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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

UNITED STATES; *et al.*,

Defendants.

Case No. 3:18-cv-00569-MMD-CBC

PLAINTIFF'S MOTION FOR INJUNCTION PENDING APPEAL

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Sometime during the course of the last year, the United States Department of Energy (DOE) shipped one-half ton of weapons-grade plutonium into the State of Nevada, to be stored indefinitely at the Nevada National Security Site (NNSS)—less than 90 miles from Las Vegas. It did so in secret, without any notification to the State—thereby risking harm to Nevada's citizens and environment—all while purporting to be engaged in negotiations with Nevada regarding the shipments. The DOE did not notify Nevada of its action until January 30, 2019--well after the State brought this suit in an attempt to enjoin the DOE from sending any illegal shipments of plutonium to Nevada.

Nevada has already been irreparably harmed by the presence of plutonium in the State shipped by the DOE in violation of the National Environmental Policy Act (NEPA), NEPA regulations, and the DOE's own rules regarding transport and storage of nuclear materials. The DOE, having already completed one such shipment in complete secrecy, remains likely to harm Nevada further with additional illegal shipments. The South Carolina injunction, pursuant to which DOE made the first shipment, mandates additional shipments from the Savannah River Site (SRS). The DOE's own Supplemental Analysis (SA) confirms that the DOE intends to ship at least an additional half-ton of plutonium in the near future.

Nevada is critically concerned with both the shipment that has already occurred and with the strong likelihood of additional shipments of plutonium into the State. Both pose a risk to the health and safety of Nevada citizens and to the environment around them, particularly when accomplished in the secretive manner chosen by the DOE, with complete disregard for the interests of the people of Nevada and its obligations under NEPA. Given the DOE's actions during the course of this litigation, it is now abundantly clear that Nevada is the unspecified "elsewhere" to which the DOE intends to send additional shipments of plutonium. Nevada requested an injunction from this Court to stop the DOE from precisely this action—transporting and storing weapons-grade

plutonium just outside Las Vegas—without regard for compliance with the laws and regulations governing such transport. Nevada continues to maintain that before the DOE sends another half-ton or worse, several more tons of plutonium to Nevada, it must be compelled to consider and act in accordance with the immediate impact of such a move. In particular, the DOE must consider how such a shipment might impact Las Vegas, a unique and growing city, and the engine that drives the State of Nevada's economy.

Due to Nevada's concerns about the DOE's actions, the State has appealed this Court's January 30, 2019, Order, which denied its motion for a preliminary injunction during the litigation of this case. Nevada therefore requests that the Court issue an injunction pending appeal, enjoining the DOE from shipping any plutonium to Nevada while the State's preliminary injunction appeal is pending. Alternatively, Nevada respectfully requests that the Court enter an interim injunction while Nevada renews its request for an injunction pending appeal in the Ninth Circuit.[1] An interim injunction will at least protect Nevada from further shipments while it seeks review of this Court's Order. Without interim relief, the DOE could do again what it has done before—surreptitiously ship additional plutonium to Nevada—before the Ninth Circuit has the opportunity to consider the important statewide and national interests at stake in this case.

II. ARGUMENT

A. Legal Standard

Federal Rule of Civil Procedure 62(c) provides that "while an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may . . . grant an injunction on terms for bond or other terms that secure the opposing party's right." Fed. R. Civ. P. 62(c). When evaluating whether to issue a stay under Rule 62, this Court must consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay;

[1] Fed. Ct. App. Manual § 21:6 (6th ed. May 2018).

(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011).

This standard is similar, but not identical "to that employed by district courts in deciding whether to grant a preliminary injunction." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Under Rule 62, the "success on the merits factor cannot be rigidly applied, because if it were, an injunction would seldom, if ever, be granted because the district court would have to conclude that it was probably incorrect in its determination on the merits." *Protect Our Water v. Flowers*, 377 F. Supp. 2d 882, 884 (E.D. Cal. 2004). Thus, even if this Court believes its denial of Nevada's request for a preliminary injunction is correct, it should grant an injunction pending appeal when it has "ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844–45 (D.C. Cir. 1977).

B. Nevada Has a Strong Likelihood of Success on Appeal

The equities of this case strongly suggest that this Court should maintain the status quo while Nevada pursues its preliminary injunction appeal in the Ninth Circuit. This case presents difficult questions concerning Nevada's interest in protecting its citizens and environment, and the United States government's (via the DOE) interest in the storage and transport of nuclear materials nationwide. The DOE has already asserted its interest by covertly shipping a large amount of weapons-grade plutonium into Nevada and by making clear its intent to ship more. Nevada deserves the opportunity to argue on appeal that the court should enjoin DOE's wrongful behavior without fear that the DOE will continue improperly shipping plutonium into the State.

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1. Nevada Has and Will Likely Continue to Be Irreparably Harmed by the DOE's Actions[2]

Nevada maintains that the health and safety of well over a million Nevadans requires enjoining the DOE's shipments. No more plutonium should pass through Nevada's largest city until the State's appeal is decided. While this Court concluded that harm to the NEPA decision-making process could not constitute irreparable harm here, Nevada has a valid legal argument to the contrary. (ECF No. 62 at 6:13-15.) Indeed, if ever there was a case in which a NEPA violation justified an injunction, this is the case.

a. Nevada Is Irreparably Harmed by the DOE's NEPA Violations

When a plaintiff alleges NEPA violations, "the harm consists of added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 971 (9th Cir. 2003). NEPA intends to prevent this very harm. "By focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Where a party seeks a preliminary injunction, "[a] procedural injury may serve as a basis for a finding of irreparable harm[.]" ." *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 829–30 (N.D. Cal. 2017), *aff'd in part, vacated on other grounds, remanded sub nom. California v. Azar*, 911 F.3d 558 (9th Cir. 2018). This makes sense, because a state's procedural rights are "in large part defined by what is at stake: the health of [its] citizens and [its] fiscal interests." *Id.* Harm via a procedural injury thus strikes at the very heart of a state's interest in protecting its citizens from harm. Here, the DOE committed a procedural injury—and irreparable harm—to Nevada, by failing to comply with its obligation to undertake a current Environmental Impact Statement (EIS).

[2] This motion focuses on the two issues considered by this Court in its Order: irreparable harm, and balance of the equities between the parties.

See Save Strawberry Canyon v. Dep't of Energy, 613 F. Supp. 2d 1177, 1187 (N.D. Cal. 2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 & n.7, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992)), (stating that "[t]here is no doubt that the failure to undertake an [Environmental Impact Statement (EIS)] when required to do so constitutes procedural injury to those affected by the environmental impacts of a project").

Nevada's witness, Jon Bakkedahl, demonstrated the procedural injury the State would suffer if DOE is permitted to make shipments without preparing an EIS. Bakkedahl—Operation Section Chief of the Nevada Division of Emergency Management (NDEM) testified that if the DOE had undergone a full EIS as required to by law, NDEM would have made comments designed to make DOE's proposed action safer for Nevada's citizens and environment in the event of an emergency response. (*See* Tr. of the January 17, 2019 Hearing, attached as Exhibit 1, 116:9-10.) Further, Bakkedahl discussed the deficiencies of the SA in its failure to give details that would help prepare NDEM to respond in the event of a release. (*Id.* 115:21–116:5.) In short, Bakkedahl established that Nevada was, and continues to be, harmed by its inability to prepare for an emergency related to the DOE's plutonium shipments.

Bakkedahl further testified that NDEM regularly uses EISs to help it create emergency response scenarios. (*Id.* 112:23–5.) Officials like Bakkedahl would help coordinate Nevada's emergency responders and protect its citizens in the event of a release. (*Id.* 110:10–4.) Bakkedahl, through NDEM, would have provided meaningful input on DOE's proposed action. The DOE harmed Nevada by imposing an added risk to its environment and to its people when the DOE chose to take unilateral action without considering and analyzing the likely effects of its decision on the State.

In a similar case, the United States District Court for the Western District of Michigan did find that a procedural injury caused irreparable harm. *See Hirt v. Richardson*, 127 F. Supp. 2d 833, 845 (W.D. Mich. 1999). *Hirt* involved DOE's shipment of mixed oxide fuel (MOX) from New Mexico to Canada. *Id.* at 837. DOE had completed an environmental assessment (EA) that concluded a full EIS was not required for this action.

Id. The plaintiffs alleged that DOE's EA was inadequate and requested a preliminary injunction. *Id.* at 839.

The *Hirt* plaintiffs argued that the violation of NEPA itself constituted irreparable injury. *Id.* at 845. The court agreed, stating that "although plaintiffs cannot demonstrate a likelihood of plutonium release, or any realistic likelihood that the environment will be put in jeopardy by the shipment of MOX from Los Alamos to Canada, they have shown an injury to the decision making process that is incapable of repair if the preliminary injunction does not issue." *Id.* at 846. "Once the shipment of MOX is transported from Los Alamos to [Canada] . . . it is extremely unlikely that a court would, or could, enjoin the project." *Id.* "Therefore, once the American MOX arrives in [Canada], the plaintiffs will forever lose the ability to formally comment upon safety and environmental concerns." *Id.* The court concluded that "these considerations demonstrate that the plaintiffs will be irreparably injured if the injunction does not issue."[3]

b. Nevada Demonstrated a Likelihood of Actual Harm to its Citizens and Environment

In addition to the irreparable procedural harm, the DOE's actions caused actual harm to Nevada. Nevada maintains that this harm is more than "a theoretical possibility at this juncture" (Order 14:14-15.); it is a current reality. Nevada demonstrated its actual harm via evidence – some unrebutted – from the testimony of Robert J. Halstead ("Halstead") and Henry Allen Gunter ("Gunter"), as well as evidence regarding the plutonium staging and storage process.

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[3] The harm here is even greater than *Hirt* because here the party is a State. The United States Supreme Court has found that harm is heightened when a State is the party. "The State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Massachusetts v. E.P.A.*, 549 U.S. 497, 518–19 (2007) (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)).

(i) Halstead Presented Unrebutted Expert Testimony that Nevadans Will Suffer Increased Radiation Doses and Contamination of Land and Groundwater.

Halstead presented unrebutted expert testimony regarding the proposed action's actual impacts on Nevada's environment and its citizens. Specifically, Halstead testified that, "based upon [his] review of the SA, and [his] experience as Executive Director [of the State of Nevada Office of the Governor Agency for Nuclear Projects], [he] believe[d] the DOE/NNSA's proposed action will result in increased radiation doses to Nevada citizens and would, in some circumstances, lead to contamination of the lands and the groundwater of Nevada with radioactive materials." (*See* Halstead Aff. (ECF No. 1-3) ¶ 8.)

(ii) Gunter Testified that Nevadans Would Suffer "Additional Unnecessary Exposure" to Radiation.

Nevada submitted the Declaration of Gunter, an individual who served as DOE's Plutonium Program Manager and Senior Technical Advisor at the Savannah River Site. (*See* Gunter Decl. (ECF 34-1) ¶ 1.) Gunter stated that, because of DOE's shipments, "additional unnecessary exposure [to significant levels of radiation] would be required of personnel at the alternate storage facility." (*Id.* ¶ 31.) This represents a certain actual harm that will result from any future DOE plutonium shipments under the SA.

(iii) Nevada Demonstrated Actual Injury with Regard to the Likelihood of an Environmental Incident in the Plutonium Staging and Storage Processes.

Nevada demonstrated a likelihood of actual injury in the so-called staging or storage process once future shipments arrive at NNSS. The SA proposes to store the plutonium in a 3013 container, which is then enclosed within a shipping container. (*See* SA (ECF No. 1-1) 12 ("for operations associated with moving one metric ton of plutonium from the State of South Carolina, DOT-certified model 9975-96 shipping containers, or equivalent, will be used for shipping and *staging plutonium packaged in 3013 containers*") (emphasis added).) Indeed, Defendants' own previous expert in the South Carolina case raised concerns regarding corrosion he witnessed in these containers. (*See* Gunter Decl. (ECF 34-1) ¶ 20.)

Specifically, Gunter noted that "there were two mechanisms identified that could possibly challenge the integrity of the [3013] containers, pressurization from gas generation and the corrosion of the container." (*Id.*) Although he noted significant gas pressurization is unlikely, "corrosion, however, has been seen in some containers." (*Id.*) Gunter found that "no place exists today, other than SRS, with the . . . surveillance program to receive and store any significant amount of this plutonium." (*Id.* ¶ 20.) Bakkedahl, agreed with Gunter's concern regarding the staging process, stating that allowing plutonium-239 to sit in transportation packages indefinitely and "not accessing the package to verify the package as well as its contents, is a huge concern." (*See* Tr. 121:15-19.)

The DOE Standard for 3013 containers requires facilities storing these containers to establish a package surveillance program. (*See* DOE Standard Stabilization, Packaging and Storage of Plutonium-Bearing Materials (ECF No. 34-3) 10-13.) This information corroborates Gunter and Bakkedahl's conclusion that these 3013 containers will require extensive surveillance to ensure their integrity, especially given the corrosion Gunter observed within some of them.

Defendants never rebutted Nevada's testimony regarding the likelihood of an environmental incident in staging.[4] The containers used by DOE to ship and store the plutonium have experienced corrosion and will need *constant* surveillance while being staged at NNSS. (*See* Gunter Decl. (ECF No. 34-1) ¶ 20 (stating that SRS performs destructive exams of plutonium storage containers three months of each year under SRS surveillance program, and that "the surveillance program serves a critical safety function to assure continued safe storage of the plutonium").) Yet the SA and referenced EISs do not discuss any surveillance procedures in place to monitor the integrity of the containers throughout staging.[5] Nevada provided undisputed testimony regarding the dangers of the

[4] The Court concluded that it was enough that "the SA envisions the need to repackage the plutonium at NNSS before shipment to LANL." (*See* ECF No. 62 at 14 n. 17.) As discussed above, however, repackaging for later shipment does not address the safety issue raised by Nevada.

[5] The Court relied on Defendants' unenforceable timeline for removal from NNSS by 2026-2027. (*See* ECF No. 62 at 14:7 ("Nevada's argument is grounded in part on the contention that the storage of plutonium may go beyond 2026/2027, but this is conjecture that the Government would delay moving the

staging process, thereby demonstrating actual harm to Nevada's environment and citizens if DOE is allowed to commence additional shipments and continue indefinite storage.

(iv) Defendants Provided No Evidence to Rebut Nevada's Evidence that Using Shipping Containers for Staging Is Not Safe.

The unsubstantiated argument of Defendants' counsel, that using shipping containers for staging must inherently be safer than for transportation, is not evidence. It is merely a speculative argument. (*See* ECF No. 62 at 14:10-13.) (stating that the Court is "persuaded by the Government's position expressed at the Hearing [stated without evidentiary support in closing argument by counsel] – that the same containers that are safe for shipment, which is a more unsteady activity than storage, also suffices for staging." This attorney argument is not evidence. *See Carrillo-Gonzalez v. I.N.S.*, 353 F.3d 1077, 1079 (9th Cir. 2003) ("[appellant] forwards this claim solely through the argument of her counsel, which does not constitute evidence").

Defendants admitted that they presented no evidence to support this position. Rather, counsel stated: "I think it's another area where, if we had the right technical witnesses here, we could make this point to the Court. But as a matter of common sense, transporting material is more dangerous and challenging than storing it." (*See* Tr. at 188:4-8.) "Common sense", however, is not evidence, especially in such a technical area as storing nuclear material.

At the very least, counsel's "common sense" cannot be accepted over the sworn testimony of Bakkedahl, who testified that "there's a number of natural hazards out there between the earthquakes, the flooding, and now wildland fires, apparently, every year, specifically on the site, but also the hazards of storing material in a transportation package for an indefinite period of time[.]"(*See* Tr. at 120:18-22; *see also id.* at 121:2-6 ("Q:

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plutonium to LANL as stated in the SA").) But this post hoc timeframe is not contained anywhere in the SA. Instead, DOE's timeframe comes from an unenforceable letter. (*See* DOE's November 20, 2018, Letter (ECF No. 4) 19.) Given that this is an Administrative Procedure Act case, DOE's plan must be considered by what is stated in the SA, not statements in subsequent letters. The SA states only that "the duration of staging at Pantex and NNSS is currently undefined." (*See* the SA (ECF No. 1-1) 11.)

And what about for storage? A: That is not what they're designed, engineered, and tested for. They're specifically for transportation").) Again, Defendants presented no evidence to rebut this testimony.

All of these facts, taken together, represent both procedural and actual injuries that Nevada would likely suffer without an injunction pending appeal. Nevada made a sufficient showing of irreparable harm to support its preliminary injunction.

2. Balance of Equities

The balance of equities in this matter favors the State of Nevada. Nevada is the party forced to deal with the likely hazards of weapons-grade plutonium being shipped into its state boundaries, traveling along its roads, and being stored near its largest city—all while being completely cut out of the process of evaluating the safety of such actions, or even knowing about such actions. Nevada citizens are the ones subject to the likelihood of higher radiation exposure. And Nevada's environment is the one at risk for land and water contamination. In contrast, the Government suffers only a minor—and completely surmountable—obstacle to comply with the South Carolina injunction. In this litigation, moreover, Nevada does not challenge the South Carolina order at all. Rather, it challenges the SA—**which plainly proposes shipments other than those required by the South Carolina Order**. The South Carolina Order thus provides no basis for evaluating the equities in this case. (*See* the Order (ECF No. 62) 16 ("the Court therefore concludes that the hardships posed to the Government in not complying with the [South Carolina Order] outweighs the hardships to Nevada").) Due to the importance of the equities at stake, particularly those directly affecting Nevada and its citizens, the Court should issue an injunction pending Nevada's appeal.

In this case, Nevada has requested a preliminary injunction that would apply to all future shipments of plutonium contemplated in the SA. (*See* Pl.'s Status Report (ECF No. 59) 4.) Nevada thus seeks to enjoin any future shipments of plutonium to Nevada *regardless of whether the South Carolina Order required the shipment*. For example, the SA contemplates that the DOE ship plutonium from Pantex to NNSS. (*See* SA (ECF No.

1-1) iii.) Nevada seeks to enjoin any such shipment, absent conditions outlined in its Complaint. (*See* Compl. (ECF No. 1) 19 (requesting "an order enjoining the Defendants from authorizing or allowing or otherwise acting to ship any plutonium, including Pu-239, from the Savannah River Site to the NNSS, or from Pantex to the NNSS, until Defendants properly comply in full with NEPA and CEQ and DOE NEPA regulations").)

Defendants' representations regarding compliance with the South Carolina Order provide no basis for establishing the equities of Nevada's preliminary injunction request in Defendants' favor. Before the Court denied Nevada's request for a preliminary injunction, Defendants submitted a Notice containing the sworn Declaration of Bruce M. Diamond, the General Counsel for the NNSA. (*See* Notice of New Information (ECF No. 56-1) ¶ 4.) Mr. Diamond stated only that "DOE may now publicly state that it has completed all shipment of plutonium (approximately ½ metric ton) to Nevada *pursuant to its efforts to comply with the South Carolina U.S. District Court order*." (*Id.* (emphasis added).) Notably, the Declaration does NOT say that DOE will not make shipments between Pantex and NNSS during the staging process. Indeed, the Declaration does not even mention the SA. It only states that shipments to Nevada to comply with the South Carolina Order are complete.[6]

Defendants' Notice informing the Court that future shipments to NNSS would not be necessary *to comply with the South Carolina Order* is not directly relevant to Nevada's requested injunction, and does not provide a basis for balancing the equities of this case in Defendants' favor. In denying Nevada's motion to enjoin future shipments, Defendants' compliance with the South Carolina Order need not, and should not, be considered.

Even if Defendants' Notice is considered, it provides no support for an argument that the equities in this matter favor Defendants. The DOE can comply with the South Carolina Order by shipping the plutonium at issue (in compliance with NEPA) to other

[6] After Defendants filed their Notice of New Information, the Court requested that each party file a status report. The Status Report stated that "no more plutonium will be shipped to the Nevada National Security Site as part of the Supplemental Analysis's proposed action." (*See* Defs.' Status Report (ECF No. 58).) This statement by counsel was not supported by any declaration, and in fact misstates the information contained in the Decl. of Bruce M. Diamond. (*See* Decl. of Bruce M. Diamond (ECF No. 56-1).)

locations besides Nevada. The court's order requires only that the DOE "remove from the State of South Carolina, for storage or disposal elsewhere, not less than one metric ton of defense plutonium" by January 1, 2020. *South Carolina v. United States*, 2017 WL 7691885, at *5 (D.S.C. Dec. 20, 2017). Thus, DOE complies with the South Carolina Order when it ships the one metric ton of plutonium outside of South Carolina, regardless of where DOE transports it. In this regard, Defendants' Notice of New Information stated that the DOE had already completed all shipments to Nevada pursuant to its efforts to comply with the South Carolina Order.

C. Nevada Will Be Irreparably Injured Without an Injunction Pending Appeal.

Nevada can demonstrate that it "will be irreparably injured absent a stay [pending appeal]." *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011). Nevada addressed this requirement above, in the section detailing its likelihood of success on the appeal.

As noted above, Nevada will be both actually and procedurally injured if the Court does not grant an injunction pending appeal. The likelihood of another one-half metric ton shipment—without notice to Nevada—remains a very real possibility under the SA. Defendant's previous obfuscation with regard to plutonium shipments into the State belies statements to the contrary.

As stated above, allowing DOE to commence additional shipments to Nevada would result in irreparable procedural harm. "There is no doubt that the failure to undertake an EIS when required to do so constitutes procedural injury to those affected by the environmental impacts of a project." *Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1187 (N.D. Cal. 2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 & n.7, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992)). "A procedural injury may serve as a basis for a finding of irreparable harm when a preliminary injunction is sought." *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 829–30 (N.D. Cal. 2017), *aff'd in part, vacated on other grounds, remanded sub nom. California v. Azar*, 911 F.3d 558 (9th Cir. 2018). Nevada's irreparable harm consists of the added risk to the environment …

that takes place when DOE made up their minds without analyzing (with public comment) the likely effects of its decision on the environment.

Nevada's environment and citizens *will* be harmed if DOE is permitted to commence additional shipments. Nevada submitted as evidence the Declaration of Gunter, who served as DOE's Plutonium Program Manager and Senior Technical Advisor at the Savannah River Site. (*See* Gunter Decl. (ECF 34-1) at ¶ 1.) Therein, Gunter states that, because of DOE's shipments, "additional unnecessary exposure [to significant levels of radiation] would be required of personnel at the alternate storage facility." (*Id.* ¶ 31.) This represents an actual harm that certainly will result from any future DOE plutonium shipments under the SA.

Finally, Nevada presented unrebutted testimony regarding the dangers of the staging process that is likely to result in injury to its citizens and the environment. For example, Nevada presented sworn testimony that these containers have experienced corrosion and will need *constant* surveillance while being staged at NNSS. (*See* Gunter Decl. (ECF 34-1) 11 ("no place exists today, other than SRS, with the . . . surveillance program to receive and store any significant amount of this plutonium").) The SA and referenced EIS do not discuss any surveillance procedures in place to monitor the integrity of the containers throughout staging, thus presenting a significant likelihood of injury throughout the staging process.

D. An Injunction Pending Appeal Would Not Substantially Harm Defendants.

Defendants can make no argument that they would be substantially injured by a stay pending appeal. *See Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (stating that the third element for obtaining an injunction pending appeal examines "whether issuance of the stay will substantially injure the other parties interested in the proceeding").

In this case, an injunction pending appeal would not substantially harm DOE. By DOE's own admission, any future shipments to would not be made "pursuant to its efforts to comply with the South Carolina U.S. District Court order." (*See* the Notice of New

Information (ECF No. 56-1) ¶ 4.) Instead, these future shipments (such as from Pantex to NNSS) would be provided by the SA but not required by the South Carolina Order. Thus, Defendants admit that the South Carolina Order is no longer at issue for future shipments, and they would suffer no prejudice in that case because of this injunction.

E. The Public Interest Favors Granting an Injunction Pending Appeal.

Here, the public interest lies with Nevada. *See Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (stating that the last element for obtaining an injunction pending appeal examines "where the public interest lies"). Nevada citizens rely on the State to protect their health, safety, and environmental welfare. Actions—like those of the DOE—that impair that interest should be enjoined. The public interest strongly favors completion of the informed environmental decision-making process that NEPA requires here. In particular, both Nevada and the public will benefit from the consideration of alternatives and additional evaluation and disclosure of transportation accident consequences and staging risk assessment that NEPA requires. *See, e.g.*, *S. Fork Band Council of W. Shoshone of Nev.*, 588 F.3d 718, 728 (9th Cir. 2009) (noting "Congress's determination in enacting NEPA . . . that the public interest requires careful consideration of environmental impacts before major federal projects may go forward").

This case is of vital public interest to Nevada's citizens. Nevada has demonstrated significant and probable concerns about the proposed action's impact on its citizens and environment. The public interest strongly favors maintaining the *status quo* until the appellate court can issue a ruling on this important matter.

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III. CONCLUSION

Plaintiff is entitled to an injunction pending appeal because: (1) Plaintiff is likely to succeed on the merits of its appeal; (2) Plaintiff is likely to experience irreparable harm in the absence of an injunction; (3) Defendants will not be substantially harmed by the issuance of an injunction; and (4) the public interests weigh in favor of an injunction. For these reasons, Plaintiff requests that this Court enter an injunction pending appeal. Alternatively, Nevada respectfully requests that the Court enter an interim injunction while Nevada renews its request for an injunction pending appeal in the Ninth Circuit.

DATED this 7th day of February, 2019.

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By: /s/ Martin G. Malsch
MARTIN G. MALSCH
Special Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 7th day of February, 2019, I served a true and correct copy of the foregoing PLAINTIFF'S MOTION FOR INJUNCTION PENDING APPEAL, by U.S. District Court CM/ECF electronic service, which will send notification of such filing to the email addresses that are registered for this case:

/s/ Sandra Geyer

INDEX OF EXHIBITS

EXHIBIT NO.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Transcript of Motion Hearing, dated January 17, 2019	205