No. 11-2141

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LOS ALAMOS STUDY GROUP,
Plaintiff-Appellant,
v.

UNITED STATES DEPARTMENT OF ENERGY;
STEVEN CHU, in his official capacity as Secretary, Department of Energy;
NATIONAL NUCLEAR SECURITY ADMINISTRATION;
THOMAS PAUL D'AGOSTINO, in his official capacity as Administrator,
National Nuclear Security Administration,
Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of New Mexico (Judith C. Herrera, J.)

FEDERAL DEFENDANTS-APPELLEES' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY DISPOSITION BECAUSE OF MOOTNESS

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Pursuant to Fed. R. App. P. 27(a)(4) and 10th Cir. Local R. 27.2(A)(1)(b), the United States Department of Energy (DOE) and the National Nuclear Security Administration (collectively NNSA) file this Reply to the Response filed by the Los Alamos Study Group (Study Group).

ARGUMENT

As NNSA explained in its Motion to Dismiss, the case on appeal and the claims that the Study Group alleged in its original Complaint are now moot. In its Complaint, the Study Group alleged that NNSA must prepare a new environmental analysis for the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility (CMRR-NF) under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f. Ex. A (Compl.).[1] Subsequently, NNSA did just that, mooting the Study Group's request for relief. In its Response to the Motion to Dismiss, the Study Group does not point to a single, discrete final agency action identified in the Complaint that the Study Group is still challenging in this case. All of the claims argued in the Study Group's Response are arguments to be made in the Study Group's *new* lawsuit currently pending in district court. *This* appeal, however, is moot.

NNSA has now completed a Supplemental Environmental Impact Statement (SEIS) for the CMRR-NF and issued an Amended Record of Decision (Amended

[1] NNSA cites to the Exhibits filed with NNSA's Motion to Dismiss.

ROD) on October 12, 2011. In the Amended ROD, NNSA selected the Modified CMRR-NF Alternative instead of continuing to implement the earlier NNSA decisions issued in the 2004 ROD with respect to the CMRR-NF. 76 Fed. Reg. 64,344 (Oct. 18, 2011) (Amended ROD). The SEIS and Amended ROD moot the Study Group's original challenge because when an agency develops an additional environmental analysis of its proposed actions and issues a new record of decision—as NNSA has done here—any challenges suggesting that the prior analysis was lacking do not present a live controversy. *Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1121 (10th Cir. 2009); *see also, e.g.*, *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110-15 (10th Cir. 2010); *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1211-13 (10th Cir. 2005).

The Study Group's Response highlights that the instant appeal is moot because the Study Group points solely to alleged flaws in the *new* SEIS that did not exist when the Study Group filed its Complaint or filed this appeal. *See* Resp. at 5-20. When an agency takes a final agency action that moots a plaintiff's suit seeking to compel the agency to take action, the plaintiff cannot resuscitate its case on appeal by shifting its allegations to challenge that new action. *See Rio Grande Silvery Minnow*, 601 F.3d at 1111 (agency's issuance of a new Biological Opinion in 2003 mooted all claims seeking to compel consultation or challenging prior 2001 and 2002 Biological Opinions). Rather, the Administrative Procedure Act

(APA) requires the plaintiff to file a new suit challenging the new final agency action, which the court then reviews based on the administrative record for that action. Otherwise, if the plaintiff should make unfounded and unsupported assertions about the adequacy of the new final agency action—as the Study Group does here—then the Court would lack the administrative record necessary to review the agency's action and the plaintiff's allegations.

Here, the Study Group had a full opportunity to present all of its concerns about the Modified CMRR-NF proposal when it submitted comments to NNSA during the SEIS process. On August 26, 2011, NNSA completed the SEIS, and on October 12, 2011, NNSA issued its Amended ROD. On October 21, 2011, the Study Group filed a new lawsuit alleging that the SEIS is inadequate under NEPA and challenging the Amended ROD. *See* D.N.M. No. 1:11-cv-00946. Assuming the Study Group satisfies other jurisdictional requirements, such as demonstrating its standing, the Study Group may pursue that challenge to NNSA's final agency action under the APA, based on the administrative record before the NNSA. The Study Group may not simultaneously pursue the exact same NEPA arguments in two different courts, especially where this Court does not have the administrative record necessary to review arguments challenging the SEIS and Amended ROD.

A. No allegation from the Study Group's original Complaint remains live, and the Study Group's challenges to the SEIS and Amended ROD must be (and are) alleged in its new suit in district court.

To determine whether a case is moot, the Court must first identify which agency actions and alleged violations were challenged in the Complaint. *See Rio Grande Silvery Minnow*, 601 F.3d at 1111 (citing *Nat'l Mining Ass'n v. Dep't of Interior*, 251 F.3d 1007, 1010 (D.C. Cir. 2001)). The Study Group's Response misrepresents their Complaint (and also misrepresents the facts on the ground, as found by the district court). *See* Ex. A (Compl.); Ex. B (Op.). The Complaint presented several variations on a single major allegation—that NNSA violated NEPA by *failing to prepare a new EIS* for the proposed *CMRR-NF*. Ex. B at 2-4 (Op.); Ex A ¶¶ 52-95.[2] NNSA's completion of the SEIS moots this case because this Court cannot grant any meaningful relief on the Study Group's original Complaint seeking to compel a new NEPA analysis. *See Greater Yellowstone Coal.*, 572 F.3d at 1121.

Rather than demonstrate that its Complaint still presents a live controversy,

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[2] Specifically, in Count I, the Study Group alleged that NNSA violated NEPA by failing to prepare a new EIS with a public scoping process for the CMRR-NF. Ex. A (Compl. at ¶¶ 52-64). In Counts II and III, the Study Group alleged that NNSA needed to develop a new EIS analyzing "connected actions" to the CMRR-NF and "reasonable mitigation measures." Ex. A (Compl. at ¶¶ 65-71; ¶¶ 72-79). Count IV alleged that NNSA's decision-making processes for the proposed CMRR-NF exceeded the scope of the 2003 EIS and that NNSA needed to prepare a new EIS and ROD. Ex. A (Compl. at ¶¶ 80-90). In Count V, the Study Group alleged that NNSA needed to provide public review and comment through a NEPA analysis. Ex. A (Compl. at ¶¶ 91-95).

the Study Group's Response attempts to conflate new allegations challenging the SEIS and Amended ROD with those it originally brought.[3] Specifically, the Study Group repeatedly argues that it is challenging the "2010-11 CMRR-NF," (Resp. at 3, 6-10, 15), but the Study Group cannot and does not point to any agency decision or document that existed *prior* to the Amended ROD that contains the "2010-11 CMRR-NF" that it is allegedly challenging. In fact, the Study Group's Response makes it clear that the "2010-11 CMRR-NF" is the Modified CMRR-NF Alternative that NNSA selected in the Amended ROD. *See* Resp. at 6 (referring to that Alternative as the "2010-11 CMRR-NF"). However, the Study Group could not have challenged the Modified CMRR-NF Alternative in the district court in this lawsuit because NNSA did not select it until October 12, 2011.

Although it did not challenge the Final SEIS in the district court, when describing the substance of its remaining NEPA claims, the Study Group focuses entirely on the alleged shortcomings in the new SEIS, contending that it violates NEPA because it failed to consider sufficient alternatives, is "strikingly abbreviated," and reflects a predetermined outcome. Resp. at 5-15. Those

[3] Similarly, the Study Group attempts to conflate the CMRR-NF with other operations at the Los Alamos National Laboratory (LANL) (Resp. at 1, 15-16 (referring to RLUOB and NMSSUP)), but the Study Group did not make those allegations in its Complaint. Also, all of those projects have pre-existing NEPA coverage and independent utility and would be constructed regardless of whether NNSA decides to build the CMRR-NF. *See*, *e.g.*, Ex. F ¶ 17, 19.

allegations are meritless,[4] but in any event, they are not part of the case on appeal. None of them appear in the Complaint, none were presented to the district court, and none of them affect whether the case on appeal is moot. *See, e.g.*, *Rio Grande Silvery Minnow*, 601 F.3d at 1111. Those allegations all target NNSA's SEIS issued *after* this case was appealed. Moreover, the Court cannot address those allegations in this suit because the Court does not have the administrative record for the SEIS or Amended ROD before it.

The Study Group ignores the requirement that it identify a final agency action in its Complaint by attempting to plead one alleged continuing NEPA violation. Resp. at 8-13. However, as this Court recognized in *Rio Grande Silvery Minnow*, "allegations of legal wrongdoing must be grounded in a concrete and particularized factual context; they are not subject to review as free-floating, ethereal grievances." 601 F.3d at 1111. After all, even "if the [legal] issue does arise again it would be in a different regulatory context than that [originally] challenged." *Id.* at 1119. "Consequently, the precise issue that was the subject of the [plaintiff's] action is no longer extant, and it would not be reasonably likely to

[4] The Study Group's broad and inaccurate characterizations of the SEIS are refuted by even a cursory review of the 2,000 page SEIS and its response to comments. *See* http://energy.gov/nepa/downloads/eis-0350-s1-final-supplemental-environmental-impact-statement (Final SEIS). For example, the Study Group suggests that the description of the affected environment is omitted, but in fact the SEIS analyzed the affected environment at length. *Compare id.* at 3-1 to 3-70 (Final SEIS), *with* Resp. at 7.

recur." *Id.* The precise issue before the district court *today* in the new suit is whether NNSA's decision in the Amended ROD violates NEPA in light of the 2003 EIS, other NEPA documents, and the 2011 SEIS. That issue is *not* the same as the one presented by the Complaint in this case, which was whether the 2003 EIS and other NEPA documents were sufficient or whether NEPA required further analysis.

In these circumstances, the plaintiff must file a new APA suit challenging the *new final agency action*, and the court will then review that action based on the administrative record before the agency. *See, e.g., Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1134-35 (10th Cir. 2006) (finding that challenges to earlier agency decisions were moot in light of new decision and, to the extent new decision presented same issues, the plaintiff may pursue those allegations in a challenge to the new decision); *Aluminum Co. v. Bonneville Power Admin.*, 56 F.3d 1075, 1078 (9th Cir. 1995) (finding that a new ROD and BiOp moot challenge to prior ROD and BiOp); *Aluminum Co. v. Bonneville Power Admin.*, 175 F.3d 1156, 1159-60 (9th Cir. 1999) (allowing same plaintiffs to pursue challenges to a new ROD and BiOp in new suit with new administrative record). The Study Group had to file the new suit, in part, because judicial review of final agency action is restricted to the administrative record before the agency at the time of its decision—here, the record before the NNSA when it issued the

Amended ROD on October 12, 2011. *See, e.g.*, *Citizens For Alternatives To Radioactive Dumping v. DOE*, 485 F.3d 1091, 1096 (10th Cir. 2007); *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994).

The Study Group relies on precedent that is inapposite because, in those cases, the plaintiffs pursued challenges against the agency's *most recent NEPA analyses and most recent agency actions*. None of those cases presented the circumstances presented here, where NNSA has prepared a *new* NEPA analysis and taken a *new* final agency action that moot the earlier challenge. For example, in *Southwest Williamson County Community Ass'n, Inc. v. Slater*, the Sixth Circuit found that the plaintiffs' challenges to the federal defendants' *most recent* NEPA analyses and approvals had not been rendered moot. 243 F.3d 270, 277 (6th Cir. 2001). The Study Group makes the same mistake in arguing that allegations of predetermination or an irrevocable commitment of resources cannot become moot. Resp. at 15-18. For example, in *Metcalf v. Daley*, the plaintiffs challenged the *new* NEPA documents that allegedly reflected a predetermined outcome, and then the court considered those allegations. 214 F.3d 1135, 1141-45 (9th Cir. 2000) (allowing plaintiffs to pursue allegations that agency predetermined the NEPA analysis *after* the agency issued the NEPA documents and final agency decision). Those cases establish that the Study Group's *new* lawsuit challenging the SEIS and Amended ROD is not moot, but cannot establish that *this* lawsuit still presents a

live controversy, since NNSA has prepared a new NEPA analysis which is the relief requested by the Study Group's original Complaint.

B. The only remedy identified by the Study Group is not available here.

The Study Group argues that this Court can still grant relief in this appeal because the Court could "remand with directions to proceed to consider the NEPA claims. The district court would then consider *the state of Defendants' NEPA compliance*, but no court is required to assume that the *SEIS* satisfies NEPA, ..." Resp. at 11 (emphases added). However, the state of NNSA's current NEPA compliance and the validity of the SEIS are not part of this appeal. That question is before the District Court for the District of New Mexico in the *new* suit. *See* D.N.M. No. 1:11-cv-00946.

At oral argument in the district court proceedings that led to this appeal, the Study Group first shifted its challenge to allege that the (then-ongoing) SEIS process and Draft SEIS were inadequate because of alleged predetermination or an irrevocable commitment of resources (though no allegations regarding that SEIS process appear in its Complaint). The district court correctly found that "[w]hile the SEIS process is ongoing, there is no ripe 'final agency action' for the court to review pursuant to the [APA]." Ex. A (Op. at 16); *see also Bennett Hills Grazing Ass'n v. United States*, 600 F.2d 1308 (9th Cir. 1979) (finding that a draft EIS is not a final agency action subject to judicial review). The court found that NNSA

and DOE "are proceeding with an SEIS and are not moving forward with final design or construction pending completion of that process." Ex. A (Op. at 11).[5] The court rejected the Study Group's arguments that the case was ripe because NNSA had allegedly made an irretrievable commitment of resources to the CMRR-NF or had predetermined the result. Ex. A (Op. at 17-21). The court correctly held that those allegations should be considered "*at the completion of the process*, as opposed to while it is ongoing." Ex. A (Op. at 20) (emphasis added).

NNSA has now completed that NEPA process, issued its SEIS, and taken a final agency action by issuing its Amended ROD. The Study Group now can (and is) proceeding with its challenges to the SEIS and Amended ROD in D.N.M. No. 1:11-cv-00946. The Study Group, if successful, may obtain relief on those claims in its *new* lawsuit, but not in this one.

CONCLUSION

For these reasons, NNSA respectfully requests that the Court grant the motion to summarily dismiss the case as moot.

[5] The Study Group's assertions (*see, e.g.*, Resp. at 1, 6, 9) that NNSA began construction of the CMRR-NF prior to issuing the Amended ROD are contradicted by the district court's findings and the evidence. *See, e.g.*, Ex. E ¶ 21; Ex. F ¶ 22.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSIONS

I submit that the foregoing document has been submitted in PDF format to the Tenth Circuit's Electronic Case Filing System; that all required privacy redactions have been made; and that the digital submission has been scanned for viruses with the Microsoft Forefront Client Security 1.117.327.0 program (last updated December 4, 2011) and, according to the program, the document is free of viruses.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c) and Tenth Circuit Rule 25.3, I hereby certify that on this date, December 5, 2011, I caused the foregoing document to be filed upon the Court through the use of the Tenth Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service is consistent with the Service Method Report:

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