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BORDER POWER PLANT WORKING GROUP V. DEPARTMENT OF ENERGY

By Kelly Rain*

In a monumental lawsuit recognizing the link between carbon dioxide and global warming, a United States federal court acknowledged that sometimes you have to reach across the border to protect the quality of local air and water. However, the repercussions of the 1993 ruling are still being felt as Mexico threatens to request an international tribunal to conclude who must pay for the pollution control equipment for one of the company's power plants.¹

The Border Plant Working Group challenged a federal permit issued by the U.S. Department of Energy to allow two utility companies to construct and operate an electric power transmission line from Mexico across the border to the United States.² The power plants are located just three miles inside Mexico's border.³ The group seeks to ensure that, despite being free of restrictions under U.S. law, Mexican power plants sending electricity to the California market are not allowed to spew harmful emissions that would impact both public health and the environment.⁴ The Border Plant Working Group would require that environmental impact statements be completed prior to the issuance of federal permits necessary to allow transmission lines to cross international borders.⁵ In May 2003, a federal judge determined that the U.S. Department of Energy violated the National Environmental Policy Act ("NEPA") by failing to fully analyze the potential health and environmental impacts of the power plants before issuing the permits.⁶

While establishing precedent for future border power plants, the court also recognized an important link between the dangers of carbon dioxide emissions and global warming.⁷ While the defendants emphasized that carbon dioxide is not classified as a hazardous or toxic pollutant under federal or California law, the court acknowledged that carbon dioxide emissions are greenhouse gases and that the "failure to disclose and analyze their significance is counter to NEPA."⁸

InterGen, which is a joint venture of Royal Dutch/Shell Group and Bechtel Corporation, was one of the power companies involved in the lawsuit and is now also facing conflict on the Mexican side of the border.⁹ InterGen is currently disputing with Mexico over who is responsible to pay for pollution control equipment for the company's border power plant.¹⁰ InterGen sent Mexico's Federal Electricity Commission the bill for the installation of emission control technology – a bill totaling over \$4 million – even though the equipment is not necessary for the plant to comply with Mexican environmental law.¹¹ Mexico is in the process of taking the debate to a tribunal of the International Energy Agency in Paris.¹²

The fight for the recognition and regulation of pollutants contributing to global warming is evident in other pending lawsuits. For example, a case originally filed by Friends of the Earth, Greenpeace, Inc., and the city of Boulder, Colorado, also alleges violations of NEPA.¹³ As the lawsuit evolved, the plaintiffs were joined by the cities of Santa Monica, Arcata, and Oakland, California.¹⁴ The complaint alleges that two U.S. government agencies, the Export Import Bank of the United States and the Overseas Private Investment Corporation, illegally provided at least US\$32 billion in financing and insuring fossil fuel projects over the past ten years while failing to comply with NEPA.¹⁵ This lawsuit is of vital importance in the fight to combat climate change since, combined, these agencies' projects will ultimately churn out over 32 billion tons of carbon dioxide emissions.¹⁶ This lawsuit is also significant given that it specifically identifies carbon dioxide as a cause of climate change.¹⁷



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ENDNOTES:

¹ Diane Lindquist, *Power Plant Billing Dispute Could Go to Tribunal in Paris*, SAN DIEGO UNION TRIB., Mar. 11, 2005, available at <http://www.signonsandiego.com/news/business/20050311-9999-1b11power.html> (last visited Mar. 24, 2005).

² *Border Power Plant Working Group v. Department of Energy*, 260 F. Supp. 2d 997, 1006 (S.D. Cal. 2003).

³ Elliot Spagat, *U.S. Debate Over Power From Mexico*, ASSOCIATED PRESS, June 17, 2003, available at <http://www.waterconserve.info/articles/reader.asp?linkid=23582> (last visited Mar. 24, 2005).

⁴ Tom Doggett, *U.S. Lawmakers Want Mexico Power Plants to Cut Pollution*, REUTERS NEWS SERVICE, June 7, 2002, available at <http://www.planetark.com/dailynewsstory.cfm/newsid/16317/story.htm> (last visited Mar. 24, 2005).

⁵ Spagat, *supra* note 3.

⁶ Urgent Cases: Mexican Border Power Plants, Earthjustice website, at <http://www.earthjustice.org/urgent/display.html?ID=106> (last visited Mar. 24, 2005).

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⁷ See *Border Power Plant Working Group*, 260 F. Supp. 2d at 1028-1029.

⁸ *Id.*

⁹ Associated Press, *CALIF: Federal Review of Power Plants' Impact Incomplete, Judge Rules* (May 8, 2003), available at <http://www.water-conserve.info/articles/reader.asp?linkid=22394> (last visited Mar. 27, 2005).

¹⁰ Lindquist, *supra* note 1.

¹¹ Lindquist, *supra* note 1.

¹² Lindquist, *supra* note 1.

¹³ Lawsuit Explained, ClimateLawsuit.org website, available at <http://www.climatelawsuit.org/lawsuit.htm> (last visited Mar. 24, 2005).

¹⁴ Plaintiffs, ClimateLawsuit.org website, available at <http://www.climatelawsuit.org/plaintiffs.htm> (last visited Mar. 24, 2005).

¹⁵ Lawsuit Explained, *supra* note 12.

¹⁶ Lawsuit Explained, *supra* note 12.

¹⁷ Lawsuit Explained, *supra* note 12.
