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The Honorable Alan A. McDonald
Hearing Date: November 23, 2004
Hearing Time: 10:00 AM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. SPENCER ABRAHAM, Secretary of Energy, et al., Defendants.	**NO. CT-03-5018-AAM** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR EXPANDED PRELIMINARY INJUNCTION**
COLUMBIA RIVERKEEPER, et al., Plaintiffs, v. SPENCER ABRAHAM, Secretary of Energy, et al., Defendants.	NO. CT-03-5044-AAM *consolidated*

I. INTRODUCTION

Plaintiff State of Washington (Washington or State) moves this Court to expand the current preliminary injunction enjoining Defendants United States Department of Energy and Secretary of Energy Spencer Abraham (DOE or Energy) from transporting

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transuranic wastes to DOE's Hanford Nuclear Reservation near Richland, Washington. DOE recently issued two Records of Decision (together, 2004 RODs) in which it announced its decision to ship low-level waste (LLW) and mixed low-level waste (MLLW), as well as certain quantities of transuranic waste already at issue in this case, to the Hanford Site. The 2004 RODs are based on the Final Hanford Site Solid (Radioactive and Hazardous) Waste Environmental Impact Statement (HSW EIS), which DOE issued earlier this year.

Washington requests that the Court issue an order expanding the current preliminary injunction (related to transuranic waste) to now also enjoin DOE from shipping LLW and MLLW to Hanford pending final resolution of this litigation. Such shipments will violate the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and cause irreparable harm to the State.

II. FACTS

A. Procedural Facts

On March 4, 2003, Washington filed a complaint seeking declaratory and injunctive relief against Defendants. Washington's complaint alleged that DOE has decided to ship transuranic waste to Hanford in violation of NEPA and the Washington State Hazardous Waste Management Act (HWMA), Wash. Rev. Code 70.105. Plaintiffs Columbia Riverkeeper, et al. (Environmental Plaintiffs) also filed an action against the same defendants alleging that the same intended shipments of waste violate NEPA. The Environmental Plaintiffs' action was originally filed in the District of Oregon, but was later transferred to this Court and consolidated with Washington's suit.

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Both Washington and the Environmental Plaintiffs filed motions to enjoin further transuranic waste shipments to Hanford until final resolution of their suits. On May 9, 2003, the Court granted these motions through a memorandum order. *See Order Granting Motion for Preliminary Injunction*. Under the Court's Order, DOE is "enjoined from making any further shipments of TRUW [transuranic waste] to Hanford pending final resolution of this litigation." *Order Granting Preliminary Injunction* at 37.

Three relevant events have occurred since the Court issued the preliminary injunction. First, on February 13, 2004, DOE finalized its HSW EIS. The HSW EIS was in draft form when the Court issued the preliminary injunction. *See Order Granting Preliminary Injunction* at 16. The fact that DOE had not yet completed this sitewide or project-specific EIS was a factor in the Court's determination that the Plaintiffs had, at a minimum, demonstrated that "serious questions" were raised by their suits. *Id.* at 16-19, 23-24.

Second, on June 23, 2004, DOE signed the two 2004 RODs. The first is formally titled "Record of Decision for the Solid Waste Program, Hanford Site, Richland, WA: Storage and Treatment of Low-Level Waste and Mixed Low-Level Waste, and Storage, Processing, and Certification of Transuranic Waste for Shipment to the Waste Isolation Pilot Plant" (2004 HSW EIS ROD). Affidavit of Max S. Power (Power Aff.), Ex. 16. This ROD announces DOE's decision to send shipments of LLW and MLLW to Hanford; identifies treatment, storage, and disposal decisions for that waste; and identifies decisions relating to the storage, processing, and certification of

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transuranic waste for shipment to the Waste Isolation Pilot Plant (WIPP) in New Mexico. The ROD is based upon the HSW EIS.

The other June 23 ROD is a revision "based on consideration of new information" to the September 6, 2002 ROD that spawned this litigation. *See Revision to Record of Decision for the Department of Energy's Waste Management Program: Treatment and Storage of Transuranic Waste*, 69 Fed. Reg. 39446-49 (June 30, 2004) (2004 Transuranics ROD) (Ex. 17 to Power Aff.). In this revision, DOE bases completion of its remaining (suspended) shipments of transuranic waste to Hanford from the Battelle West Jefferson Site (Battelle) upon issuance of the HSW EIS. *Id.* at 39446-47. DOE indicates it will transfer such wastes "once the preliminary injunction issued by the U.S. District Court for the Eastern District of Washington is lifted." *Id.* at 39447.

The third relevant event since the Court issued its preliminary injunction is that Washington has moved to amend its complaint. Washington's proposed amended complaint would broaden the scope of the NEPA issues in this case. Currently, the case is focused on DOE's alleged failure to conduct an EIS prior to deciding, in DOE's September 6, 2002 ROD, to ship transuranic waste to Hanford for storage and/or treatment. The amended complaint alleges that DOE's subsequent decisions (as set forth in the 2004 RODs) to (1) confirm DOE's prior decision to ship transuranic waste to Hanford for storage and processing, and (2) to ship significant quantities of LLW and MLLW for disposal at Hanford, were likewise not made in compliance with NEPA.

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B. Relevant Facts

The Hanford Site is managed by DOE and occupies approximately 560 square miles near Richland, Washington. *See generally* Gerald F. Hess, *Hanford: Cleaning Up The Most Contaminated Place In The United States*, 38 Ariz. L. Rev. 165 (1996). Between 1943 and 1987, the United States actively produced plutonium for nuclear weapons at Hanford. Amended Complaint ¶ 15. Plutonium production and other activities at Hanford have created enormous amounts of radioactive, hazardous, and mixed radioactive and hazardous wastes (known as "mixed wastes") that remain at the Site today, still awaiting cleanup and/or disposal. *Id.*

As a consequence of decades of nuclear weapons production, there is a monumental cleanup and waste management task at Hanford that will take decades to complete. *See* Affidavit of Robert W. Wilson (Wilson Aff.) ¶ M. The Hanford Site contains over 1,500 contaminated sites and structures which, individually and in sum, pose substantial risks to human health and the environment. Amended Complaint ¶ 16. For example, discharges to the ground of contaminated cooling water from nine nuclear reactors built along the banks of the Columbia River have contaminated groundwater and the river as well. Affidavit of Laura J. Cusack (Cusack Aff.) ¶ F.

Over 80 square miles of Hanford groundwater is contaminated above federal and state drinking water standards. Affidavit of Dibakar Goswami (Goswami Aff.) ¶ E. Significant amounts of contaminants containing radionuclides such as uranium, technetium-99, and strontium-90, and hazardous chemicals such as carbon

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tetrachloride, chloroform, and chromium are still in the vadose zone (the layer of earth between the surface and groundwater). *Id.* ¶¶ D, E. These act as future sources of groundwater contamination. *Id.* ¶ E. Current groundwater monitoring at the site is inadequate to assess the nature and extent of contamination already coming from Hanford's various waste management units. *Id.* ¶ I.

Approximately 53-million gallons of highly radioactive and hazardous waste are stored in 177 underground storage tanks,[1] some of which have leaked an estimated 750,000 to 1,050,000 gallons of high-level waste. Cusack Aff. ¶ F; Affidavit of Suzanne L. Dahl-Crumpler (Dahl-Crumpler Aff.) ¶ H. These wastes must be retrieved, vitrified (turned into glass), and sent to a deep geologic repository for disposal. Cusack Aff. ¶ F. DOE is currently building an enormous complex of facilities—the "Waste Treatment Plant"—to vitrify the waste. There are also up to 2.5-million gallons of additional waste in ancillary equipment associated with the tanks that will need to be dealt with. *See* Dahl-Crumpler Aff. ¶ H.

DOE has either disposed or "retrievably stored" 440,000 cubic meters of LLW and transuranic waste in unlined trenches in an area known as the "Low-Level Burial Grounds" (LLBG).[2] *Id.* ¶ H. These retrievably stored wastes are stored in violation of

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[1] DOE's own documents estimate that if these wastes were placed in a space the size of a football field, they would form a column 150 feet high. Dahl-Crumpler Aff. ¶ I.

[2] This amount would fill 2,200,000 55-gallon drums. (One cubic meter is roughly the equivalent of five 55-gallon drums.)

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hazardous waste laws and under conditions that cause risk of release. Cusack Aff. ¶¶ N-U. Some releases have already occurred. *Id.* ¶ U. There is also a large backlog of wastes stored above ground awaiting treatment and disposal. *Id.* ¶ H.

Because violations of applicable waste management laws are pervasive at the Site, Hanford is already subject to a massive compliance schedule to address what is, even today, ongoing illegal management of its volume of "legacy waste" created during the World War II and Cold War eras. This compliance schedule is set forth primarily in the Hanford Federal Facility Agreement and Consent Order (HFFACO). The Washington State Department of Ecology (Ecology), DOE, and the U.S. Environmental Protection Agency (EPA) (together, the Tri-Parties) entered into the HFFACO in 1989. Cusack Aff. ¶ I.

The HFFACO contains a massive collection of specific work schedules (called "milestones") necessary to bring DOE into compliance with applicable state and federal environmental laws. *See* Cusack Aff. ¶ I.[3] It will take decades to complete this work. Wilson Aff. ¶ M.

In addition to violations addressed in the HFFACO, DOE's Hanford operators and contractors have had continual difficulty complying with applicable waste

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[3] Since 1989, the Tri-Parties have established HFFACO milestones to deal with a multitude of compliance issues at Hanford. A sample list of these milestones is set forth in paragraph I. of the Cusack Affidavit.

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management laws. Since establishment of the HFFACO in 1989, Ecology and EPA have provided DOE and its contractors with over seventy written notices of violation(s) of federal and state hazardous and mixed waste laws, over eleven administrative orders to correct egregious violations of hazardous waste management requirements, and over thirteen administrative civil penalties totaling $670,000. Wilson Aff. ¶ K. As a result of this poor record of compliance, DOE and the Hanford Site are registered in EPA's nationwide enforcement database (RCRA Info) as a "Significant Non-Complier" (SNC). Wilson Aff. ¶ I.

Against this background, DOE intends to bring still more waste to the Site. In May 1997, DOE issued a Final Waste Management Programmatic Environmental Impact Statement for Managing Treatment, Storage, and Disposal of Radioactive and Hazardous Waste (WM PEIS). Power Aff. ¶ H. The purpose of the WM PEIS was to help DOE identify and select a national configuration for the management (treatment, storage, or disposal) of five types of waste managed by DOE:

- Treatment and disposal of LLW[4]
- Treatment and disposal of MLLW[5]

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[4] LLW is defined as radioactive waste that is not high-level radioactive waste, spent nuclear fuel, a by-product material (as defined in the Atomic Energy Act), or naturally occurring radioactive material. WM PEIS at 1-2 (Ex. 4 to Power Aff.)

[5] MLLW is defined as LLW that also contains one or more non-radioactive hazardous components regulated under federal or state hazardous waste laws. WM PEIS at 1-2 (Ex. 4 to Power Aff.)

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- Treatment and storage of transuranic waste[6]
- Storage of treated (vitrified) high-level waste canisters until a geologic repository is available
- Treatment of nonwastewater hazardous waste

Power Aff. ¶ I & Ex. 4.

With respect to LLW and MLLW, the WM PEIS examined a range of broadly defined waste management alternatives (*i.e.*, management on a centralized, regionalized, decentralized, or "no action" basis). Power Aff. ¶ J & Ex. 4 (WM PEIS at 3-9). The WM PEIS identified DOE's preferred alternative for disposal of LLW and MLLW as sending the waste to regional disposal sites after it is treated. Importantly, however, the WM PEIS did not identify a preferred alternative concerning *which* specific disposal sites would host the regional facilities. Instead, DOE indicated it

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[6] Transuranic wastes are wastes (other than high-level radioactive waste or wastes excluded by EPA and the Nuclear Regulatory Commission) containing more than 100 nanocuries of alpha-emitting transuranic isotopes per gram of waste, with half-lives greater than twenty years and atomic numbers greater than that of uranium. WM PEIS at 1-2 (Ex. 4 to Power Aff.). Transuranic waste that is mixed with hazardous waste is transuranic mixed waste, or TRUM. Where necessary to distinguish between transuranic wastes that are mixed and those that are not, this brief refers to "TRU" and "TRUM" waste. Use of the term "transuranic waste" will refer to the entire category of such wastes, regardless of whether they are mixed.

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would select two to three sites from a list of six, which included Hanford, the Idaho National Engineering Laboratory (INEL), the Los Alamos National Laboratory (LANL) in New Mexico, the Nevada Test Site (NTS), the Oak Ridge Reservation (ORR) in Tennessee, and the Savannah River Site (SRS) in South Carolina. Power Aff. ¶¶ K, L & Ex. 4 (WM PEIS at 3-19, 3-20).

The WM PEIS indicated it would be the basis for Records of Decision to select the sites at which waste management activities would occur. However, it indicated that decisions regarding waste management at those sites, such as the specific technologies to be employed and the actual locations of waste management within those sites, would be made in the future based on sitewide or project-specific NEPA reviews:

> At the programmatic level, however, it is not possible to take into account special requirements for particular waste streams, different technologies that are or may be available to manage particular wastes, or site-specific environmental considerations . . . . DOE will rely upon other NEPA reviews, *primarily ones that evaluate particular locations on sites or projects (sitewide or project-level reviews), for these analyses*. Thus, decisions regarding specific locations for waste management facilities at DOE sites or the waste management technologies to be used will be made on the basis of sitewide or project-level NEPA reviews.

WM PEIS at 1-48 (Ex. 4 to Power Aff.) (emphasis added).

At the time DOE developed the WM PEIS, DOE had available to it site-specific waste management EIS documents from many DOE sites, including INEL, LANL, NTS, Rocky Flats, and SRS. However, DOE had no comparable documentation for

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Hanford. Power Aff. ¶ N & Ex. 4 (WM PEIS at 1-57, 1-58, Table 1.8-1).[7] Consequently, the WM PEIS contained little site-specific information concerning Hanford. For example, the section of the WM PEIS describing the existing environment at the 560 square mile Hanford Site consisted of a mere five and one-half pages (including a full-page map.) Power Aff. ¶ N & Ex. 4 (WM PEIS at 4-43 to 4-48).

Ecology criticized this lack of site-specific detail in its comments on the Draft WM PEIS:

> The [WM] PEIS is not adequate to select sites within a conceptual alternative. The [WM] PEIS does not contain adequate data to support selecting specific sites for regionalized or centralized facilities. There are insufficient data about each of the major sites under consideration.

Power Aff. ¶ G & Ex. 3.

On December 10, 1999, nearly two and one-half years after issuing the WM PEIS, DOE published a notice of preferred alternatives in the Federal Register, identifying Hanford and NTS as DOE's preferred sites for disposal of LLW and MLLW. *See Identification of Preferred Alternatives for the Department of Energy's Waste Management Program: Low-Level Waste and Mixed Low-Level Waste Disposal*

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[7] Although in October 1997, DOE published a Notice of Intent to prepare a Hanford Site Solid (Radioactive and Hazardous) Waste Program Environmental Impact Statement and intended to issue a draft in spring 1998 (Power Aff. ¶ O & Ex. 5), the draft was not actually published until 2002, well after DOE had already made critical decisions regarding waste management (*Id.* ¶ W).

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Sites, 64 Fed. Reg. 69241 (Dec. 10, 1999) (Ex. 7 to Power Aff.) This notice provided little analysis of DOE's justification for selecting Hanford and NTS as preferred disposal sites. Power Aff. ¶ Q.

Two months later, on February 18, 2000, DOE issued a Record of Decision confirming its selection of Hanford and NTS as regional sites for disposal of LLW and MLLW. *Record of Decision for the Department of Energy's Waste Management Program: Treatment and Disposal of Low-Level Waste and Mixed Low-Level Waste; Amendment of the Record of Decision for the Nevada Test Site* (2000 ROD) (Ex. 8 to Power Aff.). The 2000 ROD stated that DOE's decision to regionalize LLW disposal at Hanford and NTS was "based on low impacts to human health, operational flexibility, and relative implementation cost." Specifically as to Hanford, the 2000 ROD relied: on (1) Hanford's arid climate, and (2) "the expansion capability of existing disposal facilities at Hanford." 2000 ROD at 6-7 (Ex. 8 to Power Aff.). The 2000 ROD stated that DOE's decision to regionalize MLLW disposal at Hanford and NTS was likewise based on the ability to use existing Hanford facilities:

> The Hanford Site and NTS are the only two DOE sites *that have MLLW disposal facilities already constructed.* Use of these existing facilities will avoid environmental impacts and costs associated with facility construction.

2000 ROD at 8-9 (emphasis added) (Ex. 8 to Power Aff.).

On May 15, 2002, DOE distributed its Draft HSW EIS (dated April 2002). The draft indicated that it was a tiered environmental review document intended to address local decisions needed to implement the RODs issued pursuant to the WM PEIS.

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Power Aff. ¶ W. Again Ecology commented that the draft EIS was improperly tiered to the WM PEIS:

> The Draft HSW-EIS assumes that the 1997 Waste Management Programmatic Environmental Impact Statement (PEIS) adequately compared the effects of treatment and disposal facilities at various sites, but it did not. The PEIS relied on data now several years old and *did not have available even the limited information about Hanford contained in the Draft HSW-EIS.*

Power Aff. ¶ X & Ex. 13 (emphasis added).

DOE issued a Revised Draft HSW EIS in March 2003 because the first draft was widely criticized as inadequate. After public comment, DOE published the Final HSW EIS in January 2004. Power Aff. ¶¶ Y, AA.

The HSW EIS purports to be the sitewide or project-specific NEPA review described in the WM PEIS as a prerequisite to decisions regarding the specific technologies to be employed at, and actual locations of, waste management facilities at particular DOE sites. HSW EIS at 1.1 (Ex. 15 to Power Aff.). The HSW EIS purports to consider alternatives for managing the following wastes at Hanford: LLW; MLLW; immobilized low-activity waste; and transuranic waste. The HSW EIS purports to evaluate alternatives for managing LLW, MLLW, and transuranic waste assuming shipment to Hanford of a range of volumes of such wastes from other sites. Power Aff. ¶ EE.

The HSW EIS assumes that Hanford will serve as a regional disposal facility for DOE's LLW and MLLW based on the WM PEIS and 2000 ROD. Power Aff. ¶ FF. It assumes that Hanford will store and process off-site transuranic waste pending disposal

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at WIPP based on the WM PEIS and 1998 and 2002 RODs. The HSW EIS does not evaluate alternatives to performing these functions at Hanford. *Id.*

The HSW EIS identified DOE's preferred alternative as the actions identified in "Alternative Group D_1." The HSW EIS indicated that the preferred alternative would be implemented for Hanford with off-site waste received up to the upper bound waste volume considered in the EIS. HSW EIS at 3.63 (Ex. 15 to Power Aff.)

Under this preferred alternative, DOE could ship up to 219,663 cubic meters of off-site LLW and up to 140,435 cubic meters of off-site MLLW to Hanford for disposal. *See* HSW EIS, Tables 3.3 & 3.4, pp. 3.19 to 3.20 (Ex. 15 to Power Aff.). DOE could also ship up to 1,557 cubic meters of off-site transuranic waste to Hanford for indefinite storage and processing pending presumed ultimate disposal at WIPP.[8] HSW EIS, Table 3.5, p. 3.20 (Ex. 15 to Power Aff.).

As noted above, on June 23, 2004, DOE issued two RODs based upon the HSW EIS: the 2004 HSW EIS ROD (Exhibit 16 to the Power Affidavit) and the 2004 Transuranics ROD (Exhibit 17 to the Power Affidavit). In the 2004 HSW EIS ROD, DOE decided to implement the preferred alternative described in the HSW EIS. The ROD indicates that DOE will limit the volumes of off-site LLW received at Hanford to

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[8] This is the same volume of transuranic waste that Plaintiffs argued (and Defendants denied) comprised the "Small Quantities Sites" initiative that DOE had failed to evaluate pursuant to NEPA.

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62,000 cubic meters, and will limit the volume of off-site MLLW received to 20,000 cubic meters. The ROD assumes that DOE will ship up to 1,550 cubic meters of off-site transuranic waste to Hanford for indefinite storage and processing pending presumed disposal at WIPP. It indicates that if DOE decides to ship additional transuranic waste to Hanford, its decision will be made in a subsequent ROD or RODs.

On the same day it signed the 2004 RODs, DOE began to move significant quantities of off-site MLLW waste to Hanford. Specifically, DOE shipped seventeen drums on June 23, ninety-one drums on June 24, and one drum on June 25. This DOE waste originated from DOE's Rocky Flats site, but was being stored at a commercial treatment facility in Richland, Washington called Pacific EcoSolutions (PEcoS). Affidavit of Einar R. Skinnarland (Skinnarland Aff.) ¶ I. On June 28, 2004, the Hanford Site received an additional four shipments of off-site LLW, some or all of which were from DOE's Fermi facility in Illinios. *Id.* ¶ J.

On June 30, 2004, Ecology received written notification from PEcoS that DOE intended to ship up to 300 cubic meters (600 drums and 50 large boxes) of MLLW comprised of heterogeneous debris and radioactive lead solids to PEcoS for treatment. The notice indicated that the waste would be received at PEcoS' facility during the fourth week of July. The notice indicated the waste would be disposed of at Hanford. *Id.* ¶ K. On July 9, 2003, Ecology received written notification from PEcoS that DOE intended to ship up to 31,000 cubic feet of MLLW to PEcoS for treatment. The notice

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indicated that the waste would be received by PEcoS during the first week in August and would be disposed of at Hanford. *Id.* ¶ L.[9]

Adding more waste to Hanford—with its attendant risks to human health, groundwater, and to the Columbia River—adds insult to existing injury when considered in tandem with the monumental task ahead for righting the environmental wrongs that have and will continue to plague the Site for decades. It is critical that any decisions to ship more waste to the most contaminated site in the nation be made only after a full and careful consideration of the environmental impacts and alternatives to such actions. This Court has already preliminarily enjoined DOE from shipping more transuranic waste to Hanford while the Court considers, on the merits, whether DOE has performed an analysis in compliance with NEPA. Washington likewise now seeks to prohibit DOE from sending off-site LLW and MLLW to Hanford pending final resolution of this litigation.

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[9] Pursuant to a Stipulation and Order as to Scheduling filed by Ecology and DOE and approved by the Court on July 27, 2004, DOE has agreed to withhold further shipments of LLW and MLLW to Hanford until either the Court's decision on the State's Motion for Expanded Preliminary Injunction or November 15, 2004, whichever is earlier.

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III. ARGUMENT

In granting its current preliminary injunction, the Court has already found that in the context of proposed shipments of transuranic waste, the balance of hardships and public interest both favor the State. *Order Granting Preliminary Injunction* at 32-35, 35-37. DOE's proposed shipments of LLW and MLLW raise the same hardship and public interest issues as did the proposed shipments of transuranic waste, which supports an expansion of the current injunction to include these waste forms.

In addition, starting with the 1997 WM PEIS and ending with the current HSW EIS, the disposition of LLW and MLLW has been the subject of the same NEPA documents, and the same NEPA analysis (or lack thereof), as transuranic waste. The Court's Order is based, in part, on the Court's finding that at a minimum, Washington and the Environmental Plaintiffs demonstrated that "serious questions" were raised concerning whether DOE had adequately complied with NEPA before issuing a ROD to commence transuranic waste shipments to Hanford. To the extent NEPA noncompliance precludes transuranic waste shipments, LLW and MLLW shipments should be similarly precluded. Washington can, at a minimum, raise "serious questions" concerning the adequacy of the HSW EIS to satisfy the need for a site-specific or project level EIS with respect to these shipments.

Based on these factors, Washington requests that the Court expand its current preliminary injunction to further enjoin DOE from shipping off-site LLW and MLLW to Hanford, pending final resolution of this litigation.

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A. Standards for Obtaining a Preliminary Injunction

The standards for obtaining a preliminary injunction in the Ninth Circuit are well settled:

> We have repeatedly instructed that to obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.

Roe v. Anderson, 134 F.3d 1400, 1401-02 (9th Cir. 1998) (citing *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992)). These standards are not inconsistent, but rather represent a single continuum of equitable discretion whereby the greater the relative hardship to the moving party, the less probability of success that must be shown. *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988). Relative hardship thus serves as the "critical element" of the test. *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 n.9 (9th Cir. 1980). If the hardship tips towards the moving party, then the moving party is not required to show "as robust" a likelihood of success on the merits. *Id.*

In addition, in cases where the public interest is involved, the Court must examine whether the public interest favors the party moving for the injunction. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 965 (9th Cir. 2002). While this inquiry is sometimes made in tandem with the balancing of hardships, it is better seen as an element that deserves separate attention. *Id.* at 974. The public interest inquiry primarily addresses impacts on non-parties rather than parties. *Id.*

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Because the State satisfies both ends of the preliminary injunction continuum, the Court should enjoin the Defendants from shipping LLW and MLLW to the Hanford Site pending final resolution of this litigation.

B. DOE's Proposed Shipments of LLW and MLLW Raise Same Irreparable Injury/Balance of Hardship Considerations

This Court has already ruled that the balance of hardships "tips sharply in favor of plaintiffs" with respect to DOE's intended shipments of transuranic waste. *Order Granting Preliminary Injunction* at 35. The Court noted that by its nature, transuranic waste poses significant hazards to human health and the environment, *id.* at 32; that there is a risk of release and exposure associated with handling and transporting transuranic waste, *id.*; that bringing off-site transuranic waste to Hanford added to the management burden of the "already considerable TRUW which has been generated on-site at Hanford," *id.* at 33-34; and that while there might be a "reasonable chance" that contact-handled transuranic waste will be "promptly dispatched to WIPP," for other portions of the waste stream, the same could not be said. *Id.* at 32. The Court concluded by stating:

> In the absence of an injunction, the balance of the Battelle TRUW . . . will be shipped to Hanford and regardless of the outcome of further proceedings in this court or before the Ninth Circuit, it will likely remain at Hanford. On the other hand, it appears DOE is not precluded from making reasonable interim adjustments to a preliminary injunction.

Id. at 35.

The same circumstances exist with respect to LLW and MLLW. To begin, just as with transuranic waste, LLW and MLLW, if released, pose significant hazards to

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human health and the environment due to toxicological and radiological effects. The constituents of LLW and MLLW, and the risks associated with these materials, are detailed in an affidavit by an Ecology Toxicologist, Damon Delistraty. Affidavit of Damon Delistraty (Delistraty Aff.) ¶¶ F-H.

Furthermore, just as with transuranic waste, there is a risk of release and exposure associated with handling and transporting LLW and MLLW. Power Aff. ¶ OO. These risks are compounded by the fact that, unlike transuranic waste, DOE intends to permanently dispose of LLW and MLLW at Hanford, thus adding significant additional contaminants to the Site's already massive inventory of buried radioactive and hazardous constituents. This action will affect groundwater at the Site. *See, e.g.,* Goswami Aff. ¶ L.

Adding more radioactive and hazardous wastes to Hanford will only compound problems associated with the existing contamination, distract resources from the cleanup effort, and further frustrate the State's efforts to bring the Site into compliance. *See* Cusack Aff. ¶ M; Wilson Aff. ¶ M; Goswami Aff. ¶¶ K-M. DOE has yet to figure out how to even approach a number of significant and pressing problems already at the Site, and is only at the beginning stages of addressing others.[10] Dealing with existing

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[10] For example, DOE has inadequate data on waste characterization. Its groundwater monitoring is also inadequate to assess the nature and extent of contamination, and DOE has yet to develop effective technologies to remediate some of the known groundwater contamination at Hanford. Goswami Aff. ¶¶ F, H, I. With regard

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cleanup and compliance issues is extremely expensive and entirely dependent upon future Congressional appropriations. Costs for Hanford cleanup already exceed $2 billion per year, *see* Brown Aff. ¶ F, and at times DOE already fails to request or obtain sufficient funding to meet all HFFACO compliance schedules. *Id.* ¶ I. DOE's plan for disposal of off-site waste at Hanford, however, is dependent upon securing additional funds for the construction of an Integrated Disposal Facility (IDF) at the Site, as well as for the modification of T-Plant to provide treatment capabilities for remote-handled waste and waste in non standard containers. Affidavit of Melinda J. Brown (Brown Aff.) ¶¶ Q, R. *See* 2004 HSW EIS ROD at 39454-55 (describing DOE's decision with regard to construction of IDF and modification of T-Plant) (Ex. 16 to Power Aff.). There is no guarantee that DOE will secure the funds necessary to undertake this work; yet under DOE's decision, Washington will be forced to bear up-front the risk of bringing additional waste to Hanford.

The management of off-site LLW and MLLW at Hanford will drain Hanford resources. There are significant expenses associated with managing off-site waste that

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to remote handled waste, large-container waste, waste containing lead or mercury, or wastes requiring thermal treatment, DOE does not have facilities to process these wastes and its plans for acquiring them are still in their infancy. Cusack Aff. ¶¶ J, M. As for tank wastes, DOE is only in the early stages of constructing a massive facility to glassify the wastes. Dahl-Crumpler Aff. ¶ Q.

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the Hanford Site will not be able to collect from generators of off-site waste. For example, Hanford cannot collect the cost of facility construction, even if the facilities will likely need to be sized larger to accommodate off-site waste. Nor can Hanford collect fees to cover future costs from off-site generators (*e.g.,* the costs of future closures and of post-closure care of the waste management facilities utilized for off-site waste). *See* Brown Aff. ¶ O.

Once LLW and MLLW waste arrives at Hanford, there is no credible expectation it will ever leave the Site. This is true even if Washington prevails in this litigation. The 2004 HSW EIS ROD documents DOE's decision to dispose of significant quantities of these wastes at Hanford. Once these wastes are disposed, retrieval of them will likely present practical and risk hazards that are similar to those posed by DOE's shipments of transuranic waste to Hanford. Retrieval and reshipment would simply compound risks. Power Aff. ¶ OO. Moreover, although DOE failed to disclose the sources of off-site LLW and MLLW in its ROD, based on shipments to date, it is clear that at least some of the waste DOE intends to send to Hanford is from Rocky Flats in Colorado. *See* Skinnarland Aff. ¶¶ I, K, L. Because Rocky Flats is a site undergoing closure, the originating facilities will no longer exist. *See* Power Aff. ¶ OO.

When the injury at issue is environmental, and that environmental injury is "sufficiently likely," the balance of harms will usually favor the issuance of an injunction to protect the environment. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545, 107 S.Ct. 1396 (1987). The Court has already made this determination in issuing a preliminary injunction with respect to transuranic waste.

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Order Granting Preliminary Injunction at 32, 35. The same considerations apply to LLW and MLLW. The balance of hardships favors the State in its motion for an expanded preliminary injunction.

C. DOE's Proposed Shipments of LLW and MLLW Raise the Same Public Interest Considerations as its Proposed Shipments of Transuranic Waste

In addition to having already found that the balance of hardships favors the State, the Court has already held that the public interest favors the State in granting its preliminary injunction. *Order Granting Preliminary Injunction* at 37. Just as with the balance of hardships analysis, nothing about the circumstances of LLW and MLLW shipments changes this result.

Just as with respect to transuranic waste shipments, as framed within the context of this lawsuit, the public interest is that any DOE decision to import and dispose of LLW and MLLW at Hanford be supported by law, namely adequate environmental review. The reason for this interest directly relates to the nature of the Hanford Site and DOE's historic management of the Site. DOE's action will permanently bring LLW and MLLW to Hanford for disposal. Citizens in Washington, the greater Pacific Northwest, and the nation have an interest in ensuring that LLW and MLLW storage and disposal does not itself generate additional contamination at the Hanford Site. Contamination already at Hanford affects not only the Site itself, but threatens the Columbia River, which is a resource of national significance. *See* Goswami Aff. ¶ E. The potential impacts of contamination to the Columbia River on the health, environment, and economy of Washington, Oregon, and the nation are incalculable.

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Citizens in Washington, the greater Pacific Northwest, and the nation also have an interest in ensuring that LLW and MLLW storage and disposal activity at Hanford does not divert resources from DOE's obligation to address the monumental cleanup task at the Site. As indicated in its initial preliminary injunction briefing, Washington has expended significant resources in working cooperatively with DOE to develop the HFFACO to address contamination at Hanford, to protect the Columbia River, and to address releases and potential releases. The HFFACO, however, does not address the shipment of additional off-site waste to Hanford. Further, while DOE has begun to make significant progress addressing the contamination already at Hanford, there are decades of work ahead before the risks to public health and the environment will be acceptably reduced. Wilson Aff. ¶ M. Set against this background, the public interest mandates that DOE only make the significant and permanent decision to dispose of LLW and MLLW at Hanford after it fully complies with the law requiring it to be informed of the potential environmental consequences of its decisions.

Nothing about the inclusion of LLW and MLLW to the list of waste streams proposed for shipment to Hanford alters the Court's existing determination. The public interest favors expanding the current preliminary injunction to enjoin shipments of LLW and MLLW to Hanford.

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D. Washington Can Demonstrate Probable Success on the Merits, or at Least that Serious Questions are Raised

Washington asserts that the Defendants have violated NEPA, 42 U.S.C. § 4321 *et seq.* (and with it, the Administrative Procedure Act (APA), 5 U.S.C. § 702). Amended Complaint ¶¶ 102-124. The HSW EIS is an enormous document that raises highly technical scientific issues. The State is still in the process of evaluating the document. At this juncture, however, it is clear that the HSW EIS—and with it, DOE's decision to ship LLW and MLLW to Hanford—violates NEPA for at least three reasons. First, DOE has failed to properly tier its environmental analyses. Second, the HSW EIS's evaluation of environmental impacts and risks related to Hanford groundwater is inadequate. Finally, the HSW EIS contains a declaration that Hanford's groundwater is "irreversibly and irretrievably committed" that is contrary to law and arbitrary and capricious.

In order to obtain a preliminary injunction, Washington must either demonstrate a "probability of success" on the merits in tandem with a showing of "irreparable injury," or that "serious questions" are raised on the merits in tandem with a showing that the balance of hardships favors the State. *See, e.g., Roe v. Anderson*, 134 F.3d 1400, 1401-02 (9th Cir. 1998) (*citing United States v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992)). To meet the "probable success on the merits" standard, Washington needs only to show a "reasonable probability" of success on its NEPA claim. *King v. Saddleback Junior College Dist.*, 425 F.2d 426, 428, n.2 (9th Cir. 1970).

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The required degree of probable success on the merits decreases as the likelihood of irreparable harm increases. *United States v. Odessa Union Warehouse Co-Op*, 833 F.2d 172, 176 (9th Cir. 1987).

At the other end of the continuum, "serious questions" are questions that are substantial, difficult, and doubtful so as to make them fair ground for litigation. "Serious questions" need not promise a certainty of success, nor even present a probability of success, but must involve a "fair chance" of success on the merits. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991).

Washington can show "probable success on the merits" of its NEPA claim or, at the least, that "serious questions" are raised by that claim. This showing—in conjunction with fact that the balance of hardships and public interest factors already favor Washington—is sufficient for the Court to expand the current preliminary injunction.

1. Statutory background and review standards

NEPA requires federal agencies to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). This requirement serves two purposes:

> It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 109 S.Ct. 1835 (1989).

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This ensures that "the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371, 109 S.Ct. 1851 (1989). The EIS must contain a detailed discussion of the environmental impacts of, and alternatives to, the proposed action. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.14; 40 C.F.R. § 1502.16. NEPA also imposes a continuing duty on federal agencies to supplement existing EISs in response to "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1509(c)(1)(ii).

Because NEPA does not contain a separate provision for judicial review, courts review an agency's compliance with NEPA under the APA. *Ka Makani 'O Kohala Ohana, Inc. v. Water Supply*, 295 F.3d 955 (9th Cir. 2002). Under the APA, an agency's decision may be set aside if the court finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Marsh*, 490 U.S. at 377. Two standards of review govern review of an agency's NEPA actions. Factual disputes which implicate substantial agency expertise are reviewable under the arbitrary and capricious standard of Section 706(2)(A) of the APA. *Surfrider Foundation v. Dalton*, 989 F. Supp. 1309, 1319 (S.D. Cal. 1998) (*quoting Marsh*, 490 U.S. at 376-77, and *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1330-31 (9th Cir. 1992)). In assessing whether an agency decision is "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh*,

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490 U.S. at 378. Disputes which are primarily legal are reviewed under a "reasonableness" standard. *Id.* at 1319-20 (*citing Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995)). In such a situation, "it makes sense to distinguish the strong level of deference we accord an agency in deciding factual or technical matters from that to be accorded in disputes involving primarily legal questions." *Id.*

When considering the adequacy of an EIS, the courts apply a "rule of reason standard," asking whether the EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental impacts. This standard involves a pragmatic judgment of whether the EIS's form, content, and preparation foster both informed decision-making and informed public participation. It is, in its essence, the same as review for an abuse of discretion. *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 n.2 (9th Cir. 2003); *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1177 (9th Cir. 2000). In other words, the court's task is to ensure that the agency has taken a "hard look" at probable environmental consequences. *Hells Canyon Alliance*, 227 F.3d at 1177. The touchstone for determining whether an EIS contains sufficient discussion of alternatives to satisfy NEPA is likewise whether selection and discussion of alternatives fosters informed decision-making and informed public participation. *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 575 (9th Cir. 1998); *State of California v. Block,* 690 F.2d 753, 767 (9th Cir. 1982).

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2. Argument

a. DOE has failed to properly "tier" its environmental impact analyses

DOE's decision to select Hanford as a regional disposal facility for LLW and MLLW is a major federal action significantly affecting the quality of the human environment. NEPA thus requires preparation of an EIS for the action. 42 U.S.C. § 4332(2)(C). NEPA allows agencies to tier environmental documents.[11] However, DOE failed to properly tier its environmental impact statement analyses for the following reasons. First, when considered alone, the WM PEIS lacks sufficient site-specific detail for selecting Hanford as a regional disposal facility. Second, DOE's actual selection of Hanford as a regional disposal facility occurred outside of, and was not informed by, the NEPA process. As a result, DOE's selection of Hanford was based on site-specific considerations that were never sufficiently evaluated in the WM PEIS. It is not surprising then, that these considerations are contradicted by the later analysis in the HSW EIS.

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[11] "Tiering" refers to the coverage of general matters in a broader analysis followed by a second narrower analysis which incorporates the prior discussion. The Council on Environmental Quality (CEQ) regulations, which are binding on DOE, specifically describe when tiering is allowed. *See Andrus v. Sierra Club*, 442 U.S. 347, 358, 99 S.Ct. 2335 (1979) (CEQ regulations are mandatory and applicable to each federal agency). Tiering is appropriate when the sequence of analyses is from the programmatic scope to a lesser scope or to a site-specific scope. 40 C.F.R. § 1508.28.

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As the Court is aware, the WM PEIS indicated that it was part of a "tiered" decision-making process through which site-specific matters would be considered later:

> The decision-making process will follow a "tiered" approach. First, DOE will make broad Departmentwide [sic] decisions, supported by this programmatic NEPA review, about which sites will manage which wastes. DOE will follow these broad decisions with an analysis of narrower proposals for the implementation of programmatic decisions in related NEPA reviews. Although DOE intends to identify a configuration (i.e., select sites for waste management activities as a result of this *programmatic* EIS), DOE will take a closer look (including site-specific design, location on the site, operating parameters for new facilities, and site-specific impacts) in *sitewide* or *project-level* NEPA reviews.

WM PEIS at 1-3 (emphasis in original) (Ex. 4 to Power Aff.).

A programmatic analysis does not necessarily require detailed analysis with respect to each and every aspect of a proposal. However, "the level of detail necessary in an EIS is directly related to the scope of the federal action under review." *Greenpeace v. National Marine Fisheries Service,* 55 F. Supp. 2d 1248, 1276 (W.D. Wash. 1999), *citing California v. Block,* 690 F.2d 753, 761 (9th Cir. 1982). Thus, if a multi-step project is proposed that nevertheless has a very broad scope at the initial stage, a high level of detail may be required even in a programmatic EIS. *Id.*

The WM PEIS purported to be the basis upon which DOE would select sites for consideration to become regional LLW and MLLW disposal facilities. To serve that role, the WM PEIS must contain sufficient detail to allow for informed decision-making. The WM PEIS fails to contain that detail. While the WM PEIS may contain sufficient analysis to support broad, programmatic decisions such as whether

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LLW and MLLW should be disposed using decentralized, regionalized, centralized, or "no action" alternatives, it lacks sufficient detail to support the selection of specific sites—such as Hanford—as the sites for those facilities.

The entire Hanford Site, containing 560 square miles, hundreds of buildings, and over 1,500 waste contamination sites, is described in a scant four and one-half pages of double-spaced text in the WM PEIS. This brief overview, which contains the most detailed information on Hanford in the entire WM PEIS, cannot possibly address the location and history, human health issues, air quality, water resources, geology and soils, ecological resources, socioeconomic conditions, environmental justice information, land use, infrastructure, and cultural resources of the Site in a manner sufficient to enable a meaningful comparison of Hanford to other sites. There is nearly no information in the WM PEIS regarding Hanford's existing wastes and contamination, its facilities (including LLW and MLLW disposal facilities), or applicable regulations and cleanup commitments. Such a broad-brush overview is inadequate to provide a meaningful basis to compare the environmental impacts of siting LLW and MLLW regional disposal facilities at Hanford to those at other sites. It was precisely this lack of specific environmental analysis in the WM PEIS (or any other NEPA document) that persuaded this Court to preliminarily enjoin DOE from shipping additional transuranic waste to Hanford. The same shortcomings prevent the WM PEIS from serving as a basis on which to choose the Hanford Site as a regional disposal facility for LLW and MLLW.

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The second flaw in DOE's tiered environmental analysis stems from its selection of regional LLW and MLLW disposal sites *outside* of the NEPA process. The WM PEIS failed to identify DOE's preferred disposal sites, as is required by NEPA. When DOE finally identified preferred regional disposal sites some two and one-half years later, it did so without further NEPA analysis and without seeking public input on its preference. DOE then issued the 2000 ROD selecting Hanford and NTS as regional disposal sites. This process precluded informed public participation and deprived DOE of the ability to make an informed site-selection decision.

Both NEPA and the CEQ regulations require that an EIS include a detailed discussion of alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14. Specifically, the regulations require that an EIS "identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference." 40 C.F.R. § 1502.14.[12]

The WM PEIS identified DOE's preferred alternative for disposal of both LLW and MLLW to be one of sending the waste to regional disposal sites after it is treated. However, the WM PEIS failed to indicate *which* sites it preferred to serve as regional disposal facilities. Instead, the WM PEIS indicated that DOE would select two to three

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[12] No law prohibited DOE from identifying its preferred alternative in the WM PEIS.

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sites from a list of six, which included Hanford, the Idaho National Engineering Laboratory, the Los Alamos National Laboratory (New Mexico), the Nevada Test Site (NTS), the Oak Ridge Reservation (Tennessee), and the Savannah River Site (South Carolina). Power Aff. ¶¶ K, L & Ex. 4 (WM PEIS at 3-19, 3-20). DOE's failure to identify a preferred alternative renders the WM PEIS inadequate under NEPA, together with the 2002 ROD and 2004 RODs that rely on the WM PEIS.

DOE eventually identified its preferred site through an "Identification of Preferred Alternatives" published in December 2003. DOE's notice of preferred alternatives does not cure DOE's failure to identify a preferred alternative in the WM PEIS. First, the notice was issued entirely outside the NEPA process with no additional environmental review to supplement the WM PEIS. Second, it was published nearly two and one-half years after DOE issued the WM PEIS. Given the passage of time, it is doubtful that the public was even paying attention at the time the notice was filed. Finally, the notice did not even *invite* public comment. Thus, even if the public had become aware that DOE had published its preferences, the public would not have understood it could comment on them. Indeed, DOE received only eight comment letters in response to its December 1999 notice of preferred alternatives. 2000 ROD at 4 (Ex. 8 of Power Aff.). In contrast, DOE received over 1,200 comment letters on the Draft WM PEIS. (WM PEIS at 1).

The fact of the matter is that DOE's decision to select Hanford over other potential sites for regional LLW and MLLW disposal facilities has never been subject to public comment, either inside or outside the NEPA process. This does not satisfy

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NEPA's aim to foster "informed decision-making and informed public participation," as required by the 9th Circuit. *See, eg., Morongo Band of Mission Indians*, 161 F.3d 569. As a result of DOE's approach, the 2000 ROD selecting Hanford and the NTS as regional disposal facilities for LLW and MLLW was not based on the NEPA process.[13]

The reality that DOE's tiering and selection process is flawed is confirmed by the fact that the site-specific considerations that led DOE to select Hanford as a regional disposal site are, in fact, contradicted by the later analysis in the HSW EIS. DOE's 2000 ROD specifically relied on the availability of existing LLW and MLLW disposal facilities at Hanford as the basis for DOE's decision to select Hanford as a regional disposal facility. 2000 ROD at 6-7 (selecting Hanford as a facility for LLW disposal based on "the expansion capability of existing disposal facilities at Hanford."), and 8-9 (selecting Hanford as a facility for MLLW disposal based on the rationale that use of existing facilities at Hanford will avoid environmental impacts and costs associated with facility construction) (Ex. 8 to Power Aff.).[14] Thus, despite the fact that the

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[13] The Notice of Preferred Alternatives provided little analysis of DOE's justification for selecting Hanford and NTS as preferred disposal sites. Power Aff. ¶ Q & Ex. 7 thereto.

[14] DOE's 2000 ROD provides that "the Hanford Site and NTS are the only two DOE sites that have MLLW disposal facilities already constructed. Use of these existing facilities will avoid environmental impacts and costs associated with facility construction. (Ex. 8 to Power Aff.).

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WM PEIS contained little information about the Hanford Site and conceded that, at the programmatic level, it was "not possible to take into account site-specific considerations" related to matters such as disposal technologies and facilities, DOE specifically relied on the presence of existing disposal facilities at Hanford as its basis for selecting Hanford as a regional disposal site for LLW and MLLW.

Ironically, while the 2000 ROD relied on the ability to use existing Hanford facilities as the basis for selecting the Hanford Site for regional disposal of LLW and MLLW, the preferred alternative in the HSW EIS and its associated 2004 HSW EIS ROD do *not* provide for using existing disposal facilities. Instead, DOE has decided to construct an entirely new "Integrated Disposal Facility" (IDF) for the disposal of these wastes. In short, DOE selected Hanford as the site for regional disposal of tens of thousands of cubic meters of LLW and MLLW largely on the basis of site-specific considerations never sufficiently evaluated in the WM PEIS, and when it later evaluated those site-specific considerations (after the selection decision was made), its analysis rejected the foundation that caused DOE to select Hanford for regional disposal in the first instance.

The HSW EIS potentially could have solved this problem, if it had included a NEPA-compliant evaluation of the facility-specific impacts of choosing Hanford as a regional disposal facility *as compared to other DOE sites*. However, the HSW EIS indicates it is a tiered environmental review document intended to address local decisions needed to implement the RODs issued pursuant to the WM PEIS. Power Aff.

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¶ W. Thus, while the WM PEIS fails to provide a basis to choose Hanford as a regional disposal facility, the HSW EIS assumes that Hanford will be a regional disposal facility.[15]

Because DOE (1) failed to adequately consider site-specific impacts in making its decision to dispose of LLW and MLLW at Hanford; (2) failed to identify its preferred alternative in the WM PEIS or otherwise subject its site selection to public comment; and (3) ultimately based its site selection decisions on considerations that were specifically excluded from its environmental analysis, DOE's tiered NEPA process neither fostered informed public participation nor informed decision making. *Friends of Yosemite Valley*, 348 F.3d 789. Because DOE has failed to take the requisite "hard look," the State has a reasonable probability of success—or at least has raised serious questions—on the merits of its NEPA claim.

b. The HSW EIS's evaluation of environmental impacts and risks related to Hanford groundwater is inadequate

As indicated above, the shear scope of the HSW EIS precludes the State from addressing every inadequacy of the document until further review is complete. At this point, however, it *is* clear that portions of the HSW EIS's evaluation of both existing and future environmental impacts and risks related to Hanford's groundwater are

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[15] While the HSW EIS contains a "no action" alternative, it does not contain any of the impacts of regional disposal at Hanford compared to regional disposal at other DOE sites.

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inadequate. Specifically, the HSW EIS's compilation of a "source inventory" and analysis of impacts expected from existing Hanford contamination is uncertain and incomplete in its scope; the EIS's assessment of impacts associated with the disposal of "secondary waste" from the process of turning Hanford's tank waste into glass is directly contradicted by other DOE information; and the EIS fails to adequately show the contribution of individual facilities such as the proposed Integrated Disposal Facility to cumulative groundwater impacts.

In order to project groundwater impacts (and, in turn, potential risks to human health and the environment), it is first necessary to develop an inventory of the potential sources that would create the impact and risk. *See* Goswami Aff. ¶ J. The HSW EIS's "source inventory" and impacts analysis is uncertain, incomplete in its scope, and with respect to at least one future waste stream, directly contradicted by other DOE information.

To begin, as DOE acknowledges in the HSW EIS, there is a poor foundation of data with respect to existing Hanford sources of actual and potential contamination, such as waste disposed to the Low-Level Burial Grounds (LLBGs). *Id.* ¶¶ I, J, K. With respect to the chemical (hazardous waste) constituents of this waste, DOE admits that "analysis of these constituents and estimated impacts based on the limited amount of information on estimated inventories and waste disposal locations *would be subject to uncertainty at this time*." *Id.* ¶ K (*citing* HSW EIS at G.301) (emphasis added).

Nevertheless, as it should under NEPA, DOE does make an attempt at an analysis. With respect to chemical hazards, however, this attempt is half-hearted and

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inadequate for NEPA purposes. In the face of the uncertainty related to pre-1987 chemical waste disposal at Hanford, the HSW EIS developed a chemical source inventory based on extrapolating from hazardous chemical generation rates during the late 1980s, without input from actual field data. *Id.* This resulted in a fixed-number volume estimate for selected chemical substances, which DOE then carried forward for the purposes of analysis. *Id.* (*citing* HSW EIS at G.301). Extrapolation from late 1980s chemical generation rates, however, may not accurately account for chemical waste disposal during the height of Hanford's defense-related activity. *Id.* Furthermore, DOE's inventory estimates do not include any ranges or error margins. *Id.* (*citing* HSW EIS at G.301). In Ecology's opinion, it is possible that the fixed-number inventory in the HSW EIS may underestimate the quantities of hazardous waste already disposed at Hanford by orders of magnitude.[16] *Id.* Creating and relying upon a fixed-number

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[16] DOE indicated that a more thorough analysis of source inventory in the LLBGs may come at some future point through other regulatory processes (*e.g.*, cleanup activity under RCRA or CERCLA):

> These facilities are part of the LLW and MLLW facilities in LLW Management Areas 1-4 [the LLBGs] that currently are being monitored under RCRA interim status programs. *Final closure or remedial investigations of these facilities under RCRA and/or CERCLA guidelines could involve further evaluation and eventually require analysis of the impacts of the chemical components of these disposed inventories*.

Goswami Aff. ¶ K (*citing* HSW EIS at G.19) (emphasis added). This, of course, will be too late to inform the analysis in the HSW EIS and any decisions based upon it.

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estimate of chemical source volumes in this manner, in the face of acknowledged uncertainty related to previous disposal history, is arbitrary and capricious.

Based on its fixed inventory, however, DOE proceeded with certainty to screen out all but three hazardous chemicals from further consideration in the EIS. This was based on a preliminary assessment that found that "without a substantial driving force," only chromium, fluoride and nitrate would reach the unconfined aquifer below Hanford's LLBGs within a 10,000 year timeframe. *Id.* ¶ L (*citing* HSW EIS at G.302). Because of this screening, potential impacts from entire classes of hazardous chemicals, such as the degradation and volatilization processes of hazardous organic compounds, are not evaluated in the EIS. *Id.* ¶ M. This includes a lack of quantitative analysis of direct risks posed by such substances to human health and the environment. *Id.* ¶ M. It also includes a lack of quantitative analysis of indirect impacts, such as whether such chemical constituents may enhance the mobility of constituents, including radionuclides, that otherwise might not migrate to groundwater. *Id.* ¶ N.

Significantly, DOE's 1997 WM PEIS predicted that proposed waste management activities at Hanford would result in the Site's groundwater exceeding drinking water standards for four organic compounds (benzene, carbon tetrachloride, 1,2-dichloroethane, and methylene chloride). Power Aff. ¶ GG (*citing* WM PEIS at 11-32, Table 11.6-1). Even by analyzing only chromium, fluoride, and nitrate, the HSW EIS predicts an impact to groundwater from waste already at Hanford within

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140 years or less at the LLGBs. Goswami Aff. ¶ O. DOE's failure to analyze other hazardous chemical impacts in the HSW EIS means that DOE failed to take the "hard look" required by NEPA. This, in turn, means that the HSW EIS fails to provide an adequate basis for informed decision making.

In addition to not adequately analyzing the impacts of existing Hanford sources, there is at least one example where the HSW EIS's source inventory with respect to projected *future* wastes is directly contradicted by other contemporaneous DOE information. This contradiction undermines the HSW EIS's analysis of expected impacts from iodine-129 and technetium-99, two highly-mobile radionuclides captured in "secondary waste" to be disposed of at Hanford's planned Integrated Disposal Facility (IDF). This is the same facility intended to accept off-site LLW and MLLW for disposal.

As explained in the attached Affidavit of Suzanne L. Dahl-Crumpler, secondary waste is a waste stream that will be produced once production begins at Hanford's Waste Treatment Plant (WTP). Dahl-Crumpler Aff. ¶¶ R-S. The WTP will process Hanford's high-level radioactive tank waste. *Id.* ¶ Q. After being separated into "high activity" and "low activity" waste streams at a pretreatment plant, tank waste will be vitrified (turned into glass) for disposal. *Id.* The "high activity" portion will be vitrified as "Immobilized High Level Waste" for intended disposal at a deep geologic repository (Yucca Mountain, Nevada). *Id.* The "low activity" portion will be vitrified as "Immobilized Low Activity Waste" (ILAW) for disposal on-site at the IDF. *Id.*

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"Secondary waste" will be a by-product of the WTP process. *Id.* ¶ R. One secondary waste stream ("liquid secondary waste") will be created from the WTP's off gas system, which will route material volatilized during the melting process to "scrubbers" designed to capture pollutants. *Id.* Wastewater from these scrubbers (the liquid secondary waste) will then be routed to a separate treatment plant (the Effluent Treatment Facility, or ETF) where contamination will be separated from the wastewater and converted to a solid form. *Id.* ¶ S. Under the current plan, this secondary waste will be minimally encapsulated in grout (concrete) and be disposed to the IDF. *Id.*

Iodine-129 and technetium-99 are both long-lived radionuclides (*i.e.*, they have long half-lives). *Id.* ¶¶ X, AA, EE. They are both highly mobile in water and present human health risks. *Id.* ¶¶ X, EE. Both are found in Hanford's tank waste. *Id.* With respect to iodine-129, the HSW EIS assumes that out of the total curies of all iodine-129 found in Hanford's tank waste, 22 curies will, at the end of WTP production, end up in vitrified ILAW glass disposed to IDF and 5 curies will end up in grouted secondary waste disposed to IDF.[17] *Id.* ¶ Y. With respect to technetium-129, the HSW EIS assumes that of a total of 25,550 curies found in Hanford's tank waste, 100 percent of these curies (all 25,550) will end up in ILAW glass disposed to IDF, with zero percent ending up in grouted secondary waste disposed to IDF. *Id.* ¶ EE.

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[17] The fate of the remaining 38 curies of iodine-129 is unclear in the HSW EIS analysis. Dahl-Crumpler Aff. ¶ X.

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The significance of these distinctions is this: ILAW glass will provide a much more durable waste form than grouted secondary waste. *See id.* ¶ AA. Grout is not a waste form that stands up over time for immobilizing waste. It allows water to percolate through to the waste (thus leaching out contaminants) and it will break down over a period of centuries, long before iodine-129 and technetium-99 will decay. *Id.* ¶¶ AA, FF. Simply put, iodine-129 and technetium-99 will significantly outlast a grouted waste form. *Id.* As a result, iodine-129 and technetium-99 disposed to IDF in grouted secondary waste will pose a risk to groundwater. *Id.*

In fact, other DOE documents directly contradict the HSW EIS's assumptions with respect to how much iodine-129 and technetium-99 will end up in grouted secondary waste. A presentation given by DOE to Ecology on March 29, 2004, assumes that significant portions of both iodine-129 and technetium-99 will volatilize during the melting process and end up in secondary waste. *Id.* ¶¶ Z, EE, FF. With respect to iodine-129, the presentation assumes that 7.7 curies of iodine-129 will end up in ILAW glass, with 40.5 curies ending up in grouted secondary waste. *Id.* ¶ Z. This compares to the HSW EIS assumption that 22 curies will end up in ILAW glass and only 5 curies will end up in secondary waste. *Id.* In other words, the March 29 presentation assumes that more than *eight times* the amount of iodine-129 assumed in the HSW EIS will end up in secondary waste. *Id.* With respect to technetium-99, the March 29 presentation does not provide a specific estimate of curies that will end up in

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secondary waste. *Id.* ¶ FF. The presentation does, however, assume that some quantum of technetium-99 will end up in the waste, which conflicts with the HSW EIS assumption that *no* technetium-99 will find its way to secondary waste. *Id.* ¶¶ EE, FF.

In addition to the March 29 presentation, a 2003 DOE document projects iodine-129 and technetium-99 groundwater impacts from secondary waste disposal at IDF that conflict with the HSW EIS. *See* Dahl-Crumpler Aff., Ex. 3 ("Risk Assessment Supporting the Decision on Initial Selection of Supplemental ILAW Technologies, September 29, 2003, RPP-17675 Rev 0"). This document's "best estimate" with respect to iodine-129 assumes that *99 percent* of Hanford's tank waste iodine-129 will end up in grouted secondary waste. Dahl-Crumpler Aff. ¶ BB. (Recall that the HSW EIS assumes that only 5 curies of iodine-129 will end up in secondary waste.) The September 29 document models expected groundwater impacts based upon this best estimate. As projected upon the completion of the WTP's processing of Hanford's tank waste, this analysis predicts the iodine-129 groundwater concentration from the disposal of secondary waste alone to be 16 picocuries per liter (pCi/l). *Id.* ¶ CC. This is sixteen times the iodine-129 drinking water standard of 1 pCi/l, *id.*, without even considering the effect of this additional waste on Hanford's *existing* iodine-129 contamination.

The 2003 document presents similar results with respect to technetium-99. The document's "best estimate" is that 0.1 percent of Hanford's tank waste technetium-99 will end up in secondary waste. *Id.* ¶ GG. Projecting the "best estimate" modeling to

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full completion of WTP processing, the total curies of technetium-99 disposed with secondary waste will result in a groundwater concentration of 5.48 pCi/l. *Id.* Using the document's "high estimate," the number jumps to 548 pCi/l. *Id.* This compares to a drinking water standard for technetium-99 of 900 pCi/l. *Id.* Even if the individual contribution of technetium-99 from secondary waste disposal at IDF is not projected to exceed drinking water standards, it will add to the existing contamination and cumulative impact at the Hanford Site. *Id.*

The HSW EIS does not reflect these expected impacts to groundwater. The HSW EIS assumes nowhere near as much iodine-129 in secondary waste as the other DOE documents suggest, and none of the technetium-99 considered in the other documents. *See id.* ¶¶ Y, Z, BB, EE, FF, GG. It fails to consider groundwater impacts as a result, including the sixteen-fold exceedence of the iodine-129 drinking water standard predicted in DOE's 2003 document. *Id.* ¶¶ DD, HH. Because of this, the HSW EIS fails to consider *any* mitigation measures that might be taken with respect to grouted secondary waste disposal at IDF. *Id.* It also fails to consider secondary waste impacts in relation to other waste disposal planned at IDF, including the disposal of off-site LLW and MLLW.

Finally, it is difficult to ascertain from the HSW EIS the individual impact of a facility such as IDF in light of the cumulative impact of existing contamination in the central Hanford area. Dahl-Crumpler Aff. ¶ JJ; Goswami Aff. ¶¶ Q, R. While the HSW EIS's analysis may show whether an individual unit like the IDF is expected to

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meet a given environmental standard, the EIS does not provide an apparent basis to sum the IDF's impact to impacts that exist from other Hanford Site contributors. *Id.* This is due to the manner in which the cumulative analysis was undertaken in the HSW EIS, which relied on cobbling together individual site modeling with a previous composite analysis. Dahl-Crumpler Aff. ¶ JJ. The differing inputs and assumptions used in the disparate components of this effort make it extremely difficult to examine the cumulative groundwater impacts of the IDF location. *Id.*

This fact takes on particular significance when it is considered in light of a statement in the WM PEIS concerning mitigation for cumulative impacts expected at Hanford. After projecting that eighteen parameters would be exceeded by adding more waste to Hanford's existing contamination, the WM PEIS concluded: "To meet drinking water standards, performance based waste acceptance criteria may be needed for onsite disposal of LLMW and LLW." Power Aff. ¶ HH. Simply put, the fact that it is difficult to determine IDF's expected contribution to cumulative impacts in the HSW EIS undermines the document's utility as a decision-making tool to evaluate the need for such measures. *See* Goswami Aff. ¶¶ H, Q; Dahl-Crumpler Aff. ¶ JJ. This, in turn, confounds the document's very purpose under NEPA.

This Court is to employ a "rule of reason" to determine whether the HSW EIS contains a reasonably thorough discussion of the significant aspects of probable environmental consequences. *See, e.g., Hells Canyon Alliance*, 227 F.3d at 1177. Under this standard, the Court's task is to ensure that the agency has taken a "hard look" at

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those consequences. *Id.* By failing to adequately account for and analyze the potential impacts of hazardous chemical waste sources; by failing to consider its own contemporaneous inventory and impact projections that directly contradict the assumptions and conclusions in the HSW EIS; and by failing to provide a basis to judge the contribution of a facility such as IDF to cumulative site impacts, DOE has failed to take a "hard look" at potential groundwater impacts in the HSW EIS. This undermines the analysis of groundwater impacts at IDF, including those from the disposal of off-site LLW and MLLW. Goswami Aff. ¶¶ H, L, M. In sum, based on the selected factors presented in this memorandum, the analysis of groundwater impacts and risks in the HSW EIS is inadequate under NEPA. Once again, the State has a reasonable probability of success on the merits of its NEPA claim, or at a minimum has raised serious questions sufficient to justify an expanded preliminary injunction.

c. The EIS's declaration that Hanford's groundwater is "irreversibly and irretrievably committed" is arbitrary and capricious and confirms DOE's failure to appropriately tier its environmental review

In Section 5.15 of the HSW EIS, DOE declares that unspecified portions of Hanford's groundwater constitute an "irreversibly and irretrievably committed" natural resource:

> DOE anticipates that *current contamination* would preclude the beneficial use of groundwater underneath portions of the Hanford Site for the foreseeable future. *It is assumed that tritium and iodine-129 groundwater plumes would exceed the drinking water standards for the next several hundred years*.
>
> Within a few hundred years after disposal of wastes evaluated in the HSW EIS, some mobile radionuclides from the wastes would reach the vadose

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> zone surrounding disposal areas and groundwater beneath the Hanford Site. Results of computer simulations…predict that levels of these contaminants in groundwater would be below DOE benchmark drinking water standards at 1 kilometer…
>
> However, *due to uncertainties in inventory estimates and mobility parameters*, DOE considers groundwater underneath portions of the Hanford Site *that is proximate to, or downgradient from, waste sites at Hanford to be irretrievably committed*.

HSW EIS at 5.300 (emphasis added) (Ex. 4 to Power Aff.).

DOE makes its declaration under 42 U.S.C. § 9607(f)(1), a portion of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) that addresses liability for damages to natural resources. That section provides:

> *[N]o liability* to the United States or State or Indian tribe *shall be imposed . . . where* the party sought to be charged has demonstrated that *the damages* to natural resources complained of *were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement . . . .*

42 U.S.C. § 9607(f)(1) (emphasis added).

DOE's declaration is problematic for at least three reasons. First, it appears to be an attempt by DOE to unilaterally grant itself a defense to natural resources liability for its own *historic* releases of contamination, as opposed to commitments of natural resources that *will result* from proposed actions. Second, the declaration inappropriately assumes that DOE is not *required* to remediate Hanford groundwater. Finally, the declaration brings into question whether DOE's decision in selecting Hanford as a repository for off-site LLW and MLLW would have been different if it had been made at the time of the WM PEIS. This confirms the concern addressed in Section III.D.2.a., *supra*, that DOE has not appropriately tiered its environmental review.

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DOE's declaration goes beyond the legal scope of 42 U.S.C. § 9607(f)(1), as is clear from the Senate Report that accompanied the passage of CERCLA. *See* S. Rep. No. 96-848 (1980), (Ex. A to the Affidavit of Andrew A. Fitz (Fitz Aff.)). As the Report explains, Section 9607(f)(1) is intended to insulate governmental entities from natural resource damages liability when proceeding on an action or project *that will result* in a "trade-off" of hazardous substances affecting natural resources, so long as that trade-off is identified in the EIS. It is not intended to serve as an after-the-fact mechanism for agencies to eliminate their own existing potential liability through the inclusion of a few magic words in an EIS:

> [I]n certain instances Federal officials make decisions in which resource trade-offs must necessarily be made, and in such cases liability for resource damage under [CERCLA] should be limited. Specifically Section 4(b) contains a provision that no liability to the United States or any State for natural resource damage will accrue where the party sought to be charged under the Act has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement . . . *and the decision to grant a permit or license authorized such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license*. For this provision to apply, a Federal agency in proceeding with an action or project must have completed a project-or action-specific environmental impact statement . . . and such analysis must identify the resource damage *which will occur* from releases of hazardous substances *if such action or project is carried out*.

Id. (emphasis added).

The declaration in the HSW EIS exceeds this scope. The declaration is broad enough to capture all of Hanford's current (historic) groundwater contamination. This contamination, however, was neither preceded by an "irreversible or irretrievable"

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declaration in an EIS, nor was it subject to any permit terms authorizing the releases that created the contamination. Furthermore, to the extent the declaration goes beyond specific impacts identified from the proposals evaluated in the EIS, it goes beyond the scope of the EIS in its declaration.

Moreover, DOE lacks authority to unilaterally determine that it is relieved of the obligation to remediate Hanford's groundwater. Hanford's groundwater contamination is being addressed under CERCLA and RCRA authorities. Neither Ecology nor the United States Environmental Protection Agency (EPA) have relieved DOE of its obligation to remediate groundwater at Hanford. Power Aff. ¶ OO.

A March 16, 2004 letter to DOE from EPA (which oversees much of Hanford's groundwater cleanup under CERCLA) echoes the above points. EPA also points out that as a factual matter, it is premature for DOE to make an irreversible and irretrievable declaration:

> Such a determination appears to be incorrect with respect to the proposed project, as those conditions are being addressed consistent with CERCLA and RCRA cleanup programs. The ability to address existing groundwater conditions with the proposed project is beyond the scope of this EIS. The record(s) of decision for the HSW EIS should clarify that no irreversible and irretrievable commitment of groundwater is being made as a consequence of implementing the preferred alternative and that ongoing cleanup programs will be used to address historic releases with the goal of groundwater restoration.

Power Aff. Ex. 18. DOE's declaration is contrary to law and is arbitrary and capricious.

Finally, as it relates to historic groundwater contamination, DOE's declaration in the HSW EIS goes beyond any conclusion made in the WM PEIS. The WM PEIS did

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not conclude that Hanford's (or any site's) groundwater would be irreversibly and irretrievably committed. In a discussion of such commitments regarding land resources, the WM PEIS stated:

> Under current law, such commitments documented in an environmental impact statement or comparable environment analyses are immunized from natural resource damage liability. Similar commitments could occur in siting facilities based on decisions that result from this PEIS. In addition, *DOE will attempt to identify sensitive resources prior to siting in order to minimize the impact that long-term disposal may have on natural resources of value to humans and the environment.*

Power Aff. ¶ II (emphasis added) (WM PEIS at 12-12).

We do not know whether, or how, a declaration such as that contained in the HSW EIS might have influenced the year 2000 selection of disposal sites had it been known at the time. However, there is no question that information suggesting that the groundwater at Hanford had already been damaged beyond repair should have been carefully considered in evaluating Hanford as a host for disposal of significant quantities of additional waste. Because DOE failed to include adequate site-specific information in the WM PEIS to support its selection of Hanford as a regional disposal facility in the 2000 ROD, DOE never even considered the issue. Once again, Washington is likely to succeed on the merits of its NEPA claim, or has at least raised "serious questions" sufficient to gain an expanded preliminary injunction.

IV. CONCLUSION

The State of Washington has demonstrated that it is likely to succeed on the merits (or, at a minimum, that serious questions are raised); that DOE's proposed action will result in irreparable injury; that the balance of hardships tips in favor of the State;

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1 and that the public interest favors issuance of an injunction. Therefore, Washington
2 respectfully requests that this Court grant the State's Motion for Expanded Preliminary
3 Injunction and enjoin the Defendants from shipping additional LLW and MLLW to the
4 Hanford Site pending final resolution of this litigation.

5 DATED this 16 day of August, 2004.

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