

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE COUNCIL,)
1200 New York Ave., N.W., Suite 400)
Washington, D.C. 20005,)

PHYSICIANS FOR SOCIAL RESPONSIBILITY,)
1875 Connecticut Avenue NW, Suite 1012)
Washington, D.C. 20009,)

NUCLEAR WATCH NEW MEXICO,)
551 W. Cordova Rd., #808)
Santa Fe, New Mexico 87505-4100,)

TRI-VALLEY CARES (Communities Against a)
Radioactive Environment),)
2582 Old First St.)
Livermore, California 94551,)

ANN SUELLENTROP,)
1865 S. Pyle St.)
Kansas City, Kansas 66103,)

DR. YOLANDA HUET-VAUGHN, M.D.,)
6801 Glenwood St.,)
Overland Park, Kansas 66204,)

and)

HENRY AND JANE STOEVER,)
8405 W. 88th Terrace)
Overland Park, Kansas 66212,)

Plaintiffs,)

v.)

SAMUEL W. BODMAN, Secretary,)
Department of Energy)
1000 Independence Ave., S.W.)
Washington, D.C. 20585,)

Case: 1:08-cv-01709
Assigned To : Friedman, Paul L.
Assign. Date : 10/8/2008
Description: Admn. Agency Review

STEVEN C. TAYLOR, Manager,)
National Nuclear Security Administration)
Kansas City Site Office)
1500 East Bannister Road)
Kansas City, Missouri 64131,)
))
JAMES A. WILLIAMS, Acting Administrator,)
U.S. General Services Administration)
1800 F Street, N.W.)
Washington, D.C. 20405,)
))
and)
))
BRADLEY M. SCOTT, Regional Administrator)
General Services Administration)
1500 East Bannister Road, Rm. 2191)
Kansas City, Missouri 64131,)
))
))
Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This case challenges the Department of Energy’s (“DOE”) and the General Services Administration’s (“GSA”) failure to meaningfully consider the significant environmental impacts associated with moving a critical nuclear-weapons related production and assembly factory to a new location. For more than fifty years DOE has used the existing facility – called the Kansas City Plant (or “KCP”), and located in Kansas City, Missouri – to manufacture and procure the non-nuclear components of nuclear weapons, which comprise approximately 85% of each weapon.

2. Decades of DOE activities at the KCP have generated significant amounts of hazardous contamination that must be properly treated and remediated to protect the local environment, especially groundwater. Nonetheless, DOE, through its sub-agency, the National Nuclear Security Administration (“NNSA”), has decided to move these non-nuclear-parts

(hereafter “NNP”) activities to a new location – called “the Botts Road Site” – near the southern City limits, without considering the ongoing groundwater treatment and necessary comprehensive cleanup of the site it intends to vacate.

3. At the same time, NNSA and GSA have also failed to adequately consider the impacts on the environmentally sensitive area where the new facility is going to be located, or the complex and unlawful financing scheme being used to fund the project. Because relocating DOE’s NNP activities in this manner may have significant impacts on the environment, DOE and GSA must prepare an Environmental Impact Statement (“EIS”) pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*, before proceeding. Accordingly, the agencies’ decision not to prepare an EIS, based on a patently inadequate Environmental Assessment (“EA”) and Finding of No Significant Impact (“FONSI”), is arbitrary and capricious and contrary to law in violation of the Administrative Procedure Act (“APA”). 5 U.S.C. § 706.

JURISDICTION

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

PARTIES

5. Plaintiff Natural Resources Defense Council, Inc. (“NRDC”) is a national, non-profit organization with an office in Washington, D.C., and over 500,000 members dedicated to the protection of the environment – of whom more than 5,600 live in Missouri, and more than 650 within Kansas City. Through education, advocacy, litigation and other efforts, NRDC works to protect the environment, and its members, from environmental threats, including the threats posed by DOE’s nuclear weapons manufacturing and production operations.

6. NRDC has invested considerable organizational resources over the course of three decades advocating for the proper cleanup of environmental contamination within and adjacent to NNSA nuclear weapons complex facilities, including the Kansas City Plant – including helping to establish the legal precedent that these federal nuclear facilities are subject to the nation’s environmental laws. NRDC has also raised concerns about the Botts Road Site, and the cost savings and improved security that could be achieved by downsizing and consolidating DOE’s NNP activities at an existing secure DOE site, such as Sandia National Laboratory (“SNL”) in Albuquerque, New Mexico. NRDC has submitted comments and otherwise participated in the public comment opportunities related to this process, and is also heavily involved in assessing DOE’s effort to modernize the overall nuclear weapons complex, of which this project is an integral part.

7. NRDC’s ability to participate effectively in DOE’s decision-making regarding its NNP activities, and thereby to protect the environment and its members, is injured by the federal defendants’ failure to comply with NEPA and the APA, because, by violating these statutory provisions, defendants are denying NRDC information to which the organization is statutorily entitled, and, by failing to address the legacy of contamination at the existing facility, and the environmental risks associated with the Botts Road Site, defendants are threatening these sites and surrounding areas with permanent environmental damage – the prevention of which is at the core of NRDC’s public purpose and mission.

8. NRDC brings this action on its own institutional behalf and also on behalf of its members, more than 150 of whom live within three miles of the KCP, and more than 40 of whom live within three miles of the Botts Road Site. These members’ interests in a safe and

healthy environment are injured by the federal defendants' failure to comply with NEPA and the APA, because, by violating these statutory provisions, defendants are threatening both sites with environmental damage.

9. Plaintiff Physicians for Social Responsibility, Inc. ("PSR") is a non-profit membership organization of health professionals working nationally, and locally, to eliminate the threat of nuclear war, address the environmental and health impacts of nuclear weapons production and testing, achieve a sustainable environment, and reduce violence and its causes. PSR was formed in 1961 by a group of Boston physicians concerned about the medical effects of atmospheric testing and of nuclear war, and its work raising public awareness about the devastating medical effects of nuclear war inspired the formation of the International Physicians for the Prevention of Nuclear War ("IPPNW"), a global network that won the 1985 Nobel Prize for Peace. PSR is the U.S. affiliate of IPPNW.

10. PSR members have served on national advisory boards on radiation health research, DOE radiation experiments on humans, the future of the nuclear laboratories, and site-specific citizen oversight boards. Its 32,000 members are located in each state and are organized into 30 chapters nationwide. PSR has 20 members in its Greater Kansas City Chapter, two of whom are named individual plaintiffs in this action. PSR and its members are injured by the federal defendants' failure to comply with NEPA and the APA, because, by violating these statutory provisions, defendants are denying PSR information to which the organization is statutorily entitled, and, by failing to address the legacy of contamination at the existing facility, and the environmental risks associated with the Botts Road Site, defendants are threatening these sites and surrounding areas with permanent environmental damage.

11. Plaintiff Nuclear Watch New Mexico (“Nuclear Watch”) is a non-profit organization based in Santa Fe, New Mexico. Through comprehensive research, public education and effective citizen action, Nuclear Watch seeks to promote safety and environmental protection at regional nuclear facilities; mission diversification away from nuclear weapons programs; greater accountability and cleanup in the nation wide nuclear weapons complex; and consistent U.S. leadership toward a world free of nuclear weapons. The organization maintains an award-winning web site (www.nukewatch.org) that now receives more than 300,000 hits a month. Through extensive litigation under the Freedom of Information Act, Nuclear Watch has acquired unique information about all eight NNSA nuclear weapons sites, including the Kansas City Plant.

12. Nuclear Watch has been effective in issues involving U.S. nuclear weapons policies and the nuclear weapons complex. For example, advocacy by Nuclear Watch helped to prompt Congress to reject NNSA’s proposals for new-design nuclear weapons and significantly expanded plutonium pit production. Nuclear Watch has also taken a specific interest in the KCP. The Executive Director has traveled to the Kansas City area three times since July, 2006, to promote citizen awareness of GSA/NNSA plans to abandon the KCP facility without assured cleanup plans or financing, and Nuclear Watch submitted formal comments during the NEPA process, and testified at the public hearing. Nuclear Watch also has a particular interest in the alternatives added to the Final EA, over which the public had no opportunity to comment, and which included moving the NNP activities to the Los Alamos National Laboratory (“Los Alamos”). Nuclear Watch is injured by the federal defendants’ failure to comply with NEPA and

the APA, because, by violating these statutory provisions, defendants are denying Nuclear Watch information to which the organization is statutorily entitled.

13. Plaintiff Tri-Valley CAREs (Communities Against a Radioactive Environment) (“TVC”) is a non-profit corporation incorporated and existing under the laws of the State of California. Founded in 1983 by concerned individuals living around DOE’s Lawrence Livermore National Laboratory (“Livermore Lab”), TVC is a community-based environmental organization committed to promoting peace, justice, and a healthy environment in the Livermore area and near DOE facilities around the country. In pursuit of that mission, TVC monitors nuclear weapons and environmental cleanup activities throughout the national nuclear weapons complex, with a special focus on Livermore Lab.

14. Tri-Valley CAREs brings this action on its own institutional behalf and also on behalf of its members, who have significant concerns about NNSA’s plans to move the NNP activities currently conducted at the KCP to the Botts Road Site. TVC submitted public comments on the Draft EA for the KCP raising a variety of concerns, including the unlawful segmentation of the project from DOE’s Complex Transformation Supplemental Programmatic Environmental Impact Statement (“Complex Transformation SPEIS”), which is concerned with modernizing the overall nuclear weapons complex, and of which this project is an integral part. TVC also has a particular interest in the alternatives added to the Final EA, over which the public had no opportunity to comment, and which included moving the NNP activities to Livermore Lab. TVC and its members are injured by the federal defendants’ failure to comply with NEPA and the APA, because, by violating these statutory provisions, defendants are denying TVC information to which the organization is statutorily entitled, and, by failing to address the legacy

of contamination at the existing facility, and the environmental risks associated with the Botts Road Site, defendants are threatening these sites and surrounding areas with permanent environmental damage.

15. Plaintiff Ann Suellentrop has resided in Kansas City, Kansas, approximately 11 miles from the KCP, and 15 miles from the Botts Road Site, since 1980. Ms. Suellentrop is a registered nurse with 30 years experience specializing in Maternal-Child Health. She is a member of PSR, and has been a member of similar organizations for over 30 years.

16. Ms. Suellentrop has been actively involved in issues surrounding NNSA's NNP activities, testifying at public hearings held in Kansas City, and even traveling to Washington, D.C. last spring to express her concerns to members of Congress. In addition to her concerns about the misappropriation of federal funds, and whether developing the Botts Road Site is consistent with federal and local law, Ms. Suellentrop is also seriously concerned about DOE's plans to abandon the KCP without any plan for a comprehensive cleanup of the heavy chemical contamination at the plant. She is also seriously concerned that moving DOE's NNP activities to the Botts Road Site, which is near a major proposed inland port facility, could increase the risk of terrorist acts by domestic or foreign extremists, which she believes NNSA and GSA have failed to adequately consider. Ms. Suellentrop is injured by the federal defendants' failure to comply with NEPA and the APA, because, by violating these statutory provisions, defendants are denying her information to which she is statutorily entitled, and, by failing to address the legacy of contamination at the existing facility, and the environmental risks associated with the Botts Road Site, defendants are threatening these sites and surrounding areas with permanent environmental damage.

17. Plaintiff Yolanda Huet-Vaughn, M.D., has resided in Overland Park, Kansas, approximately 7.5 miles from the KCP, and 15 miles from the Botts Road Site, for years, and has been a physician in family practice in the Kansas City area since 1982. She co-founded the Greater Kansas City Chapter of PSR in the early 1980s.

18. Dr. Huet-Vaughn is very concerned about the public health implications of the new facility proposed for the Botts Road Site and the lack of concrete plans for a comprehensive cleanup of the heavy PCB and volatile organic compound (“VOC”) contamination at the existing Plant at the KCP. She is also very concerned with the economic implications of the proposed use of Kansas City municipal tax abatements – approximately \$40 millions dollars – to help finance a nuclear weapons components production plant, especially in the present economic climate. Dr. Huet-Vaughn is injured by the federal defendants’ failure to comply with NEPA and the APA, because, by violating these statutory provisions, defendants are denying her information to which she is statutorily entitled, and, by failing to address the legacy of contamination at the existing facility, and the environmental risks associated with the Botts Road Site, defendants are threatening these sites and surrounding areas with permanent environmental damage.

19. Plaintiffs Henry and Jane Stoever have resided in Overland Park, Kansas, approximately 6 miles from the KCP, and 14 miles from the Botts Road Site, since 1985. Mr. Stoever, a practicing attorney, also works in a Kansas City, Missouri office approximately six miles from KCP. Over the years his clients have included present and former employees at the KCP, and others who live and work in the vicinity of the Plant.

20. Mr. and Mrs. Stoever are both seriously concerned about DOE and GSA’s plans to abandon the KCP without a comprehensive cleanup and move NNSA’s NNP activities to the

Botts Road Site. They both submitted written comments and participated in the public hearing during the NEPA scoping process. Among other concerns, they have raised issues of a conflict of interest among the proponents of the project, and the lack of (a) adequate public notice; (b) any plan for comprehensive cleanup of the KCP; (c) proper cost-benefit analysis; and (d) specificity and detail in the draft EA. Mr. and Mrs. Stoever are injured by the federal defendants' failure to comply with NEPA and the APA, because, by violating these statutory provisions, defendants are denying them information to which they are statutorily entitled, and, by failing to address the legacy of contamination at the existing facility, and the environmental risks associated with the Botts Road Site, defendants are threatening these sites and surrounding areas with permanent environmental damage.

21. Defendant Samuel W. Bodman is the Secretary of the DOE, and is ultimately responsible for all DOE decision-making.

22. Defendant Steven C. Taylor is the Manager for the Kansas City Site Office of the NNSA, and is responsible for NNSA's decision-making at issue in this case.

23. Defendant James A. Williams is the Acting Administrator of the GSA and is responsible for the activities of that agency.

24. Defendant Bradley M. Scott is the Regional Administrator of the GSA and is responsible for GSA's decision-making at issue in this case.

STATUTORY FRAMEWORK AND FACTS GIVING RISE TO PLAINTIFFS' CLAIMS

A. The National Environmental Policy Act

25. NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1. The statute requires all agencies of the federal government to prepare a "detailed

statement” regarding all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). This statement, known as an Environmental Impact Statement (“EIS”), must describe (1) the “environmental impact of the proposed action,” (2) any “adverse environmental effects which cannot be avoided should the proposal be implemented,” (3) alternatives to the proposed action, (4) “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity,” and (5) any “irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332.

26. The Council on Environmental Quality (“CEQ”) – an agency within the Executive Office of the President – has promulgated regulations implementing NEPA which are “binding on all federal agencies.” 40 C.F.R. § 1500.3. These regulations require that, unless an activity is “categorically excluded” from NEPA compliance, an agency must either prepare an EIS, or, at the very least, an Environmental Assessment (“EA”) which is used to determine whether an EIS is necessary. Id. § 1501.4. In either event, the process generally begins with a “scoping” process to “[d]etermine the scope and the significant issues to be analyzed in depth.” Id. § 1501.7(a)(2).

27. Among the factors an agency must consider to determine whether a project may have “significant” impacts, and therefore whether an EIS is required, are the “context” and “intensity” of the action. Id. § 1508.27. Regarding context, the CEQ regulations provide that, for a “site-specific action,” an agency must determine whether the “effects on the locale” are significant. Id. § 1508.27(a).

28. As for intensity, the regulations provide that, among other relevant factors, the intensity of the impact must be judged based on whether (a) the project will have “highly

uncertain” or “highly controversial” effects; (b) “[t]he degree to which the proposed action affects public health or safety”; (c) the presence of “[u]nique characteristics of the geographic area such as proximity to . . . wetlands”; (d) the project is “related to other actions with individually insignificant but cumulatively significant impacts”; or (e) it “threatens a violation of Federal” law. Id. § 1508.27(b).

29. Irrespective of whether an EIS is required, where an agency prepares an EA the CEQ regulations require that the EA discuss both the need for the proposed action and reasonable alternatives, address the environmental impacts of both the proposal and alternatives, and “provide sufficient evidence and analysis for determining whether to prepare” an EIS. Id. § 1508.9.

30. If, after preparing an EA, the agency concludes that an EIS is not necessary, it must issue a Finding of No Significant Impact (“FONSI”) that adequately explains why the project will “not have a significant effect on the human environment” and an EIS will not be prepared. Id. § 1508.13. Where an EIS is prepared, at the conclusion of the process the agency issues a Record of Decision (“ROD”) explaining its choice among the alternatives considered. Id. § 1505.2. Under either approach, the NEPA process “shall serve as the means of assessing the environmental impact of [the project], rather than justifying decisions already made,” id. § 1502.2(g) – i.e., an agency may not first make a decision, and then justify that decision in the NEPA process.

B. The KCP And The Legacy Of Contamination At The Site

31. In order to detonate the nuclear material in a nuclear weapon, numerous non-nuclear parts are required. Over 85% of each nuclear weapon is composed of such parts, which are manufactured and/or procured at the KCP.

32. The KCP is a 3 million square-foot building within the GSA-administered Bannister Federal Complex in south Kansas City, MO. Since 1949, DOE and its predecessor agencies have counted on the KCP to produce, acquire and assemble the non-nuclear components of nuclear weapons, including electrical, electronic, electromechanical, plastic, and mechanical parts.

33. These NNP activities – and predecessor activities of the U.S. Navy, which used the site before 1949 – have generated a significant legacy of contamination at the site. For more than twenty years government contractors disposed of hazardous waste in a landfill on the site, and the soil and groundwater underlying the site is contaminated with solvents, metals and petroleum contaminants. More than forty different pollution sites have been identified in the area (including areas contaminated with Polychlorinated biphenyls (“PCBs”)), more than fifty acres of groundwater are contaminated, and Missouri Department of Natural Resources officials have located pollution plumes as deep as 50 feet in some locations. The KCP is located in a flood plain at the confluence of Indian Creek and the Blue River, and the plant’s southern boundary has to be protected by a flood wall. The fish in the area are so full of PCBs from the Plant that the State warns fisherman not to eat them.

C. DOE's Decision To Move The KCP's Activities To The Botts Road Site, And The Subsequent Environmental Assessment On That Predetermined Decision

34. In 1996, DOE prepared a programmatic EIS on the post-Cold War reconfiguration of the entire nuclear weapons complex, called the Stockpile Stewardship and Management Programmatic EIS ("SSM PEIS"). In the SSM PEIS, DOE specifically considered whether the non-nuclear parts of nuclear weapons should be produced and procured at other sites, including the Sandia National Laboratory ("SNL") in New Mexico. At that time DOE decided to downsize the existing facilities at the KCP from 3.2 million to 1.8 million square feet by 2003, rather than move the NNP activities to a different site.

35. On information and belief, sometime in early 2006 NNSA developed an internal proposal to move its NNP activities to a new location in the Kansas City area. In cooperation with NNSA, and not later than April, 2007 (but more likely some months earlier), GSA acquired, at no cost, an "assignable option" to acquire the Botts Road Site for the specific purpose of building a new KCP that would be "third party developed and financed," – *i.e.* without using construction project funding that requires highly visible "line-item" authorization and appropriation of funds by Congress. The Botts Road Site is an undeveloped parcel of farm land, containing wetlands, approximately 8 miles from the KCP and 16 miles from the City center, near the southwestern edge of Kansas City but still within the incorporated city limits.

36. In May, 2007, the agencies issued a scoping notice for this project – called the "Modernization of Facilities and Infrastructure for the Non-Nuclear Production Activities Conducted At the NNSA's Kansas City Plant" – and requested public comment. 72 Fed. Reg. 23,822. In that Notice, DOE announced that it had decided even before the NEPA process began

that “relocation of the non-nuclear production mission to another location outside of the Kansas City Metropolitan Area is not a reasonable alternative.” The agency also announced that it intended to prepare an EA, rather than a more comprehensive EIS.

37. In their scoping comments, NRDC, among others, raised concerns regarding DOE’s failure to consider sites outside the Kansas City area; the failure to consider this project in connection with the integrally-related modernization of the entire nuclear weapons complex; and the need to prepare a comprehensive EIS that meaningfully considers, inter alia, the impacts associated with moving the NNP activities to a ‘greenfield’ site near the southwestern boundary of Kansas City, and across the street from what could become a very busy intermodal inland port.

38. In response to the first concern, DOE/NNSA secretly entered into a no-bid contract with Science Applications International Corporation (“SAIC”) – a private entity with billions of dollars in contracts with DOE, NNSA, GSA and other government agencies – to prepare a quick “Cost Study” that would consider moving the NNP activities to other locations. The Cost Study was not conducted as part of the NEPA process, and DOE never solicited public comment on it. In addition, the individuals who worked on the Cost Study had significant conflicts of interest that seriously undermine the Study’s conclusions. A representative of SAIC also became a registered recipient of GSA’s solicitation for bids to construct the new Botts Road Site even before GSA had issued the draft EA for public comment.

39. In light of the significant progress DOE/NNSA had already made toward planning and acquiring a new facility at the Botts Road Site (progress made before the NEPA process was completed), the Cost Study assumed that there would be significant delays associated with

moving to a different location, such as Sandia Laboratory in New Mexico. If these “delays” are removed from the Cost Study’s analysis, the Study revealed that the least expensive alternative would be to move the NNP activities to Sandia. However, by improperly assuming these delays, and also improperly assuming that any facility at Sandia must be built on newly acquired commercial property owned or leased by GSA (rather than on already available land within the Sandia campus), the Cost Study concluded that acquiring the Botts Road Site and building a new NNP facility there would be the least expensive option.

40. In the meantime, although no Draft EA had yet been issued, GSA continued to move forward with plans to move the NNP activities to the Botts Road Site. For example, GSA sought and obtained approval from the Office of Management and Budget to seek a developer for the site, and in furtherance of that objective the agency (a) publicly solicited “expressions of interest” for construction of the Botts Road Site; (b) disseminated a Solicitation for Offers and Technical Data Package providing prospective bidders with the information necessary to bid on the project; (c) assembled a list of vendors with an interest in the project; and even (d) advertised a “matchmaking and networking event” hosted by GSA in order “to provide valuable networking opportunities between potential prime contractors and small business subcontractors” for the project.

41. On information and belief, NNSA had also already decided to leave the KCP and move its NNP activities to the Botts Road Site. For example, as early as February, 2007, NNSA declined to request from Congress additional funding necessary for KCP maintenance, due to “plans to move the Kansas City Plant to a new facility.”

42. Only after taking all of these concrete steps toward its pre-determined decision to move the KCP activities to the Botts Road Site did the agencies finally, in December, 2007, issue their Draft Environmental Assessment (“DEA”). 72 Fed. Reg. 69,690 (2007). None of the DEA alternatives considered moving the KCP’s functions to a site outside the Kansas City area.

43. The “preferred alternative” in the DEA was to move these activities to the Botts Road Site. The new industrial “campus” would include approximately 1.85 million gross square feet (1.4 million rentable square feet) and up to 2,500 surface parking spaces. Construction of the plant and associated local infrastructure improvements would be funded with a combination of private and local revenue bond financing. This would be accomplished through a complex scheme of sublease payments flowing from NNSA to an entity called the Kansas City Planned Industrial Expansion Authority (“PIEA”) – via pass through payments from NNSA, to GSA, to the project developer, to the PIEA. As part of this scheme, the developer – not NNSA or even GSA – would acquire title to the facility at the end of twenty years, before which the PIEA, an entity of the Kansas City municipal government, would hold title. The bond financing would nonetheless be guaranteed with a 20 year “firm” lease by GSA, acting on behalf of NNSA, for the new facility.

44. As for the KCP itself, the agencies reiterated that because they did not know when the facility would be sold or who would acquire it, “disposition and cleanup activities for the existing NNSA facility at the KCP are not part of the current proposed action and would be addressed in appropriate future environmental analyses.” Id.

D. Plaintiffs' Comments And The KCP Final EA And FONSI

45. Hundreds of individuals and groups participated in the public hearing and written public comment opportunities during the scoping process on the EA, overwhelmingly opposing the project. Although the agencies refused to hold a public hearing on the Draft EA – or even to provide any public notice in Kansas city area news media – many individuals and groups, including plaintiffs, commented on the Draft.

46. For example, NRDC submitted extensive comments raising numerous concerns. NRDC reiterated the concerns it had raised in the scoping process, and also addressed the numerous deficiencies in the Cost Study that DOE had hired SAIC to prepare.

47. One of NRDC's principal comments was that the agencies should prepare an EIS on this project, since it triggers several of the factors that require an EIS be prepared. 40 C.F.R. § 1508.27. The project has highly "controversial" and "uncertain" environmental impacts that must be considered in an EIS. *Id.* §§ 1508.27(b)(4) and (b)(5). In particular, NRDC raised concerns about DOE's refusal to consider the environmental remediation required to address the significant environmental contamination at the KCP – estimated to cost more than \$250 million – as well as additional concerns regarding construction of a new facility in wetlands on the Botts Road Site.

48. NRDC also explained that the smaller project the agencies have attempted to consider in the EA (i.e., solely the construction at the Botts Road Site) is in fact part of several larger projects – (a) the final remediation of the existing KCP, which is inevitable, and (b) DOE/NNSA's overall modernization of the nuclear weapons complex, for which DOE/NNSA recently initiated another NEPA process. At approximately the same time comments were being

submitted on the DEA, DOE/NNSA issued a Draft Supplemental Programmatic EIS (“SPEIS”) for the SSM PEIS that was completed in 1996. Although the production of non-nuclear parts for these weapons is an integral part of NNSA’s nuclear weapons complex operations, the Kansas City Plant was the only NNSA nuclear weapons complex site excluded from consideration in the Draft SPEIS.

49. Finally, an EIS is required in light of the potential violations of federal law associated with the project. Funding through the Public Buildings Act (“PBA”), 40 U.S.C. § 3302, et seq., is not available for “public buildings” associated with “nuclear production, research or development,” id. § 3301(5)(C)(v), and may only be used for federal “office or storage space” facilities. Id. § 3301(5)(A). In light of these restrictions, the agencies’ reliance on the PBA for this project – which certainly constitutes nuclear production and research, and in any event is not for office or storage space – is unlawful. Indeed, given that the developer would ultimately own the property, the new facility does not even qualify as a “public building” under the Act. Id. § 3301(5). Similarly, while the Anti-Deficiency Act, 31 U.S.C. § 1341, prohibits agencies from entering into multi-year financial commitments without a matching congressional appropriation covering that entire commitment, the financing arrangement for the Botts Road facility includes a “20-year-firm” commitment to lease the new Plant.

50. NRDC also raised concerns with DOE and GSA’s pre-determination of the NEPA process, pointing out that while NEPA requires that agencies give full and fair consideration to reasonable alternatives to their proposals, the agencies here gave only lip service to such alternatives, since they had already acquired an option to purchase the Botts Road Site and made significant progress towards the development there. On information and belief, the agencies had

decided on the Botts Road Site long before completing the NEPA process, and also informed GSA's Congressional oversight committees concerning their plans to proceed with leasing space at the Botts Road Site before the NEPA process was completed.

51. The agencies issued a Final EA ("FEA") and FONSI for DOE's NNP activities in April 2008. See 73 Fed. Reg. 23,244 (Apr. 29, 2008). The FEA added several alternatives that had not been included in the DEA – including moving the NNP activities to other sites, including SNL, or the Los Alamos or Livermore Laboratories. However, the agencies did not reopen the EA to further public comment on these alternatives. The FEA also did not add any discussion of the costs or environmental considerations associated with the massive cleanup of the KCP that will be required should DOE/NNSA leave the facility, or meaningfully respond to the other concerns that had been raised during the comment period.

52. In the FEA the agencies also avoided some of the most significant environmental impacts associated with NNP activities – such as chrome plating, which generates significant hazardous materials – by claiming that although those activities are presently occurring at the KCP, DOE plans to outsource them and therefore they would not be conducted at the Botts Road Site. The agencies did not explain where or when this outsourcing would in fact occur, or why, if this hazardous activity could be outsourced to another location, other NNP activities could not also be conducted at other locations. Defendants also failed to consider the likely impacts associated with chrome plating (or other hazardous processes) at whatever outsourced location(s) those NNP activities are now expected to occur.

53. In the accompanying FONSI, the agencies concluded that none of the "significance" factors triggered a need for an EIS, but the FONSI ignored many of the concerns

that NRDC and others had raised. In the FEA and FONSI the agencies also acknowledged that the Botts Road Site will require a Clean Water Act permit because the project will destroy wetlands. Nonetheless, the agencies also chose to proceed without awaiting the outcome of the CWA process that will provide a detailed analysis of these wetlands impacts.

E. Plaintiffs' Effort To Resolve These Issues Without Litigation And Defendants' Response

54. On August 4, 2008, plaintiff NRDC sent defendants a detailed letter describing their continuing concerns with DOE and GSA's compliance with NEPA and other federal laws, and requesting that the agencies set aside the EA and FONSI and commit to preparing an EIS.

55. On September 17, 2008 defendant GSA responded with a short letter explaining that the agency stands by its EA, and does not intend to engage in further NEPA review in connection with this project.

PLAINTIFFS' CLAIM FOR RELIEF

56. Because the decision regarding whether and where to move DOE's NNP activities is a major federal action that may have "significant" impacts on public health and the environment within the meaning of NEPA and its implementing regulations, 40 C.F.R. § 1508.27, DOE and GSA have violated NEPA, and are acting in a manner that is arbitrary and capricious and contrary to the law in violation of the APA, by issuing a Finding of No Significant Impact ("FONSI") on the decision concerning NNP activities, rather than an Environmental Impact Statement ("EIS"). 42 U.S.C. § 4332; 5 U.S.C. § 706.

57. By preparing an Environmental Assessment ("EA") that does not adequately consider the environmental impacts associated with moving NNP activities to a new location, or

reasonable alternatives, and by issuing a FONSI based on that EA, DOE and GSA are violating NEPA and its implementing regulations, and are acting in a manner that is arbitrary and capricious and contrary to the law in violation of the APA. 5 U.S.C. § 706.

58. By deciding to move forward with real estate acquisition and bid solicitation for construction of a new facility at the Botts Road Site before the NEPA process was completed, DOE and GSA have violated NEPA and its implementing regulations, and are acting in a manner that is arbitrary and capricious and contrary to the law in violation of the APA. 5 U.S.C. § 706.

59. By segmenting some aspects of DOE's nuclear weapons-related production activities for consideration in separate NEPA documents, and ignoring other aspects of these activities altogether, DOE and GSA are violating NEPA and its implementing regulations, and are acting in a manner that is arbitrary and capricious and contrary to the law in violation of the APA. 5 U.S.C. § 706

60. These violations are injuring plaintiffs in the manner described in ¶¶ 5-20 above.

WHEREFORE, plaintiffs respectfully request that this Court:

(1) declare that the federal defendants have violated, and continue to violate, NEPA and the APA;

(2) set aside federal defendants' April 29, 2008 FONSI for the Modernization of Facilities and Infrastructure for the Non-Nuclear Production Activities Conducted At the NNSA's Kansas City Plant;

(3) enjoin the federal defendants from proceeding with moving DOE's NNP activities from the KCP to the Botts Road Site until defendants have completed an EIS and issued a Record of Decision ("ROD") pursuant to NEPA;

(4) retain jurisdiction of this matter until the federal defendants have fulfilled all of their legal obligations under NEPA and the APA;


(5) award plaintiffs their costs, attorneys' fees, and other disbursements for this action, including any expert witness fees; and

(6) grant plaintiffs such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Howard M. Crystal
D.C. Bar. No. 446189



Eric R. Glitzenstein
D.C. Bar No. 358287

MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue, N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206
(202) 588-5049 (fax)

Geoffrey H. Fettus
D.C. Bar No. 454076
Natural Resources Defense Council
1200 New York Ave., NW, Suite 400
Washington, DC 20005
(202) 289-6868
(202) 289-6868 (fax)

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Attorneys for Plaintiffs