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' MOTION FOR SUMMARY DISPOSITION BECAUSE OF MOOTNESS

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Pursuant to Fed. R. App. P. 27 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) move to dismiss this appeal because it is moot. NNSA has consulted with Counsel for Plaintiff-Appellant the Los Alamos Study Group (Study Group), Thomas Hnasko, who indicated that the Study Group opposes this motion. NNSA has good cause for filing at this time because recent events definitively establishing constitutional mootness occurred on October 12, 2011, and October 21, 2011, less than two weeks before this filing. *See* 10th Cir. Local R. 27.2(A)(3)(a).

INTRODUCTION

In the instant appeal, 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), §§ 4321-4370f. Ex. A (Compl.). The Study Group alleged that NNSA violated NEPA by failing to adequately analyze new seismic information, proposed design changes to the CMRR-NF, and other factors. The district court correctly dismissed the case as prudentially moot because, at the time the court entered judgment, NNSA was in the process of preparing a Supplemental Environmental Impact Statement (SEIS) analyzing the potential environmental effects of the proposed CMRR-NF pursuant to NEPA. Ex. B (Op.). After the

Study Group noticed this appeal, NNSA completed its supplemental NEPA process, issued its Final SEIS, and issued an Amended Record of Decision (Amended ROD) on October 12, 2011. *See* 76 Fed. Reg. 54,768 (Sept. 2, 2011) (announcing availability of Final SEIS);[1] Ex. C (76 Fed. Reg. 64,344 (Oct. 18, 2011) (Amended ROD)). On October 21, 2011, the Study Group filed a new lawsuit in the District Court of New Mexico, challenging the adequacy of NNSA's NEPA process and analysis for the proposed CMRR-NF and making clear that it was also challenging the Final SEIS and Amended ROD. Ex. D (new lawsuit's complaint). That case has been docketed as No. 6:11-cv-00946.

Under this Court's binding precedent, the completion of the new NEPA process definitively establishes that the instant appeal is *constitutionally* moot 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. v. Tidwell*, 572 F.3d 1115, 1121 (10th Cir. 2009) (holding that agency's issuance of environmental analyses mooted case seeking to compel NEPA analyses); *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 new lawsuit,

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

which challenges the Amended ROD and presents the Study Group's continued concerns with NNSA's NEPA analysis, is the only suit where a court may grant some relief.

FACTUAL BACKGROUND

1. *The National Environmental Policy Act (NEPA)*: NEPA 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. NEPA requires a federal agency to prepare an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Agencies may prepare a supplemental EIS (SEIS) supplementing an earlier EIS at any time to further the purposes of NEPA. 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).

2. *The Proposed CMRR-NF*: The Study Group, a group advocating for nuclear disarmament, challenges NNSA's NEPA analysis for a single proposed facility at the Los Alamos National Laboratory (LANL)—the CMRR-NF. The proposed CMRR-NF is part of an effort to replace the 60-year-old Chemistry and Metallurgy Research Building (CMR) which has unique capabilities for performing nuclear research on elements such as uranium and plutonium. Ex. E

¶¶ 5-8; Ex. F ¶¶ 3-6; Ex. G ¶ 4. CMR is central to LANL's mission and critical to national security, but it is now outmoded and sits on two small seismic faults. Ex. E ¶¶ 5-8; Ex. F ¶¶ 5, 25-27.

NNSA prepared an Environmental Impact Statement (EIS) in 2003 (with ample opportunity for public comment) and issued an unchallenged ROD in 2004 authorizing the proposed CMRR-NF, along with a separate but adjacent Radiological Laboratory Utility Office Building (RLUOB).[2] 69 Fed. Reg. 6,967 (Feb. 12, 2004). After NNSA issued the 2004 ROD, NNSA began an iterative design process for the CMRR-NF. Ex. G ¶¶ 9-14. During that process, NNSA proposed certain changes to the design for the CMRR-NF to address new seismic information based on its site-wide analysis of the geology underlying the area, to meet updated earthquake criteria, and to meet updated nuclear safety basis requirements, at 10 C.F.R. Part 830. *See* 75 Fed. Reg. 60,745, 60,747 (Oct. 1, 2010); Ex. E ¶¶ 12-14, Ex. F ¶ 8; Ex. G ¶¶ 9-14. The design continues to develop. Ex. F ¶¶ 9, 14.

3. *The SEIS Process*: On July 1, 2010, the Study Group wrote to NNSA and requested a new EIS in light of new seismic information, other new information, and proposed design changes. Ex. E ¶ 15. Later that month, NNSA

[2] The RLUOB has already been constructed, pursuant to the 2004 ROD. Occupancy is expected to begin this year, with radiological laboratory operations commencing during 2012. *See* Ex. F ¶ 3.

informed the Study Group that NNSA was deciding whether to prepare an additional NEPA analysis. Ex. E ¶ 15.

Roughly three weeks later, before NNSA had made any decision about whether to pursue an additional NEPA analysis, the Study Group filed its Complaint. Ex. A. Shortly thereafter, NNSA formally announced that it would prepare an SEIS for the CMRR-NF to analyze potential environmental impacts of the proposed facility in light of new information and proposed design changes. 75 Fed. Reg. 60,745; Ex. E ¶ 16. NNSA stated that no final design work or construction would take place 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 and, if so, what proposed alternative to pursue. Ex. E ¶¶ 20-21, 25; Ex. F ¶¶ 14-15; Ex. G ¶ 14.

In April 2011, NNSA issued a Draft SEIS for the CMRR-NF. 76 Fed. Reg. 24,018 (April 29, 2011). The SEIS conducted an in depth analysis of the potential environmental impacts associated with three alternatives: (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-basis requirements; or (3) continuing to use the old CMR building.

4. *District Court Proceedings and the Study Group's Appeal*: The Study Group's original Complaint alleged that NNSA violated NEPA by failing to develop a new EIS for the proposed CMRR-NF in light of proposed design changes, new information, and other factors. Ex. B at 2-4; Ex. A ¶¶ 52-95. The Complaint requested a broad injunction barring all further investment in or design of the CMRR-NF absent a new EIS. Ex. B at 2-3; Ex. A ¶ 3.

The United States moved to dismiss the case for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The district court found that, under the doctrine of prudential mootness, the ongoing SEIS process mooted the Study Group's claims that NNSA needed to prepare a new NEPA analysis. Ex. B at 22. The court found that NNSA is "proceeding with an SEIS and [is] not moving forward with final design or construction pending completion of that process." Ex. B at 11. 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." Ex. B at 15. The court concluded that the Study Group's "Complaint should be dismissed on the grounds of prudential mootness." Ex. B at 22.

At oral argument in the district court, the Study Group shifted its challenge to assert that the ongoing SEIS process and Draft SEIS were inadequate (though no

allegations regarding that process appear in its Complaint (Ex. A)). The district court rejected those arguments and found that "[w]hile the SEIS process is ongoing, there is no ripe 'final agency action' for the court to review pursuant to the Administrative Procedure Act [(APA)]." Ex. B at 16; *see also* Ex. B at 16-21. The court correctly held that any of those alleged NEPA violations should be considered "at the completion of the process, as opposed to while it is ongoing." Ex. B at 20.

The Study Group appealed the district court's dismissal for lack of jurisdiction on July 1, 2011.

5. *Events during the Appeal Definitively Render the Case Constitutionally Moot*: On August 26, 2011, NNSA issued its Final SEIS, which takes a hard look at the potential environmental impacts of three alternatives for the CMRR-NF. *See* 76 Fed. Reg. 54,768. On October 12, 2011, NNSA issued its Amended ROD and selected the Modified CMRR-NF alternative. Ex. C (76 Fed. Reg. 64,344). Less than ten days later, the Study Group filed a new lawsuit challenging the adequacy of the supplemental NEPA analysis and the Amended ROD in the District Court of New Mexico, No. 6:11-cv-00946. Ex. D.

ARGUMENT

The Study Group's Complaint alleged that NNSA had violated NEPA by failing to develop a new NEPA analysis for the proposed CMRR-NF in light of

proposed design changes, new seismic information, other new information, and other factors. Ex. B at 2-5. Under this Court's binding precedent, NNSA's completion of an SEIS for the proposed CMRR-NF—which addresses these very issues—moots the case presented in the Complaint and, in turn, moots the instant appeal.

Courts recognize two kinds of mootness: constitutional mootness and prudential mootness. *Rio Grande 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)*, 110 F.3d 724, 727-28 (10th Cir. 1997)). "If an event occurs while a case is pending that heals the injury and only prospective relief has been sought, the case must be dismissed." *SUWA*, 110 F.3d at 727. The district court correctly dismissed the Study Group's case as prudentially moot, and the events that occurred during this appeal have definitively rendered the case constitutionally moot.

A. The Study Group's original Complaint alleged that NNSA violated NEPA by not preparing a new NEPA analysis for the proposed CMRR-NF.

To determine whether the 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)); *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 Study Group's Complaint and its allegations. Ex. B at 2-4. 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 A ¶¶ 52-95. The Complaint did not (and could not) make any allegations about the recent SEIS process, Draft SEIS, Final SEIS, or Amended ROD because NNSA had not announced the SEIS process at the time that the Study Group filed the Complaint. *See, e.g., Rio Grande Silvery Minnow*, 601 F.3d at 1111 (interpreting pleadings as directed at those agency actions that had been issued when the plaintiffs filed their Complaint).

B. The SEIS and Amended ROD for the proposed CMRR-NF render the Study Group's case constitutionally moot.

When an agency develops an additional environmental analysis of its proposed actions—as NNSA has done here—any challenges to its prior alleged lack of an analysis do not present a live controversy. *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. Bonneville Power Admin.*, 56 F.3d 1075, 1078 (9th Cir. 1995) (holding that review of earlier decision document "would be especially inappropriate" because

agency's underlying analysis has also been modified); *Forest Guardians v. Forest Serv.*, 329 F.3d 1089, 1096 (9th Cir. 2003); *Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996). *Cf. Rio Grande 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 2001 and 2002 BiOps); *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1211-13 (10th Cir. 2005) (holding that new Rule mooted NEPA challenges to prior "Roadless Rule"); *McKeen v. Forest Serv.*, 615 F.3d 1244, 1255 (10th Cir. 2010) (holding that new permit moots challenge to old permit); *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; Ex. E ¶ 15. 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; Ex. A. 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.* As this Court found, "there is no reasonable expectation the alleged wrongs involving the six [projects] in question will be repeated. The [agency] has issued an environmental analysis . . . . It is thus impossible for the [agency] to return to its allegedly illegal conduct of failing to conduct an environmental analysis." *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 failing to conduct an additional environmental analysis of the proposed CMRR-NF, failing to consider new information, or failing to consider new design proposals.

C. The Final SEIS and Amended ROD redressed the Study Group's injuries, and the Study Group has already raised its NEPA claims in its new, recently filed lawsuit.

NNSA's actions of preparing the SEIS and Amended ROD rendered the Study Group's Complaint moot because they redressed any alleged injuries set forth in the Complaint. *SUWA*, 110 F.3d at 727. NNSA's preparation of the SEIS provided the very relief that the Study Group originally sought. The Study Group can provide no explanation for how an injunction ordering yet *another* round of

NEPA analysis would provide it with any meaningful relief or benefit. *SUWA*, 110 F.3d at 728. "There is no point in ordering an action that has already taken place." *Id.* at 728. *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").[3]

Moreover, the Court cannot provide the Study Group with any relief "undoing" NNSA's internal design process during the period before NNSA issued the Final SEIS and Amended ROD. *See, e.g., Aluminum Co. v. Bonneville Power Admin.*, 175 F.3d 1156, 1163 (9th Cir. 1999) ("The . . . complaints are stale because a final EIS was prepared and we can grant no relief that would 'undo' the operation of the [allegedly noncompliant agency action] during the period between [the action] and the final EIS."); *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 246 (5th Cir. 2006) ("Corrective action by an agency can moot an issue. . . . Other circuits have found that subsequent agency action under NEPA moots a

[3] Any relief would be particularly meaningless here because NNSA produced the SEIS "in the same manner as any other draft and final EIS" *including* the optional public scoping process. 10 C.F.R. § 1021.314(d). NNSA held a 45-day public comment period during the scoping period, and NNSA accepted and considered all comments submitted on the Draft SEIS (even those submitted after the close of the 60-day comment period for the Draft SEIS), maximizing the opportunity for public participation. *See, e.g.*, 75 Fed. Reg. 60,745; 75 Fed. Reg. 67,711 (Nov. 3, 2010). Thus, the Study Group cannot explain how the SEIS process provided it with less relief than an EIS process—the SEIS provided it with the same procedures and opportunity to comment that an EIS would have provided.

challenge to original compliance where there is no relief that would 'undo' the harm"). To the extent that the Study Group requested a broader injunction "pausing" the agency's design process during the NEPA process, the district court correctly concluded that it lacked authority to interfere in that internal design process. Ex. B at 15-16; *see, e.g., 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). And, in any event, no action by this Court could now "undo" NNSA's internal work on design development during the NEPA process,[4] and the NEPA process is now complete.

To the extent that the Study Group believes that the SEIS process and Amended ROD are deficient under NEPA, the Study Group must pursue and is indeed pursuing those challenges in its new lawsuit challenging the Amended ROD. The original Complaint did not (and could not) make any allegations regarding the SEIS process, and the Study Group cannot raise new claims to confer jurisdiction on appeal when it lapsed with NNSA's issuance of the final SEIS and Amended ROD. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Narvaez*, 149 F.3d 1269, 1272 (10th Cir. 1998); *see also Rio Grande Silvery Minnow*, 601 F.3d at 1111; *Greater Yellowstone*, 572 F.3d at 1121 ("[A]n actual controversy must be

[4] NNSA did not begin final design work or construction before completing the SEIS process. *See* Ex. E. ¶¶ 20-21, 25; Ex. F. ¶¶ 14-15; Ex. G ¶ 14. Thus, it is unclear what action could be "undone."

extant at all stages of review"). For example, the Study Group's Appellate Brief raises numerous challenges to the *Draft* SEIS (*e.g.* Br. at 21-22, 27, 40-45, 52), but even assuming that one could bring an APA challenge to a Draft SEIS (which one cannot), such challenges to the SEIS process have been brought and belong in the new lawsuit, not this appeal. Notably, on October 28, 2011, the district court described the complaint in the new lawsuit as "raising many of the same arguments and claims raised in this case, but incorporating the findings of the final SEIS and associated ROD." Ex. H at 3.

Thus, any NEPA claims cured by the new process are now moot, and any NEPA claims arising from the new process can (and must) be resolved in the new lawsuit. This Court cannot provide the Study Group with any meaningful relief in the case on appeal.

D. 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.

This case does not fall within the exception to the mootness doctrine for voluntary cessation. An agency's voluntary cessation of allegedly wrongful conduct after litigation begins generally will not moot a case unless "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.'" *Rio Grande Silvery Minnow*, 601 F.3d at 1115 (quoting *County 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*, 110 F.3d 727-29; *Rio Grande Silvery Minnow*, 601 F.3d at 1117-21 & n.15 (noting that "courts have expressly treated governmental officials' voluntary conduct 'with more solicitude' than that of private actors") (collecting cases). 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 NEPA coverage] . . . 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.

Thus, this appeal has been overtaken by events and is definitively moot.

CONCLUSION

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

Respectfully submitted,

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November 1, 2011
90-1-4-13225

EXHIBIT LIST:

A. Original Complaint, No. 1:10-cv-00760, filed August 16, 2010.

B. District Court Memorandum Opinion and Order, No. 1:10-cv-00760, dismissing original suit for lack of jurisdiction.

C. Amended ROD, 76 Fed. Reg. 64,344 (Oct. 18, 2011).

D. New lawsuit's complaint, No. 6:11-cv-00946, filed October 21, 2011.

E. Declaration of Dr. Donald Cook, Deputy Administrator for Defense Programs at NNSA, who oversees the proposed CMRR-NF.

F. Declaration of Roger E. Snyder, Deputy Site Manager at LANL, who oversees the proposed CMRR-NF project at the site level.

G. Declaration of Herman C. LeDoux, Federal Project Director for the proposed CMRR-NF project, who has knowledge of both the current status of the SIES process and the design process for the proposal.

H. District Court Memorandum Opinion and Order, No. 1:10-cv-00760, denying injunction pending appeal on October 28, 2011.

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 1.115.998.0 program (last updated October 31, 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, November 1, 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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