No. ________

In The
Supreme Court of the United States

JIM HODGES, Governor of the State of
South Carolina, in his official capacity,

Petitioner,

v.

SPENCER ABRAHAM, Secretary of the Department
of Energy, in his official capacity, and the
UNITED STATES DEPARTMENT OF ENERGY,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM L. WANT
171 Church St., Suite 300
Charleston, SC 29401
(843) 723-5148

STEPHEN P. BATES
Chief Legal Counsel
OFFICE OF THE GOVERNOR
P.O. Box 11829
Columbia, SC 29211
(803) 734-6313

LISA HEINZERLING
Counsel of Record
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9115

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in holding, contrary to the decisions of this Court and of other circuits, that agency compliance with the National Environmental Policy Act necessarily implies that agency action cannot be deemed arbitrary and capricious under the Administrative Procedure Act.

2. Whether the Fourth Circuit erred in holding that the National Environmental Policy Act (NEPA) did not require the United States Department of Energy to prepare any new NEPA documents when it decided to: designate South Carolina as the nation's only consolidated, long-term disposal site for weapons-grade plutonium; make storage of plutonium in South Carolina independent of any plans to process it for ultimate disposal; and eliminate one of the planned methods of disposal.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were intervenors below: Media General Operations, Incorporated, d/b/a Morning News (Florence), WBTW, WSPA, WCBD and WJBF; Aiken Communications, Incorporated, d/b/a The Standard (Aiken); Osteen Publishing Company, Incorporated, d/b/a The Item (Sumter); East Coast Newspapers, Incorporated, d/b/a Island Packet, d/b/a The Herald (Rock Hill), d/b/a the Beaufort Gazette; The Evening Post Publishing Company, d/b/a The Post and Courier (Charleston); Columbia Newspapers, Incorporated, d/b/a The State (Columbia); the Sun Publishing Company, Incorporated, d/b/a Sun News; The New York Times Company, d/b/a The Herald-Journal (Spartanburg); Independent Publishing Company, Incorporated, d/b/a Anderson Independent-Mail; Landmark Community Newspapers of South Carolina, d/b/a The Lancaster News; Jefferson-Pilot Communications Company, d/b/a WCSC; Pacific and Southern Company, Incorporated, d/b/a WLTX; The South Carolina Press Association; South Carolina Broadcasters; Associated Press; and Lee Enterprises, Incorporated, d/b/a The Times and Democrat.

RULE 14.1(b) AND 29.6 STATEMENT

Petitioner Jim Hodges is the Governor of South Carolina.

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The opinion of the Fourth Circuit Court of Appeals is available at 300 F.3d 432 (4th Cir. 2002). The opinion of the District Court for the District Court of South Carolina at Aiken is not published yet. The Fourth Circuit opinion is reproduced in the Appendix to this petition (hereafter "App.") at page 1; the District Court is reproduced at App. 32.

JURISDICTION

The judgment of the Fourth Circuit was entered on August 6, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*; and the National Defense Authorization Act of Fiscal Year 2002, Pub. L. No. 107-117 § 3155; 115 Stat. 1012, 1378 (2001) are reproduced at App. 90.

STATEMENT

1. Introduction

The United States has determined that it has more plutonium than it needs for national defense. The Department of Energy (DOE) was charged with deciding

what to do with this "surplus" plutonium. After thorough study, DOE decided to convert some of the surplus plutonium into fuel for nuclear power plants and to immobilize the rest in secure containers buried in a deep geologic repository. The Savannah River Site (SRS) in South Carolina was chosen as the site to process the plutonium. Any plutonium delivered to SRS was to be converted into a fuel for commercial nuclear power plants or immobilized for transfer to a geologic site. None was to remain at SRS. Congress ratified this approach by directing DOE to devise a plan for surplus plutonium that would provide for removal "in a timely manner" of all plutonium shipped to South Carolina. Almost right up to the moment when DOE issued the decision challenged here, DOE itself thought it appropriate to assure a pathway out of South Carolina for the plutonium to be shipped there. However, when the Governor of South Carolina refused to promise, as demanded by the Secretary of DOE, that he would not challenge DOE's decisions concerning plutonium at SRS, DOE announced that it was canceling the immobilization program, putting off indefinitely the conversion program, decoupling plutonium storage at SRS from plutonium processing, and sending surplus plutonium to South Carolina forthwith for long-term storage. The Fourth Circuit held that because it had found that DOE had complied with the National Environmental Policy Act in coming to its decision, the agency had perforce complied with the Administrative Procedure Act as well.

In combination, the Department's actions threaten to make the Savannah River Site in South Carolina the Yucca Mountain of the East, but without the benefit of the extensive environmental reviews that have attended the decisions concerning Yucca Mountain. Despite the

enormous implications of the lethality and longevity of plutonium for the human environment, despite the fact that the SRS facilities were not designed with long-term disposal of plutonium in mind, and despite the fact that the original purposes of shipping plutonium to and storing plutonium at SRS were no longer being actively pursued, DOE declined to perform an analysis of the environmental consequences of and alternatives to its decision to ship surplus plutonium to SRS and to store it there for the indefinite future. The Fourth Circuit held that DOE was not required to prepare any new NEPA documents regarding its change of policy because "it was apparent," based on DOE's explanation of its actions, "that the proposed change did not create a new environmental picture from that previously studied." App. 30.

2. Statutory and Regulatory Background

For decades, the federal government has assumed primary responsibility for the handling and disposal of nuclear materials. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 194 (1983). Nevertheless, on issues relating to long-term disposal of radioactive waste, Congress has made room for the involvement of states in the selection of disposal sites. *New York v. United States*, 505 U.S. 144 (1992).

With respect to the plutonium at issue in this case, Congress specifically directed DOE to consult with the State of South Carolina in coming to its decisions on the management and disposal of surplus plutonium. National Defense Authorization Act of Fiscal Year 2002, Pub. L. No. 107-117, § 3155, 115 Stat. 1012, 1378 (2001). At the same

time, Congress also instructed DOE to develop a plan for disposition of surplus plutonium that would specify "the means by which all such defense plutonium and defense plutonium materials will be removed in a timely manner from the Savannah River Site for storage or disposal elsewhere." *Id*.

In making decisions about the handling and disposal of nuclear waste, DOE is also bound by NEPA and the APA. NEPA requires that an agency proposal on a major federal action significantly affecting the quality of the human environment be accompanied by a detailed statement of the environmental consequences of, and alternatives to, the proposed action. 42 U.S.C. § 4332(C). Regulations issued under the Act require that federal agencies prepare an environmental assessment for their actions unless they decide at the outset to prepare an environmental impact statement or there is a specific exclusion for the action in question. 10 C.F.R. § 1021.104, 1021.321(a), 1021.400(d) and 40 C.F.R. § 1508.9.

The prohibition on arbitrary or capricious agency action embodied in the APA, 5 U.S.C. § 706(2)(A), requires, among other things, that final agency action be based on "a consideration of the relevant factors," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), and on a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Agency action will be deemed arbitrary where, for example, the agency "has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs' Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The agency decisions at issue here arose out of the federal government's efforts to deal with the problem of surplus plutonium, plutonium that the United States has determined is no longer needed for purposes of national defense. Beginning in the 1990s, the United States and the Russian Federation together concluded that they no longer needed all of the nuclear weapons they had stockpiled during the Cold War. In 1994, the Presidents of the two nations agreed to the goals of "safe, secure, long-term storage and disposition of surplus fissile materials" and to "irreversible" reduction of these materials. Joint Statement Between the United States and Russia on Nonproliferation of Weapons of Mass Destruction and Means of their Delivery (January 14, 1994).

The United States has committed, both bilaterally and unilaterally, to reducing the "surplus" weapons in its nuclear stockpile. There are at least two different ways to accomplish this goal. One is the conversion of weapons-grade plutonium into material that is not usable in nuclear weapons. Plutonium would be combined with uranium to produce "mixed-oxide fuel" (MOX), which would be used at nuclear power plants to produce electricity. Another way to reduce the accessibility of weapons-grade plutonium is to immobilize it in secure containers and bury it in a deep geologic repository. As explained below, both of these strategies were included in DOE's policies for surplus plutonium until the reversal of course at issue in this case.

3. The Department of Energy's Decisions

a. Decisions Before April 2002

On January 21, 1997, the Department of Energy issued a Record of Decision (ROD) announcing a dual-track plan for plutonium disposition whereby pure forms of plutonium would be processed into MOX for use by commercial reactors and the remaining impure plutonium would be immobilized into a ceramic form and placed in a geologic site. DOE, *Record of Decision for the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement*, 62 Fed. Reg. 3014 (Jan. 21, 1997). The National Academy of Sciences had recommended the dual approach in a 1995 report which states, "Since it is crucial that at least one of these options succeed, since time is of the essence, and since the costs of pursuing both in parallel are modest in relation to the security stakes, we recommend that project-oriented activities be initiated on both options, in parallel, at once." National Academy of Sciences, *Management and Disposition of Excess Weapons Pu: Reactor-Related Options* 417 (National Academy Press 1995). Furthermore, the United States wanted the immobilization technology to deal with certain plutonium in the military complex that it deemed unsuitable for use in nuclear reactors. *Id*.

The 1997 ROD had been preceded by a 1996 Programmatic Environmental Impact Statement (PEIS). The PEIS divided its subject into three categories: storage, storage pending disposition and disposition. DOE, *Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement* 1: 1-5, 1-6, 61 Fed. Reg. 67001 (Dec. 19, 1996). DOE's "preferred alternative" designated only the nonsurplus plutonium and highly enriched uranium, not surplus plutonium, for

long-term storage. Under DOE's preferred approach, surplus plutonium was only to be stored "pending disposition" through conversion to MOX or immobilization. To be sure, DOE concluded that it was best to transfer surplus plutonium from the Rocky Flats nuclear facility in Colorado to SRS – but for the purpose of disposition, not simply to move the plutonium to a different place. In addition, the facilities at SRS were to be upgraded and expanded to accommodate this new burden.

Over the next several years, DOE made further refinements and adjustments to its policies for surplus plutonium. In 1998, DOE issued a supplement assessment in which it analyzed its proposal to ship surplus plutonium to SRS on an accelerated schedule and to store the plutonium in an existing building at SRS, called KAMS, pending completion of a new facility specifically designed to handle the surplus plutonium. *Supplement Analysis for Storing Plutonium in the Actinide Packaging and Storage Facility and Building 105-K at the Savannah River Site* 4 (July 1998). (In January 2001, DOE canceled its plans for the new facility.) In its 1998 supplement assessment, DOE specifically explained that the transfer of plutonium to SRS "would not occur unless DOE decides to immobilize plutonium at the SRS." *Id.* Subsequently, in a federal register notice of January 11, 2000, DOE issued a ROD deciding to locate the MOX and immobilization facilities for processing surplus plutonium at SRS. DOE, *Record of Decision on Final E.I.S. Summary*, 65 Fed. Reg. 1608 (Jan. 11, 2001). Both of these decisions kept the basic structure of the 1997 ROD intact: surplus plutonium would be shipped to SRS for the purpose of rendering the material less accessible to anyone – in the U.S. government or

elsewhere – who might wish in the future to use it for aggressive purposes.

In a February 2002 supplement analysis for storage of surplus plutonium at SRS, DOE noted that a 1998 supplement analysis on the subject had assumed storage of surplus plutonium would be "for up to 10 years," pending disposition. *Supplement Analysis for Storage of Surplus Plutonium in the KAMS Facility* 3, D.O.E./E.I.S.-0229-SA2 (Feb. 2002). The February 2002 supplement assessment stated that storage of surplus plutonium at SRS may extend beyond the 10 years previously estimated, but made it clear that the storage would not be long-term, noting, "DOE plans to disposition its surplus plutonium as soon as practical and believes storage in KAMS would be necessary for less than 20 years." *Id.* at 8. At this time, then, DOE's policy continued to be interim storage at SRS pending disposition.

On February 15, 2002, DOE submitted to Congress a report Congress had requested on the status of the surplus plutonium program. The report stated that the agency rejected the long-term storage approach. NNSA/DOE, *Disposition of Surplus Plutonium at Savannah River Site* 4-24-27 (Feb. 15, 2002) (available at http://www.nci.org/pdf/doe-pu-2142002.pdf). The report also announced that DOE would eliminate the immobilization component of the surplus plutonium program and proceed exclusively by way of the MOX technology. The report provided a detailed schedule for implementing the MOX processing – and eventually deactivating it – at SRS.

Two of the options considered in the report, but rejected, were storage of the surplus plutonium in the six places where it currently resides, and consolidated storage

in two. One of the disadvantages of the storage approach was said to be, "The U.S. plutonium disposition mission and parallel Russian disposition effort would not be achieved. Russian plutonium would remain subject to increasing risk of theft or diversion." *Id.* at 4-24. Another disadvantage of the storage approach was said to be, "While the technologies for storing plutonium currently in use throughout the complex are considered mature, there is no experience for very long-term storage of pits and non-pit plutonium." *Id*. Yet another disadvantage of the storage approach came under the category, "sensitivities." For the storage in place option, the report stated: "Both South Carolina and Colorado would strongly oppose this option." *Id*. As to "sensitivities" if there were consolidated storage, the report stated:

> South Carolina would view this option as a failure to provide a pathway out of SRS for surplus plutonium brought there for disposition (assuming that SRS was selected as one of the consolidation sites). Therefore, this option can be expected to be strongly opposed by the State of South Carolina and challenged in the courts. *This option would likely require additional NEPA review and public meetings*. [*Id*. at 4-26, emphasis added.]

As of February 2002, then, this is where things stood. DOE's formal policy remained the one first announced five years before. Surplus plutonium was to be either converted to fuel or immobilized and placed in a geologic repository. Pending this activity, surplus plutonium was to be shipped to SRS for interim storage. Transfer of plutonium to SRS and interim storage of it there were to occur for the purpose of disposition. DOE had, in its report to Congress, proposed that the immobilization program be

canceled, but at that time it did not issue a formal decision to undertake this proposal. In the report to Congress, moreover, DOE specifically rejected the idea of transferring plutonium to SRS independent of disposition. All this changed in April 2002.

b. DOE's Reversal of Course

Beginning in 2001, Governor Jim Hodges of South Carolina became concerned about DOE's plans for transfer of surplus plutonium to, and long-term storage of this plutonium at, SRS. He embarked upon a correspondence with the Secretary of DOE, Spencer Abraham, in which he stated his concerns about shipping plutonium to SRS and sought DOE's assurance that the agency would meet its commitment to process, then remove, the surplus plutonium sent to SRS and not use the state as a permanent disposal ground for plutonium. This correspondence culminated in an extraordinary letter from Secretary Abraham to Governor Hodges on April 11 of this year.

Along with that letter, Secretary Abraham sent a draft record of decision to Governor Hodges and an agreement, which he asked the Governor to sign, indicating his consent to the approach of the draft record of decision. The decision proposed by DOE committed the agency to ensuring a credible "exit strategy" for plutonium brought into South Carolina and provided specific dates by which DOE would remove the plutonium from the State if DOE's commitments had not been met. In signing the agreement proffered by Secretary Abraham, Governor Hodges would have been agreeing not to file any legal challenge against the Secretary's decisions concerning SRS and surplus plutonium.

In the April 11, 2002 letter itself, Secretary Abraham wrote:

> As I have indicated in our various personal meetings and phone conversations, I appreciate your concerns that any plutonium that comes into the State have a credible pathway out. That is why when we spoke on February 23, I personally assured you that our new approach would not transport any plutonium to South Carolina unless our plans for fabricating it into MOX fuel were progressing in a fashion that assured that it would be able to be disposed of through this process.

Letter from Secretary Abraham to Governor Hodges of 4/11/02, App. 103. Additionally, Secretary Abraham stated in the same letter that DOE had made a:

> commitment to maintain a pathway out of South Carolina for any plutonium brought into the State, including firm dates by which such material would be removed from the State if DOE, for any reason, were to be unable to secure the funding necessary to build the MOX facility.

Id., App. 104. Secretary Abraham coupled his offer of a pathway out of South Carolina with a warning about what would happen if Governor Hodges did not sign the agreement:

> I am prepared to authorize issuance of this Record of Decision immediately upon receiving a signed agreement from you. . . . If you are unable to accept this agreement, I will proceed to take the steps I believe necessary to meet our national security and environmental cleanup objectives. Consistent with applicable law, on April 15, I will authorize issuance of an amended Record of

> Decision that does not incorporate the terms of the attached agreement and will direct issuance of the requisite 30-day notice of our intent to begin shipping.

Id., App. 102 and 106-107. Thus Secretary Abraham threatened Governor Hodges that if he did not sign the agreement Abraham had profferred, none of the qualifications and contingencies provided for in the agreement and the draft record of decision would be recognized.

Governor Hodges, however, insisted that DOE make the agreement legally enforceable, and this DOE would not do. Thus DOE and Governor Hodges did not execute an agreement concerning the shipment of plutonium to SRS.

On April 19, 2002, DOE issued an amended ROD in final form. DOE, *Amended Record of Decision, Surplus Plutonium Disposition Program*, 67 Fed. Reg. 19432 (Apr. 19, 2002). It was dramatically different from the draft DOE had sent to Governor Hodges eight days earlier. The amended ROD announced the "immediate implementation of consolidated long-term storage at the Savannah River Site (SRS) of surplus non-pit plutonium now stored separately at the Rocky Flats Environmental Technology Site (RFETS) and SRS. . . ." *Id*. at 19432.

Whereas Secretary Abraham had guaranteed that the shipment of surplus plutonium to SRS was strictly tied with processing it there, the amended ROD stated:

> In addition to achieving the ultimate goal of permanent disposition of surplus plutonium materials, DOE *independently* needs to improve the configuration of the storage system for these materials pending disposition. These improvements

> will allow DOE to significantly reduce storage costs, expedite closure and cleanup of sites and facilities in its nuclear complex, and enhance the security of these materials. [*Id*. at 19433, emphasis added.]

Secretary Abraham had made good on his threat to Governor Hodges: because the Governor had refused to sign an agreement DOE conceded – indeed, insisted – was legally unenforceable, DOE withdrew all of the protections it had been prepared to provide to South Carolina to assure implementation of DOE's long-standing surplus plutonium disposition policy and replaced them with a decision making South Carolina the nation's only consolidated, long-term storage site for weapons-grade plutonium.

4. Proceedings Below

Shortly after DOE announced its new policy for surplus plutonium, Governor Hodges sued Secretary Abraham and DOE in federal district court in South Carolina, alleging that the agency had failed adequately to analyze the consequences of and alternatives to its decision under the National Environmental Policy Act (NEPA) and that its reversal of policy course was arbitrary and capricious under the Administrative Procedure Act (APA).

Governor Hodges' NEPA and APA claims reflected two very different lines of attack. His NEPA claims asserted that DOE had violated NEPA by failing to prepare either an environmental assessment (prepared in cases in which the need for an environmental impact statement is unclear) or a supplemental environmental impact statement in coming to its new decisions concerning surplus

plutonium. Complaint ¶¶ 71-84. In his APA claim, on the other hand, Governor Hodges contended that DOE's reversal of course on surplus plutonium in April 2002 was arbitrary and capricious, not because of DOE's treatment of environmental issues but because DOE's abrupt change of policy was itself arbitrary and capricious. Complaint ¶¶ 89-93.

The district court denied Governor Hodges' motion for a preliminary injunction against DOE's plutonium shipments into South Carolina and at the same time granted summary judgment in favor of DOE. In this decision, the district judge completely subsumed the APA claim within the NEPA claim; she asked only whether DOE's decisions concerning the development of NEPA documents were arbitrary and capricious, not whether the decision announced on April 19 was itself arbitrary and capricious. Finding no meritorious NEPA claim, the judge granted judgment for DOE without separate discussion of the APA.

The Fourth Circuit followed a similar path. After rejecting the Governor's NEPA claims, the appeals court rejected the APA claim as well:

> Governor Hodges also maintains that the DOE's decisionmaking process violated the Administrative Procedure Act (the "APA"). Under the APA, we must uphold an agency decision if it is supported by "substantial evidence," and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E). In conducting our review under the APA, "we perform only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment." *Maryland*

> *Dep't of Human Res. v. United States Dep't of Agric.*, 976 F.2d 1462, 1475 (4th Cir. 1992) (internal quotations and citations omitted). *In view of the DOE's compliance with NEPA, the Governor's APA challenge is also without merit.*

Hodges v. Abraham, 300 F.3d 432, 449 n. 17 (4th Cir. 2002) (emphasis added). The Fourth Circuit's holding was no accident: the Department of Justice had, in its brief on appeal, argued on behalf of just this result, stating flatly that the Governor had "no independent APA cause of action in this case" and that "[t]he APA here is simply the means for effectuating judicial review under the NEPA statute, which creates a purely procedural statute." Brief for the Federal Appellees, *Hodges v. Abraham*, No. 02-1639 (4th Cir.), at 56-57.

In holding that compliance with NEPA excuses compliance with the APA, the Fourth Circuit parted company with the relevant statutory language, and with this Court's established precedents and those of other lower courts, on a matter of great importance to the State of South Carolina and to the nation as a whole.

On the NEPA issue, the Fourth Circuit determined that it was not necessary for DOE to prepare an environmental assessment for its new decision because DOE had decided that its previous environmental analyses covered its changed decision. On this point, too, the Fourth Circuit erred.

REASONS FOR GRANTING THE PETITION

1. The Department of Energy, perversely, treated its "consultation" with South Carolina, required by Congress

in the National Defense Authorization Act of FY2002, as an opportunity to dangle one approach to the problem of surplus plutonium before South Carolina's eyes and then to snatch that approach away when South Carolina failed to jump at it. By refusing to review Governor Hodges' claim that the Department's decision was arbitrary and capricious under the APA, merely because the court had found that the Department had complied with an entirely separate statute, NEPA, the Fourth Circuit gave its stamp of approval to the Department's petulant treatment of a sovereign State. The Fourth Circuit's legal error in conflating NEPA and the APA is plain; its decision conflicts with decisions of this Court and of other circuits; and it has ratified the Department of Energy's rush to judgment on a matter of great national importance. This Court should grant the Governor's petition for a writ of certiorari.

a. By its literal terms, NEPA disclaims any congressional intent to supplant other federal statutes. Other environmental standards, and requirements of coordination or consultation with, and recommendations or certification of, other Federal or State agencies, are explicitly preserved by the statute. 42 U.S.C. § 4334. In addition, NEPA provides that "[t]he policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies." 42 U.S.C. § 4335. Where the executive branch finds that existing regulatory programs are inadequate for the purposes of environmental protection, it is encouraged to make "recommendations for legislation" to fix the problem. 42 U.S.C. § 4341. These provisions together leave no doubt that NEPA supplements, but does not supplant, other statutory regimes.

Nothing in the statute remotely suggests that the APA is an exception to this rule. The Fourth Circuit's holding that compliance with NEPA implies compliance with the APA thus flouts the plain language of NEPA. Indeed, as explained next, not only does the statute itself give no hint whatsoever of an intent to repeal the APA in cases where NEPA implies, but this Court's decisions strongly confirm that NEPA and the APA are two different, independently applicable, statutes.

b. In a series of decisions handed down in the decade or so after NEPA was enacted, this Court made plain that the APA and NEPA create two different statutory regimes. In fact, it would not be an overstatement to say that the interaction between the APA and NEPA was *the* predominant question in the early NEPA cases heard by this Court. These cases resoundingly affirmed what is plain from the statutory text: NEPA did not amend or repeal the APA.

In its very first encounter with NEPA, this Court concluded that the statutory language "indicates that NEPA was not intended to repeal by implication any other statute." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 694 (1973); see also *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 319 (1975).

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), this Court unanimously rejected the argument that NEPA somehow enlarged the procedures otherwise required by the APA. "We search in vain," the Court said, "for something in NEPA which would mandate such a result. . . . Thus, it is clear NEPA cannot serve as the basis for a substantial

revision of the carefully constructed procedural specifications of the APA." *Id.* at 548.

Although Vermont Yankee is famous for its holding that NEPA did not *add to* the requirements of the APA, the case stands equally for the proposition that nothing in NEPA *subtracts from* APA requirements.[1] The Court concluded that the Atomic Energy Commission had satisfied NEPA's requirements, *id*. at 549-55, but remanded the case to the Court of Appeals to review the question whether the agency had violated the APA by issuing a decision unsupported by the administrative record. *Id.* at 549. Nowhere did the Court intimate that the agency's compliance with NEPA implied compliance with the APA, and its remand to the appeals court for further review under the APA signals just the opposite conclusion.

This Court's other leading NEPA cases reaffirm this result. In the per curiam opinion in *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980), the Court summarily reversed a Second Circuit decision requiring a federal agency to give "determinative weight" to environmental considerations pursuant to NEPA. *Id*. at 227. The Court also hinted, however, that it might have reached a different result – and certainly would have granted plenary review – if it had thought that the agency had acted "arbitrarily or capriciously." *Id*. at 228 n. 2. Because the court below had not found this to be the case, the Court rested with its NEPA analysis. The decision

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[1] Similarly, in *Bennett v. Spear*, 520 U.S. 154, 175 (1997), this Court held that the Endangered Species Act does not supplant APA requirements.

plainly recognizes, as *Vermont Yankee* did, that federal agencies' compliance with NEPA does not excuse compliance with the APA's constraints on arbitrary agency action.

In short, the Fourth Circuit departed from this Court's long- and clearly established precedents by ending its analysis with NEPA and refusing to go on to consider whether the Department of Energy had violated the APA. Perhaps even more surprising than the Fourth Circuit's erroneous decision is the fact that the United States asked for it: in responding to Governor Hodges' APA claim in its appellate brief, the Department of Justice asked the court to reject the Governor's attempt to "smuggle" arbitrary and capricious review into NEPA, and stated flatly that the Governor had "no independent APA cause of action in this case. The APA here is simply the means for effectuating judicial review under the NEPA statute, which creates a purely procedural statute." Brief for the Federal Appellees, *Hodges v. Abraham*, No. 02-1639 (4th Cir.), at 56-57. The Department of Justice is thus as confused as the Fourth Circuit is. NEPA simply does not supplant the APA. Even if a federal agency complies with NEPA, it must still comply with the APA by issuing decisions that are neither arbitrary nor capricious.

NEPA and the APA are, to be sure, linked in the following way: the APA provides the statutory basis and standard of review for judicial review of agency analysis undertaken pursuant to NEPA. But agency action that complies with NEPA can nevertheless violate the APA by being arbitrary and capricious, where the agency operates under legal constraints that arise outside NEPA. Here, the authority under which DOE set surplus plutonium policy – including nonproliferation agreements and the National

Defense Authorization Act of Fiscal Year 2002, Pub. L. No. 107-117, § 3155, 115 Stat. 1012, 1378 (2001) – nowhere made South Carolina's disagreement with federal plutonium policy a relevant consideration in setting that policy. Indeed, the National Defense Authorization Act of Fiscal Year 2002 specifically required DOE to consult with South Carolina and to describe its plans for an exit strategy for the plutonium sent to SRS for disposition. Nevertheless, Governor Hodges' simple disagreement with Secretary Abraham figured profoundly in Secretary Abraham's April 2002 decisions concerning surplus plutonium. By relying on a consideration that the laws under which he operated deemed irrelevant, Secretary Abraham acted arbitrarily and capriciously according to this Court's well-settled jurisprudence of administrative law.

c. The Fourth Circuit's decision also parted company with decisions from other federal circuits. The court's error lay not in applying an APA standard of review to the NEPA claims in this case, but in concluding that the APA spoke *only* to the NEPA claims raised here and not to the issue of whether DOE had acted arbitrarily within the meaning of *other* relevant laws. The notion that the APA might constrain agency action outside the context of NEPA, even in settings where NEPA also applies, is so well accepted in other circuits that it is hard to find explicit statements to this effect. Plenty of evidence exists, however, to conclude that the Fourth Circuit's ruling on this issue is out of line with precedents from other lower federal courts.

Particularly telling in this regard are the many cases from other courts confronting claims based on multiple statutes governing natural resources. In numerous cases concerning conflicts regarding natural resources, one finds

plaintiffs invoking not only NEPA, but also the Endangered Species Act, the National Forest Management Act, and others. Claims under these latter statutes typically invoke the APA, and courts other than the Fourth Circuit have consistently heard *both* the claims under NEPA and the claims asserting violations of the APA through actions under other statutes. *See, e.g., Native Ecosystems Council v. Dombeck*, 2002 U.S. App. LEXIS 18845 (9th Cir. Sept. 17, 2002) (reviewing separately claims arising under NEPA, National Forest Management Act, and Endangered Species Act); *Environmental Defense Fund, Inc. v. U.S. Environmental Protection Agency,* 485 F.2d 780 (D.C. Cir. 1973) (holding that NEPA claims, and APA claims arising out of agency's actions under Federal Insecticide, Fungicide and Rodenticide Act, must be heard in D.C. Circuit); *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983) (finding violations of NEPA and of APA through actions under Clean Water Act). Other courts have not held, as the Fourth Circuit did, that NEPA compliance necessarily implies APA compliance.

In sum, the lower federal courts routinely consider legal claims under the APA even where NEPA also applies. The Fourth Circuit's square holding that compliance with NEPA perforce implies compliance with the APA is a clear departure from the approach of other circuits.

d. Few issues in the modern era have so challenged the delicate balance between the States and the federal government as has the disposal of the dangerous and persistent byproducts of the nuclear age. This Court has insisted upon respectful treatment of the states by the federal government even where the "pressing national problem" of radioactive waste disposal is concerned, *New*

York v. United States, 505 U.S. 144, 187 (1992), and it has worked to preserve state authority wherever it can. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983) (upholding California's refusal, on economic grounds, to license new nuclear power plants in the absence of a solution to the problem of nuclear waste).

This case, unhappily, reflects shockingly cavalier treatment of a State by the federal government. Because Governor Hodges would not sign the agreement proffered to him by the Department of Energy, the Department turned around and reversed course on an issue of great national importance. Whereas in February of this year the Department reported to Congress that long-term storage independent of disposition was unacceptable, and whereas the Department was willing as of April 11 of this year to condition transfer of plutonium to South Carolina on the disposition of that plutonium and its removal from South Carolina upon disposition, by April 19 the Department had completely disconnected disposition from transfer of plutonium to, and storage of plutonium in, South Carolina, and had removed any assurances it had previously thought sensible concerning an "exit strategy" for the plutonium brought to South Carolina. All this because the Governor had not acceded to the Department's demand for his signature on what the Department conceded was not a legally enforceable agreement. Nothing in the nonproliferation agreements upon which the Department's work initially built, nor in the National Defense Authorization Act of Fiscal Year 2002, which refined the Department's instructions concerning surplus plutonium, makes the Governor's disinclination to sign the agreement proffered to him by Secretary Abraham a relevant consideration in

the development of the nation's policies concerning surplus defense plutonium.

Indeed, it would hardly suit the system of "dual sovereignty" established by the Constitution, see *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S.Ct. 1864, 1870 (2002), nor would it respect the principle that "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government," *id.*, but instead " 'entered the Union 'with their sovereignty intact,' " *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), to conclude that DOE may, without fear of legal reprisal, retaliate against a State for its expression of disapproval of federal policy by fundamentally reworking the structure of that policy in a way that disadvantages the State in question.

The Administrative Procedure Act was designed to prevent just the kind of arbitrary and capricious action DOE exhibited here. It is no less arbitrary or capricious to consider factors not relevant to the agency's mission – such as the honest disagreement of the Governor of a sovereign State with a proposed federal policy – than it is to fail to consider factors that are relevant to the agency's mission. *Overton Park*, *supra*, 401 U.S. at 416. The Fourth Circuit erred in refusing even to address the question whether the Department's high-handed and disproportionate reaction to Governor Hodges' qualms about the long-term storage of plutonium in his State was arbitrary and capricious within the meaning of the APA.

2. The Fourth Circuit's error in finding that compliance with NEPA implies compliance with the APA was compounded by the fact that its finding regarding NEPA compliance was also erroneous. This part of the court's

decision is also out of step with this Court's precedents, and the Fourth Circuit's clear legal error ratified DOE's unreflective reversal of course on a matter of such great national importance that the Court should grant review of this question as well.

a. The Fourth Circuit found that DOE had complied with NEPA based on DOE's representation that documents prepared prior to its April 2002 decision adequately demonstrated that its April 2002 reversal of course would not cause significant environmental consequences, triggering new NEPA obligations.

This Court has made clear that federal agencies have a continuing obligation to analyze the environmental consequences of, and alternatives to, their major proposals. By focusing agency attention on the environmental consequences of agency action, "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). "It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action," the Court has observed, "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." *Id*. Thus, the mere fact that DOE had previously prepared NEPA reports on its surplus plutonium program did not excuse it from preparing new reports when the agency profoundly altered its policy course.

b. In April of this year, DOE changed its policy regarding surplus plutonium in two very large ways: First,

it decided that transfer of surplus plutonium to, and long-term storage of this plutonium at, SRS would no longer be dependent on disposition of this plutonium. The plutonium could, in other words, stay at SRS indefinitely – indeed, forever – without doing violence to DOE's new policy. Second, DOE canceled the immobilization portion of its plutonium program and decided to rely exclusively on MOX processing for disposition. Both of these abrupt policy changes had significant potential consequences for the environment, and yet neither has been evaluated under NEPA by DOE.

Starting with the decision to disconnect storage at SRS from disposition, this choice makes SRS the nation's only indefinitely long-term storage site for surplus plutonium. Much ink has been spilled in this case over whether DOE evaluated storage of plutonium at SRS for 10, 20, or 50 years, with the Fourth Circuit concluding (erroneously, in our view) that DOE had adequately considered the environmental consequences of plutonium storage at SRS for up to 50 years. But this fine parsing of the relevant temporal period misses the larger and more important point: nothing in DOE's April 2002 Record of Decision makes 50 years the outer limit for storage of surplus plutonium at SRS. Plutonium could be stored at SRS until kingdom come and the April 2002 decision would have nothing to say about it.

If DOE had come to this decision right off the bat, in its 1997 Record of Decision which started this whole process, there is no doubt that it would have been required to prepare an EIS. DOE's own NEPA regulations deem the storage of high-level nuclear waste to be "categorically included" within NEPA's EIS requirements; that is, an EIS is normally required for this category of decisions. 10

C.F.R. § 1021.400 (Subpart D, Appendix D-10). To allow DOE, as the Fourth Circuit did, to make this same decision without an EIS merely because the agency had analyzed *other* decisions in previous EIS's is nonsensical.

Turning to DOE's reversal of course on immobilization, DOE itself in April 2002 recognized that it would need to conduct further NEPA review of the consequences of canceling immobilization, insofar as this decision necessitates the processing of more impure plutonium through the MOX facility. DOE, *Amended Record of Decision, Surplus Plutonium Disposition Program*, 67 Fed. Reg. 19435 (April 19, 2002). DOE cannot make a decision first and then analyze its environmental consequences later. In ratifying DOE's decision to do just this, the Fourth Circuit once again parted company with other circuits. *See Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (requiring federal agencies to consider environmental consequences of allowing Makah Indian Tribe to hunt whales *before* coming to its decision on whale hunting); *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989) (Breyer, J.) (in explaining that NEPA documents must be prepared before decision on agency action is made, the court observes: "[g]iven the realities, the farther along the initially chosen path the agency has trod, the more likely it becomes that any later effort to bring about a new choice, simply by asking the agency administrator to read some new document, will prove an exercise in futility").

c. The decision to make SRS the nation's consolidated long-term storage facility for surplus plutonium is too important a decision to be made without at least an environmental assessment. The Defense Nuclear Facilities Safety Board, an independent organization established by Congress to provide oversight of DOE, has raised

questions whether the KAMS facility at SRS where the storage will take place is capable of accomplishing this mission. In a letter of November 21, 2001, the Defense Nuclear Facilities Safety Board stated the KAMS facility "is an aged facility and was never intended to provide more than interim storage." App. 117. Similarly, in a report of February, 2002, it stated, " . . . KAMS is an aged facility with no confinement features for potentially extended storage of plutonium." App. 122. Before South Carolina indeed becomes the Yucca Mountain of the East, DOE should be required to analyze the environmental consequences of its new policy and to explore alternative, safer arrangements for plutonium storage at SRS.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM L. WANT
171 Church St., Suite 300
Charleston, SC 29401
(843) 723-5148

STEPHEN P. BATES
Chief Legal Counsel
Office of the Governor
P.O. Box 11829
Columbia, SC 29211
(803) 734-6313

LISA HEINZERLING
Counsel of Record
Georgetown University
Law Center
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9115

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