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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

KEEP YELLOWSTONE NUCLEAR FREE, ENVIRONMENTAL DEFENSE INSTITUTE, MARY WOOLLEN, JOHN PEAVEY, DEBRA STANSELL,	)	Civ. No. 07-36-E-BLW
Plaintiffs,	)	
-against-	)	
THE UNITED STATES DEPARTMENT OF ENERGY, and SAMUEL W. BODMAN, SECRETARY, UNITED STATES DEPARTMENT OF ENERGY,	)	
Defendants.	)	

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs submit this reply memorandum in further support of their motion for summary judgment and in opposition to the Defendants' motion for summary judgment. Unable to make any claim that they have met the requirements of the National Environmental Policy Act ("NEPA"), the Defendants (the "DOE") instead resort to collateral threshold attacks on the justiciability of Plaintiffs' claims. The DOE asserts that the Plaintiffs do not have standing to maintain this suit, that the DOE's decision not to prepare an EIS prior to embarking on a 10-year $200 million program intended to extend the life of the Advanced Test Reactor ("ATR") is not a "final agency action" pursuant to the Administrative Procedures Act ("APA"), and finally, that that decision did not constitute a "major federal action" requiring an Environmental Impact Statement ("EIS") under NEPA. As set forth below, none of these defenses has any merit. Therefore, Plaintiffs' motion for summary judgment should be granted and the DOE directed to immediately begin preparation of an EIS.

ARGUMENT

POINT I

THE APROPRIATE STANDARD OF REVIEW IS ONE OF REASONABLENESS

In Defendants' Memorandum in Support of Motion for Summary Judgment, and in Response to Plaintiffs' Memorandum in Support of Motion for Summary Judgment (the "DOE SJ Mem."), the DOE asserts that the proper standard of review in this case is

the arbitrary and capricious standard, a deferential test in which the agency's decision "will only be overturned if the agency committed a clear error in judgment." DOE SJ Mem. at 6. That is not the case. In the Ninth Circuit, where, as here, the dispute involves predominantly legal questions – such as a threshold question of the applicability of NEPA -- the appropriate standard of review is one of reasonableness. Northcoast Environmental Center v. Glickman, 136 F.3d 660 (9th Cir. 1997). As the Court stated in Northcoast, "the less deferential standard of 'reasonableness' applies to threshold agency decisions that certain activities are not subject to NEPA's procedures." 16 F.3d at 667. That is the situation here, and therefore the less deferential standard applies.

POINT II

PLAINTIFFS HAVE STAINDING TO MAINTAIN THIS ACTION

Defendants attack the Plaintiffs' standing to maintain this action, claiming that the Plaintiffs have "failed to produce any evidence that they have standing to bring their claims." DOE SJ Mem. at 8. Having had no reason to do so previously,[1] Plaintiffs now submit with this reply memorandum declarations from plaintiff John Peavey (the "Peavey Declaration"), an Idaho rancher for 30 years, plaintiff Debra Stansell (the "Stansell

1 Plaintiffs' Complaint pled more than sufficient facts to establish the Plaintiffs' standing. Plaintiffs' have previously had no reason to submit any evidence in support of their pleadings on this point, considering that the Defendants' answer failed to raise Plaintiffs' standing as an affirmative defense, or to challenge it in any way. As the passage from Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) states, "In response to a summary judgment motion, however, the plaintiffs can no longer rest on such 'mere allegations' but must 'set forth' by affidavit or other evidence 'specific facts." Plaintiffs are hereby doing just that – setting forth specific facts to establish standing in response to Defendants' motion for summary judgment.

Declaration"), an Aberdeen, Idaho resident since the age of 1, plaintiff Mary Woollen (the "Woollen Declaration"), Executive Director and Member of the Board of Directors of plaintiff Keep Yellowstone Nuclear Free ("KYNF") and Member of the Board of Directors of plaintiff Environmental Defense Institute ("EDI"), Sophie Craighead (the "Craighead Declaration"), Member of the Board of Directors of plaintiff Keep Yellowstone Nuclear Free, Chuck Broscious (the "Broscious Declaration"), President of the Board of Directors of plaintiff Environmental Defense Institute, and David McCoy (the "McCoy Declaration"), Member of the Board of Directors of plaintiff Environmental Defense Institute. As these Declarations demonstrate, and for the reasons set forth below, both the individual and organizational plaintiffs have standing to maintain this lawsuit. As a result of the Defendant's failure to comply with NEPA, Plaintiffs have suffered, or will suffer, injury to their concrete interests, including aesthetic, recreational and economic interests. Plaintiffs have further suffered injury to their procedural rights in that they have been denied an opportunity to partake in the public comment process required by NEPA. Therefore, Plaintiffs have standing to maintain this action.

In order to meet constitutional standing requirements, a plaintiff must show: (1) that it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Friends of the Earth v. Laidlaw Envtl. Serves., Inc., 528 U.S. 167, 180-81 (2000); Ocean Advocates v. U.S.

Army Corps of Engineers, 361 F.3d 1109 (9th Cir. 2004). Plaintiffs have more than met this test.

A. Plaintiffs Have Suffered Injury in Fact Sufficient To Establish Standing

In Friends of the Earth, the Supreme Court stressed that in environmental cases the relevant showing regarding the "injury in fact" requirement is an injury to the Plaintiff, not to the environment. 528 U.S. at 181. As the Court stated, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." 528 U.S. at 183. Similarly, as the Ninth Circuit subsequently reiterated in Ocean Advocates:

> An individual can establish "injury in fact" by showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable – that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction – if the area in question remains or becomes environmentally degraded.

361 F.3d at 1119 citing Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1149 (9th Cir 2000). As set forth below, Plaintiffs have more than adequately demonstrated that their aesthetic, recreational, economic, and procedural interests have been impaired by the DOE's refusal to prepare an EIS prior to deciding to extend the operating life of the ATR.

1. The Individual Plaintiffs Have Suffered Injury In Fact By the DOE's Failure to Prepare an EIS

As a result of the DOE's extending the operating life of the ATR without

preparing an EIS, all of the Plaintiffs' have suffered injury in fact that is concrete and particularized, and actual or imminent, not conjectural or hypothetical. Plaintiffs therefore meet the first requirement for standing.

Plaintiff Debra Stansell is a cancer survivor that lives just 35 miles from the INL boundary and approximately 45 miles from the ATR, well within the evacuation zone identified by the DOE in the event of a serious incident at the ATR. Stansell Declaration ¶ 2. Mrs. Stansell avoids INL altogether, and does not travel on the public highway that passes through INL just 5 miles south of the ATR, although she might otherwise do so were it not for the DOE's activities. Stansell Declaration ¶ 9. Mrs. Stansell would visit nearby Craters of the Moon National Monument, and the Mackey, Idaho area for recreational reasons were it not for the DOE's activities at INL, including continued operation of the ATR, and her resulting fears about further exposure to radioactive and hazardous emissions from those DOE activities. Id. Mrs. Stansell regularly passes through Idaho Falls, the Swan Valley, and Teton Valley on vacation with her family and enjoys the aesthetic attributes of these areas. Stansell Declaration ¶ 10. Mrs. Stansell avers that any significant release of radiation from the ATR would preclude this trip in the future. Stansell Declaration ¶ 11. Finally, if the DOE had provided public notice of its intention to extend the operating life of the ATR, and complied with NEPA's public notice and comment provisions, Mrs. Stansell would have taken part in that public process and opposed that proposal. Stansell Declaration ¶ 15. Thus, Mrs. Stansell's procedural, recreational, and aesthetic interests have all suffered injury as a result of the

DOE's failure to consider the environmental impact of extending the life of the ATR and its alternatives to doing so.

Plaintiff Mary Woollen lives in Wilson, Wyoming with her family. Woollen Declaration ¶ 9. Mrs. Woollen is an individual plaintiff to this proceeding, a member of the Board of Directors of both plaintiff EDI and plaintiff KYNF, and is the Executive Director of KYNF. Woollen Declaration ¶ 2. Mrs. Woollen enjoys recreating in Yellowstone and Grand Teton National Parks, the Caribou-Targhee National Forest and on the Snake River. Woollen Declaration ¶¶ 19-20. She uses these areas for boating, running, skiing and hiking. Mrs. Woollen has traveled through INL on her way to visit points west including Sun Valley, Idaho. Woollen Declaration ¶ 25. Mrs. Woollen has used and recreated in the Pioneer Mountains and the Lost River Range north of INL, and has visited Craters of the Moon National Monument. Woollen Declaration ¶ 22. Mrs. Woollen regularly visits Idaho Falls to shop for items unavailable in Jackson, Wyoming. Woollen Declaration ¶ 23. Mrs. Woollen has in the past, and expects in the future, to visit both Pocatello, Idaho and Rexburg, Idaho with her daughter for horseback riding competitions. Woollen Declaration ¶ 24. Mrs. Woollen intends to return to all of these areas in the future, but an incident at the ATR resulting in any amount of radioactive contamination would dissuade her future use of these areas, diminishing or eliminating her enjoyment of these areas. Woollen Declaration ¶ 27. As discussed below, the potential disruption to Mrs. Woollen's use and enjoyment of these areas near the ATR is sufficient to establish Mrs. Woollen's standing maintain this proceeding.

Finally, plaintiff John Peavey owns and operates a five-generation family ranch in Carey, Idaho known as the Flat Top Sheep Company. Peavey Declaration ¶¶ 2-4. The main ranch house is northeast of Carey approximately 30 miles west of the boundary of INL and 35 miles west of the ATR. Peavey Declaration ¶ 5. An Idaho State Senator for 21 years, Mr. Peavey, with his son and grandson, today manages the ranch's 28,000 acres of fee-ownership lands and vast leased areas, which stretch more than 100 miles. Peavey Declaration ¶ 5. Some of the leased areas lie within approximately 18 miles of the INL boarder and 25 miles from the ATR. Peavey Declaration ¶ 6. The Peavey grazing allotments include areas within Craters of the Moon National Preserve, BLM lands east of Carey, and forest lands east of Ketchum, Idaho. Peavey Declaration ¶ 6. Mr. Peavey regularly rides the range to monitor the health of his herd, and also regularly recreates on public and private lands and waters near INL including Craters of the Moon National Monument, the Big Lost River, and the Lost River and Lemhi mountain ranges. Peavey Declaration ¶ 7. Mr. Peavey, his ranch hands, and his livestock depend on both surface water and groundwater drawn from the Peavey well on the ranch. Peavey Declaration ¶ 8.

Mr. Peavey's former wife died of cancer in 1985, he believes as a result of the SL-1 nuclear reactor accident that occurred at INL in January, 1961, and her exposure to the resulting plume of radiation. Peavey Declaration ¶ 13. As a result, Mr. Peavey fears traveling on the public roads through INL. Peavey Declaration ¶ 14. Nonetheless, Mr. Peavey is occasionally required to drive through INL on his way to Idaho Falls and other

points east and south. Peavey Declaration ¶ 14. The Flat Top Sheep Company ranch lands, leased areas, and areas Mr. Peavey uses for recreation, would all be adversely affected by an accident at the ATR, and his use and enjoyment of these areas would be affected if not eliminated. Thus, Mr. Peavey's procedural, personal, aesthetic, recreational, and economic interests are all injured by the DOE's decision to extend the operating life of the ATR without first considering the impacts of, and alternatives to doing so in an EIS. Like the other individual plaintiffs, Mr. Peavey has suffered injury in fact sufficient to maintain this suit.

2. The Organizational Plaintiffs Have Suffered Injury In Fact By the DOE's Failure to Prepare An EIS

Organizational plaintiffs such as plaintiffs KYNF and EDI have standing to bring suit on behalf of their members when: (1) their members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Friends of the Earth, 528 U.S. at 181. As the Broscious, McCoy, Woollen and Craighead Declarations show, plaintiffs EDI and KYNF have suffered injury in fact as a result of the DOE's failure to prepare an EIS evaluating the impact of extending the life of the ATR, and easily meet these requirements.

Chuck Broscious, President of the Board of plaintiff EDI has submitted a declaration in support of EDI's standing to maintain this suit. As stated in the Broscious Declaration, EDI is an environmental advocacy organization that actively participates in

public debate regarding the DOE's activities at INL. Broscious Declaration ¶ 4-8. EDI seeks to protect southeastern Idaho and its residents from the potentially deadly effects of DOE activities at INL by advocating for environmentally sound nuclear policy decision-making at INL. Broscious Declaration ¶ 3. EDI also strives to provide citizens with the resources that will enable them to make informed choices regarding those issues. Id.

EDI focuses its attentions on three principal areas: (1) the development and expansion of INL as a super-site for nuclear research and development; (2) the ongoing cleanup of legacy wastes at INL; and (3) health-effects studies examining the effects of years of dangerous waste disposal practices and toxic and radiological emissions from INL accidents or experiments. Broscious Declaration ¶ 8.

EDI has published a 200-plus page book, the *Citizens Guide to INL*, and regularly publishes a newsletter, in an attempt to educate members of the public, elected officials, and its supporters of the DOE's past, present and future activities at INL. EDI regularly comments in the official record on DOE proposals ranging from new nuclear initiatives to waste treatment and disposal proposals. Broscious Declaration ¶ 7. EDI has actively pressed for and monitored the progress of ongoing health-effects studies that seek to determine releases from INL, and the resulting public health impact. Broscious Declaration ¶ 5.

EDI's standing, by virtue of that of its Board members, Charles Broscious, David McCoy and Mary Woollen, is firmly established. Mr. Broscious avers that he has in the past, and, barring a major accident at the ATR, will in the future, make many visits to

INL, Idaho Falls, and the public lands in the vicinity of INL. Broscious Declaration ¶¶ 19-29. Mr. Broscious has recreated on the public lands in the area including Craters of the Moon and the west slope of the Tetons. Broscious Declaration ¶ 27. Similarly, Mary Woollen, as set forth above, recreates on the Snake River, at Craters of the Moon, in the Pioneer Mountains, and in the Lost River Range, as well as the Tetons and Yellowstone. Woollen Declaration ¶¶ 19, 22. Similarly, Mr. McCoy has many times recreated on the public lands surrounding INL, including at Craters of the Moon, the Elephant Hunters' Cave, and Mud Lake, all of which lie within 30 miles of the ATR, and, barring a major release of radiation from the ATR, intends to return to those areas. McCoy Declaration ¶¶ 3-12. Finally, Mrs. Woollen regularly visits Idaho Falls, has been to INL several times, and travels through INL periodically. All of these individual EDI Board members have alleged sufficient injury in fact to establish individual standing. Those injuries are germane to the purposes of EDI and there is no need for those individuals to be plaintiffs (although Mary Woollen is in fact a plaintiff) in their own right. Therefore, EDI has standing.

Similarly, KYNF has standing to maintain this action by virtue of the standing of its Board Member and Executive Director, Mary Woollen, and Board Member Sophie Craighead. KYNF's organizational purpose is to protect the Greater Yellowstone ecosystem from hazardous and radiological releases from government activities at INL. Woolen Declaration ¶¶ 4-7. Greater Yellowstone, in the view of KYNF, includes a vast area that stretches beyond the boundaries of Yellowstone National Park and includes,

among other areas, many lesser known public and private lands in Eastern Idaho. Woollen Declaration ¶ 6. The Greater Yellowstone ecosystem that KYNF strives to protect includes the upper Snake River, the Caribou-Targhee National Forest, and many other publicly-owned lands in Eastern Idaho such as the Camas National Wildlife Refuge, the St. Anthony Sand Dunes, and the Green Canyon Hot Springs area. Id. The Snake River and these lands are used and enjoyed by Mrs. Woollen and Mrs. Craighead. Craighead Declaration ¶¶ 9-13; Woollen Declaration ¶¶ 19-20. As Mrs. Craighead avers, a major incident at the ATR would likely prevent her from continuing to use and enjoy these areas. Craighead Declaration ¶ 14. As Mrs. Woollen avers, a major accident at the ATR, and a resulting release of radiation, would prevent Mrs. Woollen from using the portions of the Snake River and the Caribou-Targhee National Forest that she enjoys, and might well induce her to relocate her family from their home in Wyoming. Woollen Declaration ¶ 21. Therefore, the injuries and potential injuries to Mrs. Woollen's and Mrs. Craighead's recreational and aesthetic interests in those areas posed by extending the operational life of the ATR are sufficient to establish injury in fact to Mrs. Woollen and Mrs. Craighead, and, by extension, to KYNF.

Furthermore, all of the Plaintiffs have suffered procedural injury as a result of the DOE's failure to comply with NEPA and its associated public comment requirements and are adversely aggrieved by this failure. DOE has failed to publicly weigh the environmental impacts of extending the operating life of the ATR, and the alternatives to doing so, and as a result the Plaintiffs have suffered procedural injury under the

Administrative Procedures Act and NEPA. Those procedural injuries are sufficient to establish standing.

3. Plaintiffs' Injuries Are Actual or Imminent, Not Conjectural or Hypothetical

An increased risk of harm is sufficient to establish injury in fact for standing purposes. Ocean Advocates, 361 F.3d at 1119 (threat of an oil spill was not considered to be conjectural or hypothetical, but rather a concrete injury to the plaintiffs' aesthetic and recreational interests). A plaintiff need not wait until the harm actually occurs to bring suit for violation of an environmental statute. As the Ninth Circuit has held, where a statutory violation poses a *threat* to the plaintiff's aesthetic or recreational interests, the plaintiff has alleged sufficient injury in fact to establish standing, and plaintiffs need not produce evidence of actual environmental degradation. Ocean Advocates, 361 F.3d at 1109; see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000). Thus, the threat of a major incident at the ATR is a concrete injury to the Plaintiffs' aesthetic, recreational and economic interests sufficient to support standing.

As briefly explained in the declaration of Mark D. Sullivan dated June 22, 2007 (the "Sullivan Declaration") several of the Plaintiffs have sought access to the key DOE studies evaluating the likelihood and consequences of an accident at the ATR through the Freedom of Information Act ("FOIA). In particular, KYNF and EDI requested, and have been denied, two documents of relevance here: (1) the Hazards Assessment Document for the Reactor Technology Complex, referred to as "HAD-3"; and (2) Chapter 15 of the Upgraded Final Safety Analysis Report (the "UFSAR") for the ATR. Those two

documents, Plaintiffs are told, evaluate the likelihood and consequences of a variety of accident scenarios at the ATR.

Having been denied access to the documents, KYNF and EDI were forced to file a FOIA complaint against the DOE in the Wyoming federal district court seeking disclosure of these and other documents. In that proceeding the parties have exchanged motions for summary judgment, and the matter is *sub judice*.

In the course of that FOIA litigation, the DOE submitted the Declaration of Joel Trent, an engineer and manager of INL's protective force, dated January 8, 2007, which briefly summarizes the consequences of a severe incident at the ATR.[2] See Sullivan Declaration, Exhibit A. The purpose of Mr. Trent's declaration was to convince the Wyoming Federal District Court that overwhelming national security concerns trumped the Freedom of Information Act's disclosure requirements and justified the DOE's withholding of this accident information. Id. Mr. Trent therefore provided the Court with the following grave description of the worst-case scenarios evaluated in the withheld DOE documents:

> "The Worst Case scenarios evaluated in the SAR all result in major contamination releases that would be categorized as a General Emergency, meaning there could be off site doses above protective guidelines. The exact release quantities and resulting exposures are dependent on weather and other variables surrounding the release, but the worst case scenario analyzed results in a Threshold for Early Lethality ("TEL") exposure out to 19.4 km. TEL is defined in DOE G 151.1-1 Volume II as 100 rem, where risk of early fatality begins to increase significantly. These

2 Mr. Trent, in his declaration submitted in this action, avers that the DOE is committed to withholding this information from the public, and will fight the FOIA action all the way to the Supreme Court if necessary. AR 031343.

> exposures would be reduced by evacuations or other protection measures, and the number of people exposed would depend on wind direction and speed, and the effectiveness of any notifications and evacuations. Because the ATR is relatively remote (nearest site boundary 10.8 km, nearest public highway 5.3 km), the terror value in this type of scenario is derived less from immediate death, and more from perceived threat, long term cleanup costs, and rendering certain areas temporarily uninhabitable. However, terrorists could impede or stop any evacuation by employees from the ATR or nearby facilities, which could result in a much greater lethal impact for several hundred workers.
>
> For the worst case scenarios analyzed, the protective action guidelines (1 rem Total Effective Dose Equivalent & 5 rem thyroid Committed Dose Equivalent) could extend to a distance of 105 km. Anyone in the plume area would likely be evacuated to avoid short term radiation exposure. Long term consequences, including cleanup itself, loss of livelihood, damage to the environment, and the resulting impacts to markets and public confidence are difficult to quantify, but they would be significant.

Sullivan Declaration, Exhibit A ¶¶ 23, 24.

With the submission of the Declarations of Robert D. Boston and Mr. Trent in this action, the DOE is now trying to backtrack, and appears prepared to argue that the threat of radiological releases from a major accident or terrorist strike at the ATR is too remote or speculative, and the health and ecological effects of such an incident too insignificant, to be considered concrete and particularized injury to the Plaintiffs. Both Mr. Boston and Mr. Trent now downplay the DOE's previous descriptions of the consequences of an incident at the ATR, the above description from Mr. Trent's prior declaration, and the very cursory review of a "beyond design basis" accident scenario presented in the 2000 NI PEIS. AR 006037-38. Mr. Boston and Mr. Trent now claim that those previous pronouncements were either extremely conservative or based on a scenario "not deemed to be credible," (AR 0131360) a very different message from the one Mr. Trent delivered

to the Wyoming Federal District Court.

While Mr. Trent maintains that his second declaration merely "clarifies" the doomsday scenario he presented to the Wyoming Federal District Court, these inconsistent declarations suggest that DOE is attempting to game the system. The Supreme Court has observed that the integrity of the judicial process requires courts to enquire whether a party is seeking to derive improper benefit from taking inconsistent positions according to the exigencies of the moment. New Hampshire v. Maine, 532 U.S. 742, 749 (2001). In the FOIA litigation, DOE used the first Trent Declaration to support withholding thousands of pages of information from the plaintiffs. In this litigation, through the declarations of Messrs. Bolton and Trent, DOE chastises the Plaintiffs for "misinterpreting" and "mischaracterizing" the accident scenarios presented in the NI PEIS and the Trent Declaration. AR 031359, 031340. Of course, Plaintiffs do not have access to the many hundreds of pages of analysis contained in the HAD-3 assessment and the UFSAR that are the basis of those previously presented scenarios, and thus have no way of evaluating the veracity or completeness of the declarations provided by Mr. Trent or Mr. Boston. Thus, Plaintiffs have excerpted the salient portion of Mr. Trent's first declaration so that the Court may properly hold DOE to the position it took in the FOIA litigation: the consequences to human health, the environment, and the economy resulting from an incident at the ATR would be difficult to quantify, but undoubtedly significant. See Sullivan Declaration, Exhibit A ¶¶ 23 - 24.

Plaintiffs would suffer injury to their economic, personal, recreational and

aesthetic interests in the event of an incident at the ATR. As the Broscious, McCoy, Woollen, Stansell, Craighead and Peavey Declarations make clear, regardless of the actual quantity of radiation released from a serious incident at the ATR, and the resulting dose of radiation to any individual living in or using these areas, the effect of such an accident would be to dissuade the Plaintiffs from using and visiting the areas in and around INL they now enjoy or visit for personal, recreational, aesthetic, economic and professional reasons. If there were an accident or malevolent act of any significance at the ATR, let alone the "beyond design basis" scenario previously touted by the DOE as a national security concern sufficient to withhold safety documentation from the public, the Plaintiffs' use and enjoyment of these areas would end. Indeed, as set forth above, Mr. Trent's declaration acknowledges the significance of this effect from an accident or malevolent act at the ATR, stating that the "resulting impacts to markets and public confidence are difficult to quantify, but would be significant." Sullivan Declaration, Ex. A ¶ 24. This is a risk of injury that is concrete and particularized, prolonged and exacerbated by the DOE's decision to extend the life of the ATR, and firmly established by the declarations plaintiffs have submitted.

In furtherance of the DOE's attempts to now downplay the significance of an incident at the ATR, Mr. Trent states that "even the protective action distance associated with the worst case scenario from the hazards assessment (105 km or 65.2 miles) does not impact 'Western Wyoming' or the treasured national parks referenced by the Plaintiffs in this NEPA lawsuit." AR 031342. Plaintiffs and their Board Members use and enjoy

areas in southeastern Idaho much closer to the ATR – and indeed inside of INL – than Western Wyoming's treasured National Parks. Plaintiffs travel both to INL for professional reasons associated with their advocacy, and through INL on their way to other places for other reasons, each time passing within just a few miles of the ATR. All of the Plaintiffs' declarants visit Idaho Falls, 45 miles from the ATR, for a variety of reasons. Plaintiff John Peavey uses the Peavey ranch lands and leasehold areas within 18 miles of the ATR on a daily basis. Mrs. Stansell's home in Aberdeen is approximately 40 miles distant. Craters of the Moon National Monument, visited by Mrs. Woollen, Mr. Peavey, Mr. McCoy and Mr. Broscious is within approximately 25 miles of the ATR. The Snake River wraps around INL to the south, the Lost River Range lies just north of INL, the St. Anthony Sand Dunes, Mud Lake, the Green Canyon Hot Springs are all just east of INL within approximately 25-30 miles of the ATR. All of these areas, regularly used and enjoyed by the Plaintiffs, and which the organizational plaintiffs seek to protect, are much closer to the ATR than the national treasures found in Western Wyoming that Mr. Trent seems to assert are too remote to be significantly affected by an incident at the ATR. Mr. Trent's declaration clearly demonstrates that all of these areas may well suffer radioactive fallout in measurable quantities, even quantities requiring evacuation, were there a serious incident at the ATR. Sullivan Declaration, Exhibit A ¶¶ 23-24. Thus, in light of the Ninth Circuit's holding in Ocean Advocates, the threat of such an incident is sufficient "injury in fact" to support standing.

Similarly, Mr. Boston seeks to downplay the dose of radiation to the "maximally

exposed member of the public at the nearest INL site boundary" outlined in the NI PEIS, which he states would be a 0.604 rem whole body exposure. AR 031357. First, this dose far exceeds the Nuclear Regulatory Commission's allowable *annual* dose for individual members of the public from the operation of a nuclear facility, which is .1 rem. See 10 C.F.R. § 20.1301. Second, as stressed by the Fourth Circuit in Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149 (2000), the standard is one of kind, not of degree. Thus, to establish standing, "the claimed injury need not be large, an identifiable trifle will suffice." 204 F.3d at 156. A major incident at the ATR would by no means be a mere trifle, but would rather have very serious consequences for eastern Idaho, and the Plaintiffs' use and enjoyment of these areas.

B. Plaintiffs' Injuries Are Fairly Traceable to DOE's Actions and Are Redressable

Where a plaintiff alleges injury to its procedural rights – i.e. its right to participate in NEPA's public comment procedures – the plaintiff can establish standing "without meeting all the normal standards for redressability and immediacy." Hall v. Norton, 266 F.3d 969 (9th Cir. 2001); Citizens for Better Forestry v. U.S. Dep't of Agriculture, 341 F.3d 961, 976 (stating that "once a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed"). As stated in Citizens:

> A petitioner who asserts inadequacy of a government agency's environmental studies ... need not show that further analysis by the government would result in a different conclusion. It suffices that ... the [agency's] decision could be influenced by the environmental considerations that [the relevant statute] requires an agency to study."

Citizens, 341 F.3d at 976.

Here, Plaintiffs easily meet this relaxed standard. By embarking on a program to extend the life of the ATR, the "Life Extension Program," without first preparing an EIS and subjecting that document to public review and input, the DOE has directly caused harm both to the Plaintiffs' procedural interests, and their concrete interests in seeing that their homes, businesses and cherished places in Southeastern Idaho and Western Wyoming are protected from radiological releases. Had an EIS been prepared, Plaintiffs would have actively participated in the public process required by NEPA. An EIS would evaluate the environmental impacts of extending the life of the ATR, and alternatives available to the DOE to do so, and give the Plaintiffs an opportunity to express their views to the DOE on these subjects for the DOE's consideration in a public forum. Plaintiffs need not show that the outcome of the EIS would be any different. Citizens, 341 F.3d at 976. After preparing an EIS, the DOE may still decide to go forward with the LEP and extend the life of the ATR. For standing purposes, it suffices that the DOE's decision *could* be influenced by a full and open discussion of the impacts and alternatives to extending the life of the ATR. Thus, the Plaintiffs have standing to maintain this action.

POINT III

THE DOE'S DECISION TO EXTEND THE OPERATING LIFE OF THE ATR WITHOUT PERFORMING ANY NEPA REVIEW WHATSOEVER IS A FINAL AGENCY ACTION SUBJECT TO JUDICIAL REVIEW

The DOE next argues that its decision to embark on the LEP is not a "final agency action" and therefore the Plaintiffs' claims are not cognizable under the Administrative Procedures Act ("APA"). This ripeness argument misses the point entirely. The DOE's decision not to perform any environmental review whatsoever is immediately reviewable as a final agency action. Furthermore, the DOE's decision to embark on the LEP was the consummation of the DOE's decision making with respect to the fate of the ATR, and is thus a reviewable final agency action.

A. The DOE's Decision Not to Conduct Any Environmental Review Under NEPA is Itself A Reviewable Final Agency Action

The DOE was required to prepare an EIS before they embarked on the LEP. The DOE's decision not to prepare an EIS is a final agency action and a procedural violation that is itself immediately ripe for judicial review under the APA. See Hall v. Norton, 266 F.3d 969, note 5 (stating that "the BLM's decision not to prepare an EIS is a final agency action"); Laub v. United States Department of the Interior, 342 F.3d 1080, 1088 (9th Cir. 2003); Forest Service Employees for Environmental Ethics v. United States Forest Service, 397 F.Supp. 2d 1241, 1252 (D.C. Mont. 2005).

Here, the DOE in no way even considered its NEPA obligations prior to embarking on the LEP. Upon learning of the LEP through a freedom of information act request, on November 1, 2006, the Plaintiff Keep Yellowstone Nuclear Free first wrote to

the DOE to ask if any NEPA analysis had been performed. AR 030576. The DOE responded two weeks later with a letter explaining that no NEPA analysis had been performed. AR 030574.

Subsequently, during a meeting of the DOE's "NEPA Planning Board" on December 11, 2006, the DOE further considered its NEPA obligations. The minutes state: "Suggestions were made to do analysis – EIS. NE does not want it due to public response." AR 011189. Five months later, months after the Plaintiffs had commenced this litigation, the DOE's illegitimate decision was given an elaborate rationale in a memorandum from J. Depperschmidt to R. Furstenau dated May 9, 2007 (the "Depperschmidt Memorandum"). AR 011219-011223.

Although the DOE's decision not to prepare an EIS for the LEP was belated (the decision came at least two years after DOE had decided to embark on that program, and only in response to KYNF's inquiry), it nonetheless constitutes a final agency action from which legal consequences flow. The DOE's decision not to prepare an EIS evaluating the impacts and alternatives to extending the life of the ATR violates the Plaintiffs' procedural right to participate in the NEPA process, and is immediately reviewable by this Court under the APA. Hall, 266 F.3d 969; Laub, 342 F.3d at 1088; Forest Service Employees for Environmental Ethics, 397 F.Supp. 2d at 1252.

B. The DOE's Decision to Embark on the LEP Was the Consummation of the DOE's Process of Evaluating the ATR's Condition and Continued Operability

As the massive administrative record in this case demonstrates, the DOE's

decision to embark on this very costly program came after a long chain of events, including a revealing DOE oversight team evaluation and resulting ATR shutdown, independent assessment team recommendations, a request for mission characterization approval, and budget reviews and funding requests. The decision to extend the life of the ATR, and embark on the LEP, was the consummation of that decision making process.

In August and September of 2003 a team from the DOE's Office of Independent Oversight and Performance Assurance ("OA) reviewed the essential system functionality of selected systems at the ATR. AR 030761-030778. That review identified several weaknesses and findings relating to the design and configuration control for a loss of coolant accident at the ATR. AR 030762. As a result, the ATR was ordered shut down for several months while these deficiencies were addressed. AR 030763. The OA team then produced its December, 2003 "Causal Analysis Report" evaluating the cause of the problems at the ATR. Id.

In response to the OA review and report, the DOE-Idaho Manager Elizabeth Sellers assembled a team of independent nuclear industry experts to review the ATR's condition and long-term viability. The resulting Planning Assessment Team Report concluded that "The Comprehensive long-term operating plan should be prepared, or the practical operating lifetime of ATR will be determined by default. (e.g. material condition failures, human performance issues)." See AR 031370-031399.

Ms. Sellers next developed and transmitted a memorandum[3] to her superiors dated July 12, 2004 with the subject line "Request for Approval of the Advanced Test Reactor Mission Characterization." AR 031370. The "ATR Mission Characterization" attached to Ms. Seller's memo is a 24-page document that in essence sells the need for continued ATR operation to Mrs. Sellers' superiors. The Mission Characterization's Executive Summary states that "The ATR is at a crossroads." AR 031370. It then recites the findings of the February, 2004 Planning Assessment Team, which, as explained:

> …concluded that safe operations, beyond the short term of 3-5 years, will be compromised without a comprehensive long term operating plan and the funding to address inadequacies in human capital and physical infrastructure. We must complete rigorous long range planning efforts and recapitalize the ATR to avoid premature shutdown of the facility.

AR 031375. The Mission Characterization then makes the case for extending the ATR's operating life. The Mission Characterization describes the conclusions of the Planning Assessment Team, sets forth the DOE's known and anticipated nuclear energy and naval propulsion missions, reviews the capabilities and limitations of existing DOE and university nuclear research reactors available meet those missions, and offers a comparative assessment of the cost of continuing to operate the ATR versus decommissioning it and building a new test reactor. AR 031374 to 031399.

The Mission Characterization approval sought by Ms. Sellers is nowhere found in

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3 Mrs. Sellers' memorandum and the accompanying report is one of 33 "additional" documents that the DOE belatedly added to its Administrative Record in opposition to Plaintiffs' motion for summary judgment and in support of its cross-motion for summary judgment. Oddly, some of these "additional documents" were already part of the administrative record. Others are entirely new.

the 31,000-plus page administrative record. However, in a subsequent letter dated November 24, 2004 from Ms. Sellers to Dr. Paul Kearns, INL's Vice President and Laboratory Director, Ms. Sellers states that "In response to the Rice Team Report, a corrective action was approved to develop a Long Range Operating Plan (LROP) for the ATR." AR 031482. The actual approval of this corrective action plan that Ms. Sellers is referring to does not appear to be in the administrative record.

Nonetheless, the DOE then embarked on exactly the program that the Planning Assessment Team found was needed, and Ms. Sellers requested: it developed and began implementing a plan to carry out the necessary studies of the reactor's material condition, design basis, and seismic qualifications, among other things, and began to review and implement the physical upgrades identified as necessary to extend the operating life of the reactor. The DOE developed and refined a "Long Range Operating Plan" for the ATR (AR 031482-031488) and then later revised that plan and re-named it the Life Extension Program.

Thus, the DOE's own planning documents suggest that in 2004 the ATR was "at a crossroads" due to its deteriorating condition and inadequate funding (AR 031370), and that the facility would not be able to safely operate beyond the short term of 3-5 years without "a comprehensive long term operating plan and the funding to address inadequacies in human capital and physical infrastructure." Id. As a consequence, the DOE "embarked" on a costly and complex program to address these inadequacies, identify and repair physical deficiencies, and extend the life of the ATR – the LEP. AR

011566. From its inception, the LEP included the development of a plan for assessment of the ATR's condition and reconstitution of its safety basis and "recapitalization," which involved replacement of critical components of the reactor that had worn out, failed or otherwise required replacement. AR 031394. The LEP was certainly the consummation of the DOE's decision making with respect to the future of the ATR.

In arguing that the LEP is not a "final agency action," the DOE asserts that this case "is controlled" by Lujan v. National Wildlife Federation, 497 U.S. 871, 879-80 (1980). DOE SJ Mem at 13. The DOE's decision to extend the operating life of the ATR bears no resemblance to the broad program that the Court concluded was not a discrete agency action in Lujan. Lujan is readily distinguishable and most certainly does not control this case.

In Lujan, the Plaintiffs challenged not a single agency action, but "at least 1,250" actions, or inactions, that fell within the Bureau of Land Management's "land withdrawal review program." 497 U.S. at 890. Under that "program," which the Court was careful not to even capitalize because it was not defined by the BLM, the BLM made myriad decisions regarding the classification of lands, and the development of land use plans, pursuant to its statutory mandate to manage its vast holdings. As the Court stressed, the Plaintiffs alleged that violations of law were rampant within the program, including "failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, failure to provide adequate

environmental impact statements." 497 U.S. at 891. Thus, the Plaintiffs were seeking "wholesale" improvement to a massive and ill-defined BLM program, which was "no more an identifiable 'agency action' – much less a 'final agency action' – than a 'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Administration." 497 U.S. 891. Little wonder that the Court refused to recognize the Plaintiffs right to relief under the APA in Lujan.

Here, in contrast, a single DOE action is at issue -- its decision to extend the life of the Advanced Test Reactor. While that action has numerous components, and has been modified as it is being carried out, it is nonetheless discrete, identifiable, and "final." The program had an identifiable impetus (the 2004 Planning Assessment Team Review) (AR 031370), has been provided separate funding, (AR 031278, 031280, 031282) has its own "oversight team" with its own "charter" (AR 030748-030760), and its components are clearly identified in a "plan" first prepared in 2004, and since revised several times as it is being carried out. AR 031482-031488. The LEP bears no resemblance to the "program" at issue in Lujan.

The DOE also argues that the LEP is a "decisionmaking tool, not a decision" (DOE SJ Mem. at 12) and that the LEP "merely identifies plans for monitoring and assessing ATR structures, program and operations to identify issues and make recommendations for future maintenance activities and projects." DOE SJ Mem. at 14. Therefore, the DOE argues, the LEP is not the "consummation" of the DOE's decision making process. The DOE then argues that as specific plans arise to make physical

improvements to the ATR, it considers its NEPA obligations. DOE SJ Mem. at 16.

First, this argument mischaracterizes Plaintiffs' claims, which challenge the DOE's decision to extend the operating life of the ATR by embarking on the LEP without performing any NEPA review. Second, these arguments were explicitly rejected by the Ninth Circuit in Laub. In that case, the defendant argued, and the district court found that:

> because the [challenged Record of Decision and EIS] simply outline a program by which state and federal officials and agencies commit to work together to achieve strategies in order to implement a long-term plan to solve environmental problems, the issuance of the EIS/EIR does not "mark the consummation of the decisionmaking process" and therefore does not constitute a final agency action subject to review under the APA.

342 F.3d at 1088. The Ninth Circuit disagreed, and overturned the district court decision. As the Ninth Circuit stated, "if the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review." 342 F.3d at 1089.

Here, the DOE arguments mirror those of the Department of the Interior in Laub. The DOE argues that the LEP "is not an endpoint in any decision-making process, but rather an informational tool for compiling and coordinating information and activities to help DOE make informed decisions for maintaining the long-term viability of ATR." This argument was rejected in Laub, and should be rejected here. If it is not, the DOE's decision to extend the life of the ATR for another 35 years by embarking on the LEP, with no environmental review under NEPA, will forever escape review. For the reasons set forth above, the LEP was the consummation of the DOE's decision making process,

and its decision was to extend the operating life of the ATR. That decision was and is an action subject to NEPA.

POINT IV

THE DOE'S DECISION TO EXTEND THE OPERATING LIFE OF THE ATR IS A MAJOR FEDERAL ACTION FOR WHICH AN EIS IS REQUIRED

A. The Decision to Extend the Operating Life of the ATR Is a Major Federal Action.

As set forth in the Plaintiffs' initial memorandum of law, under the clear and broad definitions found in the CEQ and DOE regulations, the DOE's decision to embark on the LEP and extend the life of the ATR is both an "action" under NEPA and a "major federal action" for which an EIS must be prepared. See 40 C.F.R. § 1508.18. It is a "group of concerted actions to implement a specific policy or plan" under the CEQ regulations, and a "project, program, plan, or policy" requiring NEPA review under the DOE's own regulations. 10 C.F.R. § 1021.104(b). Extending the operating life of the ATR will have very significant environmental impacts, including generating radioactive and hazardous waste, prolonging and increasing the risk and consequences of an accident or other serious incident, and secondary and cumulative impacts associated with the ATR's intended role as the centerpiece of the DOE's broad nuclear research and development program. AR 031394 (stating that "it is our objective that the Idaho National Laboroatry becomes the world's premier nuclear energy technology center within a decade" and stressing that extending the operating life of the ATR is essential to meeting this objective.) Therefore the DOE's decision to extend the operating life of the

ATR is a "major federal action" subject to NEPA's procedural requirements.[4]

1. The LEP Need Not Be "Legally Required" For NEPA to Apply

The DOE claims that its program to extend the life of the ATR, the LEP, "is not a license or a permit, and is not legally required for continued ATR operations" (DOE SJ Mem. at 24). While perhaps not legally required, and certainly subject to no independent authorization, permit or approval, embarking on the LEP was and is essential to the DOE's intention to extend the operation of the ATR. Two independent teams of experts identified serious problems with the Reactor's safety basis, seismic qualifications and physical condition, and attributed these problems to the ATR's aging and years of budget constraints and management failure. AR 030761-030778. In 2004, in the words of DOE-Idaho Manager, Elizabeth Sellers, the ATR was therefore at a "crossroads." AR 031370. In response, the DOE decided to extend the operating life of the ATR and embark on what it then believed would be a 10-year, $200 million program to do so that included recapitalization and a complex program for evaluating the reactor's material condition and reconstituting its safety basis. Absent the LEP, Mrs. Sellers cautioned that the operating life of the ATR would be "established by default" (031482). Indeed, absent

4 In its SJ Memorandum, the DOE spends several pages stridently arguing that the Plaintiffs failed to present any argument that the NI PEIS was inadequate in their Complaint, and that any such claim is now untimely. DOE SJ Mem. at 29-33. As explained in Plaintiffs' initial memorandum in support of their motion for summary judgment, the May, 2007 Depperschmidt Memorandum (developed after this litigation was commenced) asserted, as one of its reasons that no NEPA review of the ATR LEP was required, that the NI PEIS addressed the impacts of 35 more years of ATR operation. AR 011220. That is why the Plaintiffs argue that the NI PEIS was inadequate – in response to this defense. In their Memorandum, Defendants no longer assert this rationale, and therefore Plaintiffs need argue it no more.

implementation of the LEP, the end of ATR's safe operating life, according to Mrs. Sellers and the Planning Assessment Team, would likely have already been reached. AR 031370. Embarking on the LEP, as the Planning Assessment Team and DOE management both stressed, was essential to extending the life of the reactor.

Moreover, nothing in NEPA requires that an action be "legally required" for it to be considered a federal action. There need not be any legally required permit or authorization. It is enough that, as here, a federal agency (or its facility operator) is itself undertaking the action. See 40 C.F.R. § 1508.18 (b)(4) (stating that "federal actions" include "actions approved by permit or other regulatory decision as well as federal and federally assisted activities.") Extending the life of the ATR is a federal activity subject to NEPA. Indeed, if a permit or authorization were a prerequisite for NEPA to apply, the activities of the DOE at INL, which are often subject to no such approval, would escape NEPA review altogether, which is clearly what the DOE is hoping here.

2. Under NEPA, An EIS Must Be Prepared At the Earliest Possible Time

The DOE claims that the LEP is merely a planning and assessment "tool" that will have no effect on the environment, and that it has made no decision on whether to proceed with the "LEP Safety Posture Modernization" projects, and therefore an EIS would be premature. This claim ignores the very substantial and irretrievable commitment of resources the DOE has made to the LEP, as well as the numerous physical upgrades that have been carried out at the ATR pursuant to the LEP. The LEP is not simply a planning tool, but is the framework by which the DOE is carrying out it

decision to extend the life of the ATR.

Agencies are required to perform NEPA review at the earliest possible stage in the development of a proposal. The CEQ regulations require agencies to "apply NEPA early in the process," and state: "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. § 1501.2. Consistent with this regulation, the Supreme Court has stated that the CEQ regulations and NEPA are intended to ensure that environmental considerations are "infused into the ongoing programs and actions of the Federal Government." Marsh v. Orgeon Natural Resources Council, 490 U.S. 360, 371 n. 14. To that end, the Ninth Circuit has repeatedly stressed that:

> EAs and EISs must be prepared early enough so that [they] can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made. The phrase 'early enough' means at the earliest possible time to insure that planning and decisions reflect environmental values.

Idaho Sporting Congress Inc. v. Alexander, 222 F.3d 562, 567-568 (9th Cir. 2000); see also Save the Yaak Committee v. Block, 840 F.2d 714 (9th Cir. 1988). As the Court stated in Save the Yaak, "after a major investment of both time and money, it is likely that more environmental harm will be tolerated." 840 F.2d at 718 (citations omitted). If the DOE does not immediately begin to prepare an EIS on the LEP, any subsequent NEPA review of the "modernization" or other components of the program will not meaningfully inform the DOE's planning and decision making with respect to the LEP.

If the DOE has already spent $70 million to extend the life of the ATR, it is unlikely, to say the least, to then change course, decommission the ATR, and build a new reactor.

The DOE's claim that the LEP is a planning and assessment tool that simply maintains the "status quo" at the ATR sweeps under the rug the many physical upgrades and repairs identified as necessary and then carried out under the LEP. Under the misleading heading "environmental checklists" the Administrative Record contains dozens of "facility change forms" prepared for physical modifications made to the ATR and supporting structures and systems made during the course of the DOE's continuing execution of the LEP. These changes range from multiple modifications made to address seismic concerns (AR 010475-010492; 010732-010757) to the replacement of parts that the facility change forms acknowledge "have operated beyond their expected life." (AR 010515) Among other things, ATR piping and components have been anodized (AR 010584-010640) and extended (010641-010681); computers and electrical equipment have been replaced (AR 010682-010715; 010799-010824); modifications have been made to the Outer Shim Control Cylinder Drive System (AR 010716-010731); a failed firewater sprinkler riser was replaced (AR 0108255-010841); new fire dampers have been installed (AR –010860-010883); modifications made to the canal recycling system (involving contaminated water built up over time in the system) (AR 010884-010905); power supplies have been changed (AR 010806-010922); EFIS valves that had "reached the end of their useful life" were replaced (010975-010993); and modifications have been made to emergency coolant pumps (AR 011052-011080).

Furthermore, the critical Emergency Firewater Injection System ("EFIS"), relied upon to cool the reactor's core in the event of a major incident, has undergone "interim" modifications to address serious seismic concerns. See AR 031216-031238. The DOE installed a number of check valves in the EFIS piping in an effort to isolate sections of the system that would be vulnerable to seismic failure (AR 031218), it has added a deep-well pump emergency power supply (AR 031221), and repaired deficiencies in the primary coolant system piping. AR 31223. Again, these badly needed safety improvements demonstrate that the LEP is much more than a "planning and assessment tool."

All of these repairs and upgrades are part of the "recapitalization" of the ATR that was a key component from the very beginning of the LEP, even before it was known as the LEP, as outlined in the Mission Characterization. See Federal Defendants' Statement of Undisputed Material Fact ¶ 11; AR 031370-031399. The DOE's 2004 Mission Characterization identified the importance of these recapitalization projects, stating: "ATR also needs recapitalization funding to improve the state of infrastructure that supports reactor operations. Near term recapitalization projects will renew systems that are vital to a safe operating envelope. When completed, recapitalization will extend the useful life of the facility." AR 031394. The projects outlined in the many "facility change forms" that are part of the administrative record are all part of this "near term" recapitalization effort, that according to Ms. Sellers are necessary to "extend the useful life of the facility."

Furthermore, the CEQ regulations state that "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a). The LEP's assessment and planning elements, its short-term recapitalization projects, and its "Life Extension Program Safety Posture Modernization," are all quite clearly "related" parts of a single proposal: the extension of the ATR's operating life. They share a name (the "Life Extension Program"), impetus (the 2003 and 2004 independent assessments) and purpose (to extend the life of the ATR). Indeed, the DOE has itself repeatedly stated that the ATR LEP Safety Posture Modernization is "integrally" linked to the planning and assessment components of the LEP. See AR 011566, 011570, 011576. The LEP, including its Safety Posture Modernization component, is a single course of action intended to extend the operating life of the ATR for 35 more years. Thus, prior to embarking on the LEP, the DOE was obligated to prepare an EIS covering the entire Life Extension Program, including its Safety Posture Modernization components.

3. Analogous Nuclear Regulatory Commission and Federal Energy Regulatory Commission Actions Require EISs

As plaintiffs have previously pointed out, the analogous Nuclear Regulatory Commission action of renewing a commercial nuclear power plant operating license is a "major federal action" that, by regulation, requires an EIS in every case, and so too should extending the life of the ATR. Similarly, the re-licensing of a hydropower facility by the Federal Energy Regulatory Commission is an action that is subject to NEPA. See e.g., American Rivers v. Federal Energy Regulatory Commission, 201 F.3d 1186 (9th Cir.

1999).

In response to this argument the DOE asserts that "ATR is not a commercial reactor, nor is it like one," drawing a distinction based on the differing power rating, heat and pressure levels, and uranium inventories between the ATR and a typical commercial nuclear power reactor. DOE SJ Mem. at 24. First, the NRC regulations that require an EIS for license renewal of a commercial nuclear power plant also require an EIS for the renewal of a license to operate privately-owned test reactors far smaller and less powerful than the ATR. The Regulation states as follows:

> The following types of actions require an environmental impact statement or a supplement to an environmental impact statement: (2) Issuance or renewal of a full power or design capacity license to operate a nuclear power reactor, testing facility, or fuel reprocessing plant pursuant to part 50 of this chapter.

10 C.F.R. 51.20(b) (emphasis added). The ATR is by far the largest test reactor in the United States, and one of the largest in the world. If it were privately owned, and up for relicensing to extend its operation, the NRC would have to prepare an EIS prior to relicensing. There is no reason under NEPA why the DOE is not also obligated to prepare an EIS for ATR life extension.

Second, the differences between a large commercial nuclear power plant and the ATR by no means negate the need for an EIS. The DOE cannot deny that continued and extended operation the ATR will generate large quantities of spent nuclear fuel, as well as highly radioactive beryllium waste for which the DOE currently has identified no path for disposal. The DOE cannot deny that the worst-case incident scenarios evaluated in

their own NI PEIS and described in the Trent Declaration would have serious consequences and that the risk of such an accident is prolonged by extending the operation of the ATR. The DOE cannot deny that implementing the LEP Safety Modernization projects at the ATR will enable it to co-locate other new nuclear facilities nearby, with their attendant secondary and cumulative environmental impacts. Thus, just like re-licensing a commercial nuclear power plant or test reactor, extending the life of the ATR, and carrying out the LEP to do so, will have significant adverse environmental impacts that make doing so a "major federal action" for which an EIS is required.

The DOE also cites Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983), to suggest that an EIS evaluating the impacts of operating a nuclear reactor need not consider the consequences of a nuclear accident. DOE SJ Mem. at 20-21. That is not what the Court held in Metropolitan Edison. Quite the contrary, as the Court stressed in Metropolitan Edison, both the EIS required for the original licensing of the nuclear plant at issue (Three Mile Island), and an environmental impact assessment (EIA) required by the Nuclear Regulatory Commission prior to re-start of the reactor after an accident, considered the risk and impact of a nuclear accident posed by the operation of the reactor. 460 U.S. at 775. The claim the Court rejected was that the NRC was required to consider, in an EIS, the psychological damages the Plaintiffs would endure if the Three Mile Island facility were re-started after the serious accident it suffered. Those psychological impacts, the Court reasoned, exceeded the scope of NEPA and did not have to be considered as part of the agency's NEPA review during the

licensing proceeding.

The Court's holding in Metropolitan Edison has no bearing on whether the risk of a nuclear accident (as opposed to the psychological effect of such risk) is something an agency must consider in an EIS. Indeed, such risk would seem to be an environmental impact that even the DOE acknowledges must be considered in an EIS, since such risks are presented, although in a cursory form, in its NI PEIS. AR 006037-38.

B. Extending the Operating Life of the ATR is Subject To NEPA Even Though the ATR Pre-Dates Its Enactment

The DOE also claims that the LEP is not subject to NEPA because the ATR was constructed before NEPA's enactment, and the LEP consists of routine maintenance that will simply permit the DOE to "maintain the status quo" at the ATR. In making this argument, the DOE relies on the Ninth Circuit's decision in Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232 (9th Cir. 1990), a case that is readily distinguished.

In Upper Snake, the Court held that the Bureau of Reclamation's decision to reduce stream flows from the Palisades Reservoir after successive dry years was not subject to NEPA because it consisted of "routine managerial actions regularly carried on from the outset without change." 921 F.2d at 235. In sum, the Bureau, in its normal operation of the dam, regularly adjusted stream flows depending on demand and water availability, a routine activity the Court determined was not subject to NEPA.

Plaintiffs here do not challenge a routine operational decision made by DOE management with respect to the ATR. They do not challenge, for example, a decision to

increase the operating power level of the reactor, or to modify the neutron flux levels, decisions that could perhaps be compared to the Bureau of Reclamation's stream flow decision making in Upper Snake. Rather, Plaintiffs are challenging a very broad, very costly program that the DOE determined was necessary to extend the operating life of the reactor. That program has a variety of complex components, involves physical modifications to the reactor to address identified deficiencies (see, e.g., AR 010475-011080), and a "modernization" program that would cost tens if not hundreds of millions of dollars to bring the reactor up to contemporary standards. AR 030779-030801. The LEP is by no means routine maintenance.

Indeed, the DOE's own budget documents (belatedly submitted as "additional documents" in a supplement to the administrative record in support of their motion for summary judgment) clearly distinguish between routine operations and maintenance, and the LEP. In two places, the DOE's Work Authorization for 2007 includes separate line items for "ATR Operations" ($7,000,000) and ATR Life Extension Program" ($16,000,000). AR 031279, 031280. It then describes the $7,000,000 applied to "ATR Operations" as "Funding to be applied to the ongoing operation and maintenance of the ATR…." AR 031282 (emphasis added). Separately, the Work Authorization then describes the $16,000,000 for "ATR LEP" as "Conduct the ATR LEP in accordance with the ATR LEP Project Plan." Id. The LEP activities certainly far exceed "routine maintenance."

As set forth above, the LEP is more akin to the re-licensing of a commercial

nuclear power plant or test facility, or the re-licensing of a hydropower facility, which permit such facilities to operate for another period of many years. As established above, such relicensing requires an EIS. So too does the LEP.

The LEP is far from routine, and is in fact changing the status quo at the ATR. The ATR is being transformed from a facility that was "at a crossroads" and facing shutdown "by default" to one that the DOE intends to operate for many years to come. If the DOE had not embarked on the LEP, the ATR could not continue to safely operate. Thus, embarking on the LEP is a major federal action subject to NEPA.

POINT V

AN INJUNCTION BARRING CONTINUED OPERATION OF THE ATR IS WARRANTED

An injunction is warranted barring continued operation of the ATR until such time as the LEP's critical-to-safety assessments and upgrades have been completed and a plan developed and implemented for the disposal of radioactive waste generated by operation of the ATR. Although the DOE has taken some steps to improve the condition of the facility as it carries out the LEP, it has by no means finished its work. Indeed, the LEP's assessment and evaluation components are far from complete. The Material Condition Assessment is unfinished, the Design Basis Reconstitution is unfinished, the Seismic Assessment is unfinished, and the Probabilistic Risk Assessment is unfinished. See Federal Defendants' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ¶ 17, 18. As set forth above, the Administrative Record

demonstrates that as the DOE has carried out these ongoing LEP activities, it has identified dozens of areas in which safety-related equipment needed to be repaired or replaced, and then carried out those modifications. Because the LEP safety assessments have not been completed, and any necessary repairs and upgrades they may identify carried out, it cannot today be known what safety-related issues may arise, or even what the risks are of continuing to operate the facility. However, given the course of the LEP thus far, it would seem likely that there will be more problems identified and repairs carried out. This uncertainty alone warrants an injunction. The ATR poses a threat to public safety and the environment in southeastern Idaho.

With the support of declarations from Mr. Trent and Mr. Boston, the DOE now claims that the Plaintiffs have made "exaggerated and mistaken claims about the risk and potential extent of an accident at ATR." DOE SJ Mem. at 36. Plaintiffs have done nothing more than accurately report to the Court the DOE's own summaries of the worst-case accident scenarios (and terrorist attacks) at the ATR, in particular the statements found in the NI PEIS and the Trent Declaration.

In the FOIA litigation, the DOE used Mr. Trent's first declaration to deny Plaintiffs access to the underlying DOE documents evaluating a wide spectrum of ATR accident scenarios. Those documents were withheld from the Plaintiffs in response to a FOIA request, and redacted from the Administrative Record in this action as well. Thus, Plaintiffs have little information at their disposal to contradict the claims made by Mr. Boston and Mr. Trent.

Nonetheless, several things can be said about the Declarations of Robert Boston and Joel Trent submitted in this action. First, the accident scenario now downplayed by Mr. Boston and Mr. Trent, and which Mr. Boston now asserts are drawn from a hypothetical accident scenario that is "beyond design basis" and therefore not deemed credible (Boston Declaration ¶ 28), are certainly not the only potential ATR accident scenarios with serious consequences. The Administrative Record in this proceeding includes the Executive Summary of the UFSAR, and table ES-5 presents a "summary" of the worst case events resulting in radioactive consequences at the ATR. AR 026548. Five events are presented. Only the "Large Break LOCA," the scenario described in the NI PEIS, is considered "beyond design basis."[5] Id. The other four scenarios have varying degrees of likelihood and severity of rem doses to the public. Furthermore, Table ES-3 presents no fewer than 16 "Major Accident Sequences." Any one of these accident scenarios, even by Mr. Boston's crimped standards, would be considered credible and serious. Indeed, as Mr. Trent states, they all would be considered "general emergencies." Sullivan Declaration, Exhibit A ¶ 24.

Mr. Boston further attempts to downplay the effects of a major accident by stating: "the UFSAR analysis indicates that this severe accident is a bounding event that

5 Curiously, the off-site dose to the public for the Beyond Design Basis accident reflected in the UFSAR Executive Summary far exceed the .604 rem dose Mr. Boston cites from the NI PEIS. AR 026548. According to the UFSAR Executive Summary, the Hypothetical Large Break LOCA, the dose to the public at the low population zone (an area not defined in the Executive Summary) is 13.2 rem. AR 026548. Plaintiffs have no means of explaining this discrepancy, given than they have been denied the underlying documents.

results in off-site doses that are within the regulatory limits of 10 CFR 100 for exposures to the public." AR 0311360. This statement is then repeated in the DOE' Memorandum of law, which claims: "Yet even the off-site doses that might result from this worst-case scenario, "bounding" event are within the regulatory limits of 10 CFR § 100, because of the relatively insignificant amount of radioactive material in ATR…." DOE SJ MEM at 37 . These statements are misleading. The NRC regulation cited by the DOE governs the siting of new nuclear facilities, not the safe dose of radiation to the public in the event of an accident. Indeed, the NRC regulations even explicitly caution that the standards of 10 CFR Part 100 are not "intended to imply that these numbers constitute acceptable limits for emergency doses to the public under accident conditions." 10 C.F.R. § 100 note 2.

Apart from the likelihood and severity of an accident at the ATR, the Plaintiffs will suffer irreparable injury from the DOE's failure to prepare an EIS for the LEP relating to the storage and disposal of radioactive waste. The DOE's "Strategic Issues" are still unresolved, and thus there remains no path for disposal of beryllium waste generated at the ATR. The DOE claims that "the LEP itself, however, does not generate any nuclear waste…" DOE SJ Mem at 38. This claim cannot be taken seriously. Continuing to operate the ATR for another 35 years, as the DOE has decided it will do, and seeks to do by implementing the LEP, will generate tremendous amounts of this waste.

The DOE argues that the Plaintiffs' request for an injunction "ignores the significant adverse impacts to public interest" if the ATR were shut down. DOE SJ

Mem. at 38. In support of this assertion, the DOE cites a glossy but vague public relations "fact sheet" published by INL (AR 030570). Several of the programs described by the DOE may – or may not – be currently under way at the ATR, and others could certainly be performed at other research facilities in the U.S. or abroad. Moreover, none of the cited reasons why the ATR is so critical have any demonstrated urgency.

For example, the DOE Memorandum states that "ATR is also a critical part of several NNSA programs for eliminating the nuclear proliferation risks." DOE SJ Mem. at 39 citing AR 030795. The document cited is the "Safety Posture Modernization Mission Need Document" dated June 30, 2006, which outlined the DOE's then-intended use of the ATR, and the major physical upgrades necessary to modernize the reactor. That document refers to two NNSA programs relating to nuclear proliferation risks. The first is the Reduced Enrichment Research and Test Reactor Program. The Mission Need Document simply states that the ATR is the "test bed" for this program. AR 030795. It does not state that such testing was then underway, much less that it is now underway. The second NNSA program referred to in the Safety Posture Modernization Mission Need Document is a program for the development of a revised design for targets to produce tritium in commercial nuclear reactors. As the DOE's document states, "ATR is currently developing a proposal for conducting a series of irradiations to allow for the development of this revised target design element." AR 030796. Mr. Boston states that "Currently, there are several tests being conducted that are important to the Global Nuclear Energy Partnership and the Next Generation Nuclear Program." AR 031368.

He offers no specifics and certainly does not establish that these tests are urgently required or that they cannot be performed at other facilities, either in the US or abroad (the GNEP is a "global" partnership, involving many countries).

Finally, the DOE claims that ATR "is the only reactor in the United States capable of producing certain medical isotopes in the quantity and quality needed to support this field of medical treatment." DOE SJ Mem. at 39. Similarly, Mr. Boston claims "If the ATR were shutdown, radioactive isotopes for medical treatment, some that only ATR can supply in a commercially viable manner, would be halted. The current corporate entities that have contracted for production of these isotopes would be severely impacted and lives threatened." AR 031368.

The DOE cites its vague public relations "fact sheet," and its December, 2000 NI PEIS to support this claim. DOE SJ Mem. at 39 citing AR 030570. It is certainly true that the ATR is used to produce medically important isotopes that have helped treat many thousands of patients. However, it should be noted that the DOE carefully states that the ATR is the only reactor *in the United States* that is capable of producing these medical isotopes. These isotopes, currently being produced by an Idaho Falls based contractor called International Isotopes, Inc., are in fact readily available from other sources, and would be eagerly provided by other suppliers in Canada, the United Kingdom, and other locations if there were some U.S. shortfall due to an outage at the ATR. Furthermore, other reactors in the Untied States, including the DOE's own High Flux Isotope Reactor ("HFIR") in South Carolina, can and do produce large quantities of isotopes for medical

and other purposes, and could be used to pick up the slack if the ATR were to be shut down. See AR 009826.

Incredibly, the DOE makes the claim that an injunction shutting down the ATR threatens "thousands of human lives per year that depend on the production of medical isotopes from ATR to treat such maladies as inoperable brain cancers." DOE SJ Mem. 39. That claim is grossly overblown, and most certainly has not been demonstrated by the DOE by references to its public relations "fact sheets" and years-old NI PEIS.

It is revealing that Mr. Boston repeatedly cites the impact of shutting down the ATR in terms of "tax dollars" and the financial impact upon International Isotopes, Inc., as a reason why an injunction should not be granted in this case. AR 031368-69. These claims go to the very heart of the reason the DOE embarked on the LEP to begin with – to save money. It is simply less expensive to extend the operating life of the ATR than it would be to decommission the ATR and build a new test reactor with state-of-the-art safety features. Mrs. Sellers' 2004 "Mission Characterization" document, prepared to sell the life extension program to her superiors, briefly explores the costs of alternatives to the life extension program. She states that the "minimum" cost to decommission the ATR is $350 million, and "may be much higher." AR 031399. And she states that the cost of building a new, smaller fast research reactor that would be adequate to meet the DOE's needs, would be approximately $1 billion. AR 031399. That financial calculus was performed by the DOE without the benefit of an environmental impact statement evaluating the impacts of extending the life of the ATR and comparing those impacts to

the impacts of available alternatives to doing so. NEPA requires such an analysis, and an injunction ceasing ATR operations until that EIS has been prepared, and critically necessary ATR safety improvements carried out, is warranted.

*** * * ***

CONCLUSION

For the reasons set forth above, Plaintiffs ask that that the Court grant their summary judgment motion and order the DOE to immediately begin preparing an EIS evaluating the impacts of, and alternatives to, extending the operating life of the ATR for another 35 years.

Respectfully submitted,

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