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.)

RESPONSE BRIEF OF FEDERAL DEFENDANTS-APPELLEES
ORAL ARGUMENT IS REQUESTED

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STATEMENT OF RELATED CASES

On October 21, 2011, Plaintiff-Appellant the Los Alamos Study Group (Study Group) filed a new lawsuit in the United States District Court for the District of New Mexico, Case No. 1:11-cv-00946. As in the case on appeal, the Study Group alleges that the National Nuclear Security Administration's (NNSA) efforts with respect to the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility (CMRR-NF) violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f. The new complaint differs from the complaint in this case because the Study Group's new complaint challenges the NNSA's recently completed Supplemental Environmental Impact Statement (SEIS) and Amended Record of Decision (Amended ROD). *See* 76 Fed. Reg. 54,768 (Sept. 2, 2011) (announcing availability of Final SEIS); 76 Fed. Reg. 64,344 (Oct. 18, 2011) (Amended ROD).[1] As NNSA established in its Motion for Summary Disposition Because of Mootness and establishes below,[2] the recently completed SEIS and Amended ROD moot the case on appeal.

Undersigned counsel is unaware of any other prior or related cases within the meaning of Tenth Circuit Rule 28.2(c)(1).

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[1] The Final SEIS is available online at: http://energy.gov/nepa/downloads/eis-0350-s1-final-supplemental-environmental-impact-statement.

[2] On November 29, 2011, the Clerk's Office referred the Motion to the panel of judges that will consider the merits of the appeal.

GLOSSARY

APA	Administrative Procedure Act
BiOp	Biological Opinion
CMR	Chemistry and Metallurgy Research Building
CMRR-NF	Chemistry and Metallurgy Research Replacement Nuclear Facility
DOE	Department of Energy
EIS	Environmental Impact Statement
FONSI	Finding of No Significant Impact
LANL	Los Alamos National Laboratory
NEPA	National Environmental Policy Act
NMSSUP2	Nuclear Material Safeguards and Security Upgrade Project, Phase II
NNSA	National Nuclear Security Administration
RLUOB	Radiological Laboratory Utility Office Building
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement

JURISDICTIONAL STATEMENT

A. *District Court Jurisdiction:* Plaintiff-Appellant the Los Alamos Study Group (Study Group) asserted that the district court had jurisdiction over its claims under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704. The Study Group alleged that the National Nuclear Security Administration (NNSA) must prepare a new Environmental Impact Statement (EIS) 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. As discussed below, the district court correctly dismissed the suit as prudentially moot because NNSA was preparing (and has now completed) a new Supplemental Environmental Impact Statement (SEIS) analyzing the environmental effects of the proposed CMRR-NF. In proceedings below, the Study Group attempted to shift its focus to the then-ongoing SEIS process (though no allegations regarding that process appear in its Complaint A11-44). However, the district court correctly found that because NNSA had not yet completed the SEIS and made a final decision regarding the proposal in a Record of Decision (ROD), the Study Group did not challenge final agency action and such a suit was not ripe for judicial review.

B. *Appellate Court Jurisdiction:* This Court has jurisdiction under 28 U.S.C. § 1291. The district court dismissed the Study Group's Complaint on May

23, 2011, and the Study Group filed a timely notice of appeal on July 1, 2011. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

The issue on appeal is not whether NNSA has complied with NEPA (although it has), but rather whether the district court correctly dismissed the Study Group's suit for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

1. Whether the NNSA's new SEIS process and final decision moot the Study Group's claim that NNSA needed to prepare a new NEPA analysis?

2. Whether the Study Group's attempts to challenge the then-ongoing SEIS process identified a *final* agency action—an action that is the consummation of the agency's decision-making process and from which legal consequences flow—as required for judicial review under the APA?

3. Whether the Study Group's NEPA claims were ripe for review?

4. Whether the district court correctly dismissed this case under Rule 12(b)(1) and whether it clearly erred in making its findings of jurisdictional facts?

STATEMENT OF THE CASE

NNSA administers the Los Alamos National Laboratory (LANL) in New Mexico as part of its mission to enhance national security, engage in nuclear

research, and promote nuclear safety. LANL contains numerous facilities supporting that mission. The Study Group, a group advocating for nuclear disarmament, challenges NNSA's environmental analysis of a single proposed facility at LANL—the CMRR-NF.[1] The proposed CMRR-NF would be one component in an effort to replace the 60-year-old Chemistry and Metallurgy Research Building (CMR)—a unique facility, central to LANL's mission and critical to national security—which is now outmoded and sits on two small seismic faults.

NNSA prepared a comprehensive Environmental Impact Statement (EIS) in 2003 and issued an unchallenged Record of Decision in 2004 (2004 ROD) authorizing the proposed CMRR-NF. After issuing the 2004 ROD, NNSA began an iterative design process for the CMRR-NF, during which it revised the proposed design to address new seismic data, nuclear safety requirements, and other infrastructure enhancements. In this case, the Study Group filed its Complaint alleging that the proposed design changes and new information required a new EIS for the proposed CMRR-NF. Shortly thereafter, NNSA formally announced that it was preparing an SEIS to take another hard look at potential environmental

[1] The Study Group's Complaint alleged that NNSA had failed to prepare an adequate NEPA analysis for a single proposed facility at LANL, the proposed CMRR-NF. A316-17 (Op. at 3-4), A11-44. Unfortunately, as discussed *infra* pp. 14-16, 23-26, the Study Group's Brief conflates the proposed CMRR-NF with other, independent facilities at LANL.

impacts in light of new information and proposed design changes. *See* A1008-1531 (Draft SEIS); 76 Fed. Reg. 24,018 (April 29, 2011). NNSA committed to forego beginning final design and construction on the proposed CMRR-NF until it completed the SEIS process and made a final decision in a ROD about whether to pursue the proposal. A320; A573.

Under the doctrine of prudential mootness, the district court found that the preparation of this new NEPA analysis mooted the Study Group's claims that NNSA needed to prepare a new NEPA analysis. In the course of the district court proceedings, the Study Group shifted its challenge and pursued premature arguments requesting that the court find the new SEIS inadequate before NNSA completed it and made a final decision. However, the district court correctly found that it lacked jurisdiction because the Study Group's various challenges were either mooted by the SEIS process or would not become ripe until NNSA completed the new SEIS and made a final decision in a ROD. The Study Group appealed from the district court's dismissal of its case.

During the appeal, on August 26, 2011, NNSA completed the SEIS, and on October 12, 2011, NNSA issued its Amended ROD. *See* 76 Fed. Reg. 54,768 (Sept. 2, 2011) (announcing availability of Final SEIS);[2] 76 Fed. Reg. 64,344

[2] The Final SEIS is available online at: http://energy.gov/nepa/downloads/eis-0350-s1-final-supplemental-environmental-impact-statement.

(Oct. 18, 2011) (Amended ROD). In the Amended ROD, NNSA selected the Modified CMRR-NF Alternative—which includes various design changes—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. As NNSA explained in its Motion for Summary Disposition Because of Mootness, NNSA's Final SEIS and Amended ROD definitively establish that this case is *constitutionally* moot.

The Study Group had a full opportunity to present all of its concerns about the proposed CMRR-NF when it submitted comments to NNSA during the SEIS process. Less than ten days after NNSA issued the Amended ROD, the Study Group filed a new complaint challenging the adequacy of the NEPA analysis and the Amended ROD in the District Court for the District of New Mexico, No. 1:11-cv-00946. Assuming the Study Group satisfies other jurisdictional requirements, such as proving 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 SEIS and Amended ROD have rendered *this* case on appeal moot, and the Study Group must (and already is) pursuing its challenges to those agency actions in its *new* lawsuit.

STATEMENT OF FACTS

A. NNSA administers Los Alamos National Laboratory (LANL).

NNSA is a semi-autonomous agency within the Department of Energy (DOE). A564. NNSA oversees the management and security of the nation's nuclear weapons and nuclear nonproliferation programs. A564; *see* 50 U.S.C. § 2401(b). NNSA also administers LANL. A564. LANL occupies approximately 40 square miles in northern New Mexico. A581. Originally established in 1943 as part of the Manhattan Project, LANL is now a multipurpose institution primarily engaged in theoretical and experimental research and development. A1022.

B. Statutory and Regulatory Background

1. Administrative Procedure Act (APA)

Because NEPA does not provide for a private cause of action, the judicial review provisions of the APA, 5 U.S.C. §§ 701-706, govern review of the Study Group's claims. *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 690-91 (10th Cir. 2010). The APA provides the limited waiver of sovereign immunity necessary to provide the courts with jurisdiction. *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006). As relevant here, the APA only allows judicial review of "final agency action." 5 U.S.C. § 704.

The APA imposes a narrow and highly deferential standard of review limited to determining whether the federal agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law."

5 U.S.C. § 706(2)(A); *see, e.g., Friends of Marolt Park v. DOT*, 382 F.3d 1088, 1096 (10th Cir. 2004). Judicial review of final agency action is restricted to the administrative record before the agency at the time of its decision. *See, e.g., Citizens For Alternatives To Radioactive Dumping v. DOE*, 485 F.3d 1091, 1096 (10th Cir. 2007).

2. National Environmental Policy Act (NEPA)

NEPA, 42 U.S.C. §§ 4321-4370f, is purely a procedural statute; it mandates that agencies take a hard look at the environmental consequences of their decisions but does not require particular results. *Morris*, 598 F.3d at 690. NEPA requires a federal agency to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Council on Environmental Quality has issued guidance on compliance with NEPA, 40 C.F.R. §§ 1500-1508, and DOE has promulgated regulations governing its NEPA compliance, 10 C.F.R. §§ 1021.300-343.

DOE may prepare a supplemental EIS (SEIS) supplementing an earlier EIS at any time to further the purposes of NEPA. 10 C.F.R. § 1021.314(b). DOE's NEPA regulations require preparation of an SEIS (not an EIS) if there are substantial changes to the proposal or significant new information relevant to environmental concerns. 10 C.F.R. § 1021.314(b), (a); 40 C.F.R. § 1502.9(c). When it is unclear whether or not an SEIS is required, DOE prepares a Supplement

Analysis to decide how to proceed. 10 C.F.R. § 1021.314(c). When DOE prepares an SEIS, it does so "in the same manner as any other draft and final EISs, except that scoping is optional for a supplement. If DOE decides to take action on a proposal covered by [an SEIS], DOE shall prepare a ROD." *Id.* § 1021.314(d).

In general, connected actions should be discussed in the same impact statement. 40 C.F.R. §§ 1508.25(a)(1). In the Tenth Circuit, "[r]eviewing courts 'apply an independent utility test to determine whether multiple actions are so connected as to mandate consideration in a single EIS.'" *Wilderness Workshop v. BLM*, 531 F.3d 1220, 1228 (10th Cir. 2008) (quoting *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006)). "The crux of the test is whether each of two projects would have taken place with or without the other and thus had independent utility." *See id.* at 1229. Actions with independent utility need not be analyzed in the same EIS.

C. Chemistry and Metallurgy Research Facility (CMR)

CMR is one of LANL's most important facilities and has unique capabilities for performing nuclear material analytical chemistry, materials characterization, and actinide research and development (actinides include the 14 elements with atomic numbers from 90 to 103, such as uranium and plutonium). A565; A581; A1024. CMR supports a number of critical national security missions, including research; nuclear nonproliferation programs; the manufacturing, development, and

surveillance of pits (the fissile core of a nuclear warhead); dismantlement efforts; and material recycling and recovery. A565. CMR's analytical chemistry and materials characterization services support almost all of the nuclear programs at LANL and are necessary to fulfill NNSA's mission at LANL. A581; A723; A1024.

CMR is almost 60 years old and near the end of its useful life. A565; A1024. Many of its utility systems and structural components are aged, outmoded, and deteriorated, and it is "maintained in a safe and secure manner only at high cost." A565; A732. In 1998, geological studies identified two small seismic faults beneath two of the wings of CMR. A565; A1024. Over the long term, NNSA cannot continue to operate the mission-critical CMR support capabilities in the existing CMR at an acceptable level of risk to worker safety and health. A565-66. NNSA has taken steps to minimize risks associated with continued operations at CMR. A566; A1025. To ensure that NNSA can fulfill its national security mission for the next 50 years in a safe, secure, and environmentally sound manner, NNSA proposed to construct a replacement for CMR, consisting of the CMRR-NF and RLUOB. A566-67, 581-82.

D. NEPA process for the proposed CMRR-NF

1. NNSA prepared an EIS in 2003 and issued a ROD in 2004 authorizing construction of the CMRR-NF.

In 2002, NNSA began preparing an EIS to take a hard look at the environmental effects of its proposal to replace CMR. A567. After a thorough analysis of the potential environmental impacts of the various alternatives and ample opportunity for public comment, NNSA issued a Final EIS in 2003. A567. In 2004, NNSA published its ROD, deciding to construct a replacement for CMR. A568; A581; 69 Fed. Reg. 6967 (Feb. 12, 2004). The 2004 ROD decided that LANL should construct two distinct buildings: a single, consolidated nuclear material-capable, Hazard Category 2 laboratory building (the CMRR-NF), and a separate but adjacent administrative office and support building, the Radiological Laboratory Utility Office Building (RLUOB). A568; A581; A818.

2. NNSA constructed RLUOB, which has independent utility because it services the existing CMR and PF-4.

The 2003 EIS and 2004 ROD authorized the construction of the current RLUOB. Project personnel fully planned and constructed RLUOB, beginning in 2004. A1021; A828; A819; A723. Radiological laboratory operations are expected to commence in 2012. A1021. RLUOB has independent utility from the CMRR-NF for servicing the existing CMR and PF-4 facilities, as demonstrated by RLUOB's anticipated beginning operation date for radiological operations in

2012—almost a decade before the proposed CMRR-NF could become operational. *See* A1021; A573-74.

3. NNSA discovered new information and made some preliminary design changes to the CMRR-NF, but the CMRR-NF's purpose and need remained the same.

After NNSA issued the 2004 ROD, NNSA began an iterative design process for the CMRR-NF. A820. During that process, NNSA made some changes to the preliminary designs for the CMRR-NF. *See infra* pp. 14-16. The design changes proposed for the CMRR-NF are primarily a response to seismic, safety, and security concerns and are not dictated by programmatic changes. A570. Specifically, in 2006, NNSA partially excavated the footprint of the proposed CMRR-NF and drilled bore holes solely for the purpose of geological study. A573. NNSA then made preliminary changes to the design in light of the new geologic information. A569-70; A582. Those design changes include incorporating additional structural steel for stronger walls and floors, as well as a deeper excavation and backfill to stabilize the soil. A569-70; A582; A725; A820-21; A1037. The new designs were intended to meet updated earthquake criteria with no change to the building's functionality and to address the seismic concerns raised by the new data. A725; A820. NNSA also modified the design to meet updated DOE nuclear safety requirements, at 10 C.F.R. Part 830. A569;

A582; A1037. The new designs also incorporated some infrastructure enhancements and sustainable design principles. A582.

However, NNSA's purpose and need for the proposed CMRR-NF have not changed since the 2003 EIS or 2004 ROD, nor did the scope of operations for the proposal. A570; A581-82; A1109-10. NNSA needs to provide for continuation of mission-critical analytical chemistry and materials characterization capabilities at LANL in a safe, secure, and environmentally sound manner. A581-82; A1109-10. Concurrently, NNSA proposes to consolidate these activities at one location to increase operational efficiency and enhance security. A581-82; A1109-10. These purposes and needs have not changed.

4. NNSA prepared a Draft SEIS considering numerous alternatives.

In light of the proposed changes to the CMRR-NF design, NNSA decided to prepare a Supplement Analysis. A571. Before completing that Supplement Analysis, however, NNSA decided to prepare an SEIS for prudential reasons. A571; A577.

In October 2010, NNSA announced the preparation of an SEIS for the CMRR-NF. A580-82. NNSA conducted a public scoping process, including two public meetings and a 45-day comment period. 75 Fed. Reg. 60,745 (Oct. 1, 2010); 75 Fed. Reg. 67,711 (Nov. 3, 2010); 10 C.F.R. § 1021.314(d). In April

2011, NNSA issued a Draft SEIS for the CMRR-NF and accepted public comments on the Draft. A1010-1531; 76 Fed. Reg. 24,018.

The Draft SEIS (as well as the Final SEIS) analyzed three alternatives in depth. *See* A1035-39, A1134-50; *see* http://energy.gov/nepa/downloads/eis-0350-s1-final-supplemental-environmental-impact-statement, at 2-10 through 2-30. Those alternatives include: (1) continuing to implement the earlier NNSA decisions issued in the 2004 ROD and based on the 2003 EIS relative to the CMRR-NF; (2) constructing the Modified CMRR-NF which includes various design changes that address new seismic information, enhance the infrastructure of the facility, and meet new nuclear-safety requirements—this alternative includes two different construction options, the Deep Excavation Option and the Shallow Excavation Option; and (3) continuing to use the existing CMR. A1134-57. The Draft SEIS (as well as the Final SEIS) also considered numerous other alternatives—such as alternative sites within LANL, distributing capabilities to various other facilities at LANL, delaying a decision, or constructing several smaller buildings. A1038-39, A1124-80. NNSA did not analyze these alternatives in depth, however, because NNSA determined that they were not reasonable.

E. NNSA committed to finishing the SEIS process before NNSA made final design decisions, began construction, or entered contracts for construction of CMRR-NF.

NNSA filed sworn declarations regarding the proposed CMRR-NF with the district court describing the status of design and construction as well as the administrative process. The declarants had personal knowledge of the proposal's design process and the SEIS process: Dr. Donald Cook is the Deputy Administrator for Defense Programs at NNSA and oversaw the proposed CMRR-NF (A562-75); Roger E. Snyder was the Deputy Site Manager at LANL and oversaw the proposed CMRR-NF project at the site level (A722-34); Herman C. LeDoux is the Federal Project Director for the proposed CMRR-NF project and had knowledge of both the current status of the SEIS process and the design process for the proposal (A817-26).

NNSA committed not to begin final design prior to completing the SEIS. As the district court found, "NNSA is still evaluating the aspects of relative sizing and layout of the proposed CMRR-NF, and the overall project design is less than 50 percent complete." A320; (Op. at 7); A573. NNSA estimated that during the SEIS process, "the overall design is expected to advance by only about 15 percent." A574; A725-27. NNSA could not approve the start of final design until it completed Critical Decision 2, and NNSA indicated that Critical Decision 2 would not be made until NNSA issued a new ROD. *See* A727. Moreover, NNSA's

ongoing design efforts assisted "in preparation of the SEIS and evaluation of the alternatives." A727; A822.

NNSA also committed not to begin construction of the proposed CMRR-NF before completing the SEIS and issuing a ROD. As the district court found, "no CMRR-NF construction is underway, and none will occur until after the SEIS is finalized." A320 (Op. at 7); A573. NNSA could not approve the start of construction until it completed Critical Decisions 2 and 3, and NNSA indicated that those Decisions would not be made until NNSA issued a new ROD. A727; *see also* A17. The NNSA officials overseeing CMRR-NF swore that no construction on the project would proceed until completion of the SEIS. A563, A573, A722, A727.

Other construction has occurred at LANL, but it related to ongoing projects for different facilities and operations with independent utility. A728-29. "These projects are not dependent upon construction of CMRR-NF, nor does CMRR-NF necessitate their construction." A728-29, 731. For example, the Nuclear Material Safeguards and Security Upgrade Project, Phase II (NMSSUP2) will replace the security perimeter around the existing plutonium facilities, not just the proposed CMRR-NF. A728-731. The construction of a new parking lot will offset parking lost due to the construction of RLUOB and NMSSUP2. A731. These actions were all analyzed in prior NEPA analyses and authorized in prior RODs. A1029;

A728-29. "None of the ongoing construction activities are connected to the proposed CMRR-NF." A731.

Finally, NNSA did not enter into any contracts for construction of the proposed CMRR-NF pending completion of the SEIS. As the district court found, the Study Group had "come forward with no evidence of any" "binding agreement with an outside group committing [the agency] to a particular action." A332 (Op. at 19). "No contracts or contract options for the physical construction of CMRR-NF will be awarded pending the outcome of the SEIS." A726.

F. District Court Proceedings

On July 1, 2010, the Study Group wrote to NNSA and requested a new NEPA analysis for the CMRR-NF. A570-71. Later that month, NNSA informed the Study Group that NNSA was preparing a Supplement Analysis. A571. Without waiting to learn the results of the Supplement Analysis, the Study Group filed its Complaint about three weeks after receiving that response. A11-44.

The Complaint alleged that NNSA had violated NEPA by failing to develop a new EIS for the proposed CMRR-NF in light of proposed design changes and new information. A29-32; A316 (Op. at 3). The Complaint requested a broad injunction barring all investment in or design of the CMRR-NF absent a new EIS. A42; A316 (Op. at 3). The Complaint is discussed in more detail *infra* pp. 23-26.

Soon after the Study Group filed the Complaint, NNSA decided to prepare an SEIS. The United States then moved to dismiss the case for lack of subject matter jurisdiction under Rule 12(b)(1). NNSA presented evidence that the preparation of a new SEIS rendered the Complaint moot. NNSA also established that any challenge to the ongoing SEIS process could not be ripe until after NNSA completed the SEIS and issued a final decision in a ROD. The district court granted the motion. A335 (Op. at 22).

The district 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." A324 (Op. at 11). "The final form and conclusion of the SEIS cannot currently be known." A328 (Op. at 15). The court found "that it would be imprudent to halt all work, including design analysis, and to issue what would essentially be an advisory opinion while the SEIS process (which had not yet begun at the start of litigation) is ongoing." A328 (Op. at 15). Thus, the court concluded that the Study Group's "Complaint should be dismissed on the grounds of prudential mootness." A335 (Op. at 22).

The district court also 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]." A329 (Op. at 16). The court found that the "overall project design is less than 50 percent complete." A330 (Op. at 17). The court also found that the Draft SEIS

analyzed two different construction options, one of which had been added since the beginning of the SEIS process. A330 (Op. at 17). "Clearly, the CMRR-NF project is still in some state of flux." A331 (Op. at 18). "In other words, the design work undertaken by [NNSA] over the past six years is not a 'final agency action,' and therefore does not present an action ripe for review." A331 (Op. at 18). 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. A330-34 (Op. at 17-21). The court held that any of these alleged NEPA violations should be considered "at the completion of the process, as opposed to while it is ongoing." A333 (Op. at 20). The court also observed that the Study Group had failed to establish any such NEPA violations. A332 (Op. at 19).

Finally, the district court observed that "[the Study Group's] interpretation of NEPA would condemn agencies to the role of the mythical Sisyphus, forever advancing projects up a hill, only to be forced to start over from scratch when they encounter new information that results in design challenges. This is not what NEPA requires. Instead, the NEPA regulations contemplate that agencies will address significant new circumstances through the issuance of an SEIS, just as [NNSA and DOE] are in the process of doing in this case." A335 (Op. at 22).

The Study Group appealed.

G. During this appeal, NNSA issued its Final SEIS and Amended ROD selecting the Modified CMRR-NF Alternative, and the Study Group filed a new lawsuit.

On August 26, 2011, NNSA issued its Final SEIS, which takes a hard look at the potential environmental impacts of the new design proposals, and NNSA accepted public comments on the Final SEIS. *See* 76 Fed. Reg. 54,768; 76 Fed. Reg. 64,344. NNSA then issued its Amended 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. Less than ten days later, the Study Group filed a new complaint challenging the adequacy of the SEIS and the Amended ROD. D.N.M. No. 1:11-cv-00946.

STANDARD OF REVIEW

This Court reviews the district court's determination of prudential mootness for an abuse of discretion. *See, e.g.*, *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1122 (10th Cir. 2010). With respect to the other three jurisdictional issues—constitutional mootness, final agency action, and ripeness—this Court considers the legal issues *de novo* and reviews the findings of jurisdictional facts for clear error. *See, e.g.*, *Butler v. Kempthorne*, 532 F.3d 1108, 1110 (10th Cir. 2008).

SUMMARY OF ARGUMENT

The district court correctly dismissed the Study Group's claims as prudentially moot and unripe. Alternatively, the district court's judgment could also be affirmed because the case is constitutionally moot and there is no final agency action, as required for jurisdiction under the APA. Although the Study Group's Brief repeatedly attempts to conflate these jurisdictional issues with the merits of its NEPA claims, the merits of the NEPA claims are not before this Court. In any event, NNSA has complied with NEPA throughout this decision-making process, and the Study Group has not (and cannot) establish otherwise.

1. The Study Group's original Complaint alleged that NNSA needed to prepare a new NEPA analysis with public scoping on the new design proposals for the CMRR-NF project. The district court correctly found the case prudentially moot because NNSA was already preparing a new, supplemental NEPA analysis with public scoping on those proposals. Moreover, NNSA's completion of the SEIS and Amended ROD renders the claims presented in the Complaint *constitutionally* moot under this Court's precedent.

2. The district court also lacked jurisdiction because the Study Group does not challenge final agency action under the APA. The Study Group fails to identify any specific, discrete agency action that is *final*. In fact, the Study Group attempts to challenge alleged inadequacies in the *Draft* SEIS which is not a *final*

decision document. Furthermore, no consequences can flow from NNSA's Draft SEIS, ongoing design activities, or other conduct challenged in *this* suit, and the Study Group has already filed a *new* lawsuit challenging the *final* SEIS and Amended ROD. The Amended ROD is a final agency action, but the Study Group refused to wait for the Amended ROD. Thus, the Study Group did not (and could not) challenge the Amended ROD in this lawsuit because NNSA only issued it during the pendency of this appeal.

3. In the alternative, this Court should affirm on the grounds that the Study Group's claims are unripe and unfit for judicial review. Furthermore, the Study Group suffered no hardship from review being withheld pending the completion of the SEIS and issuance of a ROD. NNSA engaged in a thorough environmental analysis through the SEIS process before issuing a final Amended ROD determining whether to proceed with the proposed CMRR-NF. The district court properly did not disrupt that ongoing administrative process.

Finally, to the extent that the Study Group challenges the SEIS and Amended ROD, the Study Group must do so—and has done so—in its *new lawsuit* in D.N.M. No. 1:11-cv-00946. NNSA issued those two documents during the pendency of this appeal, and the Study Group cannot now resuscitate this moot case by shifting its allegations to challenge those new actions. Under the APA, the Study Group must file a new suit challenging the new (and only) final agency

action, which the court must review on the administrative record for that action. On October 21, 2011, the Study Group filed its 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, 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 (as it is attempting to do here), especially where this Court does not have the administrative record necessary to review arguments challenging the SEIS and Amended ROD.

ARGUMENT

I. NNSA's completion of a new NEPA analysis and Amended ROD for the proposed CMRR-NF moots the Study Group's Complaint demanding that the NNSA must prepare a new NEPA analysis.

In the district court, the Study Group's Complaint alleged that NNSA had violated NEPA by failing to prepare a new EIS for the proposed CMRR-NF in light of proposed design changes, new seismic information, and other new information. A29-32; A316 (Op. at 3). NNSA, however, has completed an SEIS for the proposed CMRR-NF considering these very issues, which deprives this Court of the opportunity to provide any relief. The case presented in the Complaint is moot which, in turn, moots the instant appeal.

Courts recognize two kinds of mootness: constitutional mootness and prudential mootness. *Silvery Minnow*, 601 F.3d at 1121-22 (collecting cases). "Under both Article III and prudential mootness doctrines, the central inquiry is essentially the same: have circumstances changed since the beginning of litigation that forestall any occasion for meaningful relief." *Id.* at 1122 (quoting *S. Utah Wilderness Alliance v. Smith (SUWA I)*, 110 F.3d 724, 727-28 (10th Cir. 1997). Here, NNSA's preparation of a fresh NEPA analysis in its SEIS has rendered it impossible for the court to grant the Study Group any meaningful relief on its original Complaint seeking a new NEPA analysis.

A. The Complaint alleged that NNSA had violated NEPA by failing to prepare a new NEPA analysis of the proposed CMRR-NF in light of proposed design changes and new information.

The Study Group wrongly attempts to resuscitate this moot case by shifting beyond the allegations dismissed by the district court. As this Court has recognized, a plaintiff's "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." *Silvery Minnow*, 601 F.3d at 1111 (analyzing Complaint to determine whether allegations made therein are moot). "To determine whether anything remains of [the plaintiff's] case, we need to identify which [agency actions the plaintiff] challenged." *See id.* (quoting *Nat'l Mining*

Ass'n v. DOI, 251 F.3d 1007, 1010 (D.C. Cir. 2001)); *see also Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 893 (10th Cir. 2008).

The district court provided a thorough and accurate summary of the allegations in the Study Group's Complaint. A316-17 (Op. at 2-3). The Study Group sought a declaratory judgment and mandatory injunction requiring NNSA to prepare a new NEPA analysis of the CMRR-NF. 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. A29-32. In Counts II and III, the Study Group alleged that NNSA must prepare a new EIS analyzing "connected actions" to the CMRR-NF and "reasonable mitigation measures." A33-37. Count IV alleged that NNSA's decision-making processes for the proposed CMRR-NF exceeded the scope of the 2003 EIS and that NNSA must prepare a new EIS and ROD. A37-40. In Count V, the Study Group alleged that NNSA needed to provide public review and comment through a NEPA analysis. A40-42.

Thus, the Complaint presents several variations on a single major theme—that NNSA violated NEPA by failing to prepare a new EIS for the proposed CMRR-NF.[3] But NNSA *has now* prepared a new SEIS for the proposed

[3] The Study Group also appeared to challenge the adequacy of the 2003 EIS and 2004 ROD. The district court correctly found those claims time-barred by the general six-year statute of limitations for claims against the United States, 28 U.S.C. § 2401(a). A323 (Op. at 10 n.5); *see also* Br. at 3 n.1 (abandoning those claims).

CMRR-NF which moots those claims. The Study Group cannot resuscitate its moot case by presenting new allegations on appeal.

First, the Study Group cannot resuscitate its moot case by presenting new allegations on appeal challenging the sufficiency of the new SEIS. The Complaint did not (and could not) make any allegations about the recent SEIS process, Draft SEIS, Final SEIS, or Amended ROD; NNSA had not announced the SEIS process at the time that the Study Group filed the Complaint at issue in this appeal. *See, e.g.*, *Silvery Minnow*, 601 F.3d at 1111 (holding that Court would interpret pleadings as directed at those agency actions that had been issued when the plaintiff filed its Complaint).

Second, the Study Group cannot resuscitate its moot case by asserting that it is challenging other facilities and projects at LANL when it never pled those allegations in its Complaint. In its Brief, the Study Group argues (Br. at 28-30, 36-37, 41-42) that it is challenging the RLUOB, construction of NMSSUP2, and the development of other facilities at LANL. But the Study Group did *not* challenge the final decisions authorizing those facilities in its Complaint filed with the district court. Although the Complaint acknowledged that NNSA had completed construction of RLUOB and was outfitting RLUOB, the Complaint did not allege that the construction or outfitting of RLUOB itself violated NEPA or the 2004 ROD. A15. Similarly, the Complaint did not challenge the NEPA analyses

or RODs underlying the construction of NMSSUP2 or any of the other facilities referred to in the Opening Brief (*see, e.g.*, Br. at 30). Instead, the Complaint alleged that NNSA needed to prepare a new NEPA analysis *for the CMRR-NF* which treated "RLUOB Occupancy" and "NMSSUP2" as "connected and cumulative" actions. A34. If the Study Group thought that the NEPA analyses or final decisions authorizing those other projects were fatally flawed, then the Study Group needed to allege that those decisions violated NEPA in its Complaint. It did not do so.[4]

B. The preparation of a new NEPA analysis of the proposed CMRR-NF is a change in circumstances mooting the Study Group's suit.

"To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the Complaint is filed." *Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1121 (10th Cir. 2009) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)).

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[4] In any event, as described *supra* pp. 10-11, 14-16, all of those projects have independent utility and would be constructed regardless of whether NNSA decided to build the CMRR-NF. A728-31. RLUOB services the *existing* CMR and the PF-4, NMSSUP2 replaces a security perimeter around *existing* facilities, and so on. *See* A1021; A573-74, A819, A723, A728-31, A1029. NNSA is not building and outfitting these facilities almost a decade before the proposed CMRR-NF might become operational so that they can sit idle for ten years. Because these facilities all have independent utility from the CMRR-NF, they did not need to be considered in a single NEPA document. *See, e.g.*, *Wilderness Workshop*, 531 F.3d at 1228; *Utahns for Better Transp. v. DOT*, 305 F.3d 1152, 1183 (10th Cir. 2002); *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989).

Circumstances have changed since the beginning of this litigation that forestall any occasion for meaningful relief.

Here, the Study Group's Complaint alleged that NNSA violated NEPA by failing to prepare a new EIS for the proposed CMRR-NF in light of proposed design changes, new seismic information, and other new information. During the course of this litigation, NNSA announced and prepared an SEIS analyzing the proposed changes and new information. NNSA announced that SEIS process, held public scoping, and issued a Draft SEIS while this case was pending before the district court. A580; 76 Fed. Reg. 24,018; 76 Fed. Reg. 28,222 (May 16, 2011); A1008-1531. After the district court dismissed and the Study Group appealed, NNSA issued a Final SEIS, and on October 12, 2011, NNSA issued its Amended ROD which 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. 54,768; 76 Fed. Reg. 64,344.[5] These changed

[5] This Court may affirm the district court's dismissal based solely on the evidence before the district court. However, if the Court finds that the events that occurred after the appeal also render the case moot, then the Court may also find the case moot on that basis. *See, e.g., Greater Yellowstone*, 572 F.3d at 1121, *compare with Silvery Minnow*, 601 F.3d at 1110 n.11 (holding that party *disputing* district court's finding of mootness cannot cure failure to establish jurisdiction in district court by presenting new evidence on appeal). This Court should take judicial notice of both the Final SEIS and Amended ROD. *See, e.g., Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1010 n.5 (9th Cir. 2011) (taking judicial notice of Draft EIS and noting that government had followed

circumstances moot the Study Group's case because this Court cannot grant the Study Group any meaningful relief on the claims presented in the district court Complaint at issue here.

1. The district court did not abuse its discretion in finding that the SEIS process prudentially mooted this case.

The district court did not abuse its discretion in finding that the then-ongoing SEIS process rendered the Study Group's claims prudentially moot. *See Silvery Minnow*, 601 F.3d at 1121. Prudential mootness addresses "not the power to grant relief but the court's *discretion* in the exercise of that power." *SUWA I*, 110 F.3d at 727 (quoting *Chamber of Commerce v. DOE*, 627 F.2d 289, 291 (D.C. Cir. 1980)). "In some circumstances, a controversy, though not moot in the strict Article III sense, is 'so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant.'" *Id.* (quoting *Chamber of Commerce*, 627 F.2d at 291). Declining to impose declaratory or injunctive relief is particularly appropriate where the government has *already* changed its policies or taken the requested action. *See, e.g.*, *SUWA I*, 110 F.3d at 727; *Committee for First Amendment v. Campbell*, 962 F.2d 1517, 1525 (10th Cir. 1992); *New Mexico v. Goldschmidt*, 629 F.2d 665, 668-69 (10th Cir. 1980). The district court correctly

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through on promise to assess certain information); 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed.").

decided to stay its hand here because NNSA had already made great progress towards providing the Study Group with the relief that it requested—preparation of a new NEPA analysis—and NNSA is entitled to a measure of comity. *Chamber of Commerce*, 627 F.2d at 291.

NNSA's actions rendered the Study Group's Complaint moot because they healed any alleged injuries set forth in the Complaint. *SUWA I*, 110 F.3d at 727; *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 246 (5th Cir. 2006) ("Corrective action by an agency can moot an issue."). Because NNSA had already begun the SEIS process and prepared a Draft SEIS, the court could not have granted any relief in response to the original request for a new NEPA analysis that would have had a practical effect in the real world. Any relief would be particularly meaningless here because NNSA produced the SEIS "in the same manner as any other draft and final EISs," including the optional public scoping process. 10 C.F.R. § 1021.314(d). Thus, the Study Group cannot explain how the SEIS process provided it with less relief than a new EIS process.

The district court recognized that NNSA's preparation of a supplemental EIS addressing the new information provided the relief that the Study Group originally sought. The Study Group cannot explain how an injunction ordering yet *another* round of NEPA analysis would provide it with any meaningful relief or benefit. *SUWA I*, 110 F.3d at 728; *see also Vt. Yankee Nuclear Power Corp. v.*

NRDC, 435 U.S. 519, 544 (1978) (holding that reviewing court generally lacks authority to dictate procedures for agency to follow on remand). "There is no point in ordering an action that has already taken place." *Id.* *Cf. Neighbors For Rational Dev., Inc. v. Norton*, 379 F.3d 956, 965-66 (10th Cir. 2004) (dismissing NEPA claim as moot because the Court did "not think it would be wise to require the Secretary to plow the same ground twice.").

Under *SUWA I* the district court correctly dismissed the case on prudential mootness grounds. 110 F.3d 724. In *SUWA I*, plaintiffs challenged an agency action for an alleged procedural failure to consult under the Endangered Species Act. *Id.* at 727. The agency then consulted *after* the suit had begun. *Id.* at 726-27. This Court recognized that the belated consultation prudentially mooted the suit: the consultation had cured any injury caused by the alleged violation, and in any event, no order to perform yet more consultation could do anything more to cure the alleged violation. *Id.* at 728-29.

The Study Group (Br. at 28-30, 32-36, 44) argues at length that the new NEPA analysis should have occurred earlier in the process (these arguments ignore that NNSA prepared a full EIS in 2003). These arguments are beside the point where NEPA regulations expressly provide for supplemental analyses. And, in any event, neither a court nor NNSA can change the order or timing of actions that have already occurred: if the completion of a new NEPA analysis does not cure the

injury, then what could? Just as this Court recognized in *SUWA I*, the Court cannot provide meaningful relief when the agency has completed all the requested procedures. *Id.* at 728-29.

2. The SEIS process mooted the Study Group's claims under Article III because it provided the additional environmental analysis under NEPA that the Study Group originally requested.

In the alternative, the case is constitutionally moot. Under this Court's precedent, when an agency prepares an additional environmental analysis of its proposed actions—as NNSA has done here—any challenges focused on an alleged lack of an analysis do not present a live controversy. *See Greater Yellowstone*, 572 F.3d at 1121 (holding that agency's issuance of environmental analyses for projects mooted case seeking to compel NEPA analyses); *see also Aluminum Co. v. BPA*, 56 F.3d 1075, 1078 (9th Cir. 1995) (holding that review of earlier decision document "would be especially inappropriate" because agency's underlying analysis had also been superseded); *see also Forest Guardians v. Forest Serv.*, 329 F.3d 1089, 1096 (9th Cir. 2003); *Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996). Similarly, when an agency supplements its environmental analysis and issues a new ROD, any challenges suggesting that the prior analysis was lacking do not present a live controversy. *See Silvery Minnow*, 601 F.3d at 1110-15 (holding that agency's issuance of a new Biological Opinion (BiOp) in 2003 mooted all claims challenging prior lack of consultation or 2001 and 2002 BiOps);

Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1211-12 (10th Cir. 2005) (holding that new rule mooted NEPA challenges to prior rule); *McKeen v. Forest Serv.*, 615 F.3d 1244, 1255 (10th Cir. 2010); *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1135 (10th Cir. 2006).

In *Greater Yellowstone*, this Court dismissed plaintiffs' claims as moot when the relevant facts were essentially identical to those here. 572 F.3d at 1121. In *Greater Yellowstone*, the plaintiffs first filed a letter with the agency requesting that the agency prepare environmental analyses of certain projects under NEPA, just as the Study Group did here. *Id.* at 1119; A570-71. Unsatisfied with the agency's response, the plaintiffs filed an action seeking an injunction requiring the agency to prepare environmental analyses of the projects under NEPA, just as the Study Group did here. *Id.* at 1119-20; A11-44. During the litigation, the agency prepared and issued environmental analyses under NEPA for six of those projects, just as NNSA has now issued an SEIS and Amended ROD for the proposed CMRR-NF. *Id.* at 1121. This Court concluded that the agency's new NEPA analyses of those six projects mooted the plaintiffs' "action alleging [that] the lack of environmental analyses for the six [projects] in question violated NEPA." *Id.*

Here, NNSA prepared and completed an SEIS analyzing the potential environmental effects of the proposed CMRR-NF, and the SEIS considered the very issues that the Study Group alleged required a new NEPA analysis, to wit:

proposed design changes, new seismic information, and other new information. It is thus impossible for NNSA to return to its allegedly illegal conduct of allegedly failing to conduct an additional environmental analysis of the proposed CMRR-NF, failing to consider new information, or failing to consider new design proposals.

The SEIS and Amended ROD moot all of the Study Group's original claims. In the Amended ROD, NNSA selected the Modified CMRR-NF Alternative, which includes various design changes that address new seismic information, enhance the infrastructure of the facility, and meet new nuclear-safety requirements. 76 Fed. Reg. 64,344. Thus, the Study Group's original allegations that the 2004 ROD did not authorize the NNSA's current designs are now obviated. Similarly, to the extent that the Study Group argued that NNSA had violated NEPA's procedural protections by failing to provide public scoping or an opportunity to comment, the SEIS mooted those claims as well. *Cf. Wyoming*, 414 F.3d at 1211-12 (holding that "the alleged procedural deficiencies of the [agency action] are now irrelevant because the [new agency action] was promulgated in a new and separate rulemaking process"); *see also Silvery Minnow*, 601 F.3d at 1112-13.

C. This case does not fall under the exception to mootness for voluntary cessation because NNSA can never "resume" its allegedly illegal conduct of not preparing a new NEPA analysis.

The Study Group contends (Br. at 42) that this case falls within the exception to the mootness doctrine for voluntary cessation. An agency's voluntary cessation of allegedly wrongful conduct can "moot litigation if two conditions are satisfied: '(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Silvery Minnow*, 601 F.3d at 1115 (quoting *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). NNSA's completion of a Final SEIS and issuance of an Amended ROD based on the analysis in the SEIS meet both of those conditions. *See, e.g.*, *Greater Yellowstone*, 572 F.3d at 1121; *see also SUWA I*, 110 F.3d 727-29; *Silvery Minnow*, 601 F.3d at 1116-21 & n.15 (noting that "courts have expressly treated governmental officials' voluntary conduct 'with more solicitude' than that of private actors") (collecting cases); *see also Or. Natural Res. Council, Inc. v. Grossarth*, 979 F.2d 1377, 1379-80 (9th Cir. 1992).

As this Court recognized in *Greater Yellowstone*: in the face of allegations of failing to prepare a NEPA analysis, once an agency has completed a new NEPA analysis "there is no reasonable expectation the alleged wrongs [of proceeding without a NEPA analysis] . . . in question will be repeated," and "it is thus

impossible for the [agency] to return to its allegedly illegal conduct of failing to conduct an environmental analysis [of new information]." 572 F.3d at 1121.

Dismissing this case as moot is particularly appropriate because NEPA cases turn on whether the agency took a hard look at the environmental effects of a specific proposal and thus are heavily fact and context specific. NEPA claims depend upon the agency's final decision document, NEPA documents, purpose and need, available alternatives, public comments, and the environmental data and analysis in the administrative record. As such, the "allegedly wrongful behavior" in a NEPA case "is highly fact- and context-specific, rather than conduct that is likely to 'recur' on similar facts and in the same context." *Unified Sch. Dist. No. 259, Sedgwick Cnty., Kan. v. Disability Rights Ctr. of Kan.*, 491 F.3d 1143, 1150 (10th Cir. 2007). "In such a case, the 'voluntary cessation' doctrine is inapplicable, because our review of future instances of 'wrongful behavior' may be quite different than the complained-of example that already has ceased." *Id.* After all, even "if the [legal] issue does arise again it would be in a different regulatory context than that challenged." *Silvery Minnow*, 601 F.3d 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 recur." *Id.* "Even a cursory examination" of the 2,000 page SEIS and its response to comments reveals that the Study Group's *new* suit challenging the Amended ROD and SEIS presents a very

different factual context than *this* suit, which the Study Group filed before NNSA had announced the SEIS process. *See, e.g., Committee for First Amendment*, 962 F.2d at 1525.

D. Where the Study Group has filed a new lawsuit challenging the SEIS and Amended ROD in district court, it essentially concedes that the claims on appeal are moot.

The Study Group has brought a new lawsuit challenging the merits of the SEIS and Amended ROD. D.N.M. No. 1:11-cv-00946. This lawsuit highlights that the case on appeal (which involves the original Complaint and NNSA's NEPA compliance prior to the SEIS) is now moot. The precise issue before the New Mexico district court *today* in the Study Group's *new* suit is whether NNSA's decision in the Amended ROD violates NEPA in light of, among other things, the 2011 SEIS. That issue was not and could not have been presented by the Complaint in this case, which pled that the 2003 EIS did not satisfy NEPA and that NEPA required further analysis.

A new NEPA document and new agency decision prepared during the pendency of an appeal moot a plaintiff's challenge to the agency's prior actions or NEPA compliance, *even if* the plaintiff argues that the new NEPA document and decision do not address the concerns the plaintiff raised in the suit. *Or. Natural Res. Council*, 979 F.2d at 1379-80. Those "intervening" agency actions moot the original case, and the plaintiff's allegations regarding the new NEPA document

and agency decision "should be considered in the first instance by a district court in separate litigation which can develop an independent record." *Id.*

Thus, in these circumstances, the plaintiff must file a new APA suit challenging the *new final agency action*, and the district court will then review that action based on the administrative record before the agency. *See, e.g.*, *Utah Shared Access*, 463 F.3d at 1134-35 (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. BPA*, 56 F.3d at 1078 (finding that a new ROD and BiOp moot challenge to prior ROD and BiOp); *Aluminum Co. v. BPA*, 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 its new lawsuit, 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 NNSA when it issued the Amended ROD—but that administrative record is not before the Court in this suit (indeed, the record for this original suit did not even include the new documents to which the Study Group now objects). *See, e.g.*, *Citizens For Alternatives*, 485 F.3d at 1096; *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994). Finally, the Study Group could only obtain meaningful relief in the *new* lawsuit,

and in any event, the Study Group cannot identify any meaningful relief that it could obtain in *this* lawsuit that it cannot obtain in the new one.[6]

Where the district court correctly dismissed the case actually pled in the Study Group's Complaint as moot, and where the Study Group has filed a new lawsuit challenging the SEIS and Amended ROD (the only live agency actions at this time), this Court need go no further to resolve this appeal.

II. The district court also lacked jurisdiction because the Study Group did not challenge final agency action under the APA.

As stated above, the district court correctly dismissed the case actually pled in the Study Group's Complaint as moot. Nonetheless, the Study Group later attempted to shift its argument to challenge the then-ongoing NEPA process and design process. The district court correctly dismissed those new arguments because the Study Group did not challenge final agency action and the case was not ripe for review.

The district court lacked jurisdiction because the Study Group did not challenge final agency action. Unless an agency action is otherwise "reviewable by statute," the APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *Lujan v. Nat'l Wildlife*

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[6] All of the cases cited by the Study Group in its mootness discussion are inapposite because they either (1) arise from statutes or factual circumstances completely different than the NEPA claims here or (2) address finality or ripeness. NNSA addresses those second cases *infra* pp. 46-50.

Fed'n, 497 U.S. 871, 882-83 (1990); *see also Norton v. S. Utah Wilderness Alliance (SUWA II)*, 542 U.S. 55, 61-64 (2004); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The requirement that the plaintiff challenge final agency action is jurisdictional. *See, e.g.*, *Ctr. For Native Ecosystems v. Cables*, 509 F.3d 1310, 1328 (10th Cir. 2007).

For an agency action to be "final," it (1) "must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature," and (2) "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78 (citations and internal quotation marks omitted); *Colo. Farm Bureau Fed'n v. Forest Serv.*, 220 F.3d 1171, 1173-74 (10th Cir. 2000).

The requirement that a plaintiff challenge final agency action applies fully to NEPA claims. *See, e.g.*, *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1297-98 (D.C. Cir. 2007) ("NEPA claims must be brought under the APA and allege final agency action."). All of the cases cited by the Study Group support this position—in *every* case, the court only exercised jurisdiction over the NEPA claims when the plaintiff challenged the adequacy of the NEPA analysis for a *final agency action*.

The Study Group had "the burden of identifying specific federal conduct and explaining how it is 'final agency action' within the meaning of [the APA]." *Colo.*

Farm Bureau Fed'n, 220 F.3d at 1173. The Study Group's Brief (Br. at 46, 52) fails to identify discrete, final agency action. The Study Group repeatedly contends that it is challenging (*e.g.* Br. at 8, 26, 28, 39, 46) a "2010-11 plan" or "2010-11 CMRR-NF," but the Study Group cannot and does not point to any *agency* decision or document in the record on appeal that contains the alleged "2010-11 CMRR-NF" plan. In referring to this "plan" in its Opening Brief, the Study Group only cites (Br. at 8) to the Affidavit of Study Group Director Gregory Mello—who has no direct knowledge of operations at LANL. *See* A370-72, A386, 403-05, 409, 414-15; Br. at 22 n.6 (acknowledging that the Study Group did not dispute that "Mr. Mello has no direct information for this Court."). The Study Group's Response to NNSA's Motion for Summary Disposition asserts (for the first time) that the "2010-11 CMRR-NF" is somehow the Modified CMRR-NF Alternative that NNSA selected in the 2011 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 its Complaint in the district court because NNSA *did not select it* until October 12, 2011, *during the pendency of this appeal*.

During the course of the district court proceedings below, NNSA's only relevant agency actions were (1) an ongoing NEPA analysis and (2) an ongoing design process. Neither, however, is final agency action. NNSA did not take a

final agency action until it completed its SEIS process and issued its Amended ROD. Only at that point did NNSA consummate a decision-making process and make a decision from which consequences could flow.

A. The Amended ROD is final agency action, but NNSA did not take that action until October 12, 2011, during this appeal.

The Study Group did not (and could not) challenge the 2011 Amended ROD in *this* case because NNSA issued it during the course of this appeal. The Study Group cannot amend its Complaint to plead an entirely new action challenging that ROD. First, an appellate court cannot allow a party to substantively amend a complaint by adding a new claim to produce jurisdiction where it had never existed before. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Narvaez*, 149 F.3d 1269, 1272 (10th Cir. 1998). Second, the court does not have (and has never had) jurisdiction over the claims actually presented in this case; the fact that a new suit may now be available cannot restore jurisdiction in this case. *See Greater Yellowstone*, 572 F.3d at 1121 ("[A]n actual controversy must be extant at all stages of review"). The Study Group now can (and is) proceeding with its challenges to the SEIS and Amended ROD in its *new lawsuit* 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 appeal.

Here, NNSA's Amended ROD is the operative final agency action. Under DOE's regulations, NNSA always prepares a ROD *before* taking action on any

proposal in the SEIS. 10 C.F.R. §§ 1021.314(d), 1021.315. The ROD consummates a decision-making process, and any legal consequences from the decision-making process can only flow *after* NNSA issues its ROD. *Bennett*, 520 U.S. at 177. It is not until a ROD is issued that a party can challenge an SEIS because an SEIS is *not* a final agency action within the meaning of the APA. Thus, any allegations that NNSA has violated NEPA must be brought in an APA suit challenging its ROD. *See, e.g., Friends of Marolt*, 382 F.3d at 1095-97; *see also Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1118 (9th Cir. 2010) ("Once an EIS's analysis has been solidified in a ROD, an agency has taken final agency action.") (collecting cases).

The only adverse consequences that the Study Group alleges (Br. at 49-50) are those from the construction of the CMRR-NF (though the Study Group does not provide citations supporting these allegations). As NNSA proved to the district court, no construction could occur until NNSA completed its SEIS process *and* issued a ROD. *See supra* pp. 14-16. Indeed, the Study Group concedes (Br. at 49) that construction will not occur until "*after* [NNSA] issues an SEIS *and ROD*." Since the alleged consequences all flow from the ROD, the district court did not err in finding that the Study Group needed to wait to challenge the ROD.

This Court has specifically denied judicial review of NEPA claims in these circumstances. *See Utah v. DOI (Utah I)*, 210 F.3d 1193, 1197 (10th Cir. 2000).

In *Utah I*, as here, the plaintiff attempted to challenge an ongoing NEPA process as insufficient, but this Court denied review because the agency was performing a NEPA analysis and the NEPA process would allow the plaintiff an opportunity to raise its concerns. *Id.* at 1196-97. As here, the "claimed harms" were "contingent, not certain or immediate" because the agency had not yet made a final decision. *Id.* at 1197-98.

As the consequences flow from the later agency action (the Amended ROD), the Study Group had not *yet* been "adversely affected or aggrieved by agency action," 5 U.S.C. § 702, nor was the impact of the NNSA's actions "direct and immediate." *See Colo. Farm Bureau Fed'n*, 220 F.3d at 1173. Agency action is *not* final when its adverse effects on the complainant's rights are contingent on future administrative action. *See, e.g.*, *Fund for Animals, Inc. v. BLM*, 460 F.3d 13, 22 (D.C. Cir. 2006) (collecting cases).

B. Neither the Draft SEIS nor NNSA's design work are final agency actions because they did not consummate a decision-making process and they had no legal consequences.

The Study Group wrongly suggests (*e.g.* Br. at 12, 17, 27, 30, 39-45, 52) that it can challenge NNSA's Draft SEIS or NNSA's ongoing design work. Neither is final agency action. Neither embodies the consummation of a decision-making process, and no legal consequences flow from either.

1. A Draft SEIS is not final agency action.

A *Draft* SEIS does not satisfy the first prong of the *Bennett v. Spear* test for *final* agency action because it does not consummate a distinct decision-making process. *See Bennett Hills Grazing Ass'n v. United States*, 600 F.2d 1308, 1309 (9th Cir. 1979) (finding that a draft EIS is not a final agency action subject to judicial review); *see, e.g., Ctr. for Marine Conservation v. Brown*, 917 F. Supp. 1128, 1150 (S.D. Tex. 1996). NNSA's development of a NEPA analysis, and specifically the preparation of a Draft SEIS, is only an intermediate and procedural action in a decision-making process that culminates in the issuance of a ROD. *See Bennett*, 520 U.S. at 178; *see also Sw. Williamson Cnty. Cmty. Ass'n, Inc. v. Slater*, 173 F.3d 1033, 1037 (6th Cir. 1999) (finding completed environmental assessment was not final agency action because agency had not yet issued a FONSI or final EIS).

The only legal consequence flowing from the *Draft* SEIS was that the Study Group had the obligation to submit comments on the Draft during the public comment period following the issuance of the Draft or waive any issues not commented on. *Silverton Snowmobile Club v. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006) (collecting cases). When a plaintiff still has opportunity to participate in an agency process before an agency's actions will impact the plaintiff, as here, this Court has found no final agency action. *See Phillips*

Petroleum Co. v. Lujan, 963 F.2d 1380, 1388 (10th Cir. 1992). "It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding." *See Mobil Exploration & Producing U.S., Inc. v. DOI*, 180 F.3d 1192, 1198-99 (10th Cir. 1999).

2. Design work cannot be final agency action.

An agency's design process cannot be final agency action. Here, NNSA's design work is not a "final agency action" because NNSA still must initiate its final design phase (which it did not do before completing the SEIS), choose a final design proposal, and issue final approval before the decision-making process can be complete and before its actions can have any legal consequences. *See Rapid Transit Advocates, Inc. v. S. Cal. Rapid Transit Dist.*, 752 F.2d 373, 378-79 (9th Cir. 1985) (deciding to fund preliminary design and engineering work is not a final decision because final approval by the Secretary is still required before construction can begin); *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1238 (11th Cir. 2003) (holding that the decision-making process could not be complete when agency "is actively engaged in planning"). Under analogous circumstances, the Second Circuit rejected the notion that design work constitutes final agency action that would be ripe for judicial review. *Envtl. Def. Fund, Inc. v. Johnson*, 629 F.2d 239, 241 (2d Cir. 1980). As here, the design process "may reaffirm the [project], reform it, or even recommend that it not be constructed." *Id.*

The court declined to intervene "in an administrative process which at this point has created no rights or obligations and involves no legal consequences." *Id.*

C. Courts may only consider NEPA claims on review of final agency action.

Courts have repeatedly dismissed NEPA claims brought prior to the agency's taking a final agency action. *See, e.g., ONRC Action v. BLM*, 150 F.3d 1132, 1135-36 (9th Cir. 1998); *Cmtys. for a Great Nw., Ltd. v. Clinton*, 112 F. Supp. 2d 29, 37-38 (D.D.C. 2000). "[T]he time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976). "[T]he Supreme Court has clearly stated that judicial intervention is not proper just because the time to start work preparing an EIS has arrived." *Pub. Citizen v. Office of U.S. Trade Representative*, 970 F.2d 916, 919 (D.C. Cir. 1992). "[T]he Court's statement on the timing of litigation appears equally driven by concern over values that the finality doctrine is designed to protect." *Id.* at 920 (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980)).

All of the authorities cited by the Study Group support this position: in every case, the court only found jurisdiction to review the adequacy of or need for a NEPA analysis *after* the agency had taken a final agency action with real legal consequences. *See, e.g., Sierra Club v. DOE*, 287 F.3d 1256, 1265 (10th Cir.

2002) (holding that court could review NEPA claim when agency granted easement across federal property); *Catron Cnty. Bd. of Comm'rs, N.M. v. FWS*, 75 F.3d 1429, 1432-34 (10th Cir. 1996) (holding that court could review NEPA claim when agency promulgated a final rule designating critical habitat); *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2003) (reviewing Corps' grant of a permit); *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967) (reviewing agency's promulgated, binding rule), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 965 (9th Cir. 2003) (same); *Portland Audubon Soc. v. Babbitt*, 998 F.2d 705, 708 (9th Cir. 1993) (reviewing final agency decision *not* to supplement EISs).

For example, in *Sierra Club* this Court had jurisdiction because the agency had taken a final agency action and given a private party a property interest in federal land. 287 F.3d at 1265. This Court expressly distinguished that case from *Utah I* (described *supra* p. 42-43) on the grounds that *Utah I* involved the very circumstances present here—an ongoing NEPA analysis prior to the taking of a final agency action where any legal consequences were contingent on the later final action. *See Sierra Club*, 287 F.3d at 1264 (citing *Utah I*, 210 F.3d at 1197).

Thus, NEPA claims of predetermination or that an agency is making an irreversible commitment of resources are all also reviewed after the agency has

taken a *final agency action*. Allegations that an agency failed to take the "hard look" at environmental consequences required by NEPA because the agency had predetermined the outcome of the analysis are reviewed at the *end* of the NEPA process, after the agency has made a final decision with real legal consequences. *See, e.g.*, *Forest Guardians v. FWS*, 611 F.3d 692, 710 (10th Cir. 2010) (reviewing promulgated rule allowing release of falcons); *Silverton Snowmobile Club*, 433 F.3d at 780-81 (reviewing decision governing motorized activity); *Utahns for Better Transp.*, 305 F.3d at 1161, 1186 (reviewing ROD governing parkway project); *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002) (reviewing decision authorizing construction across public park); *Metcalf v. Daley*, 214 F.3d 1135, 1140 (9th Cir. 2000) (reviewing final decision authorizing whaling). Similarly, allegations that an agency failed to meet its NEPA obligations before the agency made an irreversible and irretrievable commitment of resources are also reviewed after the agency has made a final decision regarding those resources and taken final agency action. *Forest Guardians*, 611 F.3d at 715; *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 716 (10th Cir. 2009) (reviewing agency's leasing decisions).

In any event, the Study Group has failed to establish that either challenge would succeed on the merits. Prior to issuance of the Amended ROD, NNSA had not committed any resources to final design or construction of CMRR-NF. Thus,

NNSA still had the "absolute right to prevent the use of the resources in question,"[7] and NNSA had not made an irreversible or irretrievable commitment of resources. *Friends of the Se.'s Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998) (internal citation omitted); *see also Wyo. Outdoor Council v. Forest Serv.*, 165 F.3d 43, 45, 49-50 (D.C. Cir. 1999) (holding that agency did not make irretrievable commitment of resources because agency retained authority to forestall damage in the individual leasing process); *WildWest Inst. v. Bull*, 547 F.3d 1162, 1169 (9th Cir. 2008) (holding pre-marking of trees did not foreclose agency from changing plans notwithstanding the fact that the Forest Service had expended over $200,000 to mark the trees). *Cf. Lincoln v. Vigil*, 508 U.S. 182, 191-92 (1993) (holding that agency's allocation of funds from lump-sum appropriation is unreviewable under APA).

NNSA also did not predetermine the outcome of the SEIS process because NNSA did not prejudge what the environmental analysis would show and NNSA made no binding commitment to an outside group to pursue a specific course of action. *See, e.g., Forest Guardians*, 611 F.3d at 714 (holding no predetermination when agency had made no binding commitment to outside group to pursue specific

[7] The Study Group erroneously implies (*e.g.* Br. at 22, 35) that Critical Decision 1 under DOE Order 413.3B restricted NNSA's alternatives analysis in the SEIS. Critical Decision 1 places no restriction on NNSA's choice of alternatives during the NEPA analysis, and the Order allows NNSA to make Critical Decision 1 *before* preparing its EIS.

course of action); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1240 (10th Cir. 2004) (holding no predetermination when agency prepared NEPA analysis before entering agreement). "NEPA does not require agency officials to be subjectively impartial. An agency can have a preferred alternative in mind when it conducts a NEPA analysis." *Forest Guardians*, 611 F.3d at 712 (internal citation omitted). This case bears no similarity to *Mineta* or *Daley* where contracts or other binding agreements with outside parties required a specific outcome to the NEPA analysis. *See Mineta*, 302 F.3d at 1112-13 (finding predetermination when contract for preparation of NEPA document obligated consultant to find no significant impact in NEPA analysis).

III. The Study Group's case was also not ripe for review.

The Court may affirm the district court's judgment on the alternative ground that the Study Group's case was not ripe for review. "Even where an agency action is considered final, however, a claim may not be ripe if there is no direct, immediate effect on plaintiffs." *See Friends of Marolt*, 382 F.3d at 1094. The Study Group bears the burden of providing evidence to establish that the court has jurisdiction. *See Coal. for Sustainable Res., Inc. v. Forest Serv.*, 259 F.3d 1244, 1249 (10th Cir. 2001).

"The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Nat'l*

Park Hospitality Ass'n v. DOI, 538 U.S. 803, 808 (2003) (internal citation omitted). This Court determines whether an agency decision is ripe for judicial review by "examining the fitness of the issues for judicial decision and the hardship to the parties if review is withheld." *Friends of Marolt*, 382 F.3d at 1093 (quoting *Park Lake Res. Ltd. Liab. Co. v. U.S. Dep't of Agric.*, 197 F.3d 448, 450 (10th Cir. 1999)). The test focuses on three factors: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Utah v. DOI (Utah II)*, 535 F.3d 1184, 1191-92 (10th Cir. 2008) (citing *Sierra Club*, 287 F.3d at 1262-63 and *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998)). All of these factors weighed against the district court exercising jurisdiction in this case. Indeed, postponing review here served one of the crucial purposes of the ripeness requirement—"protect[ing] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Ohio Forestry*, 523 U.S. at 733 (emphasis added) (quoting *Abbott Labs.*, 387 U.S. at 148-149).

First, the Study Group did not suffer any hardship from delayed review because NNSA's then-ongoing NEPA process and design work had no direct and immediate impact upon the Study Group. Cases where courts find hardship to the

parties from withholding review generally fall into one of two categories: (1) where "parties would have faced significant costs, financial or otherwise, if their disputes were deemed unripe"; and (2) where "the defendant had taken some *concrete action* that threatened to impair—or had already impaired—the plaintiffs' interests." *Utah II*, 535 F.3d at 1197-98 (citations omitted). Here, the Study Group faced no costs, and NNSA specifically postponed any *concrete action* (such as construction) pending the completion of an SEIS and ROD. *See supra* pp. 14-16. As detailed *supra* pp. 41-43, NNSA's actions could not have any concrete consequences for the Study Group until NNSA issued its ROD. The Study Group cannot show hardship because it has "ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry*, 523 U.S. at 734. Indeed, the Study Group is already pursuing its NEPA challenges to the Amended ROD and SEIS in its *new lawsuit* in D.N.M. No. 1:11-cv-00946, and the Study Group cannot point to any hardship that it suffered from having to wait for the Amended ROD.

Second, judicial intervention would have inappropriately interfered with NNSA's then-ongoing SEIS process. This Court has found NEPA claims unripe in exactly these circumstances, when an agency was preparing a NEPA analysis before taking a final agency action. *See Utah I*, 210 F.3d at 1196-97 (discussing

that *Ohio Forestry* supports such a result, it does not contradict it); *Utah II*, 535 F.3d at 1198 (rejecting NEPA claim as unripe and citing *Ohio Forestry*).

Moreover, as described *supra* p. 40, the Study Group challenged a "2010-11 plan" or "2010-11 CMRR-NF" that NNSA had allegedly selected, even though the Study Group could point to no document or decision where NNSA had selected such a "plan." Attempting to review this perplexing and vague claim would have resulted in precisely what the ripeness doctrine seeks to avoid: judicial entanglement in abstract disagreements over administrative policies. *See Abbott Labs.*, 387 U.S. at 148-49. In contrast, because the district court did not interfere with NNSA's ongoing administrative process, NNSA was able to complete its SEIS and issue an Amended ROD selecting the Modified CMRR-NF Alternative in a formalized decision document.

Third, the courts also benefited significantly from postponing review for further factual development. NEPA claims are heavily factual, and judicial review of whether NNSA has taken the requisite hard look at the environmental effects of its action may involve scrutiny of numerous facts. What proposed design will NNSA adopt, if any? Were other alternatives reasonable? Did they fulfill the project's purpose and need? What are the different alternatives' potential environmental impacts, such as impacts to human health, radiological impacts, air quality, water, geology, waste management, cultural resources, and ecological

resources? What comments and data did the Study Group present during the public comment process? All of these issues were best postponed until NNSA completed its SEIS, issued a ROD making a final decision about the proposed CMRR-NF, and compiled an administrative record. *See, e.g.*, *Ohio Forestry*, 523 U.S. at 733 (considering "whether the courts would benefit from further factual development of the issues presented" to determine ripeness).

For all these reasons, the Study Group's case was not ripe for judicial review, and the Court should affirm the dismissal of this case as unripe.

IV. The district court correctly dismissed under Rule 12(b)(1), and this Court reviews its findings of jurisdictional facts for clear error.

The district court correctly dismissed the complaint for lack of jurisdiction under Rule 12(b)(1), and this Court reviews the district court's findings of law *de novo* and findings of jurisdictional facts for clear error.

The Study Group contends (Br. at 53) that the district court should have converted NNSA's motion to dismiss under Rule 12(b)(1) into a Rule 56 motion for summary judgment and applied the Rule 56 standard. This is incorrect. Indeed, the Study Group expressly conceded below that the district court had "broad discretion to freely weigh affidavits and other documents in resolving the jurisdictional issue." A86.

A. The district court correctly dismissed under Rule 12(b)(1).

"When, as here, a party attacks the factual basis for subject matter jurisdiction, the court may not presume the truthfulness of the factual allegations in the complaint, but may consider evidence to resolve disputed jurisdictional facts." *SK Finance SA v. La Plata County, Bd. of County Com'rs*, 126 F.3d 1272, 1275 (10th Cir. 1997) (citing *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)). Reference to evidence outside the pleadings does not convert the motion to dismiss into a motion for summary judgment in such circumstances. *Id.* For example, a district court may dismiss an unripe suit under Rule 12(b)(1). *See, e.g., id.* As the party seeking to invoke the district court's jurisdiction, the Study Group bore the burden of establishing the facts necessary to sustain the court's jurisdiction. *See, e.g.*, *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995). This Court reviews the district court's findings of jurisdictional facts for clear error. *See, e.g.*, *Butler*, 532 F.3d at 1110.

The Study Group attempts (Br. at 53) to fit this case into the narrow exception for when subject matter jurisdiction and the merits are considered to be intertwined—"if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case." *Holt*, 46 F.3d at 1003. Here, the Study Group contends that "NEPA provides the basis for federal question jurisdiction and for the substantive claim." Br. at 53. This argument fails because it is well

established that NEPA does not provide a basis for federal court jurisdiction. *See, e.g.*, *Colo. Farm Bureau Fed'n*, 220 F.3d at 1173. The only statutory jurisdictional issue here arises under the APA (not NEPA)—namely, the Study Group's failure to establish that it challenges a "final agency action." 5 U.S.C. § 704. Also, mootness and ripeness inquiries cannot intertwine with the merits of a NEPA claim: these doctrines exist, in part, to foreclose a court from reaching the merits. *See Friends Of Marolt*, 382 F.3d at 1094.

The Study Group also contends (Br. at 58-59) that the district court erred in denying discovery. Discovery is generally not available in APA suits. *See Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009); *see also Olenhouse*, 42 F.3d at 1579-80. Moreover, even if discovery were permitted in APA suits, the Study Group does not explain how the Magistrate Judge erred in refusing to set a discovery schedule for the merits of the case based on his straightforward application of the local rules. A312 (citing D.N.M.LR-Civ.16).

B. The district court correctly found that NNSA had not begun final design, had not begun construction, and had no binding agreements to construct the CMRR-NF.

As detailed *supra* pp. 14-16, the district court correctly found that NNSA had not (and would not) begin final design until after issuing the ROD, that NNSA had not (and would not) begin construction of the CMRR-NF until after issuing the ROD, and that NNSA had not entered any contracts or binding agreements to

construct the CMRR-NF. The district court made these findings after reviewing the entire record before it, including the sworn declarations of the officials overseeing the CMRR-NF design process and SEIS process.

The Study Group's Complaint *conceded* that NNSA had neither entered the final design process nor begun construction. The Study Group admitted that the CMRR-NF "has never fully progressed through defendants' 'preliminary design' stage," and that "Defendants have not made what they call 'Critical Decision 2' or 'Critical Decision 3,' which formally allow detailed design and construction, respectively," and that "Congress has never authorized or appropriated funds for the actual construction of the proposed [CMRR-NF]." A17.

Neither construction nor final design of the CMRR-NF occurred before NNSA issued the Amended ROD. The Study Group's contrary assertions primarily rely on the testimony and Affidavit of Study Group Director Gregory Mello—who has no direct knowledge of operations at LANL. *See* A370-72, A386, 403-05, 409, 414-15; Br. at 22 n.6 (acknowledging that the Study Group did not dispute that "Mr. Mello has no direct information for this Court."). The Study Group also relies (Br. at 11-12, 19, 30, 55-56) on its characterizations of various obsolete, public presentations providing forecasts of the project's potential progress that *predate* the decision to prepare an SEIS. Thus, the Study Group's assertions that NNSA had begun construction or final design rely entirely on

outdated hearsay predating NNSA's decision to prepare the SEIS. All of those materials have been superseded, and the district court properly relied on the sworn declarations of NNSA's officials over the Study Group's hearsay and inaccurate characterizations in finding that NNSA would not begin construction before completing the SEIS and ROD.

Finally, as the district court found, the Study Group's documents do not establish that NNSA, DOE, or the Administration has entered into any kind of "binding agreement" committing "to a particular action." A332 (Op. at 19). The Study Group cites (Br. at 10) obsolete Performance Evaluation Plans with Los Alamos National Security, LLC. NNSA had already replaced them with a new Performance Evaluation Plan. A1671-72; A581. NNSA removed any construction goals for the CMRR-NF and replaced them with obligations to aid in the preparation of a NEPA analysis. A1671-72; *see also* Br. at 38 (conceding changes). Similarly, the Study Group points (*e.g.* Br. at 13-15) to a number of Administration statements about the importance of the project, but none of those documents establish that NNSA, DOE, or the Administration had entered into any kind of "binding agreement" committing "to a particular action." A332 (Op. at 19).[8]

[8] The district court correctly dismissed the Study Group's suit for lack of jurisdiction. Throughout its Brief, the Study Group presents merits arguments. If this Court were to reverse the district court's dismissal for lack of jurisdiction, the

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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Court should remand for further proceedings and not reach the merits of the Study Group's claims. *Cf. Wyoming v. United States*, 279 F.3d 1214, 1241 (10th Cir. 2002). Because the merits of the Study Group's action are not before this Court, the United States has not briefed those issues.

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument would benefit the Court because this case raises the important jurisdictional issues of whether this case is moot, is not ripe, and lacks the necessary final agency action for jurisdiction under the Administrative Procedure Act. The Court would be aided by having counsel present to address questions going to these issues.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the applicable volume limitations because it is proportionally spaced and contains 13,814 words. I relied on my word processor program to obtain the word count, and that program is Microsoft Office Word 2007. I certify that the information on this form is true and correct to the best of my and knowledge and brief formed after a reasonable inquiry.

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CERTIFICATE OF DIGITAL SUBMISSIONS

I submit that this brief has been submitted in PDF format to the Tenth Circuit via the CM/ECF system; that all required privacy redactions have been made and, with the exception of those redactions, the digital submission of this brief is an exact copy of the written document filed with the Clerk, and that the digital submission has been scanned for viruses with the Microsoft Forefront Client Security 1.117.1554.0 program (last updated December 21, 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 22, 2011, I caused the foregoing Response Brief of the Federal Defendants-Appellees 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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