

# Wind Farm/Transmission Line: Federal Court Addresses Whether Facility Operations Can Continue Pending NEPA Supplemental EIS Preparation



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A United States District Court (Southern District California) (“Court”) addressed a dispute as to the appropriate remedy for a constructed wind farm and transmission line (collectively “Project”) whose United States Department of Energy (“DOE”) issued permit violated the National Environmental Policy Act (“NEPA”). See *Backcountry Against Dumps v. Perry*, 2017 WL 3712487 (August 29, 2017).

Backcountry Against Dumps and other organizations (collectively “Plaintiffs”) asked the Court for vacatur or a preliminary injunction prohibiting operation while DOE addressed NEPA violations.

The Project is described as a commercial wind farm in Northern Baja California, Mexico and a transmission line that straddles the international border. The transmission line connects the wind farm to an electrical substation in California.

The 1.65 mile transmission line is .65 miles on U.S. soil and approximately one mile on Mexican soil. It is described as a “nine figure investment capable of generating enough clean, renewable energy to power 65,000 average households.” Power from the wind farm is distributed into the United States power grid.

As part of the permitting process for the Project, DOE was required to prepare a NEPA Environmental Impact Statement (“EIS”). After preparation of the EIS, Plaintiffs filed a complaint seeking declaratory injunctive relief for violations including noncompliance with NEPA.

The NEPA claim was the only cause of action held to be meritorious. The Court found that the EIS prepared by DOE was inadequate in two respects:

1. The EIS purpose and need statement was overly narrow and thus foreclosed consideration of distributed power generation as an alternative to the Project
2. The EIS failed to consider the environmental impacts upon Mexico of the U.S. Line, the Mexico Line, and the Wind Farm.

During the pendency of the NEPA litigation construction of the United States portion of the transmission line commenced. Further, commercial operations were subsequently initiated after construction was completed. The Plaintiffs had never sought preliminary injunctive relief after filing their complaint.

The issue addressed by the Court was the proper remedy for the NEPA violations.

The parties apparently agreed that the case was required to be remanded to DOE for preparation of a Supplemental Environmental Impact Statement (“SEIS”). Disagreement existed as to whether the Court should prohibit continued project operation during the interim, remand period.

Plaintiffs sought vacatur of a Presidential Permit (“PP-334”) that was required to be issued because the transmission line crossed the international border. In the alternative, they sought an injunction requiring that the transmission line be disconnected at the border until DOE published a valid SEIS.

DOE asked the Court to exercise its equitable discretion and allow continued Project operation during the remand period.

The Court first addressed vacatur.

The Administrative Procedures Act (“APA”) addresses scenarios in which a reviewing court holds unlawful and sets aside agency actions, etc. The Court notes that the statute also provides that in making such determinations, “due account shall be taken of the rule of prejudicial error.”

The Plaintiffs read this section of the APA as providing the court no discretion but to vacate any agency action found to be unlawful. Because a NEPA violation had already been found, they argued that the Court had no discretion and must vacate PP-334.

The Court disagreed and held that while vacatur is the normal remedy for unlawful agency action principles of equity must be considered to determine whether vacatur is warranted. The Court states that it must balance the seriousness of the agency errors against the disruptive consequences of an interim change that may itself be changed.

The Court cites a District of Columbia Circuit Court of Appeals approach for measuring the seriousness of an agency error. The error’s seriousness is coextensive with the extent to which the error creates doubt as to whether the agency made the correct decision.

DOE is stated to have drafted the purpose and needs statement from the EIS in an overly narrow manner such that it foreclosed consideration of distributed power generation as an alternative to the Project. The Court deemed this error to be without substantive consequence. Distributed generation was described as closer to the point of consumption, often encompassing rooftop solar panels or local processing of renewable energy sources.

The Bureau of Land Management and the California Public Utilities Commission were stated to have jointly prepared an EIS in connection with a different proposed utility-scale wind farm. Their EIS rejected distributed generation as an alternative because of infeasibility. This result was deemed to be potentially applicable to the wind farm Project. The Court stated it was highly unlikely that DOE’s failure to consider distributed power generation caused an erroneous decision.

The second NEPA error was also addressed. The error involved DOE’s failure to consider in the EIS the environmental impacts the Project would have upon Mexico. It was dismissed as unlikely to have caused DOE to make an incorrect decision because of Mexico’s own review of the potential impacts. An environmental impact document was prepared by Mexico and the Project was authorized by the Mexican government. DOE was allowed to rely on this document.

Because of the Mexican report’s findings the Court deemed it unlikely that DOE’s remand consideration of the environmental impacts would trigger a different result. The Court therefore found the NEPA violations not serious.

The Court deemed vacatur as highly disruptive. It states disruption would adversely affect:

1. a substantial flow of clean, renewable energy,
2. a substantial revenue stream to the Mexican agricultural community and other interested parties,
3. a number of paying jobs.

The vacatur also would decrease power grid reliability and balancing the seriousness of the errors against disruptive consequence, the Court rejects vacatur.

The Court next addressed the Plaintiffs' seeking a permanent injunction prohibiting continued operation of the Project and/or further expansion of the wind farm during the remand period. The Court reviews the four factor test governing a determination as to whether a permanent injunction should issue.

Because construction was complete and the Plaintiffs were not requesting removal of the facilities, related harms could not be considered. Therefore, operation harms to Plaintiffs were the focus of the analysis.

Such operational harms were stated to include only those stemming from maintenance vehicle traffic and fire hazard. The maintenance emissions were such that they were infrequent and unlikely to cause irreparable harm for which there was no adequate remedy at law.

The potential fire hazards associated with the Project's operation was deemed more significant.

The Court agreed with the Plaintiffs that if a large wildfire occurred it could cause irreparable injury to Plaintiffs for which there would be no adequate remedy at law. Nevertheless, it found no submission of evidence as to the likelihood of such an event during the remand period.

The Court noted that balanced against this possibility would be the elimination of a substantial revenue stream because of the injunction. It also referenced the benefits of the generation of "clean, renewable energy" which was deemed of substantial importance to the public interest. The Court also took into consideration job impacts, along with lease payments, on the Mexican portion of the Project.

The Court also disagreed with the Plaintiffs' argument that injunctive relief will encourage NEPA compliance. It held that remand to DOE for further review and preparation of an SEIS addressing the deficiencies will encourage NEPA compliance. The Court viewed injunctive relief as unwarranted because the harms outweighed Plaintiffs' concerns concerning the continued operation.

Also rejected was an injunction sought prohibiting further expansion of the Project. A proposed expansion was deemed uncertain and the wind turbines necessary for expansion would likely be located at a significant distance from the Project.

[A copy of the opinion can be downloaded here.](#)