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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**NATURAL RESOURCES DEFENSE  
COUNCIL, INC., COMMITTEE  
TO BRIDGE THE GAP, AND CITY OF  
LOS ANGELES**

Plaintiffs,

v.

**DEPARTMENT OF ENERGY,  
SPENCER ABRAHAM, Secretary,  
Department of Energy, and  
CAMILLE YUAN-SOO HOO, Manager,  
National Nuclear Security Administration,  
Oakland Operations Office**

Defendants.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**ADMINISTRATIVE PROCEDURE  
ACT CASE**

14           1.       This case challenges the Department of Energy's ("DOE") March 2003 decision  
15 concerning the cleanup of radioactive and other contamination on Area IV of the Santa Susana Field  
16 Laboratory ("SSFL") in Simi Valley, California, a DOE-controlled area that, for over fifty years, was  
17 used for the development, fabrication, and disassembly of nuclear reactors, reactor fuel, and other  
18 radioactive and highly toxic materials. For decades, Area IV was the site of widespread radiological  
19 and chemical contamination from a range of sources, including the illegal burning of radioactive and  
20 toxic wastes in open pits, reckless disposal practices, at least two nuclear accidents involving serious  
21 fuel damage, and, in 1959, even a partial core meltdown not disclosed to the public until 20 years  
22 later. As a result, Area IV itself is a radioactive and toxic wasteland, and contamination has  
23 migrated off-site, posing health risks to the public both onsite and in surrounding communities.

1 Nevertheless, without conducting a full environmental review, and in violation of U.S.  
2 Environmental Protection Agency (“EPA”) cleanup standards that, pursuant to a 1995 Joint Policy  
3 with EPA, DOE is required to apply to this and other DOE sites, DOE has decided to carry out only a  
4 partial cleanup, leaving almost 99% of the contaminated soil unremediated. Although the EPA has  
5 objected to DOE’s cleanup decision – concluding, for example, that after the cleanup Area IV will  
6 remain so unsafe that even picnicking and hiking will have to be restricted – DOE does not plan to  
7 take any steps to restrict future use of the site, and anticipates that “future use of the property for  
8 residential purposes is probable.”  
9

10  
11 2. In deciding to proceed with this deficient cleanup of Area IV, DOE has failed to  
12 comply with the 1995 Joint Policy with EPA, as well as with the cleanup standards of the  
13 Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”),  
14 42 U.S.C. §§ 9601, et seq.. DOE has done so, moreover, without preparing either an Environmental  
15 Impact Statement (“EIS”) under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §  
16 4321, et seq., or complying with the CERCLA decision-making process. In addition, despite the fact  
17 that the cleanup may adversely impact federally protected endangered species within and near Area  
18 IV, DOE has failed to complete the mandatory federal consultation process with the U.S. Fish and  
19 Wildlife Service, in violation of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, et seq.  
20

21  
22 3. As a result of these failures, once DOE’s cleanup is complete Area IV will remain so  
23 contaminated that it will expose future residents of the area to a cancer risk as high as 1 in 50, and  
24 the soil will continue to contain contamination at levels as much as 19,000 times higher than EPA  
25

1 standards. By deciding that this level of cleanup is sufficient, and is appropriate for unrestricted  
2 residential development of the site, DOE is violating NEPA, CERCLA, the ESA, and the  
3 Administrative Procedure Act (“APA”), 5 U.S.C. § 706.  
4

5 **JURISDICTION AND VENUE**

6 4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal  
7 question jurisdiction), 42 U.S.C. § 9659(a) (CERCLA) and 16 U.S.C. § 1540(g) (ESA).  
8 Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e).  
9

10 **INTRADISTRICT ASSIGNMENT**

11 5. Pursuant to Civil L.R. 3-2(d), assignment is appropriate in the San Francisco or  
12 Oakland Divisions because the decision at issue here was issued in Oakland, California by the  
13 Department of Energy’s Oakland Operations Office.  
14

15 **PARTIES**

16 6. Plaintiff Natural Resources Defense Council, Inc. (“NRDC”) is a national, non-profit  
17 organization with an office in San Francisco, California, and over 480,000 members dedicated to the  
18 protection of the environment, more than 90,000 of whom live in California. Through education,  
19 advocacy, litigation and other efforts, NRDC works to protect the environment, and its members,  
20 from environmental threats, including the threats posed by radioactive and other contamination from  
21 former nuclear research and development facilities throughout the country, such as the SSFL site.  
22

23 7. NRDC has invested considerable organizational resources in advocating for the  
24 proper and expeditious cleanup of the SSFL, including the cleanup of Area IV, which is at issue  
25

1 here. For example, at various stages of the SSFL cleanup process, NRDC has submitted comments,  
2 attended public meetings, and participated in formal proceedings related to the site, including Area  
3 IV.  
4

5 8. NRDC's ability to participate effectively in the cleanup of the SSFL and Area IV, and  
6 to thereby protect the environment and its members near the site is injured by the federal defendants'  
7 failure to comply with NEPA, CERCLA, the ESA and the APA, because, by violating these statutory  
8 provisions defendants are denying NRDC information to which the organization is statutorily  
9 entitled. In addition, by leaving massive quantities of radioactive and other contamination at the site,  
10 the defendants are threatening both the site and surrounding areas with permanent environmental  
11 damage.  
12

13 9. NRDC brings this action on its own institutional behalf and also on behalf of its  
14 members, who both reside near and regularly visit areas near the SSFL site. These NRDC members  
15 enjoy educational, recreational, and scientific activities in that portion of California where the SSFL  
16 is located, including observing and looking for Braunton's milkvetch and other plant and wildlife  
17 species in this area. These members' interests in living and recreating in a safe and healthy  
18 environment are injured by the federal defendants' failure to comply with NEPA, CERCLA, the  
19 ESA, and the APA, because, by violating these statutory provisions, and leaving massive quantities  
20 of radioactive and other contamination at the site, the defendants are threatening both the site and  
21 surrounding areas with permanent environmental damage.  
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1           10.     Plaintiff Committee to Bridge the Gap (“CBG”) is a non-profit corporation organized  
2 and existing under the laws of the State of California, with an office in Santa Cruz, California. CBG  
3 provides technical assistance to communities near nuclear facilities. CBG has been deeply involved  
4 in assisting the community near the SSFL since 1979, when it released to the public, policymakers,  
5 and the news media detailed information about the 1959 partial meltdown of a nuclear reactor in  
6 Area IV.  
7

8           11.     Since the late 1980s, CBG has invested considerable organizational resources to assist  
9 the community in ensuring the appropriate cleanup of the contamination at the SSFL and Area IV.  
10 In addition to participating in comment periods and meetings throughout the various stages of the  
11 SSFL cleanup, CBG has engaged in public education regarding the SSFL and the nuclear and other  
12 contamination at the site.  
13

14           12.     The ability of CBG to participate effectively in the cleanup of the SSFL site, and to  
15 thereby protect the environment and its members near the site is injured by the federal defendants’  
16 failure to comply with NEPA, CERCLA, the ESA and the APA, because, by violating these statutory  
17 provisions, defendants are denying CBG information to which the organization is statutorily entitled.  
18 In addition, by leaving massive quantities of radioactive and other contamination at the site, the  
19 defendants are threatening both the site and surrounding areas with permanent environmental  
20 damage.  
21

22           13.     CBG brings this action on its own institutional behalf, and also on behalf of its  
23 members, who both reside near and regularly visit areas near the SSFL site. For example, CBG  
24

1 members Barbara Johnson and Dawn Kowalski both live in Susana Knolls, California,  
2 approximately 2 miles down the hill from the SSFL site. They are both concerned about the risks  
3 that the contamination at the SSFL, and Area IV, pose to their health and that of the surrounding  
4 communities, particularly in light of the discovery of tritium, perchlorate and other contamination  
5 migrating off the site; the fact that they have both suffered from breast cancer; and their experience  
6 with cancers and birth defects in their community. They have both actively been involved in  
7 advocating for the proper cleanup of the SSFL, and Area IV, since 1989, attending public hearings,  
8 and participating in various committees working on this issue. These and other CBG members'  
9 interests in living and recreating in a safe and healthy environment are injured by the federal  
10 defendants' failure to comply with NEPA, CERCLA, the ESA, and the APA, because, by violating  
11 these statutory provisions, and leaving massive quantities of radioactive and other contamination at  
12 the site, the defendants are threatening both the site and surrounding areas with permanent  
13 environmental damage.

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17 14. Plaintiff City of Los Angeles ("City") is a municipal corporation organized and  
18 existing under the Constitution and laws of the State of California and the Charter of the City of Los  
19 Angeles. The City is located in Los Angeles County and its northwest boundary is near the SSFL.  
20 The City seeks to protect the public health, safety, and welfare and the environment of its citizens  
21 and employees from the threats posed by radioactive and other contamination at and migrating from  
22 SSFL, including Area IV.  
23  
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1           15.     The City's ability to participate effectively in the cleanup of the SSFL and Area IV,  
2 and to thereby protect the environment, City residents, and City employees near the site is injured by  
3 the federal defendants' failure to comply with NEPA, CERCLA, the ESA, and the APA, because, by  
4 violating these statutory provisions, defendants are denying the City information to which it is  
5 statutorily entitled. In addition, by leaving massive quantities of radioactive and other contamination  
6 at the site, the defendants are threatening both the site and surrounding areas, with permanent  
7 environmental damage. Migration of contamination, including contaminated groundwater and  
8 surface water, into City limits will also cause the City and its citizens financial and economic harm  
9 due to costs of remediation, devaluation of property values, loss of tax revenues, and physical harm  
10 to citizens.

13           16.     The City brings this action on its own behalf and on behalf of its citizens and  
14 employees, who reside near or regularly visit areas near the SSFL site. These citizens and employees  
15 enjoy educational, recreational, and scientific activities in that portion of California where the SSFL  
16 is located, including observing and looking for Braunton's milkvetch and other plant and wildlife  
17 species in this area. The City is concerned about the risks that the contamination at the SSFL, and  
18 Area IV, pose to the health, safety, and welfare of its citizens and employees, particularly in light of  
19 the discovery of tritium, perchlorate, and other contamination migrating off the site. These City  
20 interests in living and recreating in a safe and healthy environment are injured by the federal  
21 defendants' failure to comply with NEPA, CERCLA, the ESA, and the APA, because, by violating  
22 these statutory provisions and leaving massive quantities of radioactive and other contamination at  
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1 the site, including groundwater contamination, the defendants are threatening both the site and  
2 surrounding areas with permanent environmental damage.

3 17. DOE is the federal agency that has controlled and been responsible for activities  
4 within Area IV of the SSFL for decades and that is responsible for the cleanup of Area IV.  
5

6 18. Defendant Spencer Abraham is the Secretary of the DOE and is the official ultimately  
7 responsible for all DOE activities.

8 19. Defendant Camille Yuan-Soo Hoo is the manager of DOE's Oakland, California  
9 Operations Office, which is the DOE office that made the cleanup decision at issue in this case.  
10

### 11 STATUTORY FRAMEWORK

#### 12 **1. The National Environmental Policy Act**

13 20. NEPA is our "basic national charter for protection of the environment." 40 C.F.R.  
14 § 1500.1. NEPA requires all agencies of the federal government to prepare a "detailed statement"  
15 regarding all "major federal actions significantly affecting the quality of the human environment." 42  
16 U.S.C. § 4332(C). This statement, known as an Environmental Impact Statement ("EIS"), must  
17 describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental  
18 effects which cannot be avoided should the proposal be implemented," (3) alternatives to the  
19 proposed action, (4) "the relationship between local short-term uses of man's environment and the  
20 maintenance and enhancement of long-term productivity," and (5) any "irreversible or irretrievable  
21 commitment of resources which would be involved in the proposed action should it be  
22 implemented." 42 U.S.C. § 4332.  
23  
24  
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1           21.     The Council on Environmental Quality (“CEQ”) -- an agency within the Executive  
2 Office of the President -- has promulgated regulations implementing NEPA which are “binding on  
3 all federal agencies.” 40 C.F.R. § 1500.3. These regulations require that, unless an activity is  
4 “categorically excluded” from NEPA compliance, an agency must either prepare an EIS, or, at the  
5 very least, an Environmental Assessment (“EA”) which is used to determine whether an EIS is  
6 necessary. Id. § 1501.4.

8           22.     Among the factors an agency must consider to determine whether a project may have  
9 “significant” impacts, and therefore whether an EIS is required, are the “context” and “intensity” of  
10 the action. 40 C.F.R. § 1508.27. Regarding context, the CEQ regulations provide that, for a “site-  
11 specific action,” an agency must determine whether the “effects on the locale” are significant. Id.  
12 § 1508.27(a).

14           23.     As for intensity, the regulations provide that, among other relevant factors, the  
15 severity of the impact must be judged based on whether “the proposed action affects public health  
16 and safety”; “[t]he degree to which the effects on the quality of the human environment are likely to  
17 be highly controversial”; “the degree to which the possible effects on the human environment are  
18 highly uncertain or involve unique or unknown risks”; “[t]he degree to which the action may  
19 adversely affect an endangered species”; “[w]hether the action threatens a violation of Federal [law]  
20 imposed for the protection of the environment”; and “the degree to which the action is related to  
21 other actions with . . . cumulatively significant impacts.” Id. § 1508.27(b). With regard to the last  
22 factor, such cumulative impacts include “the incremental impact of the action when added to other  
23  
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25

1 past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-  
2 Federal) undertakes such other actions.” Id. § 1508.7.

3  
4 24. Irrespective of whether an EIS is required, where an agency prepares an EA the  
5 regulations require that the EA discuss both the need for the proposed action and alternatives to it,  
6 address the environmental impacts of both the proposal and the alternatives, and “provide sufficient  
7 evidence and analysis for determining whether to prepare” an EIS. Id. § 1508.9.

8  
9 25. If, after preparing an EA, the agency concludes that an EIS is not necessary, it must  
10 issue a Finding of No Significant Impact (“FONSI”) that adequately explains why the project will  
11 “not have a significant effect on the human environment” and an EIS will not be prepared. 40 C.F.R.  
12 § 1508.13.

13  
14 26. Even after a NEPA process is completed, where an agency learns of “significant new  
15 circumstances” or new “information relevant to environmental concerns and bearing on the proposed  
16 action or its impacts,” the agency must undertake further review under NEPA. Id. § 1502.9(c); 10  
17 C.F.R. § 1021.314.

18 **2. The Comprehensive Environmental Response, Compensation, and Liability Act**

19  
20 27. Congress enacted CERCLA to address “the serious environmental and health risks  
21 posed by industrial pollution.” United States v. Bestfoods, 524 U.S. 51, 54 (1998). To carry out  
22 this goal, the statute grants “broad power to command government agencies and private parties to  
23 clean up hazardous waste sites.” Id.

1           28.     Although many of CERCLA’s provisions are directed at prioritizing, and  
2 appportioning financial liability for, cleanups on private property, CERCLA Section 120 provides that  
3 “[e]ach department, agency, and instrumentality of the United States . . . shall be subject to, and  
4 comply with, [CERCLA] in the same manner and to the same extent, both procedurally and  
5 substantively, as any nongovernmental entity . . . .” 42 U.S.C. § 9620(a)(1). The statute further  
6 provides that “[n]o department, agency, or instrumentality of the United States may adopt or utilize  
7 any [ ] guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules,  
8 regulations and criteria established by the Administrator,” – i.e., “the Administrator of the United  
9 States Environmental Protection Agency.” Id. §§ 9620(a)(2), 9601(2).

12           29.     Pursuant to Executive Order 12580, federal agencies are responsible for certain  
13 remedial actions on facilities under their jurisdiction, custody or control. E.O. 12580. Accordingly,  
14 DOE is responsible for the cleanup at those portions of the SSFL site that it owns or controls,  
15 including Area IV.

17           30.     In 1995, DOE and the EPA entered into a Joint Policy On Decommissioning  
18 Department of Energy Facilities Under CERCLA (“1995 Joint Policy”). The Policy provides that,  
19 “regardless of whether or not a release or threatened release” of contamination “is from a site listed  
20 on the NPL [National Priorities List],” DOE will undertake the cleanup “in a manner consistent with  
21 CERCLA.” 1995 Joint Policy at 2.

23           31.     In 1999 and 2000, DOE submitted Reports to Congress listing all of the DOE sites  
24 around the country subject to CERCLA Section 120, 42 U.S.C. § 9620. DOE listed the SSFL in  
25

1 both of these Reports as one of these sites. See U.S. Department of Energy Office of Environmental  
2 Management Twelfth Annual Report To Congress (April 2000).

3  
4 32. Under CERCLA, a federal agency undertaking a remediation of a contaminated  
5 federal facility site must follow a specific set of procedures. Id. § 9621; 40 C.F.R. § 300.3. Pursuant  
6 to the National Contingency Plan (“NCP”), those procedures require, *inter alia*, a remedial  
7 investigation and feasibility study to evaluate the scope of contamination and to begin to develop  
8 potential remediation alternatives. See 40 C.F.R. § 300.430. In considering these alternatives, the  
9 agency must evaluate nine criteria, including such factors as the protection of human health and the  
10 environment; applicable or relevant and appropriate requirements under federal and state law;  
11 effectiveness and permanence; feasibility and cost; and community and state acceptance. Id.  
12 § 300.430(e)(9). Once the agency has developed a proposed remediation plan, it must again solicit  
13 public input, before making its Record of Decision, in which the agency must explain the bases for  
14 the chosen alternative. Id. § 300.430(f)(1)-(5).

15  
16  
17 33. Substantively, the NCP mandates that where there are “multiple contaminants at a site  
18 or multiple pathways of exposure,” a “ $10^{-6}$  risk level shall be used as the point of departure for  
19 determining remediation goals . . . .” 40 C.F.R. § 300.430(e)(2)(i)(A)(2). This means that after a  
20 cleanup is completed, the resulting residual risk of cancer to the maximally exposed individual on  
21 the site should be 1 in 1,000,000. As EPA has explained, although “the final cleanup level may  
22 reflect a different risk level within the acceptable risk range ( $10^{-4}$  to  $10^{-6}$  for carcinogens),” such a  
23

1 level may only be selected “[b]ased on a consideration of factors during the nine criteria analysis  
2 . . . .” Rules of Thumb For Superfund Remedy Selection (EPA 1997) at 8.

3  
4 **3. The Endangered Species Act**

5 34. Congress enacted the ESA in order to protect plants and animals that “have been so  
6 depleted in numbers that they are in danger of or threatened with extinction.” 16 U.S.C.  
7 § 1531(a)(2). Once a species is listed under the Act as “endangered” or “threatened,” it is entitled to  
8 critical protections, including a requirement under Section 7 of the Act that all federal agencies  
9 “shall, in consultation with and with the Assistance of the [U.S. Fish and Wildlife Service (“FWS”)],  
10 insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize  
11 the continued existence of” the species. Id. § 1536(a)(2).

13 35. To carry out this requirement, the ESA’s implementing regulations require that  
14 whenever a federal project “may affect” a listed species, the action agency must engage in “formal  
15 consultation” with the FWS, unless the agency obtains the FWS’s written “concurrence” that formal  
16 consultation is not necessary. Id.; 50 C.F.R. § 402.14. In this formal consultation, the action agency  
17 provides the FWS with “the best scientific and commercial data available” concerning the species,  
18 id. § 402.14(d), and the FWS, in turn, issues a “biological opinion” detailing “how the agency action  
19 affects the species,” 16 U.S.C. § 1536(b)(3)(A), and in particular, whether the action is “likely to  
20 jeopardize” the continued existence of the species. 50 C.F.R. § 402.14(g), (h).

23 36. If, after the conclusion of the consultation process, the FWS concludes that the action  
24 is likely to jeopardize a listed species, and therefore will violate Section 7, the FWS “shall suggest  
25

1 those reasonable and prudent alternatives which,” if implemented, would prevent such a violation.  
2 16 U.S.C. § 1536(b)(3)(A). In any event, the FWS must also specify the “reasonable and prudent  
3 measures” the agency must take to minimize the impact of the action on the species. Id. §  
4 1536(b)(4).  
5

## 6 FACTS GIVING RISE TO PLAINTIFFS' CLAIMS

### 7 A. DOE’s Use Of The SSFL, And The Legacy Of Contamination At The Site

8 37. The SSFL is an 11-square kilometer (~ 2800 acre) site located atop a range of hills  
9 between the Simi and San Fernando Valleys in southeastern Ventura County, California. Located  
10 approximately 30 miles northwest of downtown Los Angeles, more than 69,000 people live within  
11 five miles of the SSFL, and more than 1,400 people live within 2 miles of the site. The area also  
12 provides a unique semi-arid habitat for a diverse array of sensitive species, 14 of which have been  
13 observed in area surveys, including, for example, the critically-endangered Braunton’s milkvetch,  
14 which is federally listed as an “endangered” species, and has been found in Area IV of the SSFL.  
15

16  
17 38. Area IV, where DOE is undertaking the cleanup at issue here, is located on the  
18 Western edge of the SSFL. Within Area IV are a number of buildings that comprise The Energy  
19 Technology Engineering Center (“ETEC”). While the SSFL is principally owned by Rocketdyne  
20 Propulsion & Power (a division of The Boeing Company) and the National Aeronautics and Space  
21 Administration (“NASA”), DOE’s Oakland, California operations office controls and is responsible  
22 for ETEC and Area IV.  
23

1           39.     Beginning in the 1940s, the Department of Defense and NASA used the SSFL for  
2 testing rocket and spacecraft engines and subsequently lasers, with Rocketdyne and its predecessor  
3 corporations acting as government contractor for the work. DOE and its predecessor agencies used,  
4 and sponsored Rocketdyne activities on, Area IV to conduct nuclear research and energy  
5 development projects. These projects included the development, fabrication, disassembly, and  
6 examination of nuclear reactors, reactor fuel, and other radioactive materials. In addition, the agency  
7 engaged in large-scale liquid sodium metal experiments to test liquid metal fast breeder reactor  
8 components. Over 200 facilities were used within Area IV to undertake these projects, including 10  
9 nuclear reactors, a plutonium fuel fabrication facility, a “hot lab” where highly irradiated reactor fuel  
10 was stripped of its cladding and cut apart, and various nuclear materials storage facilities.

13           40.     There were a number of radiological accidents and releases at the site over the years.  
14 For example, in 1959, one of the site’s ten nuclear reactors experienced a partial melt-down, with  
15 approximately one-third of its fuel experiencing melting. Although government officials did not  
16 notify the public of the seriousness of the incident for nearly 20 years, some experts estimate that the  
17 incident released hundreds of times the contamination released in the 1979 Three Mile Island nuclear  
18 reactor disaster. At least eight other “radiological incidents” occurred in Area IV between 1959 and  
19 1976, including serious fuel damage in two other reactors.

22           41.     Large volumes of chemicals were also used within Area IV. For example,  
23 trichloroethylene (“TCE”) and other solvents and chemicals were used in connection with work on  
24  
25

1 the nuclear reactors. There were accidental spills and releases of all of these contaminants within  
2 Area IV.

3 42. As a consequence of these and other contaminant releases, the ETEC, Area IV, and  
4 the SSFL as a whole are contaminated with extensive radiological and chemical material. Based on  
5 existing, albeit incomplete, surveys conducted thus far, DOE has determined that the potential  
6 radioactive contaminants within Area IV include uranium-238, thorium-232, cesium-137, strontium-  
7 90, and cobalt-60. According to EPA, human exposure to these, and other potential radioactive  
8 substances at the site, can cause cancer. The groundwater within Area IV is also contaminated,  
9 principally with TCE, a dense liquid that, if ingested even at low concentrations, can be toxic, as  
10 well as with radioactive tritium. The surface water is also contaminated as a result of operations at  
11 the site, primarily with mercury, antimony, copper, and cadmium.

12 43. Extensive contamination has also already been detected off-site, including, in several  
13 locations, radioactive tritium and perchlorate, a toxic chemical that often serves as a leading  
14 indicator of contaminant migration. In addition, cesium-137, plutonium-238, and strontium-90 have  
15 also all been detected at significantly elevated levels near Area IV, including at a public park and a  
16 camp.

17 **B. DOE's Broken Promises To Characterize And Cleanup Area IV**

18 44. In the 1990s DOE repeatedly agreed to have EPA conduct a radiological  
19 characterization of Area IV of the SSFL, to help identify and characterize the contamination in  
20 preparation for cleanup. As late as May 2001, EPA Administrator Christine Todd Whitman  
21

1 announced that EPA remained prepared to conduct this survey. In a 2001 Scoping Plan, EPA  
2 explained the numerous deficiencies in prior contamination surveys that had been conducted at the  
3 site.  
4

5 45. DOE never funded the EPA survey, and that survey was never conducted. As a result,  
6 DOE's current cleanup decision is based on contamination surveys that are – according to EPA –  
7 patently deficient, both because samples have not been taken from an adequate number of locations  
8 throughout the site and because the equipment used to test the samples that have been taken have not  
9 been sensitive enough to provide adequate results.  
10

11 46. DOE has already decommissioned – i.e., shut down and dismantled – a number of the  
12 facilities within Area IV, without preparing an EA or EIS, without complying with the CERCLA  
13 process or standards, and in violation of DOE's 1995 Joint Policy with EPA which mandates that the  
14 CERCLA process and standards shall apply to this and other DOE cleanups. See Joint Policy On  
15 Decommissioning Department of Energy Facilities Under CERCLA (“1995 Joint Policy”).  
16

17 47. In January 2002, DOE issued a Draft Environmental Assessment (“EA”) “For  
18 Cleanup And Closure of the Energy Technology Engineering Center.” Aside from the ‘no-action’  
19 alternative, the Draft EA only considered two other alternatives. Under both alternatives, DOE's  
20 proposal largely focused on the demolition of remaining structures within Area IV, including the  
21 Radioactive Materials Handling Facility (“RMHF”) Complex; a building used for nuclear power  
22 testing; another building that housed nuclear test reactors; and the sodium pump test facility. Once  
23  
24  
25

1 the cleanup is complete, DOE explained, “future use of the property for residential purposes is  
2 probable.”

3  
4 48. Aside from the removal of contaminated structures, the only cleanup DOE proposed  
5 under Alternative One was to remove 5,500 cubic meters of contaminated soil from the vicinity of  
6 the RMHF Complex. Under Alternative One, no other contaminated soil or other media would be  
7 removed from near any of the other radioactively contaminated buildings, or the rest of Area IV.  
8 Nonetheless, DOE claimed that this alternative would achieve a cleanup level within Area IV of 15  
9 millirems per year (“mrem/yr.”) of exposure, and that this cleanup alternative would result in a  
10 residual lifetime cancer risk of 3 in 10,000 – i.e., an exponentially greater exposure risk than the 1 in  
11 1,000,000 risk that the NCP mandates agencies use as their “point of departure for determining  
12 remediation goals.” 40 C.F.R. § 300.430(e)(2)(i)(A)(2). Alternative one was DOE’s “preferred  
13 alternative.”  
14

15  
16 49. The only additional element in Alternative Two in the Draft EA was a provision for  
17 the removal of additional contaminated soil within Area IV. Under Alternative Two, DOE would  
18 remove more than 400,000 cubic meters of contaminated soil throughout Area IV. According to the  
19 Draft EA, this alternative would achieve a cleanup level of .05 mrem/yr. of exposure, and would  
20 result in residual lifetime cancer risk of 1 in 1,000,000.  
21

22 50. DOE received 79 comments on the Draft EA, including those of EPA and plaintiffs  
23 CBG and NRDC. In detailed comments, EPA explained that it had “serious concerns about several  
24 key issues” in the Draft EA. Among other concerns, EPA explained that “the selection of a cleanup  
25

1 level at the site is premature and is not based on the CERCLA process.” EPA also commented that  
2 DOE had not undertaken adequate contamination surveys, including “an evaluation of radionuclides  
3 or other hazardous materials that could be present [ ] throughout Area IV.”  
4

5 51. EPA observed that, by failing to consider the impacts associated with the chemical  
6 contamination at the site, and by failing to consider the overall impacts associated with  
7 decommissioning the entire ETEC site, the EA “is an inappropriate segmentation under NEPA.”  
8 EPA further explained that, “as a matter of public disclosure under NEPA, an analysis of potential  
9 impacts of these other contaminants, including impacts to public health, [should] be integrated into  
10 DOE’s NEPA analysis of environmental impacts and mitigation measures for the ETEC as a whole.”  
11 EPA also noted that the EA did not address the potential for radioactivity and/or chemical  
12 contamination to migrate off the site, through groundwater or otherwise. For example, EPA noted  
13 that tritium has been detected in groundwater at the site, but that the EA does not discuss this  
14 contamination.  
15

16  
17 52. EPA further explained that the “range of reasonable alternatives analyzed is limited  
18 and incomplete.” Among other alternatives, EPA noted that DOE should have at the very least  
19 considered following CERCLA standards and procedures in selecting its cleanup plan, which DOE  
20 has entirely failed to do. EPA also commented that DOE should have considered on-site  
21 management of radiological materials and restrictions that might prevent residential use of the site.  
22 EPA noted that “the level of human health risks and other impacts associated with all of the  
23 alternatives [DOE has considered] warrant serious consideration of additional [ ] alternatives.”  
24

1           53.     California’s Department of Toxic Substances Control (“DTSC”) also submitted  
2 comments, echoing many of the same concerns as those expressed by EPA. For example, DTSC  
3 also explained the DOE’s existing characterization of the contamination within Area IV was  
4 insufficient; that DOE had improperly failed to consider the chemical contamination on the site; and  
5 that “there is a lack of sufficient information to support a Finding of No Significant Impact for  
6 ETEC.”  
7

8           54.     Plaintiffs NRDC and Committee to Bridge the Gap (“CBG”) also submitted  
9 comments. Among other concerns, CBG explained that DOE’s estimates of the amount of residual  
10 contamination that will result in 15 mrem/yr. of exposure in Area IV deviate significantly from  
11 EPA’s own Preliminary Remediation Goals (“PRGs”) for those same radionuclides. For example,  
12 while, under DOE’s approach, the agency will permit 629,000 picocuries/gram of radioactive Iron-  
13 55 to remain after the cleanup is complete, EPA’s PRG for Iron-55 in a “rural residential” area –  
14 which is how the land is zoned – is .8 picocuries/gram.  
15

16           55.     As CBG further explained, in the Draft EA DOE also severely underestimated the  
17 risks that the residual contamination will pose. For example, DOE assumed that people will sleep  
18 only on the second floor of homes with a 4 inch concrete slab foundation.  
19

20           56.     Both California Senators Diane Feinstein and Barbara Boxer have also written  
21 multiple letters about their concerns regarding the cleanup, including letters to DOE, to EPA and to  
22 the White House.  
23

1 **C. DOE's Final Cleanup Decision For Area IV**

2 57. In March 2003, DOE issued a Final EA and FONSI for the Area IV cleanup, choosing  
3 to proceed with Alternative One. DOE admitted that the chosen alternative allows “10,000 times  
4 more radioactivity in the soil than” would be permitted were the agency to “remediate to a  $1 \times 10^{-6}$   
5 risk level.”  
6

7 58. In the Final EA, DOE also admitted that it had not considered the cumulative impacts  
8 of the contamination that would remain after its cleanup of radiological contamination in Area IV  
9 together with the chemical contamination in this area, or the contamination within the rest of the  
10 SSFL.  
11

12 59. In the Final EA, DOE also claimed that, although sensitive species, including the  
13 federally listed Brauntern's Milkvetch – an endangered species – exist in Area IV, the cleanup would  
14 have no impact on these species because they are not present in any of the buildings where the  
15 cleanup will occur. The EA did not discuss impacts on endangered or sensitive species resulting  
16 from the people and equipment that will be traveling through the area, or the reasonably foreseeable  
17 impacts on species that will occur should the property be used for residential development. On  
18 information and belief, DOE has neither undertaken formal consultation with the FWS concerning  
19 the impacts of the Area IV cleanup on federally listed species, nor obtained the FWS's written  
20 concurrence that formal consultation is not necessary.  
21  
22

23 60. In the FONSI, issued by DOE's Oakland Operations Office, DOE claimed that its  
24 cleanup is being conducted in a manner “consistent with” NEPA and CERCLA. DOE announced in  
25

1 the FONSI that “DOE has decided to implement Alternative 1.” DOE also decided that “[t]he  
2 cleanup of Area IV does not constitute a federal action significantly affecting the quality of the  
3 human environment within the meaning of NEPA [and] [t]herefore a FONSI is made and an  
4 environmental impact statement is not required.”  
5

6 61. DOE has begun carrying out the Area IV cleanup decision made in the FONSI and  
7 has indicated that the cleanup will be completed in the next year or two, after which DOE intends to  
8 release control of the property. The agency does not intend to take any steps to restrict future use of  
9 the site, and anticipates that the land will then be developed for residential use.  
10

11 **D. Developments Since DOE Made Its Cleanup Decision**

12 62. In a July 2003 Senate Report, the Appropriations Committee expressed concerns that  
13 “the ETEC site will not be remediated to CERCLA standards,” and stated that DOE’s cleanup  
14 decision “may represent an unacceptable deviation from the Department’s commitment . . . to fund  
15 an EPA radiological survey of the ETEC site and to remediate the site to CERCLA standards.” Sen.  
16 Rep. 105, 108th Cong., 1st Sess. 95-96 (2003). DOE responded by reiterating that it will not fund  
17 the EPA survey and claiming that the cleanup plan “meets the level that EPA has stated is fully  
18 protective of human health and the environment.”  
19

20 63. Contrary to those assurances, in December 2003, EPA submitted further comments to  
21 DOE, explaining that, even after issuance of the Final EA, the “concerns expressed in our DEA  
22 [Draft EA] comments remain the same,” and that DOE had “misinterpret[ed]” EPA positions to  
23 justify its cleanup decision.  
24

1           64.     EPA once again explained that, before DOE can make an appropriate cleanup  
2 decision for the site, it must undertake “further characterization” of the site “using more sensitive  
3 and specific measurements” than have been used thus far. EPA explained that “[n]ot enough  
4 measurements have been made in enough places and the measurements that were made were not  
5 sensitive enough or specific enough.”

7           65.     EPA also explained that, contrary to DOE’s plan to release the site for unrestricted  
8 use, including residential development, under DOE’s cleanup decision the site would only be safe if  
9 its use is “restricted to day-use recreational activities with limitations on picnic and camping  
10 facilities [or] other time consuming activities.” EPA further reiterated that, contrary to DOE’s  
11 claims, “DOE’s cleanup decision-making approach . . . is not consistent with CERCLA.”

13           66.     In May 2004, DOE announced that it had discovered radioactive tritium in  
14 groundwater monitoring wells near two former nuclear test facilities within Area IV at levels up to  
15 four hundred percent of EPA’s maximum contaminant drinking water standard. Elevated tritium and  
16 TCE levels have since been detected at additional wells in the surrounding area.

18           67.     On July 19, 2004, plaintiffs NRDC and CBG wrote to DOE to detail DOE’s  
19 violations of NEPA, CERCLA, and the ESA in connection with the cleanup of Area IV. Plaintiffs  
20 formally requested that, in light of EPA’s comments on the Final EA; the discovery of tritium  
21 contamination; and the migration of tritium and perchlorate off the site, DOE must, at a bare  
22 minimum, conduct further review under NEPA at this time. Plaintiffs also explained that DOE must  
23 (a) follow CERCLA standards, and the CERCLA process, for the cleanup; (b) prepare an EIS on the  
24

1 cleanup; and (c) undertake formal consultation under the ESA concerning the cleanup. This letter  
2 served as written notice of plaintiffs' intent to sue under the citizen suit provisions of CERCLA and  
3 the ESA. 42 U.S.C. § 9659; 16 U.S.C. § 1540(g).  
4

5 68. DOE has not responded to plaintiffs' letter. In response to a Freedom of Information  
6 Act request, DOE has informed plaintiffs that, since issuing the FONSI, the agency has not initiated  
7 any supplemental NEPA review concerning the cleanup of Area IV.  
8

9 **PLAINTIFFS' CLAIMS FOR RELIEF**

10 **First Claim (NEPA)**

11 **(Violations of 42 U.S.C. § 4321, et seq.)**

12 69. Because the cleanup of Area IV is a major federal action that may have significant,  
13 unknown, and highly controversial impacts on public health and the environment, DOE is violating  
14 NEPA, and its implementing regulations, and is acting in a manner that is arbitrary and capricious  
15 and contrary to the law in violation of the APA, by failing to prepare an Environmental Impact  
16 Statement ("EIS") prior to rendering its decision on the cleanup of Area IV. 42 U.S.C. § 4332; 5  
17 U.S.C. § 706.  
18

19 70. By preparing an Environmental Assessment for the cleanup of Area IV which fails to  
20 adequately consider the impacts of the cleanup on the environment, or reasonable alternatives, and  
21 by issuing a FONSI based on that EA, DOE is violating NEPA and its implementing regulations, and  
22 is acting in a manner that is arbitrary and capricious and contrary to the law in violation of the APA.  
23 5 U.S.C. § 706.  
24



1 CERCLA, 42 U.S.C. § 9620, and its implementing regulations and guidance, including the 1995  
2 Joint Policy with EPA, and is acting in a manner that is arbitrary and capricious and contrary to the  
3 law in violation of the APA. 5 U.S.C. § 706.  
4

5 75. These violations are injuring plaintiffs in the manner described in ¶¶ 6-16 above.

6 **Third Claim (ESA)**

7 **(Violations of 16 U.S.C. § 1536(a)(2))**

8 76. By failing to undertake and complete formal consultation with the FWS concerning  
9 the impacts of the Area IV cleanup on federally listed species, including the Branton's Milkvetch,  
10 DOE is violating the ESA, 16 U.S.C. § 1536(a)(2), and is acting in a manner that is arbitrary and  
11 capricious and contrary to the law in violation of the APA, 5 U.S.C. § 706.  
12

13 77. These violations are injuring plaintiffs in the manner described in ¶¶ 6-16 above.  
14

15 WHEREFORE, plaintiffs respectfully request that this Court:  
16

- 17 (1) declare that the federal defendants have violated, and continue to violate, NEPA,  
18 CERCLA, the ESA and the APA;  
19 (2) set aside federal defendants' March 31, 2003 FONSI on the Area IV cleanup;  
20 (3) preliminarily and permanently enjoin the federal defendants from transferring  
21 ownership or possession of, or otherwise relinquishing control over, any portion of Area IV until  
22 defendants have (a) completed an EIS and issued a Record of Decision pursuant to NEPA; (b)  
23

1 complied with CERCLA's standards and completed the CERCLA process; and (c) obtained a  
2 Biological Opinion from the FWS pursuant to the ESA;

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

5 (5) award plaintiffs their costs, attorneys' fees, and other disbursements for this action,  
6 including any expert witness fees; and  
7

8 (6) grant plaintiffs such other and further relief as the Court may deem just and proper.  
9

10 Respectfully submitted,

11  
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October 21, 2004

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**CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

Pursuant to Civil L.R. 3-16, the undersigned certifies that the following listed persons, associations of persons, firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding: The Boeing Company.

\_\_\_\_\_  
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