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VIA EMAIL AND U.S. MAIL

Mr. Brian Mills
Office of Electricity Delivery and Energy Reliability (OE-20)
U.S. Department of Energy
1000 Independence Avenue, SW.
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Re: Comments of Backcountry Against Dumps, The Protect Our Communities Foundation, and Donna Tisdale on the United States Department of Energy's Energia Sierra Juarez Transmission Line Final Environmental Impact Statement (DOE/EIS-20120179)

Dear Mr. Mills:

INTRODUCTION

On June 8, 2012 the United States Environmental Protection Agency (EPA) published a Notice of Availability for the Final Environmental Impact Statement (FEIS) produced by the Department of Energy (DOE) for the proposed federal action of granting a Presidential Permit for the Energia Sierra Juarez U.S. Transmission Line Project ("ESJ Project" or "Project") pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. section 4321 *et seq.* 77 Fed. Reg. 34041. The Project would entail the construction, operation, maintenance, and connection of either a 230-kilovolt or a 500-kilovolt electric transmission line crossing the U.S.-Mexico Border. The line would connect the planned 1,250 megawatt La Rumorosa wind energy project in Baja California, Mexico with San Diego Gas & Electric's (SDG&E's) existing Southwest Powerlink transmission line via the proposed ECO Substation and expanded Boulevard Substation in Jacumba, California. The Project would be developed, owned and operated by Energia Sierra Juarez U.S. Transmission, LLC ("ESJ," formerly Baja Wind U.S. Transmission, LLC), a subsidiary of Sempra Energy (Sempra).

In accordance with EPA's Notice of Availability, Backcountry Against Dumps (BAD), The Protect Our Communities Foundation (POC), and Donna Tisdale (collectively, "Community Groups") submit the following comments on the scope and content of the FEIS for the ESJ Project. These comments follow Community Groups' November 1, 2010, comments on the ESJ Project Draft EIS (DEIS), and reply to DOE's FEIS responses thereto.

DISCUSSION

Reply to FEIS Response to 401-1: In taking a “hard look” at the ESJ Project under NEPA, DOE must determine the objectives of and need for the Project before issuing a Presidential Permit. So far, DOE has not taken the required hard look. In dismissing the alternative of transmission via the Western Energy Coordinating Council (WECC) Transmission Corridor (WECC Alternative) without detailed analysis, DOE highlighted its failure to independently analyze and demonstrate a need for the Project as NEPA requires. *Rankin v. Coleman*, 394 F.Supp. 647, 656-57 (E.D.N.C. 1975); *North Carolina Alliance for Transportation Reform, Inc. v. U.S. Department of Transportation*, 151 F.Supp.2d 661, 688 (M.D.N.C. 2001). The FEIS dismissed the WECC Alternative because “the WECC transmission corridor would not provide enough interconnection capability with the U.S. grid to deliver the capacity of the [La Rumorosa wind energy project].” FEIS 2-20. It appears that the Project’s real agenda is to provide transmission capacity for the importation of electricity to be generated by the La Rumorosa wind energy project. Indeed, the FEIS dismisses from detailed analysis any alternative which does not provide the required capacity. Yet the FEIS refuses to question the underlying need for the La Rumorosa wind energy project, without which no increase in transmission capacity would be required.

In order to be adequate, the FEIS must analyze where the electricity transported by the Project would be used, whether there is an existing or projected capacity shortfall or other condition that necessitates importation of energy, and whether ESJ has entered into any power purchase agreements with California utilities. DOE must show in the EIS that the asserted need for the Project *actually exists*. *Rankin*, 394 F.Supp. at 656-57; *North Carolina Alliance for Transportation Reform, Inc.*, 151 F.Supp.2d at 688. It does not. To the contrary, DOE admits that “the degree of energy partitioning between the [U.S. and Mexican markets for the electricity to be generated by the La Rumorosa wind energy project], if any, is *unknown* at this time.” FEIS 2-1 (emphasis added).

Further, even if the FEIS had shown that there was a need for imported power, its dismissal of the WECC Alternative still violates NEPA. Instead of independently verifying them, the FEIS just repeats – without independent analysis – the Project applicant’s assertions in nearly every respect. For example, the FEIS accepts without question the Project applicant’s assertion that the alternative would require “substantial upgrades” to Mexican transmission lines and “that such upgrades would require detailed studies and new international agreements that would likely delay delivery of power from the [La Rumorosa wind energy project].” FEIS 2-20. Yet even if true, this does not excuse DOE from analyzing the WECC alternative in detail. The purpose of an EIS is to compile just such “detailed studies.” DOE’s refusal to consider this alternative for the very reason that such studies might be required contravenes NEPA. Furthermore, the Project contemplated by the FEIS already requires an international agreement, demonstrating the spuriousness of DOE’s rationale for not fully analyzing the WECC Alternative.

Reply to FEIS Response to 401-2: The FEIS states that “[i]mpacts in Mexico are outside the scope of analysis under NEPA, except to the extent that they result in impacts in the U.S.” FEIS 400-4. For this reason, DOE decided not to analyze the La Rumorosa wind energy project – and its full range of accompanying impacts – as a connected action. DOE’s rationale misapprehends the law.

NEPA does not distinguish between environmental effects on one or the other side of a border. Rather, NEPA states that an EIS is required for actions “affecting the human environment.” NEPA § 102(2)(c). It is irrelevant for purposes of determining the environmental impact of an action whether it occurs on one side or the other of a border. Thus, NEPA does not allow DOE to only analyze impacts from the La Rumorosa wind energy project in the United States and not examine all impacts to the human environment, including those in Mexico. Accordingly, it has long been settled law that NEPA applies extraterritorially. Forty years ago, the D.C. Circuit confirmed NEPA’s extraterritorial application to the construction of the Trans-Alaska Pipeline. *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972).¹ More recently, in *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993), the D.C. Circuit held that NEPA applied to the National Science Foundation’s decision to incinerate food waste in Antarctica. As connected actions, development of power generation facilities connected to the transmission lines currently being studied by DOE must be carefully considered whether they occur within the United States or not.

International law does not curtail NEPA’s extraterritorial reach. DOE may exercise jurisdiction over activities which have substantial, direct, and foreseeable effects upon or within the United States. Restatement (Third) of Foreign Relations § 403(2) (stating the Effects Principle); see, also *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923-924 (D.C. Cir. 1984) (relatively small economic effects are sufficient to extend domestic antitrust law to a foreign airline). The mere fact that electricity ultimately ends up in the United States constitutes a substantial effect. Restatement (Third) of Foreign Relations § 402(1)(c). Indeed, DOE is specifically authorized under United States law to attach conditions to the issuance of permits which may be required by the public interest. Executive Order 10485 § 1(a)(3); 12,038 (1978).²

¹*Accord, Sierra Club v. Atomic Energy Commission*, 4 Env’tl. L. Rep. (Env’tl. L. Inst.) 20,685 (D.D.C. 1974) (export of nuclear fuels and technologies required an EIS by the Atomic Energy Commission and the Export-Import Bank.) and *Environmental Defense Fund v. U.S. Agency for International Development*, 6 Env’tl. L. Rep. (Env’tl. L. Inst.) 20,121 (D.D.C. Dec. 5, 1975) (international pest management program required an EIS by USAID).

² DOE’s regulations state that a cross-border energy operator “shall have a Presidential Permit, in compliance with Executive Order 10485, as amended by Executive Order 12038.” 10 C.F.R. § 205.320(a) (1980).

Accordingly, before approving the ESJ Presidential Permit, DOE should require or itself conduct a full NEPA analysis of the connected La Rumorosa wind energy project. Doing so poses no enforcement difficulties because DOE can simply refuse to issue an importation permit if the proper analysis is not done. Multiple international agreements, as well as Mexico's own EIS requirement, amply demonstrate that there is no conflict with Mexican law or foreign policy implications in requiring NEPA compliance. *See, e.g., La Paz Agreement Art. 7* (parties should assess environmental impacts of border projects).

In addition to fully analyzing the La Rumorosa wind energy project's impacts outside the United States, DOE must also more thoroughly analyze the project's impacts *within* the United States. Review of a "partial translation of the Mexican [EIS] permit" cannot constitute a hard look. FEIS 3-43. The Mexican EIS acknowledges that its studies are incomplete. According to DOE's partial translation of that document, Mexico has deferred recommending mitigation measures until the extent of avian impacts is more fully understood. "It is not known whether these or other specific avian protection measures would be incorporated into the [La Rumorosa wind energy project]." *Id.* Essentially, DOE has acknowledged that it has absolutely no idea what kinds of impacts to expect from the La Rumorosa wind energy project on golden eagles, bats, the Quino checkerspot butterfly, the barefoot banded gecko, Peninsular bighorn sheep, or mountain lions. *Id.* at 3-42 - 3-45. Further, while the FEIS does recognize some of the impacts of the La Rumorosa wind energy project in the United States, it still fails to analyze the project as a connected action. But NEPA requires consideration of the cumulative effects of all foreseeable and related projects. *Border Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997, 1032-1033 (S.D. Cal. 2003).

Domestically, the FEIS likewise fails to analyze the Sunrise Powerlink Transmission Line ("SPTL"), the proposed Boulevard Substation upgrades, and the proposed transmission line connecting the Boulevard with the ECO Substation as connected actions, again reasoning that they are "independent" actions. FEIS Response to Comment 108-4. But they are not. The ESJ Gen-Tie Project could not function without the construction and operation of all three projects. Accordingly, the FEIS must examine the impacts of all three projects. *Thomas, supra*, 753 F.2d at 758-61; *Sierra Club v. U.S. Department of Energy*, 255 F.Supp.2d 1177, 1184-1185 (D. Colo. 2002) (holding that a road easement granted by the Department of Energy was connected for NEPA purposes to the mining activities it enabled).

Reply to FEIS Response to 401-3: The consideration of alternatives in the FEIS is still inadequate and does not reflect the full range required by NEPA. Despite our previous comments and the recommendations of numerous other commentors, the only alternatives analyzed in detail are a double-circuit 230-kV transmission line and a single-circuit 500-kV transmission line. NEPA requires agencies to rigorously explore and objectively analyze a reasonable range of alternatives. *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974); 40 C.F.R. § 1502.14(a); *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995). The alternatives should be wide-ranging and include options that may require additional approvals or participation by others. *Id.* Contrary to these

authorities, DOE failed to fully analyze (1) the WECC Alternative, and (2) a distributed generation alternative.

As Community Groups demonstrated on pages 5 and 6 of their November 1, 2010, DEIS comments, the WECC Alternative of transmitting power from the La Rumorosa wind energy project along existing CFE and SDG&E lines (the WECC Path 45) is a reasonable option to meet the applicant's stated objective of transporting electrical power generated by the La Rumorosa wind energy project in Mexico to the U.S. By reconductering the transmission lines, the amount of spare capacity available on the WECC Path could be doubled to accommodate increased Mexican exports from the La Rumorosa wind energy project. This alternative would be both practical and feasible, and would reduce costs and environmental impacts by eliminating unnecessary construction. Even in its current configuration, DOE acknowledges that this alternative would meet the Project's basic objectives. FEIS 100-9 (quoting ECO Substation EIR/EIS p. C48 to C-50). The use of existing infrastructure should always be given serious consideration. Thus, this alternative should not have been dismissed from detailed analysis.³

With respect to a distributed generation alternative, DOE cursorily dismissed it as outside the scope of the FEIS. But this alternative may not be ignored. It is feasible and would achieve the Project's objective of meeting the foreseeable energy needs of the San Diego area. The mere fact that it would require approvals from other agencies does not excuse DOE from giving it full consideration. NEPA requires agencies to assess a wide range of options, including those that may require additional approvals or participation by others. *Sierra Club v. Lynn, supra*, 502 F.2d at 62. Further, as explained above, the process for issuing a Presidential Permit must take into account the public's interest in the Project and conditions needed to protect that interest. A distributed generation alternative is both practical and feasible, and would have fewer environmental impacts and be far less expensive than constructing and operating new wind energy facilities, a transborder transmission line and multiple substations to import electricity from Mexico, as explained in Community Groups' DEIS comments.

Reply to FEIS Response to 401-4: As discussed above, the FEIS still fails to take the required "hard look" at the international impacts of the proposed action. This violates NEPA. *Hirt v. Richardson*, 127 F.Supp.2d 833 (W.D. Mich. 1999); *National Organization for Reform of Marijuana Laws v. United States Department of State*, 452 F.Supp. 1226, 1232-1233 (D.D.C. 1978); cf. Exec. Order No. 12114, 44 Fed. Reg. 1957 (1979), reprinted in 42 U.S.C.A. § 4321 app.

Reply to FEIS Response to 401-5: The FEIS makes no mention of potential mitigation measures to make transmission lines more visible, though the FEIS repeatedly acknowledges that these lines pose a threat to aerial firefighting operations. FEIS 3-142. The FEIS also fails to analyze the threat to firefighting and aerial traffic generally that is posed by transmission towers, or to include as mitigation the eminently feasible measure suggested in DOE's own Fire Plan of

³ For additional discussion of this point, see Response to Comment 401-1, *supra*.

illuminating the towers. FEIS 3-168 to 3-169; Appendix B.8 (Short Form Fire Protection Plan), p. 4 (towers “may need warning lights on them due to proximity of the airport and the potential for firefighting aircraft to operate in the area”).

Reply to FEIS Response to 401-6: DOE’s informal consultation with the United States Fish and Wildlife Service (FWS) under the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, was not properly incorporated into the DEIS. *See* DEIS Appendices C.7, C.8. DOE should prepare a supplemental EIS because the new information in the FEIS concerning Biological Resources Impacts is significant. 40 C.F.R. § 1502.9(c)(1). In addition, there is no analysis of impacts on biological resources in Mexico.

Reply to FEIS Response to 401-7: The FEIS fails to take the requisite hard look at noise impacts. It acknowledges that 50 or 55 dBA may be more appropriate to protect wildlife, but takes no action to determine the most effective standard. FEIS 3-28. In addition, the FEIS states that the 60 dBA standard applies both for “impulse noises” as well as for average noise over time periods from one to 24 hours. *Id.* This assumption remains untenable. The threshold for significance is substantially lower for some sensitive avian species and the FEIS has failed to take this undisputed fact into account.⁴ Additionally, typical noise levels remain well above the 60 dBA limit. FEIS Table 3.6-2. Noise levels surrounding the Project – at least the 500 kV alternative – would not remain below the 60 dBA threshold. During foul weather events, the property line dBA for the 500-kV line remains above threshold levels, and construction noise levels would be much greater. Yet no mitigation is contemplated. FEIS 3-133.

Reply to FEIS Response to 401-8: DOE’s response fails to address comments about Peninsular bighorn sheep, referring instead to Response to Comment 108-8, which only covers golden eagles and California condors. The added sections in the FEIS (3-44 to 3-45) conclude that because the wind development area would not be fenced, it will not create any physical barrier to cross border movement of Peninsular bighorn sheep. But access and maintenance roads and the human activities – including poaching – associated with them *do* pose barriers to bighorn use of these areas. In fact, the FEIS concedes that habitat loss from the construction of wind energy facilities threatens the bighorn, and that long-term bighorn management goals could be endangered by border development. FEIS 3-45. Thus, both the ESJ Gen-Tie Project and the La Rumorosa wind energy project have the potential to substantially impact Peninsular bighorn sheep genetic diversity and long-term population viability in both the U.S. and Mexico. Yet the FEIS fails to address these impacts.

Reply to FEIS Response to 401-9: DOE has taken no action to update its Quino checkerspot butterfly survey techniques, in spite of their outdated protocols.

⁴ See expert testimony from Dr. Travis Longcore (attached to earlier comments) showing that the threshold for significant negative impacts on bird species similar to the California horned lark and loggerhead shrike is much lower than 60 dBA.

Reply to FEIS Response to 401-10: The analysis in the FEIS of helicopter usage is cursory and inadequate and fails to determine noise impacts.

Reply to FEIS Response to 401-11: The FEIS concludes that carbon dioxide emissions are *de minimis* without analyzing the cumulative impact of all Project impacts, including the disturbance of alkaline soils.

Reply to FEIS Response to 401-12: The discussion of groundwater impacts in the FEIS remains inadequate. A proper analysis would also assess the disposal of wastewater, but no such analysis beyond that associated with human waste is contemplated. Further, the FEIS' discussion of construction and operational water use remains impermissibly vague.

Reply to FEIS Response to 401-13: In spite of its acknowledged failure to identify all of the nearby homes that would be impacted, the FEIS fails to provide any further identification of the residential uses which could be impacted by the Project. DOE must address the visual impacts of the Project on other nearby residences in addition to the three identified homes.

Reply to FEIS Response to 401-15: The only mitigation measure to reduce aviation impacts proposed in the FEIS is providing written notification to aerial fire responders. ESJ must also coordinate with commercial and recreational airplane operators who would also be forced to avoid the new transmission lines. In addition, the FEIS fails to analyze the aviation impacts of wind turbines (from the La Rumorosa wind energy project and elsewhere). Small planes are especially vulnerable to wind shear above wind power projects.

Reply to FEIS Response to 401-16: DOE still fails to provide a comprehensive analysis of the Project's substantial growth-inducing and other indirect and cumulative impacts from the many wind, solar and fossil fuel energy projects that the ESJ Gen-Tie Project would induce.

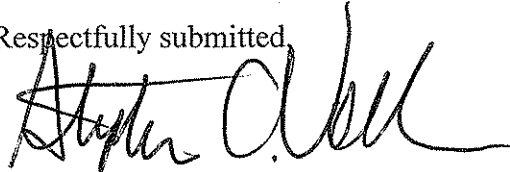
Reply to FEIS Response to 401-17: The ESJ Gen-Tie Project should be analyzed together with the massive expansion of electrical transmission facilities in San Diego and Imperial Counties that is currently underway. The cumulative effects of all of these connected projects will have short- and long-term consequences that reach far beyond the narrow scope of the present FEIS.

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CONCLUSION

The FEIS has failed to show a need for the Project, did not adequately analyze the Project's environmental impacts – or those of connected actions – and ignored numerous feasible alternatives suggested by Community Groups and by other commentors that could substantially reduce the Project's impact. This is unacceptable under NEPA, and must be rectified. Community Groups respectfully request that DOE address the issues we raise.

Respectfully submitted,



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