPA is a final administrative decision reviewable under the Administrative Procedure Act (APA). See 5 U.S.C. § 701 et seq. Under the APA, the Court must decide whether the decision was arbitrary, capricious, an abuse of discretion,

[14]Because the Court has requested the parties to brief only the issue of whether the EA and FONSI amount to violations of NEPA, the Court does not now address whether an EIS is required. The Court will address the appropriate remedies for any violations at a later hearing.

or otherwise not in accordance with law. See Native Ecosystems Council v. Dombeck, 304 F.3d 886, 891 (9th Cir. 2002). Under this standard, courts must "carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." Public Citizen v. Department of Transp., 316 F.3d 1002, 1020 (9th Cir. 2003) (internal quotations omitted). The Court must be satisfied that the agency took a "hard look" at the potential environmental impacts of the proposed action. Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992). Part of this hard look is providing a convincing statement of reasons why potential effects are insignificant, and therefore do not necessitate the preparation of an EIS. See Save the Yaak Committee v. Block, 840 F.2d 714, 717 (9th Cir. 1988). If the decision of the agency is "well informed and well considered," the Court must defer to the agency's decision. LaFlamme v. FERC, 852 F.2d 389, 398 (9th Cir. 1988); see also WAN, 222 F.3d at 1114-1115 (an environmental review under NEPA will only be overturned if the agency committed a clear error in judgment).

B. Analysis

The parties do not dispute in their briefs that the issuance of the Presidential Permits and the rights-of-way in the present case represent "major federal actions" as defined by the NEPA regulations. Rather, the dispute centers on whether these actions will have "significant" impacts on the environment. NEPA regulations provide guidance on evaluating the significance of an action's impact. See 40 C.F.R. § 1508.27. Those regulations provide as follows:

> "Significantly" as used in NEPA requires considerations of both context and intensity:
> (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
> (b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
> (2) The degree to which the proposed action affects public health or safety.
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or 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.
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27. If the agencies' actions are environmentally "'significant' according to *any* of these criteria," then they erred in failing to prepare an EIS. Public Citizen v. Department of Transp., 316 F.3d 1002, 1023 (9th Cir. 2003) (citing Nat'l Parks, 241 F.3d at 731) (emphasis in original).

1. Public Health

Plaintiff argues that despite public comments alerting the agencies to potential impacts on public health as a result of increased air pollution, the EA failed to evaluate these impacts. (See Pla's Mem. at 11-12). The Ninth Circuit has stated that even a "marginal degradation" of air quality "could easily be said" to be a significant impact on the environment for NEPA purposes. Public Citizen v. Department of Transp., 316 F.3d 1002, 1024 (9th Cir. 2003). In Public Citizen, the Court found that an agency's failure to even consider whether NOx and PM-10 emissions from diesel trucks would impact public health was a violation of NEPA. Id.

Defendants respond that they did in fact consider the health impacts of increased emissions. The reasoning upon which they rely is based on the following steps of logic: (1) Because they determined that emissions of NOx, CO, and PM-10 would fall below "significance levels" (SLs) established by the EPA, and (2) because these SLs are "based on protecting human health and welfare," then (3) the federal defendants at least implicitly analyzed whether the air emissions would harm public health. (See Def's Mem. & Opp'n at 11-12, 34). The EPA sets SLs for criteria pollutants in the context of carrying out its duties under the Clean Air Act. See DOE-101 at

204401-204402. These are the levels below which any particular major source is not deemed to be contributing to violations of the National Ambient Air Quality Standards ("NAAQS"). Id. The Appendix to the EA states that "[i]f measured or predicted concentrations of the criteria pollutants are below the ambient standard, no health effects are expected." DOE-102 at 204472. This statement contradicts plaintiff's claim that the EA contained no discussion of the health impacts of the actions whatsoever.[15] (See Pla's Reply & Opp'n at 7). Moreover, defendants argue that this link between NAAQS and public health impacts distinguishes the present case from Public Citizen. (See Defs' Mem. & Opp'n at 35, n. 18). Defendants argue that there exists no "marginal degradation" of air quality, as the term is used in Public Citizen, because the EA establishes that emissions would not exceed the SLs. (Id.). Finally, defendants argue that further discussion of the potential health impacts of the actions are discussed in the EA appendix, which they argue should be considered to be part of the EA. (Id. at 35). The EA Appendix specifies that T-US's application evaluated potential acute, chronic, and cancer health effects resulting from the TDM facility and found them to be "substantially below their relative thresholds of 10 in 1 million, 0.5 and 0.5, respectively." DOE-102 at 204486. Defendants also argue that modeling data for the LRPC export turbines were analyzed to ensure that they would result in no negative health impacts. Id. at 204469. Defendants argue that these analyses constitute the hard look they were required to take.

Although plaintiff argues that an analysis of whether air impacts will exceed EPA SLs cannot be equated with the public health analysis required by NEPA, the Court finds that plaintiff's argument is merely one involving methodology. The Court will not require that the agencies analyze the air impact on public health in a particular way, but rather will only ensure that the agencies' analysis is well-reasoned. The Court finds that the agencies have met their burden in this case. The logic of their argument is indeed well-reasoned: If ambient air quality standards are

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[15]Even if the Court excludes the Appendix to the EA from its review, the Court declines to adopt plaintiff's argument that an analysis of air quality impacts is not simultaneously an analysis of the public health impacts of impaired air quality. Air quality is regulated primarily because poor air quality has been linked to health impacts. Thus, an evaluation of whether the actions affect air quality necessarily involves an evaluation of the health impacts of the actions resulting from air pollution.

designed, as they are, to protect human health, then a finding that the projects do not violate those standards logically indicates that they will not significantly impact public health.[16]

2. Uncertainty

Plaintiff argues next that an EIS must be prepared because the effect of the Mexican power plants on the formation of ozone in Imperial County's airshed are uncertain. "Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential ... effects. The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action." Public Citizen, 316 F.3d at 1024 (internal quotations omitted) (omission in original).

In Public Citizen, the court held that an EIS was required to resolve uncertainties where an EA had made an arbitrary assumption about data supporting the agency's conclusion. See id. at 1026 (FONSI unsupportable because, among other reasons, it made an "an arbitrary assumption about the percentage of newer, 'cleaner' Mexican trucks on the roads"). Plaintiff in the present case argues that defendant's assumption that NOx emissions and ozone production would be linearly related is arbitrary and that therefore ozone modeling should have been conducted. (Pla's Reply & Opp'n at 14-15). In support of its argument, plaintiff points out that the EA itself states that the process of ozone formation is "complex and is also non-linear (i.e., output is not necessarily proportional to input."). DOE-101 at 204407. On the same page of the EA, the agencies state that ozone in Imperial County, like other rural areas, "does generally tend to be NOx-limited (i.e., adding more NOx increases [ozone])." Id.

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[16]For the same reason, the Court declines to find that the agencies acted arbitrarily by not considering whether the emissions from the plants would violate the Clean Air Act's "prevention of significant deterioration" requirements (PSD) for attainment areas. First, this is yet another disagreement concerning the methodology of the agency's analysis, rather than an argument concerning the existence or adequacy of such analysis. Second, to the extent this argument attacks the reasonableness of the agencies' analysis, the Court finds that the agencies' decision was not arbitrary because the record shows that Imperial County is a nonattainment area for the emissions in question, and the PSD regulations are meant for areas in attainment or categorized as "unclassifiable." See 42 U.S.C. § 7471; DOE-101 at 204364 (Salton Sea Air Basin in nonattainment for PM-10, ozone, and in localized nonattainment for CO).

Defendants argue that they have acted conservatively in assuming that ozone production would be proportional to NOx emissions. (See Defs' Reply at 9). First, they argue that under some circumstances, increased NOx emissions can lead to a decrease in ozone. (Id.). Second, they argue that even if they took the counter-assumption that ozone was VOC-limited,[17] then additional NOx emissions would have little to no effect on ozone production. (Id.). Furthermore, defendant argues that to the extent plaintiff demands the use of ozone modeling to assess impacts, plaintiff merely disagrees with the method chosen by DOE. (See Defs' Mem. & Opp'n at 29).

The Court need not resolve disagreements among scientists as to methodology or to decide whether the method employed by an agency in its analysis is the best available. See Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985). Instead, the Court's task "is simply to ensure that the procedure followed by the [agencies] resulted in a reasoned analysis of the evidence before it, and that the Service made the evidence available to all concerned." Id. Here, defendants present a reasoned analysis of the impacts on ozone. They provide a logical argument that the presence of NOx and ozone will be closely and positively correlated. DOE-101 at 204407. They then analyzed the contributions of all turbines at issue to the concentration of NOx at the U.S. border and reasonably extrapolated from this the impact on ozone. Id. at 204407-08. The criticism leveled by plaintiff is not at the amount of data collected to determine NOx levels at the border, but rather at the methodology employed to estimate ozone impacts. NEPA does not provide the Court with authority, however, to disagree with the agencies' specialized knowledge and determination that the particular methodology urged by plaintiffs would be infeasible and inaccurate. See DOE-101 at 204408 (describing the limited utility of ozone modeling when applied to the projects at issue). Accordingly, the Court does not find that the agencies acted arbitrarily in issuing the FONSIs because of uncertainty.

3. Impact on the Salton Sea, an Ecologically Critical Area

Although the draft EA contained no analysis of the impacts of the action on the Salton Sea,

[17]VOCs are volatile organic compounds and are, along with sunlight and NOx, one of the main sources of "fuel" for the production of ozone. DOE-101 at 204407. The production of ozone tends to be limited either by the availability of VOCs or by NOx. Id.

in response to public comments the agencies analyzed the impacts in the final EA and the FONSI. See DOE-101 at 204446, 204431-204432; DOE-103 at 204605. The final EA determined that the combined impact of the LRPC and TDM facilities will reduce water flow into the Salton Sea by 0.79 percent and increase the salinity of the Salton Sea by 0.142 percent. DOE-101 at 204431-32. At the same time, the final EA implies that the operation of the plants will reduce the level of biological contaminants in the New River (which ultimately flows into the Salton Sea). Id. at 204432. The FONSI concludes that the negative impacts are "minimal and below the threshold of detection of most measuring instruments." DOE-103 at 204605.

Plaintiff argues that the agencies' conclusion is conclusory, not supported by data or analysis, and is due no deference. (See Pla's Mem. at 13). In support of its argument, plaintiff points to a document in the record stating that the Salton Sea is already a damaged resource because of too much salinity and that recovery efforts are underway to reduce the level of salinity. DOE-25 at 200943-949. The record also links efforts to control salinity in the Salton Sea to the survival of the region's biodiversity. See id. at 200959. Given this evidence of potential impact, plaintiff challenges the agencies' conclusion that an increase in the salinity of the Salton Sea would be insignificant merely because it might be too small to measure.

Defendants respond that they have provided adequate support for their conclusion that the impact will be insignificant because the estimated decrease to inflow and increase in salinity are within the natural range of variability of the Salton Sea and because the operation of the power plants will reduce biological and chemical contaminants in the water. See DOE-101 at 204432; (Defs' Mem. & Opp'n at 17 (citing DOE-25 at 201228)).[18] Furthermore, defendants point to the fact that the construction of evaporation ponds in the effort to restore the Salton Sea to a less degraded state will evaporate more water than the TDM and LRPC facilities will use on an annual basis. (See Defs' Mem. & Opp'n at 17 (citing DOE-25 at 200947, 200949)). Therefore, defendants argue that the proposed actions are consistent with the restoration effort. (Id.).

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[18]Water used in the power facilities and then returned to the New River will be treated to remove biological and chemical contaminants prior to the use of the water in the plants' cooling processes. See DOE-101 at 204431.

The Court agrees with plaintiff that the agencies' determination that the actions will not significantly impact the Salton Sea are arbitrary and capricious. First, while decreases in water flow and increases in salinity in the Sea may be "immeasurable," as the EA itself demonstrates, they are not incalculable. In fact, the record makes clear that the actions will increase the salinity of the Sea, that the Sea is under threat from increasing salinity already, and that extensive restoration efforts are underway to reduce the current salinity of the Sea.[19] Given this backdrop, the Court finds it unconvincing to say that merely because measuring instruments may not be able to detect an increase in salinity that is bound to occur makes that increase insignificant. The significance of an impact under NEPA has less to do with its measurability and everything to do with the context of the impact. Here, the impacts would affect an "ecologically critical area." See 40 C.F.R. § 1508.27(b)(3). It is clear from the record that this resource is currently threatened in a way that will only be exacerbated if the proposed actions are undertaken. To state simply, as the agencies have done, that these known impacts will be hard to measure, that they are within a range of natural variability,[20] or that an unrelated restoration effort will evaporate even more water in its effort to decrease salinity in the Sea,[21] is not enough to demonstrate that the impacts will be insignificant. Because the agencies' analysis is not well-reasoned or convincing, the Court finds

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[19]This analysis assumes that removing the impacts of the unconnected EAX turbines in the LRPC simply makes the increases in salinity and decreases in water flow proportionally smaller. In any case, the impacts from all the turbines, including those owned by EAX, on the Sea would have to be taken into account in the cumulative impact analysis.

[20]This reason in particular makes no sense. The natural variability of water flow and salinity in the Sea has no connection to the projects at issue here. If the projects increase salinity in the Sea, it appears as though this increase will be in addition to, and completely independent of, any natural increase in salinity. Thus, the impact of these projects might be thought of as simply moving the range of natural variability in the direction of increased threat. (See Pla's Reply & Opp'n at 12). Such a move does not argue against the significance of the impact, but rather argues strongly in favor of its significance.

[21]Defendants pointed out at oral argument that restoration efforts underway in the Salton Sea actually work in a cumulative sense to ameliorate the impact of increased salinity from the power plants. However, this argument overlooks another major factor in the cumulative impact analysis: the current base-line level of salinity, which is already threatening the area's biodiversity. When the base-line level of salinity is so high that it requires an extensive restoration effort, it is difficult to see how a new source of increased salinity, even a small one, can be insignificant cumulatively. Although the ultimate determination concerning significance is for the agencies and not the Court to make, as discussed in the cumulative impact discussion below, the EA is inadequate as a matter of law because it provides no analysis of the purportedly insignificant increases in salinity from the plants in the context of the high base-line level of salinity.

that they have failed to take the hard look at the impacts of the actions on the Salton Sea required of them under NEPA.[22]

4. Controversial Nature of the Impacts

Plaintiff next argues that the controversy surrounding the potential impacts mandated the preparation of an EIS. (See Pla's Mem. at 14-15). "'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, 316 F.3d 1002, 1027 (citing Nat'l Parks, 241 F.3d at 736). The evidence establishing such a controversy must be brought to the agency's attention before it completes its deliberations on the proposed action. Id. The Public Citizen court set out a two-step test for determining the existence of a controversy. First, "[plaintiffs] must show that there was a 'substantial dispute' about [an agency's] actions and that this dispute raised 'substantial questions' about their validity." Id. If plaintiff makes this showing, "the burden then shifts to [the agency] to provide a 'convincing' explanation why no controversy exists." Id. (citing Nat'l Parks, 241 F.3d at 736).

Public Citizen held that an "outpouring of public protest" constituted a substantial dispute where 85 percent and 90 percent of public comments opposed the proposed action. See 316 F.3d at 1027. Where those comments had merit and the agency "failed to adequately account for its failure to act on them," the court held that the action was "controversial" and required preparation of an EIS. Id.

In the present case, DOE received twelve comment letters before the close of the public comment period, and an additional 400 comments by e-mail after the close of the period. DOE-103 at 204601-204602. Plaintiff cites to concerns raised in all but four of these comment letters

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[22]Although it appears that the treatment of water to be used in the plants will remove contaminants in the water and improve the biological and chemical quality of the New River, these welcome benefits do not in some way negate the agencies' duty to separately analyze the negative impacts on water flow and salinity. See 40 C.F.R. 1508.27(b)(1) ("Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.").

concerning the water and air impacts of the power plants. See DOE-103 at 204602 (e-mail comment letters raised air and water impacts); DOE-101 at 204442-204443; DOE-72 at 203697, 203699 (air impacts); DOE-79 at 203713-714 (air impacts); DOE-80 at 203717-203719 (air and water impacts); DOE-85 at 203768-769 (water impacts); DOE-82 at 203724-765 (air and water impacts); DOE-86 at 203771 (air and water impacts); DOE-87 at 203773 (air impacts); DOE-71 at 203686 (air impacts). Thus, approximately 67 percent of pre-closure comments and approximately 99 percent of both pre- and post-closure comments raised air and water impact concerns. Plaintiff argues that these comments evidence a "substantial scientific controversy" over the significance of the actions. (Pla's Mem. at 15). Plaintiff additionally argues that the agencies failed to address in the EA or the FONSI whether the comments raise a controversy such that an EIS would be required. (Id.).

Defendants point out that public controversy sufficient to require the preparation of an EIS must raise "substantial" questions concerning the significance of any impacts of the proposed action or "substantial" dispute over the size, nature, or effect of the action. See National Parks, 241 F.3d at 736. If plaintiff raises such a substantial question or dispute before the preparation of a FONSI, then the burden shifts to the government to provide a "well-reasoned explanation" why the dispute over the EA does not create "a public controversy based on potential environmental consequences." Id. (internal quotations omitted).

In the present case, the agency received 412 comments on the proposed actions before the preparation of the FONSIs, although 400 of these comments were received after the close of the comment period. The agencies responded to all 412 comments in the final EA. Although post hoc arguments do not suffice to create public controversies and at least one court has found that comments creating a controversy must be made contemporaneously with the comment period, Nat'l Parks, 241 F.3d at 737 n.16, the agencies' consideration of the e-mail comments in the final decision document suggests that the Court should give them some weight. Nearly all of the comments disputed the effects of the action and the significance of those effects. In particular, the comments, considered as a whole, disputed the air and water impacts of the actions and asserted that the generation of the power to be transmitted over the lines were effects of the actions. In light

of these comments, the Court finds that plaintiff has demonstrated the existence of a substantial dispute as to the effects and significance of those effects prior to the preparation of the FONSI.

Defendants argue that even if the comments raised a substantial dispute, the dispute was adequately addressed by responses to the comment letters. (See Defs' Mem. & Opp'n at 26). The applicable standard is whether defendants' responses provide a convincing explanation of why the comments do not suffice to constitute a public controversy. Nat'l Parks, 241 F.3d at 736; see also Northwest Environmental Defense Center v. Bonneville Power Admin., 117 F.3d 1520, 1536 (9th Cir. 1997) (holding that where agency cooperated with objecting parties, and alleviated most of those parties concerns, agency need not prepare EIS). Defendants addressed the comments in a separate section of the EA that compiles them by category. See DOE-101 at 204442-48. The Court has reviewed these responses and finds that they generally restate the substance of the comments and then reject those comments to the extent they assert significant air impacts, request mitigating conditions, or challenge the scope of the review. See id. The agency did address the comments asserting water impacts by adding a new section into the EA. Id. at 204446-47. Nowhere in the discussion of the comments, however, does the agency directly explain, much less "convincingly" explain, why the comments do not suffice to constitute a public controversy. See LaFlamme v. F.E.R.C., 852 F.2d at 401 ("While FERC disputes LaFlamme's contentions, nowhere does FERC explain why LaFlamme's points do not suffice to create a public controversy based on potential environmental consequences. NEPA requires such a well-reasoned explanation .") (brackets and internal quotation omitted). Because a controversy necessarily involves disagreement, it is not enough for defendants to simply point to their disagreement with the comments. Instead, the Court reads the applicable law to place on the agencies the burden of demonstrating the absence of a substantial public disagreement when they choose not to prepare an EIS.[23] Because defendants have failed to make such a showing in the EA or the FONSI, the Court finds that the EA inadequately considered whether the substantial questions raised by the 412 comment letters made

[23]As noted above, defendants did address the water-related comments by expanding the scope of the analysis. See DOE-101 at 204446. To the extent this may have eliminated the controversy over these impacts, however, substantial dispute over the scope of the analysis, the need for conditioning the permits on mitigating measures, and the significance of air impacts still existed.

the proposed actions controversial for purposes of determining the potential significance of the actions.

5. Local Air Laws

Finally, plaintiff argues that an EIS must be prepared because the proposed actions threaten to violate local air quality laws. (See Pla's Mem. at 17-18). "In its determination of whether its proposed action is significant, an agency must consider '[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.'" Public Citizen, 316 F.3d at 1026 (citing 40 C.F.R. § 1508.27(b)(10)). An agency has an obligation under NEPA to consider whether an action might violate state or local rules. Id.

Plaintiff's particular argument in the present case is that the proposed action threatens to violate Rule 207 of the Imperial County Air Pollution Control District (ICAPCD), which prohibits net increases from a new stationary source that has the potential to emit 137 pounds per day or more of any non-attainment pollutant. (Pla's Mem. at 17-18). The TDM plant alone is expected to emit 216 tons per year, or 1,184 pounds per day, of PM-10, a nonattainment pollutant in Imperial County. See DOE-101 at 204401.

Defendants respond that the plants cannot threaten to violate Imperial County's air laws because the plants are not part of the proposed action and because they are not subject to those laws. (See Defs' Mem. & Opp'n at 31-33). With regard to the first part of defendants' argument, the Court has already determined that the TDM and EBC turbines are effects of the proposed action and therefore fall within the scope of the analysis. However, the question of whether the plants are required to be included within an environmental analysis under NEPA differs substantially from the question of whether the plants must meet local air pollution laws. The ICAPCD rule cited by plaintiff applies to "new Stationary Sources . . . which are subject to Air Pollution Control District permit requirements." (Ex. 1 to Cty of Imperial's Request for Judicial Notice at Pg. 1).[24] Nothing in the record suggests that the TDM and EBC turbines are subject to the ICAPCD permitting requirements. In fact, defendants contend that these plants are not subject

[24]The Court considers this extra-record document only for the permissible reason of ascertaining whether the agencies considered all relevant factors in their EA.

to ICAPCD jurisdiction. See DOE-101 at 204328. Plaintiff does not specifically raise any other state or local law that they claim the plants threaten to violate. Accordingly, the Court declines to find that the potential impacts from the actions are significant because they threaten violations of any state or local air pollution laws.

VI. Is the EA adequate as a matter of law?

A. Analysis of Impacts

Plaintiff argues that the EA is deficient because it failed to consider, analyze, and disclose all of the potentially significant impacts of the proposed action. (See Pla's Mem. at 22-24). Plaintiff argues that this contravenes one of the fundamental purposes of NEPA, namely, to guarantee "that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). In particular, plaintiff argues that the EA underestimates potential emissions from the TDM plant, fails to evaluate carbon dioxide and ammonia, and fails to evaluate health impacts of the emissions it does disclose. (See Pla's Mem. at 23-24).

First, plaintiff argues that the EA is inadequate because it assumes the TDM plant will produce only 600 megawatts (MW) of energy, even though T-US states in its permit application that it intends its transmission line to be able to carry a maximum potential load of 1400 MW. See DOE-36 at 202196; DOE-35 at 202188; DOE-101 at 204401. Furthermore, plaintiff argues that since the Presidential Permit carries no contrary condition on emissions, any expansion in the production capacity of the TDM plant could more than double the analyzed emissions from the plant without requiring any new permit for the transmission. (See Pla's Mem. at 23).

Defendants respond that they have simply used in their analysis the estimated amount of power to be generated submitted by TDM to the Mexican government in order to secure a license to operate the plant. (See Defs' Mem. & Opp'n at 13 (citing DOE-36 at 202201). Defendants argue that it is not "reasonably foreseeable" that the T-US line will carry more than the assumed 600 MW of power even though T-US stated in its permit application that the line would carry "a nominal 500 MW of power (approximately 700 MW maximum peak) into the U.S., with the

potential for an ultimate nominal 1000 MW (with an approximate 1400 MW peak) of power using a possible future, second circuit." (Id.)[25] In general, defendants argue that TDM has not "indicated it has any plans to expand the TDM facility." (Id.); but see DOE-36 at 202201 (stating that a second circuit on the transmission line could "accommodate possible future expansion capability, generated by TDM" to the U.S.). The agencies determined that the "operating characteristics of the facilities" produced the estimate of generation capacity and that the higher assumptions urged by commenters were "undocumented." DOE-101 at 204446. To the extent that the higher emissions urged by plaintiff might be attributable to facilities other than TDM or LRPC, defendants argue that those other facilities are not within the scope of the analysis. (Id.). Therefore, defendants contend they are not required under NEPA to speculate about a future expansion of the TDM plant or the use of the lines to transmit power from other facilities. (Id. at 14).

The Court finds that the agencies provided adequate support for their conclusion that any future expansion of the TDM plant was not reasonably foreseeable. Plaintiff has pointed to nothing in the record suggesting that such an expansion is anything more than a speculative possibility, dependant on the market for electricity and other factors beyond the scope of this case. Additionally, defendants' counsel represented at oral argument that any future expansion of the facility to provide export power would require a supplement to the EA because the Presidential Permit currently approves of only the transmission of 600 MW of power. To the extent the potential carrying capacity of the T-US transmission line will be used to carry power from plants

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[25]Amicus T-US filed a supplemental declaration of Octavio M.C. Simoes in support of a request for judicial notice of the Mexican environmental permits issued to TDM authorizing both the generation and export of power from the TDM plant. These are evidently the same permits that the agencies indirectly relied upon in making their assumption that the TDM plant would generate 600 MW of power. Plaintiff moved to strike the supplemental declaration and request for judicial notice. At oral argument, plaintiff notified that Court that plaintiff and defendants had stipulated to the authenticity of the Mexican permits submitted by T-U.S. Defendants then moved at oral argument to supplement the administrative record by adding the permits. Plaintiff objected on the basis that plaintiff would be prejudiced since it had not had a prior opportunity to examine the documents. The Court finds that although the permits would have been properly made a part of the administrative record in this case, the prejudice to plaintiff of making them a part of the record at this late date outweighs the interest in supplementing the record. Accordingly, the Court denies defendants' motion to supplement the record. For the same reasons, the Court grants plaintiff's motion to strike the supplemental declaration and request for judicial notice.

other than the TDM plant, the agencies have also demonstrated that the record provides nothing to show that the specific operating details of these plants are reasonably foreseeable, or that these plants would be "effects" for NEPA purposes of the T-US transmission line.[26] In short, the potential for future power generation is simply too remote and speculative to provide a basis for meaningful environmental analysis at the present time.

Second, plaintiff argues that the EA fails to consider emissions of carbon dioxide and ammonia. Because carbon dioxide contributes to global warming, and because ammonia is known to have health impacts, plaintiff contends that the failure to assess and disclose the impacts makes the EA inadequate. (See Pla's Mem. at 23-24). Defendants respond that nothing in the record provides a basis for the assertion that the agencies should have considered ammonia and carbon dioxide emissions. (See Defs' Mem. & Opp'n at 15). Additionally, defendants assert that neither ammonia nor carbon dioxide is a hazardous or toxic pollutant under federal or California law. (Id.). Accordingly, defendants argue that they were not arbitrary and capricious in not analyzing these effects. (Id.).

Although the federal defendants cite authority for the proposition that they need not evaluate "questionable effects" or "imaginary horribles," these cases are inapposite to the question posed by the emissions described here. (Id.). Defendants do not dispute that the TDM and EBC turbines will emit ammonia and carbon dioxide; these effects are neither questionable nor imaginary. Additionally, the record reflects that ammonia may cause acute and chronic health impacts. See DOE-23 at 200819. Although the agencies state that plaintiff has provided no authority for the proposition that it must consider the impacts of carbon dioxide and ammonia, neither do the agencies provide reasoning or legal authority for their proposition that they need not disclose and analyze these emissions merely because the EPA has not designated them as "criteria pollutants." (See Defs' Mem. & Opp'n at 14-15). In fact, one of defendants' consultants advised the agencies that "all criteria and non-criterion air pollutants relevant to the proposed action should

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[26]For example, to conduct any legitimate analysis of the environmental impact of the additional generation of power to be carried by the T-US line, the agencies would have to be able to reasonably foresee the location of the additional power plants and their method of generation. The record does not suggest any of this information, nor does plaintiff in its brief.

be assessed." DOE-55 at 202850.

The record shows that carbon dioxide is one of the pollutants emitted by a natural gas turbine and that it is a greenhouse gas.[27] See DOE-17 at 200640; DOE-15 at 200386. Additionally, plaintiff argues that carbon dioxide emissions are the greatest by weight of all pollutants emitted by natural gas turbines, and charts from the record appear to support that argument. See DOE-17 at 200646-47. Similarly, the record discloses that ammonia is a by-product of the control technology used in the EBC and TDM turbines and that it causes acute and chronic health effects. See DOE-23 at 200818-19. Because these emissions have potential environmental impacts and were indicated by the record, the Court finds that the EA's failure to disclose and analyze their significance is counter to NEPA.

Finally, plaintiff argues that the EA is inadequate because it fails to evaluate health impacts related to the CO, NOx, and PM-10 emissions of the plants. The Court finds that the agencies' evaluation of health impacts was adequate based on the discussion in Section V.B.1, above.

B. Alternatives

Plaintiff argues next that the EA was inadequate because it failed to present reasonble and feasible alternatives. NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). Agencies must consider alternatives in an EA. See Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988); 40 C.F.R. § 1508.9(b). The alternatives analysis is central to an environmental analysis. 40 C.F.R. § 1502.14. It should "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." Id. "The rule of reason guides both the choice of alternatives as well as the extent to which the [NEPA analysis] must discuss

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[27] A "greenhouse" gas is one that is "of, relating to, contributing to, or caused by the greenhouse effect." See Merriam-Webster Dictionary, on-line edition (available at www.m-w.com) (last visited April 24, 2003). A "greenhouse effect" is the "warming of the surface and lower atmosphere of a planet . . . that is caused by conversion of solar radiation into heat in a process involving selective transmission of short wave solar radiation by the atmosphere, its absorption by the planet's surface, and reradiation as infrared which is absorbed and partly reradiated back to the surface by atmospheric gases." Id.

each alternative. Public Citizen, 316 F.3d at 1028 (internal citations and quotations omitted).

In the present case, plaintiff argues that the agencies were required under NEPA to do more than consider only a "no action" alternative and two alternative locations for the transmission lines. See DOE-101 at 204328, 204352-204354.[28] In particular, plaintiff argues that the agencies should have considered the proposal put forward by plaintiff in its comments; namely, that the granting of the rights-of-way and the Presidential Permits be conditioned on the commitment of the project proponents to implementation of state-of-the-art emissions control systems, mitigation through offsets in existing sources, and the use of dry cooling or parallel dry-wet cooling. DOE-82 at 203725-203727. Two other commentators suggested conditioning the issuance of the permits on certain controls for air and water emissions. See DOE-79 at 203714-203715 (comments of the American Lung Association) and DOE-80 at 203718-203719 (comments of Congressman Filner requesting a delay until mitigation measures could be adopted). Plaintiff argues that conditioning the permits in such a way was both within DOE's authority and feasible. (Pla's Mem. at 20-21). In sum, plaintiff argues that the agencies did not find that the alternatives proposed were unreasonable, but rather that the agencies simply never evaluated them. (Id. at 22).

In response, defendants argue that conditioning the Presidential Permits at issue would have been beyond the scope of the "purpose and need" of the proposed actions, since those actions dealt only with the construction and operation of the transmission lines and not with the operation of the power plants. (See Defs' Mem. & Opp'n at 18). In particular, defendants explained at argument their view that the alternatives analysis is co-extensive with the scope of the proposed action, and that it does not extend to the full scope of the review required under NEPA. Thus, defendants apparently contend that they only need consider alternatives to the direct effects of the construction of the power lines (e.g., the localized effects from construction of the towers).

The agencies need only consider alternatives that are feasible, and the analysis "cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may

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[28]In fact, defendants also considered the alternative of granting only one permit and not the other. See DOE-101 at 204328-30.

have been at the time the project was approved," Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978). Yet, plaintiff and others put forward the alternative of conditioning the permits in their comments responding to the draft EA. Plaintiff also argues that conditioning the permit was feasible since other conditions were placed on the permits. (See Pla's Mem. at 20). Additionally, plaintiff cites an Executive Order that grants DOE the authority to place conditions on Presidential Permits 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). Defendants argue that the "purpose and need" of the federal actions at issue did not include the generation of power at the Mexican plants. However, to the extent that this is simply a restatement of the threshold argument discussed above, the Court has already resolved that question by finding that the TDM facility and the EBC turbine are effects of the action. Said in another way, the purpose and need of the transmission lines is to deliver power from the TDM and EBC turbines.

Additionally, to the extent defendants argue that they need only consider alternatives narrowly related to the scope of the proposed action rather than considering indirect effects of the action, the Court holds otherwise. "[A]n agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action." Idaho Conservation League v. Mumma, 956 F.2d 1508, 1520 (9th Cir. 1992) (internal quotation omitted). Here, the scope of the action relates only to the transmission lines, but the nature of the action includes the full scope of the analysis, including the effects of the action. The nature of the action therefore includes the importation of power generated in Mexico. Indeed, to leave out the secondary impacts would be at odds with the purpose of the alternatives analysis, which is to provide a way for an agency to calculate and compare the various predicted effects of alternative courses of action. The analysis would be arbitrary in itself if it did not take into account all effects of a proposed action. Accordingly, defendants' argument that they need not consider alternatives related to the TDM and EBC facilities fails.

Given this nature, the agencies were obligated to set forth in the EA "the range of alternatives . . . sufficient to permit a reasoned choice." Methow Valley Citizens Council, 833

F.2d at 815. Although defendants argue that "international sensitivities" preclude conditioning the permits from being a reasonable and feasible alternative, such a discussion belongs in the EA's alternative analysis rather than a litigation brief. Furthermore, the Court is unconvinced that the federal government's conditioning of a permit to construct transmission lines within the government's jurisdiction to ameliorate negative environmental effects within the United States necessarily offends international principles of law.[29] The condition would not be a direct regulation of the Mexican power plants; those plants could still choose to sell their power to the Mexican market or transmit their power via an alternate route rather than meet the condition.

Plaintiff bears the burden of showing that the agency was alerted to the specific alternative at issue before it prepared the EA in question. See City of Angoon v. Hodel, 803 F.2d 1016, 1021-1022 (9th Cir. 1986). This requirement helps ensure that the alternative was not so remote and speculative as to have precluded the agencies from ascertaining the possibility. See Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1990). In the present case, commenters, including plaintiff, clearly proposed withholding the permits until the federal defendants could be certain that the power generation met certain environmental standards. DOE-82 at 203725-203727; DOE-79 at 203714-203715; DOE-80 at 203718-203719. Accordingly, the Court is hard-pressed to find that the proposed alternative could not be reasonably ascertained by the agencies during their deliberations. Because the Court finds that the conditioning of the permits is a reasonable and feasible alternative within the nature of the proposed actions, the Court finds that the analysis of alternatives in the EA was inadequate in this regard.

C. Cumulative Impact Analysis

Finally, plaintiff argues that the EA is inadequate because it fails to adequately assess the

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[29]Defendants argue in the same breath that conditions are not necessary on the permits because of the voluntary measures undertaken by the power plants. Defendants seem to argue that if these voluntary measures were dropped in the future, defendants could then conduct a supplementary environmental analysis that would presumptively lead to a condition on the permit. (See Defs' Mem. & Opp'n at 22-23, n.14). The Court is at a loss to understand why such conditions might not raise international sensitivities in the future after voluntary agreements failed, when the same conditions are not even feasible enough to be considered in an EA today. In the same vein, the Court fails to see how denying one or both of the permits because of U.S. environmental impacts - alternatives considered by the EA (See Defs' Mem. & Opp'n at 24) - would have any less of an effect on international sensitivities than the conditioning of the permits.

cumulative impacts of the proposed actions. (See Pla's Mem. at 24-25). NEPA regulations explain that the cumulative impact of a project consists of the "incremental impact of the action when added to other past, present, and reasonably foreseeable future action regardless of what agency (Federal or non-Federal) or person undertakes such other actions." See Sylvester, 884 F.2d at 400 (citing 40 C.F.R. § 1508.7).

Although NEPA does not require the government to do the impractical, Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754, 764 (9th Cir. 1996), the Ninth Circuit has held that "reasonably foreseeable" actions with potentially cumulative impacts must be analyzed under NEPA. Blue Mountains, 161 F.3d at 1215. Native Ecosystems Council v. Dombeck made clear the importance of the cumulative impact analysis:

> The importance of ensuring that EAs consider the additive effect of many incremental environmental encroachments is clear. "[I]n a typical year, 45,000 EAs are prepared compared to 450 EISs.... Given that so many more EAs are prepared than EISs, *adequate consideration of cumulative effects requires that EAs address them fully.*" *Kern [v. U.S. Bureau of Land Management]*, 284 F.3d [1062] at 1076 [9th Cir. 2002] (emphasis in original) (quoting Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* at 4, January 1997). As we have previously emphasized when considering the sufficiency of a timber sale EA, without a consideration of individually minor but cumulatively significant effects "it would be easy to underestimate the cumulative impacts of the timber sales ..., and of other reasonably foreseeable future actions, on the [environment]." *Id.* at 1078.

304 F.3d 886, 896 (9th Cir. 2002) (bracketed citation information added).

Plaintiff argues that the EA contains no cumulative impact analysis for effects on health, water quality or quantity, the Salton Sea, or ozone. (Pla's Mem. at 16). Additionally, plaintiff argues that the cumulative air impact analysis in the EA is inadequate to support the conclusion that the impact is insignificant. (Id.). In particular, plaintiff points to statements by DOE's consultant advising DOE that the air impacts of the power plants when considered in conjunction with the current non-attainment status of Imperial County's airshed might be cumulatively significant. See DOE-55 at 202850-202851. Additionally, plaintiff points to agency comments that the cumulative impacts section of the EA lacked discussion of potentially significant impacts. See P-52 at 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.").

The cumulative impacts section of the EA analyzed the NOx, CO, and PM-10 impacts not only from the TDM and EBC turbines that are effects of the action, but also the remaining LRPC turbines. (See Def's Mem. & Opp'n at 34 (citing DOE-101 at 204438)). That analysis determined that the projected increases in ambient concentrations of those pollutants will be below the significance levels established by the EPA. (Id.). However, the cumulative impacts section of the EA fails to expressly disclose the past or present levels of air emissions in the Salton Sea Air Basin, nor does it consider the combined effects of the present actions when added to any unrelated, reasonably foreseeable future electricity generation projects in the air basin. See DOE-101 at 204436-40 (lacking discussion of these cumulative impacts). Although the federal defendants argue that no other emissions are foreseeable, plaintiffs point to information in the record suggesting plans for the construction of three additional power plants in the region. (See Pla's Reply & Opp'n at 18 (citing DOE-71 at 203687, DOE-79 at 203714)). Additionally, plaintiff argues that at least the potential expansion of the TDM plant to a maximum capacity of 1400 MW should have been considered. (Id.).

Defendants argue that additional power plant projects in the project area are "rumors" that the agencies do not consider to be concrete enough to be reasonably foreseeable. DOE-101 at 204438. Without more, the Court is unable to uphold its responsibility of determining whether the agencies took a hard look at potential cumulative impacts arising from other power plants in the area. The EA fails to list the plants expressly noted by the Imperial County Air Pollution Control District and the American Lung Association in their comment letters, and furthermore fails to support in any way the conclusion that the emissions from these plants are not reasonably foreseeable. See DOE-71 at 203687; DOE-79 at 203714. In contrast, and as discussed more in section VI(A) above, the agencies considered and provided support to reject the assertion that the future expansion of the TDM to produce a maximum 1400 MW was reasonably foreseeable.

Furthermore, defendants argue that since all impacts of the LRPC and the TDM plant were measured together and found not to rise above the SLs at the U.S. border, the combined impact of

these turbines will not significantly impact the present background levels of the measured pollutants in Imperial County. Id. The Court agrees with the federal defendants that the cumulative impact analysis necessarily considers the impact of the cumulative LRPC and TDM emissions when combined with the current air quality of the Salton Sea Air Basin. Indeed, the agencies' finding that the emissions would not exceed the SLs means that the concentration of these air pollutants in Imperial County would not be significantly impacted by the operation of the plants. Accordingly, the Court finds that the EA adequately considered the cumulative impact of the TDM and LRPC emissions against the background of Imperial County's present air quality.

Finally, a review of the cumulative impact section of the EA and the entire FONSI fails to disclose any discussion of the actions' cumulative impact on water quality and quantity in the New River or the Salton Sea. The complete lack of an analysis of cumulative water impacts is inherently inadequate. In sum, the Court finds that the cumulative impact analysis in the EA is inadequate because the analysis fails to consider the combined impacts of future, specific power plants in the region and the cumulative impact on water resources.

VII. CONCLUSION

Based on the discussion above, the Court **GRANTS IN PART** plaintiff's motion for summary judgment to the extent it asserts violations of NEPA and the APA arising from the EA and FONSI's inadequate analysis of the following issues: **(1) the potential for controversy; (2) water impacts; (3) impacts from ammonia and carbon dioxide; (4) alternatives; and (5) cumulative impacts**. The Court **DENIES IN PART** defendants' motion for summary judgment as to the same issues. However, the Court **GRANTS IN PART** defendants' motion for summary judgment as to the remaining issues raised by plaintiffs, and **DENIES IN PART** plaintiff's motion as to those issues.

Additionally, the Court **DENIES** defendants' motion to strike plaintiff's extra-record declarations, **DENIES** defendants' motion to supplement the record, and **GRANTS** plaintiff's motion to strike T-US's supplemental declaration and request for judicial notice. Accordingly, the Court **STRIKES** T-US's supplemental declaration and request for judicial notice from the record.

Finally, the Court **INVITES** the parties, including defendant-intervenors T-US and BCP, to provide briefing on the question of an appropriate remedy or remedies for the violations found above. The parties shall provide briefing, if any, according to the following schedule and limitations:

BRIEF	**TO BE FILED AND SERVED ON OTHER PARTIES ON OR BEFORE:**	**PAGE LIMITATION**
Plaintiff's Memorandum on Remedies	May 19, 2003	10
Federal Defendants' Opposition	June 2, 2003	10
Defendant-Intervenor T-US's Opposition	June 2, 2003	10
Defendant-Intervenor BCP's Opposition	June 2, 2003	10
Plaintiff's Reply	June 9, 2003	10

The Court will hear argument concerning the appropriate remedy on June 16, 2003, at 10:30 a.m. in Courtroom 13, unless the Court notifies the parties otherwise.

IT IS SO ORDERED.

Dated: May 2, 2003

Irma E. Gonzalez

IRMA E. GONZALEZ
United States District Judge

cc: The Honorable Magistrate Judge Louisa S. Porter
all parties

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FILED

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BORDER POWER PLANT WORKING GROUP,

Plaintiff,

vs.

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)

ORDER (1) DENYING PLAINTIFF'S SPECIFIC REQUESTS FOR RELIEF; (2) GRANTING RELIEF IN MODIFIED FORM; (3) DEFERRING THE SETTING ASIDE OF THE PERMITS AND FONSI UNTIL JULY 1, 2004; (4) REMANDING THE MATTER TO THE FEDERAL DEFENDANTS FOR ADDITIONAL NEPA REVIEW AND A NEW DETERMINATION; (5) DENYING PLAINTIFF'S REQUEST FOR AN INJUNCTION PROHIBITING OPERATION OF THE TRANSMISSION LINES IN THE INTERIM; (6) DENYING WITHOUT PREJUDICE PLAINTIFF'S REQUEST FOR AN INJUNCTION TO REMOVE THE TRANSMISSION LINES AFTER 18 MONTHS; (7) RETAINING JURISDICTION PENDING NEPA COMPLIANCE; and (8) PROVIDING OTHER DIRECTION AND RELIEF AS STATED IN THE ORDER'S CONCLUSION

[Doc. Nos. 91, 93, 146]

- 1 -

02cv513

Presently before the Court are plaintiff Border Power Plant Working Group's request for relief and motion for reconsideration of this Court's denial of plaintiff's oral motion to file supplemental declarations. Having heard argument on the request and having considered the parties' legal briefs and scientific declarations, the Court denies plaintiff's specific request for relief but grants relief in a modified form, as more fully described below. Additionally, the Court grants plaintiff's motion for reconsideration and, upon reconsideration, grants plaintiff's motion to file supplemental declarations.

I. Background

The Court refers the parties to the factual background provided in the Court's May 2, 2003 Order on the merits of this case. In sum, this case involves two applications for Presidential Permits and federal rights-of-way to build electricity transmission lines within the United States and across the United States-Mexico border to connect new power plants in Mexico with the power grid in Southern California. The U.S. Department of Energy (DOE) issued on Presidential Permit and the U.S. Bureau of Land Management (BLM) issued on right-of-way to defendant-intervenor Baja California Power (BCP). Those agencies issued another Presidential Permit and another right-of-way to defendant-intervenor Termoelectrica-U.S. (T-US). For ease of use, the Court will refer below to the Presidential Permits and the rights-of-way collectively as the "permits." The agencies collaborated to produce an environmental assessment (EA) pursuant to the National Environmental Policy Act (NEPA), upon which they subsequently relied to make a finding of no significant environmental impact (FONSI) from the issuance of the permits. Under NEPA's implementing regulations, this FONSI relieved them of the duty of undertaking a more comprehensive environmental impact statement (EIS).

Plaintiff filed a motion for summary judgement, alleging various violations of NEPA and the Administrative Procedure Act ("APA") on January 31, 2003. The federal defendants filed a cross-motion for summary judgment and an opposition to plaintiff's motion on March 13, 2003. Amicus curiae briefs were filed by BCP, T-US, and Imperial County and City of El Centro. Plaintiff responded to the BCP and T-US briefs on April 4, 2003, and both plaintiff and the federal defendants replied to the other's opposition brief.

On May 2, the Court granted in part plaintiff's motion for summary judgement, holding that the federal defendants had violated NEPA and the APA by finding arbitrarily and capriciously that their actions would not lead to any significant environmental impacts. In particular, the Court held that the EA did not adequately address the water impacts on the Salton Sea, the potential for public controversy over the actions, the cumulative impacts of the actions, the impacts of carbon dioxide and ammonia emissions from the plants, and the alternative of conditioning the permits on certain emissions standards. Based on these deficiencies, the Court held that the FONSI was inadequately supported and therefore arbitrary. The Court set a remedy-phase hearing in the case for June 16, 2003.

Following the issuance of the Court's order on the merits, plaintiff moved for a temporary restraining order and a preliminary injunction pending the final decision on relief. The Court issued an order setting a hearing on June 3, 2003 to resolve the motion for a TRO. Following that hearing, the Court denied both the TRO and the PI motions, finding that plaintiff had failed to making a showing of irreparable injury in the interim and that the equities were against the issuance of temporary injunctive relief. The Court noted that its adjudication of the temporary relief motions was separate from its consideration of plaintiff's present request for permanent injunctive relief.

Plaintiff's motion for permanent relief in the case includes four requests: (1) that the Court set aside the permits and the FONSI; (2) that the Court order the DOE and the BLM to conduct an environmental impact statement (EIS) before issuing a new decision on whether to re-issue the permits; (3) that the Court enjoin operation of the transmission lines until the DOE and BLM issue permits pursuant to a legally adequate EIS and Record of Decision (ROD); and (4) that the Court enjoin the intervenors and DOE to remove the constructed transmission lines if DOE does not issue permits pursuant to a legally adequate NEPA review within 18 months of the Court's present Order. The Order will discuss each of these requests in turn.

III. DISCUSSION

A. WHETHER THE PERMITS AND THE FONSI SHOULD OR MUST BE SET ASIDE

1. Legal Standard

The Court has already determined in its Order of May 2, 2003 that the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq., establishes the standard of review for challenges to agency actions under NEPA. The APA also provides a specific remedy when a court, as here, has found agency action to be arbitrary and capricious: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

2. Discussion

Plaintiff argues that the "shall" in the APA language cited above means that the Court must set aside the permits issued pursuant to an arbitrary and capricious FONSI. At least one district court in the Ninth Circuit has agreed with this analysis. See National Wildlife Federation v. Babbitt, 2001 WL 128425, *1 (E.D. Cal., Jan. 26, 2001) (holding that the court "must 'hold unlawful and set aside'" the agency's decision once it determined that the permit was issued in violation of the APA's standards). But see Westlands Water Dist. v. U.S. Dept. of Interior, 2002 WL 32101999, *56 (E.D. Cal., 2002) ("Despite the mandatory language, 'shall,' courts retain equitable discretion to fashion appropriate remedies when there has been a violation of NEPA.")). In interpreting the language of APA's § 706 to a violation of the Endangered Species Act, the Tenth Circuit held that the "shall" in § 706 restricts the courts' equitable discretion as to the remedy and mandates that the court issue the relief specified. See Forest Guardians v. Babbitt, 174 F.3d 1178, 1187-1189 (10th Cir. 1999) (citing Environmental Defense Ctr. v. Babbitt, 73 F.3d 867 (9th Cir.1995) for the proposition that the Ninth Circuit has implicitly recognized that "shall" in the APA § 706 means "shall").

The federal defendants argue, however, that the Court may exercise its traditional equitable discretion in deciding not to issue an injunction setting aside the permits in this case. Both sides agree that such equitable discretion "is displaced only by a 'clear and valid legislative command.'" United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 496 (2001) (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)). The federal defendants argue essentially that the "shall" in § 706 of the APA is qualified by § 702, which provides that "[n]othing herein . . . affects . . . the power or duty of the court to dismiss any action or deny relief on any other

appropriate legal or equitable ground." 5 U.S.C. § 702.[1] The federal defendants argue that the legislative history of the 1976 amendment of the APA that resulted in this provision makes clear that the grounds for denying relief pursuant to § 702 include hardship to the defendant or to the public following a balancing of the equities. (See Fed. Defs' Opp'n at 2). Additionally, the federal defendants argue that § 706 itself qualifies its seemingly mandatory order for relief by adding the caveat that the court, in making determinations under § 706, must take "due account . . . of the rule of prejudicial error." 5 U.S.C. § 706. This provision, according to the federal defendants, means that the "shall" does not mean "shall" in cases where no prejudice has been shown. (See Fed. Defs' Opp'n at 3).

Plaintiff argues in reply that the term "shall" is unambiguous, and that the court must give meaning to the clearly expressed intent of Congress. (See Pla's Reply at 3). Indeed, the Supreme Court has stated that Congress could not choose a stronger word to express its intent than the use of the word "shall" as a legislative command to the courts. See U.S. v. Monsanto, 491 U.S. 600, 607 (1989). More recently, the Supreme Court warned that "[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute." Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 497 (U.S. 2001).

Plaintiff replies to the federal defendants' argument that § 702 qualifies the "shall" in § 706 by arguing that the purpose of the 1976 amendment to the APA was only to remove the defense of

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[1] 5 U.S.C. § 702 provides, in its entirety:

> Right of review. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702.

sovereign immunity as a bar to judicial review of federal administrative action. (See Pla's Reply at 5). Plaintiff argues that the provision merely serves to make clear that extraordinary injunctive relief could still be denied on other appropriate equitable grounds. (Id.). In plaintiff's view, this general provision does nothing to affect the specific and mandatory remedy set forth in § 706, but rather that it applies to other types of injunctive relief that a party may seek beside the statutorily-prescribed remedy of setting aside the action. In support of its argument, plaintiff points persuasively to a report of the House of Representatives on the § 702 amendment, which concludes that the changes made by the amendment would not upset "congressional judgments that a particular remedy in a given situation should be the exclusive remedy." H.R. Rep. 94-1656, 1976 U.S.C.C.A.N. 6121, 6140.

Plaintiff's argument, however, appears to directly contradict the holding of the Ninth Circuit in National Wildlife Federation v. Espy, in which the court held:

> Although the district court has power to do so, it is not required to set aside every unlawful agency action. The court's decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity. *Westlands Water Dist. v. Firebaugh Canal,* 10 F.3d 667, 673 (9th Cir.1993); *Sierra Pacific Industries v. Lyng,* 866 F.2d 1099, 1111 (9th Cir.1989). The district court must weigh "the competing claims of injury ... and the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co. v. Village of Gambell,* 480 U.S. 531, 542, 107 S.Ct. 1396, 1402, 94 L.Ed.2d 542 (1987).

45 F.3d 1337, 1343 (9th Cir. 1995) (emphasis added). See also Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998) ("A court may set aside an agency action if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'") (emphasis added) (citing 5 U.S.C. § 706(2)(A)); id. at 1129 (While the APA § 706 states that the agency shall set aside illegal agency action, the district court had the discretion to preserve contracts issued in violation of the APA) (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982)). Unfortunately, the court in National Wildlife Federation did not provide an in-depth explanation for its conclusions regarding the statutory construction of the APA. It is clear, however, that the Ninth Circuit in that case specifically addressed the "shall" provisions of § 706 when it held that the courts retain equitable discretion not to set aside illegal agency action. 45 F.3d at 1340 (explaining that plaintiffs brought their claims under APA §§ 701-706); id. at 1342 ("Plaintiffs seek declaratory and injunctive relief under a federal statute which empowers a federal court to

'compel agency action unlawfully withheld,' and to 'hold unlawful and set aside agency action ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right....' 5 U.S.C. § 706(1), (2)(C)."). Accordingly, this Court is bound by the Ninth Circuit's interpretation of § 706 and accordingly must exercise its equitable discretion in deciding whether to set aside the permits at issue. Id. at 1343.[2]

In light of the Court's conclusion below to deny the request for an injunction against operation of the transmission lines pending further NEPA review, reached after a searching inquiry into the balance of harms to the parties and the public, the Court exercises its equitable discretion to defer the invalidation of the permits. See Sierra Club v. Penfold, 857 F.2d 1307, 1311 (9th Cir. 1988) (upholding district court's holding that BLM action was invalid for failure to include a sufficient EA but that injunction setting aside the action should be equitably deferred); id. at 1317 ("The district court molded its decree to meet the exigencies of the situation before it. The deferral of invalidity . . . was the best course available to remedy the interests and injuries involved."). Such a resolution avoids an outcome in which the Court has allowed the interim operation of the power lines, but those lines are without the proper legal permits. Accordingly, the Court defers the setting aside of the permits until July 1, 2004. The federal defendants may seek leave of the Court to continue that date, if necessary, as provided in the conclusion to this Order.

B. WHETHER THE COURT SHOULD ORDER THE PREPARATION OF AN EIS

1. Legal Standard

An agency is required to prepare an EIS if the EA establishes that the agency's action may have significant environmental impacts. National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001) (internal quotations omitted). An agency errs in failing to prepare an EIS if the agency's action is environmentally "significant" according to any of the criteria provided

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[2]The Court notes, however, that the cases cited by the Ninth Circuit in National Wildlife Federation do not appear to provide direct support for its conclusion. The citation to Westlands Water District appears inapposite, since the latter court merely held that "[t]he APA authorizes a court to either compel or set aside agency action (i.e. to award equitable relief) but does not authorize money damages." 10 F.3d at 673. Similarly, Sierra Pacific Industries does not appear to provide direct support for the proposition that the mandatory language of § 706 is subject to general principles of equity. In fact, that case does not discuss the APA, but rather describes the court's authority to issue an injunction under a different statute. See generally 866 F.2d 1099, 1111-1112.

by the Council on Environmental Quality for assessing the significance of environmental impacts. Public Citizen v. Department of Transp., 316 F.3d 1002, 1023 (9th Cir. 2003); 40 C.F.R. § 1508.27. "[T]o prevail on the claim that the federal agencies were required to prepare an EIS, the plaintiffs need not demonstrate that significant effects *will* occur. A showing that there are *substantial questions* whether a project may have a significant effect on the environment is sufficient." Anderson v. Evans, 314 F.3d 1006, 1017 (9th Cir. 2002) (internal quotations omitted). Thus, the Ninth Circuit has required preparation of an EIS where a "substantial controversy," one of the significance factors, existed regarding the effect of the action on the environment. National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001) ("[W]e conclude that the Parks Service clearly erred and that the high degree of uncertainty and the substantial controversy regarding the effects on the quality of the environment each necessitates preparation of an EIS." (emphasis added)).

On the other hand, the Ninth Circuit has also remanded a case in which it found a violation of NEPA to the federal agency without ordering an EIS. See Smith v. U.S. Forest Service, 33 F.3d 1072, 1079 (9th Cir. 1994). In Smith the Ninth Circuit concluded, unlike this Court in the present case, that the agency's decision was "environmentally significant." Id. Nonetheless, the Smith court found it more appropriate under the circumstances to "leave to the agency the decision of how best to comply with NEPA and its implementing regulations, and hold only that the NEPA documents before us are insufficient." Id.

Plaintiff suggests in a letter-brief submitted to the Court after oral argument that Smith can be distinguished because, in that case, the FONSI issued pursuant to the invalid EA had not itself been challenged. (Id. at 1078 ("the Forest Supervisor's finding [of] . . . no significant impact . . . has not, itself, been challenged by Smith")). However, the Court declines to adopt plaintiff's interpretation of Smith for three reasons. First, reading the passage cited by plaintiff in context, it appears that the court may have simply been characterizing the argument made by the defendant agency, rather than making its own finding of fact. Second, in the very next paragraph, the court states that "[n]evertheless, we must conclude that the agency's NEPA documents are inadequate." Id. The use of the plural "documents" suggests that the court found both the EA and the FONSI

inadequate, whether or not it accepted the defendant agency's assertion that plaintiff had not challenged the FONSI itself. Finally, the Court finds it difficult to imagine how an inadequate EA could support a legally-adequate FONSI. It would be a strange outcome indeed for the Smith court to have decided that the EA illegally failed to consider related and cumulative impacts of the agency decision, but to have nonetheless found that the agency's finding of no impact was reasonably supported by the same document. Based on these considerations, the Court agrees with the federal defendants that Smith offers support for the proposition that a court need not require an EIS on remand, even where a Court has found the action to be environmentally significant.

2. Discussion

The federal defendants argue, correctly, that the Court did not find in its Order on the merits of this case that there would, in fact, be significant impacts to the environment. Instead, the Court found simply that the record did not adequately support a finding of no significant impact. In particular, the Court found that the agencies' analysis of impacts to the Salton Sea were not well-reasoned or convincing, that public comments had raised a substantial dispute as to the effects of the permits and as to the significance of those effects, that the NEPA analysis failed to assess the impacts of ammonia and carbon dioxide emissions, that the analysis failed to consider a reasonable and feasible alternative, and that the EA failed to adequately consider cumulative impacts. In fact, after an extensive review of scientific testimony, described more fully below, the Court concludes that it is unable to make a positive finding that the operation of the transmission lines will likely cause irreparable and substantial harm to the environment.

The federal defendants argue that the proper remedy for the Court's findings is to remand the matter to the agency for further explanation of its decision. (See Fed. Defs' Opp'n at 5 (citing Florida Power & Light Co. V. Lorion, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"). It does not appear, however, that any party disagrees that the matter must be remanded to the agency for additional explanation. Instead, the question presently before

the Court is whether the agency should be ordered to conduct an EIS upon remand.

Plaintiff argues in response that while it is appropriate for the agency to have a first opportunity to explain why an EIS should not be prepared, when the agency fails to issue a legally-sufficient FONSI, the Court must remand for an EIS. The Anderson and National Parks & Conservation Association cases discussed above support this position by seemingly requiring an EIS if the Court finds that "substantial" questions or controversy surround the action. Plaintiff argues, convincingly, that if the federal defendant's interpretation of the Public Citizen court's two-step process for determining the existence of substantial controversy is taken to its extreme, the Court could never order an EIS to be prepared after having found that "substantial controversy" exists, since the agency would always have to be given a second (or third, etc.) chance to provide a convincing explanation for why the controversy does not, in fact, exist. See Public Citizen v. Department of Transp., 316 F.3d 1002, 1027 (9th Cir. 2003) (If a plaintiff shows substantial dispute about an agency action that raises substantial questions, then the burden shifts to the agency to provide a convincing explanation why no controversy exists).

The Court concluded in its May 2, 2003 Order on the merits of this case that "plaintiff has demonstrated the existence of a substantial dispute as to the effects and significance of those effects prior to the preparation of the FONSI." (Order at 29). The Court based its conclusion on the twelve timely comment letters received by the agencies and the additional 400 e-mail comment letters received by the agency after the closing of the comment period. In general, those letters, to the extent that they looked into the substance of the environmental impacts, provided little more than conclusions as to the significance of those impacts.

The record now before the Court includes a large number of scientific declarations, submitted by experts on both sides of the dispute, as to the significance of the impacts that the Court previously found inadequately assessed. These declarations provide a much broader and deeper scientific foundation upon which to judge the substance of plaintiff's allegations, especially when compared with the inadequate or nonexistent analysis in the EA and the public comment letters. The Court is even more convinced at this stage of the proceeding that a dispute exists concerning the significance of the impacts. However, the Court finds it appropriate to revisit the

question of whether this dispute is "substantial," based on the record now before it. That inquiry, made in the following subsection below, leads the Court to the conclusion that plaintiff's allegations of environmental harm are, to a considerable degree, without substance. Because the Court finds that plaintiff has failed to make a likely showing of irreparable and substantial environmental harm, the Court also finds that it would be inconsistent to rely on its earlier finding of "substantial" dispute in ordering an EIS to be prepared. Rather, the Court finds for purposes of this remedial phase that plaintiff has failed to make a showing of substantial dispute or to raise substantial questions that would require such a remedial order.[3] Accordingly, the Court finds that this case can be distinguished from the Anderson and National Parks & Conservation Association cases, and that the Court is not bound by that precedent to require an EIS on remand.

Because plaintiff has not positively demonstrated to the Court the likelihood of a significant environmental impact from the proposed actions, the Court finds that it is not appropriate to constrain the agencies' decision-making by ordering an EIS on remand. The agencies are better suited to make that determination, after the completion of a fully adequate EA that rectifies and considers the deficiencies noted in the Court's May 2, 2003 Order on the merits. Accordingly, the Court remands the matter to the agencies to complete an environmental analysis of the proposed actions that complies with this Court's Order. In complying with this remand, the agencies may, according to their discretion, undertake either a supplemental EA, followed by an EIS if significant impacts are indicated, or an EIS in the first instance.[4]

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[3]In so holding, the Court does not mean to reconsider its holding on the merits that the agency failed to provide a convincing explanation for why the action had not raised a substantial dispute. The Court based its decision on the merits on the record, rather than on the extra-record materials presently before the Court. This was appropriate because the Court reviewed the reasonableness of the agency's decision based solely on that record.

The Court orders, below, that the agency may not rely on the Court's equitable analysis of environmental impacts on remand, given that the agency, and not the Court, has the superior expertise in these matters. Because the administrative record, absent the extra-record declarations prepared and submitted in this judicial proceeding and absent the Court's own analysis, fails to explain the absence of a substantial dispute, it is not inconsistent that the agency must still assess on remand whether a public controversy necessitates the creation of an EIS in this matter.

[4]Instructive in this regard is the Anderson court's analysis of the functional difference between an EIS and an EA:

[A]n EIS serves different purposes from an EA. An EA simply assesses whether there will be

C. WHETHER TO ENJOIN OPERATION OF THE TRANSMISSION LINES PENDING FURTHER ENVIRONMENTAL REVIEW AND DECISION-MAKING BY THE AGENCIES

1. Legal Standard

"The requirements for the issuance of a permanent injunction are 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.'" American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045, 1066 -1067 (9th Cir. 1995) (quoting LaDuke v. Nelson, 762 F.2d 1318, 1330 (9th Cir. 1985)).[5] "In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 542 (1987). Additionally, "the public interest is a factor which courts must consider in any injunctive action in which the public interest is affected." American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 967 (9th Cir. 1983) (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)). NEPA does not require the automatic issuance of injunctive relief upon establishing a violation, but instead the Court is obligated to conduct the traditional balancing of the equities when evaluating such a request. See Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157-1158 (9th Cir. 1988).

2. Discussion

A. Irreparable Harm

The Court has already considered once, in conjunction with plaintiff's recent motions for a temporary restraining order and a preliminary injunction, whether plaintiff had met its burden of

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> a significant impact on the environment. An EIS weighs any significant negative impacts of the proposed action against the positive objectives of the project. Preparation of an EIS thus ensures that decision-makers know that there *is* a risk of significant environmental impact and take that impact into consideration. As such, an EIS is more likely to attract the time and attention of both policymakers and the public. In addition, there is generally a longer time period for the public to comment on an EIS as opposed to an EA, and public hearings are often held.

314 F.3d at 1023.

[5]No party suggests that plaintiff has an adequate legal remedy for any environmental harm it demonstrates. Accordingly, the analysis will focus on the whether plaintiff has succeeded in demonstrating a likelihood of substantial and immediate irreparable harm.

demonstrating irreparable harm. However, the Court made clear in its order denying plaintiff's motions that it was adjudicating the issue only based on the interim period of a few weeks and that such adjudication would not limit the Court in assessing the plaintiff's motion for a final remedy. The Court now has before it a much larger evidentiary record, based on the multiple declarations submitted by plaintiff and both intervenors.[6] The Court's first inquiry will be whether plaintiff has now met its burden of showing a likelihood of substantial and irreparable harm in the absence of the requested injunction. Plaintiff argues three distinct sources of such harm: (1) to the Salton Sea and the New River; (2) to the public from cumulative particulate emissions resulting from ammonia; and (3) from the lack of full public disclosure and the benefit of an informed agency decision prior to a change in the status quo.

1. The Salton Sea and the New River

Plaintiff submitted several declarations in support of its claim that irreparable injury will occur to the Salton Sea and the New River in the absence of an injunction. First, Jose Angel, a

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[6]Plaintiff filed a memorandum of points and authorities in support of its request for relief on May 19, 2003. That memorandum contained no supporting declarations. Plaintiff then filed a motion for a preliminary injunction and a temporary restraining order on June 2, 2003, *nunc pro tunc* May 28, 2003. Accompanying the TRO/PI motion was a declaration of William Powers assessing the impacts of the plants' operation on the environment. On June 2, 2003, in response to the Court's scheduling orders, the federal defendants and intervenors filed oppositions to both the plaintiff's May 19, 2003 request and May 28, 2003 motion for a TRO/PI. Defendant-intervenor TDM filed five declarations concerning the scientific impact of the plants' operation on the environment and human health. Defendant-intervenor BCP filed six declarations on the same subject. The Court denied plaintiff's motion for a TRO/PI on June 4, 2003.

Plaintiff then filed a reply to defendants' opposition to the request for relief on June 9, 2003. Attached to plaintiff's reply were five new scientific declarations and a second scientific declaration submitted by William Powers. At a telephonic status hearing on June 10, 2003, the Court granted defendant-intervenors' oral motion to file declarations in response to plaintiff's most recent declarations. On June 13, 2003, defendant-intervenors each submitted two additional rebuttal declarations. At oral argument on the request for relief, plaintiff appeared with five new rebuttal declarations that had not previously been served on defendants. Plaintiff made an oral motion to file the new declarations, which were made by the same declarants who had previously submitted declarations on behalf of plaintiff. After providing defendants with an opportunity to respond to the motion, the Court denied the motion. Plaintiff then filed on June 20, 2003 a motion for reconsideration of the Court's denial of the oral motion. Defendant-intervenors filed oppositions to the motion for reconsideration on June 25, 2003. Having considered the parties' arguments, and good cause appearing, the Court grants the motion for reconsideration and grants plaintiff's motion to file the additional declarations. To the extent that defendant-intervenors moved in their oppositions to file responses to the additional declarations, the Court denies those motions.

Division Chief with the California Regional Water Quality Control Board,[7] declares that the operation of the power plants and the affiliated sewage treatment plants will not decrease the total amount of total dissolved solids (TDS)[8] in the New River, as the intervenors claim, but rather will increase the salinity of the New River, decrease the flow, and leave unchanged the total amount of the TDS of the water flowing to the Salton Sea. (See Declaration of Jose Angel in support of Plaintiff's Request for Relief, at ¶ 18). Angel goes on to declare that because the "overwhelming body of evidence suggest [sic] that the current level [of salinity] is more than what is healthy for the Sea . . . any further salt degradation of the Salton Sea must be considered a significant impact." (Id. At ¶ 24). Angel explains in a supplemental declaration that he has referred to water quality standards established by the Regional Water Quality Control Board, and approved by the United States E.P.A., in evaluating the significance of the rise in salinity. (See Supp. Decl. of Jose Angel at ¶ 15). According to Angel, the current salinity of the Salton Sea fails to meet these standards, and therefore any further degradation must be significant. (Id.).

In another declaration, Thomas Kirk, the Executive Director of the Salton Sea Authority, states that "[*a*]*ny reduction* of inflow would cause the Sea to shrink and the salts in the Sea to become more concentrated." (Declaration of Thomas J. Kirk III in support of Plaintiff's Request for Relief, at ¶ 6). Kirk goes on to explain that the operation of the plants in Mexico "would result in reductions of inflow to the Sea that would exacerbate the rising salinity problem and further threaten the Salton Sea ecosystem." (Id.). Such rising salinity, according to Kirk, is already threatening the Salton Sea's fishery, which sustains "millions of birds that pass through the region annually as they migrate between the Pacific Ocean and the Gulf of California." (Id.). Based on this assessment, Kirk concludes that operation of the plants would have the "strong potential to cause irreparable harm to the Salton Sea." (Id.).

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[7]Counsel for plaintiff represented at oral argument that Angel had submitted his declaration with the full authority of, and on behalf of, the California Regional Water Quality Control Board. Angel states in his Supplemental Declaration at ¶ 25 that the Executive Director of the Board gave him the assignment to prepare the declaration.

[8]The scientific declarations submitted by the parties seem to use TDS and concentration of salts interchangeably. The Court will accordingly assume that they are at least close approximations of each other.

Finally, Marie Barrett, the Outreach Coordinator for the New River Wetlands Project, declares in support of plaintiff's motion that a 6 percent reduction in flow and a 6 percent increase in salinity of the New River could result in harm to the wetlands created by her organization along the New River. (Declaration of Marie Barrett in support of Plaintiff's Request for Relief, at ¶¶ 4,5). Barrett explains that these wetlands have been created as pilot projects to remove pollutants in the New River while providing increased habitat for birds in the area. (Id. at ¶ 3[a]). A three-year monitoring program is currently underway at the wetlands. (Id. at ¶ 3[b]).

Defendant-Intervenors submitted several declarations, however, that contest whether irreparable harm to the New River or to the Salton Sea is likely during the period in which the agencies are undertaking supplemental NEPA review.[9] T-US' expert, Dr. Theodore Hromadka, explains that the EA failed to take into account the effect of groundwater seepage on the flow of the New River, and that the analysis thus overstated the decrease in flow that might be expected. (See Declaration of Theodore Hromadka in support of T-US' Opp'n at ¶ 34). In essence, Dr. Hromadka explains that any decrease in the flow of the New River caused by operation of the plants will decrease the pressure on the banks of the river and allow a greater quantity of groundwater to seep into the river. (See id. at ¶¶ 18-20). Thus, Dr. Hromadka concludes that "all or almost all of the quantity of flow that is evaporated would be returned in quantity to the New River as a result of increased groundwater seepage." (Id. at ¶ 34). This equivalent or near equivalent flow would have less of a concentration of salts and TDS because the sewage treatment facilities connected to the plants would permanently remove much of the TDS.[10] (Id.). As a result of these processes, it is Dr. Hromadka's opinion that the operation of the plants and their treatment facilities "actually slows the degradation of the Salton Sea and would be a net benefit." (Id.). Plaintiff's expert, Angel, addresses this contention in his supplemental declaration. (See Supplemental Angel Decl. at ¶ 19). First, Angel states that groundwater seepage into the river is less than 13%. (Id.). The Court finds that this evidence fails to refute Dr. Hromdka's opinion

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[9]Intervenors argue, and plaintiff does not contradict, that such review would take no longer than 2 years, and would most likely take between 6 and 18 months. (See, e.g., T-US' Opp'n at 5, n.7).

[10]The Court notes that this assertion is directly disputed by plaintiff's expert, Jose Angel, as discussed above.

since it addresses current, not hypothetical seepage if flows from Mexico are decreased. Second, Angel argues that Dr. Hromdka has failed to point to any site-specific studies supporting his opinion and that the studies that Angel has conducted or directly supervised "fail to support the notion that groundwater is a significant source of inflow into the New River." (Id.). Finally, Angel notes that water accounting models used by the Salton Sea Authority and the U.S. Bureau of Reclamation are programmed to account for changes in groundwater flow, and that these models show a change in the elevation of the Salton Sea as a result of the power plants' operation. (See id. (citing id. at ¶ 11, but apparently meaning to cite to id. at ¶ 17)).

Finally, Dr. Hromadka also argues that even in the absence of increased groundwater seepage, the reduction in flow and corresponding increases in salinity would be well within the historic range of variability for the New River and the Salton Sea. (Id. at 35). However, the Court rejected this logic once already when it was put forth by the federal defendants in the EA, since it seems to ignore that an exogenous reduction in flow would merely move the historic range of variability to a lower flow range. Thus, historically low flow levels would apparently be even lower if the power plants remove water from the system.

T-US also submitted a supplemental declaration to respond to Jose Angel's first declaration. Among other factual challenges, Octávio Simoes refutes Angel's declaration that salts and TDS removed from sewage in the treatment process will simply be discharged again into the New River. (See Second Declaration of Octávio Simoes in Support of T-US' Opp'n at ¶ 3). Simoes explains that these wastes are processed at the plant into a solid waste that is then disposed of in a landfill. (Id. at ¶ 2). A supplemental declaration by BCP's expert Joel Kasper also declares that TDS removed during the treatment process at LRPC are not returned to the New River. (Second Declaration of Joel Kasper in support of BCP's Opp'n at ¶ 5). Angel responds to these contentions in his own supplemental declaration by suggesting that the water treatment process does not remove inorganic dissolved salts (e.g., sulfates) and that the intervenors' declarations have focused inappropriately on the removal of dissolved organics (e.g., organic phosphorous). (See Supp. Angel Decl. at ¶ 7). Additionally, Angel disputes Simoes' assertion that information regarding the removal of salts during the waste water treatment process can be found in the

Mexican environment impact evaluation. (Id. at ¶¶ 10-11).

BCP also offers Dr. Jean Nichols, an oceanographer and environmental consultant, who declares that even assuming that the operation of the plants increases salinity of the Salton Sea by as much as 0.14 percent after a year's time[11], such a change "would have no adverse effect on aquatic organisms in the Salton Sea." (Declaration of Jean A. Nichols in support of BCP's Opp'n at ¶ 4). Additionally, Joel Kasper, another of BCP's experts, explains that under a worst-case, continuous operation scenario, the salinity of the Salton Sea would rise about 63 mg/l, from about 44,000 mg/l to 44,063 mg/l, as a result of the operation of all the generation units in question for a year. (See First Declaration of Joel Kasper in support of BCP's Opp'n to Pla's Request for Relief at ¶ 12).[12] Kasper argues that the Bureau of Reclamation, in a report on the status of the Salton

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[11]This is a percentage increase in salinity that corresponds to BCP expert Kasper's estimate of the worse-case, continuous operation increase in salinity in the Salton Sea of 63 mg/l. (Nichols Decl. at ¶ 3).

[12]Plaintiff's expert Kirk directly disputes this calculation in his supplemental declaration. In that declaration, Kirk presents "simple mass balance calculations" to show that a flow reduction caused by the plants of 3,000 af/yr to 16,000 af/yr would lead to an increase in salinity in the Salton Sea of 408 mg/l to 1,963 mg/l. (See Supplemental Kirk Decl. at ¶ 3). Kirk goes on to argue that "[a] rapid increase of almost 2,000 mg/l could have a very serious effect on the fish with an increase in fish mortality or destroy the fishery completely." (Id. at ¶ 4 (emphasis added)). The 2,000 mg/l assumption translates into a percentage increase in salinity of about 4.5. Kasper, BCP's expert, calculates the maximum, worst-case reduction in flow to the Salton Sea resulting from the operation of the plants at 10,504 af/yr, closer to the higher range of Kirk's assumptions, but then concludes that such a reduction would only lead to a 63 mg/l increase in salinity after one year, assuming a new equilibrium is reached in one year. (See First Kasper Decl. at ¶ 12). Kasper's estimate is the basis for Nichols' assumption that the percentage increase in the salinity of the Sea will be about 0.14. While it is clear to the Court that either Kirk's or Kasper's calculation must be incorrect or that one of the two must have employed a faulty equation, the Court is ill-equipped to resolve such a dispute. However, the Court does note that Kirk's calculation appears to show, for example, that a 16,000 af/yr decrease in flow attributable to the plants leads to a total new equilibrium capacity in the Salton Sea of 7,299,184 af. (See Supp. Kirk Decl. at ¶ 3). This represents a total reduction of 325,659 af. (See id.) Perhaps this equilibrium would be reached over many, many years, but the Court is hard-pressed to understand how an inflow reduction of 38,000 af over a maximum two-year period, holding all other inflows constant, could result in such a large total reduction in the size of the Sea. This is especially true when viewed in light of Kasper's reasonable assertion that as the elevation of the Sea drops, evaporation will decrease, thereby mitigating at least some of the decrease in inflow. In any case, the Court assumes for purposes of this request for relief that Kirk's figures describe an equilibrium that would be reached far beyond the undisputed maximum two-year time-frame on remand contemplated by defendants. Finally, to the extent that Kirk's and Kasper's declarations are irreconcilable, the Court notes that Kirk's background and education are in the area of planning and public policy, while Kasper is an engineer with extensive experience working specifically in the area of water treatment for power plants. (Compare Supp. Kirk Decl. at ¶¶ 1-2 with Kasper Decl. in support of Opp'n to Request for Relief at ¶ 1-3). The Court finds that Kasper's relative professional expertise weighs in favor of giving greater credibility to his declaration. Similarly, the Court notes the potentially contradictory statements

Sea, has stated that 60,000 mg/l is the "critical salinity level for ecological reasons." (Id.). He submits that the worst-case potential increase in the salinity of the Sea is only 0.39 percent of the difference between the current and ecologically-critical levels. (Id.). Additionally, Kasper declares that any change in the salinity of the Salton Sea attributable to the operation of the plants would be entirely reversed if the flows into the New River are restored to their present levels. (Id. at ¶ 13).[13]

Finally, in a supplemental declaration, Kasper rebuts Barrett's assertions concerning the wetlands her organization has developed along the banks of the New River. First, he counters that the maximum possible reduction of flow at the wetlands would be no more than 2.5 percent, rather than the 6 percent alleged by Barrett. (Second Kasper Decl. at ¶ 15). Second, Kasper provides evidence that the wetlands are fed by pump, and not by gravity flow, so that the inflow to the wetlands could not be affected by a small reduction in the river's flow. (Id. at ¶ 16). Finally, Kasper states, based on evidence, that the dominant plant species in the wetlands would still be within its ideal salinity range even assuming Barrett's assertion that the salinity will increase by 6

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of Kirk, who declares that a 4.5 percent increase in salinity "could" have a very serious impact on the Sea's fishery, and Nichols, who declares that a 0.14 percent increase in salinity "would" have no adverse effect on aquatic organisms in the Sea. (Compare Supp. Kirk Decl. at ¶ 4 with Nichols Decl. at ¶ 4). The Court finds, based on the discussion above, that Nichols' estimate of the change in salinity is more credible. Additionally, the Court notes that Nichols is an oceanographer and environmental consultant who focused in her graduate work on bottom living organisms in regions of environmental stress. (Nichols Decl. at ¶ 1). The Court finds that her qualifications lend her conclusions relatively greater credibility when compared to the admittedly uncertain impacts asserted by Kirk.

[13]With regard to this argument, Angel responds in a supplemental declaration that he "cannot follow Mr. Kasper's line of reasoning because he does not explain how the lagoons are going to go back to their previous levels (presumably the levels before power plant operations) and how that reverses the projected environmental impacts – not just elevation." (Supp. Angel Decl. at ¶ 19). The Court does not find it so difficult to follow Kasper's line of reasoning. Presumably, if the power plants stopped operating, they would also stop diverting and using water from the New River system. Thus, holding all else constant, the quantity flowing into the lagoons and the sewage treatment plants, and therefore out of the lagoons and treatment plants, would be the same as before the plants had begun operation. Kasper argues that reinstating the previous levels of flow would enable the Salton Sea to reach a new equilibrium, one which would be the same as before operation of the plants if all else is held constant. Presumably, the total salinity in the Salton Sea at the new equilibrium would be about the same as before the operation of the plants, or possibly lower if the sewage treatment plants continued to operate after the power plants ceased operation and if the sewage treatment process does indeed remove salts as intervenors contend it would.

percent. (Id. at ¶ 17).[14]

Having considered the various scientific declarations submitted by the parties, the Court concludes that plaintiff has failed to show that substantial and irreparable harm to the Salton Sea would more likely than not result from a failure to issue the injunction. In particular, the Court is persuaded by intervenors' largely undisputed testimony that, even assuming a reduction in flow, the impacts from increased salinity resulting could be substantially reversed. The question of whether the fishery or other wildlife of the Salton Sea would be affected in the meantime, assuming an increase in salinity, is disputed among the experts. The Court does not find that plaintiff has prevailed in showing that such impacts would be likely or substantial. Finally, plaintiff's disputed claim that a wetlands creation program would be affected does not suggest that any effect on the wetlands would be irreparable, or that the loss of the wetlands would have other irreparable effects.

2. Ammonia Emissions

Next, plaintiff argues that it will suffer irreparable injury from the emission of ammonia that will create additional particulate pollution (PM_{10}). First, Dr. Paul English declares that "[b]ecause the EA did not disclose levels of ammonia emissions from the plants and thus, the corresponding increases of PM_{10}, which result as a byproduct from ammonia emissions, the EA's projected 24-hour average of 3 $\mu g/m^3$ underestimates the true cumulative impacts from this pollutant." (Declaration of Paul Brian English in support of Plaintiff's Motion on Remedies at ¶ 3). Another of plaintiff's experts, Dr. William Stockwell, concurs in this opinion, and declares that the worst-case, continuous operation ammonia emissions of 1,016 tons per year from the combined plants "poses a serious cumulative threat of irreparable environmental harm." (Declaration of William R. Stockwell in support of Plantiff's Motion on Remedies at ¶ 6). Dr. Stockwell also

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[14]Barrett acknowledges in a supplemental declaration that the USDA Plant Guide states that the ideal salinity range for the bulrush is 0 to 6,000 mg/l. (Supplemental Barrett Decl. at ¶ 3). However, she reasserts her argument that plants continuously exposed to the higher end of this range would face some degree of stress. (Id.). Additionally, Barrett argues that this marginal stress could be magnified by stresses from other sources, including other pollutants in the New River. (Id. at ¶ 5). The Court notes that Barrett does not address the undisputed fact that the sewage treatment plants would reduce other sources of pollution, which would presumably decrease the biological stress on the wetlands.

explains how ammonia emissions can form PM_{10} through a chemical reaction with nitric acid in the atmosphere. (Id. at 9). He goes on to argue that "[a]ny increases in ambient ammonia concentrations will increase the concentrations of secondary PM_{10}." (Id. at ¶ 11). In fact, Dr. Stockwell declares that due to the relative presence of NOx and ammonia in the atmosphere in the vicinity of the plants, a "substantial fraction" of the ammonia emitted could form PM_{10}. (Id. at 14). According to Dr. Stockwell, this additional PM_{10} was not discussed in the EA and has the potential to cause immediate and irreparable harm. (Id.).

T-US expert Dr. Steven Heisler explains that although ammonia is not regulated as a criteria pollutant or as a toxic air contaminant, exposure may have acute or chronic health effects. (First Declaration of Steven Heisler in support of T-US' Opp'n at ¶ 7). For that reason, the California Office of Environmental Health Hazard Assessment (OEHHA) has established acute and chronic reference exposure levels (RELs) for ammonia. (Id.). These RELs are commonly used significance levels for toxic air pollutants. (Id.). Dr. Heisler explains that RELs are established with margins of safety to ensure that no adverse health effects would be anticipated at levels below the respective REL. (Id.). The OEHHA RELs for ammonia are 3,200 $\mu g/m^3$ for the 1-hour (acute) period and 200 $\mu g/m^3$ for the annual (chronic period). (Id.). Dr. Heisler then calculated the anticipated ammonia slip emissions from all generation units at the LRPC and TDM facilities and, using a dispersion model, the resulting concentrations of ammonia at the border from these facilities. (Id. at ¶ 10). According to his calculations, the maximum 1-hour concentration would be 13.4 $\mu g/m^3$, and the annual average concentration would be 0.63 $\mu g/m^3$. Additionally, Dr. Heisler declares that since ammonia emissions from circulating water used in the facilities' cooling towers would be "much lower" than the ammonia slip emissions, no health impacts will result from the cumulative ammonia emissions of all the generating units. (Id. at 10, 12).

Dr. Heisler also opines on the ability of the ammonia emissions to cause particulate pollution. In his opinion, because Imperial County is relatively ammonia-rich, additional ammonia emissions from the plants would not lead to significant formation of particulate ammonium nitrate. (Id. at 13-16). He ultimately concludes based on this analysis that secondary particulate formed by ammonia emissions from the facilities would not be significant, or cause significant effects, over

the next two years. (Id. at 16). In a supplemental declaration, Dr. Heisler responds to plaintiff's experts by calculating the estimated additional PM_{10} that will result from the facilities' ammonia emissions and finding that all PM_{10} emissions, both direct and secondary, attributable to the TDM and LRPC plants will not cause PM_{10} levels to exceed the EPA's significance levels at the border. (Second Declaration of Steven Heisler in support of T-US' Opp'n at ¶ 7, 15-17). Additionally, Dr. Heisler takes note of the diminishing performance of SCR technology over its lifetime, the fact that two of the LRPC plants will not immediately have SCR equipment (and will therefore have no ammonia slip emissions), and the actual ammonia content of the water to be used by the facilities. (Id. at ¶¶ 10-12). Based on these corrections and the expected actual operation of plants only 75 percent of the time, Dr. Heisler concludes that actual ammonia emissions from the facilities will be only nine percent of Dr. Stockwell's estimate over the next two years. (Id. at 13).

BCP's expert Perry Fontana, also conducted an analysis of the potential for impacts from the power plants' ammonia emissions. Fontana calculated a worst-case emission rate of ammonia and used a dispersion model to determine the maximum concentration increase of ammonia at receptors in Mexico, along the border, and into the United States. (Declaration of Perry Fontana in support of BCP's Opp'n at 3-5). Fontana compared the predicted concentrations with reference exposure levels (RELs) – based on the most sensitive effect reported in the medical literature – adopted by the California Air Pollution Control Officers Association (CAPCOA). (Id. at 6-7). The CAPCOA RELs are the same as the OEHHA RELs employed by Dr. Heisler. According to Fontana's analysis, the highest concentration of ammonia at any of the ground-level receptors is predicted to be less than 2 percent of the acute REL and even less of the chronic REL. (See id. at ¶ 7). While Fontana's calculations of emissions are somewhat higher than those of Dr. Heisler, they are still far below the RELs. Fontana also opines that the existing levels of background ammonia in the Salton Sea Air Basin are far below the RELs, and that therefore the small addition of ammonia from the plants would not cause significant adverse health impacts. (Id. at ¶ 9). Finally, Fontana, using a calculation provided by BCP's expert Joel Kasper, agrees with Dr. Heisler that ammonia emissions from the cooling towers would only be a fraction of the ammonia slip emissions, and that the additional cooling tower emissions would not change his opinion of no

significant adverse health impacts. (Id. at ¶ 10; Kasper Decl. at ¶ 19).

In a supplemental declaration, plaintiff's expert Dr. English seeks to rebut the declarations of Heisler and Fontana by asserting again that it is "commonly accepted that there is a causal linear nonthreshold relationship between particulate matter with health outcomes such as hospital admissions, all-cause death, and death due to cardiorespiratory causes." (Supp. English Decl. at ¶ 3). Dr. English argues that looking just at the short-term increase in particulate matter at the border of 3 $\mu g/m^3$, which was the estimate presented in the EA and does not include any particulate that may be formed by ammonia emissions, the scientific literature suggests that the Court can assume there will be at least a 1% increase in deaths due to respiratory causes, a 0.8% increase in hospitalizations in COPD, and approximately 1% increase in upper respiratory symptoms and asthma. (Id. at ¶ 4).[15] It is beyond dispute that such impacts would be irreparable to those who suffered them. However, the Court must still determine whether such irreparable harm would be likely and substantial. Dr. English has not rebutted the EA's conclusion, as supplemented by intervenors' expert analysis to account for ammonia conversion, that such a increase in particulate is below the significance level set by the EPA for particulate emissions. While weighing the significance of health impacts is by no means a scientific or simple business, the Court finds it appropriate to defer to the expert agency's opinion on what increases in particulate are significant for purposes of protecting human health, and which are insignificant. Where the agency has determined that a particular increase is insignificant, the Court declines to find that the same increase is substantial for purposes of issuing injunctive relief.

Dr. English also argues in his supplemental declaration that the increases calculated by intevenors' experts would not, in fact, be below the EPA significance levels. (See id. at ¶ 5). While Dr. English apparently concedes that the 3 $\mu g/m^3$ estimated in the EA is below the 5 $\mu g/m^3$

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[15]In his first declaration, Dr. English cites to a 2002 study by Pope et al. and a 1999 paper by Pope and Dockery to support the assertion that a 10 $\mu g/m^3$ increase in chronic exposure to particulate is associated with specific health effects. (First English Decl. at ¶ 4). Fontana points out in a supplemental declaration that the 3 $\mu g/m^3$ increase reported in the EA is for short-term particulate increases, while the long-term average increase is only 0.2 $\mu g/m^3$. (Supp. Fontana Decl. at ¶ 6). In a rebuttal declaration, Dr. English again points to the 1999 Pope and Dockery article as support for his conclusion regarding acute health impacts of a 3 $\mu g/m^3$ increase, but he does not address the discrepancy pointed out by Fontana. (See Supp. English Decl. at ¶ 4).

significance level set by the E.P.A., he argues that such a conclusion is illogical in light of Fontana's own interpretation of the policy behind a significance level. (Id.). In particular, Dr. English quotes Fontana's statement that "significance levels represent the incremental increases in ambient concentrations attributable to an emissions source below which the source would not be considered to cause or contribute to a violation of the applicable National Ambient Air Quality Standards ("NAAQS") in areas where those standards already are not being met." (Supp. Fontana Decl. at ¶ 11) (citing 40 C.F.R. § 51.165(b)(2)). Dr. English argues that under this rationale, even a 3 $\mu g/m^3$ increase would be significant because it would have caused two particulate monitoring stations in Calexico to exceed the 150 $\mu g/m^3$ NAAQS eight times between 1994 and 2002. (See Supp. English Decl. at ¶ 5). While the Court notes the logic in Dr. English's argument, it does not agree with his conclusion. The significance levels regulations already assume that they are to be used in a "locality that does not or would not meet the applicable national standard." 40 C.F.R. § 51.165(b)(2). Thus, while it might be assumed that any incremental increase in the pollutant will contribute to or cause a violation of the NAAQS, the regulation creates a fiction in which incremental increases under certain thresholds will not be considered to have caused or contributed to the violation. Id. This does not amount to a purely mathematical conclusion, as Dr. English assumes, but rather to a conclusion based on policy and science that incremental increases below the significance levels will not unduly threaten human health and welfare, the basis for the NAAQS. See 40 C.F.R. § 50.2(b). As the Court stated above, where an expert agency has already determined that the emission of a certain level of a pollutant will not be significant, the Court will not lightly reject this conclusion. Rather, the Court finds that the agency's determination should weigh heavily in the Court's determination of whether the asserted particulate emissions would likely cause substantial irreparable harm for purposes of issuing injunctive relief.

Nonetheless, the Court finds persuasive Dr. English's assertion that even the particulate emissions disclosed in the EA - which likely understate the total particulate emissions because they fail to account for particulate caused by the ammonia emissions - would have caused the ambient concentration of particulate to exceed the NAAQS in Calexico multiple time during recent years. Notwithstanding the EPA's significance level fiction, these NAAQS were set at a level that

preserves human health and welfare with a margin of safety. As a matter of common sense, it is clear that discharges of pollutants that actually, if not legally, cause violations of the NAAQS, or make existing violations worse, have the potential for adversely affecting health. The argument carries additional force when the Court considers that the short-term PM_{10} emissions from ammonia conversion are estimated to be 1.8 $\mu g/m^3$. (See Supp. Heisler Decl. at ¶ 15).[16] Thus, the combined 3 $\mu g/m^3$ provided by modeling in the EA and the 1.8 $\mu g/m^3$ or more contributed by ammonia conversion means that the NAAQS for particulate in the Imperial Valley will be exceeded even more frequently, or that the violations will be larger, than even Dr. English suggests, and the minimum total of 4.8 $\mu g/m^3$, while still below the E.P.A. significance level, would verge on significance even under that regulation.

According to the data provided by Dr. English, a 4.8 $\mu g/m^3$ increase in ambient particulate concentrations would have caused readings to exceed the NAAQS at the Grant Street monitor in Calexico five times in the eight years between 1994 and 2002. (See Exh. 1 to Supp. English Decl.). Similarly, such an increase would have caused the reading at the Ethel Street monitor to exceed the NAAQS four times over the same period. (Id.). Assuming these exceedances are roughly distributed over time, then over the undisputed maximum two year period for remand in this case, it might be expected that the plants' emissions would cause a reading in excess of the NAAQS about once at each station. While the Court does not view even one such exceedance of the NAAQS lightly, it will not find that these circumstances demonstrate the substantial and irreparable harm necessary to justify injunctive relief. The Court finds this conclusion to be particularly appropriate considering that the NAAQS are designed to incorporate an "adequate margin of safety," 40 C.F.R. § 50.2, and English's data suggests that any reading in the next two years that exceeds the NAAQS would likely exceed the standard by only a small margin.

In sum, the Court finds that plaintiff has failed to demonstrate that a likelihood of substantial and irreparable harm will result from the plants' ammonia emissions in the absence of

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[16]Indeed, the contribution to particulate formation from ammonia may even be higher since it appears from Heisler's declaration that he has used estimates of actual ammonia emissions, rather than the more conservative "potential to emit" estimates normally required when reviewing new emissions sources. (See Supp. Stockwell Decl. at ¶ 3).

an injunction. The Court notes the dispute between the parties' experts concerning the formation of particulate, but declines to find that plaintiff's experts have shown that such particulate will be more likely than not to lead to substantial health effects. Additionally, the Court finds support for its conclusion from the declarations of two of intervenors' experts that ammonia emissions will not exceed the applicable reference exposure levels at the U.S. border.

3. Whether Irreparable Harm Results from the Lack of Full Disclosure and Informed Decision-Making Prior to a Change in the Status Quo

Plaintiff's third argument to show irreparable harm is that it will suffer a procedural injury from the lack of full disclosure and informed decision-making prior to the operation of the transmission lines. First, plaintiff argues that the agencies might be less likely to deny the permits after a new environmental review if the lines are allowed to operate in the interim. (Pla's Reply at 12). In support of this argument, plaintiff cites Metcalf v. Daley, 214 F.3d 1135, 1146 (9th Cir. 2000), in which the court suspended operation of an agreement between the federal government and the Makah Tribe pending the completion of a NEPA analysis. The Metcalf court was concerned that the government had already "committed in writing to support the Makah's whaling proposal," and that such a commitment might lead to a case of "first-the-verdict, then-the-trial." Id. This case is readily distinguishable, however, because plaintiff does not point to any similar written agreement, other than the clearly invalid permits, between the government and the intervenors. Furthermore, this Court can limit the influence of improper considerations by ordering the federal defendants not to consider the completion or interim operation of the transmission lines when making their NEPA determinations on remand.

A stronger argument is that NEPA provides a process through which major federal actions should be undertaken, that this process was inadequate in the instant case, and that it would be a subversion of the statute and the process to allow projects commenced under the authority of the invalid federal actions to proceed nonetheless. Support for this argument can be implied from the National Parks & Conservation Association court's holding that "[w]here an EIS is required, allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement." 241 F.3d at 737. However, it is important to note that the NPCA court had already found the project under consideration in that

case to be "potentially environmentally damaging." Id. In the present, unusual NEPA case, the Court has considered the record along with the declarations of the parties and has not found likely environmental harm.

In fact, a focus on the procedural protections of NEPA as the basis for injunctive relief would be counter to the Supreme Court's holding in Amoco Production Co. v. Village of Gambell. 480 U.S. 531. In that case, the Court held that the Ninth Circuit, in granting injunctive relief, "erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect--preservation of subsistence resources." Id. at 544. The Court went on to hold that while a sufficient likely showing of environmental harm is generally enough to warrant injunctive relief, where injury to the underlying substantive policy is not at all probable and significant considerations weigh against issuing the injunction, a court abuses its discretion in doing so. Id. at 545.

Plaintiff's argument that the Court can find irreparable harm solely in a violation of statutory procedure, rather than in the environment that the procedure was designed to protect, runs counter to the holding in Gambell. In fact, the procedural error will be remedied through a remand to the agency for a new environmental analysis and a new determination under NEPA. The Court is not persuaded that the agency will not have the same, full range of alternatives available to it following a new analysis that it did when it made the decision the first time. In the meantime, as discussed above, plaintiff has failed to convince the Court that likely substantial and irreparable environmental harm will occur.

Accordingly, the Court finds that plaintiff's request for an injunction against operation of the transmission lines fails because plaintiff has failed to make the threshold showing of substantial and immediate irreparable harm. However, assuming arguendo that plaintiff has met its burden and has shown such harm, the Court is still required to balance the equities in deciding whether to issue the injunction.

B. Balancing of the Equities

As in Gambell, the parties opposed to the injunction in the present case claim that they stand to suffer considerable economic injury if the injunction issues. T-US asserts, and plaintiff

does not dispute, that enjoining the use of the transmission lines for a period of two years would result in a direct financial impact to TDM, an affiliated company, of $121 million. (See T-US' Opp'n at 8; First Declaration of Octávio Simoes in support of T-US' Opp'n at ¶¶ 22-31). BCP argues, and plaintiff does not dispute, that enjoining the use of its transmission line would result in about $5.4 to $10.9 million in direct financial impacts to it and its affiliates in Mexico. (See Declaration of Vimal Chauhan in support of BCP's Opp'n at 4, 11, 12). Under the Gambell holding, the Court may consider these substantial economic harms in the absence of a sufficient showing of irreparable environmental harm. 480 U.S. at 545 (finding a loss of $70 million to weigh against enjoining the activity in the absence of demonstrated harm).

C. The Public Interest

The interests of the public must be taken into account when it is affected by the issuance or withholding of injunctive relief. Indeed, the failure to expressly consider the public interest on the record when the public interest is affected constitutes an abuse of discretion. Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1988). In the present case, both sides lay claim to the public's interest. Plaintiff, appropriately, claims that the asserted environmental harms discussed above, if demonstrated, would harm the public. Additionally, plaintiff argues that the public has the right to an informed decision by the respective federal agency and full disclosure of environmental impacts of the action. The Court has already discussed both of these concerns above and has found them to be inadequate to require the issuance of an injunction.

On the other side of the equation, the federal defendants and intervenors argue the following public interest factors militate against issuing the injunction: (1) alleged benefits to the environment that accrue through operation of the sewage treatment plants associated with the power plants; (2) alleged benefits to the environment that accrue through the displacement of allegedly older, dirtier, and more costly power generation by the TDM and LRPC power plants; (3) the foreign policy implications from indirect impacts on Mexican plants, Mexican jobs, and Mexican taxes; and (4) the alleged threat of inadequate energy resources in California without the operation of the transmission lines.

First, BCP and T-US argue that because both the TDM and LRPC facilities have

constructed sewage treatment plants to remove pollutants from partially treated or untreated sewage from Mexicali prior to use in the plants for cooling[17], the operation of the plants provides a significant benefit for the environment. T-US states that if the injunction issues, and the TDM plant is forced to cease operations, its associated sewage treatment plant will also stop operating. (First Simoes Decl. at ¶ 13). The sewage treatment plant at the LRPC would continue operating at least partially since the injunction of the BCP would only partially and temporarily cause that facility to cease operations. (See generally Chuahan Decl. (describing plans of the LRPC to continue operations through alternative means and through reconfiguration, if necessary)).

Intervenors argue, and plaintiff does not dispute, that operation of the sewage treatment plants removes pollutants from water that would ultimately otherwise be partially treated and discharged into the New River. Intervenors also argue, and plaintiff also does not dispute, that removal of these pollutants assists Mexico in meeting its obligations under the International Boundary and Water Commission Minute 264, a treaty between the U.S. and Mexico that governs the quality of water flowing into the U.S. through the New River. (See First Simoes Decl. at ¶ 11). Although Jose Angel argues on behalf of plaintiff that the discharges from the power plants will also violate the same treaty because they are "substances . . . in concentrations which are toxic or harmful to human, animal, or aquatic life, or which may significantly impair the beneficial uses of such waters," (Angel Decl. at ¶ 27), the Court found in its preceding analysis that plaintiff failed to demonstrate that the discharges would be significantly toxic or harmful.

Second, intervenors argue that if the Court enjoins operation of the transmission lines, older, more polluting, and costlier plants will have to make up the difference, all at a harm to the public. Intervenors first argue that the additional power to replace the power from these plants will have to come from other regional sources because of transmission considerations. (See, e.g. Declaration of Alberto Abreu in Support of T-US' Opp'n at ¶ 8). T-US' expert Alberto Abreu then systematically surveys the existing generation sources in each of the region's counties and Baja, Mexico to conclude that more NOx and carbon dioxide would be emitted if these other facilities

[17]The water that is treated, less that which is evaporated in the cooling process, is discharged back into the New River after processing.

had to make up the difference from a ceasing of operations at the TDM plant. (Id. at ¶¶ 12-26). However, plaintiff's expert William Powers disputes that replacing the TDM and LRPC plants with other power plant capacity in the region will lead to anything more than "relatively little change" in NOx emissions. (Declaration of William Powers in Support of Pla's Motion on Relief at ¶ 13).[18] Additionally, Powers points out, and intervenors do not dispute, that emissions are not entirely fungible since Imperial Valley is in "nonattainment"[19] status for federal PM_{10} and ozone[20], while San Diego County is not. Thus, additional emissions in Imperial County, even if those emissions replace relatively more emissions in San Diego County, may ultimately be more harmful to the public as a whole. While acknowledging the merit of this argument, the Court also notes that it has considerable evidence before it in the intervenors' declarations and the EA that the estimated emissions of both particulate and NOx from the plants are below the significance levels established by the EPA for areas of nonattainment. The Court also notes that plaintiff has not disputed intervenors' contention that any power generated by other regional plants to replace power from TDM and the LRPC plants would be costlier and involve larger emissions of carbon dioxide.

Third, intervenors argue that the Court should be wary of issuing an injunction that would

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[18]The supplemental declaration of Simoes challenges Powers' declaration, stating that Powers' own data shows that NOx emissions would be higher if regional plants replaced the power generated by the TDM and LRPC facilities. (See Second Simoes Decl. at ¶ 14). Simoes also challenges factual evidence presented by Powers concerning the retrofitting of regional power facilities with technology to reduce NOx emissions. (See id. at ¶¶ 16-17). Powers then submitted his own supplemental declaration to rebut these assertions. Powers argues that at least the Ventura County boilers, as a group, could provide power at a lower level of NOx emissions than the TDM and LRPC turbines as a group. (See Supp. Powers Decl. at ¶ 6). He also argues that Simoes' claim that power from Ventura County is unlikely to supply the San Diego service area because of distance and congestion is unsupported by facts. (Id.). Additionally, Powers provides with his supplemental declaration evidence tending to support his claim that the average NOx reduction achieved by retrofitting gas-fired utility boilers with SCR is approximately 90 percent. (Id. at ¶ 8, Exh. 1 to Supp. Powers Decl.). Nonetheless, implicit in Powers' rebuttal to the Simoes declaration is that only the Ventura County boilers have lower emissions than the TDM and LRPC plants, even if the 90 percent figure for reductions is accepted. (See id. at ¶ 6). Accordingly, unless all power to replace the power otherwise provided by the TDM and LRPC plants comes from Ventura County, it appears that total emissions would indeed be higher if the Court enjoined operation of the transmission lines.

[19]"Nonattainment" is a designation under the Federal Clean Air Act for airsheds that are significantly degraded by specific criteria air pollutants.

[20]NOx contributes to the formation of ozone.

have an effect on international relations between the United States and Mexico. In particular, Simoes, on behalf of T-US, estimates that an injunction that causes the TDM to cease operation in the interim would result in a loss of $9-13 million in wages in Mexico, a loss of $22 million in Mexican tax revenues, and the loss of 68-102 local jobs. (First Simoes Decl. at ¶¶ 32-25). Plaintiff, while not disputing these losses, argues instead that the case law relied upon by T-US does not support a finding that the losses of tax revenues and jobs are "foreign policy implications" of an action. (See Pla's Reply at 17). Assuming, arguendo, that nothing in the cases cited by intervenors restricts the Court from entering an appropriate injunction upon finding violations of NEPA in this case, nothing in plaintiff's argument suggests that the Court may not, in exercising its duty to weigh the public interest in issuing an injunction, consider impacts on foreign jurisdictions or foreign nationals, particularly when those impacts may affect foreign relations. Accordingly, the Court finds that these impacts are entitled to some weight in the determination of the public interest.

Finally, the intervenors argue that the public will be harmed by the unavailability of power from the TDM plant, and perhaps from the LRPC export turbines, that would result from an injunction against the operation of the power lines. In particular, intervenors warn of the possibility of power shortages should the TDM and LRPC not be able to contribute their generation to the electricity grid in Southern California. Plaintiff responds, through the declaration of William Powers, that the California Independent System Operator (CAISO) has issued a 2003 Summer Assessment in which it indicates that California will have over 3,000 MW of power reserves during the summer of 2003 even if the worst-case scenarios for demand are met. (See Powers Decl. at ¶ 3). Powers asserts that this assessment does not rely on the power from the TDM or LRPC plants. (Id.). More specifically, Powers argues that neither the San Diego service area nor the Imperial County service area are in danger of power shortages. (Id. at ¶¶ 5-6). In addition, Powers states that the power produced by the TDM and the LRPC would "not add significantly to the total power available to the state at times of peak demand due to existing transmission congestion issues." (Id. at ¶ 7).

T-US, through a supplemental declaration by Simoes, disputes Powers' contentions. First,

Simoes argues that the 2003 Summer Assessment includes generation from the TDM and LRPC plants. (Second Simoes Decl. at ¶ 21). In support of his contention, Simoes attaches a copy of the Summer Assessment, which states that in the San Diego Gas & Electric Area, "about a 1000 MW of the summer peak load can only be met from the additional 1070 MW of new generation coming into ISO's Imperial Valley substation from Mexico,[21] 590 MW of new generation coming into CFE's LA Rosita substation from Mexico and over 3000 MW of new generation coming in Arizona at Hassayampa." CAISO 2003 Summer Assessment, Ex. 4 to Second Simoes Decl. at 38. The Court finds, however, that this language is ambiguous, since the sources listed total well above the 1000 MW required. It seems as though the assessment might mean to indicate that the required 1000 MW could be found in any combination of the three sources, including sources other than the TDM and LRPC plants. Second, Simoes argues that transmission congestion will not limit CAISO's ability to import power from the TDM and LRPC plants. (Second Simoes Decl. at ¶ 23). In support of this, Simoes declares that the plants have successfully sent their full generating capacity to the U.S. market without problems over the testing period. (Id. at ¶ 24). Plaintiff's expert, Powers, points out that the CAISO Summer Assessment also notes that "[a] new nomogram will limit the combined generation from Imperial Valley and imports from CFE to 800 MW." (Supp. Powers Decl. at ¶ 10 (citing CAISO 2003 Summer Assessment, Ex. 4 to Second Simoes Decl. at 38)). The implication is that, at most, 800 MW of the 1070 MW generated by the TDM and LRPC export turbines would be used to avoid power shortages in the San Diego service area. As a result, the Court agrees with plaintiff that the need for replacement power generated by potentially costlier and more polluting plants would likely be less than that estimated by intervenors. Nonetheless, this conclusion does not change the negative impact on the public interest from the issuance of an injunction, but rather changes only the relative magnitude of that impact.

Finally, and in further support of the intervenors' argument, Vimal Chauhan declares that the operation of the BCP transmission line would help alleviate transmission deficiencies and would enhance the reliability of the system by ensuring that the LRPC export generation could get

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[21]Simoes declares that this is a reference to the TDM and LRPC export plants. (Id. at ¶ 21).

to the California market if transmission along the alternative importation path is interrupted. (Chauhan Decl. at ¶ 13).

Having considered the declarations and argument of the parties, the Court finds sufficient evidence to believe that while the power that would flow over the transmission lines under consideration may not be required to avoid power shortages in the region or state in the interim period, the availability of the transmission lines and power would provide the system with a needed margin of forecasting error and safety, enhancing the reliability of the grid. Furthermore, given the high costs to the public that result from power shortages, even a relatively small probability carries with it a large risk. In sum, the Court finds that while plaintiff has not demonstrated a likelihood of substantial and irreparable environmental harm, intervenors have made a showing that they will suffer considerable economic harm and that the net interest of the public weighs against the issuance of the injunction. Accordingly, the Court declines to exercise its equitable power to enjoin operation of the transmission lines pending new NEPA determinations by the agencies.

D. WHETHER TO ENJOIN THE FEDERAL DEFENDANTS AND DOE TO REMOVE THE TRANSMISSION LINES IF LEGALLY ADEQUATE PERMITS ARE NOT ISSUED WITHIN 18 MONTHS

Finally, plaintiff moves the Court to compel intervenors to remove their transmission lines if they have not received permits issued pursuant to a valid NEPA review after 18 months. Because the Court will retain jurisdiction over the matter during that time, the Court finds no ground upon which to issue such an injunction, even if it was otherwise appropriate, at this time. Plaintiff may move the Court again for such relief after such time has elapsed if this matter has not been resolved.

IV. CONCLUSION

Based on the foregoing analysis, the Court **DENIES** Plaintiff's specific requests for relief but **GRANTS** relief in modified form. Specifically, the Court: (1) **GRANTS IN PART** plaintiff's request to set aside the Presidential Permits, the rights-of-way, and the FONSI issued in this case; (2) **DEFERS** the setting aside of the permits and the FONSI until July 1, 2004, or until such time as superceding NEPA documents and permits have issued, whichever is earlier; (3) **ORDERS** the

federal defendants to seek a hearing date and file a brief showing cause on or before May 15, 2004, if necessary, why the Court should not set aside the permits and the FONSI on July 1, 2004; (4) **REMANDS** the matter to the respective agencies for the preparation of NEPA documents consistent with this Order and the May 2, 2003 Order on the merits; (5) **DENIES** plaintiff's request for an injunction against the operation of the transmission lines in the interim period; (6) **GRANTS** plaintiff's motion for reconsideration of the Court's order at argument denying plaintiff's motion to file supplemental declarations; and (7) **DENIES WITHOUT PREJUDICE** plaintiff's request for an injunction compelling the removal of the transmission lines after 18 months in the absence of legally adequate permits. Plaintiff may renew its motion for injunctive relief as to the removal of the transmission lines after 18 months from the date this Order is file-stamped if the matter has not been resolved by that time.

Additionally, the Court **RETAINS** jurisdiction over this matter pending full NEPA compliance. To aid in the exercise of this jurisdiction, the Court **ORDERS** the federal defendants to notify the Court when they have made new determinations concerning the proposed federal actions.

Finally, the Court **PROHIBITS** the federal defendants from considering the interim operation of the transmission lines, the completion of the construction, or this Court's equitable analysis of the environmental impacts of the proposed actions as part of the NEPA analysis and determination process on remand. Cf. Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1988).

IT IS SO ORDERED.

Dated: July 8, 2003

Irma E. Gonzalez

IRMA E. GONZALEZ
United States District Judge

cc: The Honorable Magistrate Judge Louisa S. Porter
all parties