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

No. 10-1082

STATE OF WASHINGTON,
Petitioner

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,
Respondents

ON PETITION FOR REVIEW AND FOR DECLARATORY
AND INJUNCTIVE RELIEF

RESPONDENTS' RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION

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On April 13, 2010, the State of Washington filed a Petition for Review and for Declaratory and Injunctive Relief seeking review of an alleged decision by the Department of Energy ("DOE") and the Secretary of Energy "to irrevocably terminate development of a permanent repository for high-level radioactive waste and spent nuclear fuel at Yucca Mountain, Nevada" by, among other things, moving to withdraw a license application for construction authorization. Pet. 1. Petitioner also moved for a preliminary injunction enjoining DOE "from taking any further actions to terminate or dismantle operations related to the siting and licensing of a permanent nuclear waste repository at Yucca Mountain" pending this Court's review. Mt. 1.

The motion should be denied for multiple, independent reasons. First, Petitioner is unlikely to prevail on the merits. While there is no dispute that, as a policy matter, DOE has decided to consider new approaches to disposition of spent nuclear fuel and high-level radioactive waste and that DOE has filed a motion with the Nuclear Regulatory Commission ("NRC") requesting to withdraw its pending license application with prejudice. The case is also not justiciable under ripeness and exhaustion principles. Significantly, on April 23, 2010, the Commissioners of the NRC issued an order directing the NRC Licensing Board to issue a decision on DOE's motion no later than June 1, 2010.

Moreover, nothing that DOE has done or intends to do violates any statute. On the contrary, the Secretary of Energy is merely exercising authority expressly granted to him by the Atomic Energy Act and DOE Organization Act in a manner that is consistent with the NRC's rules, as the Nuclear Waste Policy Act ("NWPA") explicitly contemplates. Equally important, Petitioner cannot meet the irreparable

injury requirement for injunctive relief. Petitioner's claim of harm is that, at some point in the distant future – at least a decade from now – high-level waste will not leave Washington as quickly as it otherwise would unless this Court grants an immediate injunction. Pet. 6-7. However, the NWPA does not authorize the opening or operation of a Yucca Mountain repository. Even if DOE proceeded with the Yucca Mountain license application and NRC approved it, there are many contingencies – including Congress passing new legislation – that would need to occur before any Yucca Mountain repository could be constructed and operated. And, by the same token, alternatives to Yucca Mountain, such as interim storage, could well result in waste leaving Washington more quickly. In all events, no action DOE has taken or is planning to take would prevent it from resuming licensing activities if required to do so by a court or agency. For these reasons, Petitioner's claim involves speculative, remediable injury years in the future, not irreparable injury that is of "such imminence that there is a 'clear and present' need for equitable relief." *Chaplaincy of Full Gospel Churches v. England*, 434 F.3d 290, 297 (D.C. Cir. 2006) (citation omitted).

Even if Petitioner could establish immediate, irreparable harm, the balance of harms and the public interest weigh against granting the motion. The injunction that Petitioner seeks would thwart DOE's efforts to ensure an orderly and responsible conclusion to the Yucca Mountain licensing process and would impede DOE's ability to take measures that would protect relevant documents and scientific knowledge, as well as to treat federal employees fairly.

BACKGROUND

A. DOE's Statutory Authority – DOE has broad authority to manage radioactive waste. The Atomic Energy Act, enacted in 1954, established a comprehensive regulatory regime for defense and civilian nuclear energy and vested in the Atomic Energy Commission the exclusive, plenary responsibility to regulate nuclear materials covered by the Act. 42 U.S.C. § 2011 *et seq.*; *see, e.g.,* 42 U.S.C. §§ 2210(b), 2201(i)(3). DOE and NRC are successors to the Atomic Energy Commission. Under the DOE Organization Act, Pub. L. No. 95-91, 91 Stat. 565, codified as amended at 42 U.S.C. §§ 7101 *et seq.*, DOE's waste management responsibilities include control over existing government facilities for the treatment and storage of nuclear wastes; control over all existing nuclear waste in the possession or control of the government; establishment of facilities for treatment, storage, management, and ultimate disposal of nuclear wastes; and the establishment of programs for the treatment, management, storage, and disposal of nuclear wastes. 42 U.S.C. § 7133(a)(8)(A), (B),(C) and (E). Among other things, the Act confers on the Secretary of Energy broad discretion "to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary and appropriate." 42 U.S.C. § 7253(a).

B. DOE's License Application – In 1982 Congress enacted the NWPA, 42 U.S.C. § 10101 *et seq*., to address the disposal of the Nation's nuclear waste. In pertinent part, 42 U.S.C. § 10134(b) provides that if the President recommends to Congress the Yucca Mountain site under § 10134(a) and site designation is permitted to take effect under § 10135, "the Secretary [of Energy] shall submit to the [NRC] an

application for a construction authorization for a repository at such site." *See* 42 U.S.C. § 101034(b). The NWPA does not impose on DOE any further obligations regarding the license application except for reporting requirements and does not require NRC to approve a license application. *See infra* at 11-13. Nor does it require – or even permit, without further congressional action (*see infra* at 12) – construction and operation of the repository if a construction license were approved.

In 2008, DOE submitted to the NRC a license application for construction authorization for a permanent spent nuclear fuel and high-level radioactive waste geologic repository at Yucca Mountain. The licensing proceeding, *In re U.S. Dep't of Energy*, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04, was docketed by NRC in September 2008, and is still pending, *see infra* at 5-6.

C. The Blue Ribbon Panel and Budget Request – Scientific and engineering knowledge on issues relevant to disposition of high-level waste and spent nuclear fuel has advanced dramatically over the two decades since the Yucca Mountain project was first initiated.[1/] Ex. 7; *see also* Ex. 4. On January 29, 2010, at the direction of the President, the Secretary of Energy established the Blue Ribbon Commission on America's Nuclear Future, chaired by former National Security Advisor Brent Scowcroft and former Congressman Lee Hamilton. The Commission will conduct a comprehensive review of, and consider alternatives for, disposition of spent nuclear

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[1/] For example, there have been substantial advances in knowledge relevant to the durations of storage of spent nuclear fuel. *See, e.g.*, 64 Fed. Reg. 68006 (1999); http://www.iaea.org/OurWork/ST/NE/NEFW/nfcms_spentfuel_conf2003_res.html (2003 international conference: "both wet and dry storage technologies have evolved significantly over the last 20 years"; "[e]stimated storage durations have been trending upward during the past few years").

fuel and high-level radioactive waste. *See* 75 Fed. Reg. 5485 (Jan. 29, 2010); Ex. 4. Congress endorsed this Commission by appropriating $5 million in October 2009 for it to evaluate and recommend such "alternatives." Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009). The Commission must issue recommendations within 24 months and consider solutions not only for commercial spent nuclear fuel but also for DOE high-level waste. Ex. 5 ¶ 10. Future proposals for the disposition of high-level waste and spent nuclear fuel will be informed by the Blue Ribbon Commission's comprehensive scientific analysis.

On February 1, 2010, the Administration's Fiscal Year (FY) 2011 Budget stated that "[i]n 2010 the Department [of Energy] will discontinue its application[] to the [NRC] for a license to construct a high-level waste geological repository at Yucca Mountain." Ex. 6, p. 437, 62. It further stated that "all funding for development of the [Yucca Mountain] facility will be eliminated" for FY 2011. *Id*. DOE remains committed, however, to fulfilling the federal responsibility to provide for the permanent disposal of the Nation's spent nuclear fuel and high-level radioactive waste and to meet its contractual obligations under the Standard Contract with nuclear utilities. Meeting this commitment does not depend on development of a repository at Yucca Mountain.

D. Pending Motion to Withdraw – On March 3, 2010, DOE filed in the licensing proceeding before the NRC's Atomic Safety and Licensing Board ("Board") a motion to withdraw its license application. Ex. 7. Five parties, including the State of Washington, petitioned to intervene to oppose DOE's motion. In an April 6, 2010, order the Board announced that it would withhold decisions on the petitions to

intervene and DOE's motion to withdraw pending this Court's ruling on petitions pending before this Court. Ex. 9. Although NRC's regulations and fundamental principles of administrative law assign those decisions to the Board in the first instance, the Board deemed it more expedient to wait for this Court's "guidance" on whether DOE has authority to seek to withdraw the license application, and then decide whether to grant DOE's motion. Ex. 9 at 12. On April 12, 2010, DOE filed a request for review of the Board's interlocutory order by the Commission, the body with the final authority over NRC adjudications. Ex. 10. On April 23, 2010, the Commission granted DOE's request and ordered the Board to establish a briefing schedule on DOE's motion to withdraw and to issue a decision on DOE's motion no later than June 1, 2010. Ex. 19.

Given the likelihood that DOE will have no funds for FY 2011 for Yucca Mountain activities (including licensing), DOE has taken measures to suspend most activities related to the licensing of the repository and has redirected its focus to ensuring an orderly conclusion of such activities by the end of FY 2010, including the preservation of scientific data and program records related to Yucca Mountain and assistance to affected federal employees. Ex. 1; *see infra* n. 9,10.

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 129 S. Ct. 365, 376 (2008). A party seeking a preliminary injunction must establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest. *Id.* at 374. The movant

bears the burden of proving these factors *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). Petitioner fails to satisfy its burden.

I. Petitioner is unlikely to succeed on the merits.

A. This Court lacks jurisdiction; Petitioner fails to state a claim upon which relief can be granted; and the petition is non-justiciable – The petition invokes, *inter alia*, this Court's original and exclusive jurisdiction under 42 U.S.C. § 10139(a)(1)(A) over any civil action for review of any final decision or action of the Secretary of Energy, the President, or the NRC under Part A, subchapter I of the NWPA.[2/] Petitioner brings suit under the Administrative Procedure Act ("APA"), alleging violations of the NWPA, the National Environmental Policy Act ("NEPA"), and the APA.

The APA provides a waiver of sovereign immunity and a cause of action to review a "final agency action." *See* 5 U.S.C. §§ 702, 704. It does not, however, authorize the federal courts to entertain challenges to everything that an agency may

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[2/] Contrary to Petitioner's claim (Pet. 4), neither the Declaratory Judgment Act nor the APA are jurisdiction-conferring statutes. *See Skelly Oil Co. v. Phillips Petroleum*, 339 U.S. 667, 671-74 (1950) (Declaratory Judgment Act); *Trudeau v. FTC*, 456 F.3d 178, 183 (D.C. Cir. 2006) (APA). The petition shows a fundamental misunderstanding of the interplay between the NWPA and the APA. Although the NWPA can confer jurisdiction, it does not provide a waiver of sovereign immunity or a cause of action. The APA, conversely, can provide a waiver of sovereign immunity and a cause of action, but it cannot confer jurisdiction. *Cf. I.C.C. v. Brotherhood of Locomotive Engn'rs*, 482 U.S. 270, 282 (1987) ("While the Hobbs Act [a jurisdiction conferring statute similar to the NWPA] specifies the form of proceeding for judicial review . . ., it is the [APA] that codifies the nature and attributes of judicial review"). The APA can also provide a civil action for review of a NEPA claim. *See Public Citizen v. U.S. Trade Representatives*, 5 F.3d 549, 551 (D.C. Cir. 1993).

do, or fail to do, when conducting its business. *See Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 64 (2004). The APA's limitations necessarily exclude broad attacks on agency policies or how an agency implements a program assigned to it. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Such programmatic and policy attacks are to be made in the offices of the Executive branch or the halls of Congress, not the courts *Id.* Thus, under the APA, Petitioner cannot challenge DOE's policy toward Yucca Mountain or the administration of its on-going high-level nuclear waste and spent fuel program. *See Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006) ("Because an on-going program or policy is not, in itself, a final agency action under the APA, our jurisdiction does not extend to reviewing generalized complaints about agency behavior.").

The APA authorizes challenges only to discrete, circumscribed, and final agency actions, *see Nat'l Wildlife Fed'n*, 497 U.S. at 891-94; *SUWA*, 542 U.S. at 63-65, and then authorizes courts only to "hold unlawful and set aside" those discrete agency actions, *see* 5 U.S.C. § 706(2). Here, Petitioner has not challenged an "agency action" much less a "final agency action."[3/] Thus, Petitioner has failed to state an actionable cause for relief under the APA, and, because finality is a jurisdictional prerequisite to filing in the court of appeals pursuant to the NWPA, 42 U.S.C. § 10139(a)(1)(A), this Court lacks jurisdiction.

[3/]The APA defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). To be considered "final": (1) the action must mark the consummation of the agency's decision-making process and not be merely tentative or interlocutory in nature; and (2) the action must be one by which rights or obligations have been determined or from which legal consequences will flow. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997).

Petitioner's failure to identify the final agency action being challenged or to attach any order or decision document to the petition as required by Fed. R. App. 15(a)(2)(C) is telling. To be sure, the petition lists several statements made, or steps taken by, DOE with respect to its ongoing spent nuclear fuel and high-level nuclear waste program. Pet. 20-27.[4/] These include statements by the Secretary of Energy and DOE regarding Yucca Mountain, FY 2011 budget request, motion to withdraw the license application, withdrawal of ground water permit applications (relating to building a railroad for which planning ceased in 2009), cessation of certain operational activities at Yucca Mountain, and steps to close the Office of Civilian Radioactive Waste Management ("OCRWM"). These statements or actions are not reviewable under the APA, however, because they are not "final agency action"; they are activities committed to DOE's discretion by law, *see* 5 U.S.C. § 701(a)(2); and/or Petitioner lacks standing to complain about the activity.[5/]

As this Court stated in holding that a budget request is not a reviewable final agency action: "Much of what an agency does is in anticipation of agency action.

[4/] Petitioner's allegations are not necessarily correct. For example, Petitioner's allegation (Pet. ¶77) that DOE plans to formally terminate the USA-RS contract is incorrect. *See* Ex. 1 ¶8. Petitioner also erroneously implies that activity screening has been cancelled (Pet. ¶76). It has not. *See* Ex. 2 ¶8.

[5/] In addition, the NWPA vests this Court with "original and exclusive jurisdiction over any civil action – for review of any final decision or action . . . *under this part*." 42 U.S.C. § 10139(a)(1)(A) (emphasis added). To the extent any final agency action has been taken by DOE, that action would not have been taken under Part A, subchapter I of the NWPA. Rather, such an action would have been taken pursuant to DOE's authority under the Atomic Energy Act or the DOE Organization Act (which authority the NWPA did not revoke), and Petitioner, who bears the burden of conclusively establishing this Court's jurisdiction, has not shown otherwise.

Agencies prepare proposals, conduct studies, meet with members of Congress and interested groups, and engage in a wide variety of activities that comprise the common business of managing government programs." *See Fund for Animals v. BLM*, 460 F.3d 13, 19-20 (D.C. Cir. 2006). The budget request and the other statements and actions that Petitioner identifies represent the normal everyday discretionary activities undertaken, and statements made, by federal agencies. They are not "agency actions" within the meaning of the APA, *i.e.*, they are not a rule, order, license, sanction, or relief, *see* 5 U.S.C. § 551(13). "The most that can be said is that [the budget request and other items] outline the goals and methods of [DOE's] administrative program." *Id.* at 20. DOE's filing of a motion to withdraw its license application is also not a final agency action because, until the NRC rules on the motion, it has no legal consequences. *See supra* n.3.

Principles of justiciability, including ripeness and exhaustion doctrines, and fundamental principles of administrative law similarly support withholding judicial review until the NRC makes a decision on DOE's motion to withdraw the license application. As the Commission explained in its April 23, 2010, order, withholding judicial review until after the NRC has applied its expertise in the interpretation of the Atomic Energy Act, the NWPA, and NRC's regulations will inform and benefit the Court's consideration of issues. Ex. 19 at 4. The Commission's order directs the Board to resolve DOE's motion to withdraw by June 1, 2010.

B. Petitioner is unlikely to succeed on the merits of its NWPA claim – Petitioner contends (Mt. 10-12) that 42 U.S.C. § 10134(b) requires DOE to continue inexorably the construction authorization application process, depriving DOE of all

discretion in that process and thus forbidding DOE from moving to withdraw the license application. The plain text of that provision, however, simply requires the Secretary to "submit to the [NRC] an application." *Id*. It neither directs nor circumscribes DOE's actions with respect to the application after its submission. It does not require the Secretary to continue with the application proceeding if the Secretary decides that doing so is contrary to the public interest. The NWPA must be read in concert with the broad discretion granted to the Secretary under the Atomic Energy Act and DOE Organization Act to manage disposition of nuclear waste.

Moreover, in 42 U.S.C. § 10134(d), Congress explicitly provides that the licensing proceeding must be conducted "in accordance with the laws applicable to such applications."[6/] Those laws include the NRC's regulations governing license applications, including 10 C.F.R. § 2.107(a), which allows an applicant to request withdrawal of a license application and empowers NRC to regulate the withdrawal's terms and conditions.

Petitioner errs in suggesting (Mt. 11-12) that the structure or broader context of the NWPA supports its reading. Petitioner's core assumption that the NWPA requires DOE to move forward with "project implementation" through the "develop[ment] of a repository" (Mt. 10, 12), is incorrect. Although Congress established a process that led to the 2002 decision to authorize the filing of a license

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[6/] Contrary to Petitioner's suggestion (Mt. 11), the further proviso in § 10134(d) setting a time limit for issuance of NRC's final decision approving or disapproving the license application imposes no restraint on DOE's authority or right to seek a withdrawal of the license application pursuant to NRC regulations. Among the actions the NRC may take in response to a motion to withdraw a license application is disapproval of the license. 10 C.F.R. § 2.107(a).

application, Congress has not required - or even permitted - the development of a repository.[7/] Construction and operation of a repository at Yucca Mountain clearly would require further action by many parties, including most importantly in this regard, Congress itself. Ex. 1 ¶10; Ex. 17. Petitioner relies on a mere *reporting* provision in 42 U.S.C. § 10134(e) as evidencing Congress's intent to compel DOE to march inexorably forward with developing the repository regardless of evolving knowledge and circumstances. This provision provides that the Secretary shall prepare and update, as appropriate, a "project decision schedule that portrays the optimum way to attain the operation of the repository, within the time periods specified in this part." 42 U.S.C.§ 10134(e). Contrary to Petitioner's reading, this reporting provision shows that Congress was not trying to anticipate every eventuality or imposing specific, judicially-enforceable mandates to develop and open the facility.[8/] Indeed, consistent with this understanding, Congress has funded the Blue Ribbon Commission with the explicit purpose of studying and recommending

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[7/] *See, e.g.,* S. Rep. No. 107-159 at 13 (2009) ("It bears repeating that enactment of the joint resolution will not authorize construction of the repository or allow DOE to put any radioactive waste or spent nuclear fuel in it or even allow DOE to begin transporting waste to it. Enactment of the joint resolution will only allow DOE to take the next step in the process laid out by the Nuclear Waste Policy Act and apply to the NRC for authorization to construct the repository at Yucca Mountain"); H.R. Rep. No. 107-425 at 7 (2002) (congressional approval would "allow" DOE "to apply for a license" with the NRC).

[8/] And to the extent the NWPA is ambiguous in that regard, the existence of such ambiguity means that there is not the requisite discrete, ministerial, or nondiscretionary duty to support an APA "failure to act" claim. *See SUWA,* 542 U.S. at 62-65. Moreover, DOE's interpretation of ambiguity in the NWPA is entitled to deference. *See Coeur Alaska, Inc. v. Southeastern Alaska Conserv. Council*, 129 S. Ct. 2458, 2469 (2009), and cases cited therein.

alternatives for the disposal of high-level waste and spent nuclear fuel based upon advances in science and engineering.

C. Petitioner is unlikely to succeed on the merits of its NEPA claim – At this time, DOE has not undertaken any actions that change the environmental status quo or trigger NEPA. And DOE has already completed detailed NEPA analyses of a potential decision *not* to proceed with a permanent geologic repository at Yucca Mountain. Exs. 12,13. Petitioner thus is not likely to prevail on its NEPA claims.

Petitioner's NEPA argument incorrectly presumes that DOE will not evaluate any significant impacts from any new and presently unidentified alternatives to Yucca Mountain. In Petitioner's words (Mt. 15), "the siting of an alternative geologic repository will create land, air, water, and transportation impacts that require examination in an EIS." As the Supreme Court has explained, however, an EIS "need not be prepared simply because a project is *contemplated*, but only when a project is proposed." *Weinberger v. Catholic Action of Hawaii/Peace Educ.*, 454 U.S. 139, 146 (1981) (emphasis in original). There is no alternative to Yucca Mountain proposed at this time. Rather, the Blue Ribbon Commission has been tasked with recommending those alternatives. Exs. 4,5. Thus far, the Commission has made no recommendations for future waste disposal and DOE certainly has made no decisions on such recommendations. It is well-settled that such preliminary research and development efforts do not trigger NEPA, or constitute final agency action under the APA. *See Northcoast Envtl. Center v. Glickman*, 136 F.3d 660, 669 (9th Cir. 1998); *Ohio Forestry v. Sierra Club*, 523 U.S. 726 (1997). To the extent Petitioner requests that an EIS be prepared for an alternative site for a new repository or other action that

has yet to be proposed, DOE will conduct the requisite NEPA analysis at the appropriate time.[9/] *See* Ex. 14 at S-13.

DOE also need not prepare an EIS on the impacts of not proceeding with Yucca Mountain because DOE already has extensively studied such impacts. NEPA does not require redundant analyses. *See* 40 C.F.R. §§ 1500.4, 1502.4, 1502.20, 1502.21. In its 2002 EIS and in its 2008 supplemental EIS on the Yucca Mountain proposal, DOE included a no action alternative proposing that Yucca Mountain not be built, and analyzed all direct, indirect, and cumulative impacts stemming from this no action alternative. Exs. 12,13. The 2002 EIS also compared the impacts of the no action alternative with the action alternatives. Ex. 12(1-78to-88, 17-1 to -59, App. K; Ex. 13 (7-8 to -10) . The EIS directly addresses the very issues that Petitioner demands that a new EIS be prepared to evaluate (Mt. 16-17), including long and short term safety, air and water quality, job loss and community impacts. DOE has also taken into consideration potential impacts at Hanford stemming from any decision not to proceed with Yucca Mountain. Ex. 14(S-13, S-118). NEPA does not require DOE to duplicate its prior efforts or prepare an EIS for a decision that has yet to be made.

D. Petitioner is not likely to prevail on its APA claim. – Petitioner is not likely to prevail on its third claim (Pet. 30), alleging a violation of the APA's arbitrary and capricious standard. There can be no freestanding "arbitrary and capricious" APA review under § 706(2)(A) independent of another statute. *See*, *e.g.*, *Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 797-99 (9th Cir. 1996). To the

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[9/] Contrary to Petitioner's suggestion (Mt. 16), study of other viable, and perhaps more expedient, options does not limit the range of alternatives that can be studied for NEPA purposes.

extent that Petitioner's APA claim alleges that DOE violates the NWPA or NEPA or has failed to provide sufficient explanation for its actions, such claims provide no basis for granting its request for a preliminary injunction for several reasons: (1) as explained above, DOE has not violated the NWPA or NEPA; (2) DOE has provided reasons for its actions, *e.g.*, Exs. 7, 18 at 18-19; (3) no administrative record has been filed yet; and (4) there is no basis for this Court to render even a preliminary assessment of the adequacy of DOE's explanations in the absence of final agency action and in light of the ongoing NRC proceeding. As the NRC's April 23, 2010, order attests, briefing on DOE's motion to withdraw has yet to occur and the NRC's expertise may inform and benefit this Court's review.

II. Petitioner will suffer no irreparable injury without an injunction – "[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. "A movant's failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." *Id.* Petitioner has not shown its alleged injury is likely, imminent, or irreparable. Petitioner's motion devotes only two cursory paragraphs to this issue and asserts only that "irreparable damage *may* occur" absent a preliminary injunction. Mt. 19 (emphasis added). This is insufficient on its face. A movant must "show that in the absence of its issuance he *will suffer* irreparable injury." *Doran v. Salem Inn*, 422 U.S. 922, 931 (1975) (emphasis added). While statistical certainty is unnecessary, a "likelihood" is. *Winter*, 129 S. Ct. at 375.

Beyond that, the harm Petitioner claims is harm that would occur (if at all)

decades from now from retaining waste in Washington that might otherwise eventually go to Yucca Mountain. Such harm, however, necessarily is predicated on the assumption that absent the decisions that DOE has allegedly made, there would be an operating Yucca Mountain facility. No such facility, however, could exist *until at least 2020*, and the opening of such facility on that or any other date could occur only if, among many other things, Congress passed new legislation and NRC granted construction and operation licenses. Ex. 1 ¶10. At the same time, it may well be the case that alternative methods analyzed by the Blue Ribbon Commission, such as interim storage, would lead to taking waste more quickly from Washington than would pursuing the Yucca Mountain alternative. The claimed harm here is thus speculative, distant, and contingent, not imminent and likely.

In any event, Petitioner fails to demonstrate that its injury is "irreparable" without an injunction. "Irreparable" means permanent or at least of sufficiently long duration to make it effectively permanent. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). However, if any NRC or court decision should require DOE to continue with the license application, a workforce can be reassembled and contracts can be renewed.[10/] Moreover, the existing data relevant to the application

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[10/] As David Zabransky, Acting Principal Deputy Director of OCRWM explains (Ex. 1 ¶6), DOE is assisting OCRWM federal employees seeking to remain at DOE and, to the extent successful, this would facilitate efforts to reconstitute the Yucca Mountain work force, should the need arise. With respect to the non-federal work force, approximately 141 individuals work for Sandia National Laboratory or other National Laboratories. DOE's expectation is that many of these individuals will continue to be employed by the Laboratories (to perform work on other projects) and their continued employment could facilitate establishment of a National Laboratories' support team if DOE is required to continue with the license

is being preserved and performance confirmation can be resumed.[11/] To be sure, restarting the licensing application process may well involve some delay, but delay alone is not irreparable injury. *See I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus., Inc.*, 789 F.2d 21, 24-25 (D.C. Cir. 1986); *Nat'l Treasury Employees Union v. King*, 961 F.2d 240, 244 (D.C. Cir. 1992) (normal administrative delay not generally irreparable injury). Petitioner must, but fails to, identify some concrete and legally cognizable irreparable injury to its interests flowing from the potential for delay in restarting the licensing process before the extraordinary remedy of a preliminary injunction may issue.

Any delay also must be put in context. As noted, a Yucca Mountain repository could not have opened before 2020 at the earliest. Ex. 1 ¶10. The NRC has directed the Board to issue a decision on DOE's motion to withdraw by June 1, 2010. Additionally, the current posture of the licensing proceeding does not affect the NRC Staff's independent technical review of the application; rather, the Staff expects to

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application. *Id*. ¶7. Finally, there are no plans to terminate the Management and Operating Contract. Because the contract would remain in effect, DOE could add tasks to the contract to support licensing. *Id*. ¶8. The requested injunction could adversely effect these efforts.

[11/] DOE is maintaining all the functionalities of the "licensing support network" database containing the documents relevant to the licensing proceeding as well as materials of scientific significance. *See* Ex. 15 at 2. DOE could resume collection of data on rainfall and seismicity at Yucca Mountain and could validate the absence of any significant changes by reviewing data collected by others in the same general area. Ex. 2 ¶4. DOE also can obtain necessary data on tunnel convergence and rockfall through visual observation of the tunnel should inspections resume. *Id.* Contrary to Petitioner's suggestion (Mt. 1), performance confirmation monitoring without interruption is not legally required.

complete only two of five volumes of the Safety Evaluation Report on the application by November 2010, and not to complete the remaining three volumes until February 2012. Ex. 9 at 3. Hearings in the licensing proceeding on contested factual issues ordinarily would not take place until after the NRC Staff issues relevant portions of the Safety Evaluation Report. Ex. 16 at 1-2.

Petitioner emphasizes (Pet. 9-15) the "imminent" need to address tank waste at Hanford. However, as detailed in the Declaration (Ex. 3) of Dr. Ines Triay, DOE's Assistant Secretary for Environmental Management, high-level waste at Hanford already is being addressed by DOE's ongoing long term cleanup, irrespective of whether Yucca Mountain is delayed or never constructed. Ex. 3 ¶ 6-11. That cleanup includes the retrieval of highly radioactive mixed waste stored in underground storage tanks, the construction of a massive waste treatment plant to treat that high-level waste, and ultimately the treatment of that waste at the plant, by converting it to glass through vitrification. Vitrification is a prerequisite to transportation and storage at any repository and the process of converting all of the liquid high-level waste into glass waste forms will take several decades to accomplish; thus Petitioner has long known that such waste forms would remain on site for a lengthy period of time. *Id.* ¶ 11. Sufficient capacity exists or will be constructed at Hanford to store such wastes with no adverse impacts on the environment. Ex. 14 at 4-213, 4-218; Pet. Ex. 1, Attach 1 at 5. The notion that Hanford cleanup or construction of the treatment plant is dependent on opening Yucca Mountain is simply incorrect.[12/] Ex. 3 ¶¶7,11, 13.

[12/]The schedule for accomplishing this cleanup already is the subject of a proposed consent decree that DOE has negotiated with Washington, *State of Washington v.*

Petitioner also errs in suggesting (Pet. 14-15, Ex. 1 at 19-20) that termination of the Yucca Mountain project could cause delay or adjustments in construction of the Hanford waste treatment plant (including alleged changes as extreme as a construction tear-down and rebuild of the plant) because the treatment plant is designed to meet Yucca Mountain-specific standards. Dr. Triay explains that there is no likelihood this would occur because the treatment process for Hanford – vitrification of high-level waste into borosilicate glass – is *not* a Yucca Mountain-specific process. Ex. 3 ¶¶12-14. This waste form is currently the international standard and the material vitrified at Hanford's planned waste treatment plant will be sufficiently robust for disposal in any permanent repository. *Id.*

III. The balance of the harms and the public interest weigh against enjoining DOE – DOE would be harmed, as would the public, by an order enjoining the activities DOE is currently taking for an orderly wind-down of the Yucca Mountain project. Although DOE has taken steps to close its offices that have supported the research and study of Yucca Mountain, it is doing so because – based upon the President's proposed FY 2011 budget – as of October 1, 2010, no money will be appropriated to Yucca Mountain activities. Ex. 1 ¶5. DOE is planning to take steps to ensure that it archives all relevant studies and research and doing so is costly. Ex. 1 ¶6. It is in the public interest for this archiving effort to occur in the near term because of the likelihood that there will be no funding in FY 2011. DOE is also attempting to assist federal employees to find other positions within DOE. *Id*. ¶6.

Chu, No. 08 5085 FVS (E.D. Wa.). The proposed settlement would, if finalized, require treatment of all high-level mixed waste from the tanks no later than 2047.

DOE anticipates that many National Laboratory employees currently supporting the Yucca Mountain project will remain at the Laboratories performing other tasks. *Id*. ¶7. DOE's anticipated actions are in the public interest because they would ensure that all necessary information can be adequately preserved. An injunction that prevents DOE from undertaking these activities before, for instance, employees voluntarily choose to pursue other jobs, will hinder these efforts.

Likewise, an injunction requiring DOE to prosecute its license application – which costs DOE (and the public) $9 million per month – is not in the public interest. Ex. 1 ¶9. The Secretary has the authority to study the best and most expedient manner in which to address high level nuclear waste, and Congress has funded a Blue Ribbon Commission for that purpose. Taxpayers should not have to shoulder the burden of funding a license proceeding when the Secretary has determined to pursue other options, which will be informed by the Blue Ribbon Commission's forthcoming analysis. In sum, DOE's steps to spend its budget wisely, to engage in an orderly process that preserves its records and science and seeks to minimize harm to its employees, and to account for scientific advances before making any permanent decision about nuclear waste is in the public interest and should not be enjoined.

CONCLUSION

Petitioner's motion for a preliminary injunction should be denied.

Respectfully submitted.

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