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THE PROTECT OUR COMMUNITIES FOUNDATION,
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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 THE PROTECT OUR COMMUNITIES
FOUNDATION, BACKCOUNTRY AGAINST
12 DUMPS, and DONNA TISDALE,

13 Plaintiffs,

14 vs.

15 DR. STEVEN CHU, in his official capacity as
Secretary of the United States Department of Energy;
16 JERRY PELL, in his official capacity as Project
Manager for the United States Department of Energy
17 Office of Electricity Delivery and Energy Reliability;
UNITED STATES DEPARTMENT OF ENERGY, a
18 federal agency; KEN SALAZAR, in his official
capacity as Secretary of the Interior; KAREN A.
19 GOEBEL, in her official capacity as Assistant Field
Supervisor for the United States Fish and Wildlife
20 Service; and the UNITED STATES FISH AND
WILDLIFE SERVICE, an agency of the United
21 States Department of the Interior,

22 Defendants.

Civ. No. '12CV3062 L BGS

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1
2 1. On August 17, 2012, the U.S. Department of Energy (“DOE”) announced its decision to
3 issue Presidential Permit Number PP-334 (“Permit”) to Energia Sierra Juarez U.S. Transmission, LLC
4 (formerly Baja Wind U.S. Transmission, LLC), a subsidiary of Sempra Energy (“ESJ”), to construct,
5 operate, maintain, and connect a double-circuit, 230,000-volt (230-kV) electric transmission line
6 (“Project” or “ESJ Project”) straddling the U.S.-Mexico border in eastern San Diego County, California.
7 77 Fed. Reg. 160. The Project’s sole purpose is to enable construction and operation of the proposed
8 1,250-megawatt La Rumorosa/ESJ wind energy project (“ESJ Wind Project”) in Baja California, Mexico
9 by connecting the ESJ Wind Project with San Diego Gas & Electric’s (“SDG&E’s”) existing Southwest
10 Powerlink transmission line via the proposed ECO Substation and expanded Boulevard Substation in
11 Jacumba, California. The ESJ Wind Project would kill protected birds including golden eagles, and harm
12 essential habitat of protected mammals including the Peninsular Bighorn Sheep (“PBS”). Like the
13 Project, the ESJ Wind Project would be developed, owned and operated by a subsidiary of Sempra
14 Energy.

15 2. Plaintiffs THE PROTECT OUR COMMUNITIES FOUNDATION, BACKCOUNTRY
16 AGAINST DUMPS, and DONNA TISDALE (collectively, “plaintiffs”) challenge the approval of the
17 Project by defendants DR. STEVEN CHU, JERRY PELL, the UNITED STATES DEPARTMENT OF
18 ENERGY (collectively, “DOE”), and KEN SALAZAR, KAREN A. GOEBEL, and the UNITED
19 STATES FISH AND WILDLIFE SERVICE (collectively, “FWS”) for violations of the National
20 Environmental Policy Act (“NEPA”), 42 U.S.C. section 4321 *et seq.*, the Endangered Species Act
21 (“ESA”), 16 U.S.C. section 1531 *et seq.*, the Migratory Bird Treaty Act (“MBTA”), 16 U.S.C. section
22 701 *et seq.*, the Bald Eagle and Golden Eagle Protection Act (“Eagle Act”), 16 U.S.C. 24 section 668, the
23 Administrative Procedure Act (“APA”), 5 U.S.C. section 701 *et seq.*, and regulations promulgated
24 thereunder.

25 3. First, DOE’s NEPA review of the Project was inadequate. DOE’s Final Environmental
26 Impact Statement (“FEIS”) fails to (1) provide a detailed and independent Project purpose and need, (2)
27 analyze all reasonable alternatives to the Project, (3) study all of the actions connected to the Project, (4)
28 study the Project’s transboundary effects, (5) disclose and fully analyze many of the Project’s adverse

1 environmental impacts, (6) formulate adequate mitigation measures, and (7) respond adequately to
2 comments.

3 4. Second, DOE and FWS violated ESA because they (1) failed to use the best scientific and
4 commercial data available when analyzing whether and how the Project would affect threatened and
5 endangered species, contrary to 16 U.S.C. section 1536(a)(2); (2) failed to reinstate consultation when
6 significant new information became available, contrary to 16 U.S.C. section 1536(a)(2) and (3) and 50
7 C.F.R. section 402.16(b); and (3) failed to analyze the effects on threatened and endangered species from
8 all relevant connected actions, contrary to 16 U.S.C. section 1536(a)(2) and (3) and 50 C.F.R. section
9 402.12.

10 5. Third, DOE violated the MBTA by allowing the un-permitted taking of the numerous
11 protected migratory bird species that the Project will harm, contrary to 16 U.S.C. section 703(a).

12 6. Fourth, DOE violated the Eagle Act by allowing the unpermitted taking of golden eagles
13 and failing to secure a permit for the take of species protected by the Eagle Act that will be harmed by the
14 Project, contrary to 16 U.S.C. section 668(b).

15 7. Accordingly, plaintiffs seek orders from this Court: (1) granting preliminary injunctive
16 relief restraining defendants from taking any action that would result in any change to the physical
17 environment in connection with the Project pending a full hearing on the merits; (2) declaring that
18 defendants violated the APA by failing to comply with NEPA; (3) declaring that defendants violated
19 ESA; (4) declaring that defendants violated the MBTA; (5) declaring that defendants violated the Eagle
20 Act; and (6) granting permanent injunctive relief overturning DOE's Project approvals pending
21 defendants' compliance with NEPA, ESA, the MBTA, the Eagle Act and the APA.

22 **JURISDICTION AND VENUE**

23 8. The Court has jurisdiction over this action under 28 U.S.C. sections 1331 (federal
24 question), 1337 (regulation of commerce), 1346 (U.S. as defendant), 1361 (mandamus against an officer
25 of the U.S.), 2201 (declaratory judgment), and 2202 (injunctive relief); under the Administrative
26 Procedure Act ("APA"), 5 U.S.C. sections 701-706 (review of final agency action); and under the
27 Endangered Species Act ("ESA"), 16 U.S.C. section 1540(g)(1)(C) because (1) the action arises under the
28 APA, NEPA, the MBTA, the Eagle Act, and ESA; (2) DOE is an agency of the U.S. government and the

1 individual defendants are sued in their official capacities as officers of the U.S.; (3) the action seeks a
2 declaratory judgment voiding DOE's grant of Permit PP-334; and (4) the action also seeks further
3 injunctive and mandamus relief until DOE complies with applicable law.

4 9. Venue is proper in this judicial district pursuant to 28 U.S.C. section 1391(e)(2) because
5 DOE and one or more individual defendants officially reside in this judicial district, one or more of
6 plaintiffs' causes of action arose in this judicial district, and all of the lands and waters involved in the
7 action are located in this judicial district.

8 10. There exists now between the parties hereto an actual, justiciable controversy in which
9 plaintiffs are entitled to have a declaration of their rights, a declaration of DOE's obligations and further
10 relief because of the facts and circumstances hereinafter set forth.

11 11. This Complaint is timely filed within the applicable six-year statute of limitations set forth
12 in 28 U.S.C. section 2401(a).

13 12. Plaintiffs have standing to assert their claims and, to the extent required, have exhausted
14 all applicable remedies.

15 **PARTIES**

16 13. Plaintiff THE PROTECT OUR COMMUNITIES FOUNDATION ("POC") is a
17 community organization formed in 2009 as the successor to the Protect Our Communities Fund, which
18 was formed in 2006. POC is composed of numerous individuals and families residing in western
19 Imperial County and eastern San Diego County who are directly affected by DOE's approval of the ESJ
20 project. POC's purpose is the promotion of a safe, reliable, economical, renewable, and environmentally
21 responsible energy future. POC's members currently use and intend to continue to use the areas affected
22 by the Project for aesthetic, scientific, historic, cultural, recreational, and spiritual enjoyment.
23 Construction and operation of the ESJ Project threatens to harm the use and enjoyment of these public
24 resources by POC's members as well as the public at large. POC therefore seeks review of DOE's grant
25 of Permit PP-334.

26 14. Plaintiff BACKCOUNTRY AGAINST DUMPS ("Backcountry") is a community
27 organization comprising numerous individuals and families residing in western Imperial County and
28 eastern San Diego County who will be directly affected by the ESJ Project and connected actions.

1 Backcountry and its members are vitally interested in proper land use planning and management in order
2 to maintain and enhance the area's ecological integrity, scenic beauty, wildlife, recreational amenities,
3 and resources. Backcountry's members use the area affected by the Project for aesthetic, scientific,
4 historic, cultural, recreational, and spiritual enjoyment. Construction and operation of the ESJ Project
5 threatens to harm the use and enjoyment of these public resources by Backcountry's members as well as
6 the public at large. Backcountry therefore seeks review of DOE's grant of Permit PP-334.

7 15. Plaintiff DONNA TISDALE lives on Morningstar Ranch, located two miles west of Tierra
8 Del Sol Road in Boulevard, California. She is a member of Backcountry and POC. She is also the
9 Chairwoman of the County of San Diego's Boulevard Planning Group. Ms. Tisdale currently uses and
10 intends to continue to use the area that will be harmed by the ESJ Project for activities such as hiking,
11 family outings, recreation, wildlife and wildflower viewing, sightseeing, photography, star gazing, and
12 quiet meditation. Construction and operation of the ESJ Project will harm Ms. Tisdale's use and
13 enjoyment of these public resources. Ms. Tisdale therefore seeks review of DOE's grant of Permit PP-
14 334.

15 16. Plaintiffs' injuries are fairly tracable to DOE's actions. Construction and operation of the
16 Project and connected actions will harm plaintiffs' use of the Project area for recreational activities
17 including nature study, wildlife and wildflower viewing, scenic enjoyment, photography, hiking, family
18 outings, star gazing and meditation. These injuries are actual, concrete, and imminent. Plaintiffs have no
19 plain, speedy, or adequate remedy at law. Accordingly, plaintiffs seek injunctive, mandamus, and
20 declaratory relief from this Court to set aside DOE's unlawful acts and redress plaintiffs' injuries.

21 17. Defendant DR. STEVEN CHU is the Secretary of the U.S. Department of Energy and, in
22 that capacity, was responsible for DOE's decision to grant Permit PP-334. He is sued in his official
23 capacity.

24 18. Defendant JERRY PELL is the Project Manager for the U.S. Department of Energy Office
25 of Electricity Delivery and Energy Reliability, and, in that capacity, was responsible for DOE's decision
26 to grant Permit PP-334. He is sued in his official capacity.

27 19. Defendant UNITED STATES DEPARTMENT OF ENERGY ("DOE") is a federal
28 executive agency administered by the U.S. Secretary of Energy and headquartered in Washington, D.C.

1 DOE's mission is to use science and technology to address America's energy, environmental, and nuclear
2 challenges.

3 20. Defendant KEN SALAZAR is the Secretary of the U.S. Department of the Interior, and, in
4 that capacity, is the federal official charged with the responsibility for the proper management of the U.S.
5 Fish and Wildlife Service ("FWS") and is responsible for the actions of FWS challenged herein.

6 21. Defendant KAREN A. GOEBEL, in her official capacity as Assistant Field Supervisor for
7 the Carlsbad office of FWS, was responsible for ESA section 7 consultation with DOE.

8 22. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("FWS") is an agency
9 within the U.S. Department of the Interior. Under ESA, FWS is charged with the preservation of
10 endangered and threatened species and their habitat, including the species located in the vicinity of the
11 Project.

12 BACKGROUND

13 23. Permit PP-334 gives ESJ permission to construct, connect, operate, and maintain a
14 double-circuit, 230-kV electric transmission line to transmit up to 1,250 megawatts ("MW") of electricity
15 from the planned ESJ Wind Project in Mexico to the ECO Substation switchyard in the U.S. Permit, p. 1.
16 The Project would entail massive construction and permanent clearance of vegetation in what is now a
17 largely untrammelled rural area.

18 24. The Project would include more than one-half mile of transmission lines strung across up
19 to five 150-foot tall lattice towers, with large, permanently cleared areas at the base of each one; a 130-
20 foot-wide permanent right-of-way along the .65 mile long transmission line; parking, construction,
21 laydown, and stringing areas; and multiple new access roads and turn-arounds to the site and its water
22 sources. During construction, the Project would also use nearly three million liters of water drawn from a
23 local groundwater well in an area of acute water scarcity.

24 25. The ESJ Wind Project – the construction of which is the only reason this transmission line
25 is proposed – would be located near the town of La Rumorosa in Baja California, Mexico, with some
26 towers less than one mile from the U.S. border. Construction would proceed in phases, with 52 wind
27 turbines providing approximately 130 MW of power in Phase I, and subsequent phases eventually
28 providing a total of 1,250 MW. Each turbine would be up to 431 feet tall (including the blade), and about

1 thirty percent of them would be lighted. (By comparison, the California Tower in San Diego's Balboa
2 Park is a mere 198 feet.) The ESJ Wind Project would also require construction of access roads,
3 electrical substations, and transmission lines from those substations to the U.S.-Mexico border.

4 26. Connection to the existing U.S. electricity grid would be made possible through the ECO
5 Substation project. The ECO Substation project would entail construction of switchyards, a loop-in to the
6 existing Southwest Powerlink transmission line, a new 13.3 mile 138-kV transmission line from the ECO
7 Substation to the Boulevard Substation, and related upgrades to the Boulevard Substation.

8 27. Executive Order 10485 (September 9, 1953), as amended by Executive Order 12038
9 (February 7, 1978), requires that anyone proposing to construct, operate, maintain, or connect an
10 electricity transmission facility at the U.S. border must first obtain a Presidential permit from DOE. DOE
11 may issue the permit if it obtains recommendations to do so from the U.S. Departments of State and
12 Defense, provided DOE also determines that the permit is in the public interest. The public interest
13 determination involves consideration of the project's impact on the environment as well its effect on
14 electricity reliability in the U.S.

15 28. On December 18, 2007, ESJ applied to DOE for a Presidential permit to construct,
16 operate, maintain, and connect a transmission line across the U.S.-Mexico border. Pursuant to section 7
17 of the ESA, DOE completed informal consultation with FWS in March 2011.

18 29. DOE originally decided that an environmental assessment ("EA") was the appropriate
19 level of review under NEPA, and published a Notice of Intent to prepare an EA on August 4, 2008. 73
20 Fed. Reg. 45218. In January 2009, in response to public comments, DOE decided to prepare an
21 environmental impact statement ("EIS") instead. DOE published a Notice of Intent to prepare an EIS,
22 with the County of San Diego as a Cooperating Agency, in the Federal Register on February 25, 2009. 74
23 Fed. Reg. 8518. DOE conducted public hearings and considered comments on the Draft EIS ("DEIS")
24 between its completion in September 2010 (75 Fed. Reg. 57005) and the end of its comment period in
25 September 2011. DOE published the Final EIS ("FEIS") in May 2012. 77 Fed. Reg. 34041. Plaintiffs
26 submitted comments on both the DEIS and the FEIS.

27 30. The FEIS analyzes a "no action" alternative and several different potential routes for the
28 transmission line. It identifies multiple unavoidable impacts to biological resources, visual resources,

1 cultural resources, noise, public health and safety, fire management, water resources, transportation and
 2 traffic, land use, and recreation. Yet in spite of this long list of impacts, DOE granted ESJ's request for a
 3 Presidential permit on August 17, 2012, and issued Permit PP-334 on August 31, 2012. Office of
 4 Electricity Docket No. PP-334.

5 31. In this lawsuit, plaintiffs challenge defendants' grant of Permit PP-334 and associated
 6 environmental reviews under NEPA, ESA, the MBTA, and the Eagle Act.

7 **FIRST CLAIM FOR RELIEF**

8 (Violation of the National Environmental Policy Act)

9 (Against All Defendants)

10 32. The paragraphs set forth above are realleged and incorporated herein by reference.

11 33. By granting Permit PP-334 to ESJ based on an inadequate EIS, DOE violated NEPA, 42
 12 U.S.C. section 4321 *et seq.*, and its implementing regulations, 40 C.F.R. § 1500 *et seq.* By approving the
 13 Project without complying with NEPA, DOE failed to proceed in accordance with law in violation of the
 14 APA, 5 U.S.C. § 706(2)(A) and (D).

15 **The FEIS Fails to Specify DOE's Purpose and Need for the Project.**

16 34. NEPA requires an EIS to "specify the underlying purpose and need to which the agency is
 17 responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. DOE's
 18 internal guide for writing an EIS states that a purpose and need statement "must specify the underlying
 19 need that is motivating the Department to action," rather than simply justify what DOE is proposing to
 20 do, or explain why it is preparing an EIS. R.P. Detwiler, *The Environmental Style: Writing*
 21 *Environmental Assessments and Impact Statements*, NNSA Office of General Counsel, October 2005 at
 22 2, available at <http://energy.gov/nepa/document-preparation> (hereinafter, "DOE Guidelines").

23 35. Agencies have "considerable discretion" in defining their objectives, but may not do so in
 24 "unreasonably narrow terms," so that "only one alternative from among the environmentally benign ones
 25 in the agency's power would accomplish the goals of the agency's action, and the EIS would become a
 26 foreordained formality." *National Parks & Conservation Ass'n v. Bureau of Land Management*, 606 F.3d
 27 1058, 1070 (9th Cir. 2010) ("*Nat'l Parks*") (quoting *Friends of Southeast's Future v. Morrison*, 153 F.3d
 28 1059, 1066 (9th Cir. 1998)).

1 36. Agencies should consider the private applicant’s objectives, but must not “adopt[] private
2 interests to draft a narrow purpose and need statement.” *Id.* at 1072. Instead, agencies should focus on
3 “the views of Congress, expressed . . . in the agency’s statutory authorization to act.” *Id.* at 1070 (quoting
4 *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)).

5 37. In order for the FEIS to be adequate, it must specify a *public* need for the Project and show
6 that the asserted need *actually exists*. *Rankin v. Coleman*, 394 F. Supp. 647, 656-57 (E.D.N.C. 1975)
7 (EIS deficient because it failed to show a need for the project, and instead relied on the conclusory
8 statement – without any supporting data – that “a modern highway can enhance the economic progress of
9 resort and recreational areas”). The FEIS for the ESJ Project must therefore analyze where the electricity
10 transported by the Project would be used and whether there is an existing or projected shortage or other
11 condition that necessitates importation of energy to benefit the public.

12 38. Here, the FEIS’s one-sentence statement of DOE’s purpose and need reads: “The purpose
13 and need for DOE’s action is to respond to the ESJ request for a Presidential permit.” FEIS 1.8. The rest
14 of the FEIS’ discussion of this topic presents only a generalized description of Presidential permit
15 procedures. This is wholly inadequate under NEPA. 40 C.F.R. § 1502.13 (mandating that the EIS
16 “specify the *underlying* purpose and need to which the agency is responding,” emphasis added); DOE
17 Guidelines at 2. The FEIS’ recitation of *ESJ’s private* objectives for the Project does nothing to cure this
18 inadequacy. The FEIS does not even provide assurance that *any* energy will reach the U.S. DOE admits
19 that “the degree of energy partitioning between [U.S. and Mexican] markets [for the energy produced by
20 the ESJ Wind Project] is unknown at this time.” FEIS 2.1.

21 39. Because DOE’s statement of purpose and need fails to specify any public need for the
22 Project let alone show that such need actually exists and would be addressed, it violates NEPA.

23 **The Purpose and Need Statement Unlawfully Constrains the Range of Alternatives Considered.**

24 40. NEPA requires that an EIS “[r]igorously explore and objectively evaluate all reasonable
25 alternatives” so that “reviewers may evaluate their comparative merits.” 40 C.F.R. § 1502.14; 42 U.S.C.
26 § 4332; *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Alaska*
27 *Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995); *Sierra Club v.*
28 *Lynn*, 502 F.2d 43, 62 (5th Cir. 1974). The alternatives analysis “is the heart of the environmental impact

1 statement.” 40 C.F.R. § 1502.14. Analyzed alternatives should be wide-ranging and include options that
2 may require additional approvals or participation by others. 40 C.F.R. § 1502.14(c); *Alaska Wilderness*,
3 67 F.3d at 729. “The existence of a viable but unexamined alternative renders an environmental impact
4 statement inadequate.” *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008).

5 41. The purpose and need statement necessarily informs the range of alternatives considered
6 “because when ‘the purpose is to accomplish one thing, it makes no sense to consider the alternative ways
7 by which another thing might be achieved.’” *Nat’l Parks*, 606 F.3d at 1071 (quoting *City of Angoon v.*
8 *Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986)). It is thus axiomatic that “[a]n agency may not define the
9 objectives of its action in terms so unreasonably narrow that only one alternative among the
10 environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action,
11 and the EIS would become a foreordained formality.” *Nat’l Parks*, 606 F.3d at 1070 (internal quotations
12 and citations omitted).

13 42. Here, DOE’s purpose and need statement describes the reason for completing the EIS
14 rather than the purpose of or need for the underlying project, and fails to address vital topics such as
15 anticipated future energy needs, the extent of the region’s dependency on fossil fuels, and whether the
16 project is needed to enable California’s utilities to meet portfolio standards. Therefore, despite the
17 recommendations of numerous comments from the public, the alternatives consist only of “no action,”
18 potential routes, and a single- or double-circuit option for the transmission line. This does not come close
19 to representing a full range of alternative ways to meet future energy needs, reduce the region’s
20 dependence on fossil fuels, or meet California’s renewable portfolio standards.

21 43. DOE acknowledges that its purpose and need statement disregards “alternatives
22 considering different sources of power” on the grounds that “the federal government’s ‘need’ in this case
23 is to meet the requirements of E.O. 10485 in its response to certain request [sic] for permits and
24 approvals. Accordingly, *certain alternatives are dismissed from further analysis.*” FEIS 2.20, emphasis
25 added. *See also id.* at S-22 (“[a]lternative approaches for energy generation are outside the scope of the
26 EIS because they do not respond to DOE’s purpose and need, which is to respond to the ESJ request for a
27 Presidential permit”). Limiting the alternatives analysis in this way is unreasonable and violates NEPA.
28 *Nat’l Parks*, 606 F.3d at 1070.

1 44. The FEIS’ alternatives analysis further violates NEPA by failing to adequately assess the
2 possibility of using the existing Western Energy Coordinating Council (“WECC”) transmission line to
3 transmit electricity from the ESJ Wind Project to the U.S. In its explanation for excluding a detailed
4 analysis of the WECC alternative, the FEIS repeats – without any independent analysis – ESJ’s assertions
5 in every aspect of its WECC analysis. For example, the FEIS states that “*according to the applicant*, the
6 WECC transmission corridor would not provide enough interconnection capability with the U.S. grid,”
7 and would not have the capacity to deliver the energy generated by the ESJ Wind Project without
8 upgrades that “would require detailed studies and new international agreements that would likely delay
9 delivery of power from the ESJ Wind Project.” FEIS 2.20, emphasis added.

10 45. DOE is not permitted to uncritically accept, without any independent analysis, such self-
11 serving assertions from permit applicants. Rather, agencies “shall independently evaluate the information
12 submitted [by the applicant] and shall be responsible for its accuracy.” 40 C.F.R. § 1506.5(a); 10 C.F.R.
13 § 1021.215(d). *See also Utahns for Better Transp. v. U.S. Dept. Of Transp.*, 305 F.3d 1152, 1171 (10th
14 Cir. 2002) (“NEPA regulations require the agency to verify the accuracy of information supplied by an
15 applicant”); *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197, 207 (1st Cir. 1999) (agencies must
16 “independently evaluate any environmental information submitted by applicants for possible use by the
17 agency in preparing an EIS”). DOE failed to conduct any independent analysis of ESJ’s claims regarding
18 the potential use of the WECC transmission line.

19 46. In addition, the lack of “detailed studies” regarding the potential use of the WECC line is
20 precisely what NEPA is supposed to remedy. One of NEPA’s primary goals is to “ensure[] that the
21 agency, in reaching its decision, will have available, and will carefully consider, detailed information
22 concerning significant environmental impacts.” *Robertson v. Methow Valley Citizens Council*, 490 U.S.
23 332, 349 (1989). Agencies cannot simply circumvent NEPA by failing to gather the information needed
24 to make a fully informed decision among all reasonable alternatives. When “there is incomplete or
25 unavailable information” that is “essential to a reasoned choice among alternatives and the overall costs
26 of obtaining it are not exorbitant, the agency shall include the information in the [EIS].” 40 C.F.R. §
27 1502.22. Thus, DOE’s refusal to consider the WECC transmission line alternative just because
28 additional studies might be required violated NEPA.

The FEIS Fails to Analyze All Connected Actions.

1
2 47. Connected actions must be considered together in a single EIS. 40 C.F.R. § 1508.25(a)(1).
3 The CEQ's NEPA regulations define connected actions as those that "automatically trigger other actions
4 which may require environmental impact statements," "cannot or will not proceed unless other actions are
5 taken," or "are interdependent parts of a larger action and depend on the larger action for their
6 justification." *Id.*

7 48. In determining whether two actions are "connected" for the purposes of NEPA, courts
8 look to whether the two actions have "independent utility," *Daly v. Volpe*, 514 F.2d 1106, 1110 (9th Cir.
9 1975), or whether it would be "irrational, or at least unwise, to undertake the first phase [of the project] if
10 subsequent phases were not also undertaken." *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985).

11 49. Bringing power from the ESJ Wind Project onto the U.S. electricity grid would require
12 new infrastructure, as well as upgrades to existing infrastructure, because the current system is already
13 operating at capacity. The SDG&E ECO Substation Project and its associated infrastructure upgrades
14 would provide the first point of connection to the U.S. power grid from Mexico. FEIS S-21. Because the
15 proposed transmission line depends upon all of the components of the ECO Substation Project in order to
16 bring its power to market, DOE should have included an analysis of all four ECO Substation Project
17 components in its EIS. However, DOE's FEIS only analyzes the ECO Substation switchyards and the
18 loop-in as connected actions, and fails to address the potential effects of the other aspects of the ECO
19 Substation project, including the new 13.3 mile transmission line to the Boulevard Substation and related
20 upgrades. DOE's FEIS thus violates NEPA.

21 50. The Sunrise Powerlink Project is a connected action because it will add capacity to the
22 existing transmission system without which the Project could not deliver power from Mexico to the
23 United States. In the FEIS, DOE claims that Sunrise Powerlink is completely independent from the
24 Project, on the grounds that neither depends on the other for its justification. FEIS S-21 n. 2. However,
25 because the existing electrical transmission system is at capacity, the power from the ESJ Wind Project
26 could not come to market in the United States without the Sunrise Powerlink Project. Therefore the
27 Project is dependent on Sunrise Powerlink.

28 51. DOE claims that if Sunrise Powerlink were not built, Sempra "would seek to have the

1 CAISO [California Independent System Operator] and SDG&E evaluate alternative transmission to
 2 accommodate Sempra Generation's interconnection requests." *Id.* The fact that a project proponent
 3 would pursue alternative options if its current plan is unavailable does not, by itself, render the current
 4 plan an independent action. Because the proposed transmission line depends on the Sunrise Powerlink
 5 Project for its utility, building Sunrise Powerlink is a connected action must be – yet was not – fully
 6 evaluated as such in the FEIS.

7 **The FEIS Fails to Consider Extraterritorial Effects of the Action.**

8 52. The FEIS states that "[i]mpacts in Mexico are outside the scope of analysis under NEPA,
 9 except to the extent that they result in impacts in the United States." FEIS 400.4. For this reason, DOE
 10 decided not to fully analyze the ESJ Wind Project and its range of accompanying impacts, including
 11 impacts in Mexico. The FEIS also fails to address how building the transmission line in the U.S. would
 12 affect the environment in Mexico. DOE's rationale misapprehends the law.

13 53. NEPA requires an EIS for all "major Federal actions significantly affecting the quality of
 14 the human environment." 42 U.S.C. § 4332(2)(C). NEPA is designed to ensure that federal agencies
 15 gather information regarding the environmental impacts of their potential actions, and carefully consider
 16 that information as they make decisions. Nothing in the language of NEPA distinguishes between
 17 environmental effects on one or the other side of a border. To the contrary, NEPA instructs federal
 18 agencies to "recognize the *worldwide* and long-range character of environmental problems" and to
 19 support programs promoting "international cooperation in anticipating and preventing a decline in the
 20 quality of mankind's *world* environment." 42 U.S.C. § 4332(2)(F), *emphasis added*.

21 54. Moreover, CEQ clarified in a 1997 Memorandum to heads of agencies that "the entire
 22 body of NEPA law directs federal agencies to analyze" reasonably foreseeable effects of proposed actions
 23 "regardless of where those impacts might occur." It concluded that "based on legal and policy
 24 considerations, . . . agencies must include analysis of reasonably foreseeable transboundary effects of
 25 proposed actions in their analyses of proposed actions in the United States."¹

26 55. The CEQ Memorandum further notes that analyzing transboundary effects of U.S.-based
 27

28 ¹Memorandum *available at*
http://www.ntc.blm.gov/krc/uploads/425/ApxS_CEQ-Guidance_TransboundaryImpacts.pdf.

1 federal actions is an important step toward implementing treaty obligations and customary international
2 law, both of which prohibit nations from taking actions in their own territories that harm the territories of
3 other states. *See Trail Smelter Case (U.S. v. Canada)*, 3 R.I.A.A. 1905 (1941); Stockholm Declaration on
4 the Human Environment, Principle 21, June 16, 1972, 11 I.L.M 1416; Rio Declaration on Environment
5 and Development, Principle 2, June 13, 1992, 31 I.L.M. 874.

6 56. Where, as here, NEPA review poses no conflict with U.S. foreign policy, NEPA applies
7 extraterritorially. *See, e.g., Environmental Def. Fund, Inc. v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993)
8 (NEPA applies to agency decisions regarding conduct outside the U.S. despite general presumption
9 against extraterritoriality because NEPA “is designed to control the decisionmaking process” rather than
10 “the substance of agency decisions”); *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972)
11 (allowing nonresident Canadian citizen and Canadian environmental organization to intervene in a
12 NEPA-based challenge to the Secretary of the Interior’s grant of a pipeline permit with international
13 impacts); *Sierra Club v. Adams*, 578 F.2d 389, 391 (D.C. Cir. 1978) (presuming that NEPA applied to the
14 Panamanian section of a highway project being built by Panama, Colombia, and the U.S.); Executive
15 Order 12114 (1979) (“major Federal actions outside the United States . . . which significantly affect
16 natural or ecological resources of global importance” require an EIS.

17 57. Wildlife, ecosystems, viewsheds, watersheds, airsheds, and other natural features pay no
18 heed to political boundaries. The effects of the Project in Mexico are interconnected with and
19 interdependent on the effects in the United States. NEPA, international law, existing case law, and
20 common sense all require that DOE consider all of the Project’s potentially significant environmental
21 effects, no matter which country they impact. Accordingly, DOE’s EIS must analyze the Project’s
22 environmental effects in Mexico as well as in the U.S. In addition, DOE must require or itself conduct a
23 full EIS for the ESJ Wind Project’s effects in the U.S. and in Mexico.

24 58. Multiple international agreements, as well as Mexico’s own environmental assessment
25 requirement, amply demonstrate that there is no conflict with Mexican law or executive agreements in
26 requiring DOE’s NEPA compliance. *See, e.g., La Paz Agreement Art. 7* (parties should assess
27 environmental impacts of border projects). In addition, requiring DOE to analyze the effects that the
28 Project would have on the environment in Mexico poses no enforcement difficulties, because DOE can

1 simply refuse to issue a Presidential permit if the proper analysis is not done.

2 **The FEIS Fails to Take a “Hard Look” at Myriad Environmental Impacts.**

3 59. NEPA requires that an EIS take a “hard look” at the environmental impacts of proposed
4 major federal actions and provide a “full and fair discussion” of all direct, indirect, and cumulative
5 impacts. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 368 (1989); 40 C.F.R. § 1502.1; 40
6 C.F.R. § 1508.25(c); *see also National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 733 (9th
7 Cir. 2001). The EIS must “foster both informed decision-making and informed public participation.”
8 *Marsh*, 490 U.S. at 368. The FEIS’s discussion of many of the Project’s environmental impacts is
9 inadequate, as explained below.

10 **Noise impacts**

11 60. The FEIS fails to show that DOE took the requisite “hard look” at noise impacts. The
12 FEIS uses a 60 dBA threshold to determine when average increases in ambient noise and “impulse
13 noises” become significant. However, the studies on which DOE relies, which were published in 1997,
14 caution that 60 dBA is only a “starting point for passerine impacts until more specific research is done,”
15 and they “suggest that [a] 50 or 55 dBA [threshold] may be more appropriate.” FEIS 3.28.

16 61. The FEIS does not explain why DOE chose not to determine the most appropriate noise
17 threshold for birds in the Project area, nor whether it made any effort to identify additional research done
18 in the last fifteen years. The FEIS ignores the expert testimony of Dr. Travis Longcore (attached to
19 plaintiffs’ comments on the DEIS), which cites extensive research showing that the threshold for
20 significant negative impacts on bird species is often much lower than 60 dBA. An EIS is inadequate if it
21 rests on “stale scientific evidence.” *Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993).

22 62. The FEIS also fails to discuss how noise might affect Peninsular Bighorn Sheep, other
23 than mentioning that they could be “disturb[ed]” by helicopters, FEIS 3.34-35, despite studies suggesting
24 that loud noise (such as from helicopter overflights) can have an “extreme” “negative influence” on
25 bighorn sheep. *See, e.g., Vernon C. Bleich et al., Mountain Sheep Ovis canadensis and Helicopter*
26 *Surveys*, 70 Biological Conservation 1 (1994). Therefore, DOE failed to take the requisite “hard look” at
27 noise impacts.

28 ///

1 ***Biological impacts – Peninsular Bighorn Sheep***

2 63. In addition to failing to adequately address noise impacts, the FEIS fails to give
3 appropriate consideration to other potential impacts on Peninsular Bighorn Sheep. It concludes that
4 because the wind development area would not be fenced, “it would not create new physical barriers” to
5 PBS movement. FEIS 3.44. However, access and maintenance roads and the human activities associated
6 with them do create potential physical barriers and pose a danger to PBS using the area. In fact, the FEIS
7 concedes that habitat loss from the construction of wind energy facilities threatens the PBS, and that long-
8 term PBS management goals could be endangered by border development. FEIS 3.45.

9 64. DOE also failed to gather the necessary scientific data with respect to PBS. The FEIS
10 states that PBS “are known to cross I-8 occasionally and move south into Mexico to breed with other
11 populations.” FEIS 3.44-45. Yet it asserts that the U.S.-based sub-populations are “believed to be largely
12 independent” of those in Mexico. *Id.* It concedes, however, that the level of connectivity between U.S.
13 and Mexican sub-populations “is not well understood.” *Id.* These contradictory statements reveal a lack
14 of understanding of how the various PBS sub-populations in the U.S. and Mexico interact with one
15 another. NEPA obligates DOE to fill such analytic gaps through appropriate studies, monitoring and full
16 disclosure in an EIS.

17 ***Biological impacts - Quino checkerspot butterfly***

18 65. The FEIS does not adequately address the Project’s effects on the endangered Quino
19 Checkerspot Butterfly (“QCB”). All surveys of potential QCB food plants in the Project area were
20 conducted using FWS’s outdated 2002 protocols. Since 2002, three additional plants have been
21 identified as significant food sources for QCB larvae, one of which FWS specifically recognized as a new
22 food source in its 2009 five-year review for the QCB. 2009 5-year Review at 9. Therefore, the FEIS’s
23 conclusion that “the [QCB] is not expected to occur in the project area” is arbitrary and capricious and is
24 invalid because it is based on stale scientific evidence. *Seattle Audubon*, 998 F.2d at 704.

25 ***Other impacts***

26 66. The FEIS’s analysis of helicopter usage and its potential effects on wildlife is cursory and
27 inadequate. The FEIS acknowledges that helicopters have “the potential to disturb wildlife” due to dust
28 and noise, but does not quantify or further discuss these impacts. FEIS 3.34-35. It also offers no

1 potential mitigation measures for any negative effects of helicopter usage.

2 67. The FEIS does not analyze the aviation impacts of wind turbines at the ESJ Wind Project.
3 Although small planes are especially vulnerable to wind shear above wind projects, the ESJ Wind
4 Project's impacts on them are ignored.

5 **The FEIS Does Not Appropriately Address Incomplete or Unavailable Information.**

6 68. When an agency is faced with incomplete or unavailable information regarding potential
7 environmental effects of a proposed action, it "shall" either obtain the information or include in the EIS:
8 1) a statement that the information is unavailable, 2) a statement of the relevance of the unavailable
9 information, 3) a summary of other credible evidence, and 4) "the agency's evaluation of [reasonably
10 foreseeable significant adverse] impacts based upon theoretical approaches or research methods generally
11 accepted in the scientific community." 40 C.F.R. § 1502.22(b).

12 69. The FEIS fails to provide these required statements, summary and evaluation where it
13 asserts that information is incomplete or unavailable. For example, the FEIS states that "[s]ome projects
14 could not be included [in the cumulative impacts analysis] due to the lack of sufficient information for
15 assessment." FEIS at S-23. However, the FEIS does not include a statement explaining the relevance of
16 the missing information, or describe the agency's attempt to evaluate these projects' impacts. In fact, the
17 FEIS never even specifies what those projects are or what information was needed in order to analyze
18 their impacts.

19 70. As discussed above, the FEIS likewise fails to provide the required explanatory
20 statements, summary and evaluation where it relies upon admittedly incomplete information concerning
21 noise impacts and impacts on the cross-border PBS sub-population.

22 **The FEIS Does Not Include Adequate Mitigation Measures.**

23 71. NEPA requires that an EIS include a "detailed discussion of possible mitigation
24 measures." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989); 40 C.F.R. §
25 1502.14(f). The FEIS acknowledges, as it must, that the proposed transmission line poses a threat to
26 aerial firefighting operations, but it makes no mention of mitigation measures that would render
27 transmission lines and towers more visible. FEIS 3.142. The FEIS even fails to include as mitigation the
28 eminently feasible measure – suggested in DOE's own Fire Plan – of lighting the towers that would lack

1 lighting. FEIS 3.168-169; Appendix B.8 (Short Form Fire Protection Plan) (towers “may need warning
2 lights on them due to proximity of the airport and the potential for Firefighting aircraft to operate in the
3 area”).

4 72. Even though modern ecological science recognizes that significant effects on wildlife as
5 well as humans occur with noise levels below 60 dBA, the FEIS uses an outdated 60 dBA threshold to
6 determine when average increases in ambient noise and “impulse noises” become significant. Although
7 “typical noise levels” during construction will exceed 60 dB, FEIS Table 3.6-2, and thus warrant
8 mitigation to prevent harm, the FEIS erroneously asserts that “no mitigation measures are indicated.”
9 FEIS 3.133.

10 **DOE Did Not Adequately Respond to Comments.**

11 73. “An agency preparing a final environmental impact statement shall assess and consider
12 comments . . . and shall respond, . . . stating its response in the final statement.” 40 C.F.R. § 1503.4(a).
13 When the agency does not modify or correct its analysis in response to comments, it should “[e]xplain
14 why the comments do not warrant further agency response . . . and, if appropriate, indicate those
15 circumstances which would trigger agency reappraisal or further response.” C.F.R. § 1503.4(a)(5). The
16 FEIS fails to adequately respond to a number of plaintiffs’ comments.

17 74. As raised in plaintiffs’ comments on the DEIS and discussed above, the purpose and need
18 statement is still unduly narrow and fails to state an actual need for or purpose of the underlying Project.
19 DOE did not modify the purpose and need statement in response to plaintiffs’ comments or explain why
20 it failed to do so.

21 75. Due to its unlawfully narrow purpose and need statement, the FEIS still fails to consider a
22 reasonable range of alternatives, and dismisses plaintiffs’ feasible suggestions without good cause or
23 adequate explanation.

24 76. As discussed above, DOE failed to correct its deficient noise analysis in response to
25 plaintiffs’ comments that noise levels below 60 dBA are known to have substantial adverse impacts on
26 bird species. The FEIS does not explain why DOE continues to use outdated and inaccurate thresholds
27 when analyzing noise impacts.

28 77. The FEIS cites the same outdated QCB surveys as the DEIS. Despite plaintiffs’ comments

1 noting this deficiency as discussed above, the FEIS still relies on FWS's 2002 protocols that omit three
2 plants that are now recognized as food sources for QCB larvae. DOE did not explain why it continues to
3 use the outdated 2002 protocols, despite having significant new information that contradicts its
4 inadequate analysis.

5 **SECOND CLAIM FOR RELIEF**

6 (Violation of ESA)

7 (Against All Defendants)

8 78. Plaintiffs incorporate by reference all preceding paragraphs.

9 79. The Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, requires federal agencies
10 to ensure that their actions are not likely to jeopardize the continued existence of any endangered or
11 threatened species. 16 U.S.C. § 1536(a)(2). ESA establishes consultation procedures to ensure that
12 agencies undertaking or approving an action, such as DOE here, adequately confer with FWS regarding
13 the potential adverse impacts of proposed projects on federally-listed threatened and endangered species.
14 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.12; *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of*
15 *Reclamation*, 138 F. Supp. 2d 1228, 1240-47 (N.D. Cal. 2001).

16 80. An agency may request informal consultation with FWS to help determine whether more
17 extensive formal consultation is required. If during informal consultation the agency and FWS agree that
18 the proposed action is "not likely to adversely affect listed species or critical habitat, the consultation
19 process is terminated, and no further action is necessary." 50 C.F.R. § 402.13(a). Despite their failure to
20 conduct adequate investigation regarding the Project's potential adverse effects on listed species such as
21 the Peninsular Bighorn Sheep, FWS and DOE agreed on March 8, 2011 that informal consultation was
22 complete, and no further action was necessary to comply with ESA. FEIS Appendix C.10.

23 81. In evaluating whether an action is likely to adversely affect listed species or their critical
24 habitats, FWS must use "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2);
25 *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (agency violated ESA by failing to analyze the
26 best scientific and commercial data available); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th
27 Cir. 1988) (agency's failure to gather listed species and habitat data violated ESA because the agency
28 failed to provide the best scientific and commercial data available); *Greenpeace Found. v. Mineta*, 122 F.

1 Supp. 2d 1123, 1132-33 (D. Hawaii 2000) (agency ignored relevant data regarding the project’s effects on
2 endangered species, and the court held as a matter of law that the agency’s decision that the action was
3 “not likely to jeopardize” listed species was arbitrary and capricious); *Conservation Law Found. v. Watt*,
4 560 F. Supp. 561, 572-73 (D. Mass 1983) (agency violated ESA by failing to incorporate into the
5 biological opinion the best scientific and commercial data available).

6 82. After consultation with FWS is complete, the action agency – in this case DOE – must
7 reinstate consultation if, at any time, “new information reveals effects of the action that may affect listed
8 species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(b).

9 83. This Complaint states a claim for relief under ESA and the APA against the FWS.
10 Plaintiff will also pursue ESA claims against DOE, the action agency, pursuant to the 60-day notice
11 requirement of the citizen suit provision described at 16 U.S.C. § 1540(g)(2)(C), and amend this
12 Complaint accordingly after the 60-day notice period matures.

13 **Quino Checkerspot Butterfly**

14 84. When evaluating whether the Project was likely to adversely affect the endangered Quino
15 Checkerspot Butterfly (“QCB”), FWS and DOE failed to gather and use the best scientific and
16 commercial data available. As discussed above, DOE’s surveys for the QCB followed FWS’s 2002
17 survey protocols. These protocols are unacceptably outdated because they exclude several plants recently
18 discovered to be important food sources for QCB larvae, including the *Collinsia concolor*, *Antirrhinum*
19 *coulterianum*, and *Plantago patagonica*. In fact, during its 2009 five-year review for the QCB, FWS
20 noted that “[i]n 2008, oviposition and larval development were recorded *for the first time on a new*
21 *species* of host plant, *Collinsia concolor*.” 2009 5-year Review at 9, emphasis added. Yet DOE used the
22 outdated surveys that did not include *Collinsia concolor* as a host plant.

23 85. Surveyors might have found the newly-recognized host plants in the Project area if they
24 had been using more up-to-date protocols, and the presence of such plants would have changed the
25 analysis of whether QCB and QCB larvae are likely to occur in the Project area. Such an analysis is
26 especially important in light of the fact that vegetation under the new transmission line – including
27 potential QCB habitat – will be *permanently* destroyed by the Project. By relying on outdated survey
28 protocols, DOE and FWS failed to use the best scientific and commercial data available.

1 86. In addition, DOE and FWS violated ESA when they failed to reinitiate consultation when
2 important new information came to light. DOE and FWS should have reinitiated consultation when they
3 were made aware of the fact that additional plants not included in the 2002 survey protocols had been
4 recognized as QCB larvae food sources. Plaintiffs' comments on the DEIS alerted DOE and FWS to this
5 new information.

6 **Peninsular Bighorn Sheep**

7 87. On March 18, 1998, FWS listed the Peninsular Bighorn Sheep as endangered under ESA.
8 63 Fed.Reg. 13134 - 13150.

9 88. DOE and FWS failed to use the best scientific data available when considering the effects
10 of the Project on the endangered Peninsular Bighorn Sheep. Habitat loss and fragmentation and human
11 disturbance are among the primary threats to PBS. *See, e.g.*, FWS, Recovery Plan for Peninsular Bighorn
12 Sheep in the Peninsular Ranges, California, October 25, 2000, pp. 38, 155 ("Recovery Plan"); 66 Fed.
13 Reg. 8650-51. Human disturbance can alter PBS behavior and cause PBS to abandon traditional habitat
14 areas. *Id.* at 43.

15 89. PBS are a distinct population segment of the desert bighorn sheep. *Id.* at 1. PBS exist
16 along the Peninsular Mountain Ranges in Southern California and Mexico in dry, barren desert areas. *Id.*
17 at 6. In the Peninsular Ranges, bighorn sheep habitat is most often found on east facing slopes. *Id.* at 10.
18 The steep, rugged terrain of desert mountains provides essential escape routes for the PBS, who can
19 outrun their predators in this environment but not others. *Id.* at 6. Further, PBS prefer sparsely vegetated
20 areas that provide maximum visibility and therefore ample time to avoid or evade danger. *Id.* Ewes
21 typically seek out the "most precipitous terrain, where lambs will presumably be safest" to give birth. *Id.*
22 In addition to this mountainous terrain, PBS occasionally utilize flat terrain and valley floors to access
23 resources and travel between ewe groups, or subpopulations. *Id.* at 7.

24 90. Currently, there are at least 8 separate PBS subpopulations whose interconnectedness aids
25 in species survival. *Id.* at 6, 10. Although ewes tend to remain in one geographical area, rams often
26 range between ewe groups. *Id.* at 12. This movement among ewe groups creates a need for protection of
27 the land over which rams might travel, making a critical habitat designation difficult but essential to the
28 survival of PBS. *Id.*

1 91. Like these connectivity corridors, low-elevation habitat is essential to PBS species
2 survival. *Id.* at 6. The alluvial fans and washes at lower elevations provide PBS with necessary resources
3 at times when they are not available elsewhere. These areas provide an abundance of nutrient rich forage,
4 which is necessary both during dry years and for lambs and nursing ewes. *Id.* at 6-8. Furthermore, these
5 low-elevation habitats often provide water at times when there is none at higher elevations. *Id.* Access to
6 these resources is essential to PBS conservation and recovery.

7 92. The FEIS recognizes that the Project area includes “key foraging habitat requirements”
8 “identified as primary constituent elements for bighorn sheep recovery,” and that multiple comments on
9 the DEIS asserted that bighorn sheep use the Project area. FEIS 3.20-21. *See also, e.g.*, Public Hearing
10 Transcript, Oct. 5, 2010 at 27-28, 36-37, 40, 48-49, 54; Derik Martin comments on DEIS; Aaron
11 Quintanar comments on DEIS. The FEIS also notes that PBS “are considered to have high potential for
12 occurring in the survey area.” FEIS 3.17.

13 93. Despite this ample information about how Project activities could have negative impacts
14 on the PBS, and despite repeated anecdotal reports of PBS using the Project area, the FEIS asserts that
15 “there is a very low probability of the species using the Project area,” FEIS 3.20, and FWS declined to
16 recommend surveys for PBS. The conclusion that PBS will not occur in the Project area is
17 unsubstantiated. The FEIS dismisses the evidence, provided repeatedly during the public comment
18 period on the DEIS, that PBS use the Project area. The FEIS states that “[l]ocal residents of the area have
19 reported incidental observations of Peninsular Bighorn Sheep. However, the locations of the sightings
20 from these sources are anecdotal and not rigorously documented.” FEIS 3.21. It is no surprise that there
21 was a lack of rigorously documented sightings when FWS declined to recommend the surveys that would
22 have provided such documentation. DOE’s and FWS’ willful disregard of readily available scientific
23 evidence and refusal to conduct necessary studies violated their duty to use the best scientific data
24 available.

25 94. The FEIS also reveals that DOE and FWS failed to gather the best scientific data with
26 respect to the mixing of PBS sub-populations. Such data is critical to understanding the Project’s effects
27 on the PBS because habitat fragmentation can isolate sub-populations from one another. The FEIS states
28 that PBS “are known to cross I-8 occasionally and move south into Mexico to breed with other

1 populations,” that the U.S. based sub-populations are “believed to be largely independent” of those in
2 Mexico, and that the level of connectivity between U.S. and Mexican sub-populations “is not well
3 understood.” FEIS 3.44-45. These contradictory statements reveal a poor understanding of how PBS
4 sub-populations interact, and an inexcusable failure by DOE and FWS to gather the information
5 necessary to determine the Project’s effects on the PBS.

6 **Connected Actions**

7 95. DOE and FWS failed to fully analyze the effects on listed species of all actions connected
8 to the proposed transmission line. The scope of the Project is an important consideration when analyzing
9 its effects on listed species and their critical habitats. *Conner v. Burford, supra*, 848 F.2d at 1453.
10 Courts “interpret the term ‘agency action’ broadly,” *Id.* (quoting *TVA v. Hill*, 437 U.S. 153, 173 & n. 18
11 (1978)), because “[c]aution can only be exercised if the agency takes a look at *all the possible*
12 *ramifications* of the agency action.” *Id.* at 1453, emphasis added (quoting *N. Slope Borough v. Andrus*,
13 642 F.2d 589, 608 (D.C. Cir. 1980)).

14 96. As explained above, all components of the ECO Substation project, including the
15 switchyards, the loop-in to the Southwest Power Link, the 13.3 mile transmission line to the Boulevard
16 Substation, and upgrades to the Boulevard Substation, are connected to the proposed transmission line.
17 When evaluating whether the Project would adversely affect listed species or their critical habitats, DOE
18 and FWS failed to consider the effects of all aspects of the ECO Substation project.

19 97. In 2009, Rocks Biological Consulting conducted a QCB survey in preparation for the ECO
20 Substation project. The survey confirmed that “both QCB and larval host plants” were present. SDG&E
21 East County Substation Project, Quino Checkerspot Butterfly Survey Report, 2010 at 2. The 13.3 mile
22 transmission line would cross 1.5 miles of designated critical habit for the QCB, Substation/Tule
23 Wind/Energia Sierra Juarez Gen-Tie Projects DEIS at D.2-58, and the project would potentially have
24 “significant” effects that “cannot be mitigated.” *Id.* at D.2-148. Because the ECO Substation project is a
25 connected action, DOE and FWS should have considered its effects on listed species and their critical
26 habitats in their ESA analysis for the Project.

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28 ///

1 **THIRD CLAIM FOR RELIEF**

2 (Violation of the Migratory Bird Treaty Act)

3 (Against All Defendants)

4 98. Plaintiffs incorporate by reference all preceding paragraphs.

5 99. The Migratory Bird Treaty Act (“MBTA”), 16 U.S.C. sections 701 *et seq.*, directs that
6 unless otherwise permitted, “it shall be unlawful at any time, by any means or in any manner, to . . . take
7 [or] kill . . . any migratory bird . . . nest, or egg of any such bird . . . included in the terms of the
8 conventions between the U.S. and Great Britain . . . the United Mexican States . . . the government of
9 Japan . . . and the Union of Soviet Socialist Republics for the conservation of migratory birds and their
10 environments” 16 U.S.C. sections 703.

11 100. MBTA applies with equal force to federal agencies as it does to private individuals.
12 *Humane Society of the U.S. v. Glickman*, 217 F.3d 882, 884-88 (D.C.Cir. 2000); *American Bird*
13 *Conservancy, Inc. v. F.C.C.*, 516 F.3d 1027, 1032 (D.C.Cir. 2008).

14 101. Federal agencies must ensure that their actions do not result in violations of MBTA. *City*
15 *of Sausalito v. O’Neill*, 386 F.3d 1186, 1204 (9th Cir. 2004); *Mahler v. U.S. Forest Service*, 927 F. Supp.
16 at 1573; *Humane Society, supra*, 217 F.3d at 885; *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429,
17 438-39 (1992); Exec. Order No. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds,
18 66 Fed. Reg. 3853 (Jan. 17, 2001).

19 102. Numerous migratory bird species inhabit or use the Project site, including the golden
20 eagle,² the California condor, black-throated sparrow, western scrub-jay, ash-throated flycatcher, western
21 kingbird, red-tailed hawk, northern mockingbird, common raven, and the loggerhead shrike. FEIS 3.17.

22 103. As the FEIS recognizes, “[w]ind turbines kill birds and bats, usually because the wind
23 turbine blades strike birds and bats flying into the rotor zone, the portion of the sky swept by the rotor
24 blades.” FEIS 3.42. The FEIS states that “further study of [golden eagles] and their territories is
25 necessary” to determine whether the Project will actually cause mortalities. *Id.* The FEIS further states
26 that

27 _____
28 ² FEIS 3.41 (“the golden eagle is known to occur in the ESJ project region both in the U.S. and in Mexico”).

1 Construction and operation activities related to the ESJ Wind project in Mexico have the
 2 potential for reasonably foreseeable impacts to golden eagles and other migratory birds
 3 that in the course of their daily activities move across the U.S.-Mexico border. Such
 4 potential impacts include: 1) injury or death to migratory birds from collisions with wind
 5 turbines and related transmission facilities; 2) increased loss and adverse modification of
 habitat, particularly for the black-tailed jackrabbit, a special-status species and primary
 prey source for golden eagles and other migrating raptors in the area; and 3) direct
 disturbance of golden eagles (including nest abandonment) that may result in few nest
 attempts and reduce nest productivity.

6 FEIS 3.40.

7 104. The impacts of the Project in the U.S. include causing the death and harassment of
 8 migratory birds. DOE's ROD admits that "[u]nder all action alternatives, some bird mortality could
 9 result from collisions with the transmission line even after mitigating measures are applied." 77 FR
 10 49790 (August 17, 2012).

11 105. The FEIS claims that FWS bears no responsibility for migratory bird mortalities because
 12 they may occur outside the U.S. and thus beyond FWS' enforcement jurisdiction. FEIS 3.43. However,
 13 there is nothing in MBTA that allows *DOE* to permit activities which will admittedly result in migratory
 14 bird mortalities without complying with MBTA, regardless of *FWS*' enforcement capability. This lawsuit
 15 challenges DOE's failure to comply with *its* legal responsibilities under MBTA, not FWS' possible future
 16 failure to enforce MBTA on foreign soil. MBTA's section 703 establishes a blanket prohibition against
 17 the taking of migratory birds "except as permitted by regulations." It commands that:

18 Unless and except as permitted by regulations made as hereinafter provided in this
 19 subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue,
 20 hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer
 21 to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import,
 22 cause to be shipped, exported, or imported, deliver for transportation, transport or cause to
 23 be transported, carry or cause to be carried, or receive for shipment, transportation,
 carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any
 product, whether or not manufactured, which consists, or is composed in whole or in part,
 of any such bird or any part, nest, or egg thereof, included in the terms of the conventions
 between the United States and Great Britain for the protection of migratory birds
 concluded August 16, 1916 (39 Stat. 1702).

24 16 U.S.C. § 703. The phrase "by any means or in any manner" certainly includes issuing a Presidential
 25 permit for a project that DOE acknowledges will take or kill migratory birds. *Id.*

26 106. Despite the fact that the Project is likely to kill migratory birds during both its construction
 27 and operation phases, DOE has not applied for or secured any permits under the MBTA.

28 107. DOE listed compliance with MBTA as a "Potentially Required Permit/Approval." Yet

1 DOE failed to include in either its FEIS or its Permit any discussion of the need for ESJ to secure an
2 MBTA permit allowing ESJ to take migratory birds under the MBTA. FEIS 8.1.

3 108. By approving the Project and the resultant death of migratory birds without requiring that
4 the Project applicant or operators obtain an MBTA permit, DOE violated the MBTA (16 U.S.C. section
5 703) and the APA's prohibition on unlawful agency action (5 U.S.C. section 706(2)(A) and (D)).

6 **FOURTH CLAIM FOR RELIEF**

7 (Violation of the Bald Eagle and Golden Eagle Protection Act)

8 (Against All Defendants)

9 109. Plaintiffs incorporate by reference all preceding paragraphs.

10 110. The federal Bald and Golden Eagle Protection Act ("Eagle Act"), 16 U.S.C. section 668,
11 contains criminal and civil prohibitions against the taking of Golden Eagles. Subdivision (a) makes it a
12 criminal offense to "knowingly, or with wanton disregard for the consequences of his act take . . . in any
13 manner. . . any golden eagle . . ." 16 U.S.C. § 668(a). Subdivision (b) makes it a civil offense to "take
14 . . . in any manner. . . any golden eagle." 16 U.S.C. § 668(b). Under the Eagle Act, "'take' includes . . .
15 pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." 16 U.S.C. § 668c;
16 *accord*, 50 C.F.R. § 22.3 ("Take includes . . . pursue, shoot, shoot at, poison, wound, kill, capture, collect,
17 or molest or disturb").

18 111. In *Gonzales v. Raich*, 545 U.S. 1, 26 n. 36 (2005) the U.S. Supreme Court cited the
19 prohibition on the take of eagles in the Eagle Act, comparable to ESA's take provision, as an example of
20 "a rational (and commonly utilized) means of regulating commerce." *See also* 16 U.S.C. § 668.

21 112. As alleged above, the FEIS recognizes that wind turbines kill birds and states that further
22 study of eagles and their territories is necessary to determine whether the Project will actually cause
23 mortalities. FEIS 3.42.

24 113. Also as alleged above, the FEIS acknowledges that Project activities in Mexico are
25 reasonably certain to result in the take of golden eagles, including injury or death, adverse modification of
26 habitat, and direct disturbance. FEIS 3.40.

27 114. DOE's approval of the Project violates the Eagle Act, as species protected under this Act
28 will likely be taken as a result of DOE's approval. DOE's failure to enter into a memorandum of

1 understanding with FWS providing for the protection of golden eagles is a violation of the Eagle Act and
2 of Executive Order No. 13186.

3 115. DOE's approval of the Project without complying with the Eagle Act constitutes a failure
4 to proceed in accordance with law in violation of the APA, 5 U.S.C. § 706(2)(A) and (D).

5 **PRAYER FOR RELIEF**

6 116. As relief for the above violations of law, plaintiffs respectfully request that this Court:

- 7 1. Adjudge and declare that DOE's August 2012 grant of Presidential Permit PP-334
8 violates NEPA, ESA, MBTA, the Eagle Act, and the APA;
- 9 2. Order DOE to withdraw Presidential Permit PP-334 and the Project FEIS until
10 such time as it has complied with NEPA, the ESA, and their implementing
11 regulations;
- 12 3. Preliminarily and permanently enjoin DOE from initiating or permitting any
13 activities in furtherance of the Project that could result in any change or alteration
14 of the physical environment unless and until the defendants comply with the
15 requirements of NEPA, ESA, MBTA, the Eagle Act, and their implementing
16 regulations;
- 17 4. Award plaintiffs their reasonable attorneys' fees and costs and expenses incurred in
18 connection with the litigation of this action pursuant to the Equal Access to Justice
19 Act, 28 U.S.C. § 2412, ESA, 16 U.S.C. § 1540(g)(4), or as otherwise provided by
20 law; and
- 21 5. Award any other relief that this Court deems just and proper.
- 22

23 Dated: December 26, 2012

Respectfully submitted,

24 /s/ Stephan C. Volker
STEPHAN C. VOLKER
25 Attorney for Plaintiffs THE PROTECT OUR
26 COMMUNITIES FOUNDATION, BACKCOUNTRY
AGAINST DUMPS, and DONNA TISDALE

27

28

JS 44 (Rev. 09/11)

CIVIL COVER SHEET

'12CV3062 L BGS

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

The Protect Our Communities Foundation, Backcountry Against Dumps, and Donna Tisdale

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Stephan C. Volker, The Law Offices of Stephan C. Volker
436 - 14th Street, Suite 1300, Oakland, California 94612
Tel: (510) 496-0600 Fax: (510) 496-1366

DEFENDANTS

United States Department of Energy, Dr. Steven Chu, Secretary of the United States Department of Energy, Jerry Pell, Project Manager for the United States Department of Energy, etc.
County of Residence of First Listed Defendant _____

(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|---------------------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FOREFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Tort Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN

- (Place an "X" in One Box Only)
- 1 Original Proceeding
 - 2 Removed from State Court
 - 3 Remanded from Appellate Court
 - 4 Reinstated or Reopened
 - 5 Transferred from another district (specify)
 - 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
NEPA, MBTA, ESA, Bald and Golden Eagle Protection Act, Administrative Procedure Act
Brief description of cause: Defendants violated federal environmental laws. 16:668 - Bald Eagle Protection Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND (9 cxi) CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 12/26/2012 SIGNATURE OF ATTORNEY OF RECORD /s/ Stephan C. Volker

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____