

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.

CONEJOS COUNTY CLEAN WATER, INC.; SAN LUIS VALLEY ECOSYSTEM COUNCIL;
CONCERNED CITIZENS FOR NUCLEAR SAFETY,

Plaintiffs,

v.

U.S. DEPARTMENT OF ENERGY; NATIONAL NUCLEAR SECURITY
ADMINISTRATION; THOMAS P. D'AGOSTINO, in his official capacity as Administrator of
the National Nuclear Security Administration; SECRETARY STEVEN CHU, in his official
capacity as Secretary of the Department of Energy;

Defendants.

COMPLAINT AND PETITION FOR REVIEW OF FEDERAL AGENCY ACTION

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INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief challenging the actions of the Defendants, United States Department of Energy, the National Nuclear Security Administration, Thomas P. D’Agostino, Administrator of the National Nuclear Security Administration, and Department of Energy Secretary Steven Chu (collectively “the Department,” “DOE,” or “Defendants”) in approving and funding the transportation, transfer, and storage of toxic, hazardous, and radioactive waste materials at a site adjacent to the town of Antonito, Colorado in Conejos County. These approved activities have been and are proposed to be conducted as part of DOE’s effort to dispose of wastes generated at the Los Alamos National Laboratory (LANL) in New Mexico. The Department authorized and committed to pay for these activities without conducting any site-specific review of the impacts to the people and environment of Antonito or Conejos County, Colorado, as required by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*
2. In approving and funding the toxic, hazardous, and radioactive waste transport, storage, and transfer activities without any site-specific review of the impacts to the people and environment of Antonito and Conejos County, the Department failed to take the requisite “hard look” at or make full disclosure of the environmental impacts, giving rise to multiple violations of NEPA.
3. The Department’s failure to comply with NEPA also constitutes a violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*, which requires federal

agencies to comply with all applicable federal laws, including NEPA.

4. In this action, Plaintiffs seek (1) a declaration that DOE approval and funding of activities in and near Antonito was arbitrary and capricious and in violation of the APA and NEPA; and (2) an injunction barring Defendants from permitting or funding the transportation, transfer, and/or storage of toxic, hazardous, and radioactive waste at the Antonito site until such time as Defendants have complied with all applicable laws.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question); 1346 (United States as defendant); 1361 (mandamus); 2201 (declaratory relief); 2202 (injunctive relief); and the APA, 5 U.S.C. § 701 *et seq.* There is a present and actual controversy between the parties.
6. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e)(2) & (3), as the events giving rise to this suit occurred in this district, two of the three Plaintiff organizations are incorporated in this district, and Plaintiffs' members reside within the district.
7. The Department has issued two separate Records of Decision (ROD) upon which Defendants rely as authorizing and funding the use of the Antonito site for the transport, transfer, and storage of toxic, hazardous, and radioactive waste. The first was issued on September 26, 2009 and the second on July 10, 2009. Both decisions were signed on behalf of DOE by Thomas P. D'Agostino, Administrator of the National Nuclear Security Administration following release of the underlying Site-wide Final Environmental Impact

Statement for Continued Operations of Los Alamos National Laboratory, Los Alamos, New Mexico DOE/EIS-0380 (SW-FEIS) on May 16, 2008. At no time were any residents or the local governments of Antonito or Conejos County noticed or contacted regarding the preparation of the environmental study, and were in no way otherwise provided actual or other notice as to the potential impacts the decisions could have on the local population and environment.

PARTIES

8. Plaintiff Conejos County Clean Water, Inc. (CCCW) is a Colorado non-profit corporation with its principal place of business at 28 W 5th Ave., Antonito, CO 81120 and a mailing address of P.O. Box 153, Antonito, CO 81120. CCCW was formed in June of 2010 and is organized exclusively for charitable, scientific and educational purposes, more specifically to organize and educate the citizens of Conejos County to address potential impacts to the community and its natural resources.
9. Plaintiff San Luis Valley Ecosystem Council, (SLVEC) is a non-profit organization whose mission is to protect and restore - through research, education, and advocacy - the biological diversity, ecosystems, and natural resources of the San Luis Valley and associated upper Rio Grande bioregion, balancing ecological values and human needs. Since 1995, SLVEC has served south-central Colorado, a vast area of some 8,100 square miles that includes two National Wildlife Refuges, the Rio Grande National Forest, the Great Sand Dunes National Park, numerous state wildlife areas, 230,000 acres of wetlands, and some of Colorado's most remote wilderness. SLVEC has established a

reputation for being a strong environmental advocate that finds workable solutions.

SLVEC works to preserve natural resources and unfragmented wildlife habitat, and restore wildlife migration corridors. The mailing address for the SLVEC is: P.O. Box 223, Alamosa, CO 81101. SLVEC offices are located at 537 Main St. Alamosa, CO 81101.

SLVEC has approximately 400 members.

10. Plaintiff Concerned Citizens for Nuclear Safety (CCNS) is a 501(c)(3) non-profit community organization based in Santa Fe, New Mexico. CCNS was founded in 1988 to voice community concerns about the transportation of nuclear waste from LANL, the nation's oldest nuclear weapons production facility, to the Waste Isolation Pilot Plant, the nation's first permanent nuclear weapons waste repository, through Santa Fe. The mission of CCNS is to protect all living beings and the environment from radioactive and other hazardous materials now and in the future. CCNS is committed to ensuring that LANL is in full compliance with all applicable laws and regulations and that the natural resources and biological integrity of the air, soil, and water within the Rio Grande watershed is protected and restored. Many of the members of CCNS live in and around the Rio Grande watershed and its tributaries, including both the LANL and Antonito sites.
11. The Department's failure to conduct any review of the environmental impacts to the Antonito community, including members of Plaintiffs, associated with the authorized activities violates the Department's obligation to take a "hard look" at and fully disclose environmental impacts associated with the transportation, storage and transfer of the materials including, but not limited to, water quality degradation, radon air emissions, soil

contamination, environmental justice, socioeconomic, and cumulative impacts. These unaddressed impacts deny Plaintiffs' members, volunteers, and supporters the right to informed decision making and full disclosure under NEPA. More importantly, the toxic, hazardous, and radioactive waste transportation, transfer, and storage proposed by the Department will immediately and irreparably harm the Plaintiffs' and their members' community health, socioeconomic, environmental, recreational, aesthetic, economic, informational, procedural, and other interests. Plaintiffs' members regularly use and enjoy the lands, waters and other resources threatened by DOE's approved and funded activities and these interests are irreparably harmed by the Department's continued failure to comply with NEPA. The relief requested herein will remedy these harms. Absent such relief, these harms will continue to have direct and irreparable impacts on Plaintiffs and their members.

12. Defendant United States Department of Energy is a federal department and owner of LANL. As the federal department that owns LANL, the U.S. Department of Energy is the federal entity with ultimate responsibility for applying and implementing the federal laws and regulations challenged in this complaint.
13. Defendant National Nuclear Security Administration is a separately organized agency within the U.S. Department of Energy, which is responsible for the management and security of the nation's nuclear weapons, nuclear nonproliferation, and naval reactor programs. It was formed in 2000.
14. Defendant Thomas P. D'Agostino is the Administrator of the National Nuclear Security

Administration and signed both the September 26, 2009 and the July 10, 2009 RODs which purport to authorize and fund the transport, transfer, and storage of toxic, hazardous, and radioactive waste at the Antonito site and is named as Defendant in his official capacity.

15. Defendant Secretary Steven Chu is the Secretary of the Department of Energy, which has regulatory and administrative control over both the National Nuclear Security Administration and Los Alamos National Laboratory, and is named as Defendant in his official capacity.

STATUTORY AND REGULATORY BACKGROUND

NATIONAL ENVIRONMENTAL POLICY ACT

16. Congress enacted NEPA to “promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4331. To fulfill this stated goal, NEPA requires federal agencies to analyze the environmental impacts of a particular action before proceeding with that action. *Id.* § 4332(2)(C). In addition, federal agencies must notify the public of its proposed projects and allow the public to comment on the fully-disclosed environmental impacts of a proposed action.
17. The cornerstone of NEPA is the environmental impact statement (“EIS”) that federal agencies must prepare and circulate for public review and comment. An EIS is required for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. “Major Federal actions” include those undertaken or financed by federal agencies. 40 C.F.R. § 1508.18(a).

18. Federal agencies must prepare an EIS prior to initiating any major federal action so that the environmental impacts can be considered and disclosed to the public during the decision-making process. 40 C.F.R. §§ 1501.2, 1502.5. In this document, the federal agency must identify direct, indirect, and cumulative impacts of the proposed and any connected actions, consider alternative actions and their impacts, and identify all irreversible and irretrievable commitments of resources associated with the action. 42 U.S.C. § 4332(2). This requirement is commonly referred to as the agency's duty to take a "hard look" at the environmental impacts of its proposed action.
19. The federal agency must also identify and evaluate the effectiveness and feasibility of any mitigation measures adopted to alleviate identified impacts from the proposed action. 40 C.F.R. §§ 1502.14(f), 1502.16(h).
20. Under Executive Order 12898, DOE is responsible for identifying and addressing potential disproportionately high and adverse human health and environmental impacts on minority or low-income populations. Minority persons are those who identify themselves as Hispanic or Latino, Asian, Black or African American, American Indian or Alaska Native, Native Hawaiian or Other Pacific Islander, or multi-racial (with at least one race designated as a minority race under Council on Environmental Quality Guidelines [CEQ 1997]). Persons whose income is below the Federal poverty threshold are designated as low income.

FACTUAL AND PROCEDURAL BACKGROUND

21. In November of 2009, with no prior community notice or information, Conejos County

residents for the first time observed the transport and transfer of toxic, hazardous, and radioactive waste materials from flat-bed semi trucks to nuclear gondola rail car by crane, being performed at a site located a quarter mile from the town limits of Antonito in Conejos County, and within 500 feet of nine residences. The operation was being performed within approximately 250 feet of the San Antonio River, which is a headwaters tributary to the Rio Grande River. Concerned citizens contacted County officials to determine what was happening. At that time citizens only knew that there were black train cars, flat-bed semi trucks, and a crane transferring large, filled, dirty white bags from the flat-bed semi trucks to the train cars on the tracks of the San Luis & Rio Grande Railroad (SLRG RR).

22. Newspaper articles indicated the bags were filled with soils contaminated with depleted uranium (DU) and polychlorinated biphenyls (PCBs) from LANL. DU is an isotope of uranium that is carcinogenic and that unlike other radioactive isotopes becomes more radioactive over time. DU is also a heavy metal. PCBs were banned in the 1970s. LANL is still addressing the need to cleanup PCB, and other hazardous and radioactive waste buried on mesa tops and canyon bottoms since the Manhattan Project began 67 years ago.
23. Antonito and Conejos County community members understood that LANL had contracted with EnergySolutions in order to ship the waste to its disposal facility in Clive, Utah. DOE was removing the waste pursuant to a March 1, 2005 Compliance Order on Consent issued by the New Mexico Environment Department (NMED) to DOE and LANL under the federal Resource Conservation and Recovery Act (RCRA) and the New Mexico

Hazardous Waste Act.

24. Antonito and Conejos County are located in the San Luis Valley (SLV) in south central Colorado. Hemmed in on the west by the San Juan Mountains, and on the east by the Sangre de Cristo Mountains, the SLV ranges in elevation from 7,000 to over 14,000 feet, and contains the headwaters of the Rio Grande River. The Rio Grande River rises in the San Juan Mountains to the west of the SLV, flows south into New Mexico and Texas and empties into the Gulf of Mexico. The SLV has many unique biological features, including areas identified as Natural Heritage areas, and is home to six endemic insect species.
25. The SLV's largely agrarian and ranching community is a relatively stable population. Many of the residents are eighth-generation. The oldest parish in Colorado, Nuestra Señora de Guadalupe, Our Lady of Guadalupe, lies at the southern end of Conejos County. About sixty percent (60%) of Conejos County population is minority, and pride in the Hispanic heritage is evident in everything from the names of the rivers, mountains, and towns, to the local Spanish/English radio station. The median household income is less than half the national average at \$24,744, and thirty-eight percent (38%) of the children live in poverty (US Census 2000). The SLV has, in the past, supported a migrant worker population of 3,500 to 4,000 individuals, but that number has trended lower in recent years.
26. The SLV is known for its potatoes and alfalfa, and also grows barley, lettuce, wheat, peas, and spring grains. It has been a farm and ranching community for over 150 years, and many of the residents work in agriculture, following in the footsteps of their parents and

grandparents. Many of the farmers and ranchers still practice traditional methods. It is the highest irrigated mountain plateau in the world, with about 7,000 high-capacity wells – over half of which are irrigation wells.

27. The SLV contains over 5 million acres, of which 3.1 million acres – about fifty-nine percent (59%) -- are publicly owned (Forest Service, BLM, Fish & Wildlife Service, National Park Service, or State of Colorado). This creates an important relationship between the public and private sectors in dealing with air and water quality issues in the SLV.
28. There are 18 incorporated towns, many of which are located along the Rio Grande or its many tributaries. Six counties lie within this large geographical boundary. They are Alamosa, Rio Grande, Saguache, Mineral, Costilla, and Conejos. Costilla and Conejos Counties are among the poorest counties in the country, and unemployment levels run above the state and national averages (Costilla County eleven percent (11%); Conejos County ten and one-half percent (10.5%); as of 2008-not including the chronically unemployed).
29. In contrast to Conejos County, Los Alamos County, home of Los Alamos National Laboratory (LANL), is the wealthiest in the country. The median income in Los Alamos County of \$93,089, based on 2003 census data.
30. LANL is an industrial facility located on 40 square miles on the Pajarito Plateau in north central New Mexico. It is divided into 48 separate Technical Areas. In 2008, DOE reported that LANL structures contained about 8.6 million square feet, comprising about

952 permanent buildings, including specialized facilities that have been built and maintained over years of operations; 373 temporary structures (trailers and transportables); and 897 miscellaneous structures, such as sheds and utility (meteorological towers, water tanks, manholes, and electrical transformers) structures. (See SW-FEIS, p. 2-12).

31. In 1979, DOE reported, “In January 1943 a wartime laboratory was established at Los Alamos, New Mexico. Its sole mission was the development of a fission bomb. This project culminated in the detonation of the first atomic bombs in 1945. Since then, the primary mission of LASL [Los Alamos Scientific Laboratory] has continued to be nuclear weapons research and development, including the first thermonuclear bomb. However, expansion of Laboratory efforts has incorporated numerous programs to develop peaceful uses of nuclear energy in such areas as fission reactors, space technology, controlled thermonuclear reactions, and medical and biological applications, geothermal and solar energy resources and use of superconductor technology for energy storage and transmission. The four major research program areas are national security, energy, biomedical and environmental, and physical research.” (See “Final Environmental Impact Statement, LASL Site, Los Alamos, New Mexico,” DOE/EIS-0018, December 1979; <http://www.lanl.gov/>).
32. In October 2009, DOE first described its plans to ship an estimated 15,000 cubic yards of solid soil/debris waste contaminated with toxic, hazardous, and radioactive constituents from three LANL sites. (See “Supplement Analysis Site-Wide Environmental Impact

Statement for Continued Operation of Los Alamos National Laboratory – Proposed Transport of Low Level Radioactive Waste by Truck and Rail from Los Alamos National Laboratory (LANL) for Disposal at EnergySolutions at Clive, Utah,” DOE/EIS-0380-SA-01, October 2009). This document was never published for any public comment or review.

33. Two of the three waste sites are located at Material Disposal Area “Y” (MDA “Y”), described as Solid Waste Management Unit (SWMU) 39-001(a) and SWMU 39-001(b). The third site is Los Alamos Site Monitoring Area 2 (LA-SMA-2).
34. The MDA “Y” SWMU dumps are located at Technical Area 39 (TA-39), which is a test area for high explosives, located in the southeastern portion of LANL. Explosive testing continues today as part of the Nuclear Weapons Program.
35. These SWMU sites were used as dumps for industrial waste, or “routine” waste, such as “equipment, chemicals, oil, animal tissue, chemical treatment sludge, cement paste, hot-cell waste, and classified materials,” that was contaminated with radionuclides, heavy metals, toxic chemicals. (See “History and Environmental Setting of Los Alamos Scientific Laboratory Near-Surface Land Disposal Facilities for Radioactive Wastes: A Source Document,” Margaret Anne Rogers, Los Alamos Scientific Laboratory of the University of California, June 1977, LA-6848-MS, Vol. I).
36. A 1997 LANL report describes SWMU 39-001(a) as a landfill with two burial pits that operated between 1953 and 1979. “The pits were used for disposal of materials consisting of debris from firing sites, empty chemical containers, and office waste. Hazardous and

radioactive materials that may have been disposed in the pits before 1976 include lead, silver, copper, brass, iron, steel, thallium, cadmium, mercury, beryllium, thorium-232, natural and depleted uranium, PCB-containing oils, HE [high explosives], and solvents.” (See “RCRA Facility Investigation Report for Potential Release Sites at TA-39, 39-001 (a & b),” LANL Environmental Restoration Project, March 1997, LA-UR-97-XXXX, p. 5-1).

37. The same report describes SWMU 39-001(b) as a landfill consisting of three pits that operated between the late 1960’s and May 1, 1989. “The area was used for disposal of materials containing debris from firing sites, empty chemical containers, and office waste. Wastes from other sites may have been disposed here. Site personnel indicated that large stainless steel targets (1- to 2-ft diameter and 2-ft long) were buried on site. ... These targets were used in the dual-stage gas gun apparatus located in Building TA-39-69 and captured plutonium projectiles. Before disposal, the targets were decontaminated and the resultant waste was disposed at TA-54. Hazardous and radioactive materials disposed in the area before 1976 probably include lead, silver, copper, brass, iron, steel, thallium, cadmium, mercury, beryllium, thorium-232, natural and depleted uranium, PCB-containing oils, HE [high explosives], and solvents.” (*Id.*, p. 5-30).
38. LA-SMA-2, or SWMU 01-001(f), “is the location of a former septic tank (structure 01-140) that was installed in 1945 and served HT and FP Buildings. The septic tank outfall discharged into Los Alamos Canyon. The outfall area is known as Hillside 140. HT Building was used to heat-treat and machine natural and enriched uranium. FP Building

was a foundry for non-radioactive and nonferrous metals. In 1975, the septic tank, its inlet and outlet lines, and surrounding soil were removed. In 1995, soil with elevated concentrations of total uranium was removed from the upper and lower slopes of Hillside 140.” (“LANL Individual Permit Application for Storm Water Discharges from Solid Waste Management Units and Areas of Concern,” Permit Application No. NM0030759, Supplemental Information Submittal (Third of Four), Vol. 1, December 21, 2007, LA-UR-07-8364.)

39. Because of improper waste management practices at LANL, such as burying waste in soils without liners and a leachate collection system, the wastes leaked into the soils, thereby contaminating them. DOE states that “soil and small debris from a LANL disposal area” will be shipped. (See “Enhancing Safety through Rail Shipments,” LA-UR-10-00134 Fact Sheet, p. 1). DOE further describes the shipments as containing “debris such as soil, wood, concrete, asphalt, and metal.” (*Id.*, p. 2).
40. At the time of the November 2009 initial activity at the Antonito site, County officials determined that no Conejos County Land Use Permit was in place and the operation was immediately halted by authority of the County pending compliance with local land use regulations. In early December 2009, the Conejos County Board of County Commissioners (BOCC) held a special meeting to discuss the issue with the local community.
41. Present at the December 2009 meeting were elected officials from Conejos County, members of the Colorado State Patrol Hazardous Materials team, representatives from

U.S. Congressman John Salazar's office, representatives from U.S. Senator for Colorado Michael Bennet's office, concerned community members from Conejos County, and representatives from EnergySolutions, the company contracted by DOE to perform the work. Absent were any representatives from the SLRG RR, DOE or LANL.

42. At the December 2009 meeting, community members were informed that that the operations were part of the DOE Environmental Management Program at LANL. EnergySolutions was contracted to package, ship and dispose of LANL toxic, hazardous and radioactive waste, and contaminated soil at their commercial disposal facility in Clive, Utah.
43. Community members were further informed that the waste would be transferred from flat-bed semi truck to nuclear gondola on the rail spur at the Antonito site. In a short distance, the rail spur joins the main line over the San Antonio River and splits back into a spur on the north side of the river. That spur goes into the town limits of Antonito to the Historic Railroad Depot. Information at the meeting indicated that despite having already commenced operations, EnergySolutions had not received a Conejos County Special Use Permit (SUP). Nor had EnergySolutions obtained a Colorado Department of Transportation (CDOT) Access Permit to travel from US Highway 285 to the transfer site, which is accessed via a dirt road. County officials asserted that both of those permits were required before operations could resume.
44. The December 2009 BOCC meeting then moved to the proposed transfer site. There was a large crane, staged next to the black nuclear gondola rail cars. Several flat-bed semi

trucks with large, filled dirty white bags were parked on the dirt road off US Highway 285, en route to the transfer site. The meeting participants observed the transfer of the materials as a demonstration.

45. Meeting participants questioned the placards on the bags, which indicated that the bags contained material other than what was shown on the manifests, which indicated that the bags contained toxic, hazardous, and radioactive waste. Upon information and belief, a 49 C.F.R. Class 7 Radioactive Waste placard was missing from the bags, but identified on the manifests for those bags. Meeting participants were not allowed to keep copies of the manifests. During that meeting a CCCW member viewed water puddled below the bags sitting on the flat-bed truck. The transfer operation, which occurred within approximately 250 feet of the San Antonio River, was viewed and the meeting ended.
46. In November 2009, the Conejos County BOCC placed a temporary moratorium on the issuance of all Conejos County Special Use Permits pending review of the local regulations. The moratorium was not specific to the DOE activities, and was set to expire on May 24, 2010. Concerned community members remained engaged in all meetings open to the public in anticipation of the submittal of an application for a Special Use Permit by the SLRG RR. No discussion was had at any of these public meetings about an application for a Special Use Permit by EnergySolutions.
47. Concurrently, community members reached out to elected officials in Colorado in an effort to understand the genesis of the operations. Community members determined that the operations stemmed from a March 1, 2005, New Mexico Environment Department

- (NMED) Compliance Order on Consent that was agreed to by DOE and LANL in order to address the contaminated soils generated by industrial activities, which were buried on the mesa tops and in the canyon bottoms at the LANL site, by the year 2015.
48. In March of 2010, the SLRG RR purchased the property of the proposed waste transfer site at Antonito. Additionally, in March of 2010, Permian Basin Railways, a parent railroad to the SLRG RR, obtained an Access Permit from the CDOT.
 49. In response to community concerns, in May 2010, U.S. Congressman John Salazar sent a letter to the Secretary of Energy, Steven Chu. In that letter Congressman Salazar asked Secretary Chu to divert the shipments away from Conejos County until a solution that was agreeable to his constituents could be reached. Subsequently, in June 2010, Congressman Salazar sent another letter to Secretary Chu requesting a permanent diversion of waste away from Conejos County.
 50. In early May 2010, DOE, LANL, EnergySolutions and SLRG RR announced that they would be holding a special public informational meeting. Community members were convinced that since the May 24th date for lifting the SUP moratorium was fast approaching, the special information meeting could only mean the beginning of a public process to inform the public of the operation, the impacts to human health and the environment, and the duration of operations. Community members understood the meeting to be the beginning of the Conejos County SUP process.
 51. The same day of the public meeting, the local newspaper, the *San Luis Valley Courier*, ran an article entitled, “*Railroad resumes transload operations CDOT grants permit.*” The

article highlighted how shipments from LANL would resume the following week despite the lack of any Conejos County SUP, based on an assertion by SLRG RR and EnergySolutions that local regulations were preempted by federal law.

52. As a result, community members identified the federal Surface Transportation Board (STB), in Washington, DC, as the entity responsible for determining whether federal law preempts local land use regulation in any particular case. STB representatives verbally informed CCCW community members that preemption is not assumed, but rather must be determined by the STB or a federal court based on site-specific review. Community members were informed that two conditions must be met for a railroad to be granted preemption: 1) that the relevant local laws interfered with interstate commerce; and 2) that local laws were unreasonable, or put an unreasonable burden on the railroad. As of the date of this Complaint, while the SLRG RR has filed petition for preemption, no such findings have been made by the STB or any court.
53. During the period of the County-imposed special land use permit moratorium, the waste was transported by truck from LANL to the EnergySolutions facility in Clive, Utah via an alternate route. There were no permit applications submitted to the County prior to the moratorium going into effect in November of 2009 for the proposed radioactive, hazardous and toxic waste transfer site at Antonito.
54. The May 2010 public informational meeting left many questions unanswered and there was a lot of confusion in the community as to why the operations were resuming without a public process associated with the SUP application.

55. On May 19, 2010, the Conejos County BOCC held a special public meeting where the County outlined the closed-door discussions that had been ongoing amongst the County, EnergySolutions, and the SLRG RR from January of 2010 until May of 2010, during which the parties attempted to negotiate a proposed agreement between the County, EnergySolutions, and the SLRG RR. The proposed settlement document was dated May 14, 2010 and was not made available to the public to review before or during the special public meeting.
56. The Conejos County BOCC then opened up the May 19, 2010 meeting for public comment. There was opposition from the community members present to resuming operations at the Antonito site without an open and transparent public process where impacts to the community and environment could be analyzed and addressed. The BOCC unanimously rejected the proposed agreement and passed a motion to file for an injunction in state court against the SLRG RR and EnergySolutions waste transfer operations south of Antonito pending compliance with local land use regulations.
57. Despite the BOCC's action, the next day the SLRG RR informed Conejos County that operations would immediately resume. In response to this announcement, and absent a filing from the County, thirty individuals then filed *pro se* in state district court on May 24, 2010 for a Temporary Restraining Order (TRO) requesting a cessation of transfers until Conejos County could file its injunction. Conejos County Citizens v. San Luis Rio Grande Railroad, et al., Case No. 2010cv14.
58. Although the court did not immediately rule in the case, operations did not resume at the

Antonito site. The following week Conejos County filed for an injunction against the SLRG RR in Conejos County Court. Conejos County Board of County Commissioners v. San Luis Rio Grande Railroad, Case No. 2010c89. Both the County and *pro se* cases were removed to federal district court based on federal question jurisdiction. Both cases were subsequently voluntarily dismissed without prejudice.

59. In June of 2010, concerned local citizens incorporated into a non-profit organization, called Conejos County Clean Water, Inc. (CCCW). The primary purpose for incorporating was to build awareness and to educate the communities of Conejos County about the potential impacts associated with the proposal to transport, transfer, and store toxic, hazardous, and radioactive waste at the Antonito site.
60. In July 2010, a representative of Energy Secretary Chu responded to the May 2010 and June 2010 requests of Congressman Salazar, without saying directly or indirectly whether the toxic, hazardous, and radioactive waste could be permanently diverted away from Conejos County. Secretary Chu's representative encouraged the Congressman to help his constituents, EnergySolutions, and the SLRG RR reach a solution.
61. In August of 2010, Congressman Salazar held a round table discussion with key stakeholders, including representatives from CCCW, the Town of Antonito, Conejos County Commissioners, DOE, LANL, SLRG RR, and EnergySolutions. At the close of that meeting a Task Force was assembled to keep discussion going and to identify areas of consensus for the stakeholders. The Task Force discussed the issues for thirty days and reported back to the Congressman and the public at the conclusion of those discussions.

62. In August and September of 2010, the Task Force discussions ensued and there was some information sharing. Plaintiff CCCW sought information describing the impacts of the planned toxic, hazardous, and radioactive waste shipment campaign through Antonito. This information was not fully provided.
63. During the discussions, CCCW consistently asked for two public processes to ensure adequate assessment of the impacts of toxic, hazardous, and radioactive waste being transferred and stored near, and transported through, the community. The items were: 1) A site-specific NEPA public process for Conejos County; and 2) a Conejos County SUP public process.
64. The CCCW representatives requested a copy of the NEPA study documenting the DOE's decision to authorize and fund transport of toxic, hazardous, and radioactive waste through Conejos County. The documents provided consisted only of the Site-wide Final Environmental Impact Statement for Continued Operations of Los Alamos National Laboratory, Los Alamos, New Mexico DOE/EIS-0380 (SW-FEIS) issued on May 16, 2008. The SW-FEIS does not include discussion of the direct, indirect, or cumulative impacts to Conejos County, connected actions, alternate disposal routes considered, evidence of why alternate train routes could not be utilized, project milestones when the Requests for Proposals (RFPs) would be released to contractors, effectiveness of the mitigation measures described in the proposed settlement document dated May 14, 2010 between Conejos County, EnergySolutions, and the SLRG RR, or any permit applications submitted to Conejos County. CCCW also asked, without success, for the manifests

documenting all wastes that had been stored and transferred in Conejos County in November and December 2009.

65. During the Task Force meeting process, DOE stated that no additional NEPA documents had been prepared regarding the proposed activities at the Antonito site, despite the admission that the existing NEPA documents related to those activities contained no reference or analysis of any of the potential impacts to the public and environment of Antonito or Conejos County. To date, no NEPA document has been prepared containing such analysis of the impacts to the public and environment of Antonito or Conejos County.
66. DOE prepared the 2008 SW-FEIS in order to analyze the impacts associated with its planned excavation and shipment of toxic, hazardous, and radioactive waste. The SW-FEIS provides analysis of truck transportation of the waste, but not rail transportation. Neither of the RODs for the SW-FEIS address rail transportation, nor any analysis of any transfer or storage of wastes associated with the transfer from truck to rail. Upon information and belief, at no time during the preparation and finalization of the SW-FEIS were any officials, citizens, local governments, or citizens groups in Conejos County, Colorado noticed to comment on the draft or final SW-FEIS documents.
67. The SW-FEIS contains no mention or analysis of the transport, transfer, or storage of the excavated toxic, hazardous, and radioactive waste at the Antonito site. DOE asserts that NEPA does not require any analysis of the transportation, transfer, or storage of that waste at the Antonito site. Instead, the DOE prepared an 11-page internal Supplement

Analysis that determined that no public process to review these impacts was necessary.

(See “Supplement Analysis Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory – Proposed Transport of Low Level Radioactive Waste by Truck and Rail from Los Alamos National Laboratory (LANL) for Disposal at EnergySolutions at Clive, Utah,” DOE/EIS-0380-SA-01, October 2009).

68. Per 40 C.F.R. §1502.9(c)(2) the Supplement Analysis must contain sufficient information for DOE to determine whether: (i) An existing EIS should be supplemented; (ii) A new EIS should be prepared; or (iii) No further NEPA documentation is required. The 11-page internal document was never published for public comment, and was never circulated to local governments, citizens, or groups in Antonito or Conejos County. The 11-page document contains qualitative, quantitative and factual errors.
69. Additionally, each federal agency is required to formulate guidelines for implementing NEPA, including DOE. See 10 C.F.R. § 1021.410(a) and (d). Under DOE’s guidelines, some activities can be authorized via completion of a Categorical Exclusion (CE). At no time did DOE complete or prepare a CE for the transport, transfer, and storage of toxic, hazardous, and radioactive waste at the Antonito site.
70. The LANL toxic, hazardous, and radioactive waste destined for the EnergySolutions’ Clive, Utah dump is proposed to be transported via flat-bed semi truck in PacTec LiftPac IP1 polypropylene bags or intermodals (re-usable metal bins). The PacTec LiftPac IP1 bags are constructed from Woven Polypropylene (WPP), a material that is not waterproof, and is coated with polyethylene. The inner duffel of the bag is also WPP. The seams of the

bag are permeable to water and therefore, contaminants may escape. Further, the material placed in the bag may puncture the bag. Upon information and belief, there is no dust protection to keep the waste from attaching to the outside of the bag while they are being filled. Rather, the bags are visually surveyed, brushed off with a broom, and swabbed for testing for radioactivity. Any remaining toxic, hazardous, and radioactive waste is allowed to blow off the bags in transit from New Mexico State Road 4 (the truck route from LANL) to New Mexico State Road 502, to the junction of New Mexico State Road 30, to the junction of U.S. Highway 285 north into Conejos County. The truck route one way is approximately 100 miles and climbs to an elevation of approximately 8,000 feet near Antonito. The two-lane U.S. Highway 285 is not well maintained in the winter by either New Mexico or Colorado. The safety of truck transport on that highway is of concern for citizens in both New Mexico and Colorado.

71. At the Antonito site, the flat-bed semi trucks pull parallel to the nuclear gondolas. Alcon (the crane operator) and crew are staged between the crane and the nuclear gondola. There are varying quantities of PacTec LiftPac IP1 bags placed in each nuclear gondola due to variations in density. Each PacTec LiftPac IP1 bag has a capacity of 24,000 lbs. There were estimated to be eight intermodals on each nuclear gondola. Each nuclear waste gondola has a capacity to hold 100 tons. The private access road off U.S. Highway 285 is on average 100 feet away from the San Antonio River, the dirt road is not compacted to U.S. Highway standards for flat-bed semi truck usage, resulting in potential erosion to the river.

72. Plaintiffs maintain that a site specific NEPA process around the transportation utilizing the SLRG RR is required to analyze the unique hydrogeology of the affected area. The regional unconfined aquifer is used for irrigation; the San Antonio River is used for irrigation. The transfer site is located within approximately 250 feet of the San Antonio River, and could potentially contaminate the aquatic environment in Conejos County as well as communities downstream.
73. After the PacTec LiftPac IP1 bags or intermodals are loaded in the nuclear gondolas, the SLRG RR cars travel north to Alamosa, Colorado, east over La Veta pass. The SLRG RR asserts on its website, “The highest point on the SLRG at La Veta Pass, is 9,242 feet above sea level, the highest rail freight line in North America.” From there the SLRG RR continues east to Walsenburg, Colorado where the Union Pacific Railroad (UP RR) assumes the load. UP RR then takes the load north through the Front Range of Colorado through all the major metro areas, including Pueblo, Colorado Springs, Denver, Fort Collins, into Wyoming where it heads west into Utah for its final destination at EnergySolutions’ dump in Clive, Utah. Concerns exist as to whether this toxic, hazardous, and radioactive waste would be required to comply with the new security requirements for hazardous material rail shipments through High Threat Urban Areas (HTUAs) and High Population Areas (HPAs). (See: <http://www.state.nv.us/nucwaste/news2008/pdf/nv080715stb.pdf> - pages 59-79).
74. According to the 11-page Supplement Analysis that DOE completed, the PacTec LiftPac IP1 bags can remain on the flat-bed semi trucks in the event of inclement weather. Since

the PacTec LiftPac IP1 bags are permeable, citizens are concerned about the PacTec LiftPac IP1 bags remaining on flat-bed semi trucks. It also states the nuclear gondolas can be loaded for up to 96 hours, and that the route from LANL to Clive, Utah can take seven to ten days. “Based on previous experience, ES [EnergySolutions] expects the transit time for the rail transportation from the Antonito transload site to the ES disposal facility at Clive to be approximately 7 to 10 days.” (See “Enhancing Safety through Rail Shipments,” LA-UR-10-00134 Fact Sheet, p. 5). Upon information and belief, total transit times can exceed 30 days.

75. DOE has maintained that the movement of toxic, hazardous, and radioactive waste through Antonito will be at least a ten year campaign. LANL continues to operate now and for the foreseeable future. As long as LANL continues to operate, toxic, hazardous, and radioactive waste could be moved through Antonito and Colorado. The ten year assumption does not take into account the toxic, hazardous, and radioactive wastes from other DOE sites, such as Pantex or Sandia National Laboratories, which could also be transferred at the Antonito site. (See: http://chieftain.com/news/local/article_f100eae4-bcaf-11df-934f-001cc4c002e0.html). Nor does this assumption take into account that EnergySolutions disposes of 97% of the low-level radioactive waste volume at its disposal facility in Utah. These facts raise the reasonably foreseeable potential that as a result of the DOE’s actions authorizing and funding the activities challenged in this case, Antonito will become a long-term transport, transfer, and storage site for toxic, hazardous, and radioactive wastes.

76. DOE has not conducted any public NEPA process analyzing alternate routes for train or truck. There is no NEPA document or decision that considers various transportation alternatives that selects Antonito as a preferred alternative.
77. The safety record of the SLRG RR has not been reviewed in any NEPA document or decision. The SLRG RR has had three derailments in August of 2010 and one in September 2010, which dumped perlite over La Veta Pass. There are no DOE NEPA documents or decisions which analyze the impacts of SLRG RR derailments with respect to the release of toxic, hazardous, and radioactive wastes.
78. The Supplement Analysis prepared by DOE without any public notice or opportunity for comment asserts in general terms, without using any site-specific data from the SLRG RR, that rail is safer than other modes of transportation. In the Supplement Analysis, DOE referenced the Yucca Mountain Final Environmental Impact Statement (FEIS), which anticipates 30 to 80 rail transportation accidents, and 3 to 6 truck transportation accidents, expected over 50 years of repository operations. The DOE did not assess any of this data with respect to impacts the community and environment at the Antonito site.
79. Despite all the concerns of CCCW that were shared during Task Force discussions with the stakeholders DOE and others made continual proposals to have all stakeholders agree to terms of a proposed agreement, which includes specific mitigation measures purported to have been developed to minimize impacts to the community and the environment. None of these mitigation measures were reviewed by DOE in any NEPA process to determine their effectiveness.

80. As a new Colorado non-profit organization, CCCW has neither technical expertise nor legal expertise to negotiate terms of agreement, settlement and mitigation to protect the environment and the health and human safety of the public in general. Plaintiffs maintain that a public NEPA process is necessary to analyze potential impacts to the community and environment at the Antonito site.
81. As a result of the Task Force meetings, the Task Force agreed to have the proposed settlement document dated May 14, 2010 between Conejos County, EnergySolutions, and the SLRG RR form the framework for a Special Use Permit to Conejos County. Despite this agreement and the filing of a Special Use Permit to Conejos County by EnergySolutions, SLRG RR has moved forward with a petition to the STB requesting a declaratory order confirming federal preemption and negating the applicability of all Conejos County local land use regulations, including the requirement that a Special Use Permit be obtained for the proposed activities at the Antonito site. (See STB Docket No. FD 35380, San Luis & Rio Grande Railroad – Petition for a Declaratory Order). (See: <http://www.stb.dot.gov/filings/all.nsf/WEBUNID/A5A9A0D2623996098525772E006DB1B7?OpenDocument>).
82. A final determination by Conejos County regarding the Special Use Permit submitted by EnergySolutions will occur, as required by Conejos County land use regulations, within 30 days of the currently scheduled November 4, 2010 BOCC hearing. Should approval be granted, upon information and belief, commencement of transport, transfer, and storage of toxic, hazardous, and radioactive waste could be imminent.

83. Plaintiffs CCCW, SLVEC and CCNS filed comments to the STB in response to and in opposition to the SLRG RR petition. Conejos County filed separate comments in response to and in opposition to the SLRG RR petition. No final decision has yet been rendered by the STB.
84. The Task Force meetings failed to resolve the issue of whether and how NEPA applied to the proposed transport, transfer, and storage of toxic, hazardous, and radioactive waste at the Antonito site.
85. On September 27, 2010 and October 1, 2010, respectively, both CCCW and Congressman Salazar sent formal requests to Secretary Chu and DOE asking DOE to conduct a NEPA study which analyzes and addresses impacts of DOE authorized and funded transport, storage, and transfer of toxic, hazardous, and radioactive waste to the community and environment of Antonito and Conejos County, Colorado. Upon information and belief, no responses to these letters have been issued by Secretary Chu or DOE.

CLAIMS FOR RELIEF

Claim One

(National Environmental Policy Act - NEPA) Failure to Disclose Environmental Impacts

86. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.
87. The DOE has failed to fully assess and disclose the direct, indirect and cumulative impacts of transport, transfer, and storage of toxic, hazardous, and radioactive waste materials at

the Antonito site. Accordingly, the DOE has failed to take the required “hard look” and failed to prepare an adequate EIS pursuant to NEPA, 42 U.S.C. §§ 4332(C), and its implementing regulations at 40 C.F.R. § 1500 *et seq.*

88. In failing to comply with NEPA, DOE has taken action that is arbitrary and capricious, an abuse of discretion, not otherwise in accordance with law, and without observance of procedures required by law, within the meaning of the Administrative Procedure Act. 5 U.S.C. § 706(2).

Claim Two

(National Environmental Policy Act - NEPA)

Failure to Disclose and Consider a Reasonable Range of Alternatives

89. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.
90. DOE’s issuance of its RODs in September 2008 and June 2009 was based on an EIS that failed to consider any alternatives for the transport, transfer, and storage of toxic, hazardous, and radioactive waste materials at the Antonito site, and failed to comply with the mandate that NEPA analysis and documentation be based on a reasonable range of alternatives. 42 U.S.C. §§ 4332(2)(C)(iii) & (E).
91. NEPA requires that federal agencies consider, evaluate and disclose to the public “alternatives” to the proposed action and “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involved unresolved conflicts concerting alternative uses of resources.” 42 U.S.C. §§ 4332(2)(C)(iii) & (E).

NEPA's implementing regulations require federal agencies to "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. 40 C.F.R. § 1502.14. Additionally, the evaluation of alternatives must constitute a "substantial treatment" presenting the impacts of the alternatives in comparative form "sharply defining the issues and providing a clear basis for choice among the options by the decisionmaker and public." Id.

92. DOE never prepared a NEPA document that considered any alternatives to the transport, transfer, and storage of toxic, hazardous, and radioactive waste materials at the Antonito site. DOE never prepared a NEPA document that disclosed any of the impacts of choosing the Antonito site for these activities, nor provided any basis for choosing the Antonito site among other reasonable alternatives.
93. DOE's failure to consider a reasonable range of alternatives violated NEPA and its implementing regulations and is arbitrary and capricious, an abuse of discretion, and constitutes a failure to act in accordance with law in violation of the APA, 5 U.S.C. § 706(2).

Claim Three

(National Environmental Policy Act - NEPA) Failure to Provide Adequate Public Notice and Participation

94. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.
95. DOE issued its September 2008 and June 2009 RODs without complying with NEPA's

requirement that, to the fullest extent possible, all federal agencies are obligated to “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.” 40 C.F.R. § 1500.2(d).

96. In preparing the Site-Wide Final Environmental Impact Statement, DOE failed to provide notice to any local governments in the San Luis Valley, including Conejos County and the Town of Antonito. Further, DOE failed to provide adequate notice to any residents of Antonito or Conejos County. These failings violate NEPA’s public participation regulations which require DOE to “(a) [m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures” and to “(b) [p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those permits and agencies who may be interested or affected.” 40 C.F.R. § 1506.6.
97. “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1. NEPA implementing regulations provide additional public involvement requirements. *Id.* at § 1506.6.
98. Upon information and belief, DOE violated NEPA regulations by failing to provide notice of the availability of the draft or final SW-FEIS to local officials of Conejos County or Antonito, or to interested and affected citizens of Conejos County and Antonito.
99. DOE’s failure to provide adequate public notice is arbitrary and capricious, an abuse of discretion, a failure to act in accordance with the law and thereby a violation of the APA,

5 U.S.C. § 706(2).

Claim Four

**(National Environmental Policy Act - NEPA)
Failure to Address Connected Actions**

100. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

101. NEPA requires agencies to address connected actions in the same impact statement. 40

C.F.R. § 1508.25(a)(1). As the Tenth Circuit has stated:

A connected action is defined as being closely related to other actions and is identified based on three factors:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1).

In *Custer County [Action Assoc. v. Garvey]*, 256 F.3d 1024, 1037 (10th Cir. 2001)], we noted that projects that have “independent utility” are not “connected actions” under 40 C.F.R. § 1508.25(a)(1)(iii). An inquiry into independent utility reveals whether the project is indeed a separate project, justifying the consideration of the environmental effects of that project alone. *Piedmont [Heights Civic Club, Inc. v. Moreland]*, 637 F.2d 430, 440 (5th Cir. 1981).

Utahns for Better Transportation v. U.S. Department of Transportation, 305 F.3d 1152, 1182-83 (10th Cir. 2002).

102. The transport, transfer, and storage of toxic, hazardous, and radioactive waste materials at the Antonito site would not occur but-for the DOE’s approval of the activities authorized

by the September 2008 and June 2009 RODs. The activities authorized and funded at the Antonito site are connected actions with the activities analyzed in and approved via the SW-FEIS and associated RODs.

103. DOE's failure to address the impacts of the activities authorized for the Antonito site in the same EIS violates NEPA.
104. DOE's failure to comply with NEPA and address connected actions in the same EIS is arbitrary and capricious, an abuse of discretion, a failure to act in accordance with the law and thereby a violation of the APA, 5 U.S.C. § 706(2).

Claim Five

(National Environmental Policy Act - NEPA) Failure to Address Cumulative Actions and Impacts

105. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.
106. As defined by NEPA, cumulative actions include "reasonably foreseeable" actions "which when viewed with other proposed actions have cumulatively significant impacts." 40 C.F.R. §§ 1508.7, 1508.25(a)(2). Such actions "have cumulatively significant impacts and should therefore be discussed in the same impact statement." *Id.* at § 1508.25(a)(2). The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis. The agency cannot ignore these uncertain, but probable, effects of its decisions.
107. A project's "cumulative impact," is:

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Id. at § 1508.7 (emphases added).

108. According to the White House Council on Environmental Quality (CEQ), the office with binding authority over NEPA implementation, federal agencies must undertake some level of “reasonable forecasting,” for “[i]t is the responsibility of federal agencies to predict the environmental effects of proposed actions before they are fully known.” CEQ, *Considering Cumulative Impacts*, at 19.
109. DOE violated NEPA by failing to analyze cumulative actions and cumulative impacts in the SW-FEIS and subsequent RODs. DOE failed to account for or analyze the actions and impacts associated with the transport, transfer, and storage of toxic, hazardous, and radioactive waste materials at the Antonito site to the community and environment of Conejos County and Antonito, when combined with existing impacts from industrial activities such as perlite mills and volcanic rock yards. These cumulative actions and impacts are the reasonably foreseeable result of DOE’s authorization and funding of the excavation and removal of wastes from LANL.
110. DOE violated NEPA by failing to analyze the long-term impacts that its actions may cause. Once the Antonito site is established as a transport, transfer, and storage site for toxic, hazardous, and radioactive waste materials from LANL, use of the facility for similar purposes for wastes from other clean up sites is reasonably foreseeable. These

impacts could occur and continue for years and decades into the future.

111. DOE's failure to comply with NEPA and address cumulative actions and impacts at the Antonito site is arbitrary and capricious, an abuse of discretion, a failure to act in accordance with the law and thereby a violation of the APA, 5 U.S.C. § 706(2).

Claim Six

**(National Environmental Policy Act - NEPA)
Failure to Analyze Mitigation Measures**

112. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.
113. CEQ regulations implementing NEPA require that the agency analyze possible mitigation measures in defining the scope of the EIS, 40 C.F.R. § 1508.25(b), in discussing alternatives to the proposed action, 40 C.F.R. § 1502.14(f), and consequences of that action, 40 C.F.R. § 1502.16(h), and in explaining its ultimate decision, 40 C.F.R. § 1505.2(c). As a result, federal agencies must develop, analyze in detail, and identify the likely environmental consequences of proposed mitigation measures. Further, mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, including a full evaluation of the effectiveness and impacts of any mitigation measure adopted or implemented.
114. DOE failed to comply with NEPA by failing to address or analyze any mitigation measures proposed for the activities authorized at the Antonito site, or the likely effectiveness of those measures. Among DOE's contractors for these activities is EnergySolutions, which

has formally proposed specific mitigation for the site in an attempt to minimize impacts to the community and environment. None of these mitigation measures have been subject to any DOE NEPA process.

115. DOE's failure to comply with NEPA and address and analyze mitigation measures, including the effectiveness of such measures for the Antonito site is arbitrary and capricious, an abuse of discretion, a failure to act in accordance with the law and thereby a violation of the APA, 5 U.S.C. § 706(2).

Claim Seven

(National Environmental Policy Act - NEPA) Failure to Prepare Supplemental EIS

116. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.
117. Because the primary goal of NEPA's procedural requirements - of preparing an EIS - is to ensure that federal agencies make informed decisions, federal regulations implementing NEPA require agencies to update earlier EISs by preparing a supplemental EIS (SEIS) if there "are significant new circumstances or information relevant to the environmental consequences and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9 (c)(1)(ii).
118. As the Supreme Court explained, "[i]t would be incongruous with [NEPA's] approach to environmental protection, and with [NEPA's] manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally

removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1990). If a new environmental picture from that previously studied emerges from subsequent information or circumstances, then a new formal in depth look at the environmental consequences of the proposed action is required. In other words, if the agency action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental NEPA document must be prepared.

119. DOE violated NEPA in failing to supplement the SW-FEIS to account for its revised plan to include transport, transfer, and storage of toxic, hazardous, and radioactive waste materials at the Antonito site. These activities were never considered in the SW-FEIS. Because the impacts to the community and environment of Conejos County and Antonito were not reviewed or considered in the SW-FEIS, a supplemental EIS was required under NEPA.
120. DOE’s failure to comply with NEPA and prepare a supplemental EIS to address and analyze the impacts associated with use of the Antonito site is arbitrary and capricious, an abuse of discretion, a failure to act in accordance with the law and thereby a violation of the APA, 5 U.S.C. § 706(2).

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court:

1. Determine and declare that the Defendants have violated the National Environmental

- Policy Act, and its implementing regulations, in approving and funding the transport, transfer, and storage of toxic, hazardous, and radioactive waste materials at the Antonito site, and that Defendants' actions are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law under the Administrative Procedure Act;
2. Enjoin the Defendants from authorizing or funding such activities at the Antonito site unless and until such time as they comply fully with the requirements of NEPA and its implementing regulations;
 3. Award Plaintiffs their costs of litigation (including reasonable attorney, witness and consultant fees) under the Equal Access to Justice Act, 28 U.S.C. § 2412 and Fed. R. Civ. P. 54(d), and/or under any other statutory authority of the Court; and
 4. Award such other relief as this Court deems appropriate, just, and proper.

RESPECTFULLY SUBMITTED this 1st day of November, 2010

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