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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

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KEEP YELLOWSTONE NUCLEAR FREE, :
ENVIRONMENTAL DEFENSE INSTITUTE, :
and DAVID McCOY, : _____ Civ. _____ ()
: :
Plaintiffs, :
: :
- against - :
: :
THE UNITED STATES DEPARTMENT OF :
ENERGY and SAMUEL W. BODMAN, :
SECRETARY, UNITED STATES DEPARTMENT :
OF ENERGY, :
: :
Defendants. :
----- X

Complaint for Injunctive Relief

Plaintiffs, Keep Yellowstone Nuclear Free, Environmental Defense Institute and David McCoy, by their attorneys Carter Ledyard & Milburn LLP for their Complaint in this action, allege as follows:

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), seeking to enjoin the defendant Department of Energy ("DOE") from improperly withholding or redacting documents requested by the plaintiffs. The documents in question relate to the engineering and seismic safety of the Advanced Test Reactor (the "ATR"), a nearly 40-year old nuclear reactor operated by the Department of Energy at the Idaho National Laboratory (formerly called the Idaho National Engineering and Environmental Laboratory).

2. The ATR has a history of serious safety problems and seismic vulnerabilities both known and unknown. Nonetheless, the DOE has proposed to extend the operation of the ATR, already well beyond its life-expectancy, for at least another 40 years to test nuclear materials and produce one of the deadliest substances known to man, Plutonium-238 ("Pu-238").

3. The documents improperly withheld are believed to contain information relating to the ATR's safety shortcomings and the potential severe consequences of an accident at the ATR. In violation of FOIA, the DOE has engaged in a pattern of delay and obfuscation aimed at concealing from the public information that will expose the chronic problems of the ATR, and the threat that it may pose.

4. If a severe accident were to occur at the ATR, two of the nation's most cherished national parks, Yellowstone National Park and Grand Teton National Park, as well as the health and safety of tens of thousands of people living in southeastern Idaho

and western Wyoming, would be at risk. Therefore, it is imperative that the withheld documents be released to the plaintiffs. The public has a right to be fully informed of the grave risks associated with continued operation of the ATR, and the ramifications of extending its operation for another 40 years or longer.

5. Of equal importance here is the principle of open government embodied in FOIA. Misleadingly raising the specter of terrorism as justification for their FOIA violation, DOE is irresponsibly withholding information about the safety shortcomings at the ATR under the guise of "national security." In doing so, DOE has donned a cloak of secrecy, which cannot be tolerated if our open and democratic society is to be preserved.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action under 28 U.S.C. § 1331.

7. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B), which provides that a federal agency may be sued for violation of the Freedom of Information Act ("FOIA") in the plaintiffs' home district, or in the district where the records are located, or in the District of Columbia. Plaintiff Keep Yellowstone Nuclear Free is based in Jackson, Wyoming.

THE PARTIES

Plaintiffs

8. Plaintiff Keep Yellowstone Nuclear Free (“KYNF”) is a not-for-profit organization that seeks to protect Greater Yellowstone from contamination from activities conducted by the DOE at the Idaho National Laboratory (“INL”). KYNF is based in Jackson, Wyoming. KYNF receives support from individuals locally, regionally, nationally, and internationally.

9. Plaintiff Environmental Defense Institute (“EDI”) is a not-for-profit organization that is actively involved in the collection and dissemination of information relative to the health, safety, and environmental aspects of INL. EDI is based in Troy, Idaho.

10. Plaintiff David McCoy has been actively involved in disseminating to the public information regarding the safety of Department of Energy activities at INL. Until recently, Mr. McCoy was a resident of Idaho Falls, Idaho.

Defendants

11. Defendant Department of Energy (“DOE”) is an agency of the United States government. Defendant DOE is an agency within the meaning of 5 U.S.C. § 552(f). Among other things, the DOE operates INL, an approximately 890-square mile multipurpose laboratory complex where the DOE conducts research and development on a wide variety of subjects, including nuclear energy. The ATR is located at INL.

12. Defendant Samuel W. Bodman is the Secretary of the Department of Energy and therefore the custodian of the documents that have been improperly withheld. Defendant Bodman is responsible for DOE compliance with the laws of the United States and regulations promulgated thereunder, including the laws and regulations at issue in this case.

BACKGROUND

13. The ATR is a 250-megawatt nuclear reactor located at the Reactor Technology Center, formerly known as the Test Reactor Area, at INL. The DOE owns the ATR, but it is today operated by a private contractor, Battelle Energy Alliance, LLC ("BAE").

14. The ATR is not operated for power generation. DOE and BAE use the ATR to perform materials testing and isotope production.

15. The ATR was designed in the 1950s and began operation in 1967. It has therefore been in operation for nearly 40 years, and is based on a design that is approximately 50 years old.

16. According to DOE's own documents and BAE employees, because of funding and staffing shortfalls, the age and design of the facility, and its location in one of the most seismically active regions in North America, the ATR suffers from serious safety problems.

17. The ATR has experienced control rod malfunctions.
18. The ATR has been found to have corrosion and pitting in the primary and secondary cooling system heat exchangers.
19. The ATR has, or has had, failing electrical switchgear.
20. The ATR has, or has had, faulty radiation monitors.
21. The ATR's emergency cooling system (known as the "emergency firewater injection systems") has known vulnerabilities that may cause it to fail in the event of an earthquake.
22. Numerous other critical structures at the ATR are not designed to withstand a major earthquake, and would likely collapse were such an event to occur.
23. Due to inadequate funding, the ATR suffers a massive work backlog of more than 100,000 man hours.
24. The ATR has no concrete containment dome or other similar safety superstructure typical of commercial nuclear reactors to prevent or minimize the release of radiation in the event of a major accident.
25. Replacement parts for failing ATR systems are chronically unavailable due to the age of the facility.

26. According to DOE's own documents, in the event of a serious accident, the ATR could release as much as 175,000,000 curies of radiation, which would contaminate a vast area and rank second only to Chernobyl in terms of radiation released.

27. The ATR is operated by the DOE and BAE without any third-party regulatory oversight.

28. For example, the Nuclear Regulatory Commission ("NRC"), which closely regulates commercial and university nuclear reactors across the country to ensure their safety, has no regulatory authority over DOE's activities at the ATR.

29. Even the Defense Nuclear Facilities Safety Board ("DNFSB"), which was created in the 1980s to help ensure the protection of public health and safety at "Defense Nuclear Facilities," has declined to perform any regulatory oversight of the ATR.

30. Although it has in the past exercised authority to review safety concerns at the ATR, as it most recently did in 1996, the DNFSB rejected a KYNF petition asking that it review the safety of the ATR, asserting that it today has no jurisdiction to do so.

31. In June, 2005, the DOE released its Draft Environmental Impact Statement for the Proposed Consolidation of Nuclear Operations Related to the Production of Radioisotope Power Systems (the "DEIS"). The DEIS details the DOE's proposal to centralize the production of Pu-238 and radioisotope power systems at INL, and to use

the ATR for another 35 years to produce Pu-238 (the “Pu-238 Consolidation Proposal”) through irradiation.

32. Pu-238 is one of the deadliest substances known to man. Even a tiny speck, if inhaled, can cause cancer. Pu-238 does not exist in any significant quantity in nature.

33. Radioisotope power systems are long-life batteries, in this case powered by the heat given off by Pu-238 as it decays, which can be used in harsh environments such as the deep sea or in outer space. They are used by NASA for extended missions to outer space, and may be used both other agencies, the DEIS states, for unspecified “national security” missions.

34. The DOE is currently contemplating numerous other testing proposals and future operating plans for the ATR, including boiling water reactor simulations, advanced gas reactor plant graphite creep experiments, medical and industrial isotope production, and fast spectrum testing for an Advanced Fuel Cycle Initiative (AFCI).

35. The DOE has therefore formulated a Life Extension Program Plan (“LEP”) for the ATR, which contemplates extending the life of the ATR for another 40 years.

36. The LEP would require an investment of more than \$140,000,000 over seven years to address the enormous backlog of maintenance required for the ATR, to replace or upgrade existing safety systems, and to reconstitute the safety basis for the facility.

37. The DOE's ambitions for the ATR stand in stark contrast to the reactor's deteriorating condition.

Plaintiffs' FOIA Requests

38. Pursuant to FOIA, 5 U.S.C. § 552, plaintiffs have made several requests for documents and information relating to the safety of the ATR. In each case, after the passage of many months (well beyond the 20-day statutory time limit set forth in FOIA) the DOE, through its Idaho Operations Office (the "IOO") provided some documents, but improperly withheld or redacted others.

39. The improperly withheld documents are believed to contain information pertinent to the safety of the ATR, its vulnerability in the event of a major seismic incident, and the consequences of a loss-of-coolant accident -- a meltdown -- at the ATR.

40. FOIA mandates that federal agencies disclose documents in their possession upon request from any member of the public, with nine limited exemptions.

41. Those nine exemptions are to be construed narrowly and it is the agency's burden to prove that the withheld information falls under the claimed exemption.

42. There is no lawful basis for the DOE to withhold the requested documents.

The EDI/McCoy/KYNF Request

43. On July 7, 2005, EDI and David McCoy submitted a request, pursuant to FOIA, seeking information relating to the ATR (the "EDI/McCoy Request").

44. The EDI/McCoy Request was submitted by Chuck Broschous, EDI's Executive Director.

45. At the IOO's request, the EDI/McCoy Request was subsequently narrowed on July 28, 2005.

46. IOO responded to the EDI/McCoy request with documents sent on August 26, 2005 and September 14, 2005.

47. The IOO withheld one document, the "Development of Soil Design Basis Earthquake Parameters for Moderate and High Hazard Facilities at RTC" in its entirety, and redacted significant portions of another, the "Advanced Test Reactor Upgraded Final Safety Analysis Report" (the "Current UFSAR"), including all or part of chapters 1-4, 15 and 16.

48. The IOO claimed that redacted portions of the Current UFSAR are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(2), or Exemption 2 of FOIA, claiming the document was properly withheld as "security sensitive" information, under a claimed "high 2" exemption.

49. 5 U.S.C. § 552(b)(2) exempts from mandatory disclosure under FOIA matters that are "related solely to the internal personnel rules and practices of an agency."

50. The Current UFSAR is not "internal" and does not pertain to personnel rules or practices. FOIA requires that it be fully disclosed.

51. On October 14, 2005, EDI and David McCoy, joined by KYNF, filed an appeal with the DOE's Office of Hearings and Appeals (the "OHA") challenging the IOO's release determination.

52. Subsequently, IOO released additional documents to EDI, including the "Development of Soil Design Basis Earthquake Parameters for Moderate and High Hazard Facilities at RTC," which had been initially withheld.

53. However, several additional documents were redacted. IOO redacted the following documents: (1) Engineering Design File (EDF-5622), referred to as the "Interim Seismic Probabilistic Risk Assessment for the Advanced Test Reactor" (8 pages believed to have been redacted. The IOO has claimed that his document was released in full, but 8 pages appear to have been redacted, with nothing but page numbers. See pages A-8, A-14, A-20, A-38, A-50, A-62, A-63); (2) United States Government Memorandum from Elizabeth Sellers to William D. Magwood IV, dated March 19, 2004, subject: Advanced Test Reactor Continued Operations Planning Assessment Report (TPO-TRA-04-026) (key findings redacted); (3) the "ATR Planning Assessment Team Report" dated February 13, 2004 (many pages redacted, including key findings and conclusions).

54. Because no ruling had yet been made on its initial FOIA appeal, EDI (joined by KYNF) wrote to the case officer handling its FOIA Appeal, Janet Fishman, on December 16, 2005 to inform her of these further redactions, to supplement their appeal, and to seek a ruling from the OHA that included a ruling on those redactions.

55. Five months after EDI had filed its original appeal, and nearly three months after it had supplemented its appeal to include the additional redactions, on March 16, 2006, the OHA issued its Decision and Order on the EDI appeal (the "March 16, 2006 OHA Decision").

56. The March 16, 2006 OHA Decision, for some unexplained reason, addressed only the redaction of the Current UFSAR.

57. The OHA found that IOO "properly withheld the redacted material," with one minor exception.

58. The OHA remanded the matter to the Idaho DOE office for a release determination with respect to two pages of the current UFSAR, chapter 3/4 pages 0-1 and 0-2, because those pages "could be reasonably segregated and released...."

59. To date, although the March 16, 2006 OHA Decision is now more than four months old, the IOO has still not released even those pages.

60. None of the withheld documents are exempt from disclosure under FOIA, and therefore they must be released to EDI and KYNF.

61. Plaintiffs have exhausted their administrative remedies, and their FOIA claims are ripe for judicial review.

KYNF's FOIA Request

62. On September 22, 2005, KYNF, by its attorneys, submitted a FOIA request that included 23 itemized and particularized document requests relating to the safety of the ATR and the environmental impacts of the Pu-238 Consolidation Proposal (the "KYNF Request").

63. The DOE did not provide a timely response to the KYNF Request.

64. On January 31, 2006, more than four months after the KYNF Request was made, the IOO issued a partial response, providing some documents in their entirety while withholding or redacting others, and reserving a release determination regarding others.

65. The IOO's January 31, 2006 response withheld or redacted the following documents: (1) Sections 3 & 4 of SAR-153 section of TSR 186, Operating Limits and Surveillance Requirements (entirely withheld); (2) EDF-6020 Engineering Assessment of ATR Heat Exchanger and PCS Support Anomalies (two figures withheld); (3) the 1998 ATR Upgraded Final Safety Analysis Report (the "1998 UFSAR") (all or parts of Chapters 3-10, 12, and 15 redacted); (4) AD-116 Combination Fire Hazard Analysis and Fire Safety Assessment ATR Building TRA-670 (six pages released, 145 pages

redacted); (5) HAD-3, Reactor Technology Complex (RTC) (14 pages released, more than 600 redacted); (6) Document No. 65: EDF-4394 Update of ATR Break Spectrum and Direct Damage LOCA Frequency Analyses (2 pages released, 70 redacted); (7) NTS-ID-BBWI-ATR-2003-003 Causal Analysis Report Essential System Functionality -- December 17, 2003 (pages 8-18 and attachments redacted).

66. As it had done with respect to the EDI/KYNF request, the IOO's January 31, 2006 response asserted that the first six documents listed above were withheld pursuant to a so-called "high 2" exemption under 5 U.S.C. § 552(b)(2).

67. Exemption 2 does not justify withholding the requested documents. The documents are neither internal nor related to personnel matters, and therefore Exemption 2 does not apply.

68. Furthermore, the IOO's interpretation of Exemption 2 to apply to "security sensitive" information is not supported by the language of FOIA, or any relevant case law.

69. The IOO withheld portions of the seventh document listed above, the "Causal Analysis Report Essential System Functionality," claiming Exemption 5 under FOIA, or 5 U.S.C. § 552(b)(5).

70. Exemption 5 exempts from mandatory disclosure under FOIA "memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

71. Exemption 5 has been found to protect from disclosure "deliberative process" or "predecisional" inter-agency or intra-agency memoranda.

72. The Causal Analysis Report Essential System Functionality is not predecisional, nor was it part of the DOE's deliberative process. The Causal Analysis Report was a final agency report, signed by the Deputy Laboratory Director and the INL Vice President. FOIA mandates that it be disclosed.

73. On March 14, 2006, KYNF filed a timely administrative appeal from the IOO's January 31, 2006 release determination. KYNF filed its appeal with the OHA.

74. Nearly four months after the expiration of its statutory time to do so (ten days under FOIA), on July 20, 2006 the OHA finally issued a Decision & Order on KYNF's appeal (the "July 20, 2006 OHA Decision")

75. The July 20, 2006 OHA Decision denied KYNF's appeal from the IOO's determination in nearly all respects.

76. The July 20, 2006 OHA Decision incorrectly concluded that the documents IOO withheld pursuant to a "high 2" exemption were properly withheld.

77. The July 20, 2006 OHA Decision found that certain portions of the one document withheld pursuant to FOIA Exemption 5, the "Causal Analysis Report Essential System Functionality," are "purely factual" and therefore must be released.

78. The OHA directed that the IOO release pages 8 through 18, with certain narrow exceptions that it believed were properly redacted.

79. By letter dated July 31, 2006, the IOO released to KYNF the Causal Analysis Report Essential System Functionality document, with the redactions the OHA specified.

80. KYNF is entitled to unredacted versions of all of the withheld documents under FOIA.

81. KYNF has exhausted its administrative remedies, and this matter is ripe for the Court's consideration.

FIRST CAUSE OF ACTION

82. Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 81, as if full stated herein.

83. In violation of the Freedom of Information Act, 5 U.S.C. § 552, the defendants have improperly withheld from the plaintiffs all or part of the following documents: (1) Engineering Design File (EDF-5622), referred to as the "Interim Seismic Probabilistic Risk Assessment for the Advanced Test Reactor" (8 pages known to have been redacted); (2) United States Government Memorandum from Elizabeth Sellers to

William D. Magwood IV, dated March 19, 2004, subject: Advanced Test Reactor Continued Operations Planning Assessment Report (TPO-TRA-04-026) (key findings redacted); (3) the "ATR Planning Assessment Team Report" dated February 13, 2004 (many pages redacted, including key findings and conclusions); (4) the Current UFSAR (all or part of chapters 1-4, 15 and 16 redacted); (5) Sections 3 & 4 of SAR-153 section of the TSR 186, Operating Limits and Surveillance Requirements (entirely withheld); (6) EDF-6020 Engineering Assessment of ATR Heat Exchanger and PCS Support Anomalies (two figures withheld); (7) the 1998 UFSAR (all or parts of Chapters 3-10, 12, and 15 redacted); (8) AD-116 Combination Fire Hazard Analysis and Fire Safety Assessment ATR Building TRA-670 (six pages released, 145 pages redacted); (9) HAD-3, Reactor Technology Complex (RTC) (14 pages released, more than 600 redacted); (10) EDF-4394 Update of ATR Break Spectrum and Direct Damage LOCA Frequency Analyses (2 pages released, 70 redacted); (11) NTS-ID-BBWI-ATR-2003-003 Causal Analysis Report Essential System Functionality -- December 17, 2003 (numerous redactions in accordance with OHA Decision and Order) (collectively, the "Withheld Documents").

84. The exemptions claimed by the defendants do not permit them to withhold the Withheld Documents.

85. Defendants should be enjoined from withholding the Withheld Documents, and directed to immediately release the documents to the plaintiffs.

DEMAND FOR RELIEF

WHEREFORE, plaintiffs demand judgment as follows:

- (1) Enjoining the defendants from withholding the Withheld Documents, and ordering them to release the Withheld Documents immediately;
- (2) Granting plaintiffs costs and attorneys fees in accordance with 5 U.S.C. U.S.C. § 552(a)(4)(E);
- (3) Finding that the defendants acted arbitrarily and capriciously in withholding the Withheld Documents and directing Special Counsel to promptly initiate a proceeding to determine whether disciplinary action is warranted against the defendants pursuant to 5 U.S.C. § 552(a)(4)(F).

New York, New York
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