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20 IN THE UNITED STATES DISTRICT COURT
21 FOR THE DISTRICT OF NEVADA

22 STATE OF NEVADA,) Case No. 3:18-cv-569-MMD-CBC

23 Plaintiff,)

24 vs.) **UNITED STATES' RESPONSE TO**

25 UNITED STATES; UNITED STATES) **PLAINTIFF'S MOTION FOR**

26 DEPARTMENT OF ENERGY; RICK) **PRELIMINARY INJUNCTION**

27 PERRY, in his official capacity as Secretary)

28 of Energy; NATIONAL NUCLEAR)

SECURITY ADMINISTRATION; and)

LISA E. GORDON, in her official capacity)

as Administrator of the National Nuclear)

Security Administration and Undersecretary)

for Nuclear Security,)

)

Defendants.)

_____)

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 26 671 F.3d 1113 (9th Cir. 2012) 21

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TABLE OF ACRONYMS AND DEFINITIONS

1		
2		
3	APA	Administrative Procedure Act
4	CEQ	Council on Environmental Quality
5	DAF	Device Assembly Facility
6	DOE	Department of Energy
7	DOT	Department of Transportation
8	EA	Environmental Assessment
9	EIS	Environmental Impact Statement
10	Final Surplus Plutonium EIS	Final Surplus Plutonium Disposition Supplemental Environmental Impact Statement (US Exhibit 5)
11	IAEA	International Atomic Energy Agency
12	LANL	Los Alamos National Laboratory in New Mexico
13	NEPA	The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370
14	NNSA	National Nuclear Security Administration
15	NNSS	Nevada National Security Site
16	NNSS EIS	Final Site-Wide Environmental Impact Statement for the Continued Operation of the Department of Energy/National Nuclear Security Administration Nevada National Security Site and Off-Site Locations in the State of Nevada (US Exhibit 2)
17	NRC	Nuclear Regulatory Commission
18	ROD	Record of Decision
19	SEIS	Supplemental Environmental Impact Statement
20	SRS	Savannah River Site
21	Supplemental Analysis	NNSA's Supplemental Analysis, dated July 2018, for its Final Complex Transformation Supplemental Programmatic Environmental Impact Statement (US Exhibit 1)
22	Surplus Plutonium EIS	Surplus Plutonium Disposition Final Environmental Impact Statement (US Exhibit 3)
23	Transformation SPEIS	Final Complex Transformation Supplemental Programmatic Environmental Impact Statement (US Exhibit 4)
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1 **I. INTRODUCTION**

2 The Department of Energy’s (“DOE”) National Nuclear Security Administration
3 (“NNSA”) is responsible for enhancing national security through the military application of
4 nuclear science. To this end, NNSA maintains and enhances the safety, security, and
5 effectiveness of the United States’ nuclear weapons stockpile. This responsibility necessarily
6 entails transporting nuclear materials among several DOE facilities located throughout the
7 United States. As part of its responsibilities, DOE has a long track record of analyzing potential
8 environmental effects related to the storage and transportation of nuclear materials.

9 This track record is important when DOE has to quickly respond to court orders, as well
10 as Congressional mandates, regarding the use and location of nuclear materials. In that regard,
11 on December 20, 2017, the United States District Court for the District of South Carolina
12 ordered DOE/NNSA to remove, no later than January 1, 2020, one metric ton of plutonium from
13 its Savannah River Site in South Carolina. To comply with that order, DOE decided to transport
14 plutonium, currently in the form of nuclear weapon cores or “pits,” from the Savannah River Site
15 (“SRS”) to Texas and Nevada, where it will be stored for eventual use at Los Alamos National
16 Laboratory in New Mexico (“LANL”). At LANL, the plutonium will be remanufactured into
17 new pits as part of NNSA's long term stockpile stewardship and management program.

18 At no time will the plutonium at issue in this case be used in any way while in Nevada. It
19 will be stored in secure containers in a secure and remote facility at the Nevada National Security
20 Site, in an area known as the Device Assembly Facility.

21 In evaluating the removal and transport of plutonium from South Carolina, DOE did not
22 have to start from scratch, but instead relied upon extensive environmental analysis it had
23 previously completed pursuant to the requirements of the National Environmental Policy Act
24 (“NEPA”). It considered, referenced, and relied upon this previous analysis when evaluating the
25 transport of plutonium from South Carolina to Nevada, and determined whether new or
26 additional factors existed that required additional NEPA analysis or documentation. It decided,
27 in a 58-page Supplemental Analysis, that no additional NEPA documentation was needed.
28 Nevada now claims that this decision was in error and that DOE has not complied with NEPA.

1 Contrary to Nevada’s NEPA claims, DOE was justified in relying on its twenty-year
2 record of examining the environmental effects of the storage, transport, and use of plutonium.
3 This record includes three separate programmatic environmental impact statements (“EIS”) or
4 supplemental EISs relating to the disposition and transportation of plutonium, and three separate
5 EISs related to each of the facilities (located in Nevada, Texas, and New Mexico) included in the
6 plutonium transport at issue in this case. This lengthy and detailed analysis, in whole,
7 comprehensively analyzed the potential environmental effects of the storage and transportation
8 of plutonium in and among the three destination facilities and the SRS.

9 In addition, DOE prepared its Supplemental Analysis to evaluate precisely the issue
10 before the Court in this case – whether the transportation of materials from South Carolina to
11 Nevada (as well as Texas and New Mexico) required further analysis or whether possible
12 environmental effects had already been thoroughly analyzed in the previous documents.

13 DOE reasonably concluded that no supplemental or new EIS was required. That
14 determination is entitled to the highest deference because it rests on DOE’s technical judgments.
15 DOE fully complied with NEPA, and Nevada’s claim to the contrary is meritless.

16 Nevada also fails to demonstrate irreparable harm, having delayed in seeking equitable
17 relief and identifying no concrete injury. The public interest and the balance of hardships also
18 support DOE’s action and its continuing compliance with court orders and Congressional
19 directives entrusting it with stewardship of the nation’s nuclear arsenal.

20 Nevada’s motion for preliminary injunction should therefore be denied.

21 **II. STATUTORY AND REGULATORY BACKGROUND**

22 **A. National Environmental Policy Act**

23 Congress enacted NEPA to establish a consistent process for federal agencies to consider
24 the consequences of their actions upon the environment. *See* 42 U.S.C. §§ 4321-4370. To
25 ensure informed decision-making, NEPA requires agencies to analyze and to disclose significant
26 environmental effects, but it does not require agencies to make any particular decision.

27 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). As further explained
28 by the Supreme Court, “[i]f the adverse environmental effects of the proposed action are

1 adequately identified and evaluated, the agency is not constrained by NEPA from deciding that
2 other values outweigh the environmental costs.” *Id.* Thus, NEPA exists to ensure a process, not
3 any particular result. *Id.*; *Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (NEPA
4 “does not impose any substantive requirements on federal agencies—it exists to ensure a
5 process.”) (citation and quotations omitted), *overruled on other grounds by Winter v. Nat. Res.*
6 *Def. Council, Inc.*, 555 U.S. 7 (2008).

7 An agency’s obligation under NEPA is to take a “hard look” at environmental
8 consequences before approving a major federal action. *Kleppe v. Sierra Club*, 427 U.S. 390, 410
9 n.21 (1976). NEPA requires that, for “major Federal actions significantly affecting the quality of
10 the human environment,” a federal agency must prepare an EIS, which is a detailed statement on
11 the environmental impact of the proposed action, including an analysis of alternatives to the
12 proposed action. 42 U.S.C. § 4332(2)(C). In preparing EISs, an agency is guided by regulations,
13 promulgated by the Council on Environmental Quality (“CEQ”) at 40 C.F.R. §§ 1500-1508,¹
14 which are applicable to all federal agencies, as well as agency-specific implementing regulations,
15 such as DOE’s regulations in 10 C.F.R. Part 1021.²

16 Once an agency completes an EIS on a proposal for major federal action,³ the CEQ
17 regulations require the agency to issue a “record of decision,” or ROD, stating its decision,
18 identifying the alternatives considered, identifying other factors including “any essential
19 considerations of national policy which were balanced by the agency in making its decision,”
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21

22
23 ¹ The CEQ regulations are entitled to substantial deference. *See Robertson*, 490 U.S. at 355-56;
accord Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

24
25 ² The CEQ regulations require each federal agency to adopt implementing procedures to
26 supplement the CEQ regulations. 40 C.F.R. § 1507.3. DOE’s regulations at 10 C.F.R. pt. 1021
adopt and supplement the CEQ regulations. *See* 10 C.F.R. §§ 1021.100-.103.

27
28 ³ The CEQ regulations allow an agency to first prepare an environmental assessment (“EA”) to
aid in its decision-making and to determine whether a full EIS must be prepared on the proposed
action. 40 C.F.R. § 1501.3.

1 and stating whether all practicable means to avoid or minimize environmental harm from the
2 selected alternative have been adopted or, if not, why not. 40 C.F.R. § 1505.2.

3 A further provision of the CEQ regulations deserves mention in light of the issues raised
4 by Plaintiff. The CEQ regulations address when agencies must supplement a draft or final EIS to
5 take account of changed circumstances, including changes to a project, and new information.
6 Section 1502.9(c) requires supplementation where “[t]he agency makes substantial changes in
7 the proposed action that are relevant to environmental concerns” or “[t]here are significant new
8 circumstances or information relevant to environmental concerns and bearing on the proposed
9 action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(i), (ii); *see also Marsh v. Or. Nat. Res. Council*,
10 490 U.S. 360, 370-78 (1989) (discussing the supplementation requirement under NEPA and the
11 CEQ regulations). DOE’s own NEPA regulations track and incorporate these requirements. *See*
12 10 C.F.R. § 1021.314(a) (“DOE shall prepare a supplemental EIS if there are substantial changes
13 to the proposal or significant new circumstances or information relevant to environmental
14 concerns, as discussed in 40 C.F.R. § 1502.9(c)(1)”); *Nevada v. Dep’t of Energy*, 457 F.3d 78, 87
15 (D.C. Cir. 2006).

16 In *Marsh*, the Supreme Court held that the decision whether to prepare a supplemental
17 EIS is similar to the decision whether to prepare an EIS in the first place: “[i]f there remains
18 ‘major Federal action’ to occur, and if the new information is sufficient to show that the
19 remaining action will ‘affect the quality of the human environment’ in a significant manner or to
20 a significant extent not already considered, a supplemental EIS must be prepared.” *Marsh*, 490
21 U.S. at 374 (internal brackets and citation omitted). It follows that not every change in
22 circumstance or piece of new information requires the preparation of a supplemental EIS; only
23 “*substantial* changes to the proposal or *significant* new circumstances or information *relevant to*
24 *environmental concerns*.” 10 C.F.R. § 1021.314(a) (emphasis added); *accord* 40 C.F.R. §
25 1502.9(c)(1). As the D.C. Circuit recently summarized this standard, a supplemental EIS is only
26 required where “[n]ew and significant’ information presents ‘a seriously different picture of the
27 environmental impact of the proposed project from what was previously envisioned.’” *Blue*
28

1 *Ridge Env'tl. Def. League v. Nuclear Reg. Comm'n*, 716 F.3d 183, 196 (D.C. Cir. 2013) (quoting
2 *Hydro Res., Inc.*, 50 N.R.C. 3, 14 (1999), and citing *Marsh*, 490 U.S. at 374).

3 The CEQ regulations do not prescribe the form in which agencies determine *whether* a
4 change in the proposed action, changed circumstances, or new information rises to the level of
5 significance. DOE's NEPA regulations, however, require preparation of a Supplement Analysis
6 "[w]hen it is unclear whether or not an EIS supplement is required." 10 C.F.R. § 1021.314(c).
7 Under this regulation, a Supplement Analysis "shall discuss the circumstances that are pertinent
8 to deciding whether to prepare a supplemental EIS, pursuant to 40 C.F.R. § 1502.9(c)," 10 C.F.R.
9 § 1021.314(c)(1), and "shall contain sufficient information" for DOE to determine whether an
10 existing EIS should be supplemented, a new EIS should be prepared, or no further NEPA
11 documentation is required, 10 C.F.R. § 1021.314(c)(2). *See Hodges v. Abraham*, 300 F.3d 432,
12 439, 446 (4th Cir. 2002) (summarizing DOE's regulations regarding supplementation of an EIS
13 and upholding the use of a Supplemental Analysis).

14 **B. The Atomic Energy Act and Department of Energy Organization Act**

15 The Atomic Energy Act of 1954, as amended authorizes the Atomic Energy
16 Commission, the predecessor agency to DOE, to possess and acquire, by purchase or other
17 means, "any special nuclear material or any interest therein," dispose of such material as
18 provided in the Act, and, in respect to such material, promote the common defense and security,
19 protect public health, and minimize danger to life and property. 42 U.S.C. §§ 2075, 2201.⁴

20 The Department of Energy Organization Act of 1977 ("DOE Act") established the DOE
21 and vested it with the functions of various predecessor agencies. The declaration of purpose for
22 the DOE Act states that Congress intended the agency to "establish and implement . . . in
23 coordination with the Secretaries of State, Treasury, and Defense, policies regarding
24 international energy issues that have a direct impact on research, development, utilization,
25 supply, and conservation of energy in the United States and to undertake activities involving the

26
27
28 ⁴ References to "Commission" in the Atomic Energy Act are to the Atomic Energy Commission,
the predecessor agency to DOE. *See* 42 U.S.C. § 2014(f).

1 integration of domestic and foreign policy relating to energy” 42 U.S.C. § 7112(10).
2 Congress also expressed that a purpose of the DOE was to “assure incorporation of national
3 environmental protection goals in the formulation and implementation of energy programs, and
4 to advance the goals of restoring, protecting, and enhancing environmental quality, and assuring
5 public health and safety.” *Id.* § 7112(13). DOE meets these environmental goals, in part,
6 through compliance with NEPA. *See* 10 C.F.R. § 1021.101.

7 **C. Regulations governing the transportation of nuclear material**

8 The safe transportation of nuclear material is subject to a regulatory regime developed
9 and adopted by the international community through regulations of the International Atomic
10 Energy Agency (“IAEA”). (IAEA Safety Standards, Regulations for the Safe Transport of
11 Radioactive Materials 2012 Edition). As IAEA regulations are issued and updated, individual
12 nations promulgate compatible regulations for ensuring the safe transport of radioactive material
13 both within and between nations. In the United States, the Department of Transportation
14 (“DOT”) and the Nuclear Regulatory Commission (“NRC”) promulgate regulations governing
15 the transportation of radioactive material.

16 The IAEA regulations classify the levels of radioactive material packaging and impose
17 increasingly stringent requirements in accordance with the activity and physical form of the
18 radioactive material contained in the package. The IAEA classifications are mirrored in the
19 NRC regulations promulgated at 10 C.F.R. Part 71.

20 The NRC mandates extensive packaging requirements for the transport of fissile
21 material⁵ such as plutonium at 10 C.F.R. Part 71.55. Such material must be packaged so that it
22 remains subcritical⁶ (10 C.F.R. Part 71.55(d)(1)), meets the accident and safety requirements

24 ⁵ Fissile material, in general, means the radionuclides uranium-233, uranium-235, plutonium-
25 239, and plutonium-241, or any combination of these radionuclides. Fissile material means the
26 fissile nuclides themselves, not material containing fissile nuclides. 10 CFR § 71.4.

27 ⁶ “Subcritical” means an amount of fissionable material insufficient in quantity or of improper
28 geometrical configuration to sustain a fission chain reaction. *See* U.S. Nuclear Regulatory
Commission Reference Glossary found at
<https://www.nrc.gov/reading-rm/basic-ref/glossary/subcritical-mass.html>.

1 found in 10 C.F.R. Parts §§ 71.71 through 71.73 (10 C.F.R. Part 755(a)), and meets all of the
2 additional safety requirements for "Type B Packaging" required for the transport of fissile
3 materials (10 C.F.R. Part 71.55(a)).

4 "Type B Packaging" is the packaging required for the transport of fissile materials. A
5 Type B Package contains an inner containment vessel, known as a 3013 shipping container
6 insert. The 3013 is then housed in a steel outer drum. The two containers together constitute a
7 Type B shipping container of the type that will be used to transport the plutonium in this case.
8 See <https://www.nrc.gov/reading-rm/basic-ref/students/for-educators/11.pdf> at 11-9, USNRC
9 Technical Training Center, Reactor Concepts Manual, Transportation of Radioactive Material
10 (diagram and explanation of a Type B package).

11 The NRC also requires extensive physical security measures be taken during both the
12 transport and storage of special nuclear materials⁷ such as plutonium. 10 C.F.R. Parts 73.25
13 through 73.61.

14 **III. FACTUAL BACKGROUND**

15 **A. The Nevada National Security Site**

16 The Nevada National Security Site ("NNSS") is NNSA's primary location for high-
17 hazard experiments with radiological and other high-hazard materials. It occupies approximately
18 880,000 acres in the southeastern part of Nye County in southern Nevada, about 65 miles
19 northwest of Las Vegas. It is a remote, secure facility with restricted airspace that maintains the
20 capability for conducting underground testing of nuclear weapons and evaluating the effects of
21 nuclear weapons on military communications systems, electronics, satellites, sensors, and other
22 materials.

23 The NNSS has been in use for over 70 years and was one of the most significant nuclear
24 weapons test sites in the United States. Nuclear testing, both atmospheric and underground,
25

26
27 ⁷ "Special nuclear material" is defined as "plutonium, uranium enriched in the isotope 233 or in
28 the isotope 235, and any other material which the [Atomic Energy] Commission . . . determines
to be special nuclear material." 42 U.S.C. § 2014(aa).

1 occurred there between 1951 and 1992. On January 27, 1951, nuclear testing at the Nevada Test
2 Site, which is now part of NNSS, officially began with the detonation of Shot Able, a 1-kiloton
3 bomb, as part of Operation Ranger. Between 1951 and 1992, the U.S. government conducted a
4 total of 1,021 nuclear tests at NNSS. Out of these tests, 100 were atmospheric, and 921 were
5 underground. Test facilities for nuclear rocket engines were also constructed and used from the
6 late 1950s to the early 1970s. *See* <https://www.atomicheritage.org/location/nevada-test-site>.

7 Approximately one-third of the land (located in the eastern and northwestern portions of
8 the site) has been used for nuclear weapons testing, one-third (located in the western portion of
9 the site) is reserved for future missions, and one-third is reserved for research and development,
10 nuclear device assembly, diagnostic canister assembly, and radioactive waste management. In
11 addition, DOE has submitted an application to the NRC for authorization to construct and
12 operate a repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain,
13 an area on the southwestern boundary of the site.

14 NNSS is a critical part of NNSA's infrastructure and serves several critical missions. As
15 part of the stockpile stewardship program, NNSS maintains the readiness and capability to
16 conduct underground nuclear weapons tests and could conduct such tests within 24-36 months if
17 so directed by the President. NNSS currently conducts up to 100 high explosive experiments a
18 year using up to 70,000 pounds of TNT as well as numerous other basic physics experiments
19 related to the maintenance of the nuclear stockpile. *See* Final Site-Wide Environmental Impact
20 Statement for the Continued Operation of the Department of Energy/National Nuclear Security
21 Administration Nevada National Security Site and Off-Site Locations in the State of Nevada
22 (DOE 2013) (“NNSS EIS”) at p. 3-33 to 3-34 (US Exhibit 2). NNSS is also home to the Search
23 Augmentation Team (“SAT”). The SAT maintains the readiness to respond to any type of
24 nuclear emergency, including search and recovery for lost or stolen weapons, and conducts
25 training exercises related to nuclear weapons and radiation dispersal threats.

26 NNSS houses the Device Assembly Facility (“DAF”). The DAF conducts criticality
27 experiments and houses the machines necessary to conduct these experiments. Criticality
28 experiments are experiments that bring fissile materials, such as plutonium or enriched uranium,

1 just to the point of reaching the necessary critical mass or the point at which the fission process
2 becomes self-sustaining. These experiments further our understanding of the fission process to
3 help ensure the safety, security, and reliability of both the nation's nuclear weapons stockpile and
4 future reactor designs. In addition, the DAF has the capability to dismantle nuclear weapons
5 which have been damaged.

6 The DAF also has the capability to:

7 1. Stage nuclear devices pending disassembly, modification/maintenance, and/or
8 transportation to or from another location. Staging is the maintenance of programmatic material,
9 such as special nuclear material, or other materials, in a safe and secure manner until needed in a
10 test, experiment, or other activity. Staging does not include maintaining material with no
11 reasonable expectation of use in the foreseeable future.

12 2. Conduct dismantlement of weapons or weapon systems to aid the United States in
13 meeting its commitment to reduce its nuclear weapons stockpile of up to 100 weapons per year.

14 3. Modify and maintain nuclear devices, including replacing limited-life components in
15 nuclear weapons systems of up to 360 weapons per year.

16 4. Test weapons components for quality assurance purposes.

17 The environment effects of all of these potential operations at DAF were fully examined
18 under the "Expanded Operations Option" in the NNSS EIS. *See id.* at 3-33 to 3-34.

19 The DAF is a remote and secure facility that is used primarily for the disassembly,
20 modification, testing and reassembly of nuclear devices. As such, the DAF already stores
21 classified amounts of plutonium. Under the action at issue in this case, up to one metric ton of
22 plutonium would be transported from the SRS in South Carolina to the DAF in DOT-certified
23 shipping containers, or their equivalent. These containers would be placed into a vault for
24 staging.

25 The plutonium would be staged until transported to LANL for pit production. Prior to
26 transport to LANL, these containers would be opened and assessed for integrity and material
27 accountability. If any of the packaging has degraded during storage, the container will either be
28 repaired or if necessary put into a new container for transport. This process of examining,

1 repairing and potentially repackaging of the plutonium at issue in this case is the only time any
2 plutonium could potentially be removed from its packaging at the NNSS. After the containers
3 are assessed, each would be further contained into a certified shipping container. Supplemental
4 Analysis at 11-12 (US Exhibit 1).

5 The plutonium will only be staged at the NNSS. No other operations will be conducted
6 using the plutonium at the NNSS. All of the plutonium at issue in this case will be transported
7 from NNSS to LANL over a period of years. Any waste generated during repackaging would be
8 disposed of onsite at the NNSS Radioactive Waste Management Site at Area 5. *Id.* at 13-14.

9 **B. The South Carolina Litigation**

10 In *South Carolina v. United States*, 243 F. Supp. 3d 673 (D.S.C. 2017), the court granted
11 in part plaintiff South Carolina's summary judgment motion, concluding that DOE should be
12 compelled to remove from the SRS in South Carolina one metric ton of defense plutonium,
13 without deciding the final terms of an injunction. The court ruled that DOE's failure to meet
14 certain deadlines imposed in 50 U.S.C. § 2566 required such an order.⁸ The court did not
15 address or find fault with any of DOE's NEPA analysis. In a subsequent order, the court issued
16 its injunction ordering DOE/NNSA to remove one metric ton of plutonium from the Savannah
17 River Site by January 1, 2020. No. 1:16-cv-00391-JMC, 2017 WL 7691885 (D.S.C. Dec. 20,
18 2017). The United States appealed the court's order, but the circuit court affirmed in *South*
19 *Carolina v. United States*, 907 F.3d 742 (4th Cir. 2018).

20 **C. Previous NNSA Examination of the Environmental Effects of the** 21 **Transportation and Storage of Plutonium and Special Nuclear Materials**

22 NNSA has been examining the environmental effects of transporting, storing, disposing
23 of and reusing plutonium since at least 1999. Plutonium storage and transportation has been the

24
25 ⁸ 50 U.S.C. § 2566(c) provides that if a certain production objective related to the mixed-oxide
26 fuel fabrication facility at SRS in South Carolina "is not achieved as of January 1, 2014, the
27 Secretary shall, consistent with [NEPA] and other applicable laws, remove from the State of
28 South Carolina . . . not less than 1 metric ton of defense plutonium or defense plutonium
materials."

1 subject of environmental analysis in two EISs relating to disposal of surplus plutonium, an EIS
2 relating to NNSA's Nuclear Complex Transformation Program, and separate EISs evaluating
3 environmental impacts at NNSS, the Pantex Plant, in Carson City, Texas, and LANL, in Los
4 Alamos, New Mexico. None of these prior NEPA documents or any other NEPA document
5 relied upon by the Supplemental Analysis has been the subject of court challenge or found
6 insufficient in any way.

7 The Supplemental Analysis that is the subject of this suit must be seen within the context
8 of the extensive analysis already conducted by NNSA.

9 1. The 1999 Surplus Plutonium EIS

10 In 1999, NNSA published the Surplus Plutonium Disposition Final Environmental
11 Impact Statement (DOE 1999) ("Surplus Plutonium EIS"). The Surplus Plutonium EIS
12 examined the environmental effects of the disposal of 50 metric tons of surplus plutonium, and
13 considered alternatives that included transporting, storing, and disposing of the surplus
14 plutonium at multiple locations, including NNSS. *See* Surplus Plutonium EIS at S-6 to S-7 (US
15 Exhibit 3).

16 2. The 2008 Transformation SPEIS

17 In 2008, NNSA published the Final Complex Transformation Supplemental
18 Programmatic Environmental Impact Statement (DOE 2008a) ("Transformation SPEIS") (US
19 Exhibit 4). The Transformation SPEIS analyzed the environmental impacts of various
20 alternatives for transforming DOE's nuclear weapons complex into a smaller, more efficient
21 enterprise that could respond to changing national security challenges and ensure the long-term
22 safety, security, and reliability of the nuclear weapons stockpile. One of the alternatives the
23 SPEIS examined was consolidating plutonium and uranium storage and nuclear weapon
24 assembly at one or more sites. The NNSS was a location considered for such a site. As such, the
25 Transformation SPEIS examined the environmental effects of transporting plutonium to NNSS
26 from SRS as well as Pantex and LANL and storing at NNSS enough plutonium to support a
27 maximum of 200 weapon assemblies a year. Transformation SPEIS at S-42 to S-43 (US Exhibit
28 4).

1 Specifically, the Transformation SPEIS evaluated the impacts of transporting to NNSS
2 and storing up to 60 tons of plutonium, mostly in pit form. It also examined the environmental
3 effects of annual transportation of plutonium pits between other DOE sites and NNSS. And it
4 evaluated the environmental consequences of moving the manufacturing, research, and
5 development activities involving plutonium presently at LANL, including plutonium pit
6 production, to NNSS. *Id.*

7 3. The 2013 NNSS EIS

8 In February 2013, NNSA published the Final Site-Wide Environmental Impact Statement
9 for the Continued Operation of the Department of Energy/National Nuclear Security
10 Administration Nevada National Security Site and Off-Site Locations in the State of Nevada
11 (DOE 2013) (“NNSS EIS”) (US Exhibit 2). The NNSS EIS analyzed ongoing and reasonably
12 foreseeable future operations and activities at the NNSA. One of the alternatives examined in
13 the NNSS EIS was the expanded operation alternative. Under this alternative, the responsibility
14 for dismantling up to 100 nuclear weapons per year, replacing limited-life components on up to
15 360 nuclear devices per year, and associated maintenance activities would have been transferred
16 to the NNSS. This alternative would have required the following materials to be moved to the
17 NNSS:

- 18 1. Up to 4 metric tons of special nuclear material, including plutonium, from the Idaho
19 National Laboratory for use in experiments;
- 20 2. Approximately 200 kilograms of special nuclear material from Lawrence Livermore
21 National Laboratory in California, for use in detector development and as radiation test objects;
- 22 3. 2 kilograms of uranium-233 from LANL (associated with test readiness);
- 23 4. 500 kilograms of highly enriched uranium, depleted uranium, and uranium from
24 Lawrence Livermore National Laboratory.
- 25 5. Up 360 nuclear weapon pits per year, pending their transport to Pantex or another
26 appropriate location. NNSS EIS at 3-34 (US Exhibit 2).

27 The NNSS EIS evaluated the possible environmental impacts of these operations,
28 including the transportation and storage of all of the nuclear materials described above. In

1 addition, the 2014 Record of Decision specifically provides for the transfer of special nuclear
2 material, including plutonium, to and from other locations within the DOE/NNSA complex for
3 staging at the NNS. 79 Fed. Reg. 78421, 78423 (Dec. 30, 2014) (“DOE/NNSA will . . . transfer
4 special nuclear material, including nuclear weapon pits, to and from other locations in the
5 DOE/NNSA complex for staging and use in experiments at the NNS.”)

6 4. The 2015 Final Surplus Plutonium SEIS

7 In 2015, NNSA published its Final Surplus Plutonium Disposition Supplemental
8 Environmental Impact Statement (“Final Surplus Plutonium SEIS”) (US Exhibit 5). The Final
9 Surplus Plutonium SEIS analyzed the environmental consequences of transporting plutonium
10 between different NNSA sites. Although this document did not specifically consider
11 transporting plutonium to the NNS, it evaluated different options including the transport of
12 plutonium pits from SRS to LANL for disassembly, transport of the plutonium back to SRS for
13 immobilization, and final transport back to New Mexico. The SEIS thoroughly analyzed the
14 risks and environmental effects of the secured transport of plutonium across long distances as
15 well as the storage of plutonium for periods of time before use in manufacture or its disposal. It
16 did so for the possible transportation of up to 34 metric tons of plutonium in one form or another.
17 As such, the risks associated with and the environmental effects of transporting plutonium over
18 long distances and storing it in secure facilities are well known and documented and were
19 extensively examined by this SEIS. Final Surplus Plutonium SEIS at S-23 to S-37 (US Exhibit
20 5).

21 5. The LANL and Pantex EISs

22 In addition, the environmental effects of the transportation and storage of plutonium and
23 other special nuclear materials have been extensively analyzed in the Site-Wide Environmental
24 Impact Statement for Continued Operation of Los Alamos National Laboratory, Los Alamos,
25 New Mexico (DOE 2008b) (“LANL EIS”) and the Final Environmental Impact Statement for the
26 Continued Operation of the Pantex Plant and Associated Storage of Nuclear Weapon
27 Components (DOE 1996) (“Pantex EIS”). US Exhibit 6 at S-44 to S-92 (LANL EIS) and US
28 Exhibit 7 at S1 to S8 (Pantex EIS).

1 **D. The Supplement Analysis for the Removal of One Metric Ton of Plutonium**
2 **from the State of South Carolina to Nevada, Texas, and New Mexico**

3 It is within this context of over 20 years of examining the environmental effects of the
4 storage, transport, and use of plutonium and other special nuclear materials that NNSA published
5 the Supplemental Analysis at issue in this lawsuit. NNSA’s Supplemental Analysis, dated July
6 2018, for its Final Complex Transformation Supplemental Programmatic Environmental Impact
7 Statement (“Supplemental Analysis”) (US Exhibit 1).

8 As explained above, the South Carolina District Court has ordered DOE/NNSA to
9 remove one metric ton of plutonium from SRS by January 1, 2020. To respond to the court’s
10 order, DOE/NNSA proposed transporting one metric ton of plutonium out of South Carolina to
11 NNSS or Pantex for staging prior to shipment to LANL (“proposed action”).⁹ The proposed
12 action also may include shipments of plutonium between NNSS and Pantex. The proposed
13 action does not include any construction or ground-breaking activity.

14 To determine whether the proposed action necessitated supplementation of the EISs
15 described above, preparation of a new NEPA document, or no further NEPA documentation
16 because the proposed action was adequately analyzed in existing NEPA documents, DOE/NNSA
17 prepared the Supplemental Analysis. The Supplemental Analysis first explains that it did not
18 consider a no-action alternative because such an alternative would not comply with the South
19 Carolina District Court order. Supplemental Analysis at 10. Referencing the extensive NEPA
20 analysis already completed and summarized above, the Supplemental Analysis recognizes that
21 all the activity presently at issue before this Court was previously evaluated: The packaging and
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23
24 ⁹ Information regarding the location or transportation of the material is classified for national
25 security purposes. Defendants believe that this motion can and should be denied based on the
26 unclassified record submitted herewith. To the extent that classified information is necessary to
27 resolve the pending motion for a preliminary injunction or otherwise respond to the claims, such
28 information is subject to an assertion of the state secrets privilege and exclusion from the case,
and that result may establish separate grounds for dismissal. *See, e.g., Kasza v. Browner*, 133
F.3d 1159 (9th Cir. 1998).

1 transportation of plutonium from South Carolina to NNSS, the staging and container evaluation,
2 repair, and possible replacement at NNSS, shipments between NNSS and Pantex, and shipments
3 to LANL from NNSS. *Id.* at 8-9; *see id.* at 13-15 (describing the activity that will occur at
4 NNSS).

5 The Supplemental Analysis considered that each shipment of plutonium is contained
6 within a DOT-certified, 3013 double-sealed shipping container. *Id.* at 12. These containers
7 comply with all relevant NRC and DOT regulations, including Type B packaging requirements.
8 A diagram of the cross section of a DOT-compliant container can be found at page 13 of the
9 Supplemental Analysis. These containers are then stored in a secure facility.

10 The Supplemental Analysis then lists what it describes as “resource areas” that would not
11 be impacted by the proposed action – land use and viewshed, geology and soils, water resources,
12 radiological air quality, socioeconomics, environmental remediation, cultural resources,
13 ecological resources, and chemical impacts to public and worker health. *Id.* at 17, 18 (Table 3-
14 1). The Analysis also considers those resource areas that could be impacted – infrastructure,
15 noise, non-radiological air emissions, radiological impacts to public and worker health, waste
16 management, facility accidents and intentional destructive acts, greenhouse gases, and
17 environmental justice – and notes that all of these resources were analyzed in previous NEPA
18 documents. *Id.* at 17, 19 (Table 3-2).¹⁰

19 Finally, the Supplemental Analysis evaluates each of the resource areas that could be
20 impacted by the proposed action, from the perspective of each of the NNSA sites impacted, and
21 compares the potential impacts with the impacts evaluated in the prior NEPA analyses.¹¹ The
22 Supplemental Analysis also separately evaluates the potential impact on each of the resource
23 areas that could occur during transportation. Based on this evaluation, the Supplemental
24 Analysis concludes that, in each instance, any potential impact beyond that already considered

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26 ¹⁰ Table 3-2 is mislabeled as Table 3-1.

27 ¹¹ The Supplemental Analysis provides specific citations to the prior NEPA documents that
28 evaluated each resource area.

1 and analyzed would be negligible or minor. *Id.* at 19 (Table 3-2), 20-37. The Supplemental
2 Analysis further concludes that “the proposed action does not constitute a substantial change
3 from actions previously analyzed in existing DOE/NNSA NEPA documents, and there are no
4 significant new circumstances or information relevant to environmental concerns.” *Id.* at 37.

5 The Supplemental Analysis similarly considers cumulative effects: For each resource
6 area, it references the prior NEPA analyses, describes the potential additional impact that can be
7 reasonably expected from the proposed action, and concludes that there is no substantial change
8 and no significant new circumstances or information relevant to environmental concerns. *Id.* at
9 38-44. The Supplemental Analysis finally concludes that no further NEPA documentation is
10 required. *Id.* at 45.

11 **IV. STANDARD OF REVIEW**

12 **A. Preliminary Injunctions**

13 A preliminary injunction is an extraordinary remedy, and Plaintiff has the burden to
14 prove by clear and convincing evidence that the remedy is appropriate in every case. *See*
15 *Granny Goose Foods, Inc. v. Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 442–
16 43 (1974). In *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. at 20, the Supreme
17 Court set out a four-factor test: “[a] plaintiff seeking a preliminary injunction must establish [1]
18 that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the
19 absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an
20 injunction is in the public interest.” *See Munaf v. Geren*, 553 U.S. 674, 690 (2008) (“a party
21 seeking a preliminary injunction must demonstrate, among other things, a likelihood of success
22 on the merits” (quotations omitted)); *Mazurek v. Armstrong*, 520 U.S. 968, 971, 976 (1997)
23 (overturning a preliminary injunction issued when a plaintiff had established only a “fair chance
24 of success on the merits” of his claim). The Ninth Circuit recognizes the *Winter* test. *E.g.*,
25 *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir.2009) (quoting and applying *Winter*).¹²

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27
28 ¹² In *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011), the Ninth
Circuit applied an alternate test. This Court, however, has recognized that the alternate test is

1 **B. Administrative Procedure Act**

2 Plaintiff's claims are governed by the Administrative Procedure Act's ("APA") standard
3 of review. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990) (judicial review of
4 agency action proceeds under APA where the statute at issue does not provide cause of action);
5 *Wetlands Action Network v. Army Corps of Engr's.*, 222 F.3d 1105, 1114 (9th Cir. 2000) (same),
6 *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir.
7 2011).

8 To obtain relief under the APA, a plaintiff must show that the agency action it challenged
9 was arbitrary and capricious. *DOT v. Pub. Citizen*, 541 U.S. 752, 763 (2004); *Kleppe v. Sierra*
10 *Club*, 427 U.S. 390, 412 (1976) (requiring plaintiffs to carry the burden); *George v. Bay Area*
11 *Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009) (same). In turn, the "arbitrary and capricious
12 standard" is necessarily a deferential one. "The [agency's] action . . . need be only a reasonable,
13 not the best or most reasonable, decision." *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855
14 (9th Cir. 1989). As the en banc Ninth Circuit reaffirmed, a court can "reverse a decision as
15 arbitrary and capricious only if the agency relied on factors Congress did not intend it to
16 consider, entirely failed to consider an important aspect of the problem, or offered an explanation
17 that runs counter to the evidence before the agency or is so implausible that it could not be
18 ascribed to a difference in view or the product of agency expertise." *Lands Council*, 537 F.3d at
19 987 (en banc) (quotations omitted). In other words, courts ensure agencies comply with
20 procedural mandates, but a court does not overturn an agency's decision if a court is simply
21 unhappy with the agency's decisions or if it may have reached a different decision. *Vt. Yankee*
22 *Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

23 Moreover, the Ninth Circuit's en banc decision in *Lands Council* makes clear that a court
24

25 _____
26 contrary to both *Winters* and *Selecky*. *E.g., U.S. Bank, N.A. v. SFR Investments Pool 1, LLC*, 124
27 F. Supp. 3d 1063, 1070 (D. Nev. 2015). In any event, Plaintiff does not rely on *Cottrell* and
28 agrees that *Winter* provides the proper standard. Plaintiff's Motion for Preliminary Injunction
and Memorandum (ECF 1-20) ("Motion") at 4.

1 reviewing an agency action is necessarily at its most deferential when assessing the agency’s
2 consideration of technical matters. 537 F.3d at 993. In that role, the reviewing court is not itself
3 “to act as a panel of scientists that instructs the [agency] how to validate its hypotheses . . . ,
4 chooses among scientific studies in determining whether the [agency] has complied with [its
5 regulations], and orders the agency to explain every possible scientific uncertainty.” *Id.* at 988.
6 Indeed, “[w]hen specialists express conflicting views, an agency must have discretion to rely on
7 the reasonable opinions of its own qualified experts even if, as an original matter, a court might
8 find contrary views more persuasive.” *Id.* at 1000 (quoting *Marsh*, 490 U.S. at 378); *League of*
9 *Wilderness Defenders-Blue Mountains Biodiversity Proj. v. Allen*, 615 F.3d 1122, 1130 (9th Cir.
10 2010).

11 **V. ARGUMENT**

12 **A. Plaintiff Is Not Likely To Succeed On the Merits.**

13 The parties agree that the only appropriate NEPA question in this case is whether DOE
14 reasonably determined that the plutonium transportation at issue does not constitute a substantial
15 change from actions previously analyzed under NEPA and that no new or supplemental EIS is
16 required. *See* Motion at 4. The answer to that question is “yes”: DOE thoroughly evaluated the
17 potential environmental impacts of the transportation and staging of plutonium at the NNSS in its
18 three prior programmatic EISs and in the Site-Wide EISs for NNSS and the other NNSA
19 facilities. In its Supplemental Analysis, DOE concluded, based on its technical expertise, that a
20 supplemental EIS was not warranted because the potential impacts were not significantly
21 different from the impacts DOE analyzed in the prior NEPA analyses. DOE is entitled to
22 deference in its determination that a supplemental EIS was not required. *See Lands Council*, 537
23 F. 3d at 993.

24 1. DOE has previously analyzed the potential impacts related to the transportation, 25 storage, and use of plutonium.

26 As explained above, DOE has a twenty-year record of examining the environmental
27 effects of the storage, transport, and use of plutonium. This analysis includes evaluation of the
28 transportation of plutonium between different DOE sites. Final Surplus Plutonium SEIS at S-23

1 to S-38 (US Exhibit 5). The NNSS EIS evaluated the potential impacts of transferring plutonium
2 to NNSS from other DOE locations specifically for staging purposes. *E.g.*, NNSS EIS at 3-34,
3 5-37 to 5-68, 6-31 to 6-36 (US Exhibit 2). The Transformation SPEIS also analyzed the
4 transportation and staging of special nuclear material, including plutonium to and from multiple
5 locations around the nation including NNSS. *See* Transformation SPEIS at S-1 to S-3, S-17 to S-
6 18, S-23, S-42 to S-43, S-46 to S-47, S-69 to S-70 (US Exhibit 4).

7 Radiological and nonradiological impacts from the transportation of radioactive
8 materials, including plutonium, were evaluated in the Final Surplus Plutonium SEIS at 4-70 to 4-
9 79 (US Exhibit 5). The NNSS EIS also analyzed the radiological and nonradiological impacts
10 from the transportation of radioactive material to the NNSS. US Exhibit 2 at 5-37 to 5-58.
11 Potential impacts from transportation accidents or sabotage during plutonium transportation was
12 evaluated in the NNSS EIS at 5-55 to 5-57 (US Exhibit 2), and the Final Surplus Plutonium SEIS
13 at 4-38 (US Exhibit 5). Potential impacts from transportation accidents, as well as purposeful
14 attacks, were also analyzed in the Final Environmental Statement on the Transportation of
15 Radioactive Material by Air and Other Modes (NRC 1977) at 5-1 to 5-53, 7-1 to 7-14 (US
16 Exhibit 8).

17 The NNSS EIS also evaluated all potential impacts related to the storage of plutonium at
18 the NNSS, including nonradiological air emissions, utility consumption, noise, waste
19 management, facility accidents, intentional destructive acts, and environmental justice impacts.
20 *See* NNSS EIS at 5-1 to 5-2 (US Exhibit 2). It also analyzed not just the storage, but also the use
21 of plutonium at NNSS. *Id.* at 3-34. This analysis was comprehensive, intensive, and specific to
22 the actual activity which constitutes the proposed action – the transportation and storage of
23 plutonium, including at NNSS. The Supplemental Analysis considered all of this previous
24 evaluation and concluded that the proposed action was not a substantial change from the activity
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1 already analyzed.¹³

2 Nevada makes only one argument contending that any substantial change or new
3 circumstance exists. It claims that “new transportation circumstances in Nevada require new
4 information and a new evaluation of impacts.” Motion at 6. Nevada fails, though, to describe
5 what the “new transportation circumstances” are or how they would impact the previous NEPA
6 analyses. It relies on a vague affidavit that contends that “highway construction projects” and
7 “significant changes in population” required a supplemental EIS, *Affd. of Robert J. Halstead*
8 (ECF No. 1-3) ¶ 24,¹⁴ but nowhere does Nevada further describe these “changes” or explain how
9 they would impact DOE’s prior analysis. Such unsupported speculation provides no basis to
10 reject DOE’s conclusions. *Krichbaum v. Kelley*, 844 F. Supp. 1107, 1113 (W.D. Va. 1994), *aff’d*
11 61 F.3d 900 (4th Cir. 1995) (agency need not address areas or issues that are “highly
12 speculative”).

13 Plaintiff presents no other factor or circumstance that could be considered a change from
14 those previously analyzed. The question for the Court is whether there are substantial changes
15 from actions previously analyzed, or significant new circumstances or information relevant to
16 environmental concerns. The potential impacts of the transportation and storage of plutonium,
17 including at NNSS, has been the subject of extensive DOE analysis. There simply is nothing
18 about the proposed action that is in any way different from the activity already analyzed in the
19 numerous NEPA documents described above. Because no such differences exist, Nevada cannot
20 demonstrate that it is likely to succeed on the merits and its motion should be denied.

21
22 ¹³ As explained above, the Supplemental Analysis also considered a number of “resource areas”
23 that are not impacted in any way by the proposed action. *Infra* at 15. Nevada does not argue that
24 any of these areas are impacted.

25 ¹⁴ Although extra-record evidence may be considered for purposes of evaluating irreparable
26 harm, *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984), except in limited
27 circumstances not alleged here, it is inadmissible to support the merits. 5 U.S.C. § 706 (limiting
28 review to the administrative record); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (same).

1 2. DOE was not required to consider transportation alternatives.

2 In apparent recognition that DOE's determination on supplementation was reasonable
3 and warrants substantial deference, *Blue Ridge*, 716 F.3d at 195, Nevada attempts to deflect
4 attention away from the supplementation issue by arguing that DOE was required to consider
5 transporting plutonium to locations other than NNSS, listing a series of hypothetical destinations
6 throughout the country. Motion at 5-6. That argument, however, misapprehends the entire
7 purpose of the Supplemental Analysis. As explained above, the controlling regulations require
8 supplementation where "[t]he agency makes substantial changes in the proposed action that are
9 relevant to environmental concerns" or "[t]here are significant new circumstances or information
10 relevant to environmental concerns and bearing on the proposed action or its impacts." 40
11 C.F.R. § 1502.9(c)(1)(i), (ii); *see also Marsh*, 490 U.S. at 370-78 (discussing the
12 supplementation requirement under NEPA and the CEQ regulations). Consideration of
13 alternatives is not a requirement at this stage; DOE simply has no obligation to "evaluate
14 alternatives" when deciding *whether* to prepare a supplemental EIS. If no "substantial changes,"
15 or "significant new circumstances or information" exist, then the inquiry is over and no further
16 NEPA analysis need occur. As explained in the Supplemental Analysis, transportation of
17 plutonium to and from NNSS has been thoroughly evaluated in previous NEPA analyses. This
18 particular proposal related to a discrete quantity of plutonium does not change that analysis in
19 any manner.

20 Further, the Supplemental Analysis, in conjunction with the prior NEPA studies,
21 demonstrates that no significant environmental effects are presented by the transportation or
22 storage at NNSS of this amount of plutonium. Accordingly, whether the plutonium was shipped
23 to a different destination than NNSS would have no significant effect. Where the new activity
24 will not have significant effects, a supplemental EIS is not required. *See Marsh*, 490 U.S. at
25 373-74; *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1125-26 (9th Cir. 2012).

26 This case is similar to a recent case decided by the D.C. District Court. *Beyond Nuclear*
27 *v. U.S. Dep't of Energy*, 233 F. Supp. 3d 40 (D.D.C. 2017). At issue in *Beyond Nuclear* was
28 DOE's plan to transport "target material" which contains highly enriched uranium in liquid form

1 from Canada to South Carolina. *Id.* at 44.¹⁵ Because transportation of such material, although in
2 solid form, had previously been the subject of NEPA analysis, DOE determined in two
3 Supplemental Analyses that no additional NEPA documentation was required. *Id.* at 46.

4 Plaintiffs argued that transportation of the material in liquid rather than solid form
5 required completion of a supplemental EIS. *Id.* at 49. The court rejected this argument, agreeing
6 with DOE that its planned transport of liquid target material was not a substantial change from
7 the actions evaluated by past environmental impact statements, and that the potential risks and
8 impacts from this transport (such as impacts from release into air or water, or radiation exposure
9 to the truck drivers) were not significantly different from those already considered. *Id.* at 51-52.

10 The same holds true here. As explained above, DOE has extensively analyzed, in
11 previous NEPA documents, the transportation of plutonium throughout the United States,
12 including to and from NNSS. There is nothing unique about this particular shipment that would
13 alter the prior analysis of potential effects. If anything, there is less reason here for additional
14 analysis than in *Beyond Nuclear*. In that case, DOE was transporting materials that were in
15 different form than those previously analyzed. Here, there is no difference in the materials at all
16 and there is simply no reason to distinguish this action from those analyzed previously.

17 3. Nevada's remaining arguments are without merit.

18 Nevada makes several additional arguments, each of which misrepresents DOE's
19 previous environmental analysis. Nevada argues that the previous EISs were incomplete because
20 they did not address transportation accidents. Motion at 8. As explained above, though, the
21 Supplemental Analysis recognized that potential impacts from transportation accidents, as well
22 as purposeful attacks, were analyzed in the NNSS EIS at 5-55 to 5-57 (US Exhibit 2), the Final
23 Surplus Plutonium SEIS at 4-38 (US Exhibit 5), and in the Final Environmental Statement on the
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26 ¹⁵ Target material is the residual substance that remains after highly-enriched uranium targets are
27 irradiated in a research reactor, removed, and dissolved in a nitric acid solution to recover
28 molybdenum-99, which decays into a radioisotope used in medical applications such as cancer
diagnosis and treatment. *Beyond Nuclear*, 233 F. Supp. 3d at 44.

1 Transportation of Radioactive Material by Air and Other Modes (NRC 1977) at 5-1 to 5-53, 7-1
2 to 7-14 (US Exhibit 8). Supplemental Analysis at 34-35. The Supplemental Analysis concludes
3 that the current action does not impact these previous analyses, particularly since the NNSS EIS
4 considered transportation of materials to NNSS. *Id.* at 33; NNSS EIS at 3-34 (US Exhibit 2).

5 Nevada claims that DOE's analysis of transportation accidents considered only the risk of
6 accidents but not the possible harm. Motion at 7. But that is not the case. Nevada points to a
7 series of tables in the Supplemental Analysis that disclose that the increased risk related to
8 transportation accidents involving the proposed action is minimal. Motion at 7-8. But the
9 underlying NEPA analysis thoroughly considered not just the risks of accidents but also the
10 potential harm. The NNSS EIS, for instance, describes a detailed transportation accident
11 analysis methodology developed by NRC that consider the "spectrum of accident severities,"
12 including "high severity accidents that have a correspondingly low probability of occurrence."
13 The methodology thus considers both "the probabilities *and consequences* from this spectrum of
14 accidents." NNSS EIS at E-30 (emphasis added) (US Exhibit 2).

15 Similarly, Nevada's argument that there has been no analysis of the transportation of
16 plutonium for pit production is ill-founded. Motion at 7. As explained above, the
17 Transformation SPEIS evaluated the impacts of transporting to NNSS and storing up to 60 tons
18 of plutonium, mostly in pit form. Transformation SPEIS at S-42 to S-43. (US Exhibit 4).

19 Finally, Nevada argues that there has been no evaluation of cumulative impacts from
20 reasonably foreseeable future shipments. Motion at 8-9. These "reasonably foreseeable future
21 shipments," according to the Plaintiff, will be triggered by future requirements to transport
22 additional plutonium from South Carolina. *Id.* DOE is not required, however, to analyze
23 impacts from speculative future events that may never come to pass. *Krichbaum*, 844 F. Supp. at
24 1113. Furthermore, previous environmental analysis has considered cumulative health effects
25 over a 130-year period (from 1943 to 2073) of nuclear material and waste transport across the
26 United States. Supplemental Analysis at 44 (citing Final Surplus Plutonium SEIS). This
27 analysis necessarily encompasses the rather routine shipment at issue here.

28 Even if additional shipments were to occur besides those potentially at issue here, just as

1 the current shipments raise no new considerations that have not been already adequately
2 analyzed, any shipments in the future should similarly come within the existing environmental
3 analysis. There is little marginal impact from transporting or storing more sealed cans of
4 plutonium inside the same facility.

5 In this regard, it is important to consider the procedures in place to ensure that the
6 containers are in a safe condition. Each shipment of plutonium is contained within a double
7 sealed Type-B container that complies with all relevant NRC and DOT regulations. *See*
8 Supplemental Analysis at 13 (Figure 2-2), 14 (Figure 2-3).

9 These containers are then stored in a secure facility. NNSS has the capacity to handle the
10 extra plutonium, and NNSA has no plans to build any additional facilities or to any way alter the
11 existing facilities at NNSS. *Id.* at 17 (“No new construction is associated with the proposed
12 action and all proposed operations are routine activities at the four sites.”). The proposed action
13 consists of nothing more than storing additional sealed cans of plutonium inside an existing,
14 secure facility, activity that has been already thoroughly evaluated. If additional shipments were
15 to occur in the future, the same would be true.

16 In sum, the Supplemental Analysis demonstrates that there are no significant new
17 circumstances or environmental impacts that would require a supplemental EIS. Nevada’s
18 arguments to the contrary are completely lacking in any evidentiary basis and conclusively
19 rebutted by NNSA’s extensive environmental analysis. Nevada cannot meet its burden of
20 showing that it is likely to succeed on the merits.

21 **B. There Is No Irreparable Injury.**

22 Because Nevada cannot establish that it is likely to succeed on the merits of its NEPA
23 claim, the Court need not consider the remaining *Winters* factors. These factors, though, also
24 favor Federal Defendants.

25 To obtain a preliminary injunction, Nevada must link allegations of actual irreparable
26 injury to a claim on which they have a likelihood of success. Nevada has failed to do so. It must
27 support allegations of irreparable harm with actual evidence, not simply with conclusory
28 statements or unsupported allegations. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668,

1 674-75 (9th Cir. 1988) (holding that unsupported allegations do not suffice); *Goldie's Bookstore,*
2 *Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (holding that purely speculative
3 injury “does not constitute irreparable injury”).

4 Nevada presents no actual evidence that it will be harmed. Instead, it argues that an
5 alleged violation of NEPA, by itself, results in harm. It complains of an “injury to the decision-
6 making process.” Motion at 9; *see also id.* (“once the plutonium is transported out of South
7 Carolina to the NNSS, Nevada will forever lose the ability to formally comment upon safety and
8 environmental concerns related to the shipments as required under NEPA”). Procedural injury of
9 this sort cannot form the basis for irreparable harm. *See Lands Council*, 537 F.3d at 1005
10 (finding that courts may not “abandon a balance of harms analysis just because a potential
11 environmental injury is at issue” and declining “to adopt a rule that *any* potential environmental
12 injury *automatically* merits [a preliminary] injunction”).

13 Indeed, when considering the scope of the proposed action versus the activities that have
14 been occurring at NNSS for years and continue to occur, it is extremely difficult to credit any
15 claim of actual injury. As explained above, the NNSS has been in use for over 70 years and was
16 one of the most significant nuclear weapons test sites in the United States. Today, experiments
17 that bring plutonium and other materials just short of the point of reaching the necessary critical
18 mass or the point at which the fission process becomes self-sustaining are conducted at the
19 NNSS. Nuclear weapons and components are tested, modified, and dismantled. The NNSS
20 retains the capability of conducting underground nuclear tests if necessary.

21 These activities are ongoing, have been the subject of previous environmental analysis,
22 and have not been challenged by Nevada. The NNSS has proven capable of conducting these
23 operations in a secure and safe manner. The transportation and staging of plutonium at such a
24 facility simply does not create any reasonable likelihood of actual harm.

25 In addition, Nevada’s claim of imminent, irreparable injury is undercut by the delay in
26 bringing this action and in filing this motion and its failure to articulate to NNSA any such
27 concerns despite being consulted about the planned action multiple times over the seven months
28 preceding the filing of this lawsuit. It is well established that a delay before seeking a

1 preliminary injunction implies a lack of urgency and little likelihood of irreparable harm. *Garcia*
2 *v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015).

3 NNSA consulted with the state of Nevada once it began the process of planning to move
4 the one metric ton of plutonium from the SRS in April of 2018. At that time, the State was
5 informally told of the need to remove plutonium from the SRS and the possibility of NNSS being
6 a destination. In early May 2018, the NNSA Director of Intergovernmental Affairs Harris
7 Walker began discussing the possible plutonium transfer with state officials. During a May 18
8 conference call, NNSA officials informed the Plaintiff that NNSS was a prime candidate to
9 receive some or all of the plutonium in question and that NNSA intended to perform a
10 Supplemental Analysis of the plan that would build on the previous NEPA analysis.

11 On July 27, 2018, nearly a dozen participants from the field and headquarters levels of
12 DOE and NNSA met with several state officials for a daylong meeting to discuss DOE's
13 enduring mission at NNSS, particularly in light of the potential new plutonium staging. During
14 this meeting the State was thoroughly briefed on the possibility of NNSS being used for the
15 staging of the plutonium at issue in this case.

16 On August 27, 2018, Mr. Walker personally informed the State that NNSA had
17 completed its Supplemental Analysis and determined that the new scope of work had no
18 significant impact in light of the existing NEPA analysis. On August 29, 2018, Mr. Walker
19 explained the Supplemental Assessment's findings and NNSA's intent to publish the
20 Supplemental Assessment the next day. After publication of the Supplemental Assessment,
21 further discussions occurred at a meeting between senior leadership of DOE, NNSA, and Nevada
22 on October 30, 2018. Walker Declaration, ¶¶ 3-8.

23 As explained in the Walker Declaration, during this entire process, Nevada never stated
24 any grave or pressing safety concerns or possibility of the plan causing harm. Further, the State
25 admitted that it had no concerns about the safety and security of the transport of nuclear
26 materials within the State when done so by DOE's Office of Secure Transportation, as is the case
27 with the transportation at issue here. The State's primary concern throughout the process was
28 that the public would perceive the plan as the federal government "dumping waste" on the State

1 and that DOE was not providing any sort of compensation or new missions to the State in
2 exchange for staging of the plutonium. Walker Declaration ¶ 9.

3 On September 28, 2018, Nevada Governor Brian Sandoval wrote to DOE Secretary Rick
4 Perry stating the State's objections to the Supplemental Assessment and the possible use of DAF
5 for staging of the plutonium at issue in this case. In this letter, Governor Sandoval articulated
6 several objections to the proposed action. Governor Sandoval, however, did not make any claim
7 that the proposed action would cause irreparable harm or create any significant danger to the
8 citizens of Nevada. *See* Letter from Governor Brian Sandoval to Secretary Rick Perry,
9 Attachment 1 to Affidavit of Pam Robinson (ECF No. 4) at 12-14.

10 If Nevada truly believed that harm was imminent and irreparable, it would have made
11 such claims earlier and not have waited months to file this action. Nevada's failure to do so
12 undermines its claim of irreparable harm.

13 **C. The Balance of Equities and the Public Interest Favor the Government.**

14 Because Nevada presents no evidence of actual harm, relying instead solely on a
15 procedural injury, it has presented no factors to demonstrate that the equities or the public
16 interest favors an injunction. Again, it relies solely on supposed injury to the NEPA "decision-
17 making process." *E.g.*, Motion at 10. In balancing the relative hardships, there is no
18 presumption that harms from violations of federal environmental statutes should outweigh other
19 harms to the public interest. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987);
20 *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) ("We will not grant a
21 preliminary injunction, however, unless those public interests [in consideration of environmental
22 impacts] outweigh other public interests that cut in favor of *not* issuing the injunction."); *see also*
23 *Lands Council*, 537 F.3d at 1004–1005.

24 On the other hand, there is a compelling case that the equities and the public interest
25 favor DOE. As explained above, the South Carolina federal district court has issued an
26 injunction against DOE, requiring it to remove the plutonium from South Carolina. DOE has
27 proposed this action to comply with the court's order. Restrictions on DOE's ability to comply
28 with this order are contrary to the public interest.

1 Further, DOE's response to the court order is consistent with its continuing obligation to
2 responsibly manage plutonium and other nuclear materials. As explained above, DOE, through
3 NNSA, is responsible for enhancing national security through the military application of nuclear
4 science. To this end, NNSA maintains and enhances the safety, security, and effectiveness of the
5 United States' nuclear weapons stockpile. This responsibility necessarily entails transporting
6 nuclear materials among several DOE facilities located throughout the United States, as is
7 occurring in this case. Although it is true that DOE opposed the order issued by the South
8 Carolina court, since it is in place, orderly compliance with the order, informed by DOE's
9 substantial experience and expertise in managing the nuclear weapons stockpile, is in the public
10 interest.

11 The NEPA analysis that has occurred demonstrates that Nevada is at no additional risk of
12 harm from the possible plutonium transportation at issue here. The public, however, has a strong
13 interest in DOE managing the country's nuclear weapon stockpile in a safe and responsible
14 manner. As demonstrated by the Supplemental Analysis, DOE is doing exactly that, while
15 Nevada presents no evidence to establish otherwise. The equities and the public interest,
16 therefore, favor denial of Nevada's motion.

17 VI. CONCLUSION

18 As explained above, Plaintiff has established no likelihood of success on the merits and
19 no irreparable harm. In addition, the balance of equities and the public interest weigh against
20 any injunction. Accordingly, the Court should deny Nevada's motion.

21 Respectfully submitted, January 4, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed on January 4, 2019, with the Clerk of the Court and served using the CM/ECF system upon the following parties/attorneys of record:

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