No. 17-60191

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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In re: State of Texas,

State of Texas, Petitioner

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On Petition for Declaratory and Injunctive Relief
and Writ of Mandamus

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# THE DEPARTMENT OF ENERGY'S AND SECRETARY OF ENERGY'S OPPOSITION TO TEXAS' MOTION FOR A DECLARATORY JUDGMENT AND A PRELIMINARY INJUNCTION (PRAYERS 1 & 2)

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## INTRODUCTION

On March 19, 2017, this Court properly docketed Texas' "Original Petition" ("Petition") as a petition for a writ of mandamus and requested a response, which is now due June 30. On May 31, 2017, acting on the novel premise that a mandamus petition in this Court can proceed as though it were an "action…in district court," Mot. 1, Texas filed a "Motion for a Declaratory Judgment and a Preliminary Injunction" ("Motion") against the Department of Energy and the Secretary of Energy (collectively, "DOE").[1] Texas' Motion should be summarily denied because there is no basis for it under the applicable procedural rules or substantive law. Furthermore, the Motion does not identify any urgency, any irreparable harm, or any other reason that would justify the interim, extraordinary, and unorthodox relief it seeks.

Federal respondents will be responding by June 30 to the entire Petition and addressing its many procedural, jurisdictional and substantive legal failings. In the meantime, the instant Motion should be denied because of multiple procedural defects, including that it: circumvents applicable rules and court orders; improperly supplements argument in the Petition; injects and seeks relief as to a *new* issue not

[1] The Motion does not address the Department of the Treasury; the other federal respondent, the Nuclear Regulatory Commission ("NRC"), has independent litigating authority in the courts of appeals and has filed its own response to the Motion.

properly raised in the Petition; seeks some relief that Texas *already* has sought in the Petition; and fails to satisfy the requirements of Rule 18 for a stay pending review.

The Motion also fails on the merits because, among other reasons: Texas lacks Article III standing, Texas fails to identify a reviewable DOE final action, recent DOE actions have mooted Texas' claims, and the NWPA claims are out-of-time. Texas also fails to satisfy the stringent standard for preliminary injunctive relief because it cannot demonstrate that it is likely to succeed on the merits of its consent-based siting claims. Nor is Texas suffering irreparable, indeed any, injury from those alleged activities, which began several years ago, have no legal effect, and are not intended to be pursued by the new Administration.

## ARGUMENT

### I. The Motion is Procedurally Defective and Should be Summarily Denied

#### A. The Motion Circumvents the Rules for Petitions for Mandamus and Petitions for Review, as Well as This Court's Scheduling Orders

Petitions for mandamus and petitions for review filed in this Court are governed by the Federal Rules of Appellate Procedure, especially Rules 17-21, and applicable Court orders under which briefing schedules, the contents of the petition, and the applicable page limits are set. *See* Fed. R. App. P. 21(a)(2), (d). This Court correctly docketed the Petition as one for mandamus. Other than a response to the Petition which the Court may order, as it did here, the rules do not authorize other filings by Texas. *Id.* (b)(1). "Ordinarily the court decides the petition on its merits

without further briefing or hearing." *Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit* ("*Practitioner's Guide*") at 26. In short, upon filing the Petition, Texas presented its entire case on the merits. Federal respondents have been ordered, and are entitled under the rules, to respond to the case as it has been argued in the Petition and on the schedule set by the Court.

This Motion circumvents these rules in several respects. First, as discussed in Section III.A, it improperly seeks to introduce as a lead argument a matter that is barely noted in the Petition and thus was waived. Second, Texas improperly has expanded its threadbare arguments on the merits, mostly to add an argument insufficiently raised in the Petition. Third, by seeking declaratory judgment on one claim now, Texas improperly has expedited the deadlines for responses set by this Court's May 30 order, *which Texas did not oppose*.

Fourth, as to prayers one and two of the Petition, the Motion is largely superfluous. By filing the Petition, Texas *already* has sought from this Court the relief requested in those prayers. Texas does not even assert there is any urgency to its Motion; nor could it, as the DOE activities to which it objects began in 2010, are of no legal effect, and are not presently being pursued. *See infra* 9-10. Moreover, the federal respondents will respond to the same issues in less than three weeks, and the Intervenors thereafter. The case will then be ready for decision. Finally, there is no warrant in the rules or this Court's scheduling orders for Texas' belief that it may

litigate its petition as though it were an "action…litigated in district court." Mot. 1.[3] Texas cannot brief its 24 prayers for relief in piecemeal fashion on its own schedule through motions practice. While preliminary injunctive relief pending appeal is recognized by the rules, *see* Fed. R. App. P. 8, 18, the rules do not permit the standalone "declaratory judgment" action in the Motion. Texas should not be permitted to make up its own rules.

### B. The Motion Does Not Comply with Rule 18

This case is, at bottom, a challenge to agency action, or inaction, with a supposed jurisdictional footing in the NWPA's petition for review provision. *See* Pet. 3-4; 42 U.S.C. § 10139(a)(1)(A) ("the United States courts of appeals shall have original and exclusive jurisdiction over any civil action … for review of any final decision or action of the Secretary [of Energy] … under this part."). Texas seeks to preliminarily enjoin the alleged DOE consent-based siting activities pending this Court's ruling on the Petition. Mot. 7. Texas cites Rule 27 as authority for the Motion; however, in all but name and format, Texas actually seeks a stay of agency

[3] Nor is there anything "unique" about NWPA petitions for review. Mot. 8. Like many other statutes, the NWPA, 42 U.S.C. § 10139(a), authorizes an Administrative Procedure Act-style ("APA") petition for review that is comfortably accommodated by the Federal Rules of Appellate Procedure. This Court and other courts follow the ordinary process for briefing such petitions. *See, e.g., Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985) (characterizing NWPA action as "petition for review" and "administrative appeal[]."); *Texas v. U.S. Dep't of Energy*, 764 F.2d 278, 282 (5th Cir. 1985) (applying "finality" as used in the APA to NWPA petition for review); *In re Aiken*, 645 F.3d 428, 436-37 (D.C. Cir. 2011) (same).

action pending judicial review as governed by Rule 18. Under Rule 18(a)(1), Texas was required to first move DOE for a stay of those activities pending review, unless Texas: (i) shows it was impracticable to move DOE first; or (ii) states that it moved DOE for relief and was denied. Fed. R. App. P. 18(a)(2)(A). The Motion does not cite Rule 18, assert that Texas requested that DOE administratively stay the activities, or show that doing so was impracticable. *Id.*; *see also Practitioner's Guide* at 76, 77 (noting requirements for "pending application for a writ" to "show[] prior application to the … agency, where practicable"). Texas' non-compliance with Rule 18(a) alone warrants denying the motion.

## II. Texas is Not Entitled to Declaratory Judgment on DOE's Consent-Based Siting Activities

The Motion seeks a declaration that DOE has violated the NWPA in a "multitude" of ways and wanders through the history of the process to develop a permanent nuclear waste repository, enumerating eight supposed instances of "lawlessness" along the way. Mot. 7-8; *infra* fn. 8. However, the *only* alleged NWPA violation by DOE addressed in both the Petition and the Motion concerns the "consent-based siting activities" anchoring the following two of the Petition's 24 prayers for relief prayers for relief that Texas identifies as the *exclusive* subjects of the Motion (Mot. Title, 1):

> 1. A declaratory judgment that DOE and the Secretary of Energy violated the Nuclear Waste Policy Act by pursuing *consent-based nuclear waste repository siting activities* at locations other than Yucca Mountain, Nevada;

> 2. A preliminary and permanent injunction prohibiting DOE and the Secretary of Energy from conducting further *consent-based siting activities* until such time as Congress amends the Nuclear Waste Policy Act allowing for such activities;

Pet. 25, ¶¶ 1, 2 (emphasis added). For several reasons, Texas' consent-based siting claims are non-justiciable.

### A. Texas Lacks Article III Standing to Challenge DOE's Consent-Based Siting Activities

To establish standing, Texas must demonstrate that it has suffered: (1) a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical;" that is (2) fairly traceable to the challenged action; and that is (3) likely to be redressed by the relief requested, if that relief is granted. *See Friends of the Earth v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 180-81 (2000); *Houston Chronicle Publ'g Co. v. City of League City*, 488 F.3d 613, 617 (5th Cir. 2007).

Neither the Petition nor the Motion explicitly addresses Texas' standing or states specifically how DOE's activities injure Texas. Rather, Texas claims general "sovereign interests" in protecting its citizens and environment, ensuring compliance with the NWPA, regulating nuclear power production, monitoring storage of nuclear waste, and ensuring reasonably-priced electricity. Pet. 16-17. In the Motion (at 17-18), Texas further alleges irreparable injury justifying preliminary relief from on-site storage of spent nuclear fuel ("SNF") at facilities within (but not owned or operated by) the State. Texas baldly claims that this storage threatens the health and safety of

Texas citizens and their environment and places Texas at greater risk of a nuclear incident. *Id.* These bare allegations do not confer standing.

Texas fails to allege concrete or particularized injury because it offers no factual basis to support its claim that the on-site storage of SNF means that "environmental calamity is afoot." Mot. 17. Absent such evidence, the appropriate presumption is that SNF in Texas is safely stored in accordance with NRC regulations. The NRC has a statutory obligation "to ensure the adequate protection of public health and safety" and an "ongoing responsibility to regulate the continued storage of spent fuel, with or without a repository." *In the Matter of DTE Electric Co.*, 2015 WL 3930333 at *13 (N.R.C. 2015). As the agency vested with both the responsibility and the expertise to evaluate such issues, NRC has concluded that "spent fuel can be safely stored until a repository is available, or indefinitely should such storage become necessary." *Id.*; *see also New York v. NRC*, 824 F.3d 1012, 1019-22 (D.C. Cir. 2016). Texas offers no basis to conclude that on-site storage of spent fuel at NRC-licensed and -regulated nuclear reactor sites in Texas constitutes injury-in-fact. Texas also fails to show what injury it has suffered or will suffer merely because DOE previously has explored a potential consent-based siting process.

Furthermore, Texas' claimed injury (*i.e.,* that DOE consent-based siting activities somehow keep SNF from moving out of Texas) presumes future transport of SNF to a Yucca Mountain repository. But before such transport may occur, the NWPA requires that DOE obtain NRC authorization to construct a repository and,

subsequently, to "receive and possess high-level radioactive waste and [SNF]" there. *See* 42 U.S.C. §§ 10134, 10145. The NRC is expressly authorized to consider DOE's "application for a construction authorization" and to "issue a final decision approving or *disapproving*" it. *Id.* § 10134(d) (emphasis added). Thus, while the NWPA mandates that an administrative licensing process occur, it does not direct the outcome of that process. This contingency makes any injury based on future transport *vel non* too far removed at this juncture to satisfy Article III standing. *Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2341 (2014) (allegation of future injury suffices for standing only where the threatened injury is "certainly impending" or there is a "substantial risk that the harm will occur.").

Nor could Texas demonstrate that the status quo (SNF remaining in Texas) is traceable to DOE's mere exploration of a consent-based siting process or could be redressed through a favorable judgment here. Such an explanation is particularly necessary because Texas is not the object of, or even a party to, the license proceeding it claims is impacted by DOE's actions. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (where complainant is not the object of the government action at issue, "much more is needed"). Finally, Texas may not legitimately assert that its role as regulator and protector of ratepayers confers *parens patriae* standing: in this context, the United States, not the individual states, represents the public. *See Mass. v. Mellon*, 262 U.S. 447, 485-86 (1923); *Nev. v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990).

### B. Texas Identifies No Reviewable DOE Final Action on Consent-Based Siting, and the Claims Are Otherwise Non-Justiciable

The only potentially applicable jurisdictional basis for the Petition's consent-based siting claim is the NWPA's petition for review provision, 42 U.S.C. § 10139(a)(1)(A). While the NWPA supplies court of appeals jurisdiction, it is not a waiver of sovereign immunity and does not give Texas an independent cause of action. Rather, Texas' cause of action must be properly grounded in the APA. 5 U.S.C. §§ 703, 704; *Aiken*, 645 F.3d at 436-37 (NWPA challenges reviewable under the APA); *Texas,* 764 F.2d at 285 (applying APA "finality" and dismissing NWPA challenge because DOE's "preliminary siting decisions challenged here by Texas … are not 'final actions' which are ripe for our review").[5]

Thus, Texas must identify a DOE "final decision or action," 42 U.S.C. § 10139(a), on consent-based siting, *i.e.*, action that marks "the consummation of the agency's decision-making process" and which determines "rights or obligations" or

[5] The Petition cites (at 6) two other statutes – the Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. § 1651 – but neither provides jurisdiction here. The Declaratory Judgment Act authorizes a court to grant declaratory and injunctive relief where a federal agency has violated the law, but it does not waive sovereign immunity, create an independent basis for jurisdiction, or override generally applicable justiciability doctrines. *See, e.g.*, *Skelly Oil Co. v. Phillips Petroleum*, 339 U.S. 667, 671-74 (1950). The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). Texas does not demonstrate how review of DOE's non-final consent-based siting activities *now* is needed to prevent undermining this Court's jurisdiction to review a later final decision under the NWPA.

"from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). However, Texas identifies no DOE consent-based siting activity that meets any of these criteria. Rather, Texas merely has described a collection of DOE activities – establishing a Blue Ribbon Commission, issuing a *Strategy* document, requesting public comment on a potential process, holding a series of public meetings, and issuing for public comment a 2017 *draft* consent-based siting process document (Mot. 4-7) – without *any* showing that these activities are final or reviewable under the APA and the NWPA. Just as the D.C. Circuit in *Aiken* found the same types of prior DOE public announcements and policy proposals on SNF storage to be too "general," not final under the APA, and "simply not justiciable," 645 F.3d at 437, this Court should likewise find Texas' challenge to these activities to be non-justiciable.

In any event, the "consent-based siting activities" Texas complains about were initiatives of the prior Administration. The DOE web page on "Consent-Based Siting" that hosted the pertinent materials (https://www.energy.gov/ne/consent-based-siting) was taken down by the new Administration and replaced with this message: "Thank you for your interest in this topic. We are currently updating our website to reflect the Department's priorities under the leadership of President Trump and Secretary Perry." DOE's elimination of the "Consent-Based Siting" web page shows that there is no live case or controversy on consent-based siting. Thus, not only are the consent-based siting claims non-justiciable for lack of finality, they also are moot. *See, e.g.*, *Fontenot v. McCraw*, 777 F.3d 741, 747-48 (5th Cir. 2015).

### C. Texas' NWPA Challenge to DOE's Consent-Based Siting Activities Is Out-Of-Time

The NWPA requires that any petition for review of "any final decision or action of the Secretary [of Energy] . . . be brought not later than the 180th day after the date of the decision or action or failure to act involved." 42 U.S.C. § 10139(a)(1)(A), (b). Even assuming the Petition or Motion had identified a final and reviewable action on consent-based siting, Texas does not identify *any* such action that occurred within the limitations period.[8] By Texas' own reckoning, DOE began the allegedly objectionable consent-based siting activities years ago, with the creation of the Blue Ribbon Commission in 2010. Mot. 6. Any potential claim accrued then. The only specific DOE activity within the 180-day limitation period is the *Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Radioactive Active Waste* that was released for public comment on January 12, 2017, by the previous Administration. But this document is neither final nor reviewable (and Texas does not assert as much) because it is a draft, has no legal effect, and DOE has stated that "it has no present intention of taking further policy action on it." Doc. 00514004609 at 8.

[8] Texas suggests a challenge to seven other alleged NWPA violations by DOE that it enumerates. Mot. 7. Those challenges are all clearly out-of-time: the alleged "announcement" in (1) occurred in 1994; the alleged declaration in (2) occurred in 1995; the alleged failure to accept SNF and operate a repository in (3) and (4) occurred in 1998; the "late" Yucca Mountain license application in (5) was submitted in 2008; and DOE's motion to withdraw that application in (6) and creation of the Blue Ribbon Commission in (7) were in 2010.

## III. The Putative Declaratory Judgment Claim Concerning the 1998 Deadline for Accepting SNF Is Waived, Procedurally Improper, and Without Merit

Texas appears to seek a declaratory judgment for an alleged DOE violation of the NWPA by failing to accept SNF by 1998. Mot. 8. However, this putative request for declaratory relief should be denied because it was insufficiently raised in the Petition (and thus waived), is improperly raised in the Motion, is time-barred (*supra* n. 8), and fails on the merits because it misinterprets the NWPA.

### A. The 1998 Deadline Issue Is Waived

The Motion seeks advance declaratory judgment on the 1998 deadline issue even though that issue was not sufficiently raised in the Petition. The Motion states (at 1) that it seeks relief on "two pled remedies," and its title expressly identifies "Prayers 1 & 2." Of those two prayers, only prayer one requests declaratory judgment, and prayer one *exclusively* concerns alleged DOE "consent-based nuclear waste repository siting activities." Pet. 25, ¶ 1. Despite all this, the Motion purports to seek declaratory judgment on a completely different issue under the heading "DOE Violated the Act by Failing to Accept SNF [Spent Nuclear Fuel] by 1998." Mot. 8.

While the Motion tries to elevate this issue as a central premise of the case, the Petition mentions the issue only in passing. Pet. 4-5, 10. The alleged "breach" of a 1998 deadline to accept SNF does not appear in the Issues Presented or the Argument sections of the Petition, nor is it among the 24 prayers for relief. It is, thus, waived. *See* Fed. R. App. P. 21(a)(2)(B) (mandamus petitions must include an issues

presented and argument section). This Court "in a number of cases" has deemed waived arguments not raised in the issues presented or meaningfully analyzed in the argument section. *See, e.g., Matter of Texas Mortg. Servs. Corp.*, 761 F.2d 1068, 1073 (5th Cir. 1985); *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 688 (5th Cir. 2017). Texas cannot by the Motion seek declaratory relief that it failed to seek in the underlying Petition.

### B. Texas' Request for Declaratory Judgment on the 1998 Deadline Issue is Non-Justiciable and Fails on the Merits

Even if the issue were not waived or out-of-time, Texas' request for a declaratory judgment the 1998 deadline issue should be denied for multiple reasons. First, for essentially the same reasons noted in Section II.A, Texas lacks Article III standing because it cannot show injury, nor can it show that the declaratory judgment relief it seeks would redress its putative injury from DOE's failure to dispose of SNF by 1998.

Second, Texas' argument in support of declaratory judgment reflects several mistaken assumptions about the NWPA and available remedies for DOE's failure to dispose of SNF by 1998. Texas selectively quotes 42 U.S.C. § 10222(a)(5)(B) to suggest that it imposes on DOE a statutory mandate to perform beginning on January 31, 1998, that is enforceable by Texas. Mot. 9. But that provision actually authorizes the Secretary of Energy to enter into standard contracts with entities that generate or own high-level radioactive waste or SNF. It further provides that "*contracts entered into*

*under this section* shall provide that," *inter alia*, in return for fees paid by generators and owners, "the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel." 42 U.S.C. § 10222(a)(5)(B) (emphasis added). As the Federal Circuit has explained, that provision required only that DOE include certain obligations in its contracts. *PSEG Nuclear, L.L.C. v. United States*, 465 F.3d 1343 (Fed. Cir. 2006). Thus, while a putative contractor might complain that DOE failed to include this provision in a contract, the performance of and any damages for failure to meet *contractual* obligations were not addressed by the NWPA.[9] *Id.* at 1350; *see also Wis. Elec. Power Co. v. U.S. Dep't of Energy*, 211 F.3d 646, 648 (D.C. Cir. 2000) ("[A] contract [b]reach by the DOE does not violate a statutory duty.").

The many contract cases Texas cites are inapposite as they hold that the remedy for DOE's failure to dispose of spent fuel by 1998 lies in contract, not in a petition for mandamus under 42 U.S.C. § 10139. For example, the D.C. Circuit declined to issue a writ of mandamus to compel DOE to accept waste because the "Standard Contract … provide[s] a scheme for dealing with delayed performance" and "petitioners *must pursue the remedies provided in the Standard Contract* in the event that DOE does not perform its duty to dispose of [spent nuclear fuel] by January 31,

[9] The Government has paid approximately $6.1 billion in contract damages to contractors as a result of its delay in accepting fuel. DOE, Agency Financial Report Fiscal Year 2016 at 38, www.energy.gov/sites/prod/files/2016/11/f34/DOE_FY2016_AFR.pdf.

1998." *N. States Power Co. v. Dept. of Energy*, 128 F.3d 754, 759 (D.C. Cir. 1997) (emphasis added). Further, Texas is not a contractor and has paid no disposal fees. Texas cannot stand in contractors' shoes and, even if it could, this is the wrong court in which to obtain a contract remedy.

## IV. A Preliminary Injunction Should Be Denied Because Texas Is Unlikely to Succeed on the Merits and Has Not Shown Likely Irreparable Injury

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). To warrant preliminary injunctive relief, a movant "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter,* 555 U.S. at 20. A preliminary injunction "should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *PCI Transp., Inc. v. Fort Worth & W. R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005).

As explained above, several threshold barriers preclude Texas from succeeding on prayers one and two. Accordingly, Texas cannot meet its burden of showing a substantial likelihood of success on the merits, and the Court should deny the Motion on that basis alone.

Texas also has failed to make the requisite "clear showing" that "irreparable injury is *likely* in absence of injunction." *Winter*, 555 U.S. at 22; *see also Nken v. Holder*, 556 U.S. 418, 434–35 (2009) (a possibility of irreparable injury is insufficient); *Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir.1985) (there must be a clear and present need for equitable relief to prevent irreparable harm). Not just any harm will suffice. "Irreparable" means permanent or at least of sufficiently long duration to make it effectively permanent. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). There also must be a connection between the alleged irreparable injury and the substantive legal claim asserted, s*ee Garcia v. Google, Inc.*, 786 F.3d 733, 744 (9th Cir. 2015), as well the conduct sought to be enjoined. *See Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981 (9th Cir. 2011).

Texas' failure to clearly show *irreparable* harm largely tracks its failure to show *any* injury-in-fact that would support Article III standing. *Supra* Section II.A. The only irreparable harm that Texas identifies in the Motion is alleged environmental, health, and safety injury from on-site storage of SNF at commercial nuclear reactor sites within Texas. Mot. 17-18. But that allegation is insufficient.

First, preliminarily enjoining DOE from engaging in "consent-based siting activities" during the pendency of this case is not likely to eliminate or reduce Texas' alleged harm from on-site storage. Texas' argument assumes that the alleged harm from on-site storage can be reduced only by transporting SNF from commercial reactors in Texas to a permanent repository at Yucca Mountain. But as explained

above (*supra* 7-8), NRC must approve DOE's application for a construction authorization before such transport may occur. Furthermore, there must be specific, annual appropriations from the Nuclear Waste Fund for both NRC and DOE to pursue the licensing process. *See* 42 U.S.C. § 10105. However, Congress has not appropriated additional funds from the Nuclear Waste Fund for that purpose since Fiscal Year 2012.

While the new Administration *has* requested appropriations from Congress to continue the licensing proceedings,[11] enjoining DOE's consent-based siting activities would not guarantee that Congress will appropriate funds for the licensing process. On-site storage of SNF undoubtedly would continue for years even if a preliminary injunction were granted. In other words, there is an insufficient causal connection between the alleged harm (on-site storage of SNF in Texas due to the lack of a repository) and the requested relief (enjoining DOE's consent-based siting activities).

Second, Texas fails to explain what actual or imminent injury it has or will suffer because the previous Administration explored a potential consent-based siting process. The documents and actions cited by Texas (Mot. 14-15) are not decision documents, have no legal effect, and do not of themselves cause injury to Texas.

[11] The President's recent budget requests from Congress $150 million for DOE and NRC for the coming fiscal year to conduct the Yucca Mountain license proceeding. *A New Foundation for American Greatness: Budget of the United States Government for Fiscal Year 2018,* May 23, 2017 at https://www.whitehouse.gov/omb/budget. This fact alone negates Texas' suggestion, based on a January 2017 newspaper article (Mot. 16 n.9), that Secretary Perry does not support a repository at Yucca Mountain.

*Supra* 10. Moreover, all of these activities occurred under the prior Administration, and the new Administration has taken down the "Consent-Based Siting" web page and stated that it does not presently intend to take further policy action on the prior Administration's draft planning document. *Id.*

Texas responds to these developments by asserting that voluntary cessation does not moot the issue or give it "comfort." Mot. 16. But those assertions miss the mark because, for purposes of a preliminary injunction, Texas has the burden of clearly proving likelihood of irreparable injury before the Court renders a decision in the case. *See Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). A preliminary injunction will not issue simply to prevent the possibility of injury or to provide a movant "comfort."

Third, Texas fails to demonstrate that on-site storage of spent fuel at NRC-licensed and -regulated nuclear reactor sites in Texas, in and of itself, constitutes irreparable injury.[12] Absent contrary evidence from Texas (of which there is none), the appropriate presumption is that any such storage in Texas complies with

[12] Texas attempts to inject a fear factor by citing incidents at Chernobyl and Fukushima and a tunnel collapse at Hanford as failures of spent fuel storage without explaining why their mere mention carries Texas' burden of demonstrating irreparable harm. However, the accidents at Chernobyl and Fukushima were triggered by the loss of control of active nuclear *reactors* in Russia and Japan, not storage cask failures at NRC-regulated reactor sites. Hanford is a federal facility where plutonium production for nuclear weapons occurred and generated defense-related waste outside the purview of the NWPA. Storage of spent fuel in NRC-licensed commercial facilities simply is not comparable to these situations.

applicable regulations and is safe. *Supra* 7. Texas' complaint about continued on-site storage in accordance with the currently applicable legal regime "should be directed to Congress," *New York*, 824 F.3d at 1023, not this Court.

Texas posits that environmental damage is often irreparable. Mot. 18. But the cited case identifies a condition that Texas has failed to demonstrate here, *i.e.,* that "such [environmental] injury is *sufficiently likely*." *Amoco,* 480 U.S. at 545 (emphasis added).[13] Texas has not shown that environmental injury from consent-based siting activities is likely or that the alleged environmental injury from on-site storage will be eliminated or reduced by the preliminary injunction that Texas seeks. Quite simply, the Motion does not meet the stringent standard for a preliminary injunction.[14]

## CONCLUSION

For the foregoing reasons, the Motion should be denied.

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[13] *New Mexico v. Watkins*, 969 F.2d 1122, 1129 (D.C. Cir. 1992) is also distinguishable. Mot. 18. *New Mexico* affirmed a permanent injunction prohibiting implementation of the Department of the Interior's statutorily unlawful extension of an administrative land withdrawal of federal lands for a new purpose – depositing radioactive waste generated outside the State into a new, experimental facility in New Mexico with no guarantee of retrievability – because the violation intruded on congressional authority to withdraw federal lands. *Id.* at 1124, 1129, 1134-38. The court did not reach the contested issue of risk from irretrievability of radioactive waste because "it did not enter the permanent injunction calculus." *Id.* at 1137-38.

[14] Furthermore, enjoining DOE from engaging in undefined activities would not meet the requirements under Fed. R. Civ. P. 65(d) that an injunction state its terms specifically and describe in reasonable detail the acts restrained, and thus give the recipient fair, precisely drawn notice of what the injunction prohibits. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 441 (1974).

Respectfully submitted,

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Dated: June 12, 2017
DJ # 90-13-5-14932

## CERTIFICATE OF COMPLIANCE

1. This opposition complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) and Fifth Circuit Rule 27.4 because it contains 5,151 words, except for the items excluded from the word count pursuant to F. R. App. P. 32(f), as determined by the word-count function of Microsoft Word 2013.

2. This Motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 Times New Roman 14-point font.

Dated: June 12, 2017

s/David S. Gualtieri
David S. Gualtieri
Counsel for Federal Respondents DOE and Treasury

## CERTIFICATE OF SERVICE

I hereby certify that on the date below a copy of the foregoing was filed electronically with the Clerk and served upon all counsel of record in the case and is available through the court's CM/ECF System.

Dated: June 12, 2017

s/David S. Gualtieri
David S. Gualtieri
Counsel for Federal Respondents DOE and Treasury