JOSEPH E. SHORIN III
ANDREW A. FITZ
COLLEEN G. WARREN
MICHAEL L. DUNNING
Assistant Attorneys General
P.O. Box 40117
Olympia, WA 98504-0117
Phone: (360) 586-6770

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
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JAMES R. LARSEN, CLERK
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

SPENCER ABRAHAM, Secretary of Energy, and the UNITED STATES DEPARTMENT OF ENERGY,

Defendants.

NO. CT-03-5018-AAM

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. This is an action for declaratory and injunctive relief arising from the United States Department of Energy's (DOE) decision to ship radioactive and radioactive/hazardous mixed transuranic waste across the nation to the Hanford Nuclear Reservation in Eastern Washington for treatment and/or indefinite storage pending potential ultimate disposal in New Mexico. DOE made its decision to ship these wastes to Hanford for treatment and/or storage without complying with the requirements of the National Environmental Policy Act (NEPA). DOE's decision is

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

arbitrary and capricious, not in accordance with the law, and without observance of procedures required by law, in that it violated NEPA and applicable implementing regulations and relies on outdated and incorrect information concerning the volume and sources of wastes needing disposition, and concerning the potential impacts from transportation of these wastes to Hanford, and storage and/or treatment of these wastes at the Hanford Site.

DOE is already storing more than 75,000 drums or drum equivalents of suspected transuranic waste at Hanford in violation of the Washington Hazardous Waste Management Act (HWMA), Wash. Rev. Code 70.105. Storage at Hanford of the additional wastes at issue in this lawsuit will likewise violate the HWMA.

2. The State of Washington requests a judgment declaring that DOE's decision to treat and/or store transuranic wastes and mixed transuranic wastes at Hanford violates NEPA and applicable implementing regulations, is arbitrary and capricious, is not in accordance with the law, and is without observance of procedures required by law; and that such treatment and/or storage violates the HWMA. Further, the State seeks preliminary and permanent injunctive relief requiring DOE to rescind its decision to ship transuranic and mixed transuranic wastes to Hanford, and prohibiting DOE from shipping any additional such wastes to Hanford until DOE 1) has fully complied with NEPA, 2) has undertaken a decision making process based on current facts and circumstances, in full compliance with the Administrative Procedure Act (APA), and 3) has complied with the HWMA.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

II. JURISDICTION AND VENUE

3. This action arises under the National Environmental Policy Act (NEPA) of 1969, as amended, 42 U.S.C. § 4321 *et seq.*, and its implementing regulations, adopted by the Council on Environmental Quality (CEQ) and applicable to all agencies (CEQ NEPA Regulations), 40 C.F.R. Parts 1500-1508, and the DOE's implementing procedures, 10 C.F.R. Part 1021. Plaintiff seeks Judicial Review pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, authorizing judicial review of all agency actions. This Court also has jurisdiction over this action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Finally, jurisdiction over Plaintiff's claim to enforce the HWMA arises pursuant to Wash. Rev. Code § 70.105.120. The Court has Supplemental Jurisdiction over the HWMA claim pursuant to 28 U.S.C. § 1367.

4. The United States has waived sovereign immunity with respect to the claims asserted herein under 5 U.S.C. § 702 (APA) and 42 U.S.C. § 6961 (Resource Conservation and Recovery Act).

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

III. PARTIES

6. Plaintiff is the State of Washington. The State owns the groundwaters and surface waters of the State, including the groundwater beneath the Hanford Site, the Columbia River, and all ground and surface waters within the State over or through which DOE must transport the radioactive and hazardous transuranic wastes at issue. The State also owns numerous roads and highways over which DOE will

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

transport its waste to Hanford. State Road 240 runs through the Hanford Site. Other state roads and highways in the vicinity include State Roads 14, 24, and 224, and State Highways 12 and 395. The State's waters, highways, and roads are threatened by the transport of radioactive and hazardous transuranic wastes to Hanford, and by Defendants' treatment and/or indefinite storage of those wastes at Hanford, in violation of NEPA, the APA, and the HWMA.

7. Additionally, the State has a direct and tangible interest in the health, safety, and welfare of its citizens, and of the lands, air, and waters of the State, which are threatened by Defendants' actions. Finally, the State, through its Department of Ecology, is responsible for implementing the HWMA, Wash. Rev. Code § 70.105 *et seq.*, at facilities that treat, store, or dispose of hazardous or dangerous wastes, including the Hanford Site.

8. Defendants' plan to transport radioactive and hazardous transuranic wastes to Hanford, and to treat and/or indefinitely store such wastes there without complying with the HWMA, poses significant risks to human health and the environment. These risks include risks from potential pollution to groundwaters and surface waters of the State, such as the Columbia River, and to adjoining state-owned lands, which are used by the State and its people for commerce, fishing, recreation, habitat, aesthetics, tourism, and maintaining the cultural identity of the State. Additionally, the treatment and/or indefinite storage of off-site radioactive and hazardous transuranic waste at Hanford will only complicate Defendants' already troubled effort to cleanup existing radioactive and hazardous wastes,

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Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

including transuranic wastes currently located at Hanford, and will frustrate the State's regulatory efforts to require DOE to bring its activities and facilities at the Hanford Site into compliance with applicable law.

9. Defendant Spencer Abraham is the Secretary of the United States Department of Energy, and is the chief administrative officer of DOE. Secretary Abraham is the official ultimately responsible for the waste management decisions of DOE, including DOE decision making with respect to storage, treatment, and disposal of DOE's transuranic and mixed transuranic wastes.

10. Defendant United States Department of Energy (DOE) is an executive department of the United States, created pursuant to 42 U.S.C. § 7131. DOE owns and operates the Hanford Site near Richland, Washington. Hanford is one of the most contaminated places on the planet. DOE has decided, pursuant to a flawed NEPA process, to utilize the Hanford site for an indefinite period of time for treatment and/or storage of radioactive and hazardous transuranic wastes currently located at other DOE sites.

IV. FACTS

11. As a consequence of over fifty years of nuclear weapons research, production, and reprocessing, DOE and its predecessors generated large quantities of radioactive and mixed (hazardous and radioactive) waste at sites across DOE's national nuclear weapons complex.

12. DOE is responsible for the treatment, storage, and disposal of vast inventories of radioactive and mixed waste that have resulted from its past nuclear

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Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

energy and weapons research, production, and reprocessing, and from decontamination and decommissioning of former nuclear weapons research, production, and reprocessing sites.

13. At its peak, the federal nuclear weapons complex consisted of sixteen major facilities, including large sites in Idaho, Washington, and South Carolina. The most contaminated of these sites is the Hanford Site in Washington State.

14. Between 1943 and 1987, the United States produced plutonium at the Hanford Site for use in nuclear weapons. Plutonium production and other activities at Hanford created enormous amounts of radioactive, hazardous, and mixed wastes, some of which were disposed of directly into the ground, and some of which were stored in various forms at Hanford.

15. Today, Hanford contains over 1,500 identified contaminated sites and structures, which individually and collectively pose substantial risks to human health and the environment. For example, there are 54 million gallons of high-level radioactive waste stored in 28 double-shell tanks and 149 single-shell tanks, at least 67 of which have already leaked one million or more gallons of waste to the surrounding soil and to groundwater that flows toward the Columbia River; approximately 1,500 metric tons of spent fuel and sludge stored underwater in deteriorating K-Basins located a mere 400 yards from the Columbia River, and 30 metric tons of non-defense spent nuclear fuel stored underwater in other storage basins; approximately 3,700 kilograms of plutonium stored in aging facilities; approximately 640,000 cubic meters of low-level radioactive waste already disposed

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Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

or planned by DOE for disposal at Hanford in shallow, unlined trenches; approximately 920,000 cubic meters of mixed low-level radioactive waste already disposed at Hanford (or planned by DOE for disposal at Hanford) in land disposal trenches; and long-term release hazards through Hanford's vadose zone and groundwater. One cubic meter is roughly equivalent to the volume contained by five 55-gallon drums.

16. Among the wastes generated during plutonium production at Hanford were large quantities of transuranic wastes. Transuranic wastes are wastes that have been contaminated with radioactive elements that have an atomic number higher than that of uranium. By definition, transuranic wastes contain more than 100 nanocuries of alpha-emitting transuranic isotopes per gram of waste, and have half-lives of greater than 20 years. Transuranic wastes contain radioactive elements such as plutonium. Some transuranic wastes also contain hazardous constituents (mixed transuranic wastes), and are regulated under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq*.

17. Transuranic waste is classified according to the radiation dose at a package surface. "Contact-handled" transuranic waste has a radiation dose at package surface of 200 millirems per hour or less. This packaged waste can be handled directly by personnel. "Remote-handled" transuranic waste has a radiation dose at package surface of greater than 200 millirems per hour, and must be handled with special machinery designed to shield workers from radiation.

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Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

18. Between 1970 and 1985, DOE "retrievably stored" at Hanford approximately 16,000 cubic meters (equivalent to 80,000 fifty-five gallon drums) of known or suspect transuranic and transuranic mixed waste in drums and other containers. This waste remains on the Hanford Site today. Almost none of this waste has been "designated" (i.e., characterized as required by state and federal regulations), and nearly all of it is partially buried in unlined trenches at the Hanford Low-Level Burial Grounds.

19. Washington State attempted to work with DOE to establish an agreed compliance schedule for the retrieval, designation, treatment, and ultimate transport of this material for disposal at the Waste Isolation Pilot Plant (WIPP), a repository near Carlsbad, New Mexico constructed specifically for the deep geologic disposal of transuranic waste. However, to date, DOE has not made enforceable commitments for this work, and has made little progress in dealing with the known and suspect transuranic and transuranic mixed waste already at the Hanford Site.

20. Washington State regulates DOE's management of hazardous wastes and radioactive/hazardous "mixed" wastes at Hanford pursuant to the HWMA. The State is authorized by the United States Environmental Protection Agency (EPA) to operate the State's hazardous waste program in lieu of Federal RCRA requirements.

Facilities in the State that treat, store, and/or dispose of hazardous waste must be permitted by the Washington State Department of Ecology (Ecology). Facilities that were in existence at the time that they became subject to HWMA and RCRA requirements may operate under limited "interim status standards" pending

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Ecology's issuance of a final facility permit, if the facilities timely submit to Ecology a "Part A permit application" and comply with the interim status standards set forth in the regulations. Wash. Admin. Code § 173-303-805.

21. Ecology has issued to DOE a single final facility permit for the entire Hanford Site, pursuant to Wash. Admin. Code § 173-303-806. However, due to the number and complexity of treatment, storage, and disposal (TSD) units at Hanford, final facility standards have not been established for all TSD units at the site. DOE is subject to a compliance schedule for submitting final status permit ("Part B") applications for numerous TSD units. Once approved by Ecology, those standards will be incorporated, on a unit-by-unit basis, into the Hanford Site final status permit.

22. DOE has informally advised Ecology that DOE may treat and/or store off-site transuranic and transuranic mixed waste at one or more of the following TSDs at Hanford: the Low-Level Burial Grounds, T-Plant, the Central Waste Complex, and the Waste Receiving and Processing Facility. Because final facility standards have not been approved for any of these units, they are all operated subject to interim status facility standards.

23. In 1989, Ecology, EPA, and DOE entered into the "Hanford Federal Facility Agreement and Consent Order" (HFFACO). The HFFACO is both a federal facility agreement pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, and a consent order pursuant to the RCRA, 42 U.S.C. §§ 9601-6922k, and Washington's

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

HWMA. The HFFACO establishes numerous milestones (schedules and associated regulatory requirements) for cleanup of the Hanford Site, and for bringing Hanford facilities into compliance with applicable requirements.

24. DOE's Office of Environmental Management is responsible for a variety of waste management and environmental restoration activities, including but not limited to managing a large amount and variety of radioactive and hazardous wastes; providing safe storage for wastes while building and operating a variety of treatment facilities to prepare wastes for disposal; and cleaning up areas of existing contamination and pollution.

25. In May 1997, DOE, through its Office of Environmental Management, issued its Final Waste Management Programmatic Environmental Impact Statement for Managing Treatment, Storage, and Disposal of Radioactive and Hazardous Waste (PEIS). The purpose of the PEIS was to help DOE identify and select the optimal national configuration for the management (treatment, storage, or disposal) of five types of waste:

- Treatment and disposal of mixed low-level radioactive waste
- Treatment and disposal of low-level radioactive waste
- Treatment and storage of transuranic waste
- Storage of treated (vitrified) high-level waste canisters until a geologic repository is available
- Treatment of nonwastewater hazardous waste

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

26. With respect to transuranic waste, the PEIS evaluated alternatives for storage and treatment of transuranic waste located at sites across the DOE national nuclear weapons complex. The PEIS evaluated alternatives for storage and treatment on a centralized, regionalized, and decentralized basis.

27. The PEIS identified DOE's preferred alternative for treatment and storage of transuranic waste as having nine major DOE sites (including Hanford) treat and store their own waste onsite (decentralized basis), and for three sites (the Idaho National Engineering Laboratory, Oak Ridge Reservation, and Savannah River Site) to serve as regional treatment and storage facilities.

28. While the PEIS indicated it would be the basis for Records of Decision on sites at which waste management activities would occur, the PEIS indicated that decisions regarding the specific technologies to be employed, and actual locations of waste management facilities at particular DOE sites, would not be made on the basis of the PEIS, but rather on sitewide or project specific NEPA reviews.

29. On January 23, 1998, DOE published a Record of Decision on the Treatment and Storage of Transuranic Waste (ROD). The ROD conveyed DOE's decision that each of the DOE sites that had or would generate transuranic waste would prepare and store its own transuranic waste on-site. The ROD noted that DOE may, in the future, decide to ship some transuranic wastes from sites where it may be "impractical" to prepare them for disposal to sites where DOE has or will have the necessary capability. The ROD listed Hanford as among the sites that could receive transuranic waste from other sites. However, the ROD indicated that

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

"any future decisions regarding transfers of [transuranic] wastes would be subject to appropriate review under the National Environmental Policy Act."

30. DOE did not undertake the additional NEPA review contemplated by the 1998 ROD before deciding to transfer transuranic wastes to Hanford from other DOE sites.

31. On May 15, 2002, DOE distributed its Draft Hanford Site Solid Waste Environmental Impact Statement (EIS) (Dated April 2002). This Draft EIS indicates that it is a tiered environmental review document intended to address local decisions needed to implement the RODs issued pursuant to the PEIS. DOE has not yet published a Final Hanford Site Solid Waste EIS. In fact, based on widespread public and agency criticism of the Draft EIS, DOE has indicated that it intends to publish a Revised Draft EIS in the spring of 2003. DOE intends to take public comment on the Revised Draft EIS. Therefore, publication of the Final Hanford Site Solid Waste EIS and subsequent ROD(s) will take several months.

32. On September 6, 2002, DOE published in the Federal Register a Notice of a Revised Record of Decision for the Treatment and Storage of Transuranic Waste. The Revised ROD was dated August 27, 2002. It indicated that DOE had decided to transfer to Hanford 27 cubic meters of transuranic waste (including mixed waste) from the Battelle Columbus Laboratory (Battelle) in Columbus, Ohio, and 9 cubic meters of transuranic waste (including mixed waste) from the Energy Technology Engineering Center (ETEC) in Canoga Park, California. A copy of the Revised ROD is attached to this complaint.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

33. According to the Revised ROD, DOE plans to ship from Battelle to Hanford approximately 115 (55-gallon) drums of remote-handled transuranic waste and approximately 10 drums of contact-handled transuranic waste. DOE has informed the State that the waste contains the following radioactive constituents: cesium, plutonium, strontium, curium, americium, cobalt, and uranium. Some of the inventory may also be contaminated (mixed) with one or more of the following hazardous waste constituents: barium, chromium, lead, mercury, silver, benzene, carbon tetrachloride, methyl ethyl ketone, and trichloroethylene. Exposure to the radiological components in these shipments could cause significant health effects, including cancer and death. Exposure to the hazardous chemicals can be toxic to the nervous system and the kidneys, as well as also posing cancer dangers.

34. According to the Revised ROD, DOE also intends to ship from ETEC to Hanford approximately 15 to 34 drums of remote-handled transuranic waste and approximately 11 drums of contact-handled transuranic waste. DOE has informed the State that the waste includes the radioactive constituents plutonium, americium, cesium, and strontium. Hazardous constituents include mercury, cadmium, copper, lead, silver, mercury, and volatile organics. The ETEC waste also contains Polychlorinated Biphenyls (PCBs). Exposure to these materials can cause serious health effects. These materials pose significant risks to human health and the environment. Ionizing radiation from the radioisotopes can cause cancer and death in humans, acute radiation syndrome, and other significant health effects. The heavy

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

metal hazardous constituents, such as lead and mercury, are toxins that can affect the central nervous system.

35. WIPP is not currently authorized by the State of New Mexico and the EPA to accept remote-handled transuranic waste or transuranic waste contaminated with PCBs. DOE does not expect to begin shipping remote-handled transuranic waste to WIPP until late 2004 or 2005. However, there is no guarantee that WIPP will *ever* accept remote-handled transuranic waste or transuranic waste contaminated with PCBs. Thus, these wastes will be stored at Hanford indefinitely.

36. According to a briefing paper provided to the State by DOE, "[P]otentially, any Site within the DOE Complex could ship [transuranic] waste to Hanford." DOE has already identified fifteen sites, with a total of 1,596 cubic meters (equivalent to 7,980 fifty-five gallon drums) of contact-handled transuranic waste that it is considering shipping to Hanford. DOE has identified seven sites, with a total of 142 cubic meters (710 fifty-five gallon drum equivalents) of remote-handled transuranic waste that it is considering shipping to Hanford.

37. On Thursday, October 24, 2002, the Federal Bureau of Investigation issued a warning to state and local law enforcement officials about a possible terrorist attack against transportation systems. While the primary focus of the warning was on the nation's railroads, the report is a reminder of the need for heightened scrutiny of terrorist risks to our nation's transportation system, particularly where radioactive and hazardous substances are involved.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

38. There is no compelling reason for DOE to ship these wastes to the Hanford Site at this time. There are alternatives available to DOE, such as treating and storing the wastes at their present location, pending shipment to and final disposal at WIPP.

39. On Thursday, October 24, 2002, DOE informed Thomas Fitzsimmons, Director of the Washington State Department of Ecology, that the first shipment from ETEC or Battelle would occur on November 5, 2002.

40. On Tuesday, October 29, 2002, upon learning that these shipments were imminent, Washington State Governor Gary Locke and Attorney General Christine Gregoire wrote to DOE Secretary Spencer Abraham. In their letter, the Governor and Attorney General objected to the proposed shipments on the basis that DOE had not made adequate progress addressing the transuranic waste already at Hanford, had not clearly defined how much additional transuranic waste DOE intended to ship to Hanford nor how it would be managed there, and had not fully considered the risks associated with transporting such wastes to and managing them at Hanford.

41. On Wednesday, October 30, 2002, Mr. Fitzsimmons received via facsimile a letter from Keith Klein, Manager of DOE's Richland (Hanford) Field Office. The letter indicated that DOE would not ship any transuranic waste to Hanford during the Week of November 4-8 as it had planned, and that DOE would provide a one-week notice to the State prior to any shipments.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

42. On Thursday, December 5, 2002, Mr. Fitzsimmons had a telephone discussion with Jessie Roberson, DOE's Assistant Secretary for Environmental Management. Ms. Roberson advised Mr. Fitzsimmons that DOE believed that it must begin shipping transuranic waste to Hanford from DOE's ETEC facility in California by Thursday, December 19, 2002. (This conversation did not constitute the seven-day notice described in the preceding paragraph). During this discussion, Mr. Fitzsimmons reiterated the State's concerns, as outlined in the Governor's and Attorney General's letter, and advised Ms. Roberson that if they could not reach an accommodation of the State's concerns, the State would file a lawsuit to stop the shipments until the State's concerns were addressed.

43. On Wednesday, December 11, 2002, Mr. Fitzsimmons received via facsimile a letter from Mr. Klein formally notifying the State of DOE's intent to begin shipping both Battelle and ETEC transuranic waste to Hanford on or after Wednesday, December 18, 2002.

44. In an effort to avoid litigation between DOE and the State, Mr. Fitzsimmons traveled to Washington D.C. and met with Ms. Roberson and other senior DOE officials to discuss the matter on Friday, December 13, 2002.

45. During the December 13 meeting, Ms. Roberson made certain commitments intended to address the State's concerns regarding the proposed shipments of transuranic waste. DOE agreed to negotiate with the State and EPA new requirements for retrieval, characterization, and management of transuranic wastes at Hanford. These requirements would take the form of new milestones and

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

the modification of existing milestones under the HFFACO. The parties set March 1, 2003 as the deadline for reaching agreement on such requirements. Additionally, DOE also committed that it would not proceed with any future shipments, beyond those outlined in the August 27, 2002 Revised ROD, until March 1, 2003. DOE also committed to revise, pursuant to public comment, and reissue a draft of the Hanford Site Solid Waste EIS, and submit that revised draft for public comment. Finally, DOE committed to pursue a collective dialogue with interested states with the objective of developing strategies to guide and facilitate the disposition of transuranic waste located throughout the DOE national complex.

46. In return for DOE's commitments as described above, Mr. Fitzsimmons committed that the State of Washington would forgo, until March 1, 2003, litigation to stop DOE shipments of transuranic waste described in the August 27, 2002 ROD.

47. DOE began shipping ETEC and Battelle transuranic waste to the Hanford Site on or about December 20, 2002. On or about December 20, 2002, Hanford received four shipments of transuranic waste, two each from ETEC and Battelle. The Hanford Site received two additional shipments from Battelle on or about February 6, 2003. To date, DOE has completed six shipments, containing a total of 40 drums of transuranic waste, of which 13 drums are contact-handled and 27 are remote-handled transuranic waste.

48. Following the December 13, 2002 meeting, the State, EPA, and DOE entered into a period of intensive negotiations. A fundamental premise of those negotiations was that the resulting agreement would include HFFACO milestones

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

for retrieving, characterizing, and preparing (i.e., "certifying") Hanford Site transuranic waste for shipment to WIPP for disposal.

49. On Thursday, February 27, 2003, after weeks of detailed negotiations founded on these principles, and less than 48 hours prior to the March 1, 2003 deadline for completion of the negotiations, DOE notified State officials that it would not agree to any enforceable milestones for certification of Hanford Site transuranic waste for disposal at WIPP.

50. Having secured no enforceable commitments for certifying transuranic waste already at Hanford, the State has no assurance that DOE will have the capability in place at Hanford to prepare for shipment to WIPP transuranic waste sent to Hanford from other DOE sites for "temporary" storage, let alone the approvals needed to actually dispose of that waste at WIPP.

51. Additional shipments of transuranic waste to Hanford are imminent. DOE has already notified the State that it intends to make two shipments of transuranic waste from Battelle to Hanford to arrive on Wednesday, March 5, 2003, and two more shipments from Battelle to arrive at Hanford on Wednesday, March 19, 2003. The State expects that DOE will notify it of additional shipments in the future.

V. CLAIMS FOR RELIEF

COUNT 1: Violation of § 102(2)(C) of National Environmental Policy Act

52. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 51 above.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

53. The NEPA, 42 U.S.C. §§ 4321 *et seq.*, requires that all federal agencies prepare a detailed Environmental Impact Statement (EIS) on every proposal for a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). The EIS must contain a detailed discussion of environmental impacts (40 C.F.R. § 1502.16), including cumulative environmental impacts (40 C.F.R. § 1508.7), alternatives to the proposed action (40 C.F.R. § 1502.14), and appropriate measures to mitigate adverse environmental impacts (40 C.F.R. § 1502.14, .16).

54. DOE's decision to transport to Hanford and to process and/or store at Hanford, contact-handled and remote-handled transuranic and mixed transuranic waste from other DOE sites is a major federal action significantly affecting the quality of the human environment for which NEPA requires the preparation of an EIS.

55. The PEIS prepared by DOE in May 1997 was inadequate under NEPA to support DOE's decision to transport to Hanford, and to process and/or store at Hanford, transuranic and mixed transuranic waste from other DOE sites because the PEIS did not adequately analyze alternatives for treatment and/or storage of said waste at the Hanford Site, nor the cumulative impacts of adding additional waste to Hanford—a facility that is already woefully out of compliance with environmental requirements.

56. Although the PEIS indicated that future decisions regarding the transfer of such wastes to Hanford and other sites would be made on the basis of appropriate

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Ecology Division
PO Box 40117
Olympia, WA 98504-0117
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NEPA review, DOE did not conduct such a review prior to deciding to ship the wastes to Hanford.

57. Given the large, complex nature of the Hanford Site, the multiple treatment, storage, and disposal facilities at Hanford, the hundreds of contaminated sites and waste streams, and the non-compliant storage of thousands of cubic meters of transuranic waste already at Hanford, NEPA requires that DOE prepare a programmatic EIS or a sitewide EIS before deciding to ship additional transuranic wastes across the country for indefinite storage and for treatment at Hanford. DOE's own regulations, at 10 C.F.R. § 1021.330, require the preparation of such a site-wide analysis, and require that it be updated at least every five years. To date, DOE has failed to do either.

58. NEPA likewise requires that DOE consider the cumulative impacts on the environment that result from managing at the Hanford Site all transuranic waste that DOE reasonably foresees it may send to or otherwise manage at Hanford, as well as the cumulative effects in relation to the management of the wastes already at the Hanford Site. To date DOE has failed to do so.

59. The PEIS was an inadequate basis for DOE's August 27, 2002 decision to ship transuranic waste to Hanford because it relied on out-of-date information concerning transportation of this waste and its potential impacts. The census data used to evaluate these factors was from 1990, and populations along the likely transportation corridors, and nearby the Hanford Site, have increased significantly since 1990.

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Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

60. NEPA requires that DOE prepare a supplemental EIS if DOE makes substantial changes in the proposed action that are relevant to environmental concerns, or where there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9; 10 C.F.R. § 1021.314.

61. The increases in populations along the likely transportation corridors and near the Hanford Site since 1990, coupled with the heightened risk of terrorist attacks to transportation of radioactive and hazardous wastes, are significant new circumstances and information relevant to environmental concerns and bearing on DOE's proposed action and its impacts. DOE is therefore required to prepare a supplemental EIS prior to its decision to transport transuranic waste to Hanford for treatment and/or storage. The supplemental EIS should evaluate all alternatives for storage and treatment of transuranic wastes pending final disposition at WIPP. DOE has failed to prepare such a supplemental EIS.

62. By virtue of DOE's failure to comply with NEPA, DOE's decision to ship additional transuranic wastes to Hanford without adequately analyzing alternatives to the treatment and/or storage at the Hanford Site, without adequately considering the cumulative impacts of adding additional waste to Hanford, and without preparing a supplemental EIS based on significant new circumstances and information not fully informed, incomplete, and inadequate.

63. By virtue of DOE's failure to comply with NEPA, the public has been denied the opportunity to review and comment on DOE's plan to transport

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

transuranic wastes to Hanford, and on how DOE intends to store and treat such wastes once they arrive at the Hanford Site. Compliance with the procedural requirements of NEPA will ensure that DOE's plan is subject to public scrutiny.

64. Washington State will suffer irreparable harm in the event that DOE is permitted to ship additional transuranic wastes from other DOE sites for indefinite storage and treatment at Hanford without first complying with NEPA's procedural requirements for assessment of potential adverse environmental impacts. Such harm includes the risks of contamination of state-owned groundwater, contamination of the Columbia River, potential contamination of drinking water, disruption of state roads and highways, and potential public health and environmental impacts in the event of a release of radioactive or hazardous wastes during transportation of the wastes to Hanford or while the waste is at the Hanford Site.

65. Moreover, once the waste is shipped to Hanford, it will be difficult (if not impossible) to send it back, because DOE intends to close the sites from which it came. Moreover, because WIPP does not currently accept remote-handled transuranic waste, or transuranic waste contaminated with PCBs, and there is no guarantee that it will ever do so, shipment of the transuranic waste to Hanford will result in indefinite, if not permanent storage or disposal of the waste at the Hanford Site.

COUNT 2: Violation of the Administrative Procedures Act

66. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 65 above.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

67. Due to Defendants' knowing and conscious failure to comply with NEPA, Plaintiff has suffered legal wrongs because of agency action, and is adversely affected and aggrieved by agency action within the meaning of the APA, 5 U.S.C. § 702.

68. Defendants' knowing and conscious failure to comply with NEPA is arbitrary and capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful and set aside by this Court.

COUNT 3: Violations of the Washington Hazardous Waste Management Act

69. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 68 above.

70. The HWMA, Wash. Rev. Code 70.105, through its implementing regulation, Wash. Admin. Code § 173-303-140(2)(a) (incorporating by reference 40 CFR § 268.50), prohibits the storage of hazardous wastes restricted from land disposal pursuant to 40 CFR §§ 268.30-268.39 unless the storage is solely for the purpose of accumulating such quantities of the hazardous waste as necessary to facilitate proper recovery, treatment, or disposal. Mixed transuranic wastes from Battelle and ETEC are restricted from land disposal pursuant to 40 CFR §§ 268.30-268.39. Mixed transuranic wastes from Battelle and ETEC will not be stored at Hanford solely for the purpose of the accumulation of such quantities as necessary to facilitate proper recovery, treatment, or disposal. Such storage will thus

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

violate Wash. Admin. Code § 173-303-140(2)(a) (incorporating by reference 40 CFR § 268.50).

71. Moreover, since 1970, DOE began storing transuranic and other radioactive waste in boxes and drums that it buried in unlined trenches at the Hanford Site. Today, approximately 15,000 cubic meters (the equivalent of 75,000 55-gallon drums) of this waste remains in so-called "retrievable storage" at Hanford. This waste is stored in violation of RCRA and HWMA requirements that have applied to this waste since at least 1987.

72. Violations include, but are not limited to, the fact that the "retrievably stored" waste has not been designated pursuant to Wash. Admin. Code 173-303-070 (i.e., characterized) to determine what, if any, hazardous constituents may be present in the waste and how those constituents will affect the safe storage, management, and disposal of the waste, and any treatment required (e.g., whether the wastes are corrosive, ignitable, reactive, and/or toxic).

73. The long-term buried storage of "retrievably stored" waste violates Wash. Admin. Code 173-303-400(3)(a) and by incorporation 40 C.F.R. § 265.173(b), which require that a container holding hazardous waste not be stored in a manner which may rupture the container or cause it to fail.

74. Wash. Admin. Code 173-303-400(3)(a) and by incorporation 40 C.F.R. § 265.171 require that if a container holding hazardous waste is not in good condition, the owner or operator must transfer the contents to another container or manage the container in some other way that complies with the regulations.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Numerous containers in retrievable storage have significantly deteriorated and are not managed in accordance with the regulations.

75. The "retrievably stored" waste is stored in a manner that precludes weekly inspection for leaks and for deterioration caused by corrosion or other factors, as required by Wash. Admin. Code 173-303-400(3)(a) and by incorporation 40 C.F.R. § 265.174.

76. Wash. Admin. Code 173-303-400 and by reference 173-030-630(3) requires the owner/operator to ensure that the waste container's labels are not obscured, removed, or otherwise unreadable during inspections.

77. The "retrievably stored" waste is stored in a manner that obscures the waste container labels, renders them unreadable, and precludes determinations concerning whether the labels have been removed.

78. DOE has not even determined which containers of the "retrievably stored" waste are transuranic.

79. Under DOE's current plans—for which there are no enforceable commitments in place—it will not complete retrieval and preparation for shipment of retrievably stored transuranic waste until 2024, and will not begin retrieval of remote handled transuranic waste until 2013.

80. The State may exercise its enforcement authority with respect to "retrievably stored" and other wastes at Hanford, and may move to amend this Complaint to add additional claims in the future.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court,

1. Declare that Defendants' 1997 Programmatic Waste Management EIS was inadequate to support Defendants' decision, manifested in DOE's September 6, 2002 Revised Record of Decision (ROD), to ship to the Hanford Site for treatment and/or storage off-site transuranic and mixed transuranic waste. Declare that DOE's decision therefore violates NEPA and the APA and, consequently, is null and of no legal effect;

2. Grant Plaintiff preliminary injunctive relief, enjoining Defendants from shipping any additional transuranic waste or mixed transuranic waste to Hanford during the pendancy of this litigation;

3. Issue a permanent mandatory injunction requiring Defendants to rescind DOE's September 6, 2002 Revised ROD to ship transuranic and mixed transuranic waste to Hanford for treatment and/or storage, and prohibiting DOE from shipping any such waste to the Hanford Site until Defendants have complied with the following requirements:

a. Defendants have complied with the APA, NEPA, and NEPA implementing regulations, including i) preparation of a supplemental EIS that relies on current risk information (including the risk of terrorism and sabotage) and current census data to assess the risks associated with transport of the subject wastes to the Hanford Site; ii) preparation of an adequate Hanford Site Solid Waste Program EIS, that evaluates alternatives and impacts associated with storage and treatment of

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

off-site transuranic and mixed transuranic waste at Hanford, including impacts on cleanup at the Hanford Site and on DOE's ability to come into compliance with the HWMA and RCRA requirements with respect to the management of wastes at Hanford; and iii) the publication of a lawful ROD based on consideration of the above environmental documents;

b. Defendants have fully complied with the HWMA.

4. Allow Plaintiff to recover the costs of this action, including attorneys fees;

5. Grant such other and further relief as the Court deems just and proper.

DATED this 4 day of March, 2003.

CHRISTINE O. GREGOIRE
Attorney General

/S/
JOSEPH E. SHORIN III, WSBA #19705
Assistant Attorney General
(360) 586-6741

/S/
ANDREW A. FITZ, WSBA #22169
Assistant Attorney General
(360) 586-6752

/S/
MICHAEL L. DUNNING, WSBA #29452
Assistant Attorney General
(360) 586-6753

#27164
AAG for:
COLLEEN G. WARREN, WSBA #16506
Assistant Attorney General
(360) 586-4606

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760