UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

STATE OF WASHINGTON, Petitioner, v. UNITED STATES DEPARTMENT OF ENERGY, DR. STEVEN CHU, Secretary of the U.S. Department of Energy, NUCLEAR REGULATORY COMMISSION, Respondents.	No. 10-1082 MOTION FOR PRELIMINARY INJUNCTION

Petitioner State of Washington (Washington) moves for preliminary injunctive relief pursuant to 28 U.S.C. § 1651, 42 U.S.C. § 10139(a)(1)(A)-(D), and 5 U.S.C. § 706. Washington requests that this Court enter an order enjoining Respondents United States Department of Energy and its Secretary, Dr. Steven Chu (hereafter 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, Nevada (the Yucca Mountain project), until this Court has ruled on the merits of Washington's petition for review. In particular, Washington requests that this Court issue an order: (1) requiring DOE to continue with all performance confirmation activities mandated by regulations or the Nuclear Regulatory Commission (NRC) as part of the Yucca Mountain licensing

application process[1]; (2) requiring DOE to refrain from any action or inaction to terminate the Yucca Mountain project in any fashion; and (3) providing all other relief deemed necessary and proper by this Court to preserve the status quo pending its review on the merits.

I. STATEMENT OF THE CASE

A. Congress Designated Yucca Mountain as a Geologic Repository After Almost 20 Years of Investigation

Since the 1940s, the United States has generated a massive amount of high-level radioactive waste and spent nuclear fuel, with more waste still being produced. *Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1258 (D.C. Cir. 2004). These materials will be extremely hazardous to both humans and the environment for millennia to come. *Id.*

The difficulties in siting a geologic repository for these materials have been well documented. H.R. Rep. No. 97-491(I) at 26 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3792-93. These difficulties led Congress in 1982 to enact the Nuclear Waste Policy Act (NWPA), which prescribes a detailed process for identifying a site where high-level waste and spent nuclear fuel can be safely and permanently housed. 42 U.S.C. § 10101-10270.

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[1] Performance confirmation is "the program of tests, experiments, and analyses that is conducted to evaluate the adequacy of the information used to demonstrate compliance with the performance objectives" set for the proposed Yucca Mountain repository. 10 C.F.R. §§ 63.2, 63.102(m), 63.131.

Following the process laid out in the NWPA, DOE began searching for suitable repository sites in 1983. In 1986, DOE, using an "accepted, formal scientific method," ranked the appropriateness of the various sites it had investigated. U.S. Dept. of Energy, *A Multiattribute Utility Analysis of Sites Nominated For Characterization For the First Radioactive Waste Repository – A Decision Aiding Methodology* 1-5–1-15 (1986). Yucca Mountain was the highest-ranked site. *Id.* Congress then amended the NWPA to focus DOE's study exclusively on the Yucca Mountain site. *Id.*; 42 U.S.C. § 10172.

From 1987 to 2002, DOE continued its intensive analysis of the Yucca Mountain site. 42 U.S.C. §§ 10132-10133 (2009); U.S. Dept. of Energy, *Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the NWPA of 1982* (2002) (Suitability Determination) at 7-8; 10 C.F.R. pt. 963 (Yucca Mountain Site Suitability Guidelines); 10 C.F.R. pt. 63 (NRC Yucca Mountain Licensing Regulations). During its 15-year investigation, DOE invested "billions of dollars and millions of hours of research" on Yucca Mountain, causing DOE to call the site "far and away the most thoroughly researched site of its kind in the world." Suitability Determination at 1.

In January 2002, the Secretary formally recommended to the President that a geologic repository could be safely sited at Yucca Mountain. *Id.*; H.R. Rep. No.

107-425, at 3 (2002), *reprinted in* 2002 U.S.C.C.A.N. 532-33. In doing so, the Secretary concluded that:

> [T]he amount and quality of research the [DOE] has invested into [determining Yucca Mountain's suitability as a repository] – done by top flight people . . . – is nothing short of staggering. After careful evaluation, I am convinced that the product of over 20 years, millions of hours, and four billion dollars of this research provides a sound scientific basis for concluding that the site can perform safely during both the pre- and post-closure periods, and that it is indeed scientifically and technically suitable for development as a repository.

Suitability Determination at 45.

Based upon DOE's Suitability Determination, the President in February 2002 recommended Yucca Mountain to Congress. 42 U.S.C. § 10134(a)(2)(A) (2009); H.R. Rep. No. 107-425 at 3. The Governor and legislature of the State of Nevada submitted a notice to Congress disapproving DOE's and the President's recommendation. H.R. Rep. No. 107-425 at 3. Congress overrode Nevada's disapproval in July 2002. Pub. L. No. 107-200, 116 Stat. 735 (2002).

Consistent with its statutory duty under the NWPA, DOE then drafted and submitted an application to the Nuclear Regulatory Commission (NRC) for a license to construct the Yucca Mountain repository. On October 22, 2008, the NRC noted the application for hearing.[2] 73 Fed. Reg. 63,029 (Oct. 22, 2008).

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[2] The license application is extremely lengthy. It can be accessed at the following site: http://www.nrc.gov/waste/hlw-disposal/yucca-lic-app.html.

B. The Department of Energy Now Seeks to Irrevocably Abandon Yucca Mountain as a Geologic Repository

As recently as May 2009, DOE's application process appeared on track, with current Energy Secretary Chu stating that his agency intended to continue with the process. State of Washington's Petition for Review and for Declaratory and Injunctive Relief (Petition) ¶ 60. However, on February 1, 2010, in conjunction with announcing DOE's proposed Fiscal Year (FY) 2011 budget, Secretary Chu reversed course and announced that DOE would "discontinue its license application for a high-level nuclear waste repository at Yucca Mountain." *Id.* ¶ 62.

Subsequently, on March 3, 2010, DOE filed with the NRC its formal motion to withdraw *with prejudice* its Yucca Mountain licensing application. *Id.* ¶ 64. The only explanation DOE has given for its decision to terminate the Yucca Mountain project is its repeated assertion that a repository at Yucca Mountain is "not a workable option" and that "[t]he Nation needs a different solution for nuclear waste disposal." *Id.* ¶ 67.

C. The Department of Energy is Dismantling the Yucca Mountain Project Without Waiting for a Ruling From the Court

Since announcing its decision to irrevocably terminate the Yucca Mountain project, DOE has steadily moved forward to dismantle the project. DOE's actions demonstrate that it is not waiting for either Congressional approval of termination

of the Yucca Mountain project, or a decision by this Court or any other tribunal on whether its actions are legal.

Last year, DOE requested and Congress approved funding for the current fiscal year in order to continue the Yucca Mountain license application process. U.S. Dept. of Energy, *FY 2010 Congressional Budget Request, Vol. 5*, 504 (FY 2010 budget request "is dedicated solely to supporting to [sic] the NRC LA [licensing application] process."), 505, 520, 540[3]; P.L. 111-85, 123 Stat. 2864, 2868. However, on February 17, 2010, DOE advised Congress it intends to "reprogram" these funds and use them instead to immediately begin to shut down the entire Yucca Mountain project. Petition ¶ 71, Exs. 3, 4.

In addition, in a February 26, 2010, letter to the NRC, an official from the DOE sub-agency responsible for the Yucca Mountain project indicated that on March 1, 2010, DOE would end "data collection and performance confirmation activities" at Yucca Mountain. *Id.* ¶ 73, Ex. 6. "Specifically, the power and communications systems for all surface and subsurface work and data collection processes will be shut down" and "further data acquisition is being stopped." *Id.*

DOE has also closed the Yucca Mountain site, resulting in an inability of scientists to collect data from the site. *Id.* ¶ 74, Ex. 7 (tab 16) at 1. For example,

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[3] Available at http://www.cfo.doe.gov/budget/10budget/Content/Volumes/Volume5.pdf

on March 2, 2010, Susan Boggs of the Sandia National Laboratory, reported that the batteries that power the only repository-depth seismic monitoring station at Yucca Mountain were not changed as scheduled because the site was closed. *Id.* "[D]ata collected over the course of site characterization and performance confirmation will be impacted as a result of site access denial. Seismic data at this station has not been retrieved since January." *Id.*

DOE has a written plan with its primary Yucca Mountain contractor, USA Repository Services (USA-RS)[4], to end USA-RS's work on Yucca Mountain in April 2010. *Id.* ¶ 77, Ex. 10. According to this schedule, DOE will issue a letter to USA-RS on April 16, 2010, formally terminating the contract, and USA-RS will stop work that same day. *Id.* USA-RS plans to vacate its offices and remove all equipment from them in May 2010. *Id.* Finally, USA-RS will "initiate employee separations" in May and June 2010. *Id.*

II. ARGUMENT

A. This Court has Authority to Order Preliminary Injunctive Relief to Maintain the Status Quo Pending a Ruling on the Merits

Washington has filed an original action with this Court seeking review and reversal of DOE's decision to irrevocably terminate the Yucca Mountain project. This Court has jurisdiction over the issues raised in the petition for review

[4] http://www.lanl.gov/news/index.php/fuseaction/nb.story/story_id/14978/nb_date/2008-11-07.

pursuant to the NWPA and the Administrative Procedure Act (APA). 42 U.S.C. § 10139(a) (2009); 5 U.S.C. § 706 (2009). This Court, therefore, has authority under both the APA and the All Writs Act to grant preliminary injunctive relief to preserve the status quo until the Court can rule on the merits of the petition for review. 28 U.S.C. § 1651(a).

B. Washington has Standing to Request Preliminary Injunctive Relief

As Washington's petition establishes, Washington has an interest as a property owner, a regulator, and a sovereign in the management of nearly two-thirds of the nation's defense related high-level waste that is currently stored at DOE's Hanford Nuclear Reservation (Hanford) near Richland, Washington. Petition ¶¶ 16-22, 24-26, 37. Much of this waste is stored in aging, leak-prone underground tanks. *Id.* ¶¶ 31-34. Washington is within the zone of interests of both the NWPA and National Environmental Policy Act (NEPA) and Washington satisfies all elements of standing to ensure that DOE complies with the processes under both statutes. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7, 8 (1992).

C. Standards Governing Petitioner's Request for Preliminary Injunctive Relief

This Court should grant Washington's motion for preliminary injunctive relief if it finds Washington can demonstrate that: (1) it is likely to succeed on the merits of its substantive claims; (2) it is likely to suffer irreparable harm in the

absence of the requested preliminary relief; (3) the balance of equities tips in Washington's favor, and (4) the requested relief is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, __U.S.__, 129 S. Ct. 365, 374 (2008).

D. The Petitioner is Likely to Succeed on the Merits of Its Claims that Respondents' Permanent Abandonment of Yucca Mountain Violates the NWPA, NEPA, and the APA

Washington is likely to succeed on the merits of its substantive claims. As demonstrated in detail below, DOE has no authority under the NWPA to unilaterally and permanently terminate consideration of Yucca Mountain as a permanent repository site. Even if it had such authority, DOE has moved forward with its decision without first evaluating the impacts of that decision as required by the NEPA. Finally, DOE's decision is arbitrary and capricious under the APA.

1. DOE's Decision to Permanently Terminate Yucca Mountain Violates the NWPA Because DOE is Without Authority to Make Such a Decision

Congress enacted the NWPA in 1982 to establish a "definite federal policy" for the disposal of high-level radioactive waste and spent nuclear fuel. 42 U.S.C. § 10131(b)(2). The NWPA outlines a detailed, prescriptive, and stepwise process for the "siting, construction, and operation of repositories" to provide a "reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste. . . ." 42 U.S.C.

§ 10131(b)(1); *see also Nuclear Energy Inst.*, 373 F.3d at 1259 (NWPA establishes a "multi-stage process" to select an appropriate host site).

The NWPA vests the Secretary of Energy with considerable discretion during the first two stages of this process, which relate to identifying sites for further "characterization" and then investigating those sites in anticipation of potential approval as a repository.[5] *See* 42 U.S.C. § 10132(a), (b), 42 U.S.C. § 10134(a)(1). In fact, during the site investigation stage, Congress provides the Secretary with express authority to "terminate all site characterization activities" if at any time the Secretary determines a site is "unsuitable for development as a repository." 42 U.S.C. § 10133(c)(3).

However, the third stage—Congressional approval of a repository site under the NWPA—ends DOE's site selection process, and with it its associated discretion. *Nuclear Energy Inst.*, 373 F.3d at 1302 ("Congress has settled the matter, and we, no less than the parties, are bound by its decision"). Repository approval triggers the fourth and final stage under the NWPA: licensing and project implementation. In this stage, Congress has commanded that upon approval of a repository site, the Secretary "*shall submit* to the [NRC] an application for a construction authorization for a repository at such site. . . ."

[5] "Site characterization" is the statutory term used to describe the scientific research and testing conducted to determine the suitability of a particular site for a permanent repository. 42 U.S.C. § 10101(21).

42 U.S.C. § 10134(b) (emphasis added). At the other end of the licensing process, Congress has commanded that the NRC "*shall consider* an application for a construction authorization for all or part of a repository" and "*shall issue a final decision* approving or disapproving the issuance of a construction authorization. . . ." 42 U.S.C. § 10134(d) (emphasis added).

The plain and unambiguous language of the statute requires that once a repository site is approved, both DOE and the NRC must follow through with the construction authorization application process until a decision on the merits is reached. It renders the plain language meaningless if DOE may unilaterally withdraw a license application and seek to irrevocably foreclose a repository approved under the NWPA. *See City of Portland, Oregon v. E.P.A.*, 507 F.3d 706, 711 (D.C. Cir. 2007) (statute should be construed to give every word meaning); *U.S. v. Cook*, 594 F.3d 883, 890-91 (D.C. Cir. 2010) (statutory outcome is absurd if it renders a statute nonsensical or superfluous).

The broader context of the NWPA supports this plain language reading. First, in contrast to the express allowance that the Secretary may "terminate all site characterization activities" during the characterization phase, *see* 42 U.S.C. § 10133(c)(3)(A), nothing in the NWPA's post-approval provisions offer any hint

of such discretion.[6] *See Beach v. Ocwen Federal Bank*, 523 U.S. 410, 418-19 ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely" quoting *Rosello v. United States*, 464 U.S. 16 (1983)). Further, the NWPA's other post-approval provisions demonstrate Congress' clear expectation that once a repository is approved, DOE will move forward to develop the repository. *See* 42 U.S.C. § 10134(e)(1) (requiring the Secretary to prepare a project decision schedule "that portrays *the optimum way to attain the operation of the repository*"); 42 U.S.C. § 10134(e)(2) (any federal agency that cannot comply with the project decision schedule must report to Congress, with a corresponding report from the Secretary); 42 U.S.C. § 10134(d) (based upon project decision schedule, the NRC may extend the three-year timeline imposed on it under the NWPA to reach its decision on DOE's construction authorization application).

[6] Further, even under 42 U.S.C. § 10133(c)(3), the Secretary does not have unfettered discretion to foreclose any further consideration of a *site*, such as DOE now seeks. The Secretary's authority goes solely to terminate characterization *activities* based on a finding of "unsuitability," with the Secretary required to report to Congress on matters that include "the need for new legislative authority." *See* 42 U.S.C. § 10133(c)(3).

DOE's summary termination of the Yucca Mountain project cannot be squared with the plain language of the NWPA. Washington is likely to prevail on the merits of this claim.

2. DOE's Decision to Forever Terminate Yucca Mountain Fails to Comply with NEPA

DOE's decision also violates NEPA. DOE has failed to publish any NEPA evaluation of a decision that commits the agency to abandon an established major federal project in favor of a completely unknown and undefined "different solution."

NEPA requires federal agencies to prepare an environmental impact statement (EIS) with alternatives for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). A "major federal action," in turn, includes both "concerted actions to implement a specific policy or plan" and "systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.18(b)(3).

The decision to terminate a major federal project constitutes a major federal action, *Andrus v. Sierra Club*, 442 U.S. 347, 363 (1979), as does the revision or expansion of an ongoing federal program that alters the operational status quo. *Id.*; *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232,

234-35 (9th Cir. 1990). Further, the decision *not* to implement an action through termination of a program is a major federal action if the effect of that decision is to alter the environmental status quo. *California ex rel Lockyer v. U.S. Dep't of Agriculture*, 575 F.3d 999, 1014-15 (9th Cir. 2009).

DOE's decision to forever terminate the Yucca Mountain project is a "major federal action" under this authority. DOE's decision has changed the direction of a broad program aimed at resolving an entrenched environmental problem. DOE's decision has altered not just the operational status quo of the Yucca Mountain repository itself, but an entire national program keyed on Yucca Mountain as its centerpiece.

This is nowhere better illustrated than at Hanford. The mission of retrieving high-level radioactive waste from Hanford's aging and leak-prone underground storage tanks is directly tied to the construction of a $12.3 billion Waste Treatment Plant, which in turn is directly tied to the Yucca Mountain project. Petition at ¶¶ 44, 45. Terminating the Yucca Mountain project will cause significant regulatory, administrative, and technical issues to be revisited at Hanford, all of which could, among other effects, delay the time-critical mission to retrieve waste from Hanford's tanks. *Id.*

Based on these consequences, it is incontrovertible that DOE's decision will "significantly affect[] the quality of the human environment." Just as at Hanford,

the effects of terminating the Yucca Mountain project will be played out at storage sites across the country. Further, significant impacts may be presumed with any new alternative(s) implemented in lieu of Yucca Mountain. DOE's own NEPA regulations provide that an EIS should be prepared for the "siting, construction, operation, and decommissioning of major treatment, storage, and disposal facilities for high-level waste and spent nuclear fuel, including geologic repositories." 10 C.F.R. § 1021, Appendix D to Subpart D. No less than with the Yucca Mountain repository itself, the siting and operation of an alternative geologic repository will create land, air, water, and transportation impacts that require examination in an EIS.[7]

DOE has already acknowledged the need to comply with NEPA before it makes a decision on any alternative to Yucca Mountain:

> *Notwithstanding the decision to terminate the Yucca Mountain program*, which was the development of a geologic repository for the disposal of HLW and SNF, DOE remains committed to meeting its obligations to manage and ultimately dispose of HLW and SNF. The

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[7] The threshold for whether an EIS must be prepared is relatively low, and it is judged on a reasonableness standard: "it is enough for the plaintiff to raise substantial questions whether a project may have a significant effect on the environment."[7] *California ex rel Lockyer*, 575 F.3d at 1012 (quoting *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1211-12 (9th Cir. 1998). If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" to explain why a project's impacts are insignificant. *Blue Mountains,* 161 F.3d at 1211-12. This statement of reasons is "crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." *Id.*

> Administration intends to convene a blue ribbon commission to evaluate alternative approaches for meeting these obligations. *Decisions reached through this process will need to be addressed at a later date subject to appropriate NEPA review.*

Petition, Exhibit 1 at ¶ 49, quoting *Draft Tank Closure and Waste Management Environmental Impact Statement for the Hanford Site, Richland, Washington* (Draft TC&WM EIS) (Oct. 2009), at S-13 (emphasis added).

However, by taking action today to forever close the door on the Yucca Mountain repository, DOE has necessarily committed itself *today* to implement one or more of the "alternative approaches" to Yucca Mountain. NEPA requires the preparation of an EIS at the proposal stage, before an agency makes its decision. 42 U.S.C. § 4332(C); 10 C.F.R. § 1021.210(b). Until an EIS is completed, NEPA's implementing regulations prohibit taking actions that would "[h]ave an adverse environmental impact" or "*[l]imit the choice of reasonable alternatives.*" 40 C.F.R. § 1506.1(a) (emphasis added). DOE's own NEPA regulations require it to "complete its NEPA review for each DOE proposal *before making a decision on the proposal*", 10 C.F.R § 1021.210(b) (emphasis added), and before DOE has "reached the level of investment or commitment likely to determine subsequent development *or restrict later alternatives. . . .*" 10 C.F.R. § 1021.212(b) (emphasis added). The time for DOE to comply with NEPA is *now*, before it takes the one and only known alternative off the table.

DOE has moved forward with its decision to irrevocably terminate the Yucca Mountain project without first evaluating the impacts of that decision as required by NEPA. Washington is likely to prevail on the merits of this claim.

3. DOE's Decision to Permanently Terminate Yucca Mountain is Arbitrary and Capricious Under the APA

DOE's decision to irrevocably terminate the Yucca Mountain project reverses decades of work, billions of dollars of investment, and settled expectations across the country. Despite these facts, and despite the fact that DOE has no identifiable alternative at hand, DOE is attempting to purposefully foreclose any future consideration of Yucca Mountain as a geologic repository.

Under the APA, 5 U.S.C. § 706(2)(A), an agency action is arbitrary and capricious if the agency:

> [H]as relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

> We require only that the agency "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.' "

Nuclear Energy Inst., 373 F.3d at 1289 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

Even if DOE were free to ignore the NWPA, its decision is arbitrary and capricious under this standard. DOE has failed to articulate any explanation for its decision that rationally ties its choice to any specific facts. *See, e.g., Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 534 (2007) (EPA offers no reasoned explanation for refusal to decide whether greenhouse gases contribute to climate change); *Motor Vehicle Mfrs.*, 463 U.S. at 48-49 ("an agency must cogently explain why it has exercised its discretion in a given manner"); *Natural Res. Def. Council v. Envtl. Prot. Agency*, 966 F.2d 1292, 1306 (9th Cir. 1992) (agency cited no particular information to support its conclusion); *cf.*, *Nuclear Energy Inst.*, 373 F.3d at 1297 ("In light of NRC's detailed analysis supporting its decision . . . we believe that it adequately explained its change in course"). DOE's cryptic conclusions that Yucca Mountain is not a "workable option" and that the nation needs a "different solution" pale in relation to the lengthy and detailed process under the NWPA that led to Yucca Mountain's Congressional approval. *See infra* at 3-4; *Motor Vehicle Mfrs.*, 463 U.S. at 41-42 (agency rescinding rule obligated to supply reasoned analysis in same manner as if promulgating rule). This makes it all the more striking that without any explanation, DOE has rejected obvious and less extreme alternatives to irrevocably terminating the Yucca Mountain project. *See Motor Vehicle Mfrs.*, 463 U.S. at 48 (logical less drastic alternative not addressed by agency).

DOE's decision cannot withstand review under the APA. Washington is likely to prevail on the merits of this claim.

E. Washington is Likely to Suffer Irreparable Harm Unless This Court Grants Preliminary Injunctive Relief to Preserve the Status Quo

Washington seeks an order to preserve the status quo of the Yucca Mountain project until the Court has addressed the merits of its petition. Without such an order, irreparable damage may occur even if Washington prevails on the merits.

DOE is aggressively terminating the Yucca Mountain project. DOE's actions have interrupted required data collection, resulted in the continuing loss of a uniquely skilled workforce, and involve the ongoing dismantling of a complex physical and technological infrastructure. *See infra* at 6-7. With each of these actions, DOE further hinders the ability to resume the licensing process should Washington prevail on the merits. Unless this Court intervenes to preserve the status quo until a decision on the merits, Washington's victory may be pyrrhic.

F. The Balance of the Equities Favors Granting a Preliminary Injunction

The equities lie in favor of granting the requested relief, which would merely maintain the status quo of a federal program authorized by statute and already funded by Congress until the merits of this challenge are reached.

G. The Preliminary Injunctive Relief is in the Public Interest

The NWPA recognizes the substantial public interest in placing the nation's high-level waste and spent nuclear fuel in a protective geologic repository. *See e.g.,* 42 U.S.C. § 10131. Without Congress having changed a word of the statute, DOE is on its own initiative undertaking to dismantle the only repository project approved by Congress under the NWPA. Until such time as this Court determines the legality of DOE's unilateral action to terminate Yucca Mountain, it is in the public's interest for the Court to preserve the status quo of a Congressionally-mandated program aimed at resolving one of the nation's most vexing nuclear waste problems.

III. CONCLUSION

For the above reasons, Washington respectfully requests that the Court grant its request for preliminary injunctive relief.

RESPECTFULLY SUBMITTED this 12th day of April, 2010.

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CERTIFICATE OF SERVICE

I herby certify that on the 12th day of April, 2010, a copy of the State of Washington's Motion for Preliminary Injunction was served by overnight mail upon the following:

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