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SOUTHERN DISTRICT OF CALIFORNIA

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

8 I. Background

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

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

1 On May 2, the Court granted in part plaintiff's motion for summary judgement, holding that
2 the federal defendants had violated NEPA and the APA by finding arbitrarily and capriciously that
3 their actions would not lead to any significant environmental impacts. In particular, the Court held
4 that the EA did not adequately address the water impacts on the Salton Sea, the potential for public
5 controversy over the actions, the cumulative impacts of the actions, the impacts of carbon dioxide
6 and ammonia emissions from the plants, and the alternative of conditioning the permits on certain
7 emissions standards. Based on these deficiencies, the Court held that the FONSI was inadequately
8 supported and therefore arbitrary. The Court set a remedy-phase hearing in the case for June 16,
9 2003.

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

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

26 III. DISCUSSION

27 A. WHETHER THE PERMITS AND THE FONSI SHOULD OR MUST BE SET 28 ASIDE

1. Legal Standard

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

7 2. Discussion

8 Plaintiff argues that the “shall” in the APA language cited above means that the Court must
9 set aside the permits issued pursuant to an arbitrary and capricious FONSI. At least one district
10 court in the Ninth Circuit has agreed with this analysis. See National Wildlife Federation v.
11 Babbitt, 2001 WL 128425, *1 (E.D. Cal., Jan. 26, 2001) (holding that the court “must ‘hold
12 unlawful and set aside’” the agency’s decision once it determined that the permit was issued in
13 violation of the APA’s standards). But see Westlands Water Dist. v. U.S. Dept. of Interior, 2002
14 WL 32101999, *56 (E.D. Cal., 2002) (“Despite the mandatory language, ‘shall,’ courts retain
15 equitable discretion to fashion appropriate remedies when there has been a violation of NEPA.”)).
16 In interpreting the language of APA’s § 706 to a violation of the Endangered Species Act, the
17 Tenth Circuit held that the “shall” in § 706 restricts the courts’ equitable discretion as to the
18 remedy and mandates that the court issue the relief specified. See Forest Guardians v. Babbitt, 174
19 F.3d 1178, 1187-1189 (10th Cir. 1999) (citing Environmental Defense Ctr. v. Babbitt, 73 F.3d 867
20 (9th Cir.1995) for the proposition that the Ninth Circuit has implicitly recognized that “shall” in
21 the APA § 706 means “shall”).

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

1 appropriate legal or equitable ground.” 5 U.S.C. § 702.¹ The federal defendants argue that the
2 legislative history of the 1976 amendment of the APA that resulted in this provision makes clear
3 that the grounds for denying relief pursuant to § 702 include hardship to the defendant or to the
4 public following a balancing of the equities. (See Fed. Defs’ Opp’n at 2). Additionally, the federal
5 defendants argue that § 706 itself qualifies its seemingly mandatory order for relief by adding the
6 caveat that the court, in making determinations under § 706, must take “due account . . . of the rule
7 of prejudicial error.” 5 U.S.C. § 706. This provision, according to the federal defendants, means
8 that the “shall” does not mean “shall” in cases where no prejudice has been shown. (See Fed.
9 Defs’ Opp’n at 3).

10 Plaintiff argues in reply that the term “shall” is unambiguous, and that the court must give
11 meaning to the clearly expressed intent of Congress. (See Pla’s Reply at 3). Indeed, the Supreme
12 Court has stated that Congress could not choose a stronger word to express its intent than the use
13 of the word “shall” as a legislative command to the courts. See U.S. v. Monsanto, 491 U.S. 600,
14 607 (1989). More recently, the Supreme Court warned that “[c]ourts of equity cannot, in their
15 discretion, reject the balance that Congress has struck in a statute.” Oakland Cannabis Buyers’ Co-
16 op., 532 U.S. 483, 497 (U.S. 2001).

17 Plaintiff replies to the federal defendants’ argument that § 702 qualifies the “shall” in § 706
18 by arguing that the purpose of the 1976 amendment to the APA was only to remove the defense of

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20 ¹ 5 U.S.C. § 702 provides, in its entirety:

21 Right of review. A person suffering legal wrong because of agency action, or adversely
22 affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to
23 judicial review thereof. An action in a court of the United States seeking relief other than
24 money damages and stating a claim that an agency or an officer or employee thereof acted or
25 failed to act in an official capacity or under color of legal authority shall not be dismissed nor
26 relief therein be denied on the ground that it is against the United States or that the United
27 States is an indispensable party. The United States may be named as a defendant in any such
28 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.

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

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

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

20 45 F.3d 1337, 1343 (9th Cir. 1995) (emphasis added). See also Natural Resources Defense Council
21 v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998) (“A court may set aside an agency action if it was
22 ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’”) (emphasis
23 added) (citing 5 U.S.C. § 706(2)(A)); *id.* at 1129 (While the APA § 706 states that the agency shall
24 set aside illegal agency action, the district court had the discretion to preserve contracts issued in
25 violation of the APA) (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982)).

26 Unfortunately, the court in National Wildlife Federation did not provide an in-depth explanation
27 for its conclusions regarding the statutory construction of the APA. It is clear, however, that the
28 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

1 'compel agency action unlawfully withheld,' and to 'hold unlawful and set aside agency action ...
2 in excess of statutory jurisdiction, authority, or limitations, or short of statutory right....' 5 U.S.C. §
3 706(1), (2)(C)."). Accordingly, this Court is bound by the Ninth Circuit's interpretation of § 706
4 and accordingly must exercise its equitable discretion in deciding whether to set aside the permits
5 at issue. Id. at 1343.²

6 In light of the Court's conclusion below to deny the request for an injunction against
7 operation of the transmission lines pending further NEPA review, reached after a searching inquiry
8 into the balance of harms to the parties and the public, the Court exercises its equitable discretion
9 to defer the invalidation of the permits. See Sierra Club v. Penfold, 857 F.2d 1307, 1311 (9th Cir.
10 1988) (upholding district court's holding that BLM action was invalid for failure to include a
11 sufficient EA but that injunction setting aside the action should be equitably deferred); id. at 1317
12 ("The district court molded its decree to meet the exigencies of the situation before it. The deferral
13 of invalidity . . . was the best course available to remedy the interests and injuries involved.").
14 Such a resolution avoids an outcome in which the Court has allowed the interim operation of the
15 power lines, but those lines are without the proper legal permits. Accordingly, the Court defers the
16 setting aside of the permits until July 1, 2004. The federal defendants may seek leave of the Court
17 to continue that date, if necessary, as provided in the conclusion to this Order.

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

19 **1. Legal Standard**

20 An agency is required to prepare an EIS if the EA establishes that the agency's action may
21 have significant environmental impacts. National Parks & Conservation Ass'n v. Babbitt, 241
22 F.3d 722, 730 (9th Cir. 2001) (internal quotations omitted). An agency errs in failing to prepare an
23 EIS if the agency's action is environmentally "significant" according to any of the criteria provided
24

25 ²The Court notes, however, that the cases cited by the Ninth Circuit in National Wildlife
26 Federation do not appear to provide direct support for its conclusion. The citation to Westlands Water
27 District appears inapposite, since the latter court merely held that "[t]he APA authorizes a court to
28 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.

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

13 On the other hand, the Ninth Circuit has also remanded a case in which it found a violation
14 of NEPA to the federal agency without ordering an EIS. See Smith v. U.S. Forest Service, 33 F.3d
15 1072, 1079 (9th Cir. 1994). In Smith the Ninth Circuit concluded, unlike this Court in the present
16 case, that the agency’s decision was “environmentally significant.” Id. Nonetheless, the Smith
17 court found it more appropriate under the circumstances to “leave to the agency the decision of
18 how best to comply with NEPA and its implementing regulations, and hold only that the NEPA
19 documents before us are insufficient.” Id.

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

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

9 2. Discussion

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

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

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

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

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

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

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

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

21 ³In so holding, the Court does not mean to reconsider its holding on the merits that the agency
22 failed to provide a convincing explanation for why the action had not raised a substantial dispute. The
23 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.

24 The Court orders, below, that the agency may not rely on the Court’s equitable analysis of
25 environmental impacts on remand, given that the agency, and not the Court, has the superior expertise
26 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.

27 ⁴Instructive in this regard is the Anderson court’s analysis of the functional difference between
28 an EIS and an EA:

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

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

4 **1. Legal Standard**

5 “The requirements for the issuance of a permanent injunction are ‘the likelihood of
6 substantial and immediate irreparable injury and the inadequacy of remedies at law.’” American-
7 Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045, 1066 -1067 (9th Cir. 1995) (quoting
8 LaDuke v. Nelson, 762 F.2d 1318, 1330 (9th Cir. 1985)).⁵ “In each case, a court must balance the
9 competing claims of injury and must consider the effect on each party of the granting or
10 withholding of the requested relief.” Amoco Production Co. v. Village of Gambell, 480 U.S. 531,
11 542 (1987). Additionally, “the public interest is a factor which courts must consider in any
12 injunctive action in which the public interest is affected.” American Motorcyclist Ass'n v. Watt,
13 714 F.2d 962, 967 (9th Cir. 1983) (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 312
14 (1982)). NEPA does not require the automatic issuance of injunctive relief upon establishing a
15 violation, but instead the Court is obligated to conduct the traditional balancing of the equities
16 when evaluating such a request. See Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157-
1158 (9th Cir. 1988).

17 **2. Discussion**

18 **A. Irreparable Harm**

19 The Court has already considered once, in conjunction with plaintiff’s recent motions for a
20 temporary restraining order and a preliminary injunction, whether plaintiff had met its burden of
21

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

314 F.3d at 1023.

⁵No 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.

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

11 1. The Salton Sea and the New River

12 Plaintiff submitted several declarations in support of its claim that irreparable injury will
13 occur to the Salton Sea and the New River in the absence of an injunction. First, Jose Angel, a
14
15

16
17 ⁶Plaintiff filed a memorandum of points and authorities in support of its request for relief on
18 May 19, 2003. That memorandum contained no supporting declarations. Plaintiff then filed a motion
19 for a preliminary injunction and a temporary restraining order on June 2, 2003, *nunc pro tunc* May 28,
20 2003. Accompanying the TRO/PI motion was a declaration of William Powers assessing the impacts
21 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.

22 Plaintiff then filed a reply to defendants' opposition to the request for relief on June 9, 2003.
23 Attached to plaintiff's reply were five new scientific declarations and a second scientific declaration
24 submitted by William Powers. At a telephonic status hearing on June 10, 2003, the Court granted
25 defendant-intervenors' oral motion to file declarations in response to plaintiff's most recent
26 declarations. On June 13, 2003, defendant-intervenors each submitted two additional rebuttal
27 declarations. At oral argument on the request for relief, plaintiff appeared with five new rebuttal
28 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.

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

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

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

28 ⁸The 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.

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

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

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27 ⁹Intervenors 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).

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

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

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

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

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

2 BCP also offers Dr. Jean Nichols, an oceanographer and environmental consultant, who
3 declares that even assuming that the operation of the plants increases salinity of the Salton Sea by
4 as much as 0.14 percent after a year's time¹¹, such a change "would have no adverse effect on
5 aquatic organisms in the Salton Sea." (Declaration of Jean A. Nichols in support of BCP's Opp'n
6 at ¶ 4). Additionally, Joel Kasper, another of BCP's experts, explains that under a worst-case,
7 continuous operation scenario, the salinity of the Salton Sea would rise about 63 mg/l, from about
8 44,000 mg/l to 44,063 mg/l, as a result of the operation of all the generation units in question for a
9 year. (See First Declaration of Joel Kasper in support of BCP's Opp'n to Pla's Request for Relief
10 at ¶ 12).¹² Kasper argues that the Bureau of Reclamation, in a report on the status of the Salton
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12 ¹¹This is a percentage increase in salinity that corresponds to BCP expert Kasper's estimate of
13 the worse-case, continuous operation increase in salinity in the Salton Sea of 63 mg/l. (Nichols Decl.
at ¶ 3).

14 ¹²Plaintiff's expert Kirk directly disputes this calculation in his supplemental declaration. In
15 that declaration, Kirk presents "simple mass balance calculations" to show that a flow reduction
16 caused by the plants of 3,000 af/yr to 16,000 af/yr would lead to an increase in salinity in the Salton
17 Sea of 408 mg/l to 1,963 mg/l. (See Supplemental Kirk Decl. at ¶ 3). Kirk goes on to argue that "[a]
18 rapid increase of almost 2,000 mg/l could have a very serious effect on the fish with an increase in fish
19 mortality or destroy the fishery completely." (Id. at ¶ 4 (emphasis added)). The 2,000 mg/l
20 assumption translates into a percentage increase in salinity of about 4.5. Kasper, BCP's expert,
21 calculates the maximum, worst-case reduction in flow to the Salton Sea resulting from the operation
22 of the plants at 10,504 af/yr, closer to the higher range of Kirk's assumptions, but then concludes that
23 such a reduction would only lead to a 63 mg/l increase in salinity after one year, assuming a new
24 equilibrium is reached in one year. (See First Kasper Decl. at ¶ 12). Kasper's estimate is the basis for
25 Nichols' assumption that the percentage increase in the salinity of the Sea will be about 0.14. While
26 it is clear to the Court that either Kirk's or Kasper's calculation must be incorrect or that one of the
27 two must have employed a faulty equation, the Court is ill-equipped to resolve such a dispute.
28 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

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

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

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

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28 ¹³With 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.

1 percent. (*Id.* at ¶ 17).¹⁴

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

13 2. Ammonia Emissions

14 Next, plaintiff argues that it will suffer irreparable injury from the emission of ammonia
15 that will create additional particulate pollution (PM₁₀). First, Dr. Paul English declares that
16 "[b]ecause the EA did not disclose levels of ammonia emissions from the plants and thus, the
17 corresponding increases of PM₁₀, which result as a byproduct from ammonia emissions, the EA's
18 projected 24-hour average of 3 µg/m³ underestimates the true cumulative impacts from this
19 pollutant." (Declaration of Paul Brian English in support of Plaintiff's Motion on Remedies at ¶
20 3). Another of plaintiff's experts, Dr. William Stockwell, concurs in this opinion, and declares that
21 the worst-case, continuous operation ammonia emissions of 1,016 tons per year from the combined
22 plants "poses a serious cumulative threat of irreparable environmental harm." (Declaration of
23 William R. Stockwell in support of Plaintiff's Motion on Remedies at ¶ 6). Dr. Stockwell also

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25 ¹⁴Barrett acknowledges in a supplemental declaration that the USDA Plant Guide states that
26 the ideal salinity range for the bulrush is 0 to 6,000 mg/l. (Supplemental Barrett Decl. at ¶ 3).
27 However, she reasserts her argument that plants continuously exposed to the higher end of this range
28 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.

1 explains how ammonia emissions can form PM₁₀ through a chemical reaction with nitric acid in
2 the atmosphere. (Id. at 9). He goes on to argue that “[a]ny increases in ambient ammonia
3 concentrations will increase the concentrations of secondary PM₁₀.” (Id. at ¶ 11). In fact, Dr.
4 Stockwell declares that due to the relative presence of NO_x and ammonia in the atmosphere in the
5 vicinity of the plants, a “substantial fraction” of the ammonia emitted could form PM₁₀. (Id. at 14).
6 According to Dr. Stockwell, this additional PM₁₀ was not discussed in the EA and has the potential
7 to cause immediate and irreparable harm. (Id.).

8 T-US expert Dr. Steven Heisler explains that although ammonia is not regulated as a
9 criteria pollutant or as a toxic air contaminant, exposure may have acute or chronic health effects.
10 (First Declaration of Steven Heisler in support of T-US’ Opp’n at ¶ 7). For that reason, the
11 California Office of Environmental Health Hazard Assessment (OEHHA) has established acute
12 and chronic reference exposure levels (RELs) for ammonia. (Id.). These RELs are commonly
13 used significance levels for toxic air pollutants. (Id.). Dr. Heisler explains that RELs are
14 established with margins of safety to ensure that no adverse health effects would be anticipated at
15 levels below the respective REL. (Id.). The OEHHA RELs for ammonia are 3,200 µg/m³ for the
16 1-hour (acute) period and 200 µg/m³ for the annual (chronic period). (Id.). Dr. Heisler then
17 calculated the anticipated ammonia slip emissions from all generation units at the LRPC and TDM
18 facilities and, using a dispersion model, the resulting concentrations of ammonia at the border from
19 these facilities. (Id. at ¶ 10). According to his calculations, the maximum 1-hour concentration
20 would be 13.4 µg/m³, and the annual average concentration would be 0.63 µg/m³. Additionally,
21 Dr. Heisler declares that since ammonia emissions from circulating water used in the facilities’
22 cooling towers would be “much lower” than the ammonia slip emissions, no health impacts will
23 result from the cumulative ammonia emissions of all the generating units. (Id. at 10, 12).

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

1 the next two years. (Id. at 16). In a supplemental declaration, Dr. Heisler responds to plaintiff's
2 experts by calculating the estimated additional PM₁₀ that will result from the facilities' ammonia
3 emissions and finding that all PM₁₀ emissions, both direct and secondary, attributable to the TDM
4 and LRPC plants will not cause PM₁₀ levels to exceed the EPA's significance levels at the border.
5 (Second Declaration of Steven Heisler in support of T-US' Opp'n at ¶ 7, 15-17). Additionally, Dr.
6 Heisler takes note of the diminishing performance of SCR technology over its lifetime, the fact that
7 two of the LRPC plants will not immediately have SCR equipment (and will therefore have no
8 ammonia slip emissions), and the actual ammonia content of the water to be used by the facilities.
9 (Id. at ¶¶ 10-12). Based on these corrections and the expected actual operation of plants only 75
10 percent of the time, Dr. Heisler concludes that actual ammonia emissions from the facilities will be
11 only nine percent of Dr. Stockwell's estimate over the next two years. (Id. at 13).

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

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

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

21 Dr. English also argues in his supplemental declaration that the increases calculated by
22 intervenors' experts would not, in fact, be below the EPA significance levels. (See id. at ¶ 5).
23 While Dr. English apparently concedes that the $3 \mu\text{g}/\text{m}^3$ estimated in the EA is below the $5 \mu\text{g}/\text{m}^3$
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25 ¹⁵In his first declaration, Dr. English cites to a 2002 study by Pope et al. and a 1999 paper by
26 Pope and Dockery to support the assertion that a $10 \mu\text{g}/\text{m}^3$ increase in chronic exposure to particulate
27 is associated with specific health effects. (First English Decl. at ¶ 4). Fontana points out in a
28 supplemental declaration that the $3 \mu\text{g}/\text{m}^3$ increase reported in the EA is for short-term particulate
increases, while the long-term average increase is only $0.2 \mu\text{g}/\text{m}^3$. (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 $3 \mu\text{g}/\text{m}^3$ increase, but he does not address the
discrepancy pointed out by Fontana. (See Supp. English Decl. at ¶ 4).

1 significance level set by the E.P.A., he argues that such a conclusion is illogical in light of
2 Fontana's own interpretation of the policy behind a significance level. (Id.). In particular, Dr.
3 English quotes Fontana's statement that "significance levels represent the incremental increases in
4 ambient concentrations attributable to an emissions source below which the source would not be
5 considered to cause or contribute to a violation of the applicable National Ambient Air Quality
6 Standards ("NAAQS") in areas where those standards already are not being met." (Supp. Fontana
7 Decl. at ¶ 11) (citing 40 C.F.R. § 51.165(b)(2)). Dr. English argues that under this rationale, even
8 a 3 µg/m³ increase would be significant because it would have caused two particulate monitoring
9 stations in Calexico to exceed the 150 µg/m³ NAAQS eight times between 1994 and 2002. (See
10 Supp. English Decl. at ¶ 5). While the Court notes the logic in Dr. English's argument, it does not
11 agree with his conclusion. The significance levels regulations already assume that they are to be
12 used in a "locality that does not or would not meet the applicable national standard." 40 C.F.R. §
13 51.165(b)(2). Thus, while it might be assumed that any incremental increase in the pollutant will
14 contribute to or cause a violation of the NAAQS, the regulation creates a fiction in which
15 incremental increases under certain thresholds will not be considered to have caused or contributed
16 to the violation. Id. This does not amount to a purely mathematical conclusion, as Dr. English
17 assumes, but rather to a conclusion based on policy and science that incremental increases below
18 the significance levels will not unduly threaten human health and welfare, the basis for the
19 NAAQS. See 40 C.F.R. § 50.2(b). As the Court stated above, where an expert agency has already
20 determined that the emission of a certain level of a pollutant will not be significant, the Court will
21 not lightly reject this conclusion. Rather, the Court finds that the agency's determination should
22 weigh heavily in the Court's determination of whether the asserted particulate emissions would
23 likely cause substantial irreparable harm for purposes of issuing injunctive relief.

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

1 preserves human health and welfare with a margin of safety. As a matter of common sense, it is
2 clear that discharges of pollutants that actually, if not legally, cause violations of the NAAQS, or
3 make existing violations worse, have the potential for adversely affecting health. The argument
4 carries additional force when the Court considers that the short-term PM₁₀ emissions from
5 ammonia conversion are estimated to be 1.8 µg/m³. (See Supp. Heisler Decl. at ¶ 15).¹⁶ Thus, the
6 combined 3 µg/m³ provided by modeling in the EA and the 1.8 µg/m³ or more contributed by
7 ammonia conversion means that the NAAQS for particulate in the Imperial Valley will be
8 exceeded even more frequently, or that the violations will be larger, than even Dr. English
9 suggests, and the minimum total of 4.8 µg/m³, while still below the E.P.A. significance level,
10 would verge on significance even under that regulation.

11 According to the data provided by Dr. English, a 4.8 µg/m³ increase in ambient particulate
12 concentrations would have caused readings to exceed the NAAQS at the Grant Street monitor in
13 Calexico five times in the eight years between 1994 and 2002. (See Exh. 1 to Supp. English
14 Decl.). Similarly, such an increase would have caused the reading at the Ethel Street monitor to
15 exceed the NAAQS four times over the same period. (*Id.*). Assuming these exceedances are
16 roughly distributed over time, then over the undisputed maximum two year period for remand in
17 this case, it might be expected that the plants' emissions would cause a reading in excess of the
18 NAAQS about once at each station. While the Court does not view even one such exceedance of
19 the NAAQS lightly, it will not find that these circumstances demonstrate the substantial and
20 irreparable harm necessary to justify injunctive relief. The Court finds this conclusion to be
21 particularly appropriate considering that the NAAQS are designed to incorporate an "adequate
22 margin of safety," 40 C.F.R. § 50.2, and English's data suggests that any reading in the next two
23 years that exceeds the NAAQS would likely exceed the standard by only a small margin.

24 In sum, the Court finds that plaintiff has failed to demonstrate that a likelihood of
25 substantial and irreparable harm will result from the plants' ammonia emissions in the absence of
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27 ¹⁶Indeed, the contribution to particulate formation from ammonia may even be higher since it
28 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).

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

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

8 Plaintiff's third argument to show irreparable harm is that it will suffer a procedural injury
9 from the lack of full disclosure and informed decision-making prior to the operation of the
10 transmission lines. First, plaintiff argues that the agencies might be less likely to deny the permits
11 after a new environmental review if the lines are allowed to operate in the interim. (Pl.'s Reply at
12 12). In support of this argument, plaintiff cites Metcalf v. Daley, 214 F.3d 1135, 1146 (9th Cir.
13 2000), in which the court suspended operation of an agreement between the federal government
14 and the Makah Tribe pending the completion of a NEPA analysis. The Metcalf court was
15 concerned that the government had already "committed in writing to support the Makah's whaling
16 proposal," and that such a commitment might lead to a case of "first-the-verdict, then-the-trial."
17 Id. This case is readily distinguishable, however, because plaintiff does not point to any similar
18 written agreement, other than the clearly invalid permits, between the government and the
19 intervenors. Furthermore, this Court can limit the influence of improper considerations by
20 ordering the federal defendants not to consider the completion or interim operation of the
21 transmission lines when making their NEPA determinations on remand.

22 A stronger argument is that NEPA provides a process through which major federal actions
23 should be undertaken, that this process was inadequate in the instant case, and that it would be a
24 subversion of the statute and the process to allow projects commenced under the authority of the
25 invalid federal actions to proceed nonetheless. Support for this argument can be implied from the
26 National Parks & Conservation Association court's holding that "[w]here an EIS is required,
27 allowing a potentially environmentally damaging project to proceed prior to its preparation runs
28 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

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

4 In fact, a focus on the procedural protections of NEPA as the basis for injunctive relief
5 would be counter to the Supreme Court’s holding in Amoco Production Co. v. Village of Gambell.
6 480 U.S. 531. In that case, the Court held that the Ninth Circuit, in granting injunctive relief,
7 “erroneously focused on the statutory procedure rather than on the underlying substantive policy
8 the process was designed to effect--preservation of subsistence resources.” Id. at 544. The Court
9 went on to hold that while a sufficient likely showing of environmental harm is generally enough
10 to warrant injunctive relief, where injury to the underlying substantive policy is not at all probable
11 and significant considerations weigh against issuing the injunction, a court abuses its discretion in
12 doing so. Id. at 545.

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

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

26 B. Balancing of the Equities

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

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

10 C. The Public Interest

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

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

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

1 constructed sewage treatment plants to remove pollutants from partially treated or untreated
2 sewage from Mexicali prior to use in the plants for cooling¹⁷, the operation of the plants provides a
3 significant benefit for the environment. T-US states that if the injunction issues, and the TDM
4 plant is forced to cease operations, its associated sewage treatment plant will also stop operating.
5 (First Simoes Decl. at ¶ 13). The sewage treatment plant at the LRPC would continue operating at
6 least partially since the injunction of the BCP would only partially and temporarily cause that
7 facility to cease operations. (See generally Chuahan Decl. (describing plans of the LRPC to
8 continue operations through alternative means and through reconfiguration, if necessary)).

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

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

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

1 had to make up the difference from a ceasing of operations at the TDM plant. (Id. at ¶¶ 12-26).
2 However, plaintiff's expert William Powers disputes that replacing the TDM and LRPC plants
3 with other power plant capacity in the region will lead to anything more than "relatively little
4 change" in NOx emissions. (Declaration of William Powers in Support of Pla's Motion on Relief
5 at ¶ 13).¹⁸ Additionally, Powers points out, and intervenors do not dispute, that emissions are not
6 entirely fungible since Imperial Valley is in "nonattainment"¹⁹ status for federal PM₁₀ and ozone²⁰,
7 while San Diego County is not. Thus, additional emissions in Imperial County, even if those
8 emissions replace relatively more emissions in San Diego County, may ultimately be more harmful
9 to the public as a whole. While acknowledging the merit of this argument, the Court also notes
10 that it has considerable evidence before it in the intervenors' declarations and the EA that the
11 estimated emissions of both particulate and NOx from the plants are below the significance levels
12 established by the EPA for areas of nonattainment. The Court also notes that plaintiff has not
13 disputed intervenors' contention that any power generated by other regional plants to replace
14 power from TDM and the LRPC plants would be costlier and involve larger emissions of carbon
15 dioxide.

16 Third, intervenors argue that the Court should be wary of issuing an injunction that would
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18 ¹⁸The supplemental declaration of Simoes challenges Powers' declaration, stating that Powers'
19 own data shows that NOx emissions would be higher if regional plants replaced the power generated
20 by the TDM and LRPC facilities. (See Second Simoes Decl. at ¶ 14). Simoes also challenges factual
21 evidence presented by Powers concerning the retrofitting of regional power facilities with technology
22 to reduce NOx emissions. (See id. at ¶¶ 16-17). Powers then submitted his own supplemental
23 declaration to rebut these assertions. Powers argues that at least the Ventura County boilers, as a
24 group, could provide power at a lower level of NOx emissions than the TDM and LRPC turbines as
25 a group. (See Supp. Powers Decl. at ¶ 6). He also argues that Simoes' claim that power from Ventura
26 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.

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

²⁰NOx contributes to the formation of ozone.

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

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

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

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

25 Finally, and in further support of the intervenors’ argument, Vimal Chauhan declares that
26 the operation of the BCP transmission line would help alleviate transmission deficiencies and
27 would enhance the reliability of the system by ensuring that the LRPC export generation could get
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²¹Simoes declares that this is a reference to the TDM and LRPC export plants. (*Id.* at ¶ 21).

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

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

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

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

24 **IV. CONCLUSION**

25 Based on the foregoing analysis, the Court **DENIES** Plaintiff's specific requests for relief
26 but **GRANTS** relief in modified form. Specifically, the Court: (1) **GRANTS IN PART** plaintiff's
27 request to set aside the Presidential Permits, the rights-of-way, and the FONSI issued in this case;
28 (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

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

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

16 Finally, the Court **PROHIBITS** the federal defendants from considering the interim
17 operation of the transmission lines, the completion of the construction, or this Court's equitable
18 analysis of the environmental impacts of the proposed actions as part of the NEPA analysis and
19 determination process on remand. Cf. Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157
20 (9th Cir. 1988).

21 **IT IS SO ORDERED.**

22
23 Dated: July 8, 2003


24 **IRMA E. GONZALEZ**
25 United States District Judge

26 cc: The Honorable Magistrate Judge Louisa S. Porter
27 all parties
28