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September 22, 2010

Via Electronic Mail
John P. Tustin, Esq.
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 663
Ben Franklin Station
Washington, DC 20044-0663

Re: *Los Alamos Study Group v. United States Department of Energy, et al.;*
No. CV-10-760 JH/ACT

Dear Mr. Tustin:

Thank you for your September 17, 2010 letter, in which you requested that the Los Alamos Study Group voluntarily dismiss the referenced complaint for the reason that defendants have now decided, "based, in part, on a draft supplemental analysis," to prepare a Supplemental Environmental Impact Statement (SEIS) for the Chemistry and Metallurgy Research Replacement Nuclear Facility (Nuclear Facility). According to your letter, this pending action by defendants effectively cures alleged violations of the National Environmental Policy Act (NEPA) and renders our complaint "not ripe for judicial review." For the reasons set forth below, we respectfully decline your offer.

Your letter asserts that, since the National Nuclear Security Administration (NNSA) now intends to prepare a SEIS, the February 12, 2004 Record of Decision (ROD) – upon which NNSA has relied and continues to rely as a final agency action under NEPA to justify its budget requests to Congress for this project over the past seven years – is no longer a final agency action. This belated offer to prepare a SEIS constitutes an acknowledgement that defendants are conducting a major federal action significantly affecting the quality of the human environment without an applicable Environmental Impact Statement (EIS). We therefore respectfully request that defendants halt all further expenditures on the Nuclear Facility until an applicable, adequate EIS is prepared and a new ROD is issued. We also request that defendants make these commitments clear to Congress, which is currently poised to authorize and appropriate approximately $166 million for final design and initial construction activities for the Nuclear Facility based on the representation that there has been final agency action under NEPA, "as described in the November 2003 Final Environmental Impact Statement for CMRR and approved in the February 2004 CMRR EIS Record of Decision" (NNSA Congressional Budget Request for Fiscal Year 2011, p. 217).

Defendants cannot substitute a SEIS for the required *de novo* EIS, for the reasons adduced in our Complaint. As recounted in detail there – and as defendants are acutely aware – the presently proposed version of the Nuclear Facility bears virtually no relationship to the project analyzed under the 2003 EIS and chosen in the 2004 ROD. In fact, the 2004 ROD could not have selected the presently-proposed version of the Nuclear Facility as the preferred alternative, since the present iteration of the project was not addressed or even contemplated at that time.

Moreover, Defendants have long abandoned all of the alternatives of the 2003 EIS and are implementing a novel and vastly more impactful alternative that has never been compared with reasonable alternatives identified in any EIS. Changed circumstances, significant new knowledge, changed national policies, dramatic increases in expected environmental impacts, and a ten-fold increase in expected cost compel environmental and business-case analyses of new, reasonable, and less environmentally-destructive primary alternatives to the current action. In short, there presently exists no applicable EIS which could possibly be supplemented.

Under the Department of Energy (DOE) regulations, the DOE has three options available to it to address changes in a project that have occurred since the ROD. First, in the case of changes that are not material, the DOE can elect to do nothing. In the case of larger changes in which the essence of the project has not been altered, the DOE may publish, as a result of a supplement analysis or for any other reason, a notice of intent to prepare a SEIS. However, in cases where the project itself has transmuted into an endeavor entirely different than that which was proposed and examined – as in the present case – the DOE regulations contemplate the preparation of a new EIS, which analyzes alternatives based on existing, and not long past and otherwise inapplicable, circumstances.

Finally, the "draft supplemental analysis" upon which defendants are relying to support their alleged decision to prepare a SEIS is a Supplement Analysis (SA). Pursuant to 10 C.F.R. 1021.314(c)(3), please provide the undersigned with a copy of the SA.

Sincerely,

Thomas M. Hnasko

TMH:sm
cc: Greg Mello