

NO. 10-1082

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

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.

ON PETITION FOR REVIEW AND FOR
DECLARATORY AND INJUNCTIVE RELIEF

**STATE OF WASHINGTON'S REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

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Application for Admittance Pending

Washington provides the following reply to Respondents' April 23, 2010, Response in Opposition to Petitioner's Motion for Preliminary Injunction (Resp.). DOE's response underscores the necessity of the preliminary relief requested by Washington. Without such relief, DOE's continuing dismantling of the Yucca Mountain project will irreparably harm that project before the Court reaches the merits of Washington's petition for review.

I. ARGUMENT

A. Washington is Likely to Succeed on the Merits of Its Claims

1. Washington has Raised Justiciable Claims

This Court has jurisdiction over Washington's claims pursuant to three separate subsections of the NWPA's judicial review provision: 42 U.S.C. § 10139(a)(1)(A), (B), and (D).¹ Without question, DOE's decision to irrevocably terminate development of a repository site identified by the NWPA, characterized under the NWPA, determined suitable by the Secretary under the NWPA, and approved by Congress under the NWPA is an action taken "under" the NWPA, as

¹ DOE's unilateral decision to terminate Yucca Mountain is a final decision reviewable under subsection (a)(1)(A); DOE's failure to continue with the licensing process as required by the NWPA is reviewable under subsection (a)(1)(B); and DOE's failure to prepare an EIS under NEPA before deciding to terminate Yucca Mountain in favor of an unknown alternative is reviewable under subsection (a)(1)(D). Pet. for Review ¶¶ 9, 80-81, 84-86, 88-89. DOE's assertion that the NWPA itself "does not provide a . . . cause of action" is simply false. Resp. at 7, n.2. The NWPA prescribes various rights and obligations with respect to the siting of a permanent repository, the violation of any one of which may serve as the basis for a cause of action. The judicial review provision supports this conclusion by providing, for example, jurisdiction in this Court over any civil action in which the petitioner alleges "the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part." 42 U.S.C. § 10139(a)(1)(B) (emphasis added).

opposed to any other DOE authority.² See *Nuclear Energy Inst., Inc. v. Env'tl. Prot. Agency*, 373 F.3d 1251, 1285-88 (D.C. Cir. 2004) (finding that although the NRC promulgated regulations under preexisting AEA authority, the NWSA directed the activity).

The action and inaction incumbent in DOE's decision is also reviewable as "agency action" that is "final" under both the NWSA and the APA.³ "Agency action" is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." 5 U.S.C. § 551(13) (emphasis added). This definition is "meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478 (2001).

By this definition, DOE's decision to forever terminate Yucca Mountain constitutes "agency action." But for the unique structure of the NWSA (under

² Even if the Court were to accept DOE's argument that it has authority under the AEA or DOE Organization Act to terminate the Yucca Mountain project, then that decision (which amounts to abandoning the framework of NWSA §§ 112 through 116) would necessarily constitute a "final decision" of the Secretary within the meaning of Section 119(1)(A) of the NWSA.

³ The NWSA does not define what constitutes a "final decision" within the meaning of its judicial review provision. DOE assumes without explanation that finality under the NWSA is the same as under the APA. Resp. at 8. However, given the broad manner in which Congress has drafted the judicial review provision, "finality" under the NWSA is likely more liberally construed than in the APA. *Neb. Pub. Power Dist. v. United States*, 590 F.3d 1357, 1365 (Fed. Cir. 2010) (noting "broad" nature of NWSA judicial review provision); *Gen. Elec. Uranium Mgmt. Corp. v. Dep't of Energy*, 764 F.2d 896, 901-02 (D.C. Cir. 1985) (noting Congress's intent that judicial review provision cover "all actions concerning waste disposal . . ." (emphasis added)). Even if the arguably more restrictive APA definition of finality is used, DOE's decision to irrevocably terminate Yucca Mountain is still "final."

which Congress took ultimate repository “approval” out of DOE’s hands), DOE would have been required to issue a Record of Decision (ROD) to establish the Yucca Mountain repository. *See, e.g.*, Ex. 1 (DOE ROD establishing WIPP transuranic waste repository); 10 C.F.R § 1021.315(b) (requiring ROD preparation). A substantial change to this decision—such as reversing it entirely—would require a revision to the ROD. 10 C.F.R § 1021.315(d). Without question, ROD issuance and revisions constitute “agency action.”⁴ *See, e.g., Citizens for Alternatives to Radioactive Dumping v. Dep’t of Energy*, 485 F.3d 1091, 1095 (10th Cir. 2007) (challenging WIPP ROD).

DOE’s decision is also unquestionably “final.” It “mark[s] the ‘consummation’ of the agency’s decisionmaking process” and is not “of a merely tentative or interlocutory nature.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations omitted).⁵ The various statements made by Secretary Chu on the subject, as well as various actions taken or proposed by DOE, contain no compromising language or indication that the decision is ‘merely tentative or interlocutory.’ They demonstrate DOE’s implacable determination to close Yucca Mountain. *See e.g.*, Pet. for Review at 20-27, ¶¶ 62-64, 67, 70-77 (and sources cited therein).⁶

⁴ The fact that DOE has failed to compile a record for its decision cannot be used to shield that decision from review. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420-21 (1971).

⁵ DOE’s decision is also a matter “from which ‘legal consequences will flow,’” *Bennett*, 520 U.S. at 177-78, including the termination of contracts and employment relationships.

⁶ Further, whereas under the NWP Congress has expressly defined certain DOE “pre-approval” activities as “preliminary” and not subject to review, no such

DOE's argument that its Yucca Mountain termination activities are unreviewable "normal everyday discretionary activities," Resp. at 9-10, relies on a semantic sleight of hand that ignores the forest for the trees. DOE's "smaller" actions are all being carried out to implement a primary decision that is a challengeable final agency action.⁷ While DOE may have certain discretion in the realm of its internal organization and program management, it is completely without discretion to terminate the entire Yucca Mountain repository program, since to do so violates the NWPA and Congress' designation of Yucca Mountain as the nation's repository. Wash. Mot. at 9-12. Washington's petition is justiciable.

2. Washington is Likely to Succeed on its NWPA Claim

DOE responds to Washington's NWPA argument by parsing particular phrases within the NWPA (while ignoring others), and then arguing its highlighted phrases should be "read in concert with the broad discretion granted to the Secretary under the Atomic Energy Act and DOE Organization Act." Resp. at 11. This is incorrect, as the rules of statutory construction and interpretation provide that provisions of the NWPA must be read within the context of the NWPA itself, followed (if necessary) by resort to the NWPA's legislative history. *See, e.g.,*

limitation accompanies DOE's "post-approval" activities. *Cf.* 42 U.S.C. §§ 10132(d), 10133(d), with § 10134.

⁷ In addition, the authority DOE cites for this argument, *Fund for Animals, Inc. v. B.L.M.*, 460 F.3d 13, 19-20 (D.C. Cir. 2006), demonstrates that its Yucca Mountain decision and termination activities are not mundane "everyday" activities. The activities described in *Fund for Animals* included preparing proposals, conducting studies, and meeting with stakeholders. *Id.* These activities are a far cry from DOE's decision to forever terminate Yucca Mountain and the individual actions it has taken in support of that decision. *See* Wash. Mot. at 5-7.

Wash. v. Chu, 558 F.3d 1036, 1042-43 (9th Cir. 2009). Doing so here demonstrates that Congress gave DOE no authority to unilaterally terminate Yucca Mountain, once Congress approved that site. *Wash. Mot.* at 11.

Even if the NWPA were ambiguous, the statute's legislative history supports Washington's reading, while offering nothing to demonstrate that Congress contemplated DOE could unilaterally terminate an approved repository project in the licensing phase. *See* Ex. 2 at 52-53; Ex. 3 at 2. Contrary to the suggestion that Congress meant for the Secretary to continue exercising full discretion under other "plenary" authority,⁸ the legislative history indicates that Congress intended to take certain critical decisions *out* of the hands of executive officials. *See* Ex. 2 at 26-30 (e.g., "It is necessary . . . to provide close Congressional control . . . to assure that the political and programmatic errors of our past experience will not be repeated." (emphasis added)).

Because both the statute and its legislative history are clear, DOE should be accorded no deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter . . ."). Furthermore, while DOE suggests that the Court should find some legal significance in Congress' funding of the Blue Ribbon Commission, DOE fails to acknowledge the far more direct signal sent by Congress' continued funding of DOE's license prosecution.

⁸ The NWPA (1982) was enacted after the Atomic Energy Act (1954) and DOE Organization Act (1977).

3. Washington is Likely to Succeed on its NEPA Claim

DOE's response does not contest that its decision to terminate the Yucca Mountain project is a major federal action requiring an EIS, or that any alternatives implemented in lieu of Yucca Mountain require an EIS. Instead, DOE attempts to segment its decision by arguing that no further NEPA analysis is required to support its actions *at this time*. DOE argues that the immediate act of terminating the Yucca Mountain project has already been adequately analyzed under a "no action" alternative in the Yucca Mountain Final EIS and supplement (YM FEIS), and promises to give any future alternatives to Yucca Mountain appropriate NEPA review at a later time. *See Resp.* at 13-14.

It is precisely this segmentation that is at the heart of Washington's NEPA argument. By taking action today to forever close the door on a repository at Yucca Mountain, DOE is not just "contemplating" implementing unknown alternatives to Yucca Mountain, but actually committing itself to implementing one or more of those alternatives without the benefit of a NEPA analysis.

Under NEPA regulations, "connected actions" must be reviewed concurrently in an EIS. 40 C.F.R. § 1508.25(a)(1); *see also, e.g., Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893-95 (9th Cir. 2002); *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987). DOE's decision to irrevocably terminate Yucca Mountain in favor of unidentified alternative(s) involves "connected actions" that require NEPA review now, before DOE commits to eliminating its only known alternative.

The YM FEIS does not provide this analysis.⁹ Under the NWPA, Congress specifically relieved DOE from having to undertake a NEPA evaluation of alternatives to the Yucca Mountain repository. 42 U.S.C. § 10134(f)(2), (3). As a result, the YM FEIS considers only two variations on a static, strawman, “no action” alternative that involve indefinitely maintaining the current storage of spent nuclear fuel and high-level waste at their present sites. Ex. 4 at S-29. The YM FEIS acknowledges that neither scenario is likely. *Id.*

The YM FEIS thus fails to provide any comparison of the Yucca Mountain project to other alternatives, such as another repository site, centralized interim storage, or (for spent nuclear fuel) further reprocessing.¹⁰ In the absence of such analysis, DOE is violating NEPA by moving forward today on a decision that eliminates a known, reasonable alternative, without being fully informed of the impacts of that decision. 40 C.F.R. § 1506.1(a); 10 C.F.R. § 1021.210(b), .212(b).

4. Washington is Likely to Prevail on its APA Claim

Washington’s arbitrary and capricious claim is not “freestanding.” The NWPA prescribes a detailed process for determining whether a candidate site is “suitable” (or “unsuitable”), *see* 42 U.S.C. §§ 10132(b), 10133(c)(3), 10134(a)(1), which the Secretary has already followed to determine that Yucca Mountain is

⁹ Furthermore, DOE has not published a ROD to take action on the YM FEIS’s “no action” alternative as required by 10 C.F.R. § 1021.315(b).

¹⁰ In addition, while DOE has given some consideration to the specific effect of a Yucca Mountain termination on Hanford, *Resp.* at 14, this analysis appears only in a draft EIS upon which DOE cannot act. 10 C.F.R. § 1021.210(b); *see also*, 10 C.F.R. § 1021.212(b).

suitable as a repository.¹¹ This provides a meaningful standard against which to evaluate DOE's termination decision.¹² See *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

Beyond this criticism, DOE provides no substantive response to Washington's APA claim, referring simply to the "provided reasons" in its withdrawal motion before the NRC and recent Congressional testimony by Secretary Chu. See Resp. Exs. 7, 18. Even accepting *arguendo* that "[s]cientific and engineering knowledge . . . has advanced dramatically over the two decades since the Yucca Mountain project was first initiated," Resp. at 4, DOE provides no explanation of how that mandates or supports its decision to irrevocably terminate a Yucca Mountain project for which a license application was submitted *less than two years ago*, or why, when no other alternative is at hand, the project needs to be terminated in a manner intended to forever eliminate Yucca Mountain from future consideration as a repository.¹³ See generally, Resp. Ex. 18.

B. Washington is Likely to Suffer Irreparable Harm

The NWPA's process is intended to deliver a substantive result: a disposal solution for waste such as that stored in Hanford's tanks. See 42 U.S.C.

¹¹ See 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).

¹² Furthermore, NEPA provides a standard against which to judge DOE's failure to evaluate the environmental consequences of its decision. See, e.g., *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 n.22 (1989).

¹³ DOE's decision to terminate Yucca Mountain pre-dates and is independent from its motion to withdraw its license application. Further, DOE's already-filed motion should contain whatever rationale the agency saw fit to present. An NRC decision will not "inform and benefit" this Court's APA review.

§ 10131(b)(1). At this juncture, there is only one legal process for developing a geologic repository—that provided by the current NWPA—and only one prospective geologic repository approved by Congress: Yucca Mountain. If Yucca Mountain is terminated, it is wholly speculative to expect that any alternative legal process, or any concrete alternative to Yucca Mountain, will be in place within any identifiable timeframe.¹⁴

While Washington is indeed concerned about consequences that may be felt decades from now, this is not the harm that is relevant to the instant motion. Instead, the relevant harm is the implementation of DOE's *decision itself*, made in violation of law that will put the NWPA's process back to square one.

This harm is imminent and irreparable. Just as decision-makers “are less likely to tear down a nearly completed project than a barely started project,” *Sierra Club v. Marsh*, 872 F.2d 497, 500-01 (1st Cir. 1989), so too are decision-makers less likely to reconstruct a fully dismantled project than one that has been preserved.¹⁵ This harm is sufficient to support granting Washington's motion. *See also, e.g., N.Y. Natural Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1312-13 (1976) (irreparable harm is “axiomatic” if government commits to a decision uninformed by NEPA analysis).

¹⁴ While DOE postulates that alternatives to Yucca Mountain “could well result in waste leaving Washington more quickly,” Resp. at 2, 16, it is just as possible that waste could come to Hanford for indefinite centralized storage.

¹⁵ DOE's Boyle declaration provides no comfort. Resp. Ex. 2. Mr. Boyle does not decide what is sufficient for purposes of the licensing process. Instead, the NRC's regulations specify that performance confirmation activities “shall” continue until Yucca Mountain is closed (which has not yet occurred). 10 C.F.R. §§ 63.102(m), 63.131(b).

C. The Balance of the Equities and Public Interest Favor Granting a Preliminary Injunction

DOE argues that a preliminary injunction will harm it (and the public) by interfering with an “orderly wind-down” of the Yucca Mountain project. Resp. at 19. Any such “harm,” however, is entirely of DOE’s own making.¹⁶ If Washington prevails on the merits and DOE should have never begun terminating a project twenty years in the making, the nation should not have to bear the cost, difficulty, and uncertainty of restoring a project dismantled in the interim.¹⁷

II. CONCLUSION

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

RESPECTFULLY SUBMITTED this 28th day of April, 2010.

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¹⁶ With respect to archiving, it is far from clear whether DOE’s current intention is to preserve information in any useable format. See Ex. 5 at C-5.

¹⁷ On this point, and in assessing the preliminary injunction factors generally, Washington notes that the *Winter* decision did not eliminate a “sliding scale” standard. See *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34-38 (2nd Cir. 2010); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 12 (D.D.C. 2009).

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CERTIFICATE OF SERVICE

I herby certify that on the 28th day of April 2010, I caused the State of Washington's Reply in Support of Motion for Preliminary Injunction to be filed electronically using the CM/ECF system by 4:00 p.m. EST, which will provide service on the following parties:

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