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25 IN THE UNITED STATES DISTRICT COURT
26 FOR THE CENTRAL DISTRICT OF CALIFORNIA

27 CENTER FOR BIOLOGICAL
28 DIVERSITY, a non-profit corporation,

Plaintiff,

v.

DEPARTMENT OF ENERGY, SAMUEL
W. BODMAN, as Secretary of Energy,

Defendants.

Case No.:

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

1 The Center for Biological Diversity (“the Center”) hereby alleges as follows:

2 **INTRODUCTION**

3 1. On October 5, 2007, the Department of Energy and Secretary Bodman
4 (hereinafter collectively referred to as “DOE”) designated the Southwest Area
5 National Interest Electric Transmission Corridor (“SW NIETC”) (Docket No.
6 2007–OE–02). 72 Fed. Reg. 56,992 (Oct. 5, 2007). The SW NIETC includes
7 seven counties in southern California and three counties in southwestern Arizona –
8 an area covering almost 70,000 square miles.

9 2. DOE’s designation allows utility right-of-way and transmission line
10 construction to enjoy a “fast-track” federal approval process, which allows energy
11 companies proposing to construct or modify electric transmission lines and
12 facilities to bypass state jurisdiction, environmental laws, and even private land
13 ownership – *i.e.*, by delegating to energy companies the power of eminent domain.
14 Despite the significant environmental effects of the SW NIETC, DOE failed to
15 analyze the environmental impacts of its Order, thus violating the National
16 Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (“NEPA”), the Federal Power
17 Act (“FPA”), as amended by the Energy Policy Act of 2005 (“EPAAct”), Pub. L.
18 109-58, codified at 16 U.S.C. § 824p, and the Administrative Procedure Act, 5
19 U.S.C. § 701 *et seq.* (“APA”), as discussed in more detail below.

20 **JURISDICTION AND VENUE**

21 3. This Court has subject matter jurisdiction over the claims set forth in this
22 Complaint pursuant to 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 2201
23 (declaratory relief), because this case involves a civil action for declaratory relief
24 arising under the laws of the United States – specifically, 5 U.S.C. § 702, which
25 authorizes any person aggrieved by an agency action under a relevant statute to
26 seek judicial review, and 5 U.S.C. § 706, which authorizes a reviewing court to
27 compel an agency to take an action that has been unlawfully withheld or
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1 unreasonably delayed, and to set aside agency actions that are found to be
2 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
3 the law.

4 4. The Center and its members are aggrieved by DOE's issuance of its
5 Order designating the SW NIETC. The Center and its members live in, work in,
6 and visit the area covered by the SW NIETC for wildlife viewing, scientific
7 research and observation, educational study, aesthetic enjoyment, spiritual
8 contemplation, and recreation. DOE's failure to consider the impact of the SW
9 NIETC is likely to cause an impairment of the state of the ecosystems and species
10 within the SW NIETC, and as a result, the Center's and its members' use of the
11 area is impaired and diminished.

12 5. This Court has jurisdiction over the DOE and the Secretary of Energy.
13 DOE is a federal agency established by the government of the United States.

14 6. Venue in the United States District Court for the Central District of
15 California is proper under 28 U.S.C. § 1391(e) because a substantial part of
16 property that is the subject of the action is located within the Central District of
17 California.

18 **PARTIES**

19 7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a
20 non-profit corporation with offices in Los Angeles, California; San Francisco,
21 California; Joshua Tree, California; San Diego, California; Tucson, Arizona;
22 Phoenix, Arizona; Portland, Oregon; Pinos Altos, New Mexico; and Washington,
23 D.C. The Tucson office is its primary office. The Center is actively involved in
24 species and habitat protection issues throughout North America and the World.
25 The Center's members (including its staff) include Arizona and California
26 residents with health, aesthetic, biological, educational, scientific, moral, spiritual,
27 economic, and recreational interests in the area designated as the SW NIETC. The
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1 Center and its members have participated in extensive efforts to protect and
2 preserve imperiled species, including those listed under the Endangered Species
3 Act, 16 U.S.C. § 1531, *et seq.* (“ESA”), and ecosystems of southern California and
4 southwest Arizona. The Center brings this action on its own behalf and on behalf
5 of its adversely affected members and staff.

6 8. As a result of the acts and omissions of Defendants alleged herein,
7 members of the Center have suffered and will continue to suffer injuries to their
8 health, aesthetic, biological, educational, scientific, moral, spiritual, economic, and
9 recreational interests in the area included in the SW NIETC.

10 9. Defendant DEPARTMENT OF ENERGY is the agency of the United
11 States Government responsible for administering and implementing the EAct,
12 pursuant to which DOE designated the SW NIETC.

13 10. Defendant SAMUEL W. BODMAN, is the Secretary of the Department
14 of Energy, and is sued in his official capacity only. Defendant Bodman has the
15 responsibility to insure that DOE complies with applicable laws including NEPA,
16 FPA, EAct, and APA. If ordered by the Court, Mr. Bodman has the authority and
17 ability to remedy the harm inflicted by Defendants’ actions.

18 **STATUTORY BACKGROUND**

19 **Energy Policy Act of 2005 and Federal Power Act**

20 11. Section 1221 of the EAct amended the Federal Power Act (“FPA”) to
21 add a new section 216, codified at 16 U.S.C. § 824p (hereinafter referenced as
22 codified in the FPA). Section 824p gives DOE authority first, to study electric
23 transmission congestion, and then, “[a]fter considering alternatives and
24 recommendations from interested parties,” to “issue a report, based on the study,
25 which may designate any geographic area experiencing electric energy
26 transmission capacity constraints or congestion that adversely affects consumers as
27 a national interest electric transmission corridor.” 16 U.S.C. § 824p(a)(1-2).

1 12. Once an NIETC is designated, the FPA authorizes the Federal Energy
2 Regulatory Commission (“FERC”) to issue a permit for the construction or
3 modification of an electric transmission line or facility in cases where: (1) FERC
4 decides that the state in which the line or facility is to be located does not have
5 authority to approve the siting of the line or facility or consider the interstate
6 benefits of the project; (2) the applicant does not qualify to apply for a permit in a
7 state; (3) a state with siting authority has rejected the permit, withheld approval for
8 more than one year, or has conditioned approval in a manner that FERC decides, in
9 its discretion, will not reduce congestion. 16 U.S.C. § 824p(b). Thus, in many
10 cases, as an immediate result of DOE’s October 5, 2007 SW NIETC designation,
11 FERC now has jurisdiction over specific siting decisions.

12 13. Generally, once FERC’s jurisdiction is invoked, FERC and any other
13 agencies with jurisdiction over the project are to conduct environmental, historic
14 preservation, and other regulatory reviews, according to a streamlined, one-year
15 process. 16 U.S.C. § 824p(h).

16 14. However, if FERC or other regulatory agencies either deny a required
17 authorization or fail to meet deadlines set by DOE in its discretion, a permit
18 applicant may appeal directly to the President who may issue the permit. 16
19 U.S.C. § 824p(h)(6)(A).

20 15. Although FPA section 824p provides that the President is to comply
21 with certain enumerated environmental statutes, generally only federal agencies –
22 not the President – are required to comply with those laws, and the APA, the
23 vehicle used to enforce many of these laws, does not provide for suit against the
24 President. *See* 5 U.S.C. § 701.

25 16. In addition to drastically altering and streamlining the process for
26 evaluating and granting permits needed for electric transmission lines and
27 facilities, section 824p also delegates to energy companies that have acquired a
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1 permit for a project within an NIETC the power of federal eminent domain to
2 acquire rights-of-way needed for their projects. 16 U.S.C. § 824p(e).

3 17. In summary, by designating the SW NIETC, DOE has implemented a
4 “fast-track” approval process for construction or modification of electric
5 transmission lines or facilities in the expansive SW NIETC area, which allows
6 utility companies to bypass state jurisdiction and regulatory requirements and
7 federal environmental protections, as well as state laws regarding eminent domain.

8 **National Environmental Policy Act**

9 18. The National Environmental Policy Act (“NEPA”) is “our basic national
10 charter for protection of the environment.” 40 C.F.R. § 1500.1(a). “NEPA’s
11 purpose is not to generate paperwork – even excellent paperwork – but to foster
12 excellent action.” *Id.*

13 19. “Agencies shall integrate the NEPA process with other planning at the
14 *earliest possible time* to insure that planning and decisions reflect environmental
15 values, to avoid delays later in the process, and to head off potential conflicts.” 40
16 C.F.R. § 1501.2 (emphasis added).

17 20. To accomplish this purpose, NEPA requires that all federal agencies
18 prepare a “detailed statement” regarding all “major federal actions significantly
19 affecting the quality of the human environment.” 42 U.S.C. § 4332(C). This
20 statement, known as an environmental impact statement (“EIS”), must, among
21 other things, describe the “environmental impact of the proposed action,” and
22 evaluate alternatives to the proposal. *Id.*

23 21. CEQ regulations define a “major Federal action” to include “projects
24 and programs entirely or partly financed, assisted, conducted, regulated, or
25 approved by Federal agencies; new or revised agency rules, regulations, plans,
26 policies, or procedures; and legislative proposals.” 40 C.F.R. § 1508.18. The
27 regulations further clarify that these actions “tend to fall within one of the
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1 following categories”: (1) Adoption of official policy, such as rules, regulations, ...
2 formal documents establishing an agency’s policies which will result in or
3 substantially alter agency programs; (2) Adoption of formal plans ... upon which
4 future agency actions will be based; (3) Adoption of programs ... systematic and
5 connected agency decisions allocating agency resources to implement a specific
6 statutory program” 40 C.F.R. § 1508.18.

7 22. To determine whether a proposed action significantly affects the quality
8 of the human environment, and whether an EIS is therefore required, regulations
9 promulgated by the Council on Environmental Quality (“CEQ”) provide for
10 preparation of an environmental assessment (“EA”). Based on the EA, a federal
11 agency either concludes its analysis with a finding of no significant impact
12 (“FONSI”), or the agency goes on to prepare a full EIS. 40 C.F.R. § 1501.4.

13 23. NEPA also requires that every agency must “study, develop, and
14 describe alternatives to recommended courses of action in any proposal which
15 involves unresolved conflicts concerning alternative uses of available resources . . .
16 .” 42 U.S.C. § 4332(E). CEQ regulations provide that the alternatives evaluation
17 “is the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. It
18 should “sharply defin[e] the issues and provid[e] a clear basis for choice among
19 options by the decisionmaker and the public.” 40 C.F.R. § 1502.14.

20 24. Thus, federal agencies must prepare a detailed statement outlining the
21 environmental impact of any major federal action, including adoption of a formal
22 plan or policy. Furthermore, NEPA’s requirements are included in the EPAct’s
23 amendments to the FPA, which states “Except as specifically provided, nothing in
24 this section affects any requirement of any environmental law of the United States,
25 including [NEPA].” 16 U.S.C. § 824p(j).

1 **FACTUAL BACKGROUND**

2 **SW NIETC Designation**

3 25. On August 8, 2006, pursuant to FPA section 824p(a)(1), DOE submitted
4 its study of regional electric transmission grid congestion (“Congestion Study”) to
5 Congress. 71 Fed. Reg. 45,057 (Aug. 8, 2006). The Congestion Study identified
6 two “Critical Congestion Areas,” including one in southern California – the
7 Southern California Critical Congestion Area. On May 7, 2007, DOE proposed to
8 designate two NIETCs, including one which included the Southern California
9 Critical Congestion Area as well as a large area in Southern California, Southern
10 Nevada, and Southwest Arizona. 72 Fed. Reg. at 25,83.

11 26. On October 5, 2007, DOE made a final designation of the two NIETCs,
12 one of which was the SW NIETC (Docket No. 2007–OE–02). 72 Fed. Reg.
13 56,992. DOE excluded from its final proposal one county in Nevada, so that the
14 final SW NIETC includes seven counties in southern California (San Bernardino,
15 Kern, Los Angeles, Orange, San Diego, Riverside, and Imperial Counties) and
16 three counties in southwestern Arizona (La Paz, Yuma, and Maricopa Counties),
17 an area covering almost 70,000 square miles. The designation went into effect
18 immediately and is to remain in effect until October 7, 2019. *Id.*

19 27. The SW NIETC includes numerous areas protected for their special
20 values, including the Kofa National Wildlife Refuge and the Sonoran Desert
21 National Monument in Arizona, as well as the Joshua Tree National Park and
22 Carrizo Plain National Monument in California. In addition, the SW NIETC
23 covers National Wildlife Refuges, National Parks, and units of the BLM’s National
24 Landscape Conservation System, including National Monuments, California
25 Desert Conservation Area, other BLM National Conservation Areas, as well as
26 many Wilderness Areas and Wilderness Study Areas. In addition to federally
27 protected land, the SW NIETC includes State Beaches, State Parks, State Reserves,
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1 State Historic Parks and State Recreation Areas, including Picacho Peak State Park
2 and Tubac Presidio State Historic Park.

3 28. The SW NIETC is home to numerous species, including at least 95
4 species listed as threatened and endangered under the ESA, as well as large tracts
5 of designated critical habitat. Indeed, San Diego County alone, which
6 encompasses over 4,200 square miles, has more threatened and endangered species
7 than anywhere else in the continental United States. Las Californias, where
8 California and Baja California meet and an area included within the SW NIETC, is
9 at the center of an internationally-recognized biodiversity hotspot.

10 29. In rendering the SW NIETC, the DOE did not do any NEPA analysis
11 regarding the impacts of the designation on these areas or species. DOE did not
12 consider any alternatives to the creation of an NIETC.

13 **Effects of SW NIETC Designation on Environmental Resources**

14 30. DOE's designation of the SW NIETC, by itself, causes serious
15 environmental impacts. By designating the SW NIETC, DOE has facilitated
16 transmission line development in a huge region of the Southwest United States,
17 allowing utility companies to construct or modify energy distribution and
18 transmission lines or facilities anywhere within the SW NIETC. Furthermore, the
19 designation delegates to utility companies the power of eminent domain.

20 31. As a result, it is likely that counties will delay in protecting or
21 maintaining undeveloped land, in particular, land that is already being considered
22 for transmission line development.

23 32. Private landowners also may be hesitant to protect land through the use
24 of conservation easements or similar measures. Private landowners may also seek
25 to increase development and suburban sprawl into rural areas, knowing that those
26 areas will be served by additional transmission.

1 33. Furthermore, because DOE’s designation of the SW NIETC facilitates
2 likely decreases the costs of, transmission line and facility development, power
3 companies may decide to continue increasing their capital investment in generating
4 capacity, rather than encouraging conservation or local distribution of power
5 through renewable energy or other means. Because electricity is still largely
6 produced by coal-fired power plants, and DOE asserts that part of its mission “to
7 keep coal in America’s electricity future,”
8 <http://www.energy.gov/energysources/electricpower.htm> (last accessed Jan. 3,
9 2008), continued reliance on generation rather than conservation or more
10 renewable alternatives will likely lead to maintenance of status quo reliance on
11 fossil fuels. Such reliance has grave environmental impacts, included accelerated
12 climate change.

13 **Implications for Electricity Generation as a Result of the SW NIETC**

14 34. The designation of the SW NIETC not only causes environmental
15 impacts in its own right, the fast-track process for the approval and construction of
16 transmission lines also gives transmission-based solutions to congestion an
17 advantage over other solutions. The preference for transmission hinders the
18 development of solutions with lesser environmental impacts.

19 35. The geographic area falling within the boundaries of the SW NIETC
20 includes a much larger area than that identified by DOE as an area of “critical
21 congestion.” DOE’s Congestion Study identified only a small portion of Southern
22 California around San Diego and Los Angeles as an area of “critical congestion.”
23 However, the SW NIETC includes most of Southern California and a large part of
24 Arizona.

25 36. By including what DOE calls “source areas,” and counties linking the
26 “source areas” with “sink areas,” DOE facilitates transmission line development
27
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1 and expansion in a much larger area than that which DOE's study showed was
2 congested. 72 Fed. Reg. at 56,996.

3 37. Transmission of energy from one place to another results in enormous
4 loss of energy, called "line loss." On average, about 10 percent of energy
5 produced never reaches its destination, and at peak periods the losses can reach 20
6 percent. Line losses increases as the distance electricity must travel increases.
7 Thus, producing power in a more distributed or local manner can decrease the
8 inefficiency caused by line loss.

9 38. Despite the inefficiency of transmission, DOE did not consider non-
10 transmission alternatives to alleviating congestion, such as conservation or local
11 generation. *Id.* at 57,018.

12 **Effects of Power Line Construction and/or Enlargement on Environmental** 13 **Resources**

14 39. DOE's designation of the SW NIETC lays the foundation for expedited
15 approval of power line construction and/or enlargement projects – by FERC or the
16 President – without full review of the associated adverse environmental impacts.

17 40. By facilitating the construction or expansion of transmission lines and
18 facilities, adverse effects on environmental, wildlife, and historic preservation
19 resources are inevitable.

20 41. Transmission line construction and/or enlargement leads to
21 fragmentation of wildlife habitat, as many types of wildlife are reluctant to cross
22 utility rights-of-way, where increased predation is widely observed.

23 42. Transmission line construction and/or enlargement leads to avian
24 mortality, as birds inevitably collide with towers and lines, especially at night and
25 in bad weather.

26 43. Transmission line construction and/or enlargement leads to decreased
27 ambient water quality, because the vegetation-clearing and earth-moving activities
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1 required in order to construct and/or enlarge power lines produces increased
2 erosion and runoff of sediment-laden rain water.

3 44. Transmission line construction and/or enlargement will lead to surface
4 water pollution from herbicides, which are commonly used to keep rights-of-way
5 clear of vegetation.

6 45. Transmission line construction and/or enlargement will lead to increased
7 suburban sprawl.

8
9 **FIRST CLAIM FOR RELIEF**

10 Violation of NEPA and the APA

11 42 U.S.C. §§ 4332(2)(C) and (E), 5 U.S.C. §§ 702-706

12 46. Plaintiffs hereby incorporate by reference all preceding paragraphs.

13 47. The SW NIETC designation was a “major federal action” “significantly
14 affecting the quality of the human environment.” As such, NEPA and CEQ
15 regulations require DOE to perform a NEPA analysis which considers the impacts
16 and alternatives to the proposed action. 43 U.S.C. § 4332(C); 40 C.F.R. §
17 1502.9(c)(1). Alternatively, even if the designation is found not to “significantly”
18 affect the environment, DOE must, at a minimum, prepare an EA and a FONSI.

19 48. DOE did not conduct any analysis of the impacts of or alternatives to
20 the SW NIETC designation and did not prepare any NEPA documents. Therefore,
21 DOE is acting in a manner that is arbitrary, capricious, and otherwise not in
22 accordance with law. 5 U.S.C. §§ 702-706.

23 **SECOND CLAIM FOR RELIEF**

24 Violation of FPA and the APA

25 16 U.S.C. § 824p(a)(2), 5 U.S.C. §§ 702-706

26 49. Plaintiffs hereby incorporate by reference all preceding paragraphs.

27 50. FPA section 824p(a)(2) requires DOE to consider alternatives before
28 designating an NIETC.

1 51. DOE did not consider any alternatives before designating the SW
2 NIETC. As such, DOE is acting in a manner that is arbitrary, capricious, and
3 otherwise not in accordance with law. 5 U.S.C. §§ 702-706.

4
5 **THIRD CLAIM FOR RELIEF**

6 Violation of FPA and the APA

7 16 U.S.C. § 824p(a)(2), 5 U.S.C. §§ 702-706

8 52. Plaintiffs hereby incorporate by reference all preceding paragraphs.

9 53. FPA section 824p(a)(2) authorizes the DOE to designate as an NIETC
10 geographic areas “experiencing electric energy transmission capacity constraints or
11 congestion that adversely affects consumers.”

12 54. DOE exceeded this authorization by including areas in the SW NIETC
13 that are not “experiencing electric energy transmission capacity constraints or
14 congestion that adversely affects consumers.” Thus, DOE is acting in a manner
15 that is arbitrary, capricious, and otherwise not in accordance with law. 5 U.S.C. §§
16 702-706.

17 **REMEDY**

18 55. The Center has no plain, speedy, and adequate remedy, in the ordinary
19 course of law, other than the relief sought in this Complaint, because there is no
20 other mechanism for compelling DOE to take action as required by NEPA and the
21 FPA.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, the Center seeks the following relief:

24 A. Declare that the SW NIETC designation is invalid and in violation of
25 NEPA, FPA, and all applicable regulations.

26 B. Vacate and remand the SW NIETC designation so that DOE may prepare
27 an EIS analyzing the impacts on the environment and environmentally
28 preferable alternatives.

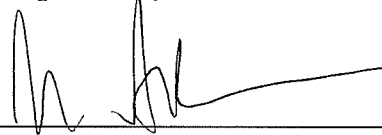
1 C. Vacate and remand the SW NIETC designation so that DOE may
2 analyze alternatives and properly define the SW NIETC boundaries in
3 compliance with FPA section 824p(a)(2).

4 D. Award the Center its reasonable costs and attorney fees as provided by
5 the Equal Access to Justice Act, 28 U.S.C. § 2412 or other applicable law.

6 E. Provide such further and additional relief as the Court deems just and
7 proper.

8
9
10 Dated: January 9, 2008

Respectfully submitted,



11
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