CASE 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; THE HONORABLE STEVEN CHU, in his capacity as Secretary, Department of Energy; NATIONAL NUCLEAR SECURITY ADMINISTRATION; THE HONORABLE THOMAS PAUL D'AGOSTINO, in his capacity as Administrator, National Nuclear Security Administration,	)
	)
Defendants-Appellees.	)

On Appeal from the United States District Court
For the District of New Mexico
The Honorable Judge Judith Herrera
D.C. No. 1:10-CV-760-JCH-ACT

PLAINTIFF-APPELLANT'S REPLY BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT'S MOTION TO SUPPLEMENT THE RECORD, TO VACATE THE JUDGMENT BELOW, AND TO REMAND PURSUANT TO TENTH CIRCUIT RULE 27.2(A)(1)

Preliminary Statement

Plaintiff-Appellant, Los Alamos Study Group ("LASG") submits this memorandum pursuant to Fed. R. App. P. 27(a)(4), in reply to Federal-Defendants-Appellees' Response in Opposition to Motion to Supplement the Record, Vacate Judgment Below and Remand Pursuant to 10th Cir. R. 27.2(A)(1), filed on March 19, 2012 ("DOE/NNSA Response Br.").

Argument

In accordance with Fed. R. App. P. 27(a)(4), LASG responds as follows to the response brief of Defendant-Appellees ("DOE/NNSA"):

1. In this appeal, LASG challenges Defendant-Appellees' ("DOE/NNSA") irrevocable commitment to and construction of the Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") project at Los Alamos, New Mexico, without issuing an applicable environmental impact statement ("EIS"), analyzing reasonable alternatives, and obtaining a record of decision ("ROD") authorizing the massive federal project.[1] Thus, this suit was brought to challenge DOE/NNSA's *conduct*, which constitutes final agency action. It was not brought to challenge the *post hoc* production of documents that attempt

[1] This case does not challenge the original 2003 EIS, or the 2004 ROD, but contends that the antiquated 2003 EIS and 2004 ROD are *not applicable* to the radically-changed project that DOE/NNSA began constructing prior to 2010-11, and to which DOE/NNSA remain irretrievably committed today.

to justify that conduct and, by manipulating the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.* ("APA"), seek to divest this Court of jurisdiction to review the actual agency decisions that stray far afield from compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA").

2. The lower court acquired jurisdiction of this case when LASG sued to challenge DOE/NNSA's final agency action in committing to construction of CMRR-NF without the required NEPA analysis. There is one final agency action under challenge in this case, and it is DOE/NNSA's irreversible commitment to the CMRR—without NEPA analysis and in a state of total disregard of NEPA compliance. By committing to contracts to design and build CMRR and by constructing the $360 million "Part A" of the CMRR—the CMRR-Radiological Laboratory, Utility, and Office Building ("RLUOB")—DOE/NNSA continue to make irretrievable commitments of resources to the CMRR project. LASG has shown that such actions constitute final agency action, ripe for judicial review. LASG Opening Brief at 32. This is no "ethereal grievance" (DOE/NNSA Response Br. at 3), but a specific violation of law.

3. The court below dismissed the case on the basis of DOE/NNSA's promise to produce a Supplemental EIS ("SEIS"), and DOE/NNSA have moved in this Court for dismissal on mootness grounds based on the issuance of the final SEIS. LASG asserted in the lower court that the after-the-fact SEIS could never

achieve NEPA compliance, because the draft SEIS stated that it would not consider reasonable alternatives to the behemoth 2010-11 CMRR-NF—indicating that the final SEIS would simply rubber-stamp the very project to which DOE/NNSA remained irretrievably committed. In response, DOE/NNSA then claimed the same illegitimate justification for its decisions: the promised SEIS would cure the NEPA violations and, thus, the documents themselves became the final agency action rather than the agency's illegal conduct.

4. As LASG forewarned in the court below, the SEIS was a sham designed to legitimize decisions already made. Only three alternatives were considered in the SEIS, two of which were rejected as unreasonable, leaving the 2010-11 CMRR-NF as the "default" choice, an alternative to which DOE/NNSA not only was irretrievably committed by the expenditure of hundreds of millions of dollars for design, but in fact had already begun constructing. LASG Opening Brief (Aug. 31, 2011) at 32. DOE/NNSA promptly moved this Court for dismissal, asserting that the case is moot, now that a final SEIS has been issued.[2]

5. LASG filed this motion to bring forward facts that respond to DOE/NNSA's claims that they have completed their NEPA compliance upon issuance of the SEIS and that the case is moot. Again, DOE/NNSA's actions

[2] DOE/NNSA assert, further, that if LASG wishes to assert that the SEIS fails to achieve NEPA compliance, that must be done in a separate lawsuit, starting from scratch. DOE/NNSA Response Br. at 15-16.

speak louder than their NEPA pronouncements. The budget request expressly states that DOE/NNSA have decided *not to follow* the very SEIS and Amended ROD, upon the promise of which the lower court entirely rested its decision to dismiss based on prudential mootness and ripeness. It states that DOE/NNSA have adopted alternatives that are not discussed or analyzed in any of their NEPA documents, clearly establishing the inadequacy of the SEIS and all of DOE/NNSA's prior NEPA analyses.

6. Specifically, the budget request submitted by DOE/NNSA states explicitly in three places that DOE/NNSA have now chosen a new alternative, never before analyzed in any EIS or SEIS, "instead of" and "in place of" the CMRR-NF. This is a "new" preferred alternative, while CMRR-NF, as rubber-stamped in the SEIS, is deferred until at least 2018, but not cancelled. LASG submits that this agency decision flatly refutes DOE/NNSA's assertion that NEPA claims concerning the CMRR-NF are moot. To the contrary, this recent agency decision constitutes a supervening event calling for vacating and remanding the lower court's decision, which relied exclusively on the promise of the now-irrelevant SEIS to support dismissal.

7. DOE/NNSA have adopted an overall strategy of inventing new NEPA processes which, they claim, will moot and require dismissal of NEPA complaints about their prior noncompliance, so that litigation must be dismissed and

consideration of DOE/NNSA's latest NEPA devices must occur in another case. By this strategy they seek to avoid adjudication of their responsibility actually to analyze the alternatives to the CMRR-NF, while at the same time continuing with massive investment to render the project a *fait accompli*. DOE/NNSA have been pursuing the CMRR-NF for years without complying with NEPA, and the budget request amplifies LASG's showing that there are important, unanalyzed alternatives establishing that LASG's existing claims are not moot. Rather, this is simply more evidence (this time irrefutable) that DOE/NNSA have continued to forge forward with the CMRR-NF project, despite the existence (and recent adoption) of alternatives that have never been analyzed under NEPA,[3] and certainly not in the SEIS-which DOE/NNSA continues to reply upon in this appeal.

8. DOE/NNSA claim that budget requests are not "final agency action," they are not reviewable, and what may happen with the CMRR-NF is now speculative. DOE/NNSA Response Br. at 13. This misses the mark entirely. The budget request decidedly states the agency's decision to adopt several unanalyzed

[3] DOE/NNSA's recent agency action disavowing the SEIS has the further consequence of rendering the second lawsuit challenging the SEIS an exercise in administrative futility. *Los Alamos Study Group v. U.S. Dep't of Energy*, 1:11-cv-00946-JEC-WDS ("LASG II"). In LASG II, DOE/NNSA expect to produce an administrative record supporting the SEIS that they acknowledge they will not follow, at least until 2018. Of course, any administrative record produced by DOE/NNSA will be limited to the SEIS and will not address the supervening event embodied in the recent budget request, *i.e.*, DOE/NNSA's new preferred alternative to be implemented while DOE/NNSA remain firmly committed to CMRR-NF construction in 2018.

alternatives, while remaining irretrievably committed to CMRR, and to defer the construction for at least five additional years.[4] The "new" final agency action vitiates the entire basis for the lower court's decision that the promise of a SEIS, which DOE/NNSA have since issued and now have decided to ignore, justified dismissal of the case on grounds of prudential mootness and ripeness.

9. Not only do DOE/NNSA incorrectly assert that LASG is trying to challenge the budget request as "final agency action" (DOE/NNSA Response Br. at 2, 16-18), but they also claim that LASG has attempted to challenge the October 2011 Amended ROD as "final agency action." DOE/NNSA Response Br. at 6. They argue that LASG is now attempting to amend the complaint on appeal. DOE/NNSA Response Br. at 8, 9-10. At the same time, they claim that LASG "did not identify a discrete, final agency action." DOE/NNSA Response Br. at 16; *see id.* 2-3. These arguments have no basis in fact.

10. The fundamental challenge in this case is not to the SEIS, which postdates this case. The SEIS, rather, was DOE/NNSA's device for persuading the court below to dismiss this case as prudentially moot, erroneously, LASG contends. The SEIS contains no valid analysis of reasonable alternatives—not even of the alternatives DOE/NNSA now have chosen to implement during this deferred period—and so was deficient in its premise and could not remedy the

[4] Plainly, five years is ample time to commission a new EIS to satisfy the "hard look" required by NEPA.

massive NEPA violations inherent in DOE/NNSA's continued commitment to CMRR-NF. Now the SEIS process is over, and DOE/NNSA adhere to the decision that they had made years ago to build the modified CMRR-NF with no NEPA analysis; thus, the main issue remains. DOE/NNSA's latest announcement to defer that massive project in favor of alternatives not analyzed under NEPA is simply more of the same violative conduct.

11. The argument that this case was rendered moot by the SEIS (DOE/NNSA Response Br. at 14) is clearly incorrect. LASG has shown that a NEPA defendant cannot moot a case by issuing inadequate documents, while proceeding with its project and ignoring NEPA. *See* LASG Reply Br. (Jan. 9, 2012) at 16-20. DOE/NNSA must now concede that they will not even follow the deficient SEIS.

12. *Wyoming v. U.S. Dep't of Interior*, 2012 WL 642126 (10th Cir. 2012) (DOE/NNSA Response Br. at 14), does not support DOE/NNSA. There, the agency issued a new EIS to support its rulemaking, wholly independently of the procedures underlying a previous rule. Where the environmental analysis had been redone, a complete new EIS had been issued, and its validity was not questioned, the Court found that litigation over the previous NEPA compliance was moot:

> Because the procedural challenge in this case is to the analysis underlying the 2009 temporary rule and that analysis has been redone, we hold that the procedural challenge to the 2009 temporary rule is moot.

Id. at *8. Here, in contrast, the inadequate 2003 EIS does not even discuss the 2010-11 CMRR-NF that DOE/NNSA plan to construct (now in 2018), and it expressly was not "superseded" or "redone" but only supplemented by the SEIS, which effectively considers *no alternatives*. Thus, the situation is wholly unlike that in *Wyoming*. Indeed, the "new EIS" that was issued in *Wyoming* is precisely the relief that LASG seeks herein and DOE/NNSA have refused.

13. Even if a NEPA defendant completes the necessary NEPA analysis—which has not happened here—the district court must oversee the agency's efforts to achieve or avoid NEPA compliance. LASG Reply Br. at 12-13. Where an agency has violated NEPA, the district court retains jurisdiction to administer appropriate relief, including the assessment of new NEPA documents that are claimed to achieve compliance and of agency decisionmaking under those documents. *Natural Res. Def. Council v. U.S. Army Corps of Eng'rs*, 457 F.Supp.2d 198 (S.D.N.Y.2006). DOE/NNSA's assertion (DOE/NNSA Response Br. at 15-16) that all such issues must be heard in another lawsuit is erroneous.

14. The budget request on behalf of DOE/NNSA that is the subject of this motion shows that, after issuance of the SEIS and AROD, *DOE/NNSA have now publicly decided to adopt* further "reasonable alternatives" that indisputably were not analyzed under NEPA. At the same time, the decision to build CMRR-NF remains in effect (DOE/NNSA Response Br. at 6, 12), albeit delayed for at

least five years. With DOE/NNSA officially acknowledging the validity of alternatives that have not been analyzed under NEPA, it is clear that the issuance of the SEIS and AROD does not render this case moot. Clearly, NEPA has not been satisfied.

15. This new information constitutes a supervening event bearing on this appeal from the lower court's order of dismissal based on mootness, which appeal DOE/NNSA have moved in this Court to dismiss as moot based on post-judgment events. DOE/NNSA Response Br. at 13. The budget request puts it beyond argument that the SEIS, written only after DOE/NNSA's full commitment to the project and designed to rubber-stamp a single "alternative," could not possibly have achieved NEPA compliance for the CMRR-NF project, that no existing NEPA analysis has addressed the true range of reasonable alternatives, and that DOE/NNSA are and remain far out of compliance with NEPA. Both parties—including LASG—could fairly be criticized if they had failed to draw these facts to the Court's attention.

16. DOE/NNSA assert that this motion should have been filed by July 15, 2011. (DOE/NNSA Response Br. at 8). But the supervening event did not occur until February 13, 2012. LASG filed its motion on March 6, 2012. It is submitted that LASG acted expeditiously.

Conclusion

The Court should allow the Record to be supplemented by the addition of the extract from the Administrations FY 2013 budget request attached to LASG's motion and in light of the new position taken therein by the Federal Government, the Court should vacate the judgment below and remand:

(a) with directions to require preparation of a new EIS, or, alternatively,

(b) with directions to proceed to further consideration of issues of NEPA compliance.

Respectfully submitted,

HINKLE, HENSLEY, SHANOR & MARTIN, LLP

/s/ Thomas M. Hnasko

Thomas M. Hnasko
Dulcinea Z. Hanuschak
P.O. Box 2068
Santa Fe, NM 87504
(505) 982-4554

and

LINDSAY A. LOVEJOY, JR.
3600 Cerrillos Road #1001A
Santa Fe, NM 87507

March 29, 2012

CERTIFICATE OF COMPLIANCE

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Thomas M. Hnasko

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I hereby certify that a copy of the foregoing *Plaintiff-Appellant's Reply Brief in Support of Plaintiff-Appellant's Motion to Supplement the Record, to Vacate the Judgment Below, and to Remand Pursuant to Tenth Circuit Rule 27.2(A)(1)*, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the AVG Anti-Virus Business Edition 2011, AVG Version 10.0.1424, Virus DB: March 29, 2012 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: */s/ Thomas M. Hnasko*
Thomas M. Hnasko

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Plaintiff-Appellant's Reply Brief in Support of Plaintiff-Appellant's Motion to Supplement the Record, to Vacate the Judgment Below, and to Remand Pursuant to Tenth Circuit Rule 27.2(A)(1)* was furnished through (ECF) electronic service to the following on this 29th day of March, 2012:

Robert P. Stockman
P.O. Box 23795
Washington, D.C. 20026-3795
robert.stockman@usdoj.gov

John P. Tustin, Trial Attorney
Natural Resources Section
P.O. Box 663
Washington, DC 20044-0663
Phone (202) 305-3022/Fax: (202) 305-0506
john.tustin@usdoj.gov

Andrew A. Smith, Trial Attorney
Natural Resources Section
c/o U.S. Attorney's Office
P.O. Box 607
Albuquerque, NM 87103
Phone: (505) 224-1468/Fax: (505) 346-7205
Andrew.smith6@usdoj.gov

Attorneys for Federal Defendants

/s/ *Thomas M. Hnasko*
Thomas M. Hnasko