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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

STATE OF NEVADA,
Plaintiff,
vs.
UNITED STATES; UNITED STATES DEPARTMENT OF ENERGY; RICK PERRY, in his official capacity as Secretary of Energy; NATIONAL NUCLEAR SECURITY ADMINISTRATION; and LISA E. GORDON, in her official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security,
Defendants.

Case No. _____

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Plaintiff State of Nevada (Nevada), by and through its counsel, moves the Court for entry of an order preliminarily enjoining Defendants, their agents and employees, from shipping (or directing any other entity to ship) all or any part of the one metric ton (about 2,200 pounds) of plutonium, described in Defendants' July 2018 "Supplemental Analysis for the Removal of One Metric Ton of Plutonium from the State of South Carolina to Nevada, Texas, and New Mexico," from DOE's Savannah River Site (SRS) which is located in the State of South Carolina, in and through Nevada to the DOE's Nevada Nuclear Security Site (NNSS), which is located approximately 65/90 miles northwest of the City of Las Vegas. Nevada seeks such injunctive relief until Defendants have fully complied to the satisfaction of this Court with National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq*., and the governing regulations on supplementation of environmental impact statements in 40 C.F.R. § 1502.9(c)(1)(iii) (Council on Environmental Quality) and 10 C.F.R. § 1021.314(a) (DOE regulations).

As grounds for this Motion, Plaintiff states: (1) Plaintiff can show a substantial probability of success on the merits of its claims that Defendants have violated, and remain in violation, of NEPA and the NEPA regulations cited above; (2) Plaintiff will suffer irreparable harm if the subject shipments of plutonium are allowed to enter Nevada, especially including the environs of the City of Las Vegas; and (3) Plaintiff can show that the balance of equities and the public interest strongly support the granting of the injunction.

The underlying facts and the legal bases for this Motion are more fully set forth in the Memorandum of Points and Authorities. Additionally, this Motion hereby incorporates Plaintiff's Complaint and the exhibits attached thereto.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Defendants, the United States Department of Energy, Rick Perry, Secretary of Energy in his official capacity, the National Nuclear Security Administration, and Lisa E. Gordon in her official capacity as Administrator of the National Nuclear Security

Administration (referred to collectively as "DOE"), propose to ship one metric ton (about 2,200 pounds) of plutonium from DOE's Savannah River Site in the State of South Carolina, to the DOE's Nevada National Security Site (NNSS), located approximately 90 miles northwest of the City of Las Vegas, Nevada. DOE may also ship the same plutonium between DOE's Pantex Site, which is located in the State of Texas, and the NNSS. The plutonium would be stored at the NNSS until, at some unspecified future date, it would be shipped to its ultimate destination, Los Alamos National Laboratory, which is located in the State of New Mexico, where it would be used in nuclear weapons production. DOE's proposed action is described in its "Supplement Analysis for the Removal of One Metric Ton of Plutonium from the State of South Carolina to Nevada, Texas and New Mexico" (DOE/EIS-0236-S4-SA-01, July 2018) (hereinafter referred to as DOE's "SA").

The stated purpose of the shipment (or shipments) is to comply with an order from the U.S. District Court in South Carolina which provides as follows:

> Within two years from the date of the entry of this injunctive order (or at the latest by 1/1/2020), the Secretary of Energy shall, consistent with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq*., and other applicable laws, remove from the State of South Carolina, for storage or disposal elsewhere, not less than one metric ton of defense plutonium or defense plutonium materials, as defined by 50 U.S.C. § 2566.

State of South Carolina v. U.S., No. 1:16-cv-00391-JMC, 2017 WL 7691885 (D.S.C. Dec. 20, 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018).

In this action Nevada challenges DOE's failure, in proposing these new plutonium shipments to the NNSS, to comply with the central mandate of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(C), that agencies (such as DOE) prepare "a detailed statement" for every "recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment." Such a detailed statement takes the form of an environmental impact statement (EIS). Avoiding the requirement of an EIS directly addressing this proposed action, DOE erroneously claims that the required analysis is already covered by one or more previous DOE EISs.

The critical legal question is whether NEPA requires the earlier statements to be supplemented in order for the new proposed action to be supported by an adequate EIS.

The governing regulations on supplementation of existing EISs are found in 40 C.F.R. § 1502.9(c)(1)(ii) (Council on Environmental Quality regulation) and 10 C.F.R. § 1021.314(a) (DOE's regulation). The Council's regulation requires a supplemental EIS whenever the agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." DOE's regulation is to the same effect. Both regulations require a supplemental EIS "if there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns."

DOE's explanation of its refusal to prepare a supplemental EIS for the new plutonium shipments appears in its July 2018 SA. Nevada filed a Complaint challenging the proposed DOE shipments on November 30, 2018. Nevada's Complaint sets forth the factual basis why DOE's explanation in its SA, on why no supplemental EIS is required, is in error.

II. Injunction Criteria

To obtain a preliminary injunction, Plaintiff must establish that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of the preliminary injunction; (3) the balance of equities tips in its favor; and (4) the issuance of the preliminary injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (applying *Winter* to support reversal of decision denying preliminary injunction in light of likely NEPA violation).

A. Factor (1): Probability of Success on the Merits

As explained below, Nevada is highly likely to succeed on the merits of its NEPA claims.

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A reviewing court must not "rubber-stamp" agency environmental reviews. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859 (9th Cir. 2004). When determining whether an existing EIS must be supplemented, the agency must take the requisite "hard look" at the proposed action to determine whether supplementation is required. *Norton v. So. Wilderness Alliance*, 542 U.S. 55, 73 (2004). Supplementation is required whenever a proposed new action represents a substantial change, relevant to environmental concerns, to actions addressed in previous EISs, or presents any significant new circumstances or information relevant to environmental concerns and bearing on the actions or its impacts. *See* 40 C.F.R. § 1502.9(c)(1)(ii); 10 C.F.R. § 1021.314(a). The DOE SA at issue here purports to document that the proposed action meets these standards for determining when supplementation is required. It utterly fails to do so. The significant defects in the SA include the following.

First, neither the SA nor any of the referenced DOE EISs analyze any project alternatives to the proposed action. The SA only addresses a "no-action" alternative, which it rejects because DOE asserts that an order of a federal district court requires it to ship one metric ton of plutonium out of the Savannah River Site in South Carolina by January 1, 2020. SA at 10. The SA entirely fails to mention, *or* evaluate, intermediate destinations other than the NNSS. However, as the Affidavit of Mr. Timothy A. Frazier (Exhibit B to Nevada's Complaint) demonstrates, there are several alternatives to shipping the one metric ton of plutonium to the NNSS for storage including: (1) shipping to the Y12 National Security Complex in Oak Ridge, Tennessee; (2) shipping to the Pantex Plant in Amarillo, Texas; (3) shipping to Sandia National Laboratory in Albuquerque, New Mexico; and (4) shipping to Kirkland Air force Base in Albuquerque, New Mexico. There is also the obvious alternative of avoiding storage at intermediate destinations altogether by shipping the plutonium directly to its ultimate destination at Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico. Any of these five alternatives left unanalyzed by the DOE should pose less risk and fewer environmental impacts than shipping the one metric ton of plutonium to the NNSS for eventual

shipment to Los Alamos National Laboratory. Shipping plutonium from SRS to LANL by way of NNSS results in a combined shipment distance of 3,187 miles, about 1,448 miles longer than direct shipment from SRS to LANL (1,739 miles), an increase of about 83 percent. Halstead Affidavit, Exhibit C, ¶ 23, to Nevada's Complaint. None of these alternatives is precluded by the South Carolina Court's decision, which merely requires DOE to remove the plutonium from the Savannah River Site in South Carolina, and says nothing about where the plutonium should go. Moreover, the order requires DOE to ensure its actions are consistent with NEPA and other applicable laws. *South Carolina v. U.S.*, 2017 WL 7691885, at *5 (D.S.C. Dec. 20, 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018).

The requirement to consider alternatives lies at the heart of NEPA. 40 C.F.R. § 1502.14; *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006) (*citing Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998). "The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal. The existence of reasonable but unexamined alternatives renders an EIS inadequate." *Id.* at 1095. As the aforementioned Affidavit of Robert Halstead demonstrates, none of the above five alternatives to the proposed plutonium shipment are addressed in either the SA or the prior DOE EISs referenced in the SA. Accordingly, the proposed action at issue here must constitute a substantial change, relevant to environmental concerns, to actions and alternatives addressed in previous EISs. Although DOE claims the new proposed action is adequately addressed in some prior DOE EISs, none of those EISs included the required evaluation of the five alternatives discussed above. Indeed, if such a discussion could be found in some prior DOE EIS, surely the SA would have pointed to where such a discussion could be found among the thousands of pages of analysis, but it did not do so.

Second, the DOE SA does not include any new analysis of the environmental impacts from the new plutonium shipments to the people in Nevada. New transportation circumstances in Nevada require new information and a new evaluation of impacts. The 2013 NNSS Site-wide EIS can no longer be used for route selection, safety and security

planning, or for transportation impact evaluations, including risk assessment. None of the other DOE EISs referenced in the SA provide this new information. Halstead Affidavit, ¶ 24. Instead, the SA, purporting to show that these impacts are adequately addressed in prior DOE EISs, cites five tables of transportation environmental impacts contained in two of its previous EISs (SA at 26, 28, 33, and 34) which, the SA claims, adequately address the new shipments at issue here. These five tables are attached to the Complaint as Exhibits G, H, I, and J. There are no other references. NEPA requires a hard look at these five tables to determine whether, in fact, the new plutonium shipments constitute a substantial change, relevant to environmental concerns, to actions addressed in previous EISs, or present significant new circumstances or information relevant to environmental concerns and bearing on those actions or their impacts not discussed.

None of the five tables specifically address transportation in Nevada of plutonium intended for future pit production. Halstead Affidavit, Exhibit C. ¶¶ 16-24. Moreover, they contain no estimates of the health consequences from transportation accidents involving these specific nuclear materials, assuming they occur. Instead, the tables only display risk numbers, which are the multiplication product of at least three terms—release probability, release consequences (in rem, a measure of radiation dose), and premature cancers per rem. *Id.* But an agency must examine both the probability of a given harm *and* the consequence of that harm if it does occur. *New York v. NRC*, 681 F.3d 471, 478 (D.C. Cir. 2012); *Standing Rock Sioux Tribe v. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 132 (D.D.C. 2017); *Sierra Club v. Watkins*, 808 F. Supp. 852, 868 (D.D.C. 1991). This requirement applies even if the probability of the harm is low and, moreover, when the degree of potential harm could be great, the degree of analysis should also be great. *Standing Rock Sioux Tribe v. Army Corps of Eng'rs*, 255 F. Supp. 3d at 133. The SA does not demonstrate that the environmental impacts of the new plutonium shipments through Nevada were covered in previous EISs for the simple reason that these previous EISs are so incomplete that it cannot be determined whether their impact

evaluations, including probabilities and consequences, apply to this new proposed action. Halstead Affidavit, Exhibit C, ¶¶ 17-18, 24. Even if it could be assumed that the proposed new shipments of plutonium were included among the actions described and addressed in the previous DOE EISs, those EISs cannot satisfy NEPA because they do not disclose or address the consequences of transportation accidents.

Finally, the SA is deficient in its failure to include or reference any evaluation of cumulative environmental impacts arising from the combination of this shipment of one metric ton to Nevada and reasonable foreseeable future shipments of plutonium from South Carolina to Nevada required to be completed by January 1, 2022. NEPA requires a full consideration of cumulative impacts. *See, e.g.,* 40 C.F.R. § 1508.7; *see also Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1183 (9th Cir. 2011) ("To comply with NEPA alternatives analysis, the [agency] must consider, among other things, the 'cumulative impacts' of the proposed action, which NEPA's implementing regulations define as the 'impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions") (*quoting League of Wilderness Defenders v. U.S. Forest Serv.*, 549 F.3d 1211, 1216 (9th Cir. 2008)). The statute at issue in the South Carolina litigation, 50 U.S.C. § 2566(c), provides that in the event of a failure of MOX project to process plutonium into reactor fuel, DOE "shall, consistent with the National Environmental Policy Act of 1969 and other applicable laws, remove from the State of South Carolina, for storage or disposal elsewhere—(1) not later than January 1, 2016, not less than 1 metric ton of defense plutonium or defense plutonium materials; and (2) not later than January 1, 2022, an amount of defense plutonium or defense plutonium materials equal to the amount [transferred to the SRS after April 15, 2002, that remains unprocessed]." Accordingly, Congress has provided for an additional closely related action by DOE—the removal and transportation from South Carolina of additional tons of plutonium. Moreover, given DOE's refusal to consider viable and reasonable alternatives to the NNSS for staging (indefinite storage) of the one metric ton of plutonium covered by the paragraph (1), it is reasonably foreseeable

that the NNSS will be used for future staging (indefinite storage) of the additional tons of plutonium required to be removed from South Carolina by paragraph (2). The SA does not discuss these additional DOE actions, much less refer to portions of previous environmental impact statements where a discussion of the cumulative environmental impacts of shipping and staging both the one metric ton and future tons of plutonium were discussed. *See* Halstead Affidavit, Exhibit C, ¶ 25. The evasive discussion in the SA, which conspicuously lacks specific and thorough analysis of these actions, fails NEPA's requirement of a "hard look" at cumulative impacts. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 974 (9th Cir. 2006).

B. Factor (2): Irreparable Injury

Nevada simply does not know when the proposed plutonium shipments will first leave the Savannah River Site in the State of South Carolina, when they will first reach the State of Nevada, or even whether they will travel through densely populated areas of Las Vegas, because DOE has not and apparently will not inform the State of any of those details. Affidavit of Pam Robinson, Policy Director to the Governor, Exhibit D to Nevada's Complaint. Lacking any assurance against this imminent risk, Nevada (and this Court) must assume that the shipments could reach Nevada any day now.

Unless the Court grants the requested preliminary injunction, it is highly likely that one or more of the shipments will be completed before the Court can consider and rule on the merits of the case. DOE would successfully evade compliance with NEPA. This will be an injury to the decision-making process that is incapable of repair if the preliminary injunction does not issue, for once the plutonium is transported out of South Carolina to the NNSS, Nevada will forever lose the ability to formally comment upon safety and environmental concerns related to the shipments as required under NEPA. *See, e.g.*, *Sierra Club v. Marsh*, 872 F.2d 497, 500-01 (1st Cir. 1989) ("the harm consists of the added risk to the environment that takes place when government decision-makers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision on the environment"); *Ctr. for Food Safety*

v. Vilsack, 753 F. Supp. 2d 1051, 1056-57 (N.D. Cal. 2010) (applying *Sierra Club v. Marsh*); *Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1189-90 (N.D. Cal. 2009) (without injunction, harm will occur and "alternatives will have been foreclosed" prior to a decision on the merits). These considerations demonstrate that the Plaintiff will be irreparably injured if the injunction does not issue. NEPA requires agencies to take a "hard look" that "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011).

In addition to withholding information on the timing of the shipments of plutonium, DOE officials have refused to assure Nevada that the shipments will be made in certified "Type B" packages, which are packages designed to withstand severe accidents in transit (*see, e.g.*, 10 C.F.R. § 71.51); or even that the shipments will be made with the same safety and security protections that apply generally to other shipments of weapons-grade plutonium. Robinson Affidavit, Exhibit D. Without this information, Nevada will be thwarted from evaluating the safety or security of the proposed shipments, and left unable to assure its citizens that they will be safe or to discharge its sovereign duty to be prepared to assist responders if an accident occurs. Halstead Affidavit, Exhibit C, ¶¶ 13-17.

C. Factor (3): The Balance of Equities

As explained below, the balance of equities strongly supports the granting of the injunction.

The South Carolina District Court's order does not compel Defendants to ship the plutonium to any particular destination, and the deadline in the order of January 1, 2020, would appear to give DOE plenty of time to evaluate and consider intermediate destinations other than the NNSS in Nevada. Also, it is extremely important to note that the South Carolina District Court's order was not based on any concerns that keeping the one metric ton of plutonium at the Savannah River Site would pose any significant risk to national security, health and safety, or the environment. Instead, the order was based on

a statutory requirement in 50 U.S.C.A. § 2566 that if a certain DOE objective related to production of mixed plutonium-uranium reactor fuel is not achieved by January 1, 2014, then "the Secretary shall . . . remove" from South Carolina "not less than one metric ton of defense plutonium" by no later than January 1, 2016. That production objective was not achieved and, therefore, the statute came into force. *State of South Carolina v. U.S.*, 243 F. Supp. 3d 673 at 695 (D.C. S.C. Mar. 20, 2017). Moreover, the District Court's injunction is conditioned on DOE's compliance with NEPA and, therefore, a preliminary injunction to secure NEPA compliance would not be contrary to the spirit or the terms of that Court's injunction.

Therefore, there are no countervailing national security, health and safety, or environment factors that would weigh against granting preliminary injunctive relief.

D. Factor (4): The Public Interest

The public interest strongly favors completion of the informed environmental decision-making process that NEPA requires here. In particular, both Nevada and the public will benefit from the additional evaluation and disclosure of alternatives and transportation accident consequences that NEPA requires. *See, e.g.*, *S. Fork Band Council of W. Shoshone of Nevada*, 588 F.3d at 728 (noting "Congress's determination in enacting NEPA . . . that the public interest requires careful consideration of environmental impacts before major federal projects may go forward"). Indeed, an adequate NEPA evaluation would likely show that the proposed shipments to the NNSS at issue here can be avoided entirely, given that there are at least five viable alternatives that avoid any transportation in Nevada.

III. Conclusion

A preliminary injunction is clearly warranted here. Nevada is highly likely to succeed on the merits of its claims that NEPA requires DOE to prepare a supplemental EIS to support the proposed plutonium shipments and DOE has failed to do so. Unless the Court grants the requested preliminary injunction, it is highly likely that one or more of the proposed plutonium shipments will be completed before the Court can consider and

rule on the merits of the case. DOE would then successfully evade compliance with NEPA, and its injury to the NEPA decision-making process will be incapable of repair. There are no countervailing national security, health and safety, or environment factors that would weigh against granting preliminary injunctive relief. Finally, the public interest strongly favors completion of the informed environmental decision-making process that NEPA requires here. In particular, both Nevada and the public will benefit from honoring NEPA's requirement for evaluation and disclosure of project alternatives and transportation accident consequences. As noted above, an adequate NEPA evaluation would likely show that the proposed plutonium shipments to NNSS at issue here can be avoided entirely. Requiring DOE to meet these NEPA requirements could not possibly jeopardize DOE's compliance with the South Carolina District Court's order, which required DOE to ensure its actions would be consistent with its NEPA duties.

DATED this 30th day of November, 2018.

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