

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**JIM HODGES, Governor of the State of South
Carolina, in his official capacity,**

Plaintiff-Appellant,

v.

**SPENCER ABRAHAM, Secretary of the
Department of Energy, in his official capacity,
and the UNITED STATES DEPARTMENT
OF ENERGY,**

Defendants-Appellees.

C.A. No.: 02-1639

JURISDICTIONAL STATEMENT

This matter was filed in the South Carolina District Court, Aiken Division, on May 1, 2002, on the basis of original jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702. The District Court granted summary judgment for appellees. (App. 196). Jurisdiction is invoked before this court pursuant to 28 U.S.C. § 1291 and Rule 3 of the Federal Rules of Civil Procedure.

STATEMENT OF THE ISSUES

- (1) Whether the District Court committed reversible error in determining that the Department of Energy complied with the National Environmental Policy Act (NEPA) when it issued an amended record of decision on April 19, 2002, making the Savannah River Site near Aiken the nation's consolidated, long-term storage facility for surplus plutonium,
 - (a) where the Department of Energy did not prepare any NEPA review document specifically for that decision as required by NEPA regulations;
 - (b) where the only claimed NEPA compliance for the long-term storage decision was information contained in previously prepared NEPA documents for previous decisions; and
 - (c) where the April 19 amended record of decision also cancelled the immobilization technology for processing surplus plutonium without NEPA compliance?
- (2) Whether the District Court committed reversible error in ruling that the Department of Energy's amended record of decision did not violate the Administrative Procedures Act where DOE arbitrarily reversed its long-standing policy to store surplus plutonium on an interim basis pending disposition after reaffirming that policy just eight days earlier?
- (3) Whether the District Court committed reversible error in not enjoining the shipment of surplus plutonium from the Rocky Flats nuclear facility in Colorado to the Savannah River Site where those shipments were to be made pursuant to the April 19 amended record of decision, which violated NEPA and the Administrative Procedures Act?

STATEMENT OF THE CASE

On May 1, 2002, appellant Governor Jim Hodges filed the complaint in this case challenging the amended record of decision (ROD) of the Department of Energy (DOE) of April 19, 2002 making the Savannah River Site (SRS) near Aiken, South Carolina the nation's long-term storage facility for surplus plutonium, canceling the immobilization method of processing plutonium and deciding to begin shipments of surplus plutonium from the Rocky Flats nuclear site in Colorado to SRS. (App. 13). Appellant alleged that the amended ROD is illegal under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370d, for failure to undertake appropriate environmental review and under the Administrative Procedures Act, 5 U.S.C. § 702, because the long-term storage decision was arbitrary and capricious and made without observance of due process of law. For relief, appellant sought a declaratory judgment that the amended ROD violates NEPA and the Administrative Procedures Act, and an injunction prohibiting appellees from sending any surplus plutonium to SRS unless and until DOE complied with applicable law.

On May 15, 2002, appellant filed a motion for preliminary injunction to prevent the shipment of surplus plutonium from the Rocky Flats to SRS. On May 24, 2002, appellees filed a motion for summary judgment. Argument was heard on June 13, 2002, and on that date, the court issued its decision granting appellees'

motion for summary judgment and denying appellant's motion for preliminary injunction. (App. 196). Appellant filed a notice of appeal on June 14, 2002. (App 183-186).

STATEMENT OF FACTS

Plutonium

Plutonium is a highly radioactive, metallic element. Although it is virtually non-existent in nature, plutonium has been produced in large quantities by processing used uranium fuel from nuclear reactors. Plutonium can exist in approximately fifteen different variations, called isotopes, but only one, plutonium 239, is used to manufacture the explosive triggers, or "pits," at the core of modern nuclear weapons. Plutonium 239 can also be processed to form a powdery oxide that can be mixed with uranium dioxide to form mixed-oxide ("MOX") fuel for use in nuclear reactors. All subsequent references to plutonium in this memorandum are to plutonium 239.

Plutonium's radioactive qualities make it an extremely hazardous substance. Inhalation of microscopic amounts of plutonium can cause cancer and other adverse health effects. A relatively small quantity of plutonium has the potential to reach a "critical mass." A critical mass occurs when plutonium is configured in such a way that its radiation cannot escape into the environment and instead triggers more radiation, causing a self-sustaining chain reaction. A critical mass of

plutonium would release an intense amount of radiation that would be lethal to humans and lead to serious environmental contamination. As little as ten pounds of plutonium can be fashioned into a bomb more powerful than the bomb that struck Hiroshima.

Plutonium has a “half-life” of 24,000 years, meaning that it takes 24,000 years for half of a given amount of plutonium to decay into a different element. After two half-lives, there would be one-fourth of the plutonium that was contained in the original sample, after three half-lives, one-eighth, and so forth. As a general rule of thumb, a radioactive element’s hazardous life is ten times its half-life. Accordingly, the plutonium in existence today will be hazardous for at least 240,000 years.

Elemental plutonium is a metal that readily reacts with oxygen in air to form an oxide powder that has a high potential for environmental dispersal. Most potential storage safety problems arise from the interaction of the plutonium itself with air, moisture, or breakdown products. Although plutonium oxide is a more stable chemical form than plutonium metal, its storage is more complicated because the powder has a high surface area and therefore has the potential to adsorb a large amount of moisture on the surface. Before being packaged for storage, plutonium must be heated at very high temperatures to remove the moisture. Water remaining on the oxide in storage reacts to form hydrogen gas

over time and may generate a sufficiently high pressure to rupture a sealed container.

Surplus Plutonium Disposition Program

A decade ago, at the end of the cold war, it became clear that some of the plutonium used in nuclear bombs would no longer be needed due to bilateral treaties and unilateral pledges that promised reductions of nuclear warhead stockpiles. On September 1, 2000, the United States and Russia signed an agreement for the management and disposition of plutonium declared excess to military needs. The agreement sets forth a plan whereby each country would dispose of at least 34 metric tons of weapon-grade plutonium. (Subsequent references to tons means “metric tons”). The United States has approximately 52.5 tons of excess weapons-grade or weapons-usable plutonium. (App. 42).

DOE has taken the lead in managing the disposition of the surplus plutonium in the United States. On January 21, 1997, it issued a ROD announcing a dual-track plan for plutonium disposition whereby pure forms of plutonium would be processed into a mixed oxide fuel (MOX) for use by commercial reactors and the remaining impure plutonium immobilized into a ceramic form and placed in a geologic site. (App.139) The National Academy of Sciences had recommended the dual approach in a 1995 report which states, "Since it is crucial that at least one of these options succeed, since time is of the essence, and since the costs of

pursuing both in parallel are modest in relation to the security stakes, we recommend that project-oriented activities be initiated on both options, in parallel, at once." (App. 41) DOE echoed these reasons for the dual approach in the 1997 ROD, stating, "The additional expense of pursuing the hybrid approach would be warranted by the increased flexibility it would provide . . . to ensure that plutonium disposition could be initiated promptly should one of the approaches ultimately fail or be delayed." (App. 139)

Furthermore, the United States wanted the immobilization technology to deal with certain plutonium in the military complex that was not suitable for use in nuclear reactors. (App. 41). In this regard, DOE stated in the 1997 ROD that "approximately 30 percent of the total quantity of plutonium (that has or may be declared surplus to defense needs) would require extensive purification to use in MOX fuel, and therefore will likely be immobilized." (App. 139). DOE's plan called for using immobilization for approximately 17 tons of surplus plutonium. (App. 199) Recognizing the importance of immobilization, the January, 1997 ROD made transport of surplus plutonium from Rocky Flats to SRS contingent on DOE selecting SRS as the site for the immobilization facility. (App. 139)

In a federal register notice of January 11, 2000, DOE issued a ROD deciding to locate the MOX and immobilization facilities for processing surplus plutonium at SRS as well as a pit disassembly and conversion facility. (App. 156) That ROD

discussed some of the advantages and disadvantages of the MOX and immobilization technologies:

Immobilization technology has some advantage over the reactor technology [MOX] in avoiding the perception that the latter approach could potentially encourage additional separation and civilian use of plutonium, which itself poses proliferation risks. Because reactor technology results in accountable “items” (for purposes of international safeguards) whose plutonium content can be accurately measured, this approach offers some advantage in accounting to ensure that the output plutonium matches the input plutonium from the process. The principal uncertainty with respect to using excess weapons plutonium as MOX fuel in domestic reactors relates to the potential difficulty of gaining political and regulatory approvals from the various operations required. (App. 156)

The January, 2000 ROD reiterated the reasoning for the dual approach, stating: “Pursuing both immobilization and MOX fuel fabrication also provides important insurance against uncertainties of implementing either approach by itself.” (App. 156)

The Administration re-evaluated the surplus plutonium strategy in 2001 and decided to reduce spending for it. There were reports that DOE might abandon the program altogether. (App. 42) Some members of Congress became concerned about the program and succeeded in enacting legislation requiring the Administration to report to Congress on its plans for the surplus plutonium program. (App. 43 & 44)

DOE submitted the report to Congress on February 15, 2002, and in it announced that it would eliminate the immobilization component of the surplus plutonium program and proceed exclusively by way of the MOX technology. (App. 130; 135 & 138) The report provided a schedule for implementing the MOX processing at SRS which includes the following milestones: NRC licensing - FY 2000-2005; construction - FY 2007; first MOX fuel fabricated - FY 2008; full-scale operations - FY 2007- 2019; and deactivation-FY 2020. (App. 136)

Two of the options considered in the report, but rejected, were storage of the surplus plutonium in the six places where it currently resides and consolidated storage in two. One of the disadvantages of the storage approach was said to be: “The U.S. plutonium disposition mission and parallel Russian disposition effort would not be achieved. Russian plutonium would remain subject to increasing risk of theft or diversion.” (App. 131) Another disadvantage of the storage approach was said to be: “While the technologies for storing plutonium currently in use throughout the complex are considered mature, there is no experience for very long-term storage of pits and non-pit plutonium.” *Id.* Another disadvantage of the storage approach came under the category, “sensitivities.” For the storage in place option, the report stated: “Both South Carolina and Colorado would strongly oppose this option.” (App. 131) As to “sensitivities” if there were consolidated storage, the report stated:

South Carolina would view this option as a failure to provide a pathway out of SRS for surplus plutonium brought there for disposition (assuming that SRS was selected as one of the consolidation sites). Therefore, this option can be expected to be strongly opposed by the State of South Carolina and challenged in the courts. This option would likely require additional NEPA review and public meetings. (App. 133)

Just as members of Congress became concerned about the Administration's commitment to proceed with expeditious processing of the surplus plutonium, so did Governor Hodges. He began a series of letters to Secretary of Energy Abraham in April, 2001 seeking DOE's assurance that it would meet its commitment to process, then remove, the surplus plutonium sent to the Savannah River Site and not use the state as a dumping ground for plutonium.

In his first letter dated April 6, 2001, Governor Hodges stated:

. . . I am very disappointed to read in published reports that the Department's proposed budget does not include funds to begin construction of the immobilization plant. Given the Department's apparent and sudden change of plans, which was done without any consultation with my office, I would like a briefing on the Department's intentions with respect to immobilization and how that affects the Department's plans for MOX. (App. 50)

In a letter to Secretary Abraham of April 24, 2001, Governor Hodges stated:

Approximately 18 months ago, DOE made the decision to locate all three parts of the plutonium disposition program at SRS. With the importation plan for the plutonium, there was also a clear exit strategy. Other commitments for environmental restoration involving high-level wastes as well as other on-site wastes were made. Because DOE cannot or will not meet its responsibilities associated with the large volumes of waste currently at SRS, I must consider all options available to me involving receipt of additional DOE wastes into South Carolina. (App. 51)

In a letter of June 13, 2001 to Secretary Abraham, Governor Hodges stated:

“I am following up on my letters to you of April 6, April 24 and May 17, for which I have yet to receive a response, expressing my deep concern about the Department of Energy’s proposed budget for the Savannah River Site (SRS).” (App. 54)

In a letter of August 30, 2001 to Secretary Abraham, Governor Hodges stated:

Several years ago, DOE approached the State of South Carolina about hosting missions identified as key elements of a successful plan to safely convert and dispose of surplus plutonium. These were the immobilization, MOX fuel fabrication, and pit disassembly and conversion projects. Assurances were provided that the funding needs would be met to build and operate these initiatives. South Carolina agreed to be the host state for implementation in return for those assurances and a guaranteed pathway out of the state.

Since that time, design funding has been cancelled on immobilization and pit disassembly and conversion, and reports indicate MOX may be cancelled. Nevertheless, DOE continues to plan shipments of plutonium to South Carolina without any clear indication of how it will be processed and when it will leave our state. (App. 57)

Secretary of Energy Abraham and Governor Hodges discussed DOE providing assurances to South Carolina in the form of an agreement that would be signed by both of them. An agreement was subsequently drafted that contained most of the assurances Governor Hodges wanted and included the statement: “DOE acknowledges that the K-Reactor [KAMS] is not intended for use as a long-term storage facility.” (App. 68) The agreement also had provisions that prevented most of the surplus plutonium from being shipped to SRS until the actual construction of the processing facilities was underway. The dispute over the agreement ultimately came down to Governor Hodges’ insistence that it be an enforceable agreement rather than a voluntary one. (App. 67)

On April 11, 2002, Secretary Abraham wrote to Governor Hodges stating:

As I have indicated in our various personal meetings and phone conversations, I appreciate your concerns that any plutonium that comes into the State have a credible pathway out. That is why when we spoke on February 23, I personally assured you that our new approach would not transport any plutonium to South Carolina unless our plans for fabricating it into MOX fuel were progressing in a fashion that assured that it would be able to be disposed of through this process. (App. 60)

Additionally, Secretary Abraham stated in the letter of April 11, 2002 that DOE had made a:

commitment [in the agreement] to maintain a pathway out of South Carolina for any plutonium brought into the State, including firm dates by which such material would be removed from the State if DOE, for any reason, were to be unable to secure the funding necessary to build the MOX facility. (App. 61)

Secretary Abraham enclosed a signed copy of the agreement and urged Governor Hodges to sign it as well and end the dispute. But Governor Hodges refused, insisting that DOE make the agreement enforceable by waiving its immunity to suit over it or entering it into a consent decree.

Also, on April 11, DOE faxed to Governor Hodges a draft amended ROD for the surplus plutonium disposition program that would serve as the decision document for the plan to eliminate immobilization, proceed exclusively with MOX processing and transfer surplus plutonium immediately from Rocky Flats to SRS. (App. 70) With respect to the MOX processing plans, the draft amended ROD stated: “Under this amended ROD . . . DOE/NNSA will begin taking actions necessary to disposition of up to 33 metric tons (t) of surplus plutonium by fabricating it into mixed oxide (MOX) fuel.” (App. 71) In discussing the surplus plutonium that would be moved from sites other than Rocky Flats to SRS, DOE stated that the shipments of plutonium from Rocky Flats “will be made in a manner consistent with the terms of DOE’s agreement with South Carolina.” (App. 71)

The draft amended ROD acknowledged that previous RODs placed as a condition for Rocky Flats plutonium being sent to SRS that the immobilization facility be built at SRS (App. 70 & 76), but found it sufficient to cancel this condition on the basis that DOE was required to meet “a set of milestones for the

construction of a MOX plant that are set out in an agreement between the Department and the State of South Carolina.” (App. 70)

In a letter of April 11, 2002, Steve Bates, legal counsel to Governor Hodges, informed DOE that Governor Hodges would sue it to prevent shipments of surplus plutonium to SRS if DOE made a unilateral decision to ship the surplus plutonium without an enforceable agreement. (App. 87) Mr. Bates stated that the grounds of the lawsuit would be that a supplemental EIS was required for the revised surplus plutonium strategy that eliminated immobilization and thereby relied exclusively on the MOX technology.

Secretary Abraham wrote to Governor Hodges again on April 12, 2002, thanking Governor Hodges for accepting the terms of the agreement DOE had offered South Carolina on shipping surplus plutonium to SRS, but criticizing Governor Hodges for insisting on making a “means of enforcing these commitments.” (App. 90) Secretary Abraham asserted that the signed agreement should address Governor Hodges’ concerns, “since that is the kind of commitment that an Administration walks away from unilaterally only at considerable political peril.” (App. 91)

Further, Secretary Abraham stated: “I hope that rather than electing to throw this matter into litigation, thereby vastly complicating its resolution, you will reconsider, accept the proposal I have offered, sign the proposed agreement which

I believe gives you very substantial protection against a unilateral change of course” (App. 93 & 94)

But a few days later an order of the Nuclear Regulatory Commission came to light that revealed it was far from certain that the MOX program would proceed. The order was issued on April 12, 2002 in the re-licensing proceeding for Duke Energy Corporation’s McGuire and Catawba nuclear facilities, which are proposed to be used in the MOX program. Specifically, those facilities would burn MOX fuel fabricated at SRS. In that order, the Nuclear Regulatory Commission stated that Duke Energy’s possible application to file for permission to burn the MOX fuel was speculative. (App. 96)

Additionally, the Nuclear Regulatory Commission stated it found no reason to doubt the following statement in the proceeding by Duke Energy:

Duke is currently participating in an international program to reduce stockpiles of surplus weapons plutonium in the United States and Russia. This program may eventually involve the use of MOX fuel at McGuire and/or Catawba. However, the future use of MOX fuel at McGuire and Catawba reactors is not a certainty. Substantial uncertainties and contingencies continue to surround the program. (App. 97)

DOE then issued the amended ROD in final form in a federal register notice of April 19, 2002. (App. 199) It was dramatically different from the draft DOE had sent to Governor Hodges eight days earlier. (App. 70) The amended ROD announced the “immediate implementation of consolidated long-term storage at the

Savannah River Site (SRS) of surplus non-pit plutonium now stored separately at the Rocky Flats Environmental Technology Site (RFETS) and SRS. . . .” (App. 99)

The amended ROD stated that MOX processing, which Secretary Abraham had presented to Governor Hodges as a certainty, was to be reviewed “pursuant to the National Environmental Policy Act (NEPA). No final decisions regarding the MOX portion of the program will be made until these reviews are completed.” (App. 99)

Whereas Secretary Abraham had guaranteed that the shipment of surplus plutonium to SRS was strictly tied with processing it there, the amended ROD stated:

In addition to achieving the ultimate goal of permanent disposition of surplus plutonium materials, DOE independently needs to improve the configuration of the storage system for these materials pending disposition. These improvements will allow DOE to significantly reduce storage costs, expedite closure and cleanup of sites and facilities in its nuclear complex, and enhance the security of these materials. (App. 99; emphasis supplied.)

Further, demonstrating the separation of the shipment of surplus plutonium to SRS from its processing, the amended ROD added as a new heading “Consolidated Long-term Storage of Plutonium at SRS,” and under it stated:

Canceling the U.S. immobilization program has caused DOE/NNSA to reevaluate the long-term storage needs of the DOE nuclear complex. Much of the non-pit surplus plutonium currently stored at various sites in the complex was originally destined for immobilization. DOE/NNSA is examining alternative disposition paths for this material, including use as MOX fuel In the meantime, however, DOE needs to move forward with consolidated storage of some of this material, which serves independent objectives. In particular, DOE must consolidate the plutonium in order to close and clean up facilities and sites in the complex. . . . Shipments from RFETS [Rocky Flats] must begin soon in order to maintain that schedule. (App. 99)

Additionally, the ROD asserted: “Canceling the immobilization portion of the U.S. surplus plutonium disposition program removes the basis for the contingency contained in the January 21, 1997, ROD for the Storage and Disposition PEIS [Programmatic EIS] that SRS be selected as the site for the immobilization facility before DOE transports surplus plutonium from the RFETS [Rocky Flats] to SRS.” (App. 99)

In a federal register notice of April 24, 2002, the Nuclear Regulatory Commission announced that it was postponing preparation of an EIS on the proposed MOX fuel fabrication facility at SRS. 67 Fed. Reg. 20183. The notice stated:

NRC staff decided this schedule needed to be changed when, in January 2002, the U.S. Department of Energy (DOE) announced its decision to alter its planned hybrid approach for surplus weapons plutonium disposition. . . . DOE’s decision not to build the PIP [Plutonium Immobilization Plant] and convert all of the plutonium into MOX fuel requires design changes to the proposed MOX facility. [67 Fed. Reg. 20183.]

SUMMARY OF ARGUMENT

On April 19, 2002, DOE issued an amended ROD substantially changing the country's surplus plutonium policy. Previously that policy had been to store surplus plutonium on an interim basis pending its processing by both the immobilization and MOX technologies beginning around 2007. The amended ROD cancelled immobilization and made SRS the nation's consolidated, long-term storage facility for surplus plutonium. In making this decision, DOE did not issue any NEPA compliance document. Rather, in response to this lawsuit, DOE argued that previous NEPA reviews for previous DOE decisions sufficed as the NEPA compliance for the April 19 amended ROD.

DOE's amended ROD is clearly illegal under its NEPA regulations and the NEPA regulations of the Council on Environmental Quality. These regulations require the issuance of an environmental assessment or supplement assessment for all federal agency actions unless the action is specifically listed in a categorical exclusion. DOE regulations in fact list storage and disposal facilities for high level waste and spent nuclear fuel as requiring an environmental assessment and normally requiring an EIS. The need for an EIS or supplemental EIS on this amended ROD is further demonstrated by the DOE regulation that requires a supplemental EIS "if there are substantial changes to the proposal"

DOE is incorrect in its claim that previous NEPA reviews adequately considered the environmental impacts, and alternatives to, the long-term storage decision made by the amended ROD. The principal NEPA document upon which DOE relies is a 1996 programmatic EIS covering both the storage and disposition of surplus plutonium. However, this programmatic EIS only generally discussed long-term storage, dealing with the storage facility, for instance, simply by stating that it would be a new one specifically designed for storage. In fact, the facility that would be used for storage under the amended ROD is an old reactor that the Defense Nuclear Facility Safety Board stated “is an aged facility and was never intended to provide more than interim storage.”

The amended ROD also violates the Administrative Procedures Act because the change in policy is arbitrary in light of the commitment just eight days earlier by the Secretary of Energy that SRS would not be used as a long-term storage facility for surplus plutonium and that surplus plutonium would only be brought into South Carolina if there was a clear pathway out for it.

An injunction preventing shipments of surplus plutonium to SRS unless and until DOE complies with law should be the remedy in this case. An injunction is necessary to accomplish NEPA’s purpose of not implementing actions before the environmental analysis has been completed and is available for use in the decision-making process. Also, allowing the shipments to proceed would be contrary to

NEPA's purpose of providing information to the public to allow it to participate in the agency decision-making process. Without an injunction, South Carolina would suffer the irreparable harm of dangerous plutonium being brought to SRS for long-term storage before it is determined if SRS is the best alternative for the long-term storage program and if it is, how long-term storage can best be accomplished at SRS. It is extremely unlikely that once the surplus plutonium is shipped to SRS, it will be removed regardless of the results of a later NEPA review.

ARGUMENT

A. Standard of Review

The judgment by the District Court was on summary judgment. Accordingly, this Court's review of that judgment is de novo. Providence Square Assocs., L.L.C. v. G.D.F., Inc., 211 F.3d 846, 850 (4th Cir. 2000)

B. Violations of NEPA

1. NEPA Requirements

NEPA, 42 U.S.C. §§ 4321 - 4370d, requires federal agencies to consider environmental impacts in their decision-making and to prepare a detailed statement of environmental impacts on, and alternatives to, the recommended course of action (“environmental impact statement” or “EIS”) when proposing a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332. The Council on Environmental Quality (CEQ) has issued NEPA regulations that apply to all federal agencies. Many of the individual federal agencies, including DOE, have issued NEPA regulations that apply to those particular agencies.

NEPA requires that federal agencies do their environmental review prior to implementing their decisions. 42 U.S.C. § 4332(2). DOE NEPA regulations specifically provide: “DOE shall complete its NEPA review for each DOE proposal before making a decision on the proposal” 10 C.F.R. § 1021.210(b).

DOE may prepare an environmental assessment to determine whether it is necessary to prepare an EIS or it may skip the environmental assessment if it determines at the outset to prepare an EIS. 40 C.F.R. § 1508.9, 10 C.F.R. § 1021.104. If DOE decides in its environmental assessment that it is not necessary to prepare an EIS, it must issue a finding of no significant impact (FONSI). CEQ

regulations define a FONSI as “a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.” 40 C.F.R. § 1508.13.

CEQ regulations allow an agency to categorically exclude certain activities that do not as a group have sufficient environmental impacts to require an EIS. 40 C.F.R. § 1508.4. If an activity falls into one of those categories, it is unnecessary for the federal agency to prepare even an environmental assessment. DOE has issued a regulation establishing categorical exclusions. 10 C.F.R. § 1021.410. That regulation makes clear that if an activity does not qualify for a categorical exclusion, as is the case here, DOE must prepare either an environmental assessment or EIS for the activity. The regulation states in part:

- (d) If a DOE proposal is not encompassed within the classes of actions listed in the appendices to this subpart D [categorical exclusions], or if there are extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal, DOE shall either:
 - (1) Prepare an EA [environmental assessment] and, on the basis of that EA, determine whether to prepare an EIS or a FONSI; or
 - (2) Prepare an EIS and ROD.

DOE regulations describe the purpose of an environmental assessment as “providing sufficient evidence and analysis for determining whether to prepare an EIS or to issue a FONSI.” 10 C.F.R. § 1021.321(c). DOE regulations make clear that an environmental assessment must result in either a finding of no significant impact or a decision to prepare an EIS. The regulations state:

DOE shall prepare a FONSI only if the related EA supports the finding that the proposed action will not have a significant effect on the human environment. If a required DOE EA does not support a FONSI, DOE shall prepare an EIS and issue a ROD before taking action on the proposal addressed by the EA. . . . [10 C.F.R. § 1021.322(a).]

Other parts of the DOE NEPA regulations also make clear that an environmental assessment is required for most agency actions including decisions having to do with storage of high level waste. DOE regulations state:

- (a) When to prepare an EA. . . . DOE shall prepare an EA for a proposed DOE action that is described in the classes of actions listed in appendix C to subpart D of this part, and for a proposed DOE action that is not described in any of the classes of actions listed in appendices A, B, or D to subpart D, except that an EA is not required if DOE has decided to prepare an EIS. [10 C.F.R. 1021.321, emphasis supplied.]

Storage of high-level waste is included in appendix D of subpart D under the following description:

siting, construction, operation, and decommissioning of major treatment, storage, and disposal facilities for high level waste and spent nuclear fuel, including geologic repositories, but not including onsite replacement or upgrades of storage facilities for spent nuclear fuel at DOE sites where such replacement or upgrade will not result in increased storage capacity. [10 C.F.R. 1021, subpt. D, App. D.]

Therefore, under 10 C.F.R. § 1021.321 quoted above, storage of the surplus plutonium is an activity that requires an environmental assessment. Significantly, appendix D itself is the category for activities normally requiring an EIS.

If DOE has already prepared an EIS and it subsequently makes a change in its proposal, it must prepare a supplement assessment to determine whether a supplemental EIS is required unless it decides to do a supplemental EIS at the outset. 10 C.F.R. § 1021.104 and 1021.314(c). See, Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996). DOE regulations provide:

The supplement analysis shall contain sufficient information for DOE to determine whether:

- (i) An existing EIS should be supplemented;
- (ii) A new EIS should be prepared; or
- (iii) No further NEPA documentation is required. [10 C.F.R. § 1021.314(2).]

Both CEQ and DOE NEPA regulations require a supplemental EIS where substantial changes are made to a proposal for which an EIS was prepared. Specifically, CEQ regulations require a supplemental EIS if “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(ii). Similarly, DOE NEPA regulations provide: “DOE shall prepare a supplemental EIS if there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns” 10 C.F.R. § 1021.314.

2. DOE Did Not Issue a NEPA Compliance Document for Its Amended ROD

The fundamental violation of NEPA in this case is that DOE issued its amended ROD of April 19, 2002 without any NEPA compliance document. It did not claim that there was a categorical exclusion for the amended ROD; it did not prepare an environmental assessment or supplement assessment resulting in a FONSI; nor did it prepare an EIS or supplemental EIS for the amended ROD. It was not until this case was filed and DOE was forced to provide some defense to the alleged NEPA violations that DOE provided the explanation that previous NEPA documents prepared for previous decisions on

the surplus plutonium program sufficed as NEPA compliance for the April 19 amended ROD.

Even if the previous documents did in fact sufficiently analyze the decisions made in the amended ROD, they could not by themselves constitute NEPA compliance for that decision. The CEQ and DOE regulations require that DOE issue an environmental assessment or supplement assessment for the specific decision that is made. Thus, DOE must provide its explanation of NEPA compliance in connection with the actual decision, not in a court case challenging.. If the previous NEPA documents sufficiently analyzed the current action as DOE claims, the agency could have issued a relatively short environment assessment or supplement assessment based principally on those previous documents. This is in fact exactly what DOE did when it made changes in the surplus plutonium storage program planned at SRS in July, 1998 and February, 2002. (App. 115 & 116)

In the court proceedings below, DOE did not directly confront its clear violation of NEPA of not issuing a NEPA document for the amended ROD. Rather it sought to deflect attention from it by claiming the amended ROD did not make much or any change in the surplus plutonium program and previous NEPA documents prepared by DOE for other decisions sufficed as the NEPA review for the April 19 decision. The district court ruled for Appellees on

NEPA compliance, but did so on a faulty view of NEPA requirements. (App. 167) (The court stated at the June 13, hearing, “Their [DOE’s] own regulations say that they only have to do a supplement analysis if it is unclear whether or not a supplemental EIS is required.”). In any case, both of DOE’s arguments are incorrect.

3. The Amended ROD Substantially Changed the Surplus Plutonium Program

The record is replete with evidence demonstrating that the surplus plutonium policy prior to the April 19 amended ROD was interim storage and disposition, not long-term storage. The 1996 programmatic EIS divides its subject into three categories: storage, storage pending disposition and disposition. (App. 148-149) It was only the nonsurplus plutonium and highly enriched uranium that the EIS stated would be considered for long-term storage, not the plutonium. *Id.*

The ROD issued on the 1996 programmatic EIS also demonstrates that the surplus plutonium policy was interim storage and disposition, stating:

The Department of Energy (DOE) has decided to implement a program to provide for safe and secure storage of weapons-usable fissile materials . . . and a strategy for the disposition of surplus weapons-usable plutonium as specified in the Preferred Alternative in the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement (S&D Final PEIS, DOE/EIS-0229, December 1996). (App. 139; emphasis supplied.)

Another clear demonstration that DOE's surplus plutonium policy was not long-term storage of surplus plutonium prior to its April 19 amended ROD is the supplement analysis for storage of surplus plutonium at SRS of February, 2002. That supplement assessment noted that a 1998 supplement analysis on the subject had assumed storage of surplus plutonium would be "for 10 years pending disposition." (App. 88) The February, 2002 supplement assessment stated that storage of surplus plutonium at SRS "beyond 10 years may be needed. Surplus plutonium materials will be stored in the KAMS facility until they are processed and converted into MOX fuel, which is expected to occur in the 2007 – 2019 time frame." (App. 116) Again, this shows that the strategy was interim storage pending disposition.

DOE's report to Congress of February 15, 2002, stated that the agency rejected the long-term storage approach. (App. 131-134) The report included a schedule for MOX processing at SRS, which included starting construction in fiscal year 2007 and beginning operations in fiscal year 2008. (App. 136)

Additionally, Secretary of Energy Abraham's letters to Governor Hodges emphatically stated that DOE's policy was to ship surplus plutonium to SRS only if it would be processed in the near term. He specifically stated that long-term storage of surplus plutonium would not occur at SRS.

Dr. Allison Macfarlane, who served on the National Academy of Sciences panel on the Spent Fuel Standard and Plutonium Disposition, stated:

In an unprecedented move, the Department of Energy has decoupled plutonium disposition from storage and made plans for its long-term storage independent of its ultimate disposition. In the past, the Department of Energy has always regarded long-term storage as one disposition method that was not seriously considered as viable in terms of meeting national security goals and international agreements. But on April 19, 2002, the Department of Energy selected the Savannah River Site to be the location for long-term storage of plutonium. (App. 39)

DOE's principal arguments that its long-term storage decision of April 19 was not a substantially new policy are that DOE had studied long-term storage of surplus plutonium in previous NEPA documents and that DOE stated in a number of those documents that the disposition strategy depended upon the two independent variables of costs and ongoing nonproliferation relationship and agreements with Russia. As to the latter, appellant does not dispute that DOE may change its policy based on these or other factors, but contends that changes are subject to NEPA. As to the former, while appellant accepts that DOE did some general analysis of long-term storage previously, long-term storage of surplus plutonium at SRS was never selected as the preferred alternative for surplus plutonium and therefore was never the agency policy until its decision of April 19, 2002.

4. Previous NEPA Documents Do Not Suffice As the NEPA Review

DOE claims that previous NEPA documents it prepared for previous decisions on the surplus plutonium program suffice as its NEPA compliance for its April 19 amended ROD. As noted earlier, NEPA regulations require a NEPA review specifically of the decision in question. But even if previous NEPA analyses for other actions could constitute NEPA compliance for the amended ROD, the previous documents did not in fact provide adequate review for the April 19 decision.

In ruling for DOE that the previous documents were adequate NEPA compliance, the court relied principally on the December, 1996 programmatic EIS. That document was a programmatic EIS that considered numerous aspects of the plutonium disposition program for eight nuclear sites including the Savannah River Site. The preferred alternative for storage of surplus plutonium was to continue current storage of plutonium at existing sites pending disposition other than to begin shipping the Rocky Flats surplus plutonium to the Savannah River Site where it would be stored in a new actinide packaging and stabilization facility pending processing. (App. 149A-149B)

DOE argued below that even though long-term storage was not the preferred alternative for surplus plutonium, this alternative was considered and this consideration can serve as the NEPA compliance for a later decision making long-

term storage the preferred alternative. This argument suffers from the fact that rejected alternatives are usually not considered in as much detail as the chosen alternative and the 1996 programmatic EIS mention of long-term storage of plutonium at SRS was in connection with references to the actinide packaging and storage facility, which was to be a new facility specially designed for storage.

Probably, the simplest way to refute DOE's argument that the long-term storage consideration of surplus plutonium in the December, 1996 programmatic EIS is sufficient NEPA analysis for the April 19 amended ROD is to note that the 1996 document is a programmatic EIS. Programmatic EISs are for the purpose of considering broad programs or projects at a general level prior to doing more specific NEPA review for specific decisions that follow. State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) ("When a programmatic EIS has already been prepared, site-specific impacts are fully evaluated when a critical decision has been made to act on site development."). This is illustrated here by what DOE did with regard to plutonium disposition. After considering both immobilization and MOX in the December, 1996 programmatic EIS, DOE prepared an individual EIS on them in November, 1999 (the Surplus Plutonium Disposition Final EIS). Similarly, DOE should do a separate EIS or supplemental EIS on the storage component of the December, 1996 programmatic EIS and not attempt to rely on the programmatic EIS as a basis for not complying with NEPA.

Also, consistent with the programmatic nature of the 1996 programmatic EIS are the general references it makes to long-term storage. Where long-term storage is mentioned, it usually is done so in connection with a statement that the actinide packaging and storage facility was planned to handle the storage at SRS (e.g., “this facility [the actinide packaging and storage facility] would enable SRS to stabilize and package Pu [plutonium] metals and oxides to meet storage criteria and also provide space for storage of all Pu and special actinide materials.” (App. 151) The discussions of long-term storage were very short and general, along the lines of: “the facility would be designed to provide safe, secure, long-term storage for up to 50 years.” (App. 150) At another point where long-term storage options for consolidation of plutonium are mentioned, the programmatic EIS states as to SRS: “Construct New Pu Storage Facility.” (App. 154)

DOE also relies for NEPA compliance of its amended ROD on a supplement analysis of February, 2002. That supplement analysis was done because DOE was

proposing to use the KAMS facility for interim storage of surplus plutonium from other DOE sites [in addition to Rocky Flats], as needed. The storage of surplus plutonium materials in KAMS could extend beyond the 10 years estimated in the APSF/B105-K SA (DOE, 1998a). KAMS would serve as an interim storage facility pending disposition of the materials. (App. 118)

With this description of the purpose of the supplement assessment and other statements showing that early processing was contemplated,¹ it is difficult to see how DOE could claim that it sufficed as the NEPA compliance for the long-term storage decision of April 19, 2002.

DOE also relies on a supplement analysis of July, 1998. DOE decided to do this supplement analysis as a result of its proposed decision to accelerate shipments of surplus plutonium to SRS if it were chosen as the site for immobilization. The principal change examined in this supplement analysis had to do with the fact that the actinide packaging and storage facility would not be completed by the time plutonium started arriving and that more storage area would be required than it would provide. The supplement analysis discussed the use of other areas of SRS in conjunction with the actinide packaging and storage facility. The circumstances are obviously quite different now. Moreover, DOE discredits the relevance of the July, 1998 supplement assessment by noting in the February, 2002 supplement assessment that the 1998 supplement assessment “assumed that the KAMS facility would operate for the storage of surplus plutonium for 10 years pending disposition of the materials.” (App. 116)

¹ “DOE plans to disposition its surplus plutonium as soon as practical and believes storage in KAMS would be necessary for less than 20 years.” (App. 122)

An additional problem with both the July, 1998 and February, 2002 supplement assessments is that they principally rely on the December, 1996 programmatic EIS, which as noted above was only a general consideration of long-term storage.

Further arguing that its previous NEPA documents fulfill its NEPA obligations for the April 19 amended ROD, appellees argued below that appellant had not named a single environmental issue that needed to be analyzed further. There are several answers to this argument. First, it incorrectly attempts to shift the burden from DOE to private parties to fulfill NEPA obligations. Next, it is appellant's view that DOE has an obligation to analyze in detail all the areas it analyzed generally in the programmatic EIS. Additionally, the fact that there are areas to be examined is shown by DOE's pre-litigation statement in its report to Congress of February 15, 2002, that a disadvantage of the long-term storage option was that it would likely require additional NEPA review. (App. 133) Here DOE is stating there are environmental impacts of the long-term storage option that probably would have to be analyzed under NEPA if long-term storage were the chosen option. While DOE now claims in litigation that there is nothing further to review, this court has made clear that such *post hoc* rationalizations carry no weight. American Trucking Association v. Federal Highway Administration, 51

F.3d 405, 411 (4th Cir. 1995) (“[I]t is this actual reasoning that must prove reasonable, not the *post hoc* rationalization devised during litigation.”).

One important issue that should be examined in a valid NEPA review of the amended ROD is whether to build a state-of-the-art storage facility at SRS. The 1996 programmatic EIS stated that storage would be undertaken in such a facility, but in 2001, DOE canceled this facility because of expense. (App. 161) As part of the decision to implement long-term storage, DOE should have considered whether it was worth building the state-of-the art facility in light of the new policy.

Another question that should have been considered in the NEPA review of the amended ROD, is storage of surplus plutonium at SRS for more than 50 years. Fifty years was the limit of the consideration in the 1996 programmatic EIS, but the district court acknowledged that surplus plutonium could be stored at SRS “indefinitely.” (App. 196) In Public Service Company of Colorado v. Andrus, 825 F. Supp. 1483, 1497 (D. Idaho, 1993), the court held that DOE should have addressed in its NEPA compliance document on interim storage of spent nuclear fuel at an Idaho nuclear facility the possibility of its storage lasting “a great deal longer than anticipated” because DOE’s plans for a permanent solution might not work out.

Other issues that should have been considered in the NEPA review of the amended ROD are highlighted by comments of the Defense Nuclear Facility Safety Board, an independent organization established by Congress to provide oversight of DOE. In a letter of November 21, 2001, it stated the KAMS facility “is an aged facility and was never intended to provide more than interim storage.” (App. 103) In a report of February, 2002, it stated, “. . . KAMS is an aged facility with no confinement features for potentially extended storage of plutonium.” (App. 109) In a letter of March 9, 2000, the Defense Nuclear Facilities Safety Board stated:

However, the staff raises issues related to the longer-term safety and viability of using this aging facility (KAMS) as the largest plutonium storage facility at the Savannah River Site, and perhaps in the DOE complex, for what could be more than a decade. Probably the most significant of these issues are that KAMS has no capability to open, inspect, or repackage containers, and no capability to provide confinement in the unlikely event that one or more containers should fail. KAMS is dependent on other aging facilities at the Savannah River Site for assistance in addressing these issues, but the remaining service life of these facilities is uncertain. None of these facilities has the capability to restore a failed container to compliance with the plutonium storage standard (DOE-STD-3013), which is a requirement in the KAMS authorization basis. Currently, such capability appears to be several years away at the Savannah River Site. The anticipated plutonium disposition facilities might provide these capabilities. Doing so, however appears outside the mission scope of these facilities; moreover, they will not be ready until 2008 or later. (App. 125)

DOE claims that it has examined all of these questions in previous environmental reviews for other DOE decisions on storage, but neither appellant or the judge knew the status of the construction of a stabilization facility at SRS until the judge questioned a DOE employee at the hearing of June 13, 2002. (App. 218) The employee stated that the stabilization facility would be completed at SRS in early May, 2003. App. (180-181) This contrasts with the fact that DOE completed the stabilization facility at Rocky Flats on June 14, 2001. (App. 127)

5. The April 19, 2002 Amended ROD Requires a Supplemental EIS

Because the changes to the surplus plutonium program made by the amended ROD were so substantial, DOE is required to prepare a supplemental EIS before implementing the ROD. DOE NEPA regulations provide: “DOE shall prepare a supplemental EIS if there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns” 10 C.F.R. § 1021.314. Clearly, the amended ROD in this case made substantial changes to the surplus plutonium program.

The Fourth Circuit reversed the issuance of a federal permit in Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437 (4th Cir. 1996) on the basis that the federal government’s determination that a supplemental EIS was not required failed to comply with its duty under NEPA to take a “hard look” at the issues.

DOE has not taken the “hard look” at the issues raised by its April 19 amended ROD, and should be required to do so in a supplemental EIS.

6. The Amended ROD Is Also Invalid Because DOE Did Not Comply with NEPA in Canceling Immobilization

The amended ROD also fails to comply with NEPA because it cancelled immobilization without any NEPA compliance of the changes that would be required to the MOX program. The draft amended ROD that DOE provided to Governor Hodges on April 11, 2002 stated that DOE was canceling immobilization and would proceed with processing exclusively through the MOX technology. (App. 70 & 71) This is also what DOE told Congress in a report of February 15, 2002. (App. 130; 135 & 138) But on April 11, 2002, Governor Hodges’ legal counsel informed DOE that Governor Hodges would sue DOE if it made a unilateral decision to ship the surplus plutonium on the grounds that a supplemental EIS was required for the revised surplus plutonium strategy that relied exclusively on the MOX technology. (App. 37) The suit would likely have succeeded in light of the fact that the Nuclear Regulatory Commission determined that processing by MOX the impure plutonium originally slated for immobilization required substantial changes in the EIS it was preparing on the MOX program.

So when DOE issued the amended ROD on April 19, 2002, it simply removed from the ROD the decision to do processing exclusively through MOX. Instead, it stated that it was undertaking long-term storage independent of what

processing might occur, thus revealing that long-term storage of the surplus plutonium was likely. DOE stated in the amended ROD that it was doing additional NEPA review of MOX in light of the elimination of immobilization. But the elimination of immobilization means that any processing that occurs will be through the MOX technology and the environmental impacts of using it as the exclusive processing technology must therefore be examined as part of canceling immobilization.

DOE argued below that the decision to ship surplus plutonium from Rocky Flats to SRS is not linked to the decision to cancel immobilization and proceed exclusively through MOX, but these actions are linked in a fundamental way. Prior to the amended ROD of April 19, 2002, there was a condition that prevented the shipment of surplus plutonium from Rocky Flats to SRS unless the immobilization technology was built at SRS. (App. 70) DOE had to remove that condition in its amended ROD to allow for the Rocky Flats shipments to proceed.

Therefore, DOE failed to comply with NEPA in issuing the amended ROD not only because it did not do an environmental review of the long-term storage decision, but also because it did not do an environmental review of the decision to cancel immobilization that was inextricably linked to the decision to ship surplus plutonium from Rocky Flats to SRS.

C. Violations of the Administrative Procedures Act

The Administrative Procedures Act prohibits federal agencies from taking action that is arbitrary, capricious or an abuse of discretion and without providing due process of law. 5 U.S.C. § 706. The surplus plutonium strategy has at least since the December, 1996 programmatic EIS been to store surplus plutonium short-term prior to its processing and removal. It was on this basis that South Carolina agreed to surplus plutonium coming to SRS.

Secretary of Energy Abraham was still promising Governor Hodges on April 12, 2002 that the surplus plutonium would only be shipped to SRS for processing. He told Governor Hodges, and DOE told Congress, that SRS would not be used as a long-term storage facility for surplus plutonium (App. 59 & 128) Then on April 19, 2002, DOE abruptly broke Secretary Abraham's commitment to process surplus plutonium, rather than simply store it, by naming SRS as the site for long-term storage of surplus plutonium and announcing that this storage was independent of any decision on treating the plutonium. This erratic decision-making constitutes arbitrary and capricious action prohibited by the Administrative Procedures Act.

D. The Remedy in this Case Should Be an Injunction Prohibiting the Shipments of Surplus Plutonium to SRS

Injunctions are not automatically granted as the remedy for agency violations of law, Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), but they are typically granted for violations of NEPA. See, e.g., Frank P. Grad, 4 Treatise on Environmental Law, §.9.04[2][b] (Matthew Bender 2000) (noting that in NEPA suits “the remedy invariably sued for and frequently granted is an injunction which prohibits the particular agency from proceeding with the project in question until an environmental impact statement is filed that meets the requirements of the Act.”).

The criteria for issuance of a permanent injunction are similar to those for issuance of a preliminary injunction with the exception that the court need not consider the likelihood of success on the merits criterion. The three remaining criteria are likelihood of irreparable harm to the plaintiff, likelihood of harm to the defendant and the public interest. Hughes Network Systems v. Interdigital Com. Corp., 17 F.3d 691, 693 (4th Cir. 1994); Blackwelder Furn. Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977). Because an injunction is an equitable remedy, equitable factors such as bad faith are also considered in determining whether an injunction should be issued. In this case, the specific injunction criteria, as well as general equitable factors, favor the award of an injunction.

1. The Likelihood of Irreparable Harm to Appellant if Injunction Is Not Granted

Plutonium is a deadly substance if inhaled in microscopic quantities. It remains dangerous for approximately 240,000 years. As little as ten pounds of it can be used to make an atomic bomb. In the amended ROD of April 19, 2002, DOE changed the policy for surplus plutonium from interim storage followed by processing to long-term storage independent of processing without undertaking the environmental review required by NEPA.

The irreparable harm that will occur to South Carolina if plutonium is sent to SRS is that it will arrive for long-term storage before it has been determined through NEPA compliance whether long-term storage of plutonium at SRS is appropriate and can be safely accomplished. The experience with nuclear materials is that they remain where they are placed “temporarily.” This result would be an inescapable outcome if the Rocky Flats surplus plutonium is shipped to SRS since Rocky Flats is scheduled to be closed in 2006 and DOE has not identified any other place that its surplus plutonium can be taken other than SRS.

NEPA’s purpose is to evaluate the environmental impacts of, and alternatives to, decisions before they are made so that the information can be taken into account in the decision. It also is for the purpose of providing the public information about federal agency projects to allow it to better participate in the determinations. 40 C.F.R. § 1500.1(b) (“NEPA procedures must insure that

environmental information is available to public officials and citizens before decisions are made and before actions are taken. . . .”). These purposes were not accomplished when DOE reversed its policy on storage of surplus plutonium in its amended ROD of April 19, 2002, just eight days after Secretary of Energy Abraham emphatically reaffirmed that policy.

Because of the purposes NEPA seeks to accomplish, courts have frequently held a federal agency’s failure to comply with NEPA constitutes irreparable harm in and of itself. As the First Circuit stated: “[I]f any decision is made without the information which NEPA seeks to put before the decision-maker, the harm that NEPA seeks to prevent occurs.” Sierra Club v. Marsh, 872 F.2d 497, 497 (1st Cir. 1989). See also, Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152 (9th Cir. 1988); Southern Utah Wilderness Alliance v. Thompson, 811 F.Supp. 635, 641 (D.Utah 1993); Coeur D’Alene Lake v. Kiebert, 790 F.Supp. 998 (D. Idaho 1992). Some cases, such as Southern Utah, supra, hold that when a NEPA violation is prima facie established, injunctive relief is presumptively available. As Sierra Club v. Marsh, supra, holds, the potential harm of a NEPA violation is that a project will go forward without the necessary environmental review.

The district court below agreed that once the surplus plutonium is shipped from Rocky Flats to SRS, it will likely remain there. (App. 225) The court, however, sought to diminish this harm to the appellant on the basis that SRS

already has two tons of surplus plutonium that is not packaged in as safe condition as the surplus plutonium that will be shipped from Rocky Flats. (App. 225-226) This would be a good argument if Governor Hodges and South Carolina had chosen to have those two tons of surplus plutonium at SRS and to keep them in the condition they are in. In fact, appellant objects to the presence and condition of those two tons of surplus plutonium, but has no legal grounds it is currently aware of to challenge it. It is quite a different situation when DOE issues a decision with no NEPA compliance to authorize all of the nation's surplus plutonium to be consolidated at SRS.

2. The Likelihood of Harm to the Appellees if the Preliminary Injunction Is Granted

Appellees claimed below that their harm from the issuance of an injunction is that an injunction (1) will significantly delay the prompt cleanup and closure of Rocky Flats; (2) could result in “significant potential for misunderstanding by the Russians” which, in turn, could negatively impact the government's nonproliferation agreements with Russia; (3) will prevent consolidation of surplus plutonium that would be more secure storage; and (4) could disrupt the transportation schedule for shipping the surplus plutonium from Rocky Flats which, in turn, would negatively impact the movement of other nuclear materials and weapons throughout the country.

Before addressing these alleged harms individually, appellant notes that in deciding whether to issue the injunction, the court must balance the harms of the appellant and appellees. One of the principal harms to the appellant is that allowing the shipment of surplus plutonium allows significant steps towards implementing DOE's decision to make SRS the nation's consolidated long-term storage facility without NEPA compliance. The balance of harms would be very different if DOE were shipping the Rocky Flats surplus plutonium as part of a decision that made SRS the facility for storage of just the Rocky Flats surplus plutonium² or if DOE made clear that the shipments were part of a program to process the surplus plutonium on a short-term basis as opposed to being totally independent of processing. It is DOE that raised the stakes of harm to South Carolina by tying the shipment of the Rocky Flats surplus plutonium directly to the long-term storage decision. It would seem absurd that DOE could just declare that there are a variety of national interests in shipping radioactive wastes to Yucca Mountain for storage and then begin shipping the wastes without undertaking the studies required by law. But that is what DOE attempts to do here.

² While the April 19, 2002 decision only specifically authorizes the shipment of surplus plutonium from Rocky Flats to SRS, the decision makes SRS the nation's consolidated, long-term storage facility for surplus plutonium. Future shipments from other sites can simply be announced by the DOE without review of whether SRS is appropriately the long-term storage facility.

As to the specific harms alleged by DOE from an injunction against shipments of surplus plutonium pending compliance with law, the first is a delay in closing the Rocky Flats nuclear facility. But if its closure were delayed by an injunction, the costs of keeping the facility open for a longer period would not constitute harm sufficient to prevent issuance of an injunction. As the district court correctly noted, the Fourth Circuit does not allow monetary costs to outweigh potential harm to the environment in determining whether to issue an injunction. (App. 238) While DOE also says the plutonium from Rocky Flats can be made more secure at a consolidated site, this cannot be a matter of urgent necessity since DOE is not choosing to consolidate the surplus plutonium from the other sites in the near term.

The second harm DOE alleged below is that the injunction could harm the 2002 nonproliferation agreement with Russia whereby both the United States and Russia agreed to each dispose of at least 34 metric tons each of surplus plutonium. Appellees claimed below that they presented an un-rebutted declaration testimony by Linton Brooks regarding injuries stemming from Russian confusion about any injunction which appeared to interfere with U.S. plutonium disposition. But in fact appellant submitted the rebuttal affidavit of Dr. Allison Macfarlane, who stated:

Linton Brooks claims that the South Carolina lawsuit will negatively effect the U.S. plutonium disposition program, national security, the U.S.-Russian plutonium disposition agreement, and future nonproliferation agreements. (App. 187)

* * *

The facts are that the United States will meet its agreement with the Russians on plutonium disposition if they continue with their plan to process plutonium according to schedule. This schedule is not put at risk by the state of South Carolina; in fact, South Carolina is attempting to hold the DOE to this schedule by requesting that DOE guarantee that it will process the plutonium according to schedule and remove it from the state in a timely manner. The DOE is itself putting at risk the disposition program by their recent decisions (stated in their ROD of April 19, 2002) (1) to abandon the alternative disposition strategy to MOX, that is, immobilization of plutonium and (2) to state that they may now store plutonium from Rocky Flats for up to 50 years at the Savannah River site (SRS). DOE now has “all its eggs in one basket” and must rely solely on the MOX strategy for plutonium disposition. To meet its agreement with Russia, the U.S. MOX strategy must not meet technical or political snags along the way. (App. 188)

* * *

Delaying the transport of Rocky Flats plutonium to SRS will not result in delay of the U.S. plutonium disposition program. Construction of facilities to process the plutonium at SRS has not even begun yet and these facilities would not be complete and able to process plutonium until 2006 or 2007 at the earliest. (App. 191)

* * *

The Annex to the plutonium disposition agreement cited by Linton Brooks does contain schedules and milestones, but does not mention any plutonium at the Rocky Flats facility (though it does mention that the Pantex facility, SRS, the Los Alamos and Livermore National Laboratories, and the Hanford Site contain plutonium). Furthermore, in contradiction to Mr. Brooks' claim to the contrary, the Annex does not provide schedules for moving plutonium from one facility to another, only rough milestones for the construction and operation of the disposition facilities. [65 Fed. Reg. 1618.]

Further, it should be noted that when it suits DOE, it argues that national security requires the expeditious processing of surplus plutonium, not its long-term storage. In its January 11, 2000 record of decision making SRS the location for the immobilization and MOX processing facilities, it stated:

In order to achieve the benefits of plutonium disposition as rapidly as possible, and to minimize the risks and negative signals resulting from leaving the excess plutonium in storage, it is important for disposition options to begin, and to complete the mission as soon as practicable, taking into account non-proliferation, environment, safety, and health, and economic constraints. Timing should be a key criterion in judging disposition alternatives. Beginning the disposition quickly is particularly important to establishing the credibility of the process, domestically and internationally. (App. 108)

Similarly, the district court noted DOE's statement in its report to Congress of February 15, 2002 that the long-term storage option without disposition would renounce the U.S.-Russian Nonproliferation Agreement. (App. 234)

While the district court concluded that an injunction would not directly run counter to the U.S.-Russian Agreement, it nonetheless decided to defer to Ambassador Linton's determination that an injunction "would likely cause some potential, adverse impact on the Russian Federation's *perception* of U.S. compliance with the U.S.-Russian Nonproliferation Agreement" (App. 235) (emphasis in original). At some point, however, DOE's willingness to suddenly reverse policy, break public commitments, and attempt to evade the law all in pursuit of its goal of shipping surplus plutonium from Rocky Flats to SRS immediately should reflect on the credibility of its statements, particularly where as here they defy logical analysis. Also, it should be borne in mind, that the district court made its conclusions on harm to appellees in the context of having decided for them on the merits of the case.

Appellees' claim that an injunction preventing the surplus plutonium shipments from Rocky Flats pending appeal would negatively impact the movement of other nuclear materials and weapons throughout the country is premised on the view that after the injunction is removed, DOE would try to make up the lost months by gaining the use of extra trucks. If that would in fact disrupt the movement of other important nuclear materials, DOE would just have to accept a delay of the closure of Rocky Flats, which we have shown is not harm that outweighs the irreparable harm to the appellant.

3. Public Interest

The public interest is best served by completing compliance with NEPA before sending the surplus plutonium from Rocky Flats to SRS. Only then will there be a legal decision assuring that SRS is the appropriate place to send the Rocky Flats surplus plutonium. Only then will there be a decision, which determines how best to store the surplus plutonium at SRS if it is the chosen site. By beginning the shipments now, DOE would be taking incremental steps to actually implement a decision, which has not been properly evaluated under NEPA.

4. Equitable Factors

The court should also grant a permanent injunction in this case to prevent DOE from succeeding in its efforts to evade the law and because DOE breached its commitments to South Carolina. The draft amended ROD of April 11, 2002, did not make SRS the nation's long-term storage facility for surplus plutonium, rather it announced that DOE would cancel immobilization and process the surplus plutonium exclusively through MOX. But when the Nuclear Regulation Commission determined that this would require more NEPA review and Governor Hodges' legal counsel told DOE that Governor Hodges would sue DOE on this basis if it proceeded with the plutonium shipments, DOE changed the record of decision. DOE stated that it was not necessarily proceeding with MOX, but would

undertake more NEPA review of it. Forced to cancel immobilization to remove the condition that it be built for the shipment of the Rocky Flats surplus plutonium, DOE was left with no processing option and had to turn to long-term storage as the reason for shipping surplus plutonium from Rocky Flats to SRS. DOE's attempt to evade the law by removing MOX processing from its decision document should not be rewarded. Nor should its quick breach of its commitment to South Carolina on long-term storage.

CONCLUSION

There can be no legitimate legal argument that DOE complied with NEPA when it issued its decision of April 19, 2002 making SRS the nation's consolidated, long-term storage facility for surplus plutonium. There was no NEPA review; DOE merely points in its legal briefs to previous NEPA reviews of previous decisions. NEPA requires that there be an environmental review for each federal agency action unless the action falls into a categorical exclusion established by regulation. DOE makes no claim of a categorical exclusion for its April 19 decision. Therefore, DOE was required at a minimum to prepare a brief environmental assessment for that decision. Further, an analysis of the circumstances of this case shows that a supplemental EIS was required. DOE's abrupt change of policy on the storage of surplus plutonium also violates the Administrative Procedures Act.

To remedy the violations of law in this case, DOE must be enjoined from shipping any surplus plutonium, including that from Rocky Flats, to SRS unless and until it has remedied the violations of law. If DOE is allowed to ship the Rocky Flats surplus plutonium to SRS while preparing its NEPA document, it will make NEPA a meaningless paper exercise. As noted in the seminal NEPA case of Calvert Cliffs' Coordination Committee v. U.S. Atomic Energy Department, 449 F.2d 1109, 1111 (D.C. Cir. 1971), the role of courts in NEPA cases is to assure

“that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.” That role requires the issuance of an injunction prohibiting shipments of surplus plutonium in this case until there is compliance with law.

Respectfully submitted,

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June 26, 2002