Mr. Carlos Salazar,
GSA Regional NEPA Coordinator
U.S. General Services Administration,
1500 East Bannister Road, Room 2191 (6PTA),
Kansas City, MO 64131,

January 13, 2008

Via Email to: NNSA-KC@gsa.gov

Dear Mr. Salazar:

The Natural Resources Defense Council (NRDC) appreciates this opportunity to comment on the draft *Environmental Assessment for the Transformation of Facilities and Infrastructure for the Non-Nuclear Production Activities Conducted at the NNSA Kansas City Plant* ("KCP-EA").

With a staff of over 350 scientists, economists, environmental litigators, policy experts, advocates and support personnel representing the environmental interests and views of approximately 1.2 million members and on-line activists, NRDC has for three decades maintained a deep and abiding interest in reducing the environmental and other harmful impacts of the U.S. Nuclear Weapons Complex.

I. Our Prior Extensive Written Comments on the Scoping of This EA Have Been Ignored

We note with regret that our extensive written comments (submitted jointly with Nuclear Watch New Mexico on 21 May 2007) on the GSA's Notice of Intent [FR/72 at 23822] to prepare this EA have been ignored. At that time we advised you that the proposed scope of the alternatives analysis for acquiring a "transformed" Kansas City Plant, as outlined in the NOI, was "premised on preemptive agency judgments that prematurely narrow and effectively predetermine the NEPA analysis."

Specifically we objected to the NOI's arbitrary, unsupported, and controlling presumption that "relocation of the non-nuclear production mission to another location outside of the Kansas City Metropolitan Area is not a reasonable alternative." [NRDC-Nuclear Watch letter to NNSA Acting Administrator Mr. William C. Ostendorff, (copied with a cover letter of the same date to Mr. Carlos Salazar, GSA Regional NEPA Coordinator) May 21, 2007, p.1-20]

We further noted our view that the segmentation of NNSA's non-nuclear fabrication activities from its ongoing programmatic review of its "Complex Transformation" proposal violates NEPA, because it arbitrarily and capriciously excludes consideration of objectively reasonable consolidation alternatives for non-nuclear component manufacturing that are worthy of detailed study. We also observed that DOE's underlying 1996 *Final Programmatic EIS for Stockpile Stewardship and Management,* which the NNSA's parallel ongoing review relies upon and purports to "supplement," regards non-nuclear consolidation at sites outside of the Kansas City area as a "reasonable alternative" worthy of detailed NEPA analysis. We see nothing in today's environment that would alter that judgment, and much that would tend to reinforce it.

Our May 21 2007 letter also commented that converting a 185 acre "greenfield" site in agricultural use into a modern $500 million "campus" for nuclear weapon parts production that generates hazardous wastes in the course of its operations inherently meets the definition of a Major Federal Action requiring consideration in an EIS, not merely an EA. We noted that the "still unresolved environmental hazards at the current KCP plant site," and the siting of a nuclear weapons production facility near a proposed inland port with heavy truck and rail traffic, likewise raise environmental and security concerns that need to be analyzed in an EIS. We concluded by noting that, judging from the approach taken in the NOI, GSA's "cooperating agency" partner in the new KCP project, NNSA, was simply ignoring NRDC's previous comments, filed five months earlier (17 Jan. 2007), objecting to the arbitrary exclusion of non-nuclear fabrication mission alternatives from the "Complex 2030" (now "Complex Transformation") Supplemental PEIS analysis.

We do note, however, that one misguided and completely inappropriate response to these concerns was undertaken by NNSA. Rather than do what is clearly required under NEPA—which is first *to consider alternatives representing the range of reasonable consolidation alternatives for non-nuclear component fabrication activities as part of the broad programmatic "Complex Transformation" NEPA analysis, and then to conduct site-specific NEPA analysis on any construction projects included in a Record of Decision (ROD) based on this analysis*—GSA/NNSA have instead sought to substantiate *retroactively* their exclusion of these reasonable alternatives, from both the *Supplemental PEIS* process and the KCP-EA, by commissioning, in parallel with preparation of the draft EA for public comment, a "business case" analysis on "Relocation of Non-Nuclear Production to an Alternate Location." [Science Applications International Corp., October 18, 2007, Revision 2, hereafter referred to as the "SAIC study" or "SAIC report"]. This curious document is actually larger (2,152 vs. 1,635 kilobytes in PDF format), far more elaborate, and appears to have been more costly to prepare than the KCP-EA itself, which comprises a mere 63 double-spaced pages (with triple spacing between paragraphs and only two tables.)

II. The SAIC Report Violates Government Regulations Barring Parties with Conflicts of Interest from Preparing Documents Used in the NEPA Process

NRDC has grave concerns about this SAIC document, extending both to the manner and timing of its preparation as well as its substance. Its scope and analytical assumptions were not subject to public review and comment, and as a result these appear custom-tailored to prejudice the case for relocation of non-nuclear production outside of Kansas City. This lengthy document and its conclusions are briefly described in a mere eight sentences in the KCP-EA [Sec. 3.4.2 Alternative Considered Outside Kansas City Metropolitan Area, p.17], which are introduced as follows:

> "In response to comments made during the public scoping comment period, the NNSA Office of Transformation prepared an *independent* and *objective* assessment of the business case for moving non-nuclear production from the KCP to an alternate city, for comparison with alternatives identified in the GSA/NNSA EA NOI (p. 17, emphasis added)."

In reality, the study was not prepared by the "NNSA Office of Transformation," but rather by one of its contractors, SAIC Corp., a huge, ubiquitous contractor to both GSA and NNSA which routinely conducts billions of dollars worth of business with these and other government agencies. SAIC is in fact a "GSA Environmental Services" Schedule contractor, and also holds eight other GSA Schedules allowing it to provide government agencies with a wide array of products and services using streamlined non-competitive contract procedures. Thus SAIC's report was neither "independent" nor "objective" by any reasonable definition of those terms, since it is GSA's proposal for a privately financed, but NNSA-run nuclear weapons industrial park that is at issue.

The review's lack of independence at the corporate level is reflected in the individual resumes of the SAIC staff and consultants listed in "Appendix 7 – Vitae" [p. 61] as having worked on the study. *All of them are or have recently been employed on other SAIC contracts with NNSA* on closely related matters:

For example, Ms. Leslie A. Bowen is currently employed by SAIC as a "Senior Regulatory Engineer" on a contract supporting NNSA's "Deputy Assistant Deputy Administrator of Military Application and Stockpile Operations and other Federal staff in the evaluation, selection, and management of Readiness Campaign Projects." Thus Ms. Bowen was working for an official with direct responsibility over the very program and project she was charged with evaluating.

According to his vitae, "during the last five years, Dr. [Geoffrey D.] Kaiser, [an SAIC Assistant Vice President for Technology,] has been working with the National Nuclear Security Administration's (NNSA) Office of Stockpile Technology (OST) providing guidance in the areas of program and project risk management and business practices…During 2006, he worked on the development of an Applied Science and Technology Roadmap (ASTR) for NNSA's Nuclear Weapons Complex…*He works as*

the de facto risk management coordinator for OST." Again, this person's "independence" is fatally compromised by his contract and work relationships with officials having direct responsibility for the US nuclear weapons stockpile.

Another co-author of the report, Dr. Steven R. Ligon, is a Lead Systems Engineer in SAIC's "Energy Solutions Operation" who "currently provides system engineering, engineering management, and program management advice to NNSA's Readiness Campaign, Office of Transformation, and [DOE's] Office of Civilian Radioactive Waste Management. (OCRWM)." As a contractor to NNSA's Office of Transformation, which has been deeply involved in the development of the controversial third-party finance deal for a new KCP, Dr. Ligon has a direct conflict.

According to her resume, since 2000 SAIC Senior Scientist Diane Nemeth has "supported the Department of Energy Office of Legacy Management (LM) and monitors grants awarded to 15 local development organizations in communities impacted by DOE downsizing through the 1993 National Defense Authorization Act. She reviews and makes recommendations on grant applications, proposed budgets, and the progress of local economic development activities…At SAIC, Ms. Nemeth is responsible for preparing socioeconomic, cultural, and environmental justice portions of *environmental impact statements and environmental assessments (EA) for DOE, the National Nuclear Security Agency (NNSA) ….Ms. Nemeth prepared strategic plans for several program offices with NNSA* and DOE …" Since preparing these documents for DOE/NNSA is what she does for a living, can Ms. Nemeth really be "independent" and "objective" in her analysis of alternatives to an NNSA-sponsored weapons production initiative?

Another listed co-author of the report, SAIC Senior Project Manager Peter F. Riehm, "has over 16 years of experience in support of the NNSA Office of Defense Programs (DP)…*Dr. Riehm has been the SAIC Project Manager [for] large, multi-task order contracts supporting the NNSA since 2001*. (This conflict is obvious and requires no further comment)

"Since 2004," SAIC Senior Project Engineer William I. Toman has "conceived and produced a procurement program for $4.6 billion or uranium to support long term production of tritium for DOE-NNSA …Client is reviewing implementation of the program." Can Mr. Toman reasonably be expected to render independent views that are at odds with the desires of senior NNSA managers who are reviewing implementation of his program?

And finally, the sixth and last member of this nominally "independent' and "objective" SAIC team, James R. Chapman, is a consultant "subcontractor to SAIC" who "has *provided program management support, mentoring, and training to the National Nuclear Security Administration* to develop project charters, program plans, cost estimates and budgets, resource-loaded schedules, earned-value tracking, and issue papers for the Planning, Programming, Budgeting, and Evaluation system.'' As an SAIC consulting subcontractor scrounging for work, Mr. Chapman is possibly in an even more compromised position, as he must please both NNSA and SAIC senior managers by

delivering an assessment that (a) affirms NNSA's desired outcome, (b) ensures that SAIC's assistance will be sought again on future contracts.

NRDC would like to take the opportunity, at this juncture, to remind GAO/NNSA that Courts have disallowed the delegation of public duties [such as the review of alternatives in a NEPA document] to conflicted private parties. The Fifth Circuit Court of Appeals in Sierra Club v. Sigler, 695 F. 2d 957 (1983), stated,

> "[A]n agency may not delegate its public duties to private entities, see *Lynn*, 502 F.2d at 59, particularly private entities whose objectivity may be questioned on grounds of conflict of interest."

The *Council on Environmental Quality* has issued implementing regulations for NEPA which disallow the use of interested parties to conduct NEPA analyses. In fact, the regulations require contractors involved in the preparation of a statement to execute a "disclosure statement…specifying that they have no financial interest in the outcome of the project." [40 C.F.R. § 1506.5(c).]

In addition to the obvious, ongoing, and very large financial interest SAIC has in not displeasing either GAO and NNSA—and therefore jeopardizing its privileged position as a "large multi-task order" contractor for NNSA, and/or its special status as a "GSA Environmental Services" schedule contractor—KCP project records show that sometime between November 7 and Nov. 27, the registered vendor "Vernon Reid," representing "Science Applications International Corp." (DUNS No. 054781240), became a controlled access "Planholder" of "National Nuclear Security Administration SFO 7MO2054" (SFO stands for "Solicitation for Offer") released by GSA on November 7, 2007. This constitutes a clear and *disqualifying* conflict of interest, as this solicitation concerns the same third-party finance project for a new KCP at the Botts Road site that SAIC *had just revalidated* for GSA/NNSA in a supposedly "independent" and "objective" analysis. SAIC's possession of these limited access bidder documents clearly indicates a *direct* SAIC business interest in the outcome of the environmental review, for which it was purporting to prepare "independent" and "objective" analysis.

<u>In light of the above evidence, GSA and NNSA must remove any references to the conflicted SAIC report from any final EA</u>, should one be issued, and place a prominent disclaimer on the cover page of the PDF copy accessible via the GSA website, as follows:

> "WARNING: THIS REPORT WAS PREPARED IN VIOLATION OF GOVERNMENT REGULATIONS GOVERNING CONFLICTS OF INTEREST IN THE PREPARATION OF DOCUMENTS USED IN THE NEPA PROCESS."

III. The Baseline Assumptions and Analysis of the SAIC Study Are Deeply Flawed and Arbitrarily Exclude an Obviously Reasonable Re-location Alternative Analyzed in Previous DOE NEPA Documents.

The corporate-level and individual conflicts of interest involved in SAIC's performing this "business case assessment" are alone sufficient to fatally compromise its independence and objectivity, and hence the validity of its conclusions. But as one might suspect from a hired-gun study tailored to reach predetermined conclusions sought by the sponsoring agency, its baseline assumptions are arbitrary, erroneous, and overtly and needlessly prejudicial to the case for consolidation of the KCP mission activities within *the existing NNSA laboratory footprint* in New Mexico, principally at Sandia National Laboratories in Albuquerque.

For example, the SAIC study mistakenly (but we believe *purposefully*) assumes that re-location to Albuquerque of remaining KCP functions, even after implementing increased "outsourcing," would still require "*comparable* GSA land acquisition, financing, development, and lease arrangements" to those outlined for the preferred alternative in the KCP-EA, including "a desirable [private] plot of 100-140 acres with the same level of utilities and environmental advantages as the proposed KCRIMS site." [p. 26].

The study failed to model the most advantageous and obvious option – consolidation *within* Sandia-NM's 2,842 acre, government-owned site. In fact, Sandia has recently completed a $518 million, 400,000 square foot complex that is devoted to microelectronics R & D and production of components for nuclear weapons systems and other national security needs. The ostensible need for this facility was predicated in part on the assumption that continuing and possibly extensive modernization of the non-nuclear components of future nuclear weapons systems would be required in the future, but political and national policy trends are taking the nation in a different direction, toward continuing reductions in nuclear weapons and away from continuing modernization of the US nuclear weapons stockpile. This means that the new MESA facility is likely to have significant unused capacity for its primary mission – sustaining the US nuclear weapons stockpile -- that could be directed to some of KCP's relocated manufacturing missions.[1]

Even if one assumes that this is not the case, the relocation analysis performed for the *1996 Stockpile Stewardship and Management PEIS*—when planning guidance for the future size of the active nuclear weapons stockpile was *higher* than it is today—showed that relocation of the non-nuclear fabrication mission to SNL-NM could be accommodated with new construction of "approximately 625,000 square feet," located on "22 acres of available land" directly east of Sandia Technical Area I and *within* the

[1] This is not to say that Sandia's management has no other goals in mind for the use of MESA's floorspace that lie outside its primary NNSA mission. It clearly does. But using the nuclear weapons program as a kind of Christmas tree on which to hang other kinds of research is getting to be a bad habit with NNSA's weapons laboratories and production sites that have excess capacity and personnel, particularly when the outlook for the nuclear weapons business is no longer as brisk as it once was.

Kirtland AFB site boundary. "Minor modifications" to existing SNL buildings "would yield an additional 55,000 sq. ft. of work space." [SSM PEIS, 1996, Vol. 1, p. 3-54]

The resulting total of 680,000 sq. ft is *dramatically less* than the 1.0 – 1.55 million square ft. proposed for the new KCP at the Botts Road site, and the 22 government-owned acres within an existing secure military reservation is *dramatically less* than the "100-140 acres" of insecure commercial property that is deemed the starting point for the trumped-up SAIC analysis. This is a striking disparity with the SAIC report, and it must be explored in a thorough, unbiased analysis of reasonable relocation alternatives, either as part of the PEIS, or as part of a freestanding EIS.

Similar disparities exist in the analysis of waste management requirements. According to the draft EA, the new privately-developed KCP at the "greenfield" Botts Road site in Kansas City will require construction of an entirely new waste management infrastructure, including new sewer lines, as none of this exists currently at the site. However, at SNL "existing waste management infrastructure can be applied to manage and treat all anticipated waste streams from this [KCP relocation] alternative…The wastes anticipated from the estimated workload would not require significant modification of the existing SNL waste management infrastructure." [SSM PEIS, Vol. 1, p. 3-57].

The SAIC study completely misses this and other significant cost differences by assuming that implementation of the KCP relocation project in Albuquerque must mirror the commercial property development deal proposed for the Kansas City site. But that deal is not a given. It is not mandated by any act of Congress, government regulation, or court decision. The terms of that deal are voluntary, and entirely self-generated by GSA/NNSA officials in Kansas City and Washington. Thus they do not and cannot bound the range of objectively "reasonable" alternatives that must be fairly considered as part of the NEPA evaluation process.

Curiously, the SAIC report contains no discussion of or even references to DOE's *Stockpile Stewardship and Management PEIS* regarding its analysis of the KCP relocation issue. In fact, the SAIC report contains no references or footnotes of any kind for the data and assumptions contained in the study, and no list of sources consulted. Thus there is no basis for believing that the conclusions of the report have any grounding in actual facts, while, as noted, there is strong evidence pointing to the opposite conclusion, namely, that the report is merely an elaborate wax job designed to apply retroactively a sheen of analytical plausibility to agency decisions already made. Such conduct, we note, if proven in court would represent an impermissible abuse of the NEPA statute, and a gross misuse of public funds.

Rather than taking heed of the many comments received during scoping urging preparation of EIS and/or reintegration into NNSA's Supplemental PEIS, GSA's and NNSA's joint decision was to press ahead with a thin and poorly documented EA that arbitrarily excludes analysis of significant alternatives and connected environmental impacts. Suffice to say, there can be no legitimate dispute here that these decisions have

been "highly controversial." 40 C.F.R. § 1508.27(b) (4). As the Ninth Circuit explained in NPCA, this significance factor is triggered where "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor . . . or there is a substantial dispute (about) the size, nature, or effect of the major Federal action" – which means evidence that "casts serious doubt upon the reasonableness of [the] agency's conclusions." 241 F.3d at 736 (emphasis added). There can be no doubt that this significance factor for preparation of an EIS is satisfied, as virtually every aspect of this GSA/NNSA proposed action is in dispute, down to its fundamental constitutionality as an improper aggrandizement of federal executive power at the expense of the enumerated congressional tax and appropriation powers to "raise and support armies" and "provide for the common defense." [Sec. 8]

IV. NNSA and GSA Have Violated NEPA's Injunction Against Undertaking Agency Actions that Would Tend to Predetermine the Outcome of NEPA Analysis

Arbitrary assumptions abound in the SAIC study. It rejects out of hand that KCP relocation to SNL-NM could be accomplished by a "line-item construction project" on Federal property – the normal path for acquiring a new and secure nuclear weapons facility. The reason given for this rejection is embarrassingly circular: The SAIC report opines, "Obtaining approval and Congressional funding for a line item construction project is a protracted process that would push the potential move-in date beyond that required to capture potential savings." [SAIC, *Relocation Business Case*, Rev. 2, Oct. 18, 2007, p.37]

While we may not fully comprehend the meaning of this curious statement, we strongly suspect it is an oblique reference to the fact that NNSA/GSA have already deferred, and are continuing to defer necessary maintenance projects at the Bannister Complex in anticipation of their privately-financed flight from the facility. Therefore in the view of the NNSA's own SAIC analysts, any major delay now to accommodate the messy modalities of the democratic process could trigger the need to make these critical KCP improvements, thereby pushing the move-in date "beyond that required to capture the potential savings" that have allegedly accrued from deferring this maintenance to date. This interpretation is confirmed by an acknowledgement elsewhere in the SAIC report, in a section entitled "Risk Identification":

> "*When KCRIMS planning* [i.e. the NNSA's prior name for what is now the EA's "Preferred Option"[2]] *was well underway, KCP began deferring maintenance at the Bannister facility to capture near-term savings from avoiding investments that would be unneeded upon vacating the site*. As a result, there is a considerable backlog of maintenance actions that have been delayed with the expectation that the Bannister facility would be shortly closed. KCP estimates a backlog of approximately $200 million deferred maintenance through 2014 in those areas normally funded by Readiness in Technical Base and Facilities (RTBF) and Facilities and Infrastructure Recapitalization Program (FIRP)." [SAIC, 2007, p. 27]

[2] The acronym KCRIMS stands for "Kansas City Responsive Infrastructure Manufacturing and Sourcing."

We hasten to note that the preceding paragraph constitutes significant indisputable evidence, in a report ordered and issued by NNSA itself, of just the sort of premature and irreversible commitment of agency resources to a proposed action, prior to completion of the NEPA process, which is clearly barred by CEQ regulations and judicial precedent.

CEQ's NEPA regulations provide that "[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision." 40 C.F.R. § 1502.2(f). Moreover, an EIS must be "prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made . . . ." 40 C.F.R. § 1502.5. Numerous courts have held that the same standards apply to an EA.

In this case, if NNSA's carefully laid plan to under fund and then abandon the Bannister Complex does not come to fruition on schedule in 2010-2012, a huge deferred maintenance bill will likely come due. This heavily stacks the deck in favor of the agency's preferred option before even a word of NEPA analysis has been prepared. The agencies have effectively "predetermined" their favored outcome for the NEPA analysis by racking up a $200 million deferred maintenance bill that can only be avoided by prompt implementation of its preferred option. We have litigated many NEPA cases over the years, and this fact pattern literally screams "predetermination."

But the SAIC analysts have a creative use for this illegal conduct: *pin the big deferred maintenance bill on the Albuquerque move option,* and thereby undermine its "business case" by claiming it would prompt delays sufficient to "lose" the "deferred maintenance savings" arising from purposeful neglect of the Bannister Complex.:

> "In the event that an Albuquerque move is brought into the timeline, with both [sic] the planning delay, extending moving time and production hiatus, some deferred maintenance areas might require unplanned or emergency repairs to be made to the Bannister facility and related equipments. [SAIC, 2007, p. 27]

Of course, none of this contorted reasoning changes the real prospective long-term budget savings – in greatly reduced administrative overhead, site security, and land acquisition costs, reduced construction requirements, reduced finance costs, reduced personnel travel and shipping costs, lower product development costs, and smaller environmental footprint – that could very likely be obtainable from consolidating the remaining KCP production missions at Sandia National Laboratory. Staying longer at the Bannister Complex, as the SAIC study suggests might be required to implement *its* Sandia option, merely shifts the realization of these prospective savings farther out in time. *It does not eliminate them*. And there may even be ways to mitigate the short-term price of doing the right thing for the longer-term.

One obvious solution to KCP's self-imposed deferred maintenance backlog, not examined in the SAIC study, would be to limit KCP's production output during the transition period to essential stockpile maintenance items only, while deferring both additional stockpile Life Extension Programs (LEPs) *and* capital improvement projects

linked to those programs, until full-scale consolidated component production could resume at SNL-NM. Since the necessary extent of current and planned LEPs are currently in doubt and will be reviewed in the course of the nuclear policy reviews recently directed by Congress, the next 2-3 years could well be a *good* time to dial back on production at the Bannister Complex, and therefore possibly *an optimum time* to make the move to Sandia-NM.

The SAIC study also summarily dismisses a second "facility option" – "commercial construction and lease-back on Federal property," on the grounds that "it is an untried concept, especially for a facility of this size." This odd piece of misinformation would certainly be news to managers and staff of NNSA's own *Y-12 National Security Complex* in Oak Ridge Tennessee, 1100 of whom moved in July 2007 into the privately-owned and developed "Jack Case Center," which was constructed *inside* the site's security perimeter on federal land transferred to the private developer, and then leased-back to the site contractor, BWXT. ["Grand Opening – Summer 2007," Y-12 Report, Fall 2006, Vol. 3 and "Nuke Plant has a 'big, big, day,'" Knoxville News Sentinel, July 10, 2007.]

Since "practically speaking," according to the SAIC analysts, "the first two facility options are not considered viable," the option for the Albuquerque move cost comparison becomes (conveniently) "*the same arrangement as at KCRIMS*, in which GSA is working with a developer who will build and maintain the facility, with annual lease payments made by the tenant to GSA" [SAIC, Rev. 2, p. 37] According to the SAIC study, the annual lease payments for the proposed privately-financed KCP, which include buildings operation and maintenance and GSA's "management fee" as the middleman in the transaction, will total $912 million through 2030 in constant FY 06 dollars [Table, p. 15]. This is $412 million more than the reported $500 million "construction budget" for the new buildings, and thus hardly a bargain for the taxpayers.[3]

If the government paid for the new "campus" up front, and incurred no additional costs for construction financing and private land acquisition, the cost to the taxpayer for the buildings could well be considerably less than $500 million. In fact, GAO and NSSA appear to have chosen the most expensive route to "transforming" KCP's non-nuclear production capabilities. Its chief, and perhaps only "advantage" is the apparent ability to proceed with the new KCP project without obtaining an up-front appropriation covering its full acquisition cost.

[3] These lease payments do not cover the "Readiness in Technical Base and Facilities/Maintenance costs" for the production lines, computers, and other equipment that NNSA/Honeywell would install in these new buildings, and these costs which are expected to add another $1.8 billion (in constant FY 06 dollars) to the 20-year cost of the project., according to the SAIC study. So paying an additional $20.6 million/yr – and more each year in escalated "then-year" budget dollars – for some private property management firm rather than the operating contractor, to change the light bulbs and wax the floors, seems a rather dubious privilege.

V. The Matter of Possibly Willful Violations of the *Anti-Deficiency Act*

We say "apparent" ability to proceed because this entire private finance scheme—which is geared to magically transforming an agency's acquisition of new capital assets, normally requiring Congressional line item budget approval, into a 20 year stream of invisible lease payments hidden in the agency's aggregated operations and maintenance budgets—appears to us to be a violation of the *Anti-Deficiency Act*. The act is violated whenever a government official obligates the government to spend money, now or in the future, for which there is no matching Congressional appropriation in their budget *at the time the financial obligation or commitment to spend funds is made*. According to the General Accountability Office:

> The fiscal principles underlying the Antideficiency Act are really quite simple. Government officials may not make payments or commit the United States to make payments at some future time for goods or services unless there is enough money in the "bank" to cover the cost in full. The "bank," of course, is the available appropriation.
>
> Violations of the Antideficiency Act are subject to sanctions of two types, administrative and penal. The Antideficiency Act is the only one of the title 31, United States Code, fiscal statutes to prescribe penalties of both types.
>
> An officer or employee who violates 31 U.S.C. § 1341(a) (obligate/expend in excess or advance of appropriation), section 1342 (voluntary services prohibition), or section 1517(a) (obligate/expend in excess of an apportionment or administrative subdivision as specified in an agency's regulation) "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. §§ 1349(a), 1518.
>
> In addition, an officer or employee who "knowingly and willfully" violates any of the three provisions cited above "shall be fined not more than $5,000, imprisoned for not more than 2 years, or both." 31 U.S.C. §§ 1350, 1519.
> [http://www.gao.gov/ada/antideficiency.htm]

While GSA officials now have the authority to negotiate various types of innovative private financing arrangements, they do not have the authority to commit the government to what are effectively *new capital asset acquisitions*, under the guise *of long term capital leases* (often misrepresented as annual operating leases), without having a matching Congressional appropriation for the full cost of the long-term capital lease in the year in which the obligation is incurred. Since the FY 2008 budget has already been agreed upon, and contains no appropriation covering the $912,000,000 cost of the "20 Year Firm" lease obligation for the new KCP campus on the Botts Road property, neither GSA nor NNSA may not enter into any such agreement, explicit or implied, in FY 2008.

While not entirely a settled question, we doubt that NRDC or other citizen's organizations are likely to gain standing to sue GSA and NNSA directly for violating the *Anti-Deficiency Act* in the course of their efforts to "lock-in" their preferred option in advance of both a congressional appropriation and the required NEPA analysis.

But if GSA/NSSA do not cease and desist immediately from their ongoing and planned violations of NEPA, we can and will refer the evidence we have gathered of *Anti-Deficiency Act* violations to the DOE Inspector General and to the Comptroller General of the United States, who do have the inherent authority to pursue this matter, and to seek fines and jail time for those officials who appear to have been involved in "willful violations." It is our view that the current Administration's interpretation of OMB rules and guidelines have strayed very far from the historical norms for scoring various types of government expenditures, and that a new Administration may not take the same benign view toward the breakdown of budget-scoring discipline that has characterized the present Administration. Government officials who continue to discount this possibility do so at their own risk.

The Congressional Budget Office (CBO) has raised a number of serious concerns about agencies resorting to the kind of private financing proposed for GSA's "Preferred Option" as outlined in the KCP-EA. According to CBO, "Third-party financing arrangements have a number of negative consequences. In general, projects are more costly to the government when they use such financing." Particularly relevant in the instant case is CBO's concern that "third party arrangements may also *skew decisions* about how to allocate budgetary resources *by giving preferential treatment to investment projects on the basis of their method of financing rather than their relative merits."*

Indeed, this is precisely the dysfunctional behavior being exhibited by GAO/NNSA in the present case, as they go to great lengths to skew the NEPA decision process, and even NNSA's own capital improvement budget process at the Bannister Complex, to favor the private-finance option, and to penalize the consideration of more cost-effective reasonable alternatives.

And finally, of considerable concern to NRDC and anyone concerned about the current state of our democracy, CBO notes that "third-party financing allows agencies to raise capital in private markets *without the full scrutiny of the Congressional appropriations process*." ["Third-Party Financing of Federal Projects," CBO Economic and Budget Issue Brief, June 1, 2005, p. 1, emphasis added]

Indeed, the prospect of putting together a third-party finance deal in this case appears to have induced GAO and NNSA to duck not only the congressional appropriations process, but the legally required NEPA process as well. And while we are on matter of agencies ducking their legal obligations, <u>there remains the very serious concern that GSA and NNSA, in their haste to leave the Bannister Complex, will simply abandon the task of cleaning-up the old KCP plant</u>.

VI. The Current KCP-EA Unlawfully Segments NEPA Analysis of Bannister Site Decontamination, Demolition and Environmental Remediation from the Analysis the KCP Transformation Alternatives

The Draft KCP-EA states "…disposition and cleanup activities for the existing NNSA facility at the KCP are not part of the current proposed action and will be addressed in appropriate future environmental analyses." The EA offers no justification for this view, which flies in the face of the common sense perception that construction of a new KCP, and cleanup of the old Bannister site the agencies intend to leave behind, are inherently "connected actions." The threat of an increased dispersion of underground contaminants under the existing KCP facility, now protected from surface water intrusion by the vast roof structures of the KCP facility, increases once these buildings are decontaminated, and torn down, or allowed to decay in a manner that increases surface water intrusion.

We find it imperative, therefore, for the ongoing *Complex Transformation Supplemental PEIS* and/or a freestanding EIS to consider alternatives for the remediation of the existing site, including which federal and state agencies will have continuing jurisdiction over and financial responsibility for cleaning up the site. This analysis must provide informed estimates of the cleanup timescale, its technical requirements and costs, and assess the environmental hazards and likely disposal pathways for wastes generated by the cleanup.

The SAIC study supporting the draft KCP-EA put these cleanup costs at $287 million [SAIC, 2007, p. 22], and given the history of such cleanup programs, that estimate is probably low. Hence the total 20 year cost to the public for "transforming" the KCP to the new privatized site is at least $3 billion: $912 million for the 20-yr capital lease on the new "campus," + $287 million for the old KCP cleanup, + $1.8 billion to maintain and equip the new factory, plus any additional public expenditures (roads, sewer connections, culverts, etc.) that are required to accommodate the plant in an environmentally safe manner at its new location. A federal action on this scale, with these types of connected impacts, is a "major federal action" that clearly rises to the level requiring consideration in an EIS.

As you know, an agency may not segment its analysis, and thus avoid preparing an EIS, by breaking down a project in smaller components, as GSA and NNSA are proposing to do by deferring analysis of environmental cleanup alternatives for the Bannister Complex and how the existing contamination will be controlled once NNSA and GSA depart the site. [Kern v. Bureau of Land Mgmt, 284 F.3d 1062, 1077 (9th Cir. 2003).]

An EIS is also required when the "environmental effects" of a planned cleanup are "highly uncertain," or when there are "substantial questions" regarding "the significance of the effect" a proposed action will have "on the *local* area." National Parks & Conservation Ass'n v. Babbitt ("NPCA"), 241 F.3d 723, 731 (9th Cir. 2001); Anderson v. Evans, 371 F.3d 475, 489-92 (9th Cir. 2004); Anderson, 371 F.3d at 492 (emphasis in original).

It is well-established that "(a)n EIS *must* be prepared if 'substantial questions' are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor." Ocean Advocates, 402 F.3d at 864 (emphasis in original); Blue Mountains Biodiversity Project, 161 F.3d at 1212 (EIS required if project "may have a significant effect' on the environment") (emphasis added); Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998); Found. for N. Am. Wild Sheep v. USDA ("FNAWS"), 681 F.2d 1172, 1178 (9th Cir. 1982). Thus, in order to prevail on a claim that an agency has violated its statutory duty to prepare an EIS, a "plaintiff need not show that significant effects *will in fact occur* [but rather] raising substantial questions whether a project may have a significant effect is sufficient." Ocean Advocates, 402 F.3d at 864-65 (emphasis in original) (other citations omitted).

In addition, the Council on Environmental Quality ("CEQ") – an agency within the Executive Office of the President -- has promulgated NEPA implementing regulations that are binding on all federal agencies. See 40 C.F.R. § 1500.3. These regulations provide for an agency to prepare an EA where it is uncertain whether an EIS is required, id. § 1501.4(b), but they also set forth a series of factors that govern whether an action may have "significant" environmental effects, in which case an EIS *must* be prepared. Id. § 1508.27. These factors include:

- "The degree to which the effects on the quality of the human environment are likely to be highly controversial;"
- "The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks";
- "Whether the action is related to other actions with . . . cumulatively significant impacts;"
- "The degree to which the proposed action affects public health or safety"; and
- "Whether the action threatens a violation of Federal [law] imposed for the protection of the environment." Id. (emphasis added).

The Ninth Circuit has explained that the presence of any one of these factors "may be sufficient to require preparation of an EIS." Ocean Advocates, 402 F.3d at 865.

It hardly seems necessary to point out that the effects on the human environment, from "transforming" KCP's non-nuclear manufacturing facilities and infrastructure with a new privately-owned "campus" at a new greenfield site," are "highly controversial," generating hundreds of public comments and sparking public protests in Kansas City. The controversy stems not only from the intimate and intrinsic association of KCP's activities with *the continued rebuilding and possible use of nuclear weapons*, which many people regard as deeply immoral in light of their devastating impacts on the human environment, but also because the proposed action is associated with the abandonment of a large heavily contaminated site by the two agencies that currently occupy it, with future responsibilities for containment of the contamination and cleanup left "highly uncertain".

Moreover, the proposed action is clearly and functionally related to the national complex that continues to maintain, design, develop, test, evaluate, and rebuild thousands of nuclear weapons, and there is no debate that these activities have "cumulatively significant impacts." The proposed departure of the agencies from the contaminated

Bannister Complex obviously "affects public health and safety," as do the increased traffic and waste management issues at the proposed new site. Finally, the actions of GSA and NNSA not only "threaten" to violate laws protecting the environment, as detailed earlier in these comments, but they have already done so. So in fact not just one, but all of the C.E.Q. factors likely to trigger preparation of an EIS are met in the present case.

Specific Comments on the Draft KCP-EA

Since NRDC strongly objects to GSA's and NNSA's use of this EA to illegally segment NEPA review of it non-nuclear production activities from NNSA's ongoing *Supplemental PEIS on Complex Transformation*, and from consideration of inherently connected environmental remediation activities for the facility it is vacating, we will not expend a great deal of effort delineating the particular weaknesses of this document that render it completely inadequate. Suffice it to say, there are many such weaknesses, and here we will identify only a few of the most glaring:

Page iii – 3) Air Emissions: This paragraph states, "the *elimination* of chrome plating operations would result in a cumulative annual reduction of approximately 28% from current facility air emissions," but elsewhere [p. viii] the EA refers to "chrome planting" (sic) being "outsourced" under the preferred option and Alternatives 2-4. Of course, "outsourcing" of chrome plating operations would not necessarily result in their "elimination," and the EA contains no data showing this to be the case. To where is this operation being outsourced, and what are the local environmental impacts? Also it is not clear why "the use of chrome plating lines and associated pollution control equipment" "will continue" under Alternative 1, but not under any of the other alternatives? Further, in Table 1 (p.*v*), the formulation is "chrome plating *may* continue" under Alternative 1, which is different. Which is it, and what is the origin of the uncertainty?

Finally, on this same matter of chrome-plating operations, the claim is made on page 39 that the amount of water usage (and subsequent wastewater discharge) for regulated industrial processes would be reduced by approximately 12,800 gallons per day (primarily due to the elimination of the on-site chrome plating operations. Again, this statement is true only if these operations have been *eliminated* rather than "outsourced" to another facility in the region, in which case the environmental impacts are merely being displaced.

In the latter case, *NEPA requires consideration of connected actions*, and therefore the required EIS must include an analysis of the environmental impacts attributable to KCP's "outsourcing" operations. The Draft EA contains no information on this subject, although it is the factor most often cited for enabling the reduced size, work force, and operating expense of the proposed new plant. Also, given that this new plant will not be pickling cucumbers, but rather manufacturing some of the most highly sensitive weapons technology in the entire world, the off-hand treatment of "outsourcing" to commercial suppliers many of the parts formerly produced at the secure KCP surely merits consideration in an EIS.

-- What are the environmental impacts of the production being dispersed to commercial suppliers, where will these impacts be felt?

-- What are the risks that this sensitive technology will become more exposed to theft, sabotage, or espionage as a consequence of this outsourcing?

-- What would be the enabling impacts on foreign nuclear weapons programs if they were able to gain access to the designs or actual units of these components?

Again, these weighty matters cannot be assessed in a mere EA, but require a full-blown EIS, with a classified appendix if necessary evaluating the most sensitive national security risks involved in "outsourcing" nuclear weapons components to private commercial producers.

Page 1 – 1.0 Purpose: "The National Environmental Policy Act (NEPA) requires Federal officials to consider the environmental consequences of proposed actions prior to making decisions." This is a woefully incomplete description of an agency's obligations under NEPA, which are at once broader and more specific than merely "considering environmental consequences before making decisions." For example, NEPA requires that such consideration must be *timely*, and that analysis must be provided early enough in the process of formulating an agency's proposal for action that it can meaningfully inform the consideration of alternatives that would minimize adverse impacts and improve government decision-making, as opposed to serving as an *ex post facto* rationalization for decisions already made. NEPA analysis must consider *the full range of reasonable alternatives* to a proposed action that could accomplish the agency's purpose and need for action. It must consider *connected and cumulative impacts*.

NRDC is in possession of detailed information demonstrating that this EA is not timely, and that it has been developed primarily to justify decisions already made.

P. 3 the EA states, "The proposed facility would be at least 50% smaller in size than the current facility, resulting in reduced maintenance and energy costs." What is the size of the current facility, what is the size of the proposed new facility, and what is the standard used for comparison? Without this information, this statement is meaningless.

The EA (p. 8) states that "the current facilities are approximately 3 million square feet, but pursuant to the 1996 SSM-PEIS and ROD, the KCP footprint was to be reduced from 3.2 million sq. ft. to 1.8 million sq. ft. by October 2003. Does the EA's use of the "3 million sq. ft." figure mean that this mandated reduction never achieved in practice. If so, why? What is the source of the discrepancy? The EA should explain its origins and resolve it, and provide definitive data on the floor space currently utilized by KCP at the Bannister Complex, and on the space required for each of the other options.

p. 6 - 2.0 Description of Preferred Option. …"GSA *would* issue a Solicitation for Offers to the real estate development community…" This statement is misleading, and should be revised to reflect that GSA *has already issue*d this solicitation, and actually did so a month *before* announcing the availability of this draft EA in the *Federal Register*. This sequence of dates in fact raises the serious question whether this EA meets NEPA's

timeliness standard, and indeed whether the contents of this EA have been effectively predetermined by the agency's contract solicitation activities, conducted well in advance of public comment on this EA.

p. 8 In connection with this Proposed Action, the General Services Administration (GSA) sought early expressions of interest for a build-to-suit lease manufacturing facility consisting of approximately 1,035,000 square feet of rentable space with 2,100 parking spaces. In addition, GSA has sought options for expansion space up to 517,500 square feet of rentable space together with another 400 parking spaces. The total requirement could therefore be up to 1,552,500 square feet of rentable space with 2,500 parking spaces. The EA (p. 8) states, "The proposed facility would cover approximately 1 to 1.55 million rentable square feet, and provide up to 2900 surface parking spaces."

These figures encompass a fairly wide range – a difference of 550,000 square feet and 800 parking spaces, and an EIS should indicate what proposed activities or planning contingencies account for these differences?

p. 8. "a workforce reduction of approximately 900 employees (FY 2005 baseline) would be enacted …." What is the point of measuring a workforce reduction from a three year old baseline? Why the use of this fiscal year?

p.12 - 3.3.2 Alternative No. 3 – This discussion lacks information on the associated workforce reduction, and the reduction in floor space from the "No Action" baseline, which itself is not clear.

p.14.- 3.4.1 This paragraph should state when GSA acquired an option to purchase and develop the Botts Road/Highway 150 property.

.p. 17- 3.4.2 "…the NNSA Office of Transformation prepared an independent and objective assessment of the business case for moving non-nuclear production …. As discussed at considerable length above, this statement is false. The other statements on this page relating to the SAIC assessment likewise give a false or misleading impression of the Sandia-NM alternative. A forecast mean difference of $289 million in the net present value of future project cash flows cumulated over 22 years is largely a function of two arbitrary and prejudicial initial assumptions, namely, that the Sandia option would have to exactly mimic the high cost features of GSA's preferred Kansas City private-finance option, and that the Sandia option would kick in 3.5 years later than the KC proposal, generating a big project "debt" from remaining longer in the high maintenance Bannister Complex that must be recouped later on. Since the KC project in this analysis gets a head start, and discounted cash flow analysis values a dollar received this year more than one received three years from now, the future savings from the NM project never "catch-up" with those of the KC project within the period of interest, which runs in this analysis until 2030. As noted earlier, using more realistic initial assumptions regarding the consolidation option in Albuquerque, along the lines indicated in the 1996 SSM-PEIS, would lead to radically different "business case" results.

Finally, the draft KCP-EA does not explicitly address why a further downsizing in place, combined with modest upgrades to a portion of the existing KCP, and the same outsourcing measures as the other alternatives, would not comprise a reasonable alternative worthy of detailed analysis. Indeed, this is an alternative that appears to have been overlooked, but in light of the uncertainties that pervade the future outlook for the entire NNSA nuclear weapons enterprise, it may in fact be a "reasonable" and realistic one, at least for the short term, until the strategic reviews now in progress can lead to the establishment of a more durable consensus on the future of the NNSA Complex, and other consolidation options can be restored to their rightful place in the NEPA analysis of alternatives.

In light of the gaping analytical deficiencies, and multiple agency violations of government regulations identified in these comments, GSA/NNSA have but two options before them that could, if pursued immediately with diligence and good faith, restore them to the path NEPA compliance. Whether or not they proceed to completion of this EA, they must either:

(a) Restore the analysis of all reasonable alternatives for transforming and re-locating KCP non-nuclear manufacturing activities, including analysis of all the connected and cumulative impacts flowing from this action, to its rightful place in the ongoing Supplemental PEIS, from which it has been illegally excluded, or

(b) Prepare a freestanding EIS that accomplishes the same objectives as (a), and is available in final form for consideration, in tandem with the *Final Transformation SPEIS,* in any Record of Decision to be taken on the future consolidation and transformation of the Nuclear Weapons Complex.

In sum, NNSA and GSA have already engaged in serious violations by NEPA, by:

(1) Arbitrarily and capriciously segmenting the NEPA analysis of reasonable alternatives for transforming, consolidating, and re-locating NNSA's non-nuclear manufacturing activities from an ongoing Supplemental PEIS process in which they could easily have been included;

(2) Depriving the citizens of the Kansas City area their due process rights under the APA and NEPA to participate in public hearings on the Scope and Draft of a complex wide SPEIS on Transformation of NNSA's Nuclear Weapons Complex. Kansas City was the only site and host city thus excluded.

(3) Engaging in a wide array of illegal actions, ranging from employing contractors with severe conflicts of interest to prepare NEPA documentation, to issuing Solicitations for Offers and holding bidders conferences on their Preferred Alternatives before completing a draft EA and issuing it for public comment, to deliberately deferring maintenance at the old KCP plant to artificially inflate the budgetary reward for promptly abandoning KCP for their preferred option, thereby engaging in a pattern of conduct which has as its object to rig the NEPA process in favor of its preferred option.

(4) Arbitrarily and capriciously segmenting analysis, to unspecified later NEPA documents, of requirements for containment and remediation of contamination at the existing KCP and Bannister complex after they depart the site; and

(5) Misusing NEPA documents and government funding set aside for NEPA analysis to falsely discredit, and preclude equitable consideration of, "reasonable alternatives" for consolidation of KCP capabilities at the Sandia National Laboratories-NM.

Numerous federal judges have set aside deficient EAs and FONSIs based on the agency's failures to satisfy the basic requirements of NEPA. See, e.g., NRDC v. Dep't of Energy, 2007 WL 1302498 (N.D. Cal. May 4, 2007) (permanently enjoining Department of Energy project based on deficient EA). In light of the manifest deficiencies and violations of law detailed in these comments, should GSA and NNSA, and their erstwhile "partners" in the private sector, elect to proceed with a FONSI and subsequent implementation of the preferred alternative described in this EA, please be advised that they do so at their own peril.

We are of course amenable to discussing these matters with you or representatives of NNSA to clarify these comments, or to answer any questions you may have. My contact information is below. Should you desire to contact me, please note that I will be out of the country from January 14 -22.

Thank you for affording us the opportunity to comment on this draft KCP-EA, and we hope you have found the information contained herein to be useful.

Sincerely,

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