UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

SIERRA CLUB and SOUTHERN ALLIANCE FOR CLEAN ENERGY,	)	
Plaintiffs	)	
v.	)	**No. 1:11-cv-00041-CMH -TRJ**
U.S. DEFENSE LOGISTICS AGENCY ENERGY, f/k/a U.S. DEFENSE ENERGY SUPPORT CENTER; KURT KUNKEL, in his official capacity as Commander of the U.S. Defense Logistics Agency Energy; U.S. DEPARTMENT OF DEFENSE; ROBERT GATES, in his official capacity as Secretary of the Department of Defense; U.S. DEFENSE LOGISTICS AGENCY; and ALAN S. THOMPSON, in his official capacity as Director of the Defense Logistics Agency,	)	
Defendants,	)	
and	)	
AMERICAN PETROLEUM INSTITUTE, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,	)	
Defendants-Intervenors.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION

This case is about the Defendants' deliberate refusal to comply with Section 526 of the Energy Independence and Security Act of 2007 ("EISA"), 42 U.S.C. § 17142, which provides:

> No Federal agency shall enter into a contract for procurement of an alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources, for any mobility-related uses, other than for research or testing, unless the contract specifies that the lifecycle greenhouse gas emissions associated with the production and combustion the fuel supplied under the contract must, on an ongoing basis, be less than or equal to such emissions from the equivalent conventional fuel produced from conventional petroleum sources.

Reducing greenhouse gas emissions of the federal government is an important purpose of EISA, because these emissions contribute directly to climate change. As the U.S. Supreme Court has concluded, "[t]he harms associated with climate change are serious and well recognized." *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007).

Nonetheless, Defendant U.S. Defense Logistics Agency Energy ("DLA Energy") has violated Section 526 by entering into contracts on behalf of the U.S. Defense Logistics Agency and the U.S. Department of Defense (collectively "Defendants") to procure fuel produced from Canadian oil sands (also called "tar sands") recovered crude, which is a nonconventional petroleum source, and which has lifecycle greenhouse gas emissions that are greater than those from the equivalent fuel produced from conventional petroleum sources. Defendants admit that they have not inserted this specification into any contracts for fuels derived from Canadian oil sands recovered crude ("COSRC") since the passage of EISA. *See* Amended Complaint (Doc. 56) ¶¶ 56-57; Defendants' Amended Answer (Doc. 61) ¶¶ 56-57.

In addition, DLA Energy has published and relies upon its "Interim Implementation Plan Regarding Section 526 of [the EISA]" ("Implementation Plan") to implement its policy of non-compliance with Section 526, which violated the APA, 5 U.S.C. § 553(b), as a rule enacted without any prior public notice and opportunity for comment. Finally, Defendants have not even

attempted to comply with the requirements of the National Environmental Policy Act ("NEPA") regarding the contracts or the Implementation Plan, inasmuch as they prepared no Environmental Assessments or Environmental Impact Statements to take a hard look at the environmental impact of these actions.

Plaintiffs' Motion for Summary Judgment seeks a declaratory judgment that Defendants have violated the APA and NEPA. Ultimately, Plaintiffs seek permanent injunctive relief to force Defendants to comply with Section 526, the APA, and NEPA with regard to the COSRC contracts and the rule implementing Section 526. There are no issues of material fact to be decided in this administrative record review case, and Plaintiffs demonstrate herein that they are entitled to summary judgment as a matter of law.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. FUEL DERIVED FROM CANADIAN OIL SANDS RECOVERED CRUDE IS AN ALTERNATIVE OR SYTHENTIC FUEL PRODUCED FROM A NONCONVENTIONAL PETROLEUM SOURCE.

1. Most of the oil refined by refineries in the United States is imported from other countries, with Canada being the top supplier of U.S. oil imports, exceeding imports from Saudi Arabia.[1] The U.S. imported nearly 2 million barrels per day ("b/d") of crude oil from Canada in 2006, out of total imports of approximately 10 million b/d.[2]

2. Around half (1 million b/d) of the Canadian oil imported to the U.S. in 2006 was from the world's largest nonconventional petroleum source, the oil sands of western Canada. Canadian oil imports have grown since 2006, and the amount of Canadian oil sands recovered

[1] Exhibit ("Ex.") 1, attached. LMI Government Consulting. EISA Section 526: Impacts on DESC Supply (March 2009) ("LMI Report"). AR at 43. Excerpts from the Administrative Record filed by Defendants on January 6, 2011, are attached to this Memorandum as Exhibits. Citations to the pages of the Exhibits and the Administrative Record will be "AR at ___," which refers to the page number stamped on bottom of the page(s) of the Administrative Record.
[2] Ex. 1. LMI Report. AR at 43, 62.

crude ("COSRC") is expected to grow substantially over the next decade.[3] By 2020, Canadian oil sands production is projected to be nearly three times what it is today. If most of this oil were shipped to the U.S., as it is today, and this country continues to consume about 20 million barrels per day, CORSC oil would represent about 15 percent of total U.S. supply.[4]

3. COSRC is transported from the principal producing areas by pipeline; several pipelines move this oil to refineries throughout the United States, and many more are planned.[5]

4. Section 526 applies to federal agency contracts for procurement of "an alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources." 42 U.S.C. § 17142. Defendants state in their Implementation Plan that COSRC "might be considered 'an alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources' under Section 526."[6] Defendants' Implementation Plan categorized fuels derived from COSRC as "petroleum products" and evaluated them under Section 526 as "alternative fuels," because COSRC is a "nonconventional petroleum source."[7]

5. COSRC is a "nonconventional petroleum source" because of the manner in which it is extracted and processed. The main deposits of Canadian oil sands are located in Athabasca, Peace River, and Cold Lake in the Province of Alberta. In 2007 approximately 55 percent of oil sands were extracted by open pit strip mining, in which truck-and-shovel operations pull away the overburden and dig up the sands. Once the sands are mined, the solid product, called bitumen, is separated from the other materials by adding hot water and caustic soda to the sand, then pumping the resulting slurry to an extraction plant where it is agitated and the oil skimmed

[3] Ex. 1. LMI Report. AR at 43, 51.
[4] *Id.*
[5] Ex. 1. LMI Report. AR at 52.
[6] Ex. 2, attached. "Interim Implementation Plan Regarding Section 526 of the Energy Independence and Security Act of 2007" ("Implementation Plan"). AR at 4.
[7] Ex. 2. Implementation Plan. AR at 11-12.

from the top. The remaining 45 percent of COSRC was recovered through *in situ* methods in 2007, which involve injecting steam or another source of heat into the oil sands formation in order to free the bitumen.[8]

6. Oil sands bitumen must be upgraded before it can be piped to refineries for processing into finished products. Upgrading is done by some combination of thermal conversion, or coking, distillation, catalytic conversion, and hydrotreating, each of which is an energy intensive process. "The end product is synthetic crude oil, which is shipped by pipeline to refineries across North America to be refined further into jet fuels, gasoline, and other petroleum products" [emphasis added].[9] Refining of COSRC also requires additional steps by refineries as compared with conventional crude oil, due to the unusually viscous consistency of the COSRC.[10]

II. DEFENDANTS HAVE CONTRACTED FOR PROCUREMENT OF FUELS FOR MOBILITY USES THAT ARE PRODUCED FROM CANADIAN OIL SANDS RECOVERED CRUDE.

7. The DOD is by far the largest federal government agency purchaser of fuels, and the DLA Energy (formerly known as U.S. Defense Energy Support Center ("DESC")) is the principal purchaser of these fuels for the DOD.[11] In 2008 DLA Energy purchased 5.7 billion gallons of fuels worldwide.[12] U.S. suppliers of fuels to DLA Energy are domestic refining companies, which are located throughout the country and include a number of smaller companies as well as some very large ones. In any given year, the bulk of DLA Energy's purchases are made from about 20 refiners, some of which own multiple refineries and supply DLA Energy

[8] Ex. 1. LMI Report. AR at 46-49.
[9] Ex. 1. LMI Report. AR at 48.
[10] Ex. 1. LMI Report. AR at 42-43.
[11] Ex. 1. LMI Report. AR at 40.
[12] Ex. 2. Implementation Plan. AR at 5.

from more than one. Others own a single refinery, but it may be strategically located near one or more military installations and hence provide a key source of supply.[13]

8. Mobility related fuels purchased through contracts by Defendants in the U.S. contain significant quantities of fuels derived from COSRC. Defendants have estimated that COSRC imported into the U.S. in 2006 was about 6% of U.S. refinery capacity, with the fraction varying from less than 4% to as much as 40%, depending on the region, because pipelines transport COSRC to refineries in some regions, but not others.[14] When Defendants looked at specific refineries with DLA Energy bulk fuel purchase contracts in 2006, the refineries were estimated to have potential COSRC fractions of 0 to 27% of their output, depending on whether they were known to be processing COSRC or had the capability to process COSRC.[15]

9. Several of the refineries identified as likely processing COSRC have contracts to supply mobility related fuels to Defendants. These include, but are not limited to: BP-Husky in Lima, Ohio; BP in Whiting, Indiana; BP West in Ferndale, Washington; ChevTex in Salt Lake City, Utah; Conoco-Phillips in Ponca City, Oklahoma; ConocoPhillips in Oklahoma City, Oklahoma; ExxonMobil in Baton Rouge, Louisiana; ExxonMobil in Baton Rouge, Louisiana; Gary Williams in Wynnewood, Oklahoma; Hunt in Tuscaloosa, Alabama; Shell in Deer Park, Texas; Shell in Martinez, California; Sinclair in Sinclair, Wyoming; Tesoro in Aiea, Hawaii; United Refining in Warren, Pennsylvania; U.S. Oil Refining in Tacoma, Washington; Valero in Benicia, California; Valero in Corpus Christi, Texas; and Valero in Texas City, TX.[16] The

[13] *Id*.
[14] Ex. 1. LMI Report. AR at 78-79.
[15] Ex. 1. LMI Report. AR at 81-82.
[16] Ex. 1. LMI Report. AR at 74-75.

contracts with these refineries, listed in the Amended Complaint at ¶ 55, are included in the administrative record and attached as Exhibits 3-21.[17]

10. Furthermore, Defendants have included in the administrative record certain military specifications for mobility related fuels, including aviation fuels and naval distillate.[18] Both of the military specifications for aviation fuels require that "[t]he feedstock from which the fuel is refined shall be crude oils derived from petroleum, tar sands, oil shale, or mixtures thereof" [emphasis added].[19] Most of the contracts included in the administrative record are for the procurement of aviation fuels that are required to meet these specifications.[20]

11. Therefore, based on the information in the administrative record, it is indisputable that Defendants are contracting for mobility related alternative or synthetic fuels that are produced from COSRC, a nonconventional petroleum source.

III. DEFENDANTS' CONTRACTS AND CONTRACT SOLICITATIONS DO NOT CONTAIN THE SPECIFICATION REQUIRED BY SECTION 526 OF EISA.

12. Defendants admitted in their Amended Answer that none of the contracts that DLA Energy has entered since the enactment of Section 526 for fuels for mobility-related uses that include fuels derived from COSRC have included the specification required by Section 526 of EISA that "the lifecycle greenhouse gas emissions associated with the production and

[17] The contracts referenced in the Amended Complaint are attached as Exhibits 3-21 and included in the record at AR at Tabs 26, 51, 12-14, 25, 37, 16, 21, 20, 38-39, 40-42, 18, 23, 28, 47-48, 35, 43, 33, 46, 123.

[18] Exhibit 22, attached. Detail Specification Turbine Fuel, Aviation, Kerosene Type, JP-8 (NATO F-34), NATO F-35, and JP-8+100 (NATO F-37). AR at 10216-10235; Exhibit 23, attached. Detail Specification Turbine Fuel, Aviation, Grades JP-4 and JP-5. AR at 10247-10263; Detail Specification Fuel, Naval Distillate. AR at 10236-10246.

[19] Ex. 22. Detail Specification Turbine Fuel, Aviation, Kerosene Type. AR at 10221; Ex. 23. Detail Specification Turbine Fuel, Aviation, Grades JP-4 and JP-5. AR at 10251.

[20] See AR at Tabs 12-14, 16-30, 32-35, 36-48, 51, 122-123. See also Exhibits 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 18, 20 and 21, which are contracts referenced in the Amended Complaint that are required to meet these specifications.

combustion of the fuel supplied under the contract must, on an ongoing basis, be less than or equal to such emissions from the equivalent conventional fuel produced from conventional petroleum sources." See Plaintiffs' Complaint [Doc. 56, ¶ 57], Defendants' Amended Answer [Doc. 61, ¶ 57]. In fact, none of Defendants' contracts with refineries that Defendants believe are likely processing COSRC contain the specification required by Section 526. *Id.* [21]

13. Defendants' omission of this language is significant, because there is no issue that "[p]etroleum products derived from oil sands crude are estimated to have lifecycle [greenhouse] emissions exceeding those from conventional oil."[22] Lifecycle greenhouse gas emissions for a fuel are those that are emitted during the extraction of the feedstock through the processing, distribution, and delivery and combustion of the finished fuel.[23] CORSC involves greater lifecycle greenhouse gas emissions than conventional oil because of the additional energy used in its mining, transportation, processing, and refining.[24]

14. In addition, the Court should note that Defendants have included in the record thousands of pages of contract solicitations for mobility related fuels. These include 17 domestic (U.S.) solicitations and 48 solicitations for fuels to be delivered to far-flung locations around the globe, such as the United Kingdom, Kenya, Cameroon, Israel, Bulgaria, Greece, Egypt, Italy,

[21] *See* contracts. AR at Tabs 12-52, 122-123. In addition, DLA Energy admitted in response to Plaintiff SACE's request for documents under the Freedom of Information Act that it had no documents responsive to the request for "Any and all contracts for the procurement of bulk petroleum which specify that the lifecycle greenhouse gas emissions associated with the production and combustion of the fuel supplied under the contracts are, on an ongoing basis, less than or equal to such emissions from the equivalent fuel produced from conventional petroleum sources." Ex. 24. AR at 211, 216.
[21] Ex. 2. Implementation Plan. AR at 1-25.
[22] Ex. 1. LMI Report. AR at 30.
[23] One section of EISA defines the term "lifecycle greenhouse gas emissions" as "the aggregate quantity of greenhouse gas emissions…from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer…" 42 U.S.C. § 7545(o)(1)(H).
[24] Ex. 1. LMI Report. AR at 42-43.

and Afghanistan. Plaintiffs are unclear why Defendants included these solicitations in the record, but it is telling that not one of them contains the language required by Section 526 or any reference to the lifecycle greenhouse gas emissions of the fuels.

IV. THE DLA ENERGY IMPLEMENTATION PLAN ATTEMPTS TO EXCLUDE FUELS DERIVED FROM CANADIAN OIL SANDS FROM SECTION 526.

15. In August 2009 DLA Energy published the so-called "Interim Implementation Plan Regarding Section 526 of the Energy Independence and Security Act of 2007"[25] as its plan "to implement Section 526."[26] It identifies actions necessary to determine whether all of the mobility related fuels DLA Energy purchases meet the requirements of Section 526 and which contracts will be affected. Among other things, the Implementation Plan concludes, without analysis, that "so long as DLA Energy does not target or specify oil sands as the source of crude and so long as the fuels are commercially available, then these products should be considered outside the purview of Section 526."[27]

16. The Plan further attempted to justify, without any analysis, excluding from Section 526 contracts for fuels containing any amount of COSRC fuels, stating "because it is almost impossible to purchase fuel which contains no Canadian oil sands as its crude source, attempting to exclude oil sands crude from purchases of refined products would increase costs and compromise readiness by eliminating needed sources of supply."[28]

[25] Ex. 2. Implementation Plan. AR at 1-25.
[26] Ex. 25. Action Memo, A.S. Thompson, Director, DLA, accompanying Implementation Plan (Feb. 25, 2010). AR at 121.
[27] Ex. 2. Implementation Plan, AR at 12.
[28] Ex. 2. Implementation Plan. AR at 12-13.

17. It is not impossible for Defendants to purchase fuel which contains no Canadian oil sands as its crude source. For instance, Defendants have procured fuels from refineries that they know do not utilize COSRC.[29]

18. This Implementation Plan has been applied broadly to Defendants' contracts for procurement of fuels containing COSRC derived fuels, because none of these contracts has included the specification required by Section 526.

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE IN THIS APA RECORD REVIEW CASE.

Summary judgment is proper when the pleadings and discovery show there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment is particularly appropriate in challenges to federal agency actions under the APA, because the cases are based on an administrative record and no fact finding by the Court is required. *See e.g. Northwest Motorcycle Ass'n v. United States Dep't of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir.1994); *Occidental Engineering Co. v. I.N.S.*, 753 F.2d 766, 769-770 (9th Cir. 1985).

The APA states that the Court "shall" "set aside" agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).[30] The court "must consider whether the decision was based on a consideration of

[29] Ex. 1. LMI Report. AR at 74-75.

[30] Plaintiffs have standing to bring these APA and NEPA claims because of the impacts of climate change on their members and due to the procedural violations of Defendants' failure to comply with the APA and NEPA. *See, e.g., Massachusetts v. E.P.A.*, 549 U.S. 497, 521-23 (2007); *South Carolina Wildlife Federation v. Limehouse,* 549 F.3d 324, 330 (4th Cir. 2008); *Natural Res. Defense Council, Inc. v. Watkins,* 954 F.2d 974, 980 n. 7 (4th Cir.1992); *Piney Run Pres. Ass'n v. County Comm'rs of Carroll County*, 268 F.3d 255, 263-64 (4th Cir. 2001); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000)

the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). An agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Ohio River Valley Environmental Coalition, Inc. v. Kempthorne*, 473 F.3d 94, 102 (4th Cir. 2006).

II. DEFENDANTS' CONTRACTS FOR PURCHASE OF FUELS DERIVED FROM CANADIAN OIL SANDS RECOVERED CRUDE VIOLATE SECTION 526 OF THE EISA AND THE APA.

A. Section 526 of the EISA Clearly Applies to Defendants' Contracts for Fuels Derived From Canadian Oil Sands Recovered Crude.

The Energy Independence and Security Act of 2007, 42 U.S.C. §§ 17001, *et seq*., which became law on December 19, 2007, was established to "move the United States toward greater energy independence and security, to increase the production of clean, renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government, and for other purposes." Preamble, Pub. L. 110-140 (Dec. 19, 2007). The EISA as enacted included provisions of the House of Representatives bill, the "Carbon Neutral Government Act," which had the overall purpose "[t]o reduce the Federal Government's

(*en banc*). Plaintiffs have attached declarations to this Memorandum from Sierra Club members concerning the impacts of climate change to support standing. Exhibits 26 and 27, attached. If Defendants challenge Plaintiffs' standing in their response or by separate motion, Plaintiffs will respond with additional declarations, if necessary.

contribution to global warming through measures that promote efficiency in the Federal Government's management and operations..." H. R. 2635, 110th Cong. (2007).[31] One such provision from the Carbon Neutral Government Act included in EISA was Section 526, 42 U.S.C. § 17142.

Again, Section 526 of the EISA states as follows:

> No Federal agency shall enter into a contract for procurement of an alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources, for any mobility-related uses, other than for research or testing, unless the contract specifies that the lifecycle greenhouse gas emissions associated with the production and combustion the fuel supplied under the contract must, on an ongoing basis, be less than or equal to such emissions from the equivalent conventional fuel produced from conventional petroleum sources.

Although EISA does not contain definitions of some of the terms in Section 526, the terms are either clear on their face or have been defined in other related statutes, providing a basis for interpreting the technical terms in Section 526 *in pari materia* with these statutes.[32] The term "mobility-related uses" has common meaning and is clear to Defendants that it would apply to "most liquid fuels purchase by the Federal government for ground, aviation, and marine uses."[33] The term "synthetic fuel" has previously been defined by Congress to include fuel derived from tar sands as part of an extension to the Defense Production Act of 1950.[34] Defendants' own

---

[31] One of the findings in the Carbon Neutral Government Act bill was that "[i]mproved management of Government operations, including acquisitions and procurement…, can maximize the use of existing energy efficiency and renewable energy technologies to reduce global warming pollution, while saving taxpayers' money, reducing our dependence on oil, enhancing national security, cleaning the air, and protecting pristine places from drilling and mining."

[32] The canon of statutory interpretation *in pari materia* provides that similar statutes are to be interpreted in light of, and consistently with, one another. *Wachovia Bank v. Schmidt*, 388 F.3d 414, 422 (4th Cir. 2004).

[33] Ex. 2. Implementation Plan. AR at 6.

[34] The "Energy Security Act" was passed by Congress in 1980 to promote the production of synthetic fuels in the U.S., which included an extension of the Defense Production Act of 1950. Pub. Law 96-294 (June 30, 1980). Section 308(b) of the Act, previously codified at 50 U.S.C. App. § 2098, defined the term "synthetic fuel" for the Defense Production Act as "any solid,

report called COSRC "synthetic crude oil."[35] The term "nonconventional petroleum sources" has also been previously defined by Congress in the Internal Revenue Code to include "oil produced from shale and tar sands." 26 U.S.C. § 45K(c)(1)(A). However, it is unlikely that Congress intended the term "alternative fuels" to apply to fuels derived from COSRC, because the definition of that term in other statutes does not include fuels from tar sands crude.[36]

The plain language of Section 526, with reference to the definitions of technical terms previously passed by Congress, makes it clear that fuels derived from COSRC are covered by Section 526 as synthetic fuels and/or fuels produced from nonconventional petroleum sources. Yet, in refusing to comply with Section 526 for contracts for fuels containing COSRC derived fuels, in their Implementation Plan Defendants attempt to portray this provision as unclear or ambiguous, principally because it does not contain definitions.[37]

Defendants have also taken the position in their Implementation Plan that Section 526 does not apply to contracts for bulk fuels that contain COSRC derived fuels, arguing that the "contracts do not target any specific source of crude oil nor do they specify that the refined

---

liquid, or gas, or combination thereof, which can be used as a substitute for petroleum or natural gas (or any derivatives thereof, including chemical feedstocks) and which is produced by chemical or physical transformation (other than washing, coking, or desulfurizing) of domestic sources of…(iii) tar sands, …" This provision was omitted in the general amendment of this Title by Pub.L. 111-67, § 7, Sept. 30, 2009.

[35] Ex. 1. LMI Report. AR at 47, 48.

[36] 42 U.S.C. § 6374(g)(2), pertaining to Alternative fuel use by light duty Federal vehicles, defines the term "alternative fuel" as "methanol, denatured ethanol, and other alcohols; mixtures containing 85 percent or more (or such other percentage, but not less than 70 percent, as determined by the Secretary, by rule, to provide for requirements relating to cold start, safety, or vehicle functions) by volume of methanol, denatured ethanol, and other alcohols with gasoline or other fuels; natural gas; liquefied petroleum gas; hydrogen; coal-derived liquid fuels; fuels (other than alcohol) derived from biological materials; electricity (including electricity from solar energy); and any other fuel the Secretary determines, by rule, is substantially not petroleum and would yield substantial energy security benefits and substantial environmental benefits."

[37] Ex. 2. Implementation Plan. AR at 6.

products must be produced from oil sands crude oil."[38] This misinterpretation of Section 526 fails for three reasons. First, Defendants' position is factually inaccurate, because Defendants' military specifications for aviation fuels procured by many of the contracts require that "[t]he feedstock from which the fuel is refined shall be crude oils derived from petroleum, tar sands, oil shale, or mixtures thereof" [emphasis added].[39] Therefore, by contracting for aviation fuels in accordance with these specifications, Defendants deliberately and specifically included fuels derived from tar sands in all of these contracts.

Second, Defendants' interpretation of the phrase "contract for" would read language into Section 526 that is not there and contradict the plain meaning of the phrase. A contract is "for" whatever it procures. If Defendants know or suspect they are procuring fuels derived from COSRC, as they must in contracting for fuel from refineries they have identified as processing CORSC, Defendants cannot avoid Section 526 by feigning ignorance of the contents of the fuel.

Third, Defendants' interpretation would produce the absurd result that federal agencies could avoid complying with Section 526 by simply calling the fuels "bulk fuels" or some other general term in their contracts while all the while knowing that they contain fuels derived from COSRC, thereby increasing greenhouse gas emissions as compared to conventional fuels. Legislative enactments "should never be construed as establishing statutory schemes that are illogical, unjust, or capricious," which is an apt description of Defendants' interpretation of Section 526. *In re Motley,* 150 B.R. 16, 18 (Bkrtcy. E.D. Va. 1992) (*quoting Bechtel Construction, Inc. v. United Brotherhood of Carpenters and Joiners of America,* 812 F.2d 1220, 1225 (9th Cir. 1987)); *see also United States v. Preston,* 739 F.Supp. 294, 297 (W.D. Va. 1990).

[38] Ex. 2. Implementation Plan. AR at 4.
[39] Ex. 22. Detail Specification Turbine Fuel, Aviation, Kerosene Type. AR at 10221; Ex. 23. Detail Specification Turbine Fuel, Aviation, Grades JP-4 and JP-5. AR at 10251.

Defendants have also attempted to read a *de minimis* exception into Section 526, which does not exist, by claiming that the "amount of oils sands crude mixed with conventional crude oil is not substantial."[40] This claim is factually inaccurate, because Defendants have estimated that the refineries from which Defendants purchase mobility-related fuels process as much as 27% COSRC.[41] Even if there is a level of COSRC fuels in bulk fuels procured by Defendants that could be considered *de minimis* from an increased greenhouse gas emissions perspective, nothing in the administrative record establishes what that level should be or that any particular contracts would fall under a *de minimis* level.

Finally, the application of Section 526 to Defendants' contracts for blends of COSRC fuels with conventional fuels is consistent with the stated legislative purposes of the EISA and the Carbon Neutral Government Act from which Section 526 originated. The reduction of lifecycle greenhouse gases resulting from Federal government procurement would be frustrated if Defendants can ignore one of the major sources of excessive greenhouse gases – the procurement of millions of gallons per year of COSRC derived fuels.

B. Even if "Legislative History" is Considered, It Supports the Application of Section 526 to Defendants' Contracts.

Because the language of Section 526 is clear with the aid of definitions contained in other statutes passed by Congress, there is no need to resort to a review of legislative history in order to determine the applicability of Section 526 to COSRC derived fuels. *See, e.g. Etape v. Chertoff,* 497 F. 3d 379, 391 (4th Cir. 2007). If the Court decides to go beyond the statutory language, it will find that there is no true legislative history that reflects the intent of Congress during the consideration of EISA Section 526 regarding fuels derived from COSRC, except for some general debate about the increased reliance upon Canadian tar sands oil increasing

[40] *Id.*
[41] Ex. 1. LMI Report. AR at 81-82.

greenhouse gas emissions.[42] Defendants have relied upon a post-enactment letter from one of the sponsors of Section 526 in the House of Representatives as "subsequent legislative history" to support their interpretation of Section 526 in their Implementation Plan and are expected to rely upon this letter in their response to Plaintiffs' Motion for Summary Judgment.[43] However, as Justice Scalia has stated, "[s]ubsequent legislative history – which presumably means the post-enactment history of a statute's consideration and enactment – is a contradiction in terms." *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (concurring opinion). *See also Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("[p]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight"); *Rehabilitation Association of Virginia, Inc. v. Kozlowski,* 42 F.3d 1444, 1457 (4th Cir. 1994) (noting the "pitfalls of relying on post enactment legislative history").

In the instant case, Defendants would not be relying on the enactment of subsequent legislation to support their interpretation of Section 526, which can sometimes provide useful guidance in statutory interpretation, but simply on subsequent statements by one member of Congress. Justice Scalia further stated in *Sullivan v. Finkelstein* that "the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed." *Sullivan, supra* at 632; *see also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (a *post-hoc* statement in a conference

---

[42] As a matter of background knowledge, during a floor debate on the day that H.R. 6 was introduced, which became the House version of EISA, one House of Representatives member, Rep. Roscoe Bartlett of Maryland, stated:

> Now, if your concern is foreign oil, then you could also get some additional energy from such things as tar sands and oil shales and coal. But if your concern is global warming, this will be a very bad place to get energy to invest in the alternatives that we will ultimately have to transition to because it take a lot of energy to get energy out of tar sands, and that energy is fossil fuel energy and that releases CO2 into the atmosphere.

Cong. Rec. H752 (Jan. 18, 2007).

[43] Ex. 2. Implementation Plan. AR at 19.

report for subsequent legislation is not entitled to any weight); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (after-the-fact "legislative observations ... are in no sense part of the legislative history" because "[i]t is the intent of the Congress that enacted [the section] ... that controls"). This Court should reject the Congressman's letter as any indication of the scope of Section 526 as applied to COSRC derived fuels.

The only subsequent legislative history of Section 526 that can provide guidance for the interpretation of Section 526 is the 2008 amendment to the EISA that exempted the National Aeronautics and Space Administration ("NASA") from compliance with Section 526 for certain fuel purchases.[44] 42 U.S.C. § 17827 states as follows:

> Section 17142(a) [Section 526 of the EISA] of this title does not prohibit NASA from entering into a contract to purchase a generally available fuel that is not an alternative or synthetic fuel or predominantly produced from a nonconventional petroleum source, if –
> (1) the contract does not specifically require the contractor to provide an alternative or synthetic fuel or fuel from a nonconventional petroleum source;
> (2) the purpose of the contract is not to obtain an alternative or synthetic fuel or fuel from a nonconventional petroleum source; and
> (3) the contract does not provide incentives for a refinery upgrade or expansion to allow a refinery to use or increase its use of fuel from a nonconventional petroleum source.

Obviously, Congress considered it necessary to enact an amendment to the EISA to provide NASA with the same exceptions to Section 526 that Defendants would have this Court read into the plain language of the Section for DOD. Congress clearly knows how to create exceptions to Section 526, but, in fact, declined to do so for DOD's fuel purchases. At the same time the NASA amendment was being considered, some members of Congress were pushing a similar

[44] "A statute should be construed to be consistent with subsequent statutory amendments." *United States v. Dauray*, 215 F.3d 257, 263 (2nd Cir. 2000) (*citing Bowen v. Yuckert*, 482 U.S. 137, 149-151 (1987)).

exemption for DOD, but no such exemption was enacted, further supporting the application of Section 526 to Defendants' contracts.[45]

C. Defendants' Contracts are in Violation of the APA, Because They Are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law.

Defendants' specific contracts for purchase of mobility related fuels containing fuels derived from COSRC do not contain the specification required by Section 526 of the EISA. Therefore, these contracts do not comply with Section 526 and are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

This Court can review these contracts, hold them unlawful and set them aside, pursuant to the APA, 5 U.S.C. § 706, because they are "final agency actions."[46] Plaintiffs' challenge to the DLA Energy contracts is a challenge to particular and discrete agency actions, not to a whole broad program. *See, e.g., Lujan v. National Wildlife Federation*, 497 U.S. 871, 890 (1990). The contracts fit the conditions for final agency action in *Bennett v. Spear*, 520 U.S. 154 (1997).[47] Defendants' contracts are "the consummation of the agency's decisionmaking process," and thus would satisfy the first element of the *Bennett* test. Second, there is no doubt that the contracts determine rights or obligations, and are actions from which "legal consequences will flow."

[45] Ex. 2. Implementation Plan. AR at 15.

[46] The APA does not define "final agency action," but defines "agency action" as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C.S. § 551(13). "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review". 5 U.S.C. § 704.

[47] The United States Supreme Court stated: "As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decision-making process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' *Id*. at 177-178.

The contracts in the instant case are similar to the project-specific insurance, loans, and loan guarantees provided by the Overseas Private Investment Corporation which the Court found to be final agency action for APA review in *Friends of the Earth v. Watson*, 2005 WL 2035596 (N.D. Cal. 2005) (copy attached). In addition, at least one court has held that DOD contracts constitute final agency actions. *State of Alabama v. United States Army Corps of Engineers*, 382 F. Supp. 2d 1301 (N.D. Ala. 2005). The Court there held that the Corps' action of entering into contracts for water supply storage was final agency action, stating that:

> Because entering into the contracts was a discrete action that marked the consummation of the agency's decision-making process, and because the…contracts determined rights and obligations and had legal consequences, the Corps' entry into those contracts constituted a final agency decision.

Similarly, Defendants' contracts for procurement of fuels in this case mark the consummation of the agency's decision-making process, and further would determine final rights and obligations and have legal consequences.

In addition to the individual contracts listed in Plaintiffs' First Amended Complaint, Plaintiffs' challenge the failure of Defendants to apply Section 526 to any contracts for purchase of mobility related fuels. As the Northern District of California pointed out in *Friends of the Earth*, such a challenge to a defined group of actions would not convert Plaintiffs' challenge into a broad programmatic attack prohibited by *National Wildlife Federation*, because the Supreme Court held that "it would be appropriate to challenge a 'universe' of particular orders under the APA." *Id.* at *5 (*citing National Wildlife Federation*, 497 at 890); *see also Cobell v. Babbit*, 30 F.Supp.2d 24, 34 (D.D.C. 1998) (application of agency accounting system constituted final agency action).

III. DEFENDANTS' INTERIM IMPLEMENTATION PLAN VIOLATES THE APA.

A. The Implementation Plan is a Substantive Rule That Was Not Adopted in Accordance with the Rulemaking Provisions of the APA.

Defendants' Implementation Plan developed and relied upon in order to implement Section 526 is a substantive rule which should have been adopted with the notice and comment rulemaking procedures of the APA. Defendants failed to comply with these procedures, and, as a result, the Implementation Plan is invalid. 5 U.S.C. § 553(b) and (c). Furthermore, Defendants' failure to comply with these procedures was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to 5 U.S.C. § 706(2)(A).

The APA defines a rule, in pertinent part, as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. § 551(4). Under the APA, a federal administrative agency is required to follow prescribed notice and comment procedures before promulgating and relying upon substantive rules.[48] 5 U.S.C. § 553; *see also Tabb Lakes, Ltd. v. United States of America*, 715 F.Supp. 726, 728 (E.D. Va. 1988). These required procedures include publication of the proposed rule in the *Federal Register* and an opportunity for public comments. *Id.* Failure of an agency to utilize the notice and comment rulemaking procedures of the APA renders a substantive rule void, and any action taken under the rule has no legal effect and must be set aside as agency action taken without observance of procedure required by law. *Tabb Lakes, supra* at 729.

[48] Under the APA, there are exceptions to the notice and comment rulemaking procedures set forth in 5 U.S.C. § 553 for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). This exception is a "narrow one" and should be "only reluctantly countenanced." *Batterton v. Marshall,* 648 F.2d 694, 703 (D.C. Cir. 1980). This exception is inapplicable to the case at hand because the Plan is a substantive rule.

In the instant matter, Defendants' Implementation Plan is a "rule" as defined by 5 U.S.C. § 551(4), because, by its terms, it is intended to implement Section 526 for all of Defendants' fuel contracts.[49] Moreover, the Plan is a substantive rule. Substantive rules are ones which "grant rights, impose obligations, or produce other significant effects on public interests, or which effect a change in existing law or policy." *Tabb Lakes, supra* at 728. Stated differently, a substantive rule "has the force of law, and creates new law or imposes new rights and or duties." *Jerri's Ceramic Arts, Inc. v. Consumer Prodcut Safety Commission,* 874 F.2d 205, 207 (4th Cir. 1989). As discussed above, the Plan creates an immediate change in existing law, *i.e.,* Section 526, by concluding that contracts for fuels containing fuels derived from COSRC are not covered by Section 526 and formalizes Defendants' policy of noncompliance with Section 526.

Because the Implementation Plan implements Section 526, effects a change in existing law, and in fact creates new law, it constitutes a substantive rule and should have been subjected to the notice and comment procedures of the APA prior to promulgation. However, as admitted by Defendants, the Implementation Plan was not published in the *Federal Register*, and there was not any opportunity for public comments. [Doc. 61, ¶ 68]. Therefore, Defendants' promulgation of and reliance on the Implementation Plan is invalid for failure to comply with the rulemaking procedures of § 5 U.S.C. § 553(b) and (c), and Defendants' failure to comply with these procedures was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law contrary to 5 U.S.C. § 706(2)(A).

[49] Ex. 25. Action Memo, A.S. Thompson, Director, DLA, accompanying Implementation Plan (Feb. 25, 2010). AR at 121.

B. The Implementation Plan is an Invalid Because it Violates Section 526.

Pursuant to 5 U.S.C. § 706(2), the reviewing court can also invalidate agency rules that are "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." As discussed *supra*, the Implementation Plan has, in effect, created law that is in direct contravention of the plain language of Section 526, and has resulted and will result in violations of Section 526 by Defendants. Therefore, Defendants' publication of and reliance on the Implementation Plan is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right in violation of Section 526 and 5 U.S.C. § 706(2)C.

IV. DEFENDANTS VIOLATED NEPA BY FAILING TO EVALUATE THE ENVIRONMENTAL IMPACTS OF THEIR CONTRACTS AND THE IMPLEMENTATION PLAN.

The administrative record contains absolutely no evidence that Defendants have attempted to comply with NEPA, 42 U.S.C. § 4332(2), by conducting any NEPA analysis of their contracts in an Environmental Assessment ("EA"), a Finding of No Significant Impact ("FONSI"), or an Environmental Impact Statement ("EIS"). Furthermore, Defendants have violated NEPA, 42 U.S.C. § 4332(2), and the APA, 5 U.S.C. § 706(2)(A), by their publication of and reliance on the Implementation Plan without conducting any NEPA analysis, including not preparing an EA or FONSI, and/or not evaluating the impacts of the Implementation Plan in an EIS. Defendants' failure to comply with NEPA and its implementing regulations also violates the APA, 5 U.S.C. § 706(1), as agency unlawfully withheld or unreasonably delayed.

NEPA is "the basic national charter for protection of the environment," 40 C.F.R. § 1500.1(a), and declares a national policy of protecting and promoting environmental quality. *See* 42 U.S.C. §§ 4321, 4331(a); *see also Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). It is intended "to promote efforts which will prevent or eliminate

damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. To that end, NEPA is designed to sensitize all federal agencies to the environment in order to foster precious natural resource preservation. *Andrus v. Sierra Club,* 442 U.S. 347, 350-351 (1979); *Hodges v. Abraham,* 300 F.3d 432, 438 (4th Cir. 2002).

NEPA's purpose is "to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). To effectuate this purpose, NEPA requires that all federal agencies prepare a "detailed statement"[50] regarding all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Ultimately, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989), and a reviewing court must ensure that an agency took a "hard look" at the environmental consequences of its decision.[51] *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976); *Hughes River Watershed Conservancy, supra* at 443.

A. Defendants' Contracts For Fuels Containing Canadian Oil Sands Recovered Crude and the Implementation Plan Constitute Major Federal Actions Significantly Affecting the Quality of the Human Environment.

Defendants' contracts for mobility related fuels containing COSRC fuels, as well as the Implementation Plan, are "major federal action[s] significantly affecting the quality of the human environment," pursuant to 42 U.S.C. § 4332(2)(C). Major Federal action "includes actions with

[50] This statement, known as an Environmental Impact Statement ("EIS"), must describe, among other items, the "environmental impact of the proposed action," any "adverse environmental effects which cannot be avoided should the proposal be implemented," and "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C).

[51] This "hard look" includes consideration of all foreseeable direct and indirect impacts, as well as the cumulative impacts of a single project together with all past, present, and reasonably foreseeable future actions. 40 C.F.R. 1508.7.

effects that may be major and which are potentially subject to Federal control and responsibility..." 40 C.F.R. § 1508.18 (emphasis added). Federal actions covered by NEPA include "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive" [emphasis added]. 40 C.F.R. § 1508.18(b)(3).

Defendant DLA Energy's mission is to provide Defendant DOD and other government agencies with comprehensive energy solutions, including contracting for fuels on behalf of the federal government.[52] Courts have found government contracts to constitute "major federal action." *See, e.g., Port of Astoria v. Hodel,* 595 F.2d 467, 477 (9th Cir. 1979) (power supply contract); *Forelaws on Board v. Johnson,* 743 F.2d 677, 681 (9th Cir. 1984) (electrical supply contracts); *Environmental Defense Fuel v. Andrus,* 596 F.2d 848,852 (9th Cir. 1979) (water supply contracts.) This contracting, which includes the contracts for mobility related fuels containing COSRC, plainly constitutes "systematic and connected agency decisions" which allocate agency resources to implement any number of statutory programs and/or executive directions. Moreover, these contracts for mobility related fuels containing COSRC have major effects, including, but not limited to, the fact that such fuels have higher lifecycle greenhouse gas emissions compared to conventional petroleum and, thus, exacerbate global warming.[53] Therefore, Defendants' contracts for mobility related fuels containing COSRC constitute major Federal action.[54]

[52] Ex. 2. Implementation Plan. AR at 4.
[53] Ex. 1. LMI Report. AR at 30.
[54] Notably, DLA's NEPA Regulations provide that an "environmental review may be required for…Federal contracts." DLAR No. 1000.22, at Encl 1.

Furthermore, pertaining to Defendants' promulgation of and reliance on the Implementation Plan, 40 C.F.R. § 1508.18 provides, in pertinent part:

(a) Actions include…new or revised agency *rules*, regulations, *plans, policies*, or procedures…. (emphasis added). As discussed *supra*, the Implementation Plan is a substantive rule. It is also a "plan" and statement of Defendant's "policy." The Defendants' promulgation of and reliance on the Implementation Plan has had and will continue to have major effects, as the Implementation Plan's conclusions have allowed Defendants to continue to contract for mobility related fuels derived from COSRC, and in so doing exacerbate global warming. Therefore, like Defendants' contracts for mobility related fuels containing COSRC, the Implementation Plan constitutes major federal action subject to NEPA.[55]

B. Defendants Arbitrarily and Capriciously Failed to Take the Requisite Hard Look at the Environmental Impacts of These Contracts as Well as Their Publication of and Reliance on the Implementation Plan.

Despite the fact that Defendants' contracts, as well as their Implementation Plan, constitute major Federal actions, the record in this matter is completely devoid of any NEPA analysis whatsoever, much less the requisite "hard look," at the environmental impacts of the contracts or the Implementation Plan. Defendants have apparently concluded that NEPA does not apply to these contracts or the Implementation Plan, as the record contains no EA prepared in order to determine whether these contracts, or the Implementation Plan, would have significant environmental impacts.[56]

[55] DLA's NEPA regulations provide that "policies, regulations, and procedures (e.g. regulations, manuals, instructions, mission changes)" are "[T]he type of actions subject to environmental review. DLAR No. 1000.22, at Encl. 1.

[56] To determine "significance" (and thus whether an EIS must be prepared), the agency must consider: (1) ecologically critical area impacts, (2) cumulative impacts, (3) endangered species impacts, (4) uncertain impacts, and (5) controversial impacts. 40 C.F.R. § 1508.27. To help determine whether this significance threshold is met, the agency may prepare an Environmental Assessment ("EA"). Based on the EA, a federal agency either decides to prepare an EIS or

This Court should to ensure that Defendants took a "hard look" at the environmental consequences of their decision to enter into contracts for mobility related fuels derived from COSRC, as well as their decision to promulgate and rely on the Implementation Plan. Defendants' failure to conduct this requisite analysis in relation to these contracts and the Implementation Plan is a violation of NEPA, 42 U.S.C. § 4332(2), as well as the APA, 5 U.S.C. §§ 706(1) and 706(A)(2).

CONCLUSION

The United States Supreme Court has stated that "[t]he harms associated with climate change are serious and well recognized." *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007), and Congress endeavored to reduce the Federal Government's contribution to climate change by including Section 526 when it enacted the EISA of 2007. 42 U.S.C. § 17142. Section 526 clearly applies to Defendants' contracts for mobility fuels derived from COSRC and contains no *de minimis* or bulk fuels exception for Defendants.

Nevertheless, since the passage of the EISA of 2007, Defendants have, by their own admission, refused to comply with Section 526 of the EISA by continuing to enter into contracts for fuels for mobility-related uses derived from COSRC, without including the specification required by Section 526. While Defendants have argued that Section 526 does not apply to contracts for bulk fuels that contain COSRC-derived fuels, this argument is wholly without merit, not only because it violates basic cannons of statutory construction, but further because the majority of the contracts in the administrative record are based on military specifications that *require* that fuels produced should be derived from tar sands or a mixture thereof. As a result,

---

makes a finding of no significant impact ("FONSI"). *See* 40 C.F.R. §§ 1501.4, 1508.9(a)(1).

these contracts are in direct contravention to the plain language of Section 526, and this Court should hold them unlawful and set them aside.

Additionally, Defendants have violated the APA by promulgating and relying upon the Implementation Plan without compliance with the mandatory notice and comment rulemaking procedures set forth in 5 U.S.C. § 553. Therefore, this Court should find the Implementation Plan void, and set aside any action taken under the rule as agency action taken without observance of procedures required by law.

Finally, Defendants have violated NEPA by failing to take the requisite "hard look" at the environmental impacts of the contracts at issue as well as the Implementation Plan. Although Defendants' contracts, as well as the Implementation Plan, are major federal actions significantly affecting the quality of the human environment, Defendants have failed to conduct any NEPA analysis whatsoever in regards to the environmental impacts of the contracts or the Implementation Plan

Therefore, Plaintiffs respectfully request that the Court enter summary judgment for Plaintiffs on their claims that Defendants have violated the APA and NEPA.

Respectfully submitted, this 17th day of February, 2011.

/s/

David S. Bailey (Va. Bar No. 24940)
The Environmental Law Group, PLLC
5803 Staples Mills Road
Richmond, VA 23228
Ph: (804) 433-1980
Fax: (804) 433-1981
dbailey@envirolawva.com

Tammy Belinsky (Va. Bar. No. 43424)
9544 Pine Forest Road
Copper Hill, VA 24079
Ph: (540) 929-4222
Fax: (540) 929-9195
tambel@hughes.net

Gary A. Davis (NC Bar No. 25976)
Admission *pro hac vice* applied for
Gary A. Davis & Associates
P.O. Box 649
61 North Andrews Ave.
Hot Springs, NC 28743
Ph: (828) 622-0044
Fax: (828) 622-7610
gadavis@enviroattorney.com

Eric E. Huber (Col. Bar No. 40664)
Admission *pro hac vice* applied for
Sierra Club Environmental Law Program
1650 38th St. Ste. 102W
Boulder, CO 80301
Ph: (303) 449-5595
Fax: (303) 449-6520
eric.huber@sierraclub.org

CERTIFICATE OF SERVICE

I hereby certify that, on February 17, 2011, a copy of the foregoing Plaintiffs' Motion for Summary Judgment was filed electronically. I understand that notice of this filing will be sent to the following filing users:

Lauren A. Wetzler
United States Attorney Office
2100 Jamieson Ave
Alexandria, VA 22314
lauren.wetzler@usdoj.gov
Attorney for Defendants

Timothy K. Webster
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
twebster@sidley.com
Attorney for Intervenor-Defendants

I also certify that, on February 17, 2011, a copy of the foregoing was mailed to the following non-filing users via US mail, postage paid:

Steven Gillingham
1100 L St. NW
Washington, DC 20036
Attorney for Defendants

/s/
David S. Bailey