

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATE OF WASHINGTON,
United States Court of Appeals
District of Columbia Circuit Petitioner,

NO. 10-1082

STATE OF WASHINGTON'S
PETITION FOR REVIEW AND
FOR DECLARATORY AND
INJUNCTIVE RELIEF

v.

UNITED STATES DEPARTMENT
OF ENERGY, DR. STEVEN CHU,
Secretary of the U.S. Department of
Energy, NUCLEAR REGULATORY
COMMISSION,

Respondents.

I. INTRODUCTION

1. This is a civil action arising from the decision of the Respondents, United States Department of Energy (DOE) and its Secretary, Dr. Steven Chu (hereafter collectively referred to as DOE), to irrevocably terminate development of a permanent repository for high-level radioactive waste and spent nuclear fuel at Yucca Mountain, Nevada (the Yucca Mountain project) in favor of an unknown and yet-to-be-identified alternative. As part of this decision, DOE on March 3, 2010, moved to withdraw with prejudice its application to the Respondent Nuclear Regulatory Commission (NRC) for a license to begin construction of the Yucca Mountain repository.

2. The State of Washington requests a judgment declaring that DOE's decision to irrevocably terminate the Yucca Mountain project in favor of an unknown and yet-to-be identified alternative, including its motion to withdraw with prejudice the license application, violates the Nuclear Waste Policy Act (NWPA), 42 U.S.C. §§ 10101-10270. Specifically, DOE lacks authority under the NWPA to unilaterally terminate the Yucca Mountain project where, as here, it has concluded its investigation into the suitability of the site and recommended it as suitable for a permanent repository, Congress has designated Yucca Mountain as such under the NWPA, and DOE has submitted to the NRC an application for a license to begin construction of the Yucca Mountain repository.

3. The State of Washington requests a judgment declaring that DOE's decision to irrevocably terminate the Yucca Mountain project in favor of an unknown and yet-to-be identified alternative violates the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(f), its implementing regulations applicable to all agencies including DOE, 40 C.F.R. Parts 1500-1508, and the DOE's implementing procedures, 10 C.F.R. Part 1021. Specifically, DOE's actions to forever foreclose consideration of the Yucca Mountain site in favor of an unknown and yet-to-be identified alternative has occurred without DOE completing a final environmental impact statement required by NEPA in order to assess the environmental consequences of such an action, including but not limited

to impacts on the human population and environment of the State of Washington. This failure to comply with NEPA's requirements is arbitrary and capricious and not in accordance with the law in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706.

4. The State of Washington requests a judgment declaring that DOE's decision to irrevocably terminate the Yucca Mountain project in favor of an unknown and yet-to-be identified alternative violates the APA, 5 U.S.C. §§ 701-706. Specifically, DOE's actions, which are intended to permanently end any consideration of the Yucca Mountain site in favor of an unknown and yet-to-be identified alternative, have been made without reference to any rationale or administrative record and is therefore arbitrary and capricious and not in accordance with the law.

5. The State of Washington requests a judgment declaring that the NRC is without authority to consider DOE's motion to withdraw its Yucca Mountain license application or to grant that motion.

6. Based upon the aforementioned statutory violations, both individually and collectively, the State of Washington requests an order permanently enjoining DOE from implementing its decision to irrevocably terminate the Yucca Mountain project in favor of an unknown and yet-to-be identified alternative, including withdrawing in any fashion its license application

for the purpose of precluding any future consideration of Yucca Mountain as a deep geologic repository for high-level radioactive waste and spent nuclear fuel.

7. Based upon the aforementioned statutory violations, both individually and collectively, the State of Washington requests an order requiring DOE to continue to undertake its obligations with respect to the Yucca Mountain project, as defined by the NWPAA and funded by Congress.

8. Based upon the aforementioned statutory violations, both individually and collectively, the State of Washington requests all other relief deemed necessary and proper by the Court.

11. JURISDICTION

9. This Court has original and exclusive jurisdiction of the State of Washington's petition for review and the claims herein pursuant to the NWPAA, 42 U.S.C. § 10139(a)(1)(A), (B), (D).

10. This Court also has jurisdiction of the State of Washington's claims for a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

11. This Court also has jurisdiction of the State of Washington's NEPA-related and **APA** claims pursuant to the judicial review provision of the **APA**, 5 U.S.C. §§ 701-706.

111. VENUE

12. Venue is proper in this Court pursuant to 42 U.S.C. § 10139(a)(2) and 5 U.S.C. § 703.

IV. PARTIES AND STANDING

13. Respondent United States Department of Energy (DOE) is an executive department of the United States, created pursuant to 42 U.S.C. § 7131. DOE is responsible under the NWPA for: (a) conducting research and testing at the Yucca Mountain site to determine its suitability to serve as a permanent repository for high-level radioactive waste and spent nuclear fuel; (b) recommending to the President whether the Yucca Mountain site is suitable to serve as a repository; and (c) submitting to the NRC an application for a license to construct the aforementioned repository, if the President forwards to Congress the that recommendation that Yucca Mountain be approved as the site of a permanent repository, and that approval takes effect. 42 U.S.C. §§ 10133, 10134(a)-(b).

14. Respondent Dr. Steven Chu is the Secretary of DOE and is the chief administrative officer of DOE. Secretary Chu is the official ultimately responsible for DOE's compliance with the terms of the NWPA, NEPA, and the APA.

15. Respondent Nuclear Regulatory Commission (NRC) is the independent agency assigned the task of considering DOE's license application to

construct a high-level radioactive waste and spent nuclear fuel repository at Yucca Mountain. 42 U.S.C. § 10134(b), (d).

16. Petitioner is the State of Washington, which has standing to bring this action. DOE's decision to irrevocably terminate the Yucca Mountain project in favor of a yet-to-be identified alternative will cause the State of Washington and its citizens injury-in-fact. It is likely this harm can be averted if this Court grants the relief requested by the Petitioner.

17. Specifically, and as described in greater detail in paragraphs 27-46, below, massive amounts of high-level radioactive waste and spent nuclear fuel are currently stored at the Hanford Nuclear Reservation (Hanford), a federal property managed by DOE and located near Richland, Washington. Approximately one million gallons of high-level waste has already leaked into Washington's air, soil and water, and this leakage is expected to continue.

18. DOE is responsible for cleaning up the Hanford waste. Pursuant to a binding legal agreement, DOE has committed to meeting its obligations by designing and building a \$12.3 billion waste treatment plant at Hanford to recover and process the waste for permanent disposal. The plant has been designed and is being built to meet the specific requirements of the Yucca Mountain site.

19. Respondents' decision to irrevocably terminate the Yucca Mountain project in favor of an unknown and yet-to-be identified alternative threatens to

harm the State of Washington's compelling and tangible interest in protecting the health, safety and welfare of its citizens. The summary termination of the Yucca Mountain project will send a ripple effect through Hanford's tank waste retrieval and treatment mission. The mission of retrieving high-level radioactive waste from Hanford's aging and leak-prone underground storage tanks is directly tied to the above-referenced waste treatment plant, which itself is directly tied to the Yucca Mountain project. Any delay or interruption of the waste treatment plant (now or in the future) in proximate relation to termination of the Yucca Mountain project, such as a redesign and rebuild to produce a waste form acceptable at a different repository, may delay even further the projected thirty-year project of retrieving untreated waste from Hanford's aging, unfit-for-use single shell tanks. More than one-third of these tanks are already known or suspected to have leaked high-level waste to Hanford's soils and groundwater.

20. Further, any delay in siting a new repository as a result of the termination of the Yucca Mountain project until such time as any new repository site is identified, investigated, approved and constructed—if ever—will require extending the storage of tank waste and other materials at Hanford, with its attendant risks to human health and the environment.

21. All of the aforementioned interests of the State of Washington are within the zone of interests Congress intended to be protected by the NWPA,

NEPA, and the Atomic Energy Act. *See, e.g.*, 42 U.S.C. § 10131(a)(2), (a)(6); 42 U.S.C. § 4331; 42 U.S.C. § 2239.

22. The negative impact on the State's interests will be redressed if this Court issues a favorable decision on the claims made in the State's petition and grants the State the relief it has requested. This relief will ensure that the Yucca Mountain siting process, which has been ongoing for over 20 years, will not be irrevocably terminated in favor of an unknown and yet-to-be identified alternative absent a change to the NWPA by Congress or an unfavorable decision by the NRC on the merits of DOE's license application for the Yucca Mountain site.

V. FACTS

The Hanford Site:

23. DOE's Hanford Site covers 586 square miles in south-central Washington.

24. The Columbia River flows through or is contiguous to the Hanford Site before flowing through the "Tri-Cities" of Richland, Kennewick, and Pasco, Washington. The Tri-Cities are home to approximately 170,000 persons (2007 official estimate).

25. The Columbia River is a water source for municipal, agricultural, and industrial uses in south-central Washington, as well as downstream in Washington

and Oregon. The Columbia River supports aquatic life and related biota, including salmon that migrate and breed within and near the Hanford Site.

26. The Hanford Site itself is significant to the State and its citizens. Large portions of the Hanford Site were designated as the Hanford Reach National Monument in 2000. The National Monument and other portions of the Hanford Site contain some of the only intact tracts of shrub-steppe habitat in Washington, which support a unique variety of plants and wildlife. The Hanford Site, including plants and wildlife within the Hanford Site, is significant to Native American tribes including the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe.

Hanford's Tank Waste:

27. From the mid-1940s to the late 1980s, the United States produced plutonium at the Hanford Site for use in nuclear weapons. Affidavit of Suzanne Dahl-Crumpler, attached hereto as Exhibit 1, ¶ 10. Plutonium production and other activities at Hanford created enormous amounts of radioactive, hazardous, and mixed wastes, much of which remains at the site, still awaiting cleanup and/or proper disposal.

28. There are over 1,500 identified contaminated sites and structures at Hanford, which individually and collectively pose substantial risks to human health and the environment. These include 177 underground storage tanks holding

approximately 53 million gallons of mixed high-level radioactive and hazardous waste. *Id.* ¶¶ 11, 17. This volume constitutes nearly two-thirds of the nation's defense related high-level waste. *Id.* ¶¶ 16, 41

29. The Hanford tank waste was generated beginning in the 1940s from the reprocessing of spent fuel rods to extract weapons-grade plutonium. *Id.* ¶ 10, 11. All of this waste is "mixed," containing a mixture of hazardous waste and radioactive material. *Id.* ¶¶ 13, 14. The hazardous waste component of tank waste is regulated under the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901-6992(k), and Washington's Hazardous Waste Management Act (HWMA), chapter 70.105 Revised Code of Washington.

30. Hanford's tank waste includes at least 26 hazardous waste constituents, including heavy metals and volatile organic compounds. *Id.* ¶ 14. All of these constituents are potentially harmful to human health and the environment. *Id.* In addition, the tank waste contains at least 46 identified radionuclides. *Id.* ¶ 13. These radionuclides are also potentially harmful to human health and the environment. *Id.* Once released, some of these radionuclides will persist in the environment for hundreds of thousands of years. *Id.*

31. Over 80 percent of Hanford's 177 underground storage tanks are single-shell tanks (SSTs) that do not comply with RCRA and HWMA standards

for hazardous waste tanks. *Id.* ¶¶ 19, 20. These 149 SSTs currently hold approximately 30 million gallons of toxic waste. *Id.* ¶ 19.

32. All 149 SSTs have been identified by DOE as “unfit for use” pursuant to 40 C.F.R. § 265.191 (incorporated by reference in WAC 173-303-400(3)). *Id.* ¶ 20.

33. At least 67 of the SSTs have leaked an estimated one million or more gallons of waste to the environment. *Id.* ¶ 22. This leaked waste is mobile and has contaminated the soils surrounding the tanks. *Id.* ¶ 23. Some of the leaked tank waste has reached Hanford’s groundwater. *Id.* This groundwater is hydraulically connected to the Columbia River. *Id.*

34. Unless affirmative steps are taken to timely remove the waste from the SSTs, further leakage of tank waste to the environment will occur. *Id.* ¶¶ 22, 24; *see also*, ¶¶ 28, 30, 44. Once leaked, tank waste will continue to migrate into Hanford’s groundwater and toward the Columbia River.

35. Hanford lacks sufficient regulatory compliant (double-shelled) tank capacity to allow for the retrieval and transfer of all but a limited volume of the waste currently stored in the SSTs. *Id.* ¶ 29. To date, DOE’s strategy for addressing this situation has by and large been to rely on the prospective treatment capacity of a future Waste Treatment Plant (WTP) to process tank waste and

create the “throughput” necessary to retrieve and transfer SST tank waste into compliant storage. *Id.* ¶¶ 29, 30.

Hanford Tank Waste Treatment:

36. There is currently no treatment capacity for tank waste at Hanford. *Id.* ¶ 15. The tank waste is instead being stored in violation of the prohibition on storing land disposal restricted waste under the HWMA and RCRA. WAC 173-303-140(2)(a) (incorporating by reference 40 C.F.R. § 268.50).

37. To address Hanford’s multiple environmental compliance issues, in 1989 the Washington State Department of Ecology (Ecology), the federal Environmental Protection Agency (EPA), and Respondent DOE entered into the Hanford Federal Facility Agreement and Consent Order (hereafter, the Tri-Party Agreement). *Id.* ¶ 25. The Tri-Party Agreement establishes numerous milestones (schedules and associated regulatory requirements) for cleanup of the Hanford Site and for bringing Hanford facilities into compliance with applicable requirements. *Id.*

38. The milestones included in the Tri-Party Agreement include: (a) The retrieval of all high-level waste from the SSTs by a defined end date (currently 2018); (b) The design and construction of a Waste Treatment Plant; and (c) Complete treatment of all retrieved waste by a defined end date (Currently 2028). *Id.* ¶ 26.

39. The Waste Treatment Plant is central to the federal government's efforts to comply with its obligation to clean up the Hanford site. *Id.* ¶ 30. The design process is 78 percent completed and construction of the Plant is almost 50 percent complete. *Id.* ¶ 44. The Plant is projected to begin treating waste in 2019 and to become fully operational by 2022. *See Id.* ¶ 27. The scope of this effort and the enormous amounts of waste at Hanford that need to be retrieved and treated are reflected in the \$12.3 billion cost to design and construct the Waste Treatment Plant. *Id.* ¶ 31.

40. The waste treatment process is designed to split tank waste into two streams: a concentrated "high level waste" (HLW) fraction and a remaining "low activity waste" (LAW) fraction. *Id.* ¶ 33. Both waste streams will then be "vitrified" (immobilized in a solid glass matrix) and placed into steel canisters to provide additional containment and shielding. *Id.* ¶¶ 34, 35.

41. The vitrified HLW fraction will constitute only approximately 10 percent of the total waste volume, but will contain approximately 90 percent of the total waste radioactivity. *Id.* ¶ 38. Despite constituting only 10 percent of the total waste volume, it is still estimated that the treated HLW volume from Hanford's tanks will exceed 7,200 metric tons.

42. Following vitrification, HLW canisters will be held in a specialized storage building at Hanford while awaiting offsite disposal. *Id.* ¶ 45. Pursuant to

a 1996 Record of Decision, DOE has determined that Hanford's vitrified HLW will be disposed of offsite in a national geologic repository to permanently isolate the wastes from humans and the environment to the greatest extent practicable and provide for protection of public health and the environment. *Id.* ¶ 40. DOE's subsequent planning documents include Hanford's vitrified HLW among the volume of waste to be disposed of at the Yucca Mountain repository. *Id.* ¶ 41.

43. Based on this, the Waste Treatment Plant at Hanford is being designed and constructed in order to ensure the treated waste complies with the waste acceptance standards specific to Yucca Mountain, as promulgated by the NRC under 10 C.F.R. Part 63. *Id.* ¶¶ 42, 43. These standards include such matters as canister size and weight, radionuclide content and thermal output limits. *Id.* ¶ 43.

44. If the Yucca Mountain siting process is terminated or significantly delayed, major regulatory, administrative and technical issues will have to be revisited at Hanford, especially as regards the design and parameters of the Waste Treatment Plant. *Id.* ¶ 44. This could require changes necessary to meet another repository's acceptance criteria or to accommodate the fact that the treated waste will necessarily need to be stored at Hanford until such time as another repository site is investigated, approved by DOE, the President and Congress, and licensed by NRC. *Id.* ¶¶ 44, 45. These changes could be as extreme as a construction tear-

down and rebuild of the Waste Treatment Plant. *Id.* ¶ 44. Such changes would add significantly to the over \$12 billion price tag of the Waste Treatment Plant.

45. Because of the interdependence between the Waste Treatment Plant and tank retrievals, any delay or adjustment in construction of the Waste Treatment Plant to accommodate a new repository site will have a ripple effect, delaying the retrieval of untreated waste from the SSTs. *Id.* at 28, 29, 30; *see also*, ¶¶ 22, 24, 44. Further delay in retrieving these unfit-for-use tanks will exacerbate the already dire risks associated with Hanford's tank waste. *Id.* ¶¶ 13, 14, 22, 24, 28.

46. Finally, termination or delay of the Yucca Mountain siting process will also have a deleterious impact on not just the tank waste at Hanford, but also on the other nuclear materials stored by the federal government at Hanford. *Id.* at 46, 47. This includes over 2500 metric tons of spent nuclear fuel, over 1300 capsules of cesium and over 600 capsules of strontium. *Id.* Termination or delay of the Yucca Mountain siting process will force Washington and the federal government to continue to store these extremely hazardous materials at Hanford, with concomitant danger to Washington's citizens and the environment. *Id.*

The NWPA and the Decision to Pursue Siting of a Nuclear Waste Repository at Yucca Mountain:

47. The federal government first began its attempts to site a repository for the nation's high-level radioactive waste and spent nuclear fuel in the 1970s. H.R. Rep. No. 97-491(I); at 26-27 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3792, 3793. These early attempts were quickly derailed by the extremely hazardous nature of the waste and the threat it poses to humans and the environment, the incredible duration of the waste's toxicity, and the consequent uproar in the communities the federal government first looked to as potential repository sites. *Id.*

48. In recognition of these difficulties in siting a repository, Congress enacted the NWPA in 1982. As described in more detail below, the NWPA mandates a systematic approach to the siting of a repository that emphasizes a systematic approach to the siting of a repository. *See generally*, 42U.S.C. §§ 10132-10138, 10141, 10174a, 10191-10198, 10262-10270.

49. DOE began searching for appropriate repository sites in 1983. 42 U.S.C. § 10132(a). In the next several years, DOE conducted environmental assessments of the suitability of numerous sites across the country, including Yucca Mountain. U.S. Dept. of Energy, Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository

Under the Nuclear Waste Policy Act of 1982, 4 (2002) (hereafter, Secretary's Suitability Determination), attached hereto as Exhibit 2. Indeed, DOE's research into Yucca Mountain's suitability as a site for storing nuclear waste predates the enactment of the NWPA by six years. *Id.*

50. In 1986, DOE, using an "accepted, formal scientific method," ranked the appropriateness of the various sites it had investigated. *Id.* Yucca Mountain was the highest-ranked site. *Id.*

51. The following year, Congress amended the NWPA to focus DOE's research efforts on the Yucca Mountain site. 42 U.S.C. § 10172.

52. The NWPA prescribes the thorough inquiry DOE thereafter conducted at Yucca Mountain between 1987 and 2002 to determine whether it is an appropriate site for a repository. 42 U.S.C. §§ 10132-10133. During this time period, DOE spent "billions of dollars and millions of hours of research" in determining whether a repository site could be safely located at Yucca Mountain. Exhibit 2 at 1. DOE's scientific analysis of the site and its inclusion of interested parties (including state, local and tribal governments) throughout the process are described in detail in the Secretary's Suitability Determination at 12-33. According to DOE, "Yucca Mountain is far and away the most thoroughly researched site of its kind in the world" and its suitability has been "studied for

more than twice the amount of time it took to plan and complete the moon landing.” *Id.* at 1, 2.

53. In January 2002, the Secretary of DOE formally recommended to the President that a nuclear waste repository could be safely sited at Yucca Mountain. *Id.*; H.R. Rep. No. 107-425, at 533 (2002), as reprinted in 2002 U.S.C.C.A.N. 532. In doing so, the Secretary concluded that “the amount and quality of research the [DOE] has invested into [determining Yucca Mountain’s suitability as a repository] – done by top flight people . . . – is nothing short of staggering. After careful evaluation, I am convinced that the product of over 20 years, millions of hours, and four billion dollars of this research provides a sound scientific basis for concluding that the site can perform safely during both the pre- and post-closure periods, and that it is indeed scientifically and technically suitable for development as a repository.” Ex. 2 at 45. The Secretary also stated that “compelling national interests” supported moving forward at Yucca Mountain: “I am convinced . . . that a repository for nuclear waste at Yucca Mountain will advance, in important ways, our energy security, our national security, our environmental goals, and our security against terrorist attacks.” *Id.* at 45-46.

54. Based upon DOE’s recommendation to move forward with siting a repository at Yucca Mountain, and consistent with the NWPA, the President in February 2002 recommended Yucca Mountain to Congress. 42 U.S.C.

§ 10134(a)(2)(A); H.R. Rep. No. 107-425, at 534 (2002), *as reprinted in* 2002 U.S.C.C.A.N. 532.

55. The NWPA provides interested parties, including the Governor and legislature of the State of Nevada, not only the right to participate in the process of evaluating Yucca Mountain, but also the right to formally disapprove the President's recommendation of Yucca Mountain. 42 U.S.C. § 10136(b)(1)-(2). The Governor of Nevada did this in April 2002.

56. However, again consistent with the NWPA, Congress overrode Nevada's veto in July 2002. P.L. 107-200. Congress in July 2002 formally designated Yucca Mountain as the site of a permanent repository for high-level radioactive waste and spent nuclear fuel. *Id.*

DOE's Non-Discretionary Duty to Submit Application to Construct a Permanent Repository at Yucca Mountain and NRC's Non-Discretionary Duty to Issue a Ruling on the Merits of the Application:

57. Subsequently, in June 2008, DOE submitted its formal application to the NRC for a license to begin construction of a high-level radioactive waste and spent nuclear fuel repository at Yucca Mountain. DOE's application is required by the NWPA. 42 U.S.C. §10134(b) (after Congressional designation of a repository, "the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site. . .").

58. Once DOE submits a license application, the NRC is required to consider the application and issue a final decision on the merits of the application. 42 U.S.C. § 10134(d) (NRC “shall consider an application for a construction authorization” of a repository and “shall issue a final decision approving or disapproving the issuance of a construction authorization . . .”).

59. On October 22, 2008, the NRC noted for hearing DOE’s Yucca Mountain license application. 73 Fed. Reg. 63,029.

DOE’s Decision to Forever Abandon Yucca Mountain Licensing Application:

60. As recently as May 2009, Secretary Chu stated that DOE intended to continue with the NRC licensing process. *FY 2010 Appropriations Hearing: Before the S. Subcomm. on Energy and Water Development, and Related Agencies*, 111th Cong. 10-11 (May 19, 2009) (statement of Secretary Chu).¹

61. However, in a series of statements and actions beginning on January 29, 2010, DOE abruptly reversed course. DOE now seeks to irrevocably terminate the Yucca Mountain project in favor of an unknown, yet-to-be identified alternative and it has – and is continuing – to take steps to do so.

62. On Friday, January 29, 2010, Secretary Chu announced the formation of a commission to examine how and where to store the nation’s high-level

¹ Available at <http://appropriations.senate.gov/ht-energy.cfm?method=hearings.view&id=95551689-1902-4074-af76-2cfb7f705475>.

radioactive waste and spent nuclear fuel. U.S. Dept. of Energy, *Secretary Chu Announces Blue Ribbon Commission on America's Nuclear Future* (Jan. 29, 2010).² In this announcement, Secretary Chu stated that DOE would not proceed with the Yucca Mountain repository site. *Id.*

63. The following Monday, February 1, 2010, in conjunction with announcing DOE's proposed Fiscal Year (FY) 2011 budget, Secretary Chu announced that DOE would move to withdraw its Yucca Mountain licensing application and permanently terminate the Yucca Mountain project. U.S. Dept. of Energy, *FY 2011 Budget Request: Budget Highlights 8* (Feb. 2010).³

64. On March 3, 2010, DOE filed with the NRC its formal motion to withdraw with prejudice its Yucca Mountain licensing application. U.S. Dept. of Energy's Motion to Withdraw Application for License, Atomic Safety and Licensing Board (ASLB) Docket No. 63-001.

65. The State of Washington filed a motion to intervene in the licensing proceeding. State of Washington's Petition for Leave to Intervene and Request For Hearing, ASLB Docket No. 63-001 (March 3, 2010). In doing so, the State of Washington sought an opportunity to challenge DOE's attempt to forever remove Yucca Mountain from consideration as the site of a permanent repository.

² Available at <http://www.energy.gov/news/8584.htm>.

³ Available at <http://www.mbe.doe.gov/budget/11budget/Content/FY2011Highlights.pdf>.

66. However, on April 6, 2010, the ASLB issued an order effectively staying its consideration of both DOE's motion to withdraw the license application and the State of Washington's motion to intervene until such time as this Court has had an opportunity to consider the various challenges to DOE's action raised by several parties, including private citizens living near Hanford, Washington, Aiken County, South Carolina, and the State of South Carolina. Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion), ASLB Docket No. 63-001-HLW.

DOE's Vague Explanation of the Rationale Underlying Its Decision to Forever Abandon the Yucca Mountain Site.

67. From its first announcement of its intent to permanently terminate the Yucca Mountain project, DOE has repeatedly offered one ambiguous explanation for its decision: that Yucca Mountain is "not a workable option." *See, e.g.,* U.S. Dept. of Energy, *FY 2011 Budget Request: Budget Highlights* (Feb. 2010) 5, 8; *FY 2011 Budget Hearing: Before the S. Comm. on Energy and Natural Resources*, 111" Cong. 10 (Feb. 4, 2010) (statement of Sec. Dr. Steven Chu)⁴; Letter from Steve Isakowitz, Chief Financial Officer, DOE, to the Hon. Byron Dorgan, Chair, S. Subcomm. On Energy and Water Development 1 (Feb. 17, 2010), attached hereto as Exhibit 3; Letter from Steve Isakowitz, Chief Financial

⁴ Available at [http://www.congressional.energy.gov/documents/2-4-10_Final_Testimony_\(Chu\).pdf](http://www.congressional.energy.gov/documents/2-4-10_Final_Testimony_(Chu).pdf).

Officer, DOE, to the Hon. Peter J. Visclosky, Chair, H. Subcomm. On Energy and Water Development 1 (Feb. 17, 2010), attached hereto as Exhibit 4; *FY 2011 Budget Hearing: Before the H Comm. on Science and Technology*, 111th Cong. 10 (March 3, 2010) (statement of Sec. Dr. Steven Chu)⁵;

68. Beyond the “not a workable option” language, DOE has published no other formal explanation of its decision to irrevocably terminate the Yucca Mountain project in favor of an unknown and yet-to-be identified alternative (e.g., in the Federal Register).

DOE Is Continuing to Take Actions To Terminate Yucca Mountain as Soon as Possible.

69. Immediately after announcing its intent to permanently remove Yucca Mountain from consideration as a permanent repository, DOE began to take steps to shut down its Yucca Mountain activities.

70. On February 8, 2010, DOE moved to withdraw its application for groundwater permits for the Yucca Mountain project. Letter from Ned B. Larson, Federal Project Director, Nevada Rail Line Project, Dept. of Energy, to Tracy Taylor, State Engineer, Division of Water Resources, State of Nevada, attached hereto as Exhibit 5.

⁵ Available at http://www.congressional.energy.gov/documents/Final_Testimony_3-3_HST_CHU_.pdf.

71. On February 17, 2010, DOE sent letters to the chairmen of the House and Senate appropriations subcommittees responsible for DOE's budget. Exhibits 3 and 4. These letters contain DOE's notice of its intent to "reprogram" or reallocate FY 2010 funding that had been requested by DOE and approved by Congress to continue the licensing application process, to instead fund Yucca Mountain termination activities. *Id.*; U.S. Dept. of Energy, *FY 2010 Congressional Budget Request, Vol. 5*, 504 (FY 2010 budget request for DOE sub-agency responsible for Yucca Mountain "is dedicated solely to supporting to (sic) the NRC [Yucca Mountain] LA [licensing application] process."), 505, 520, 540⁶; P.L. 111-85, 123 Stat. 2864, 2868.⁷

72. DOE's actions in reprogramming these funds may violate the Purpose Law, 31 U.S.C. § 1301(a) ("appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."). Specifically, when Congress approved DOE's proposed FY 2010 budget, it made clear that DOE could not deviate from its intended use of the appropriated funds without prior Congressional authorization. P.L. 111-85 (Oct. 2009) at 102.

⁶ Available at <http://www.cfo.doe.gov/budget/10budget/Content/Volumes/Volume5.pdf>.

⁷ Specifically, DOE requested a total of \$197 million from two sources for its sub-agency, Office of Civilian Radioactive Waste Management (OCRWM), that is responsible for Yucca Mountain. U.S. Dept. of Energy, *FY 2010 Congressional Budget Request, Vol. 5*, 504. This is the total amount that was, in fact, appropriated. 123 Stat. 2864, 2868.

Congress defined agency reprogramming of funds to include “the reallocation of funds from one activity to another within an appropriation, or any significant departure from a program, activity or organization described in the agency’s budget justification as presented to an approved by Congress.” *Id.* It then ordered that “any reallocation of new or prior year budget authority . . . must be submitted to the House and Senate Committees on Appropriations in writing *and may not be implemented prior to approval by the Committees.*” *Id.* (emphasis added). Congress has not provided any such approval.

73. On February 26, 2010, DOE issued a letter announcing that on March 1, 2010, it would terminate all “data collection and performance confirmation activities” at Yucca Mountain and shut down “the power and communications systems for all surface and subsurface work and data collection processes” there.⁸ Letter from William J. Boyle, Director, Regulatory Affairs Division, Office of Technical Management, Dept. of Energy, to Michael F.

⁸ The “performance confirmation” activities mentioned in DOE’s February 26th letter refer to “the program of tests, experiments, and analyses that is conducted to evaluate the adequacy of the information used to demonstrate compliance with the performance objectives” required of the Yucca Mountain facility by the NRC. 10 C.F.R. § 63.2; *see also*, 10 C.F.R. § 63.131. Any interruption in the required performance confirmation activities, and the data collected thereby, could threaten the viability of any future licensing proceeding, should this Court grant the State of Washington’s requested relief.

Weber, Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission 1, attached hereto as Exhibit 6.

74. It appears that the Yucca Mountain site was, in fact, closed down in early March 2010, and access to the site by scientific personnel terminated. Exhibit 7.

75. On March 10, 2010, DOE issued a notice of expected separation to all employees working for the Office of Civilian Radioactive Waste Management, the DOE subagency responsible for investigating the siting of a repository at Yucca Mountain. Letter from David Zahransky, Chief Operating Office, Office of Civilian Radioactive Waste Management (OCRWM), Dept. of Energy, to all OCRWM employees, attached hereto as Exhibit 8.

76. On or about March 17, 2010, DOE announced it will no longer update the Yucca Mountain license application and that any future activities need no longer be screened for their potential impact on the license application. Exhibit 9 at 3.

77. Finally, DOE and its primary Yucca Mountain subcontractor, USA-Repository Services (USA-RS)⁹, have put together a written plan that calls for a quick end to USA-RS's work on the Yucca Mountain project. Exhibit 10.

⁹See, http://www.lanl.gov/news/index.php/fuseaction/nb.story/story_id/14978/nb_date/2008-11-07.

Specifically, DOE will issue a letter to USA-RS on April 16, 2010, formally terminating the contract, and USA-RS will stop work that same day. *Id.* at 2. USA RS plans to vacate its offices and remove all equipment from them in May 2010. *Id.* at 3. Finally, USA-RS will “initiate employee separations” in May and June 2010. *Id.* at 4.

78. Although DOE has continued to take various steps to terminate the Yucca Mountain project, DOE has not prepared an environmental impact statement, or provided indication of any analysis under the NEPA, regarding its decision to irrevocably terminate the Yucca Mountain project in favor of an unknown and yet-to-be identified alternative.

VI. CLAIMS FOR RELIEF

COUNT 1: Violation of the NWPA

79. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 78 above.

80. Under the NWPA, 42 U.S.C. § 10134(b), DOE “*shall submit* to the [NRC] an application for a construction authorization for a repository at such site. . .” upon the approval of the Yucca Mountain site as a repository pursuant to the NWPA. (Emphasis added.) Upon such approval, DOE is thus without discretion or authority to summarily terminate the Yucca Mountain licensing process, and its contrary actions are in violation of the NWPA.

81. Under the NWPA, further provisions require DOE's development and maintenance of the Yucca Mountain repository project upon the approval of the Yucca Mountain site as a repository. *See e.g.*, 42 U.S.C. § 10134(e)(1) (requiring the Secretary to prepare a project decision schedule "that portrays *the optimum way to attain the operation of the repository*"); 42 U.S.C. § 10134(e)(2) (any federal agency that cannot comply with the project decision schedule must report to Congress, with a corresponding report from the Secretary). Upon such approval, DOE is thus without discretion or authority to summarily terminate the Yucca Mountain project, and its contrary actions are in violation of the NWPA.

82. Under the NWPA, 42 U.S.C. § 10134(d), the NRC "*shall consider* an application for a construction authorization for all or part of a repository" and "*shall issue a final decision* approving or disapproving the issuance of a construction authorization. . ." (Emphasis added.) *See also*, 42 U.S.C. § 10134(d) (based upon project decision schedule, the NRC may extend the three-year timeline imposed on it under the NWPA to reach its decision on DOE's construction authorization application). The NRC is without discretion or authority to, either by its own accord or by granting DOE's motion to withdraw, terminate its own consideration of DOE's Yucca Mountain license application short of a decision on the merits, and any contrary actions would be in violation of the NWPA.

COUNT 2: Violation of NEPA

83. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 82 above.

84. NEPA requires federal agencies to prepare an environmental impact statement (EIS) with alternatives for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

85. NEPA further requires the preparation of an EIS at the proposal stage, before an agency makes its decision. 42 U.S.C. § 4332(C); 10 C.F.R. § 1021.210(b). Until an EIS is completed, NEPA’s implementing regulations prohibit taking actions that would “[h]ave an adverse environmental impact” or “[l]imit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a) (emphasis added). DOE’s own NEPA regulations require it to “complete its NEPA review for each DOE proposal *before making a decision on the proposal*”, 10 C.F.R. § 1021.210(b) (emphasis added), and before DOE has “reached the level of investment or commitment likely to determine subsequent development *or restrict later alternatives. . .*” 10 C.F.R. § 1021.212(b) (emphasis added).

86. DOE’s decision to irrevocably terminate the Yucca Mountain project in favor of an unknown and yet-to-be identified alternative is a major federal project significantly affecting the quality of the human environment. DOE’s failure to prepare an EIS analyzing the impacts of its decision is arbitrary and

capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2).

COUNT 3: Violation of the Administrative Procedure Act (APA)

87. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 86 above.

88. An agency action is arbitrary and capricious in violation of the APA, 5 U.S.C. § 706(2)(A), if the agency “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

89. DOE’s decision and actions in terminating the Yucca Mountain project in favor of an unknown and yet-to-be identified alternative, including its vague and cryptic assertion that it Yucca Mountain is “not a workable option” and that the nation needs a “different solution,” is arbitrary and capricious under the aforementioned standard.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

90. Declare that DOE's decision to irrevocably terminate consideration of Yucca Mountain, Nevada, as the potential site for a permanent high-level radioactive waste and spent nuclear fuel repository in favor of an unknown and yet-to-be identified alternative violates the NWPA and, consequently, is null and of no legal effect;

91. Declare that DOE's decision to irrevocably terminate consideration of Yucca Mountain, Nevada, as the potential site for a permanent high-level radioactive waste and spent nuclear fuel repository in favor of an unknown and yet-to-be identified alternative violates NEPA and, consequently, is null and of no legal effect;

92. Declare that DOE's decision to irrevocably terminate consideration of Yucca Mountain, Nevada, as the potential site for a permanent high-level radioactive waste and spent nuclear fuel repository in favor of an unknown and yet-to-be identified alternative violates the **APA** and, consequently, is null and of no legal effect;

93. Issue a permanent injunction prohibiting DOE from implementing its decision to irrevocably terminate the Yucca Mountain project in favor of an unknown and yet-to-be identified alternative;

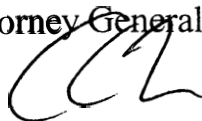
94. Issue a permanent injunction requiring DOE to continue to undertake its obligations with respect to the Yucca Mountain project, as defined by the NWPA and as funded by Congress;

95. Issue a permanent injunction prohibiting the NRC from considering or granting DOE's motion to withdraw its license application for Yucca Mountain; and

96. Grant such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED this 12th day of April, 2010.

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