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11 UNITED STATES DISTRICT COURT  
 12 NORTHERN DISTRICT OF CALIFORNIA

13  
14 NATURAL RESOURCES DEFENSE  
 COUNCIL, INC.; et al.

15 Plaintiffs,

16 v.

17 DEPARTMENT OF ENERGY; et al.,  
 18 Administration, Oakland Operations  
 Office,

19  
20 Defendants.

CASE NO.: 04-CV-04448 SC (BZ)

AMICUS CURIAE BRIEF BY  
 THE PEOPLE OF THE STATE OF  
 CALIFORNIA, EX REL.  
 ATTORNEY GENERAL BILL  
 LOCKYER, IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR  
 SUMMARY JUDGMENT

DATE: June 23, 2006  
 TIME: 10:00 a.m.  
 PLACE: Courtroom 1

The Honorable Samuel Conti

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1 **INTRODUCTION**

2 The People of the State of California, ex rel. Attorney General Bill Lockyer  
3 (“Attorney General”), file this Amicus Curiae Brief in support of the Plaintiffs  
4 Natural Resources Defense Council, Committee to Bridge the Gap and the City of  
5 Los Angeles (hereafter, “Plaintiffs”) Motion for Summary Judgement, as to their  
6 complaint’s First Claim for Relief under the National Environmental Policy Act  
7 (“NEPA”), 42 U.S.C. § 4321 *et seq.* This case involves the United States  
8 Department of Energy’s (“DOE”) proposed closure and cleanup of the  
9 Environmental Technology Energy Center (“ETEC”) of the Santa Susana Field  
10 Laboratories (“SSFL”) in the Simi Valley where DOE operated and engaged for  
11 decades in the development, fabrication, disassembly and examination of nuclear  
12 reactors. AR 264 at 10928.<sup>1/</sup> DOE’s proposed cleanup of the hazardous materials  
13 and radiological contamination at the ETEC site leaves uncertainty as to the risks  
14 that remain at the site, and controversy as to the suitability of the land for  
15 residential construction.

16 The California Attorney General takes issue with DOE’s decision to approve  
17 the closure of ETEC by the use of a brief Finding of No Significant Impact  
18 (“FONSI”), instead of following the more comprehensive review that would  
19 accompany an Environmental Impact Statement (“EIS”). Approving the closure of  
20 a former nuclear site by way of a FONSI is incomprehensible, especially where, as  
21 here, there are no restrictions on future land use. AR 264 at 10936, 10964. Failure  
22 to conduct a more thorough review is even more surprising because ETEC is a  
23 facility with a long history of radioactive contamination which experienced a

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27 1. Consistent with Plaintiff’s brief, cites to the Administrative Record are  
28 referred to as “AR”, and its corresponding bates number. We understand that  
Plaintiffs are filing the Administrative Record concurrently with their brief.

1 partial meltdown of its nuclear reactor during its operation, clear proof of the  
2 environmental concerns the site poses.

3 The Attorney General also believes that DOE improperly segmented its  
4 analysis of hazards posed from the site. DOE did not assess the radiological risk of  
5 the current cleanup in the context of the contamination that has occurred at the site.  
6 Although more than one hundred buildings have been decommissioned and  
7 demolished at ETEC to date, all this work has been done without the use of an  
8 Environmental Assessment or EIS. AR 264 at 10928,10938. To be sure, this is  
9 part of the site’s history and cannot be changed. However, the effect of that history  
10 on the instant cleanup can be considered now through a more thorough EIS.

11 The Environmental Assessment likewise fails to evaluate the impact of the  
12 cleanup of chemical contamination at ETEC on the radiologic cleanup and vice  
13 versa; it merely states that the cleanup of chemical contamination will be evaluated  
14 at the property in the future through an entirely different cleanup regimen. This  
15 does not comport with NEPA, which requires a thorough evaluation of these  
16 additional circumstances as part of a cumulative impact analysis.

17 In light of the history of the site, the expected future use of the site, and the  
18 controversial nature of the closure action, a more intensive and comprehensive  
19 study of the contaminants at the site is needed prior to closure. The controversy is  
20 made all the more immediate due to the uncertain nature of the risks to future  
21 residents, and the undisputed fact that much of the highly populated Los Angeles  
22 basin lies well within the area of concern.<sup>2/</sup> NEPA mandates the more thorough  
23 analysis of an EIS to assess the environmental impact of ETEC’s closure of  
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26  
27 2. As part of its analysis of the risks posed by the cleanup and closure of the  
28 facility, DOE looks at the “collective population” that lives within 80 kilometers  
(50 miles) of the site. AR 264 at 10930.

1 radioactively contaminated buildings, rather than the brief Environmental  
2 Assessment DOE offers here.

3 The Attorney General respectfully requests that the Court issue an order  
4 requiring the preparation of an EIS before DOE proceeds further with its closure of  
5 ETEC.

### 6 **FACTUAL BACKGROUND**

7 The SSFL is located less than 30 miles northwest of downtown Los Angeles,  
8 California, on a hilltop between the rapidly developing Simi and San Fernando  
9 Valleys. AR 12 at 2385, AR 264 at 10928. ETEC occupies a small portion of the  
10 SSFL facility on its western edge within a location known as Area IV. Area IV is  
11 comprised of approximately 290 acres within the SSFL facility where ETEC  
12 originally had over 200 buildings. AR 264 at 10928. Most of those buildings have  
13 been decommissioned and demolished and only 64 structures remain. AR 264 at  
14 10938. The decommissioning of these buildings was performed under much less  
15 stringent environmentally protective standards than apply today. AR 813 at 5955.

16 ETEC was involved in various nuclear operations, including the  
17 development, fabrication, disassembly, and examination of nuclear reactors,  
18 storage of radioactive materials and large-scale liquid sodium metal experiments  
19 from the mid-1950's to mid-1990's. AR 264 at 10928, 10934. Ten nuclear  
20 reactors, a hot laboratory, a radioactive materials handling facility, a nuclear  
21 materials development facility, and numerous nuclear materials storage facilities  
22 were operated at ETEC. AR 264 at 10938.

23 As a result of its historic operations, ETEC is contaminated with radioactive  
24 and other toxic materials. AR 264 at 10928. In 1959, there was a partial meltdown  
25 of the sodium reactor at the site. This meltdown contaminated the containment  
26 vessel for the reactor core and the coolant around the reactor. AR 264 at 11062.  
27 Radioactive "cover gas" caused by this incident was later vented to the atmosphere  
28 at low levels. AR 264 at 11063.

1 Three of the facilities at ETEC are still radioactively contaminated or  
2 activated. AR 264 at 10939-10941, 10934. In addition to the contamination from  
3 these radioactive materials, ETEC is contaminated by other materials. DOE  
4 experimented at ETEC with sodium metal in a molten state, which can have violent  
5 reactions when exposed to oxygen, water, steam, or carbon dioxide -- elements  
6 commonly found in the environment, and which therefore must be handled with  
7 extreme caution. Residual sodium remains in the soil at ETEC, and one of the  
8 facilities still contains liquid sodium. AR 264 at 10934, 10941. Extensive  
9 contamination by solvents, such as TCE, and other hazardous waste, is also  
10 prevalent on the site. AR 264 at 10945. Nonetheless, cleanup of these other  
11 contaminants was not the subject of DOE's Environmental Assessment or its  
12 FONSI, and will be conducted at a later time. Uncertainty as to when and how  
13 these contaminants will be dealt with only compounds the concern about the  
14 inadequacy of DOE's current cleanup analysis.

15 Nuclear research ended at ETEC in 1988. At that time, ETEC began the  
16 process of decontamination and decommissioning the buildings involved in nuclear  
17 operations; decontamination activities at the sodium facilities began in 1996. AR  
18 264 at 10929. Prior to 2000, DOE did not prepare an Environmental Assessment  
19 or EIS before conducting these cleanup activities. DOE believed its cleanup and  
20 closure work was exempt from the environmental analysis required by NEPA on  
21 the basis that DOE was entitled to categorical exclusions from the law. AR 264 at  
22 10929. Not only did DOE not prepare an Environmental Assessment or an EIS for  
23 those cleanups, but since DOE's cleanups and closures have been ongoing for  
24 decades, those cleanups and closures have been made pursuant to less protective  
25 standards than are in effect today. AR 264 at 10928.

26 After public and congressional concerns were raised about DOE's failure to  
27 comply with NEPA in the cleanup of ETEC, DOE decided to conduct an  
28 Environmental Assessment, under NEPA, of its remaining cleanup and closure

1 activities. AR 264 at 10928. DOE issued its draft Environmental Assessment in  
2 January 2002. AR 264 at 10932. In response to the information in the draft  
3 Environmental Assessment, the United States Environmental Protection Agency  
4 (“EPA”) and other interested parties submitted numerous comments urging DOE to  
5 prepare an EIS. These comments criticized the draft Environmental Assessment on  
6 the basis that: (1) it failed to adequately analyze the direct and cumulatively  
7 significant effects associated with chemical contamination at the facility in  
8 conjunction with the radiological materials; (2) it failed to use well settled  
9 procedures to select an appropriate remedy under the Comprehensive  
10 Environmental Response, Compensation and Liability Act (“CERCLA”), 42  
11 U.S.C. § 9401 *et seq.*; and (3) it did not analyze reasonable alternatives for the  
12 cleanup and closure. AR 810 at 5915-26, AR 811 at 5933-34. However, in March  
13 2003, DOE determined none of this was necessary, and despite the long history of  
14 nuclear and other contamination at the facility, DOE issued a brief FONSI and  
15 announced its intention not to prepare a more comprehensive EIS. AR 264 at  
16 10915-17.

17 In December 2003, EPA sent another letter criticizing the final  
18 Environmental Assessment and the decision to use a FONSI. AR 813 at 5946.  
19 EPA specifically pointed out three failings of the Environmental Assessment: (1)  
20 there was inadequate characterization of the site and more sensitive and specific  
21 measurements needed to be utilized; (2) EPA did not believe that the cleanup  
22 would satisfy standards that will allow the site to be available for “unrestricted land  
23 use” (including residential) as intended by DOE; and (3) the cleanup was not  
24 consistent with CERCLA, as claimed and promised by DOE. AR 813 at 5946-48.  
25 The import of the EPA’s letter, which was written after DOE’s decision to use a  
26 FONSI, is that it indicates how much uncertainty and controversy exist as to  
27 DOE’s proposed cleanup plan. It is that very uncertainty and controversy that  
28 trigger the NEPA requirement to prepare an EIS to give these issues a full airing.

1 DOE improperly avoided its obligations to fully analyze these critical issues and it  
2 has not provided the information to the public that NEPA demands. DOE's  
3 apparent "trust us, we are the experts" attitude is wholly inappropriate in this  
4 instance, especially when public health is at issue. Accordingly, an EIS should be  
5 ordered.

## 6 ARGUMENT

### 7 **I. DOE SHOULD HAVE PREPARED AN ENVIRONMENTAL IMPACT 8 STATEMENT TO FULLY EVALUATE THE SIGNIFICANT 9 IMPACTS RESULTING FROM THE CLOSURE OF ETEC.**

#### 9 **A. NEPA Purposes and Requirements.**

10 NEPA is the basic national charter for protection of the environment and is  
11 implicated whenever a federal action has the potential for "significantly affecting  
12 the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. §  
13 1500.1(a). It is a procedural statute that requires the Federal agencies to assess the  
14 environmental consequences of their actions before those actions are undertaken.  
15 *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989,  
16 993 (9<sup>th</sup> Cir. 2004). NEPA is to be applied liberally to carry out the Act's  
17 purposes. *La Flamme v. F.E.R.C.*, 852 F.2d 389, 398 (9<sup>th</sup> Cir. 1988). NEPA  
18 "ensures that the agency ... will have available, and will carefully consider, detailed  
19 information concerning significant environmental impacts; it also guarantees that  
20 the relevant information will be made available to the larger [public] audience."  
21 *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9<sup>th</sup> Cir.  
22 1998), *cert. denied* 527 U.S. 1003 (1999) (quoting *Robertson v. Methow Valley*  
23 *Citizens Council*, 490 U.S. 332, 349 (1989)). "NEPA requires that a federal  
24 agency consider every significant aspect of the environmental impact of the  
25 proposed action ... [and] inform the public that it has indeed considered  
26 environmental concerns in its decision making process." *Lands Council v. Powell*,  
27 395 F.3d 1019, 1026-27 (9<sup>th</sup> Cir. 2005) (quoting *Earth Island Inst. v. United States*  
28 *Forest Serv.*, 351 F.3d 1291, 1300 (9<sup>th</sup> Cir. 2003)).

1 NEPA's first step in considering the environmental impact of a proposed  
2 cleanup action is by way of an Environmental Assessment. The federal agency  
3 performs an Environmental Assessment to determine if the proposed action has the  
4 potential for an effect on the environment and whether an EIS should be prepared.  
5 40 C.F.R. § 1501.4(a)-(c). If the Environmental Assessment establishes that the  
6 proposed action may have a significant effect on the environment, then an EIS  
7 must be prepared. *Blue Mountains Biodiversity Project*, 161 F.3d at 1212. The  
8 plaintiff need not show that significant effects will in fact occur; it is sufficient to  
9 raise substantial questions whether a project may have a significant effect on the  
10 environment. *Id.* Only if the Environmental Assessment concludes that the action  
11 will not have a significant effect on the environment, may the agency issue a  
12 FONSI and may then proceed with the action. 40 C.F.R. § 1508.13; *Klamath-*  
13 *Siskiyou Wildlands*, 387 F.3d at 993.

14 **B. Closing a Contaminated Nuclear Facility May Have a Significant**  
15 **Effect on the Environment.**

16 Where the closure of a former nuclear facility is concerned, one that has  
17 experienced a partial meltdown and is well-documented as being contaminated, it  
18 cannot be gainsaid that the public and the decision makers need to be convinced  
19 that the project will be handled in a manner that identifies all significant  
20 environmental effects, in this case, through an EIS, and not a FONSI. In reviewing  
21 an agency's decision to prepare a FONSI rather than an EIS, the court must  
22 determine if the agency took the mandated "hard look" at the potential  
23 environmental impact of the project, and must decide whether the responsible  
24 agency has reasonably concluded that the project cannot have a significant adverse  
25 environmental consequence. *La Flamme*, 852 F.2d at 397-98. An EIS must be  
26 prepared if "substantial questions are raised as to whether a project ... may cause  
27 significant degradation of some human environmental factor." *Idaho Sporting*  
28 *Congress v. Thomas*, 137 F.3d 1146, 1149-50 (9<sup>th</sup> Cir. 1998) (citations omitted). A

1 plaintiff need not show that significant effects *will in fact occur*; it is sufficient to  
2 show that significant effects *may occur*. *Id.* at 1150.

3 **C. DOE Failed to Follow NEPA When It Utilized an Environmental**  
4 **Assessment to Close ETEC Instead of an EIS.**

5 DOE prepared an Environmental Assessment for its closure of ETEC and  
6 came to the conclusion that closure of this contaminated former nuclear facility  
7 will have no significant impact on the environment. AR 264 at 10915-17. Based  
8 on the history of the site, the type of contamination that has occurred at the site,  
9 and the site's proximity to Los Angeles, this conclusion seems more than  
10 questionable. The cleanup of ETEC is a major federal action that may have  
11 significant, unknown, and highly controversial impacts on public health and the  
12 environment. Certainly, the designation of the ETEC area as appropriate for  
13 "unrestricted use" after closure is a decision that may have a significant impact on  
14 public health and the environment, and should have been subjected to the full,  
15 comprehensive analysis only provided by an EIS.

16 As discussed above, an EIS must be prepared if the Environmental  
17 Assessment establishes a proposed action may have a significant effect on the  
18 environment. Significant, according to the Council of Environmental Quality's  
19 NEPA regulations, requires an analysis of both the "context" and "intensity" of the  
20 proposed action. 40 C.F.R. § 1508.27. "Context" refers to NEPA's requirement  
21 that the impacts of an action be analyzed in several contexts including "society as a  
22 whole...the affected region, the affected interests, and the locality." 40 C.F.R. §  
23 1508.27(a). "Both short- and long-term effects are relevant." *Id.* "Intensity"  
24 refers to the severity of the impact, and includes consideration of the degree to  
25 which the effects of the proposed action "affect[] public health or safety," and "are  
26 likely to be highly controversial...highly uncertain or involve unique or unknown  
27 risks." 40 C.F.R. § 1508.27(b). "A significant effect may exist even if the Federal

1 agency believes that on balance the effect will be beneficial.” *Id.* Based on these  
2 factors, as discussed below, an EIS was mandated.

### 3 **1. Controversy**

4 A consideration under NEPA in determining whether a proposed action will  
5 significantly affect the quality of the human environment is “(t)he degree to which  
6 the effects on the quality of human environment are likely to be highly  
7 controversial.” 40 C.F.R. § 1508.27(b)(4). A proposal is highly controversial  
8 when there is “a substantial dispute [about] the size, nature, or effect of the major  
9 Federal action,” or where “substantial questions are raised as to whether a project  
10 ... may cause significant degradation of some human environmental factor.”

11 *Anderson v. Evans*, 371 F.3d 475, 489 (9<sup>th</sup> Cir. 2004). *See also Blue Mountains*  
12 *Biodiversity Project*, 161 F.3d at 1212, *Nat’l Parks & Conservation Ass’n v.*  
13 *Babbitt*, 241 F.3d 722, 736 (9<sup>th</sup> Cir. 2001).

14 The potential environmental effects of the proposed cleanup of ETEC are  
15 highly controversial. First, as discussed above, EPA and other interested parties  
16 have raised substantial questions about whether the cleanup’s cumulative impacts  
17 in connection with the hazardous chemical and radiological contamination  
18 throughout Area IV and the SSFL will significantly degrade the environment. The  
19 Environmental Assessment completely ignores these recognized cumulative  
20 impacts. In fact, the Environmental Assessment deals with the chemical  
21 contamination of Area IV and ETEC by pawning it off as the exclusive  
22 responsibility of *another* cleanup process. AR at 10929, 10931. Yet, it is unclear  
23 from the Environmental Assessment what the interaction of radiologic and  
24 chemical contamination is in the soil and the subsurface, and whether the cleanup  
25 of one will necessarily impact or interfere with the cleanup of the other.

26 Second, a substantial controversy exists concerning whether the cleanup  
27 complies with CERCLA, or is merely “consistent with” CERCLA. DOE asserts  
28 that the cleanup will be “consistent with CERCLA.” This standard appears to be a

1 lesser standard than compliance with CERCLA, when interpreted by DOE. AR at  
2 10935. Indeed, EPA disagrees with DOE's conclusion that its selected remedy is  
3 consistent with CERCLA, or that it adequately protects future workers or residents  
4 who come to the property. AR 5953, 5949. To be consistent with CERCLA, a  
5 cleanup must meet not just one CERCLA requirement, but a number of CERCLA  
6 requirements. AR 5953-54. DOE's clean up does not do this. *Id.* Additional  
7 examples of inconsistency include the fact that CERCLA requires the cleanup to be  
8 based on a risk assessment that includes an assessment of all the risk factors in a  
9 particular setting. AR 810 at 5921. Yet DOE based its cleanup level on a flat  
10 numerical radiation dose, rather than performing the assessment required by  
11 CERCLA. AR 813 at 5947. Use of a dose (exposure) level as a cleanup standard,  
12 rather a standard based on a cancer risk analysis conducted pursuant to CERCLA,  
13 expressly contradicts EPA policy. AR 813 at 5954. This difference is significant  
14 in terms of its impact on the human environment, as basing the cleanup standard on  
15 dose rather than cancer risk analysis may result in a greater risk to the public  
16 depending on the site specific conditions. Under the DOE's proposed standard for  
17 the cleanup, significantly more radionuclides may be left in the environment than  
18 would be the case if a CERCLA approach was used instead.

19 EPA remains critical of DOE's approach even when the concept of "As Low  
20 As Reasonably Achievable" ("ALARA") is added to the equation. AR 813 at  
21 5949. This concept, part of DOE regulations, attempts to manage and control  
22 exposures to radiation to the work force and the general public to "as low as  
23 reasonable, taking into account social, technical, economic, practical, and public  
24 policy considerations." 10 C.F.R. § 835.2(a). AR 264 at 10949. EPA points out  
25 the DOE has not explained in the Environmental Assessment how the use of the  
26 ALARA concept will allow the remedy to be consistent with CERCLA, or even  
27 how ALARA will be specifically implemented at ETEC. AR 813 at 5949.

28

1 Third, a substantial controversy exists between DOE and EPA about whether  
2 the chosen remediation level suffices to allow future unrestricted use of ETEC,  
3 including the construction of housing. EPA points out that given “the need for  
4 additional field data, and given the level of uncertainty that remains about possible  
5 residual radiological contamination at ETEC, EPA does not currently believe that  
6 the clean-up at ETEC will satisfy standards for unrestricted land use.” AR 813 at  
7 5947. Indeed, EPA has cautioned that ETEC should be “restricted to day-use  
8 recreational activities with limitations on picnic and camping facilities ....” *Id.*

9 All of these differences in opinion point to the controversial nature of the  
10 cleanup decision to be made. These very real disagreements about whether DOE  
11 has done enough to protect the public in its closure of ETEC is the kind of  
12 controversy that must be addressed in a comprehensive EIS, as NEPA requires.

## 13 **2. Uncertainty**

14 An agency must prepare an EIS if the environmental effects of a proposed  
15 action are highly uncertain or involve unique or unknown risks. 40 C.F.R. §  
16 1508.27(b)(5). “Preparation of an EIS is mandated where uncertainty may be  
17 resolved by further collection of data or where the collection of such data may  
18 prevent ‘speculation on potential ... effects. The purpose of an EIS is to obviate the  
19 need for speculation ...’” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d at  
20 732 (quoting *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1195 (9<sup>th</sup>  
21 Cir. 1988) (citation omitted)). *See also Ocean Advocates v. U.S. Army Corps of*  
22 *Engineers*, 402 F.3d 846, 870 (9<sup>th</sup> Cir. 2005).

23 The Ninth Circuit has repeatedly held that uncertainty as to the  
24 environmental effects of a proposed action is a sufficient basis to set aside a  
25 FONSI and mandate preparation of an EIS. *Anderson v. Evans*, 371 F.3d at 492  
26 (EIS required where Environmental Assessment inadequately addressed impact of  
27 whale hunting on local whale population); *Nat’l Parks & Conservation Ass’n v.*  
28 *Babbitt*, 241 F.3d at 731-32 (EIS required where effects of increased vessel traffic

1 on Bay and its inhabitants were uncertain in the Environmental Assessment); *Blue*  
2 *Mountains Biodiversity Project*, 161 F.3d at 1212 (EIS required where impact of  
3 increased sedimentation from post-fire salvage logging on fish populations was not  
4 adequately documented in Environmental Assessment).

5 In its reliance on a FONSI rather than an EIS, DOE failed to collect  
6 sufficient data, both quantitative and qualitative. EPA has stated that DOE has not  
7 sampled enough points. AR 810 at 5923. Further, DOE has failed to generate data  
8 on the impacts of the chemical contamination in conjunction with the proposed  
9 cleanup. This too, renders the Environmental Assessment entirely inadequate.  
10 Because DOE has not adequately analyzed cumulative impacts, it is unknown  
11 whether and to what extent there are significant cumulative effects associated with  
12 the radioactive and other chemical contamination at ETEC, Area IV, and the SSFL  
13 in its entirety, as well as additional contamination that may have migrated off-site.  
14 AR 810 at 5924. Accordingly, the environmental effects of the proposed cleanup  
15 are highly uncertain and may involve unique or unknown risks.

16 The possible extent of human exposure to residual radioactivity is also  
17 unknown because DOE has failed to consider the effects of radioactivity  
18 attributable to previously decontaminated and decommissioned facilities at the  
19 SSFL. AR 810 at 5921. Since DOE has not adequately surveyed the site, it is  
20 uncertain whether DOE's chosen cleanup level will support unrestricted residential  
21 use after the cleanup. AR 813 at 5947. Indeed, the Environmental Assessment  
22 raises as many questions as it answers, and creates uncertainty about the  
23 effectiveness of the proposed cleanup. Such issues should have been resolved in  
24 an EIS.

25 **3. The Controversy of DOE and EPA is Not Merely a**  
26 **Disagreement Between Experts.**

27 The dispute between DOE and EPA about how the cleanup and closure of  
28 ETEC should be assessed cannot be characterized as a simple disagreement

1 between qualified experts arriving at “reasoned conclusions” about the data. *Cf.*  
2 *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d at 736-37. This is no battle  
3 of the experts. EPA’s main criticism is the lack of information necessary to make a  
4 valid assessment - it is not a dispute over an interpretation of results such as  
5 experts might disagree upon. EPA believes the dispute involves a failure to  
6 analyze potentially significant direct and cumulative impacts associated with  
7 hazardous chemical and radiological contamination at ETEC. AR 813 at 5952, AR  
8 810 at 5924. DOE’s failure to adequately survey the site for characterization has  
9 prevented DOE, or any other agency, from making an informed decision about the  
10 future suitability of the site for residential use. AR 813 at 5949. “[T]he absence of  
11 currently available information does not excuse [an agency] from preparing an EIS  
12 when there is a reasonable possibility that such information can be obtained in  
13 connection with the preparatory process.” *Babbitt*, 241 F.3d at 737. As EPA’s  
14 April 2002 and December 2003 letters indicate, DOE’s scanty Environmental  
15 Assessment fails to analyze critical information. For example, DOE did not use  
16 radiologic survey methods sensitive or specific enough to be used in its risk  
17 assessment. AR 82 at 5954-55. Further, EPA concluded that DOE did not take a  
18 sufficient number of samples at the site to support its conclusion that the land will  
19 be appropriate for unrestricted land use, including residential housing. AR 82 at  
20 5955. In particular, EPA stated the subsurface was inadequately characterized,  
21 which could pose a health risk to workers and residents during future excavations,  
22 such as those required for the construction of house foundations, power lines and  
23 swimming pools. *Id.* All of these missing pieces of analysis, pointed out by EPA,  
24 (which is a sister federal agency to DOE with the primary responsibility for  
25 overseeing CERCLA’s application), indicate the inadequacy of DOE’s  
26 Environmental Assessment.

27 Moreover, the dispute over CERCLA compliance is not a mere disagreement  
28 between qualified experts arriving at “reasoned conclusions” about the data. DOE

1 blatantly disregards CERCLA procedures in developing its cleanup level. For  
2 example, DOE impermissibly relies on a dose level as a presumptive cleanup level  
3 which EPA explicitly warned was not to be relied upon in these circumstances.  
4 AR 810 at 5921. Significantly, after the finalization of the Environmental  
5 Assessment, EPA remained critical of DOE's choices and its failure to properly  
6 follow CERCLA in its analysis. In its December 2003 letter, EPA pointed out the  
7 numerous areas of concern and disagreement. AR 813 at 5946-56.

8 Pursuant to well-settled Ninth Circuit authority, this Court should find  
9 DOE's failure to analyze cumulative impacts of chemical and radiological  
10 contamination at the site, its failure to adequately survey and characterize the site,  
11 and its failure to follow CERCLA procedures, raise substantial questions as to the  
12 environmental impacts of the cleanup, rendering it sufficiently controversial to  
13 mandate the preparation of an EIS.

## 14 **II. INADEQUACY OF ALTERNATIVES ANALYSIS**

15 NEPA requires an agency to "study, develop, and describe appropriate  
16 alternatives to recommended courses of action in any proposal which involves  
17 unresolved conflicts concerning alternative uses of available resources." 42 U.S.C.  
18 § 4332(2)(E). "Alternatives analysis is both independent of, and broader than, the  
19 EIS requirement." *Surfrider Foundation v. Dalton*, 989 F.Supp. 1309, 1325 (S.D.  
20 Cal. 1998) (citing *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9<sup>th</sup> Cir.  
21 1988)).

22 NEPA regulations require an agency to "[r]igorously explore and objectively  
23 evaluate all reasonable alternatives, and for alternatives which were eliminated  
24 from detailed study, briefly discuss the reasons for their having been eliminated."  
25 40 C.F.R. § 1502.14(a). "The 'rule of reason' guides both the choice of  
26 alternatives as well as the extent to which the Environmental Impact Statement  
27 must discuss each alternative." *City of Carmel-by-the-Sea v. United States Dep't*  
28 *of Transp.*, 123 F.3d 1142, 1155 (9<sup>th</sup> Cir. 1997). The Ninth Circuit "rule of reason"

1 requires an agency to “provide as much information and detail as is necessary to  
2 provide a ‘reasonably thorough discussion of the significant aspects of the probable  
3 environmental consequences.’” *Citizens for a Better Henderson v. Hodel*, 768  
4 F.2d 1051, 1058 (9<sup>th</sup> Cir. 1985) (quotations omitted)).

5 An alternatives analysis is to be “bounded by some notion of feasibility.”  
6 *See Vermont Yankee Nuclear Power v. NRDC*, 435 U.S. 519, 551 (1978).  
7 However, an agency must analyze all viable alternatives. A “viable but  
8 unexamined alternative renders [the] environmental impact statement inadequate.”  
9 *Muckleshoot Indian Tribe v. United States Forest Service*, 177 F.3d 800, 814 (9<sup>th</sup>  
10 Cir. 1999) (alternatives analysis inadequate because imposition of deed restrictions  
11 was a viable alternative which the Forest Service could not ignore.) An analysis  
12 of all viable alternatives is essential to the informed decision making that is the  
13 heart of NEPA. That was not done here.

14 DOE unreasonably restricts the range of alternatives that it analyzed. In the  
15 Environmental Assessment, DOE only considers two alternatives in addition to the  
16 “no action” alternative. The only difference between the two alternatives analyzed  
17 is the level of cleanup. DOE’s two alternatives differ only in the dose amount,  
18 with one more protective than the other, and requiring more soil to be removed as  
19 part of the cleanup. Neither alternative considers other reasonable measures  
20 recommended by various comments on the Environmental Assessment.

21 For instance, EPA recommended several viable alternatives that would  
22 incorporate reasonable mitigation measures. AR 810 at 5924. DOE fails to fully  
23 consider any of EPA’s alternatives, each of which would have improved the  
24 proposed cleanup. For example, EPA recommended that DOE consider an  
25 alternative remedy using CERCLA risk assessment procedures. The CERCLA  
26 alternative differed in many respects from DOE’s alternatives because the  
27 CERCLA cleanup level would be based on total cancer risk, not solely on radiation  
28 dose. AR 813 at 5954. DOE does not incorporate this well-settled CERCLA

1 process in either of its analyzed alternatives. DOE's proffered alternatives simply  
2 do not include the protective, sensitive methods for its cleanup that CERCLA  
3 requires and EPA advised.

4 EPA also recommended that DOE consider an alternative that would impose  
5 a restriction on the site which would prohibit future residential use of the site. AR  
6 813 at 5947. EPA believes that the site has not been adequately characterized, and  
7 pursuant to the proposed cleanup, will be unsafe for unrestricted residential use.

8 *Id.* DOE summarily dismissed EPA's concerns and recommended alternative by  
9 stating that it neither owns the site nor controls its future uses. AR 264 at 11064.

10 DOE is wrong on this point. Site ownership or control does not excuse DOE's  
11 failure to consider EPA's viable alternative. NEPA regulations mandate that  
12 agencies shall "include reasonable alternatives not within the jurisdiction of the  
13 lead agency." 40 C.F.R. § 1502.14(c). *See also Muckleshoot Indian Tribe v.*

14 *United States Forest Service*, 177 F.3d at 814. In *Muckleshoot*, the Ninth Circuit  
15 held that the Forest Service's alternatives analysis was inadequate because  
16 imposition of deed restrictions was a viable alternative which could not be ignored.

17 *Id.* DOE may have to compensate the owner of the property to obtain such a land  
18 use restriction, or work with a state or local land use agency, but this does not bar it  
19 from consideration as an alternative.

20 Additionally, EPA recommended that DOE consider on-site treatment and  
21 management of some of the radioactive waste to reduce the environmental impacts  
22 associated with the transportation of the waste. AR 810 at 5924. DOE, however,  
23 fails to consider this reasonable alternative as well. DOE summarily pushes aside  
24 this alternative as unreasonable on the assertion that "[t]he impacts of transporting  
25 radioactive waste offsite for storage or disposal have been analyzed and found to  
26 be very small." AR 264 at 11064. Even if the transport-related impacts were  
27 expected to be minor, the cumulative impact of the transportation of radioactive  
28 and other hazardous waste from ETEC, in combination with the extensive soil

1 removal necessary for the cleanup of the SSFL, may well add up to a more  
2 significant impact. “Cumulative impacts can result from individually minor but  
3 collectively significant actions taking place over a period of time.” 40 C.F.R. §  
4 1508.7.

5 Each of these alternatives or combinations of alternatives should have been  
6 considered as offering viable alternatives to mitigate the environmental impacts of  
7 the proposed cleanup. DOE entirely omits discussion of these alternatives in the  
8 Environmental Assessment, and has impermissibly narrowed the range of  
9 alternatives to be analyzed. Accordingly, the Environmental Assessment does not  
10 allow the requisite reasoned decision making, and is inadequate. *See Muckleshoot*,  
11 177 F.3d at 814.

### 12 **III. AN ENVIRONMENTAL ASSESSMENT IS NOT A SUBSTITUTE** 13 **FOR THE ANALYSIS PROVIDED IN AN EIS.**

14 An Environmental Assessment is never an adequate substitute for an EIS  
15 when an EIS is required. *Anderson v. Evans*, 371 F.3d at 494. In addition:

16 [G]irth is not a measure of the analytical soundness of an environmental  
17 assessment. No matter how thorough, an EA [Environmental Assessment]  
can never substitute for preparation of an EIS, if the proposed action could  
significantly affect the environment.

18 We stress in this regard that an EIS serves different purposes from an  
19 EA. An EA simply assesses whether there will be a significant impact  
20 on the environment. An EIS weighs any significant negative impacts  
21 of the proposed action against the positive objectives of the project.  
22 Preparation of an EIS thus ensures that decision-makers know that  
23 there is a risk of significant environmental impact and take that impact  
into consideration. As such, an EIS is more likely to attract the time  
and attention of both policymakers and the public. In addition, there  
is generally a longer time period for the public to comment on an EIS  
as opposed to an EA, and public hearings are often held.

24 *Id.* (citations omitted). “NEPA requires that a federal agency consider every  
25 significant aspect of the environmental impact of the proposed action ... [and]  
26 inform the public that it has indeed considered environmental concerns in its  
27 decision making process.” *Lands Council v. Powell*, 395 F.3d at 1026-27 (quoting  
28 *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1300 (9<sup>th</sup> Cir.

1 2003)). Although the finding of even one significant factor suffices to require an  
2 EIS, here, the effects of the proposed cleanup are well-documented as both highly  
3 controversial and largely uncertain. Thus, the law requires DOE to prepare an EIS  
4 because the action may involve significant, unknown, and highly controversial  
5 impacts.

6 **IV. THE ENVIRONMENTAL ASSESSMENT DOES NOT MEET THE**  
7 **REQUIREMENTS OF NEPA IN THAT IT DOES NOT**  
8 **ADEQUATELY DISCUSS CUMULATIVE IMPACTS.**

9 In considering the scope of the required NEPA analysis, the agency must  
10 consider cumulative impacts:

11 In determining the significance of a proposed action, an agency must  
12 consider [w]hether the action is related to other actions with  
13 individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

14 *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1075 (9<sup>th</sup> Cir. 2002)  
15 (citing 40 C.F.R. § 1508.27(b)(7)).

16 DOE's analysis of cumulative impacts in its Environmental Assessment is a  
17 series of summary conclusions in four short paragraphs of text; there is an equally  
18 short, unsatisfactory discussion in DOE's response to comments. AR 264 at  
19 10988, 11063-64. DOE's discussion breezily mentions that chemical  
20 contamination will be addressed separately as part of another cleanup program. It  
21 does not analyze whether the cleanup of radiologic materials in soil or buildings  
22 will affect, or be affected by, the chemical contamination also existing at the site.  
23 The Environmental Assessment also does not analyze the impact of previous  
24 cleanups performed at ETEC, (each done without an Environmental Assessment or  
25 an EIS and under less stringent standards than required today), on the current  
26 cleanup and closure of the facility. DOE claims it "saw no value in re-evaluating  
27 the decontamination and decommissioning decisions previously made ...," but  
28 without explaining why this is the case. AR 264 at 11057. DOE's Environmental

1 Assessment parses its analysis into distinct component parts: radiological from  
2 chemical and past from present and future. This compartmentalized analysis is  
3 certainly not realistic when addressing the environmental impact of a contaminated  
4 site closure, and it also contravenes NEPA.

5 A proper consideration of the cumulative impacts of a project requires some  
6 quantified or detailed information. “[G]eneral statements about possible effects  
7 and some risk do not constitute a hard look absent a justification regarding why  
8 more definitive information could not be provided.” *Klamath-Siskiyou Wildlands*  
9 *Center*, 387 F.3d at 994 (citations omitted). The cumulative impact must be more  
10 than perfunctory; it must provide a ‘useful analysis of the cumulative impacts of  
11 past, present, and future projects.’” *Kern v. U.S. Bureau of Land Management*, 284  
12 F.3d at 1075 (quoting *Muckleshoot Indian Tribe v. United States Forest Service*,  
13 177 F.3d at 810). DOE has utterly disregarded this requirement of NEPA. Its brief  
14 discussion is nothing more than a perfunctory nod to the requirement to evaluate  
15 cumulative impacts. For this reason, the Environmental Assessment fails on its  
16 own terms, and is a separate ground for setting aside the FONSI.

### 17 CONCLUSION

18 The Ninth Circuit has repeatedly set aside a FONSI when it is based on an  
19 Environmental Assessment that failed to take a “hard look” at the environmental  
20 consequences and reasonable alternatives of a project. Likewise, courts have set  
21 aside the use of an Environmental Assessment as the exclusive NEPA inquiry  
22 where the impacts of an action are so uncertain or so controversial, that an EIS is  
23 necessary to properly analyze the significant environmental impacts of that action.  
24 These circumstances are present here. Additionally, the Environmental  
25 Assessment is conclusory and unsatisfactorily dismisses the closure’s impact on  
26 the environment. It should not have been relied upon by DOE in its decision about  
27 the closure and cleanup of ETEC. Accordingly, the Attorney General respectfully  
28 requests that the Court grant the Plaintiffs’ Motion for Summary Judgment as to

1 the First Cause of Action, set aside the Environmental Assessment and the FONSI  
2 for the proposed ETEC closure and cleanup, and order the preparation of an EIS.

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