APPEAL

U.S. District Court
District of New Mexico - Version 4.2 (Albuquerque)
CIVIL DOCKET FOR CASE #: 1:10-cv-00760-JCH-ACT

The Los Alamos Study Group v. United States Department of Energy et al
Assigned to: District Judge Judith C. Herrera
Referred to: Magistrate Judge Alan C. Torgerson
Case in other court: US Court of Appeals, 11-02141
Cause: 42:4321 Review of Agency Action-Environment

Date Filed: 08/16/2010
Date Terminated: 05/23/2011
Jury Demand: None
Nature of Suit: 893 Environmental Matters
Jurisdiction: U.S. Government Defendant

Plaintiff

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V.

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Defendant

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Date Filed	#	Docket Text
08/16/2010	1	COMPLAINT *FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969* against Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy (Filing Fee - Deliver Payment), filed by The Los Alamos Study Group. (Attachments: # 1 Civil Cover Sheet)(Hnasko, Thomas) (Entered: 08/16/2010)
08/17/2010		Magistrate Judge Lourdes A. Martinez and Magistrate Judge Alan C. Torgerson assigned. (ln) (Entered: 08/17/2010)
08/17/2010	2	PLEASE TAKE NOTICE that this case has been randomly assigned to United States Magistrate Judge Lourdes A. Martinez to conduct all proceedings in this matter, including trial. Appeal from a judgment entered by a Magistrate Judge will be to the United States Court of Appeals for the Tenth Circuit. **It is the responsibility of the case filer to serve a copy of this Notice upon all parties with the summons and complaint.** *Consent is strictly voluntary, and a party is free to withhold consent without adverse consequences. Should a party choose to consent, notice should be made within 21 days after service of this notice.* For e-filers, visit our website at www.nmcourt.fed.us for more information and instructions. [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (ln) (Entered: 08/17/2010)
08/17/2010	3	Filing fee: $ 350.00, receipt number SF001395 (gr) (Entered: 08/17/2010)
08/17/2010		Summons Issued as to Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy(ln) (Entered: 08/17/2010)
08/27/2010	4	NOTICE of Appearance by John Tustin on behalf of Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy (Tustin, John) (Entered: 08/27/2010)

08/27/2010	5	REFUSAL TO CONSENT to Proceed before a U.S. Magistrate Judge (Hnasko, Thomas) [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 08/27/2010)
08/27/2010	6	MINUTE ORDER by Matthew J. Dykman, Clerk of the Court reassigning U.S. District Judge Bruce D. Black as Presiding Judge pursuant to Doc. 5 REFUSAL TO CONSENT. U.S. Magistrate Judge Lourdes A. Martinez is no longer assigned to the case. (mr) (Entered: 08/27/2010)
09/15/2010	7	MINUTE ORDER by the Clerk of Court adding District Judge Judith C. Herrera; Chief Judge Bruce D. Black no longer assigned to case. (mjr) (Entered: 09/15/2010)
09/20/2010	8	SUMMONS Returned Executed by The Los Alamos Study Group. Stephen Chu served on 8/30/2010, answer due 10/29/2010; Thomas Paul D'Agostino served on 8/30/2010, answer due 10/29/2010; National Nuclear Security Administration served on 8/30/2010, answer due 10/29/2010; United States Department of Energy served on 8/30/2010, answer due 10/29/2010. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit)(Hnasko, Thomas) (Entered: 09/20/2010)
10/04/2010	9	MOTION to Dismiss for Lack of Jurisdiction *and Brief in Support* by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy. (Attachments: # 1 Affidavit Declaration of Dr. Donald L. Cook, # 2 Exhibit Exhibits to Declaration of Dr. Donald L. Cook)(Tustin, John) Modified on 1/6/2011 (kg). (Entered: 10/04/2010)
10/21/2010	10	RESPONSE to Motion re 9 MOTION to Dismiss for Lack of Jurisdiction *and Brief in Support* filed by The Los Alamos Study Group. (Attachments: # 1 Affidavit Affidavit of Gregory Mello, # 2 Exhibit Exhibits to Affidavit of Gregory Mello)(Hnasko, Thomas) (Entered: 10/21/2010)
11/08/2010	11	REPLY to Response to Motion re 9 MOTION to Dismiss for Lack of Jurisdiction *and Brief in Support* filed by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy. (Tustin, John) (Entered: 11/08/2010)
11/09/2010	12	NOTICE of Briefing Complete by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy re 9 MOTION to Dismiss for Lack of Jurisdiction *and Brief in Support* filed by National Nuclear Security Administration, United States Department of Energy, Thomas Paul D'Agostino, Stephen Chu (Tustin, John) (Entered: 11/09/2010)
11/12/2010	13	MOTION for Preliminary Injunction *and Memorandum in Support* by The Los Alamos Study Group. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit)(Hnasko, Thomas) (Entered: 11/12/2010)
11/15/2010	14	NOTICE by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security

		Administration, United States Department of Energy re 13 MOTION for Preliminary Injunction *and Memorandum in Support Federal Defendants' Notice of Agreed Extension of Time to Respond* (Tustin, John) (Entered: 11/15/2010)
11/17/2010	15	ORDER by District Judge Judith C. Herrera referring Defendants' Motion to Dismiss for Lack of Jurisdiction and Brief in Support 9 to Magistrate Judge Alan C. Torgerson for Report and Recommendation. (baw) (Entered: 11/17/2010)
11/22/2010	16	MOTION for Leave to File *Plaintiff's Unopposed Motion to File Materials Cited in Affidavits* by The Los Alamos Study Group. (Attachments: # 1 Exhibit)(Hnasko, Thomas) (Entered: 11/22/2010)
11/23/2010	17	ORDER by District Judge Judith C. Herrera granting 16 Motion for Leave to File Materials Cited in Affidavits. (baw) (Entered: 11/23/2010)
12/01/2010	18	CERTIFICATE OF SERVICE by The Los Alamos Study Group re 17 Order on Motion for Leave to File *Materials Cited in Affidavits* (Hnasko, Thomas) (Entered: 12/01/2010)
12/03/2010	19	MOTION for Extension of Time to File Response/Reply as to 13 MOTION for Preliminary Injunction *and Memorandum in Support* by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy. (Tustin, John) (Entered: 12/03/2010)
12/07/2010	20	ORDER by District Judge Judith C. Herrera granting 19 Motion for Extension of Time to File Response to 13 MOTION for Preliminary Injunction and Memorandum in Support. Response due by 10/20/2010 (baw) (Entered: 12/07/2010)
12/08/2010	21	*Plaintiff's* RESPONSE *and Request for Modification* re 20 Order on Motion for Extension of Time to File Response/Reply filed by The Los Alamos Study Group. (Attachments: # 1 Exhibit Ltr from Hnasko to Tustin and Smith) (Hnasko, Thomas) (Entered: 12/08/2010)
12/10/2010	22	REPLY to Response to Motion re 19 MOTION for Extension of Time to File Response/Reply as to 13 MOTION for Preliminary Injunction *and Memorandum in Support* filed by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy. (Attachments: # 1 Affidavit Exhibit A, Declaration of John P. Tustin) (Tustin, John) Modified text on 12/13/2010 (kg). (Entered: 12/10/2010)
12/20/2010	23	RESPONSE in Opposition re 13 MOTION for Preliminary Injunction *and Memorandum in Support* filed by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy. (Attachments: # 1 Exhibit Exhibit List, # 2 Affidavit Declaration of Roger E. Snyder, # 3 Exhibit Snyder Attachment 1, # 4 Exhibit Snyder Attachment 2, # 5 Exhibit Snyder Attachment 3, # 6 Exhibit Snyder Attachment 4, # 7 Exhibit Snyder Attachment 5, # 8 Affidavit Declaration of

		Herman C. LeDoux, # 9 Exhibit LeDoux Attachment 1)(Tustin, John) (Entered: 12/20/2010)
01/05/2011	24	NOTICE by The Los Alamos Study Group *of Agreed Extension of Time to Reply in Support of Plaintiff's Motion for Preliminary Injunction* (Hnasko, Thomas) (Entered: 01/05/2011)
01/06/2011	25	MAGISTRATE JUDGES'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION re 9 Motion to Dismiss by Magistrate Judge Alan C. Torgerson. Objections to R&R due by 1/20/2011. (ns) Modified text on 1/6/2011 (kg) (Entered: 01/06/2011)
01/07/2011	26	NOTICE of Appearance by Lindsay A Lovejoy on behalf of The Los Alamos Study Group (Lovejoy, Lindsay) (Entered: 01/07/2011)
01/10/2011	27	NOTICE of Appearance by Dulcinea Z Hanuschak on behalf of The Los Alamos Study Group (Hanuschak, Dulcinea) (Entered: 01/10/2011)
01/14/2011	28	MOTION for Leave to File Excess Pages by The Los Alamos Study Group. (Hnasko, Thomas) (Entered: 01/14/2011)
01/14/2011	29	STIPULATION *for Extension of Page Limitations for Exhibits to Plaintiff's Reply in Support of Motion for Preliminary Injunction* by The Los Alamos Study Group (Hnasko, Thomas) (Entered: 01/14/2011)
01/14/2011	30	REPLY to Response to Motion re 13 MOTION for Preliminary Injunction *and Memorandum in Support* filed by The Los Alamos Study Group. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4, # 5 Exhibit Exhibit 5, # 6 Exhibit Exhibit 6, # 7 Exhibit Exhibit 7, # 8 Exhibit Exhibit 8, # 9 Exhibit Exhibit 9, # 10 Exhibit Exhibit 10, # 11 Exhibit Exhibit 11, # 12 Exhibit Exhibit 12, # 13 Exhibit Exhibit 13, # 14 Exhibit Exhibit 14, # 15 Exhibit Exhibit 15, # 16 Exhibit Exhibit 16, # 17 Exhibit Exhibit 17, # 18 Exhibit Exhibit 18, # 19 Exhibit Exhibit 19, # 20 Exhibit Exhibit 20, # 21 Exhibit Exhibit 21, # 22 Exhibit Exhibit 22, # 23 Exhibit Exhibit 23, # 24 Exhibit Exhibit 24)(Hnasko, Thomas) (Entered: 01/14/2011)
01/18/2011	31	RESPONSE in Opposition re 28 MOTION for Leave to File Excess Pages filed by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy. (Attachments: # 1 Exhibit A)(Tustin, John) (Entered: 01/18/2011)
01/20/2011	32	OBJECTIONS re 25 REPORT AND RECOMMENDATIONS by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy (Tustin, John) (Entered: 01/20/2011)
01/20/2011	33	OBJECTIONS re 25 REPORT AND RECOMMENDATIONS by The Los Alamos Study Group (Attachments: # 1 Exhibit Exhibit A)(Hnasko, Thomas) (Entered: 01/20/2011)
01/26/2011	34	REPLY to Response to Motion re 28 MOTION for Leave to File Excess Pages

		filed by The Los Alamos Study Group. (Hnasko, Thomas) (Entered: 01/26/2011)
01/26/2011	35	NOTICE of Briefing Complete by The Los Alamos Study Group re 28 MOTION for Leave to File Excess Pages filed by The Los Alamos Study Group (Hnasko, Thomas) (Entered: 01/26/2011)
01/28/2011	36	MOTION for Leave to File *Documents Cited in Affidavit* by The Los Alamos Study Group. (Hnasko, Thomas) (Entered: 01/28/2011)
02/03/2011	37	ORDER by District Judge Judith C. Herrera granting 36 Motion for Leave to File Documents Cited in Affidavit (baw) (Entered: 02/03/2011)
02/07/2011	38	CERTIFICATE OF SERVICE by The Los Alamos Study Group re 37 Order on Motion for Leave to File *Documents Cited in Affidavit* (Hnasko, Thomas) (Entered: 02/07/2011)
02/07/2011	39	OBJECTIONS re 33 Objections *Federal Defendants' Response to Plaintiff's January 20, 2011 Objections to Magistrate Judge's Proposed Findings and Recommended Disposition* by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy (Tustin, John) (Entered: 02/07/2011)
02/09/2011	40	NOTICE of Briefing Complete by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy re 25 REPORT AND RECOMMENDATIONS (Tustin, John) (Entered: 02/09/2011)
02/24/2011	41	NOTICE of Hearing on 32 33 39 Plaintiff's and Defendants' Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition; and 13 Plaintiff's MOTION for Preliminary Injunction *and Memorandum in Support*: Hearing on Objections and Motion is set for Tuesday, 3/15/2011 at 09:00 AM in Albuquerque - 580 Brazos Courtroom before District Judge Judith C. Herrera. 1/2 day is allotted for this hearing. (id) (Entered: 02/24/2011)
02/28/2011	42	Unopposed MOTION to Continue *March 15, 2011 Hearing* by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy. (Tustin, John) (Entered: 02/28/2011)
03/01/2011	43	ORDER by District Judge Judith C. Herrera granting Federal Defendants' 42 Unopposed MOTION to Continue *March 15, 2011 Hearing* re: 32 33 39 Plaintiff's and Defendants' Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition; and 13 Plaintiff's MOTION for Preliminary Injunction *and Memorandum in Support*. Hearing on Objections and Motion for Preliminary Injunction is RESET for Wednesday, 4/27/2011 at 09:00 AM in Albuquerque - 580 Brazos Courtroom before District Judge Judith C. Herrera. THIS IS A TEXT ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED. 1/2 day is allotted for this hearing.(id) (Entered: 03/01/2011)
03/02/2011	44	ORDER by District Judge Judith C. Herrera. Having considered the Motion for

		Leave to File Excess Pages 28 , the response and the reply, the Court hereby grants the requested leave to file excess pages. [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (baw) (Entered: 03/02/2011)
03/03/2011	45	NOTICE of Briefing Complete by The Los Alamos Study Group re 13 MOTION for Preliminary Injunction *and Memorandum in Support* filed by The Los Alamos Study Group (Hnasko, Thomas) (Entered: 03/03/2011)
03/11/2011	46	Opposed MOTION to Compel *Defendants' Counsel to Participate in a Conference of the Parties Under Rule 26(f)(1) and for the Issuance of a Scheduling Order Under Rule 16* by The Los Alamos Study Group. (Hnasko, Thomas) (Entered: 03/11/2011)
03/28/2011	47	RESPONSE in Opposition re 46 Opposed MOTION to Compel *Defendants' Counsel to Participate in a Conference of the Parties Under Rule 26(f)(1) and for the Issuance of a Scheduling Order Under Rule 16* filed by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy. (Smith, Andrew) (Entered: 03/28/2011)
04/04/2011	48	REPLY to Response to Motion re 46 Opposed MOTION to Compel *Defendants' Counsel to Participate in a Conference of the Parties Under Rule 26(f)(1) and for the Issuance of a Scheduling Order Under Rule 16* filed by The Los Alamos Study Group. (Hnasko, Thomas) (Entered: 04/04/2011)
04/07/2011	49	Opposed MOTION for Leave to File *a Three-Page Surreply to Plaintiff's Reply on Motion to Compel* by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy. (Tustin, John) (Entered: 04/07/2011)
04/08/2011	50	ORDER by Magistrate Judge Alan C. Torgerson denying 49 Motion for Leave to File (ns) (Entered: 04/08/2011)
04/08/2011	51	ORDER by Magistrate Judge Alan C. Torgerson denying 46 Motion to Compel (ns) (Entered: 04/08/2011)
04/27/2011	52	Clerk's Minutes for proceedings held before District Judge Judith C. Herrera: Preliminary Injunction Hearing held on 4/27/2011. (Court Reporter P. Baca) (kg) (Entered: 04/28/2011)
04/28/2011	53	NOTICE of Continuation of Hearing on 32 33 39 Plaintiff's and Defendants' Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition; and 13 Plaintiff's MOTION for Preliminary Injunction and Memorandum in Support: Motion Hearing RESET for 5/2/2011 at 09:00 AM in Albuquerque - 580 Brazos Courtroom before District Judge Judith C. Herrera. 3 hours allocated for this hearing (id) (Entered: 04/28/2011)
05/02/2011	54	Clerk's Minutes for proceedings held before District Judge Judith C. Herrera: Motion Hearing held on 5/2/2011 re 13 MOTION for Preliminary Injunction filed by The Los Alamos Study Group and Objections to 25 REPORT AND RECOMMENDATIONS. (Court Reporter Paul Baca) (dmw) (Entered: 05/02/2011)

05/23/2011	55	MEMORANDUM OPINION AND ORDER by District Judge Judith C. Herrera ADOPTING Magistrate Judge's Proposed Findings and Recommended Disposition 25 , OVERRULING Plaintiff's Objections to Magistrate Judge's Proposed Findings and Recommended Disposition 33 and GRANTING Defendants Motion to Dismiss for Lack of Jurisdiction 9 . (baw) (Entered: 05/23/2011)
05/23/2011	56	JUDGMENT by District Judge Judith C. Herrera (baw) (Entered: 05/23/2011)
05/23/2011	57	TRANSCRIPT of Proceedings (objections and preliminary injunction) held on April 27, 2011, before Judge Judge Herrera. Court Reporter Paul Baca, Telephone number 505-843-9241. **PLEASE TAKE NOTICE that each party now has seven (7) calendar days to file a Notice of Intent to Request Redaction of any personal identifiers from this transcript. If no notice is filed during this seven-day period, the court will assume that redaction of personal data is not necessary and will make the transcript electronically available, as is, to the public after 90 days. For additional guidance, PLEASE REVIEW the complete policy, located in the CM/ECF Administrative Procedures Manual at www.nmcourt.fed.us. Transcripts may be purchased from the court reporter and/or viewed (but not copied) at the Clerk's Office public terminal within the 90-day period.** Notice of Intent to Request Redaction set for 5/31/2011. Redaction Request due 6/13/2011. Redacted Transcript Deadline set for 6/23/2011. Release of Transcript Restriction set for 8/22/2011.(pb) (Entered: 05/23/2011)
05/23/2011	58	TRANSCRIPT of Proceedings (objections and preliminary injunction) held on May 2, 2011, before Judge Herrera. Court Reporter Paul Baca, Telephone number 505-843-9241. **PLEASE TAKE NOTICE that each party now has seven (7) calendar days to file a Notice of Intent to Request Redaction of any personal identifiers from this transcript. If no notice is filed during this seven-day period, the court will assume that redaction of personal data is not necessary and will make the transcript electronically available, as is, to the public after 90 days. For additional guidance, PLEASE REVIEW the complete policy, located in the CM/ECF Administrative Procedures Manual at www.nmcourt.fed.us. Transcripts may be purchased from the court reporter and/or viewed (but not copied) at the Clerk's Office public terminal within the 90-day period.** Notice of Intent to Request Redaction set for 5/31/2011. Redaction Request

		due 6/13/2011. Redacted Transcript Deadline set for 6/23/2011. Release of Transcript Restriction set for 8/22/2011.(pb) (Entered: 05/23/2011)
07/01/2011	59	NOTICE OF APPEAL as to 56 Judgment by The Los Alamos Study Group. (Filing Fee - Deliver Payment) (Hanuschak, Dulcinea) (Entered: 07/01/2011)
07/01/2011	60	USCA Appeal Fees received $ 455 receipt number SF001569 re 59 Notice of Appeal filed by The Los Alamos Study Group (pg) (Entered: 07/01/2011)
07/07/2011	62	USCA Case Number 11-2141 for 59 Notice of Appeal filed by The Los Alamos Study Group. (pg) (Entered: 07/09/2011)
07/09/2011	61	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 59 Notice of Appeal (pg) (Entered: 07/09/2011)
07/21/2011	63	TRANSCRIPT ORDER FORM by The Los Alamos Study Group for proceedings held on 04/27/11; 05/02/11 before Judge Herrera, (Hnasko, Thomas) (Entered: 07/21/2011)
07/21/2011	64	MOTION to Stay *Pending Appeal* by The Los Alamos Study Group. (Hnasko, Thomas) (Entered: 07/21/2011)
07/22/2011	65	LETTER to USCA re briefing schedule for 59 Notice of Appeal. (pg) (Entered: 07/22/2011)
08/08/2011	66	RESPONSE in Opposition re 64 MOTION to Stay *Pending Appeal* filed by Stephen Chu, Thomas Paul D'Agostino, National Nuclear Security Administration, United States Department of Energy. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Tustin, John) (Entered: 08/08/2011)
08/23/2011	68	(DUPLICATE ENTRY OF #57) TRANSCRIPT of Proceedings held on 04/27/2011 (Entered: 08/23/2011)
08/25/2011	69	REPLY to Response to Motion re 64 MOTION to Stay *Pending Appeal* filed by The Los Alamos Study Group. (Hnasko, Thomas) (Entered: 08/25/2011)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v. Case No. _____

UNITED STATES DEPARTMENT OF ENERGY; THE HONORABLE STEPHEN 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.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

I.

PRELIMINARY STATEMENT

1. This action arises under the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C.A. §§ 4321 *et seq.*, together with the implementing regulations for NEPA issued by the White House Council on Environmental Quality ("the CEQ Regulations") 40 C.F.R. §§ 1500-08, and regulations issued by the Department of Energy ("DOE"), 10 C.F.R. § 1021. This action also arises under the Administrative Procedure Act, 5 U.S.C.A. §§ 701 *et seq.*

2. This action challenges defendants' actions in planning, approving, and implementing the construction and operation of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("Nuclear Facility") at the Los Alamos National Laboratory ("LANL") in Los Alamos, New Mexico. The proposed Nuclear Facility would be an approximately four billion dollar facility for storing and handling plutonium. Construction is currently expected to begin in 2011 and conclude in 2020.

3. The complaint seeks a declaratory judgment and mandatory injunction requiring defendants to comply with the National Environmental Policy Act of 1969 (NEPA), by preparing an environmental impact statement (EIS) regarding the proposed Nuclear Facility and its many subprojects. The complaint also seeks an injunction to prohibit all further investment in the Nuclear Facility, including all detailed design, construction, and obligation of funds, until an EIS is prepared.

4. Defendants prepared an EIS under the NEPA in 2003 for a much simpler and less environmentally impactful nuclear facility concept. Subsequently, defendants greatly expanded the scale, scope, cost, and geographic footprint of the proposed Nuclear Facility, while adding numerous additional buildings and project elements that were not part of the original proposal. The Nuclear Facility has expanded so greatly that defendants, at the request of the Senate Armed Services Committee and other authorities, are now conducting studies regarding the proposed size, scope, and cost of the Nuclear Facility and alternative means of constructing it. Defendants have never prepared an EIS analyzing the environmental impacts of the aggrandized Nuclear Facility now proposed and its alternatives. NEPA requires them to do so.

II.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C.A. § 1331 (federal question), and 28 U.S.C.A. § 1361 (mandamus); and 28 U.S.C.A. § 1651 (writs); and may issue a declaratory judgment and a preliminary and permanent injunction and further relief pursuant to 5 U.S.C.A. §§ 701 *et. seq.* (Administrative Procedure Act), 28 U.S.C.A. § 2201 (declaratory relief) and 28 U.S.C.A. § 2202 (injunctive relief). There is a present and actual controversy between the parties. Venue is properly vested in this Court pursuant to 28 U.S.C.A. § 1341(e) and the Rules of Procedure for the United States District Court for the District of New Mexico.

III.

PARTIES

6. Plaintiff the Los Alamos Study Group ("the Study Group") is a non-profit corporation organized under the laws of the State of New Mexico, which focuses on educating the general public, federal and contractor management, members of Congress, and others on a range of inter-related policy issues, including Department of Energy ("DOE") missions, programs, and infrastructure. The Study Group has approximately 2,691 members and supporters within a 50-mile radius of LANL, approximately 2,341 of whom live within a 30-mile radius of LANL. The Study Group and many of its members have been intimately involved in the analyses and education regarding LANL plutonium infrastructure and programs since October 1989. Given their proximity to LANL and the proposed Nuclear Facility, the Study Group members are adversely affected and will be irreparably harmed and aggrieved by the environmental impacts of

planning, constructing, and operating the proposed Nuclear Facility. Additionally, the Study Group and its members have no adequate remedy at law and must seek equitable relief to prevent the environmental consequences of defendants' continuing efforts to plan, construct and operate the proposed Nuclear Facility without preparing an applicable EIS, which is preceded by a meaningful scoping process.

7. The Study Group and its members have commented to the National Nuclear Security Administration ("NNSA") and to its predecessor, DOE Defense Programs ("DP"), regarding the matters raised in this Complaint on previous occasions over the last two decades. The Study Group commented on the scope of the now antiquated EIS and discussed the Nuclear Facility issues with NNSA officials on numerous occasions. Study Group representatives have traveled dozens of times to Washington, DC to meet with NNSA and other executive branch officials, as well as with members of Congress, their staff, and with congressional research, auditing, and oversight organizations regarding issues raised in this Complaint. To the limit of the Study Group's resources and abilities, and within the limits of the information available to the Study Group and to its members, the Study Group has carefully followed and engaged with the federal government on CMRR issues. The Study Group has diligently pursued and exhausted all of the administrative remedies available to it - and many more - over a decade-long period specifically concerning the proposed Nuclear Facility.

8. Defendant DOE is an executive branch department with jurisdiction and authority over LANL. DOE has a duty to comply with NEPA at its facilities, including LANL, where the proposed Nuclear Facility would be built.

9. Defendant the Honorable Stephen Chu is the Secretary of the Department of Energy and is named as a defendant in his official capacity.

10. Defendant NNSA is the agency within the DOE with direct jurisdiction and authority over all aspects of the proposed construction and operation of the Nuclear Facility, including NEPA compliance.

11. Defendant the Honorable Thomas Paul D'Agostino is the Administrator of the NNSA and is named as a defendant in his official capacity.

IV.

FACTUAL BACKGROUND

12. Defendants' Chemistry and Metallurgy Research Replacement (CMRR) project would complete two new buildings at LANL's Technical Area 55 (TA-55), to be devoted primarily to activities involving plutonium. These two buildings are: (A) a Radiological Laboratory, Utility, and Office building (RLUOB); and (B) the proposed Nuclear Facility.

13. RLUOB contains laboratories designed to handle small quantities of radioactive materials, including approximately a few grams of weapons-grade plutonium. The proposed Nuclear Facility, however, is being designed to store, handle, and process several tons of plutonium. Both new facilities would augment the capabilities of, and would be directly or indirectly connected to, LANL's main Plutonium Facility, Building PF-4. PF-4 is being thoroughly upgraded in a separate, but connected, major project.

14. The RLUOB structure is physically complete and is being outfitted. RLUOB is expected to be ready for full occupancy and use in approximately 2013.

15. Defendants have reported that they expect to begin initial construction on the proposed Nuclear Facility project in the coming fiscal year (FY2011). Defendants have requested $225 million for the CMRR project from Congress for FY2011, including $168.5 million for the proposed Nuclear Facility, an increase of $110.3 million from the present fiscal year (FY2010), more than tripling the present appropriation. Congress has taken no final action on this request.

16. Other than the interstate highway system, the proposed Nuclear Facility is by far the largest proposed federal or state capital project in the history of New Mexico. The Nuclear Facility is expected to cost in the neighborhood of $4 billion to build, roughly ten times as much as RLUOB, currently estimated at $363 million. By comparison, inflation-corrected costs for three of the state's largest previous public construction projects, Elephant Butte Dam, Cochiti Dam, and the "Big I" highway interchange project in Albuquerque, are approximately $222 million, $344 million, and $386 million, respectively. Of all government-funded projects undertaken in New Mexico, only the interstate highway system is of comparable cost.

17. At Los Alamos, estimated Nuclear Facility costs are comparable to the inflation-corrected costs of building and operating the whole laboratory for its first decade (1943-1952), including constructing all of the facilities and conducting all the activities of the Manhattan Project, and constructing the post-war Chemistry and Metallurgy Research (CMR) building and all other early post-war projects and facilities.

18. The primary purpose of the proposed Nuclear Facility is to facilitate an increase in the capacity of the TA-55 facilities to manufacture plutonium warhead cores, known as "pits." Several other projects underway and proposed are also part of this manufacturing upgrade, but

the proposed Nuclear Facility dwarfs all these other projects in cost, duration (approximately two decades from start to finish), and complexity.

19. The CMRR project was first announced in 1999 and was provided with conceptual planning funds by 2000. It was first funded by Congress as a formal engineering and design project in 2002 and first funded as a construction line item in 2003. Despite line item appropriations of more than $289 million (roughly 7-8% of the estimated total cost) since 2002, the Nuclear Facility has never fully progressed through defendants' "preliminary design" stage.

20. NNSA has never prepared what it calls a "performance baseline" for the Nuclear Facility, which is a detailed scope of work, key project performance parameters, a reliable cost estimate, and an accepted completion schedule. Defendants have not made what they call "Critical Decision 2" or "Critical Decision 3," which formally allow detailed design and construction, respectively, and Congress has never authorized or appropriated funds for the actual construction of the proposed Nuclear Facility.

21. On July 23, 2002, NNSA filed a Notice of Intent (NOI) to prepare an EIS for the CMRR project. An EIS was issued on November 14, 2003 ("2003 EIS"). A Record of Decision (ROD) was issued on February 12, 2004 ("2004 ROD," 69 Fed. Reg. 69, pp. 6967-6972).

22. In the 2003 EIS, all of the alternatives analyzed, except the "No Action" alternative, appeared superficially similar. Each alternative included constructing facilities of the same type and size, in slightly different ways, at somewhat different maximum depths (50 ft vs. 75 ft.), at one of two adjacent technical areas at LANL. The 2003 EIS reported that the "above-ground" concept (i.e. less than 50 ft. deep) was the upper bound for impacts. The EIS did not mention the adverse engineering properties of the approximately 50-foot-thick layer of poorly-

consolidated volcanic ash beneath the site, beginning at an approximate depth of 75 feet. These adverse properties are now known to generate extensive additional project requirements and greatly expanded environmental impacts for what defendants called "below ground" construction options – those which approached 75 feet in depth.

23. In the ROD, NNSA chose its preferred alternative, which included "above-ground" construction that would not exceed 50 feet in depth.

24. In 2002, the total cost provided to Congress by defendants for both CMRR buildings was "$350-500" million, not including administrative costs. In 2003, defendants provided to Congress a total cost for both buildings of "$600 million," including administrative costs. Since these initial years, projected costs for the Nuclear Facility have increased by approximately a factor of ten to roughly $4 billion. In the 2003 EIS, defendants reported that the high cost of certain alternatives was a significant factor in rejecting them from NEPA analysis. Those "high" costs are now only a small fraction of the expected cost of the Nuclear Facility.

25. In early 2003, when defendants were eliminating possible alternatives from NEPA analysis, defendants reported to Congress that both buildings would be completed by the end of calendar year 2010. In their 2003 EIS, defendants assumed that construction would be completed even earlier, by the end of 2009. Presently, however, defendants do not expect to complete the proposed Nuclear Facility before 2020 and do not expect to begin operating it until 2022, which is a delay of approximately one decade from the original estimate. Defendants must now choose and implement interim actions to maintain or increase safety for the programs remaining in the CMR building, actions which were not mentioned, discussed, or analyzed in the

2003 EIS. These federal actions are in effect new unplanned components of the expanding Nuclear Facility project.

26. In 2003, when defendants were eliminating possible alternatives from NEPA analysis, the proposed Nuclear Facility was to consist of 60,000 square feet of floor area for handling large amounts of plutonium (DOE "Hazard Category 2" space) in an approximately 200,000 gross square foot building. The currently-proposed Nuclear Facility would provide about 36% less Hazard Category 2 space in about a 44% larger building, measured by floor area, leaving only 14% of the proposed floor area available for program use, which is about half the fraction available in 2003. In the several years that have passed since defendants vetted project alternatives prior to the now-antiquated NEPA analysis, projected unit costs per useful square foot have risen even farther and faster than projected overall Nuclear Facility costs, thereby widening the potential range of reasonable alternatives to the proposed Nuclear Facility.

27. In May 2003, and again in October 2004, defendants increased the Design Basis Threat (DBT), which is the hypothetical threat standard against which they must be able to defend all their nuclear facilities. These new DBT requirements disadvantaged the less-impactful "above ground" (less than 50 feet deep) construction plan, which was chosen in the 2004 ROD. For this reason and others, defendants abandoned "above ground" construction, as selected in the 2004 ROD, and substituted a design which includes excavation up to 75 feet in depth. Defendants chose this new design without providing public, agency, or tribal notice, without providing comment opportunities, and without any record of decision whatsoever.

28. This significant design change, in combination with the geology of the site and its constrained size, access, topography, and its existing heavy uses, profoundly transformed the

project and dramatically increased expected costs and environmental impacts across LANL and the region. However, it subsequently proved impossible even to build the facility at 75 feet in depth, without complete replacement or reengineering of the earth to a depth of 125 feet, a far more challenging concept at this site and one that was not mentioned or analyzed in the 2003 EIS and certainly not in the 2004 ROD.

29. On January 5, 2005 NNSA announced its intent to prepare a Supplement to the 1999 LANL Site-Wide EIS (SWEIS) and held one scoping hearing later that month. Completion and operation of the proposed Nuclear Facility was incorporated into all proposed alternatives, including the "No Action" alternative. Without further public notice NNSA later decided to prepare a new SWEIS instead of a Supplement to the SWEIS. A final SWEIS was published on April 4, 2008 (2008 SWEIS).

30. The 2008 SWEIS considered three alternative generic levels for all of LANL operations. Construction and operation of the original Nuclear Facility concept proposed in the 2003 EIS was part of the "No Action" and "Expanded Operations" alternatives. The 2008 SWEIS imported by reference the assumptions and findings of the 2003 EIS, and those assumptions and findings were not changed or updated. The 2008 SWEIS did not describe or analyze the Nuclear Facility proposed today.

31. On September 26, 2008, the first SWEIS ROD was issued, combining portions of the "No Action" and "Expanded Operations" alternatives, both of which included construction and operation of the original concept for the Nuclear Facility proposed in 2003. Defendants acknowledged, however, that "[n]ew information about seismic risks at LANL . . . may change how . . .facilities are constructed or renovated."

32. On October 19, 2006, NNSA announced its Notice of Intent (NOI) to prepare another broad and generic EIS, which was labeled a "Supplement to the Stockpile Stewardship and Management Programmatic Environmental Impact Statement," and subsequently renamed the Complex Transformation Supplemental Programmatic Environmental Impact Statement (CTSPEIS). The final CTSPEIS was published on October 24, 2008.

33. The CTSPEIS included the original Nuclear Facility concept proposed in 2003 as an element within larger possible program choices. The CTSPEIS neither mentioned any changes in the nature of the proposed Nuclear Facility, nor did it analyze the proposed Nuclear Facility's environmental impacts in any way. Defendants responded, in response to public comment, that "[n]o [building] footprint additions [to the Nuclear Facility] are planned beyond that [footprint] already analyzed within the CMRR EIS [the 2003 EIS]; therefore, because there will be no change to what has already been analyzed, no further facility NEPA analysis is planned."

34. On December 19, 2008, NNSA issued two RODs pursuant to the CTSPEIS. The first CTSPEIS ROD included a decision to proceed with design, construction, and operation of a Nuclear Facility at LANL, citing the analyses in the 2003 EIS, the 2008 LANL SWEIS, as well as those in the CTSPEIS. The latter two analyses merely incorporated the 2003 EIS and did not update it in any way. None of these NEPA analyses addressed the Nuclear Facility as it is proposed today.

35. In November 2006, the JASON defense advisory group, at the request of Congress, articulated a new scientific consensus that most plutonium pits have credible lifetimes in excess of 100 years and therefore will not need replacement within the proposed Nuclear

Facility's useful life. This consensus, developed three years after the 2003 EIS, dramatically increased the viability of reasonable alternatives to the Nuclear Facility and obviated the fundamental purpose of building the Nuclear Facility in the first place.

36. In May 2007, defendants published an updated probabilistic seismic hazard assessment (PSHA) for LANL, which "significantly revised" defendants' understanding of the regional fault system. The overall seismic hazard to LANL and to the proposed Nuclear Facility, including both the magnitude and frequency of expected earthquakes, "increased significantly" from that reported in the 2003 EIS. Predicted accelerations doubled for the 10,000-year recurrence interval earthquake. The probability of an earthquake in the range of magnitude 7 in a given year increased by a factor of roughly 25. Earthquakes up to magnitude 7.3 are now believed possible. This new information has had far-reaching consequences for the nature of the proposed Nuclear Facility project and its expected environmental impacts, particularly given the adverse engineering properties of the earth beneath the proposed facility.

37. Defendants are presently designing the currently-proposed Nuclear Facility under a so-called "hotel concept," the purpose of which is to accommodate unstated future missions. This concept requires wide unsupported floor and roof spans, with relatively few internal walls, and thus has raised significant design and safety concerns. Upon information and belief, the "hotel concept" has contributed to the dramatic (roughly 20-fold) increase in expected structural concrete and steel requirements since the 2003 EIS, thereby significantly increasing the environmental impacts of construction. The "hotel concept," and possible reasonable alternatives to it, were never mentioned, discussed, or analyzed in the 2003 EIS.

38. In May 2008, the Defense Nuclear Facilities Safety Board (DNFSB) formally transmitted to defendants their serious concerns about the adequacy of Nuclear Facility design with respect to seismic and other safety issues. The FY2009 Defense Authorization Act (P.L. 110-417) subsequently withheld approximately half of the authorized FY2009 CMRR funding until DNFSB and NNSA could jointly certify that the serious issues raised by DNFSB had been resolved.

39. In May 2009, the Obama Administration presented its first budget request to Congress, formally ending the Reliable Replacement Warhead (RRW) program, the pits for which were to be manufactured at LANL's TA-55, with storage, testing, processing, and/or other plutonium handling activities occurring in the proposed Nuclear Facility. This was the only large-scale pit production mission ever formally planned for TA-55, and no further such mission has been authorized or planned since. At that time, defendants acknowledged to Congress:

> It is recognized that many of the prior [CMRR project] planning assumptions have changed.....The decision about how far to proceed into final design [of the proposed Nuclear Facility] will be based on numerous ongoing technical reviews and other ancillary decisions NNSA management will be making during the period of FY 2009 - 2010. A future decision to proceed with construction of the Nuclear Facility and associated equipment has been deferred pending the outcome of the current ongoing Nuclear Posture Review and other strategic decision making.

40. Despite defendants' acknowledgments concerning the changed planning assumptions, and despite congressional testimony in the spring of 2009 suggesting the proposed Nuclear Facility project might be too large or might be entirely unnecessary, defendants chose not to initiate any NEPA analysis of the changed Nuclear Facility.

41. In July and August of 2009, the serious design issues raised by DNFSB were resolved and their resolution was formally transmitted by DNFSB to Congress. This resolution included, among several other agreed design changes, intensive remediation or replacement of the 50-foot thick stratum of unconsolidated volcanic ash beneath the proposed Nuclear Facility. This substantial change in the proposed Nuclear Facility was deemed necessary to prevent structural collapse and/or lateral sliding of the proposed Nuclear Facility in the event of a large earthquake.

42. In September 2009, the JASON advisory group reported to NNSA that the stockpile could be maintained indefinitely at current standards of reliability, safety, and security, without new pit production. Defendants then submitted a budget request to Congress which would conclude all active stockpile pit production at the end of FY2011. In April 2010, consistent with this budget request, the DOD and defendants established a policy of giving "strong preference" to stockpile management without pit manufacturing, which would be allowed only, "if critical... goals could not otherwise be met, and [only] if specifically authorized by the President and approved by Congress."

43. In February 2010, defendant NNSA commissioned a review of the proposed Nuclear Facility project, including a review of "key planning assumptions" and "the magnitude of their impacts" on cost and management risk.

44. In May 2010, the Senate Armed Services Committee issued its markup of the FY2011 Defense Authorization bill, saying the proposed Nuclear Facility project had "*many* unresolved issues *including the appropriate size of the facility*" (emphasis added). The Committee went on to say:

> Now that the Nuclear Posture Review is completed *the NNSA and the Department of Defense (DOD) are in a better position to ensure that the facility is appropriately sized*....The committee is very concerned that the NNSA follow the DOE 413 order series and project management and guidance. The NNSA is also directed to conduct a true independent cost estimate for the CMRR Nuclear Facility, phase III of the CMRR project. The committee is concerned that the phase III project [i.e. the Nuclear Facility] is being divided into multiple sub-projects. Notwithstanding this management approach the committee directs the CMRR baseline to reflect all phases and subprojects for the purposes of the cost and schedule baseline provision and to be accounted for as a single project (emphasis added).

45. On June 16, 2010, defendants held a public meeting and revealed a web site describing the extensive planned construction (and, *inter alia*, environmental impacts) associated with what defendants called the "Pajarito Construction Corridor," in which the Nuclear Facility would be the largest proposed project. Some of these direct environmental impacts, connected actions, and cumulative impacts had never been mentioned by defendants before. Defendants also mentioned they were conducting internal studies of these heretofore unrevealed project alternatives and impacts, including utilities planning, traffic studies, site selection for ancillary facilities needed for the proposed project, and institutional impacts of the proposed project.

46. On July 6, 2010, the Comptroller General of the United States wrote defendant DOE, expressing his agency's urgent concern, given defendants' ambitious construction proposals, that defendant DOE "does not have a sound basis for making decisions on how to most effectively manage its portfolio of projects."

47. On July 15, 2010 LANL Director Anastasio testified to Congress that:

> [t]here is already a gap emerging between expectations and fiscal realities. I fear that some may perceive that the FY11 budget request meets all of the necessary budget commitments for the program; however, there are still significant financial uncertainties, for example, the design of the UPF [the proposed Uranium

> Processing Facility in Tennessee] and CMRR are not complete and the final costs remain uncertain. As I look to the future, I remain concerned that science will be squeezed when trying to compete with capital infrastructure investments and life extension program funding priorities.

48. On July 20, 2010, defendant D'Agostino told the *Nuclear Weapons and Materials Monitor* that other fundamental reviews of the Nuclear Facility are planned besides the one(s) recently completed and underway, "including one by the Department of Defense," which will reexamine the proposed Nuclear Facility's "requirements" and "scope," asking, among other things: "Is it out of bounds?"

49. On July 27, 2010, former NNSA Deputy Administrator John Foster testified to Congress, requesting "a thorough scrub" of proposed Nuclear Facility requirements and suggesting that escalating costs at the proposed Nuclear Facility and another proposed facility could have "major" negative impacts on defendants' other national security programs:

> In addition, budgets are estimated for new facilities, in particular CMRR at Los Alamos for research on plutonium and UPF, a uranium parts manufacturing plant at Oakridge in Tennessee. The Committee should understand that at present we do not yet have good cost estimates for the new facilities, each of which are expected to cost billions of dollars. There is general concern that their costs will exceed the preliminary estimates and that may force major reductions in other NNSA nuclear weapons activities to include warhead surveillance, the life extensions and science programs....I have suggested that the Nuclear Weapons Council initiate a thorough scrub of the necessary capabilities and construction costs for the new facilities to insure that safety, security, programmatic risks and costs are effectively managed.

50. As a result of the significant new circumstances and information that have changed the proposed Nuclear Facility project so dramatically over the past eight years, the expected environmental impacts of the proposed facility have also increased significantly relative to the 2003 EIS. Examples include:

A. Increased overall *acreage requirements for construction yards and offices*, parking lots, concrete batch plant, utilities, security infrastructure, excavation spoil disposal, storm water retention basin(s) temporary housing, and road realignments or bypasses.

B. The *locations directly affected* by construction have greatly expanded. The 2003 EIS anticipated direct construction impacts in TA-55 only, for construction limited to that location. NNSA now expects direct construction impacts in TA-55, TA-48, TA-63, TA-66, TA-46 and TA-50, and TA-54 or TA-36.

C. *Concrete and soil grout requirements* have greatly increased, from 6,255 yd^3 (for two or three buildings in the 2003 EIS) to 347,000 yd^3 of structural concrete and soil grout for the Nuclear Facility alone, a factor of more than 55.

D. The manufacture of the additional concrete has significant additional *greenhouse gas emissions*, which were not mentioned or analyzed in the 2003 EIS at all. Upon information and belief, production and delivery of concrete and grout alone for the proposed Nuclear Facility may now produce more than 100,000 metric tons of carbon dioxide, more than four times CEQ's proposed source threshold for EIS analysis and at least 55 times the emissions from this source in the original project.

E. The manufacture of this much additional concrete will result in significant *aggregate mining impacts*, which were not analyzed in the original EIS.

F. *Steel requirements* have greatly increased, from an estimated 558 tons (for two or three CMRR buildings in the 2003 EIS) to more than 15,000 tons for the Nuclear Facility today, a factor of more than 27.

G. *Expected peak employment* during proposed Nuclear Facility construction has increased, according to NNSA, from an estimated 300 in the 2003 EIS to an estimated 844 today. According to NNSA, this increment in transient workforce could affect local housing markets, possibly requiring temporary worker housing.

H. The anticipated *construction period* during which these construction impacts will occur has been lengthened from 34 months in the 2003 EIS to 144 months today, more than a factor of four.

I. Increasing the depth of excavation from 50 feet to 125 feet has increased the *excavation spoils to be disposed* from roughly 100,000 cubic yards to roughly 400,000 cubic yards, not including material already removed from the proposed Nuclear Facility site during RLUOB construction. Transport, storage, disposal, and reclamation of this waste will have significant environmental, aesthetic, and cultural impacts. Prompt permitting is not assured.

J. According to NNSA, defendants expect to use a major part of these *excavation spoils to cap hazardous chemical and nuclear material disposal areas* (MDAs), specifically

MDAs C and G, in lieu of other closure options for those sites, including whole or partial removal of waste. According to defendants, MDAs C and G contain roughly 14 million cubic feet of diverse nuclear and chemical wastes, including transuranic wastes. Decisions to: (a) leave these wastes in place; and (b) cover these sites with volcanic ash removed from the proposed Nuclear Facility excavation, were not mentioned or analyzed in the 2003 EIS. The decision to leave 14 million cubic feet of nuclear and chemical waste in shallow unlined disposal pits covered by this material would be a major federal action significantly affecting the quality of the human environment, with far-reaching impacts.

K. The proposed Nuclear Facility will not begin operations until 2022. The 2003 EIS assumed this would occur more than a decade sooner. The proposed Nuclear Facility project therefore now also includes *continued CMR operation for a decade longer* than described in the 2003 EIS, or, in the alternative, *compensatory interim actions*. By implication the Nuclear Facility project now includes, for at least the coming decade, elements of both the Preferred and the No Action alternatives of the 2003 EIS.

L. Construction of the proposed Nuclear Facility now requires construction of a *craft worker facility*, which was not part of the project analyzed in the 2003 EIS.

M. The proposed Nuclear Facility construction now requires an *electrical substation*, which was not part of the project analyzed in the 2003 EIS.

N. The proposed Nuclear Facility construction now requires traffic modifications, including *closure of Pajarito Road for two years* and *possible construction of temporary traffic bypass(es)*. These impacts and actions were not analyzed in the 2003 EIS.

O. The proposed Nuclear Facility construction now requires construction of a *truck inspection facility*, which was not part of the project analyzed in the 2003 EIS.

P. The proposed Nuclear Facility construction now requires construction of a *warehouse*, which was not part of the project analyzed in the 2003 EIS.

Q. Some of the 4,400 employees whose workplaces are accessed from Pajarito Road will be temporarily displaced during work on the proposed Nuclear Facility. Upon information and belief, this requires *temporary facilities for those "Pajarito Corridor" operations which may be displaced by construction*, which were not part of the project analyzed in the 2003 EIS.

R. The proposed Nuclear Facility is now expected to contain roughly 29 times as much structural concrete as shown in the 2003 EIS. *Final disposition of the proposed Nuclear Facility*, which would become contaminated during use with plutonium and other toxic substances, was not analyzed in the 2003 EIS and, upon information and belief, *is made much more problematic and expensive by the far greater volumes of building materials now expected* to be used in the building.

S. The new Nuclear Facility will *dramatically increase trucking of concrete ingredients and excavation spoils*, which were not analyzed in the 2003 EIS. Between 20,000 to 110,000 heavy truck trips to and from Los Alamos County, and within LANL, would be required for concrete ingredients and for storage and disposal of excavation spoils alone, not including all other deliveries and services. Trucking impacts will extend to at least three and to as many as five counties, depending on secondary project alternatives, sources, routes, and quantities.

51. The impacts summarized above will be exacerbated by the cumulative impacts of other construction activities planned in and on the same canyon and mesa or close nearby, at more or less the same time, which were not included in the 2003 EIS.

CLAIMS FOR RELIEF

Count I

Violation of NEPA and APA – Failure to Prepare an Applicable EIS for the Proposed Nuclear Facility and Failure to Implement Alternative Chosen in any Record of Decision.

52. Plaintiff incorporates the allegations in paragraphs 1 through 51 the same as if fully set forth.

53. Defendants' decision to construct and operate the Nuclear Facility comprises a major federal action "significantly affecting the quality of the human environment" within the meaning of 42 U.S.C.A. § 4332(2)(C), 40 CFR 1508.3, 40 CFR 1508.14, 40 CFR 1508.18, and 40 CFR 1508.27.

54. Pursuant to 42 U.S.C.A. § 4332(2)(C) and the implementing CEQ regulations, defendants must prepare an applicable EIS "before decisions are made and before actions are taken," and "at the earliest possible time." 40 CFR 1500.1, 1501.2. Defendants are prohibited from taking any action that has an adverse environmental impact, limits reasonable alternatives to the proposed action, or prejudices agency decisions in the absence of an applicable EIS and subsequent final decision (40 CFR 1502.2(f), 40 CFR 1506.1).

55. Notwithstanding these statutory and regulatory directives, Defendants are implementing a Nuclear Facility proposal which differs substantially from, and has significantly much greater environmental impacts than, any alternative analyzed in the 2003 EIS or in any subsequent EIS. In short, the 2003 EIS is obsolete and inapplicable.

56. Defendants have not only made "substantial changes" to the proposed Nuclear Facility since the 2003 EIS that are relevant to environmental concerns (40 CFR 1502.9(c)(1)(i)), but there also exist "significant new circumstances [and] information relevant to environmental concerns and bearing on the proposed action or its impacts," which have manifested themselves since the antiquated 2003 EIS and 2004 ROD were issued. 40 CFR 1502.9(c)(1)(ii).

57. As summarized in the Factual Background, defendants have been aware, since at least May 2009, of the substantial changes in the proposed federal action that are relevant to environmental concerns, the significant new circumstances relevant to environmental concerns, and the significant and expansive changes in "the scope of the proposed action...since the original EIS was prepared." Defendants are also aware of the "importance, size, [and] complexity of the proposal," all which warrant preparation of a new EIS. Thus, while a Supplemental EIS ("SEIS") can be implemented under circumstances of mild change to remedy the deficiencies of an "old" EIS, those circumstances are absent in the present situation. (*see* CEQ, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," at 32).

58. In May 2009, defendants reported to Congress about the need to examine new project alternatives, a major element of the EIS scoping process (40 CFR 1501.7). *See* paragraph 39 *infra.* Consequently, defendants' own acknowledgments underscore the need for a new EIS,

including the initial scoping process, to examine the environmental impacts of currently available alternatives to the expanded proposed Nuclear Facility (40 CFR 1501.7).

59. These acknowledgments have been underscored by requests from the Senate Armed Services Committee for a complete review of the size and cost of the presently-proposed Nuclear Facility project.

60. Moreover, according to Defendants' own policies implementing NEPA, the substantial and fundamental changes proposed for the new Nuclear Facility mandate an entirely new EIS, preceded by the required scoping process. DOE has described the circumstances which warrant a new EIS and a new scoping process, as opposed to a SEIS, in the Preamble to DOE's NEPA regulations (April 24, 1992, at 57 FR 15122) and in its NEPA guidance (Revised "Frequently Asked Questions on the Department of Energy's (DOE's) National Environmental Policy Act (NEPA) Regulations," August 1998, at 10b). As stated by DOE:

> As explained in the Preamble to the NEPA final rulemaking published on April 24, 1992 (57 FR 15122), DOE believes that there is no need to repeat the public scoping process if the scope of the proposed action has not changed since the original EIS was prepared. Such an approach is consistent with 40 CFR 1502.9, which does not require public scoping for a supplemental EIS. However, as stated in the Preamble, ***when the scope of the proposed action has changed, or the importance, size, or complexity of the proposal warrant, DOE may elect to have a scoping process.*** (emphasis added)

61. It is incontrovertible that "the scope of the proposed action has ...changed since the original EIS was prepared" and that "the importance, size, or complexity of the proposal warrant" re-examination of the scope of the EIS, including re-examination of reasonable project alternatives. However, defendants have never analyzed their substantially changed Nuclear Facility project, with its additional project elements and its greatly expanded environmental

impacts, in any EIS. As a result, defendants have been and are continuing to implement a novel Nuclear Facility project alternative which differs substantially from, and has significantly different environmental impacts than, any alternative analyzed in any EIS, including the 2003 CMRR EIS.

62. Additionally, in contravention of the Administrative Procedure Act (5 U.S.C.A. §§ 701 *et. seq.*) as well as NEPA and its implementing regulations, defendants attempted to implement a different project alternative ("below-ground construction") than the one chosen and justified in the 2004 ROD ("above-ground construction"). Defendants chose to implement a project alternative not chosen and justified in any ROD, in violation of 40 CFR 1505.2.

63. Moreover, defendants must publish a decision which selects an alternative "encompassed by the range of alternatives discussed in the relevant environmental documents and . . . described in the environmental impact statement" in a formal ROD (40 CFR 1502.2(e), 40 CFR 1505.1(e); 10 CFR 1021.210 (d); 40 CFR 1505.2). Contrary to these regulatory requirements, defendants ultimately chose to attempt to implement an alternative (construction to a depth of 125 feet) not included within the range of alternatives analyzed in the 2003 EIS, let alone one selected or even mentioned in the 2004 ROD.

64. Accordingly, defendants' failure to prepare a new EIS with the required scoping process, including a re-examination of reasonable alternatives and followed by issuance of a new and accurate ROD, is arbitrary and capricious, and a violation of NEPA, the Administrative Procedure Act, and the CEQ and DOE regulations.

Count II

Violation of NEPA – Failure to Develop EIS Addressing Connected Actions and Cumulative Environmental Impacts.

65. Plaintiff incorporates the allegations in paragraphs 1 through 64 the same as if fully set forth.

66. Under NEPA, federal actions may be single and unconnected, or they may be "connected," "cumulative," or "similar." Connected actions are those which automatically trigger other actions which may require an EIS, cannot or will not proceed without other actions, or are interdependent parts of a larger action and depend on the larger action for their justification (40 CFR 1508.25(a)(1)). "Cumulative actions" are those which, with other proposed action(s), have cumulatively significant impacts and should therefore be discussed in the same EIS (40 CFR 1508.25(a)(2)).

67. In addition to the new subprojects within the proposed Nuclear Facility, defendants are now also pursuing several connected actions which are geographically proximate, functionally related, and/or roughly contemporaneous, or which have cumulative impacts. These connected and cumulative actions include the following construction projects:

A. The Nuclear Materials Safeguards and Security Upgrade Project (NMSSUP);

B. The TA-55 Revitalization Project (TRP);

C. The Radioactive Liquid Waste Treatment Facility (RLWTF);

D. The TRU Waste Facility (TRU);

E. Material Disposal Area C Closure;

F. Material Disposal Area G Closure;

G. The Waste Disposition Project; and

H. RLUOB Occupancy.

68. Defendants have characterized the projects referenced above as "major projects" which are "near-concurrent" parts of a coordinated "Pajarito Construction Corridor" project nexus. None of these eight, with the exception of RLUOB Occupancy, was analyzed in the 2003 EIS, or in the context of decisions regarding alternatives to the proposed Nuclear Facility.

69. Defendants are also pursuing, now and in the coming decade, major new *programs* and *projects* involving plutonium, which are planned to take place in PF-4 and RLUOB at roughly the same time as the construction projects referenced in paragraph 67 above. These programs and projects are connected to the proposed Nuclear Facility and will have cumulative impacts that must be analyzed within an EIS (40 CFR1508.25(c)).

70. Defendants have described the above programs and projects, including the proposed Nuclear Facility, as subprojects within a "Pajarito Construction Corridor." On other occasions defendants have described many of the same or similar projects, including the proposed Nuclear Facility, as subprojects within "Integrated Nuclear Planning." On yet other occasions defendants have described many of the same or similar projects as elements within a "Consolidated Plutonium Center" and a "Consolidated Nuclear Production Center." The close affinities of these projects underscore the necessity of including the impacts of all these proposed facilities as connected or cumulative actions within the "full and fair" environmental impacts analysis required by 40 CFR 1502.1.

71. Defendants must analyze the full suite of impacts of the proposed Nuclear Facility and its necessary subprojects and elements, as well as the connected actions with which the

proposed Nuclear Facility is functionally interdependent. Defendants' failure to do so is arbitrary and capricious and a violation of NEPA. Consequently, defendants should be enjoined from proceeding in any manner with the proposed Nuclear Facility without conducting a *de novo* EIS preceded by an open scoping process, one purpose of which will be to delineate the connected actions and cumulative impacts meriting inclusion and analysis.

Count III

Violation of NEPA- Failure to Provide Required Mitigation Measures and Mitigation Action Plan.

72. Plaintiff incorporates the allegations in paragraphs 1 through 71 the same as if fully set forth.

73. A central purpose of NEPA is to minimize and mitigate environmental impacts. The CEQ regulations formalize an obligation to study and specify appropriate mitigation measures in EISs. (40 CFR 1502.14 (f), 40 CFR 1502.16 (e) through (h)). Mitigation may include: avoiding impacts by not taking an action or part of an action; minimizing impacts by limiting the action; rectifying impacts by repairing or restoring the environment; reducing impacts by taking protective actions; and compensating for impacts by providing substitute resources. (40 CFR 1508.20).

74. Once the project as a whole is considered to have significant effects, all of its specific effects on the environment (whether or not each is deemed "significant") must be considered, and mitigation measures must be developed where it is feasible to do so. Sections 1502.14(f), 1502.16(h), 1508.14. (CEQ, "Forty Questions," at 19a). Crafting and committing to mitigation measures is one of most important means by which NEPA protects the environment

and citizens, including minority populations, low-income populations, and Indian tribes. (Executive Order 12898 on Environmental Justice, February 11, 1994).

75. Moreover, the ROD itself must contain a concise identification of the mitigation measures which the agency has committed itself to adopt. The ROD must also state whether all practicable mitigation measures have been adopted, and if not, why not. (40 CFR 1505.2(c)). The ROD must identify the mitigation measures, monitoring, and enforcement programs that have been selected and plainly indicate that they are adopted and enforceable as part of the agency's decision.

76. In addition to mitigation measures discussed and crafted in EISs, DOE's NEPA regulations require Mitigation Action Plans. The pertinent regulation provides:

> [f]ollowing completion of each EIS and its associated ROD, DOE shall prepare a Mitigation Action Plan that addresses mitigation commitments expressed in the ROD. The Mitigation Action Plan shall explain how the corresponding mitigation measures, designed to mitigate adverse environmental impacts associated with the course of action directed by the ROD, will be planned and implemented. (10 CFR 1021.331)

77. Because defendants have no EIS which addresses the currently-proposed Nuclear Facility, or any applicable ROD, defendants necessarily have omitted mitigation measures and a mitigation plan for the impacts yet to be identified and analyzed by themselves or by commenters. Additionally, defendants have no other specific and applicable mitigation measures, plans, or commitments in any other environmental document, including the SWEIS and CTSPEIS, or their associated RODs, or in any other EIS or ROD or subsequent to them.

78. Defendants' 2003 EIS inexplicably claimed that their then-proposed project would have no impacts which would merit mitigation measures. According to defendants, based on the analyses of the environmental consequences resulting from the proposed action, no

mitigation measures would be necessary because all potential environmental impacts allegedly would be below acceptable levels of promulgated standards.

79. Defendants' decision to forego a mitigation plan and identify mitigation measures was not related to, or based on, the current iteration of the Nuclear Facility. Defendants' failure to analyze and craft reasonable mitigation measures for the impacts of the proposed Nuclear Facility, to commit to those measures in an enforceable ROD, and to prepare a Mitigation Action Plan for the proposed Nuclear Facility prior to implementation, is arbitrary and capricious and a violation of NEPA and its implementing regulations. Accordingly, defendants should be enjoined from taking any further action with respect to the Nuclear Facility until such time as defendants comply with NEPA and prepare an EIS and issue a ROD with appropriate and enforceable mitigation measures, and prepare a Mitigation Action Plan pursuant to defendants' regulations.

Count IV

Violation of NEPA – Failure to Integrate NEPA–Required Analysis in Decision-Making Processes for the Proposed Nuclear Facility.

80. Plaintiff incorporates by reference the allegations in paragraph 72 through 79 the same as if fully set forth.

81. NEPA requires environmental analyses prior to agency decision-making. It does so for the purpose of influencing federal decisions. Consequently, agencies must "include in every recommendation or report on proposals for...major federal actions...a detailed [EIS]..." (42 U.S.C.A. § 4332(C)).

82. The purpose of NEPA's implementing regulations is to foster "better decisions." This is the reason NEPA requires EISs and the reason these EISs must be prepared and available prior to federal decisions and actions (40 CFR 1500.1). EISs assess "proposed agency actions, rather than justifying decisions already made." (40 CFR 1502.2(g)).

83. The primary purpose of an EIS is to serve as an action-forcing device to ensure that the policies and goals defined in NEPA are infused into the ongoing programs and actions of the Federal Government. Consequently, federal agencies are required to integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice, so that all such procedures run concurrently rather than consecutively. (40 CFR 1500.2)

84. NEPA's implementing regulations also require EISs to be explicitly linked with management and cost analyses prior to agency decision-making. Cost-benefit analyses and any related "important qualitative considerations" which are "relevant and important" to decisions must be indicated, included by reference, or appended to EISs. (40 CFR 1502.23).

85. Defendants' decision-making regarding the nature and scope of the proposed Nuclear Facility, and defendants' choices significantly affecting expected environmental impacts and costs, did not stop with the 2004 ROD. These processes continued, leading to project alternatives and impacts that lay far outside the range of choices and impacts discussed in the 2003 EIS, in violation of NEPA (40 CFR 1502.2(e), 40 CFR 1505.1(e); 10 CFR 1021.210 (d). Upon information and belief, the scope, scale, and impacts of the proposed Nuclear Facility are subjects of current decision-making, uninformed by a NEPA scoping process and without any applicable EIS.

86. By May 2009, defendants admitted to Congress that the proposed Nuclear Facility planning assumptions had changed and that the new scope of any Nuclear Facility and any decision to proceed would be dependent on the outcome of a new Nuclear Posture Review (completed only in April 2010) and other strategic decision making.

87. By September 2009, major design changes to the Nuclear Facility project had occurred, partly as a result of an independent review process formalized by the FY2010 Defense Authorization Act (Public Law 110-417). According to defendants, these changes added approximately 225,000 additional cubic yards of excavation and an additional 225,000 cubic yards of concrete and/or grout. This major decision was not preceded by any applicable EIS or integrated with NEPA analysis.

88. New information available by May 2009 also included "significant" changes in seismic hazard and design requirements, as well as major new security requirements, both of which contributed to major design decisions which significantly escalated the costs and associated environmental impacts. These decisions were not preceded by any applicable EIS or integrated with NEPA analysis.

89. Moreover, defendants have prepared no applicable EIS, and are not integrating NEPA analysis with, the following decisions and plans, which have or are changing the Nuclear Facility proposal and its impacts:

A. Defendants' ongoing study to keep CMR Wing 9 open indefinitely, the permanent closure of which was part of the proposed action in the 2003 EIS;

B. Defendants' plans and interim actions to keep open parts of the CMR long past 2010, the closure of which was part of the proposed action in the 2003 EIS;

C. Defendants' current plans to conduct further Nuclear Facility project reviews in the near future, which, upon information and belief, include review of alternative sizes of the facility as well as its basic requirements;

D. Defendants' current studies of utilities, traffic impacts and road modifications, possible sites for ancillary facilities needed for the proposed project, institutional impacts, and other aspects of and alternatives to the proposed project; and

E. Defendants' current plans for moving program activities out of CMR and into RLUOB and PF-4, without reliance on the proposed Nuclear Facility.

90. It is now beyond dispute that the information in the 2003 EIS was not of "high quality" in critical areas (e.g. the nature and scope of the project, the seismic hazard, and the soils beneath the site), which have rendered its conclusions and environmental analysis obsolete for NEPA's purpose of informing federal decisionmakers. (40 CFR 1500.1(b)) Defendants' continued failure to integrate NEPA with their decision-making processes is an arbitrary and capricious misuse of agency discretion. Consequently, defendants should be enjoined from taking any further actions which may prejudice federal decisions to be made with respect to the proposed Nuclear Facility, pending the completion of a new EIS, preceded by the required scoping process and followed by issuance of a new ROD.

Count V

Violation of NEPA – Denial of Review and Comment Opportunities.

91. Plaintiff incorporates by reference the allegations in paragraphs 1 through 90 the same as if fully set forth.

92. NEPA's notice and comment provisions are a fundamental aspect of NEPA's method of environmental protection. Accordingly, "federal agencies shall to the fullest extent possible... (d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment." (40 CFR 1500.2(d)). EISs "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." (40 CFR 1502.1)

93. To achieve meaningful comment and participation, NEPA's implementing regulations provide detailed requirements for agency, tribal, and public involvement. Agencies shall "make diligent efforts to involve the public in preparing and implementing their NEPA procedures" (40 CFR 1506.6(a)), beginning with a notice of intent published in the Federal Register and proceeding to the scoping process (40 CFR 1501.7) and to the preparation of the EIS itself (40 CFR 1503.1).

94. In contravention of these requirements, defendants have not provided any notice or comment process involving the public, relevant agencies, and tribes concerning the nature of the proposed Nuclear Facility being designed today, reasonable alternatives to it, or the likely impacts of the proposed new project and its alternatives. Despite a period of six (6) years since the 2004 ROD, the public, agencies, and tribes have not been notified that today's proposed Nuclear Facility involves a much greater irreversible commitment of resources and is a far more impactful project than any alternative analyzed in the 2003 EIS, including the alternative chosen in the 2004 ROD. The most recent comment period for this project closed in June 2003, more than seven years ago. These procedural and informational violations gravely undermine the

independent scrutiny which is essential to implementing NEPA. They also harm citizens procedurally and informationally.

95. DOE's NEPA regulations authorize the production of Supplement Analyses (SAs) to discuss changed project parameters, circumstances, and impacts pertinent to deciding whether a supplemental EIS or a new EIS must be prepared pursuant to 40 CFR 1502.9(c). (10 CFR 1021.314(a)(1)). DOE must make the determination and the related SA available upon written request. (10 CFR 1021.314(c)(3)). Upon information and belief, defendants have prepared one or more SAs or other NEPA-related analyses, but despite, demand these analyses have not been made public or provided to plaintiff.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against defendants as follows:

A. Preliminarily and permanently enjoining all further investment in and contractual obligations for the Nuclear Facility, including but not limited to any portion of final design or construction of any project phase, portion or element, until defendants have completed a new EIS, including scoping, on the proposed Nuclear Facility and its alternatives in full compliance with NEPA and its implementing regulations;

B. Declaring that the defendants have violated the National Environmental Protection Act by:

1. failing to prepare an applicable EIS for the proposed Nuclear Facility, including failing to consider reasonable alternatives to the project overall, its design concept, and its construction strategy;

2. failing to analyze connected and cumulative actions and cumulative impacts in any EIS pertaining to the proposed Nuclear Facility;

3. failing to produce any mitigation plans or offer adequate mitigation measures with respect to environmental impacts of the proposed Nuclear Facility;

4. failing to integrate NEPA analyses into the Agency's decision making process with respect to the proposed Nuclear Facility; and

5. failing to provide notice and comment opportunities to plaintiff, citizens, and to the state of New Mexico, tribes, local governments, and other agencies, and failing to publicly release NEPA documents which defendants have prepared.

C. Declaring that the defendants have violated the Administrative Procedure Act by attempting to implement a project alternative not chosen in any ROD.

D. Requiring the defendants, through a mandatory injunction, to comply with all provisions of NEPA;

E. Requiring the defendants, through a mandatory injunction, to prepare a new and applicable EIS for the proposed Nuclear Facility, beginning with the scoping process and following all provisions of NEPA and its implementing CEQ and DOE regulations;

F. Awarding plaintiff costs of this action, including attorney's fees, expert witness fees, and other expenses, pursuant to the Equal Access to Justice Act, 28 U.S.C.A. § 2412; and

G. Granting such other and further relief as the Court deems proper.

Respectfully submitted by:

[Electronically Filed]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP, Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, et al., Federal Defendants.	Case No. 1:10-CV-0760-JH-ACT FEDERAL DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

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LIST OF ACRONYMS

APA	Administrative Procedure Act
CMR	Chemistry and Metallurgy Research Building
CMRR	Chemistry and Metallurgy Research Replacement
CMRR-NF	Chemistry and Metallurgy Research Replacement Nuclear Facility
DOE	Department of Energy
EIS	Environmental Impact Statement
LANL	Los Alamos National Laboratory
NEPA	National Environmental Policy Act
NNSA	National Nuclear Security Administration
RLUOB	Radiological Laboratory Utility Office Building
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION

Despite the Federal Defendants' good faith efforts to dissuade it, Plaintiff has insisted on bringing and continuing a premature challenge to the adequacy of the Department of Energy/National Nuclear Security Administration's ("DOE/NNSA" or "NNSA") analysis of potential environmental impacts from construction and operation of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") at Los Alamos National Laboratory ("LANL") in New Mexico. Plaintiff's Complaint should be dismissed.

The proposed CMRR-NF is a unique facility, central to LANL's mission and critical to the national security of the United States. The proposed facility, which will provide capabilities for special nuclear material analytical chemistry, materials characterization, and research and development, is critically necessary as a replacement for the 60-year-old Chemistry and Metallurgy Research Building ("CMR") at LANL that presently houses most of these activities. The CMR is outmoded and sits on a seismic fault trace.

NNSA has already completed extensive environmental review of the proposed CMRR-NF in accordance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(f). This review culminated in a November 2003 Environmental Impact Statement ("EIS") and a February 12, 2004, Record of Decision ("ROD") that approved construction of CMRR-NF and the associated Radiological Laboratory Utility Office Building ("RLUOB"). Since the 2004 ROD, new developments and information have necessitated modifications in the design of the proposed CMRR-NF. But, for NEPA purposes, the purpose and need for the proposed CMRR Project have not changed, nor has the scope of operations to be carried out in the proposed CMRR-NF. The laboratory space in which key mission operations will be performed within the proposed facility has

actually *decreased* in the new design. Nonetheless, given the design modifications to the building structure, NNSA has decided for prudential reasons to conduct further environmental review pursuant to NEPA. NNSA will prepare a Supplemental EIS ("SEIS"). Upon completion of the SEIS, a process that will include two public scoping meetings and a 45-day public comment period on the Draft SEIS, NNSA will prepare a new ROD.

In a July 1, 2010, letter, counsel for Plaintiff, a New Mexico-based activist group that advocates nuclear disarmament, asserted that the 2003 EIS for the proposed CMRR-NF was inadequate. Plaintiff never challenged the 2004 ROD. On July 30, 2010, NNSA informed Plaintiff in writing that NNSA was still evaluating the potential environmental impacts of the proposed CMRR-NF and would be preparing a Supplement Analysis pursuant to DOE's NEPA regulations. In other words, NNSA informed Plaintiff that it was not finished considering the environmental impacts of its proposals. Knowing that, but without waiting to learn the results of NNSA's Supplement Analysis, Plaintiff filed this lawsuit. In September 2010, Federal Defendants again notified Plaintiff that the environmental analysis of the proposed CMRR-NF was ongoing (and would include preparation of a full SEIS that would provide Plaintiff with additional opportunities to air its concerns) and respectfully requested that it withdraw the Complaint. Plaintiff refused to do so, thus forcing Federal Defendants to seek relief from this Court.

Federal Defendants bring this motion to dismiss because the Complaint suffers from at least three obvious and fatal jurisdictional flaws. First, Plaintiff's challenges to the adequacy of the original 2003 EIS and 2004 ROD are time-barred by the six-year statute of limitations applicable to NEPA claims. Second, Plaintiff's challenges to the sufficiency of the SEIS would not be ripe until NNSA completes the SEIS and issues a ROD. Third, Plaintiff's challenges to the 2003 NEPA

analysis of the proposed CMRR-NF are moot, since NNSA will conduct further environmental analysis through an SEIS.

NNSA has been, and is, complying with its obligations under NEPA, so that it can make an informed decision on how to proceed. Despite Federal Defendants' repeated efforts to inform Plaintiff of the jurisdictional defects in its Complaint, Plaintiff has refused to withdraw the action. The Court should dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

FACTUAL BACKGROUND

I. THE PROPOSED CMRR-NF

NNSA is a semi-autonomous agency within DOE. Declaration ("Decl.") of Dr. Donald L. Cook, Deputy Administrator for Defense Programs, DOE/NNSA (Exhibit A hereto) ¶ 3. NNSA is responsible for the management and security of the nation's nuclear weapons, nuclear nonproliferation, and naval reactor programs. Id.; see 50 U.S.C. § 2401(b). NNSA is also responsible for administration of LANL. Decl. ¶ 4.

In the mid-1990s, in response to direction from the President and Congress, DOE developed the Stockpile Stewardship and Management Program to provide a single, integrated technical program for maintaining the continued safety and reliability of the nuclear weapons stockpile. Decl. ¶ 4. Work conducted at LANL is essential to this mission. Id. A particularly important facility is CMR, which has unique capabilities for performing special nuclear material analytical chemistry, materials characterization, and actinide[1] research and development. Id. ¶ 5. CMR

[1] "Actinide" refers to the members of a series of elements that encompasses the 14 elements with atomic numbers from 90 to 103. Uranium and plutonium are actinides.

supports a number of critical national security missions, including nuclear nonproliferation programs; the manufacturing, development, and surveillance of pits;[2] life extension programs; dismantlement efforts; waste management; material recycle and recovery; and research. Id.

The CMR Building is almost 60 years old and near the end of its useful life. Decl. ¶ 6. Many of its utility systems and structural components are aged, outmoded, and deteriorated. Id. Recent geological studies identified a seismic fault trace located beneath two of the wings of the CMR Building, which raised concerns about the structural integrity of the Hazard Category 2 nuclear facility.[3] Id. Over the long term, NNSA cannot continue to operate the mission-critical CMR support capabilities in the existing CMR Building at an acceptable level of risk to worker safety and health. Id. NNSA has already taken steps to minimize the risks associated with continued operations at CMR. Id. ¶ 7. To ensure that NNSA can fulfill its national security mission for the next 50 years in a safe, secure, and environmentally sound manner, NNSA proposes to construct a replacement facility, known as the CMRR-NF. Id. ¶ 8. The CMRR-NF would replace and relocate CMR capabilities. Id.

On July 23, 2002, the NNSA published a Notice of Intent to prepare the CMRR EIS and invited public comment on the CMRR EIS proposal. Decl. ¶ 9. NNSA also hosted two public scoping meetings on the proposed CMRR in August of 2002. Id. NNSA published a Draft EIS and provided a 45-day public comment period. After thoroughly analyzing the potential environmental impacts of the proposed CMRR and considering public comments, NNSA issued a Final EIS in November 2003. Id. NNSA published its ROD on the 2003 EIS in the Federal Register on

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[2] A "pit" is the fissile core of a nuclear warhead.

[3] A "Hazard Category 2" nuclear facility has the potential for significant on-site consequences.

February 12, 2004. Id. ¶ 10; 69 Fed. Reg. 6967 (Feb. 12, 2004). The 2004 ROD announced that the CMRR Project would consist of two buildings: a single, above-ground consolidated special nuclear material-capable, Hazard Category 2 laboratory building (the CMRR-NF), and a separate but adjacent administrative office and support building, the RLUOB. Id. ¶ 10. Construction of the RLUOB is complete and building outfitting is currently underway. Id. ¶ 22. Radiological operations are scheduled to begin in 2013. Id.

Since NNSA completed the 2003 EIS and 2004 ROD, new developments have arisen that required changes to the proposed CMRR. Decl. ¶ 12. Specifically, a site-wide analysis of the geophysical structures that underlay the area occupied by LANL was prepared. Id. In light of this new geologic information regarding seismic conditions at the site, and more detailed information on the various support functions, actions, and infrastructure needed for construction, changes were made to the proposed design of the CMRR-NF. Id. In addition, design modifications have been incorporated to ensure the facility implements DOE's nuclear safety management design requirements for increased facility engineering controls to ensure protection of the public, workers, and the environment. Id. These changes relate to the structural aspects of the building, not its purpose. Id. ¶ 13. The scope of operations remains the same, as does the quantity of special nuclear material that can be handled and stored in the proposed CMRR-NF. Id. ¶ 14. The laboratory space where key mission operations would be performed is significantly reduced from what was contemplated prior to the design modification. Id.

II. PLAINTIFF'S CRITICISM OF CMRR-NF AND COMPLAINT

Given the design changes, NNSA decided to prepare a Supplement Analysis pursuant to 10 C.F.R. § 1021.314(c)(2) to assist it in determining whether the 2003 EIS should be supplemented,

a new EIS should be prepared, or no further NEPA document is required. Decl. ¶ 15.

On July 1, 2010, counsel for Plaintiff wrote to Dr. Steven Chu, Secretary of the Department of Energy, and Thomas P. D'Agostino, Administrator of the NNSA, expressing concerns about the cost and adequacy of NNSA's NEPA analysis for the CMRR-NF. Decl. ¶ 15. Plaintiff requested that DOE halt any and all CMRR-NF design activities, make no further contractual obligations, and seek no further funding until NNSA completes a new EIS for the CMRR-NF. Id. On July 30, 2010, NNSA informed Plaintiff that NNSA was preparing a Supplement Analysis to determine whether the 2003 EIS should be supplemented, a new EIS should be prepared, or no further NEPA document is required. Id.

Shortly after NNSA's response, and without waiting to learn the results of NNSA's Supplement Analysis, Plaintiff filed its Complaint. Despite being fully aware that the NEPA analysis of the CMRR-NF was still in progress, Plaintiff apparently prejudged that any NEPA analysis that NNSA would prepare would be inadequate. On September 21, 2010, NNSA's Deputy Administrator for Defense Programs determined that the NNSA will complete an SEIS to address the ways in which the potential environmental effects of the proposed CMRR-NF may have changed since the project was first analyzed in the 2003 EIS. Decl. ¶ 16; see Decl. Ex. 1. The Notice of Intent to prepare the SEIS has already appeared in the Federal Register. 75 Fed. Reg. 60745 (Oct. 1, 2010); see Decl. Ex. 2. Development of the SEIS includes a scoping process, public meetings, and a comment period on a draft SEIS to ensure that the public has a full opportunity to participate in review of the proposed CMRR-NF under NEPA. Decl. ¶ 17. The results of the SEIS will assist DOE and NNSA in determining how best to proceed. Id. ¶ 18. Nonetheless, even when NNSA informed Plaintiff of the full SEIS on the CMRR-NF, including a scoping period, Plaintiff

prejudged the adequacy of a yet-to-be-completed SEIS and persisted with its lawsuit.

LEGAL BACKGROUND

The purpose of NEPA, 42 U.S.C. §§ 4321-4370(f), is to foster better decision making and informed public participation for federal agency actions that affect the environment. See 42 U.S.C. § 4321; 40 C.F.R. § 1501.1.[4] NEPA imposes procedural rather than substantive requirements. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978). Under NEPA, federal agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA regulations contemplate supplementation of an EIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). Agencies also may prepare an SEIS "when the agency determines that the purposes of [NEPA] will be furthered by doing so." Id. at § 1502.9(c)(2).

Because NEPA does not provide for a private cause of action, the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, govern judicial review of Plaintiff's claims. See Marsh, 490 U.S. at 377 n.23; Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125, 1134 (10th Cir. 2006). Under the APA, a reviewing court may, under limited circumstances, "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); accord Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004). The APA also imposes a narrow and highly deferential standard of review limited to a determination whether

[4] Specific guidance for complying with NEPA is provided by regulations promulgated by the Council on Environmental Quality. See 40 C.F.R. §§ 1500-1508.

a federal agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law." 5 U.S.C. § 706(2)(A); see Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971). An agency's action is entitled to a presumption of validity, and the petitioner challenging that action bears the burden of establishing that the action is arbitrary or capricious. Citizens' Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169, 1176 (10th Cir. 2008).

RULE 12(b)(1) MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may file a motion to dismiss based on the court's "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1).[5] A complaint must be dismissed for lack of subject matter jurisdiction if the action: "does not 'arise under' the Federal Constitution, laws, or treaties (or fall within one of the other enumerated categories of [Article III, Section 2, of the Constitution], or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute." Baker v. Carr, 369 U.S. 186, 198 (1962).

Because federal courts are courts of limited jurisdiction, "the presumption is that they lack jurisdiction unless and until a plaintiff pleads sufficient facts to establish it." Celli v. Shoell, 40 F.3d 324, 327 (10th Cir. 1994) (citations omitted). "Mere conclusory allegations of jurisdiction

[5] Under the APA, Plaintiff's NEPA claims are governed by reference to the Federal Rules of Appellate Procedure pursuant to Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1580 (10th Cir. 1994). In reviewing motions to dismiss, however, the Tenth Circuit applies the same standards of review as the district courts, and therefore reference to the Federal Rules of Civil Procedure is appropriate here. See, e.g., Ordinance 59 Ass'n v. U.S. Dep't of the Interior, 163 F.3d 1150, 1152 (10th Cir. 1998) ("We review *de novo* the trial court's decision to dismiss under either Fed. R. Civ. P. 12(b)(1) or 12(b)(6) . . . [and o]ur independent determination of the issues uses the same standard employed by the district court." (citations omitted)); accord Kane County v. Salazar, 562 F.3d 1077, 1086 (10th Cir. 2009).

are not enough; the party pleading jurisdiction 'must allege in his pleading the facts essential to show jurisdiction.'" Id. (citing Penteco Corp. Ltd. P'ship-1985A v. Union Gas Sys., Inc., 929 F.2d 1519, 1521 (10th Cir. 1991) (quoting McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936))).

Motions to dismiss pursuant to Rule 12(b)(1) may take two forms. In the first form, the movant asserts that the allegations in the complaint on their face fail to establish the court's subject matter jurisdiction. "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995) (citation omitted). In the second form, the movant may present evidence challenging the factual allegations in the complaint "upon which subject matter jurisdiction depends." Id. at 1003 (citation omitted). "When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations . . . [but] reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion." Id. (citations omitted). Here, Federal Defendants challenge jurisdiction of this latter form of review.

ARGUMENT

Plaintiff's Complaint must be dismissed because it does not meet several jurisdictional requirements. First, Plaintiff's challenges to aspects of the 2003 EIS and 2004 ROD are time-barred because NNSA issued the ROD more than six years ago. Second, Plaintiff's challenges to the sufficiency of issues and analyses that may be addressed in the 2011 SEIS will not be ripe for review until NNSA completes the SEIS and issues a new ROD. Third, Plaintiff's attempt to compel NNSA to perform further environmental analysis of the CMRR Project is moot because NNSA is already in the process of preparing an SEIS. For these reasons, Plaintiff's Complaint should be dismissed

in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(1).

I. SOME OF PLAINTIFF'S CHALLENGES ARE TIME-BARRED BY THE SIX-YEAR STATUTE OF LIMITATIONS

It is well-established that NEPA claims are subject to a six-year statute of limitations that accrues upon the completion of administrative proceedings. 28 U.S.C. § 2401(a) ("Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); see Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army, 111 F.3d 1485, 1494-95 (10th Cir. 1997) (recognizing that NEPA claims are subject to the APA's general six-year limitations period under 28 U.S.C. § 2401(a)); Greater Yellowstone Coal. v. Tidwell, 572 F.3d 1115, 1123 n.3 (10th Cir. 2009) (same).

Plaintiff was required to raise any challenge to the 2003 EIS prior to February 12, 2010, which is six years after NNSA published the 2004 ROD in the Federal Register. Specifically, Count II (¶¶ 65-71) alleges the 2003 EIS failed to address connected actions and cumulative environmental impacts. Count III (¶¶ 72-79) alleges that the 2003 EIS failed to provide required mitigation measures and a mitigation action plan. Count IV (¶ 90) challenges the quality of the information present in the 2003 EIS. The facts in dispute for these claims *all* arise from the 2003 EIS and thus any such claims accrued on February 12, 2004, the date of publication of the 2004 ROD. Because Plaintiff waited more than six years to bring these claims, they are time-barred and should be dismissed pursuant to Rule 12(b)(1). 28 U.S.C. § 2401(a); accord Chem. Weapons Working Group, 111 F.3d at 1494-95.

II. PLAINTIFF'S CLAIMS WILL NOT BE RIPE FOR REVIEW UNTIL NNSA ISSUES A DECISION ON THE SEIS

Any claims that the SEIS for the updated proposed CMRR-NF will be deficient are not yet ripe for judicial review.

A. Plaintiff's Claims Fail the Test for Ripeness

Whether a claim is ripe for review "bears on a court's subject matter jurisdiction under the case or controversy clause of Article III of the United States Constitution." New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1498-99 (10th Cir. 1995). Accordingly, a ripeness challenge, "like [most] other challenges to a court's subject matter jurisdiction, is treated as a motion to dismiss under Rule 12(b)(1)." Id. at 1499. Ripeness is a doctrine of justiciability intended to "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 807-08 (2003) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977)); Utah v. U.S. Dep't of the Interior, 535 F.3d 1184, 1191- 92 (10th Cir. 2008) (same); F.T.C. v. Standard Oil Co. of Cal., 449 U.S. 232, 244 n.11 ("one of the principal reasons to await the termination of agency proceedings is to obviate all occasion for judicial review.") (internal citation omitted); Nevada v. Dep't of Energy, 457 F.3d 78, 84 (D.C. Cir. 2006) ("[T]he ripeness doctrine takes into account questions regarding the institutional capacities of, and the relationship between, courts and agencies.") (internal quotation and citation omitted).

A claim is not ripe when it rests "upon contingent future events that may not occur as

anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998) (quotation marks and citation omitted). "If there is still a real possibility that the agency will conduct further environmental analysis, the NEPA claim is not yet ripe." N.M. ex rel. Richardson v. Bureau of Land Mgt., 459 F. Supp. 2d 1102, 1116-1117 (D.N.M. 2006) (vacated in part and reversed in part on other grounds by 565 F.3d 683 (10th Cir. 2009) (citing Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 50 (D.C. Cir. 1999)). Courts determine whether an agency decision is ripe for judicial review by "examining the fitness of the issues for judicial decision and the hardship caused to the parties if review is withheld." Park Lake Res. Ltd. Liab. Co. v. U.S. Dep't of Agric., 197 F.3d 448, 450 (10th Cir. 1999). These two factors are sufficient to guide a decision on ripeness. Friends of Marolt Park v. U.S. Dep't of Transp., 382 F.3d 1088, 1094 n.2 (10th Cir. 2004).

B. The Challenged Issues Are Not Fit for Judicial Decision

1. There is No Final Agency Action on the Updated CMRR Project

Plaintiff's Complaint is not fit for judicial decision because there has been no "final agency action" on the updated CMRR-NF Project. Under the APA, judicial review of an agency action is limited to "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704; accord Utah Envtl. Cong. v. Bosworth, 443 F.3d 732, 749 (10th Cir. 2006) ("Under the APA, a case may only be ripe for review if the federal conduct at question constitutes a final agency action."); Marolt Park, 382 F.3d at 1093-94 ("Ordinarily, whether the issues are fit for review depends on whether the plaintiffs challenge a final agency action.").

The APA defines "agency action" as an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). An agency action is "final"

under the APA if it satisfies two criteria: (1) "the action must mark the consummation of the agency's decision making process – it must not be of a merely tentative or interlocutory nature"; and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted); Franklin v. Massachusetts, 505 U.S. 788, 797 (1992) (the "core question" in evaluating if there is final agency action "is whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties"); Ctr. for Native Ecosystems v. Cables, 509 F.3d 1310, 1329 (10th Cir. 2007) (same). Plaintiff bears the burden of demonstrating that the agency action challenged is final. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990); Colo. Farm Bureau Fed'n v. U.S. Forest Serv., 220 F.3d 1171, 1173 (10th Cir. 2000).

The actions challenged in Plaintiff's Complaint clearly fail to satisfy either element of finality as described in Bennett, 520 U.S. at 177-78. First, it was clear to Plaintiff even before it filed this lawsuit that NNSA had not completed its decision-making process: NNSA informed Plaintiff in July 2010 that it was preparing a Supplement Analysis to help it determine what, if any, further NEPA documentation was necessary for the CMRR-NF Project. Decl. ¶ 15. Although the Supplement Analysis concluded that an SEIS was not necessary, NNSA decided to prepare an SEIS for prudential reasons. Id. ¶ 16. Thus, the decision-making process on the updated proposed CMRR-NF will not be complete until the SEIS is finished and a new ROD is issued. The SEIS will address the ways in which potential environmental effects of the CMRR Project may have changed since the project was first analyzed under the 2003 EIS. Additionally, because the SEIS process provides for public participation, id. ¶ 17, Plaintiff and other members of the public will have an

opportunity to assist in establishing the scope of the issues to be analyzed in the SEIS and to comment on the draft SEIS. Because Plaintiff challenges a process that is still ongoing, Plaintiff has failed to challenge an action that marks the completion of NNSA's decision-making process. Bennett, 520 U.S. at 177-78 (final agency action "must mark the consummation of the agency's decision making process – it must not be of a merely tentative or interlocutory nature" (internal citations and quotations omitted)); see Texas, 523 U.S. at 300 ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (citations and internal quotations omitted)); Dine Citizens Against Ruining Our Env't v. Klein, 676 F. Supp. 2d 1198, 1214-15 (D. Colo. 2009) (challenge seeking supplementation of NEPA review dismissed as unripe because administrative actions were ongoing, judicial intervention would interfere with proceedings, and completion of administrative process would benefit court).

Second, Plaintiff's claims fail to challenge a final agency action that determines rights or obligations, or from which legal consequences will flow. Bennett, 520 U.S. at 177. As discussed in the preceding paragraph, NNSA decided to prepare an SEIS that provides for a scoping period for public review and comments. Decl. ¶¶ 16, 17. Because the public has the opportunity to assist NNSA in establishing the scope of the issues to be analyzed in the SEIS and to comment on the draft SEIS, there is no concrete agency action that harms or threatens to harm Plaintiff's interests. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-33 (1998) (the purpose of the ripeness doctrine is "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties") (citations omitted).

Plaintiff filed its Complaint before NNSA's decision-making process was complete and before any rights or obligations have been determined, or from which legal consequences will flow.

Bennett, 520 U.S. at 177-78; Ctr. for Native Ecosystems, 509 F.3d at 1329. The Complaint therefore fails to challenge a final agency action and is not fit for judicial decision. Utah Envtl. Cong., 443 F.3d at 749; Marolt Park, 382 F.3d at 1093-94.

2. DOE Has Not Made an Irretrievable Commitment of Resources

Another factor demonstrating that Plaintiff's claims are not fit for judicial decision is that DOE has not made an irretrievable commitment of resources to the CMRR-NF.

An agency's NEPA obligations mature only once it reaches a "critical stage of a decision which will result in irreversible and irretrievable commitments of resources to an action that will affect the environment." Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466, 480 (D.C. Cir. 2009) (internal citations and quotations omitted). An irreversible and irretrievable commitment is made when the government fails to reserve the "absolute right to prevent the use of the resources in question." Friends of the Se.'s Future v. Morrison, 153 F.3d 1059, 1063 (9th Cir. 1998) (internal quotations and citation omitted). Cases presented with this question typically have focused on the commitment of natural resources, not necessarily the agency's financial resources. See, e.g., id. at 1063-64 (no irreversible and irretrievable commitment of timber resources through the development of a tentative schedule "because the government retain[ed] absolute authority to decide whether any such activities will ever take place on the lands" (internal quotation and alteration omitted; citation omitted)); Pennaco Energy, Inc., v. U.S. Dep't of the Interior, 377 F.3d 1147, 1160 (10th Cir. 2004) (issuance of certain oil and gas leases constituted irreversible commitment by agency). Where financial resources are concerned, however, even the expenditure of substantial amounts of money is not an irretrievable commitment of resources. WildWest Inst. v. Bull, 547 F.3d 1162, 1169 (9th Cir. 2008) (holding that "the Forest

Service's pre-marking of [hazard] trees did not irretrievably commit it to a particular course of action" notwithstanding the fact that the Forest Service had expended over $200,000 to mark the trees); Haw. County Green Party v. Clinton, 124 F. Supp. 2d 1173, 1198 (D. Haw. 2000) (finding no irretrievable commitment of resources even though the Navy had allegedly spent $350 million over 20 years on a weapons system because "doing research and building a ship do not mark the consummation of agency decision making on deployment").

NNSA has not reached the "critical stage of a decision which will result in irreversible and irretrievable commitments of resources." Ctr. for Biological Diversity, 563 F.3d at 480 (internal quotations and citation omitted). 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. Decl. ¶ 20. No CMRR-NF construction is underway, and none will occur while the SEIS is being prepared. Id. ¶ 21. Between October 2010 and June 2011, the expected SEIS period, the overall design is expected to advance by only approximately 15 percent. Id. ¶ 25. If, after completion of the SEIS, NNSA decides to proceed with construction of the proposed CMRR-NF, the building is not expected to be operational until 2022. Id. ¶ 23. Although NNSA has expended money over the course of six years for building design of the proposed CMRR-NF, id. ¶ 19, the expenditure of even substantial amounts of money is not an irretrievable commitment of resources. WildWest Inst., 547 F.3d at 1169; Haw. County Green Party, 124 F. Supp. 2d at 1198. This absence of an irretrievable commitment of resources to the CMRR-NF means that Plaintiff's challenge to the SEIS is not fit for judicial decision because planning for the facility has not reached a critical stage. Ctr. for Biological Diversity, 563 F.3d at 480.

C. Hardship Imposed by Judicial Review Seriously Harms Defendants

Another factor courts examine to determine whether a claim is ripe is the hardship caused to the parties if review is withheld. Park Lake Res., 197 F.3d at 450. Plaintiff will suffer no hardship if judicial review of NNSA's compliance with NEPA is withheld until the completion of the SEIS. To show hardship, Plaintiffs must show adverse effects of a strictly legal kind. Ohio Forestry Ass'n, 523 U.S. at 733. The "inquiry into harm takes into account financial, operational, and legal consequences flowing from the agency action." Park Lake Res., 197 F.3d at 452. Cases where courts have afforded significant weight to the hardship element generally fall into one of two categories: (1) where "parties would have faced significant costs, financial or otherwise, if their disputes were deemed unripe for adjudication"; and (2) where "the defendant had taken some *concrete action* that threatened to impair – or had already impaired – the plaintiffs' interests." Utah, 535 F.3d at 1197-98 (citations omitted) (emphasis in citation).

Here, Plaintiff cannot identify any such hardship. There are no financial, operational, or legal consequences to Plaintiff flowing from NNSA's decision to prepare an SEIS. Nor is there any concrete action that threatens to impair Plaintiff's interests. As discussed in Part II.B.2, supra, NNSA has not made an irretrievable commitment of resources to the CMRR-NF. Plaintiff and other members of the public will have an opportunity to assist in establishing the scope of the issues to be analyzed in the SEIS and to comment on the draft SEIS. Decl. ¶ 17. Additionally, construction of the CMRR-NF will not occur until after the SEIS is completed and a new ROD issued. Decl. ¶ 21. Construction will take more than a decade, and the facility is not expected to be occupied and operational until 2022. Decl. ¶ 23. Plaintiff thus cannot show hardship because it "will have ample opportunity later to bring its legal challenge at a time when harm is more imminent

and more certain." Ohio Forestry Ass'n, 523 U.S. at 734; accord San Juan Citizens Alliance v. Norton, 586 F. Supp. 2d 1270, 1296 (D.N.M. 2008) (finding no hardship from delayed review, in part, because no concrete legal rights were created or destroyed).

On the other hand, Federal Defendants would suffer serious hardship. NNSA has identified certain aspects of the project, such as new geologic information, that merit further analysis of possible environmental effects. Decl. ¶ 12. As NNSA informed Plaintiff on three separate occasions, NNSA has initiated an SEIS and will examine these and other possible environmental effects. Id. ¶¶ 15, 16. This further factual development of the issues will benefit both the public interest and the Court. Sierra Club v. U.S. Dep't of Energy, 287 F.3d 1256, 1262-63 (10th Cir. 2002) (citing Ohio Forestry Ass'n, 523 U.S. at 733). Further review will allow NNSA, on its own and without court involvement, to "correct its own mistakes," if such mistakes exist. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 242 (1980). NNSA should be allowed to reconsider its own decisions, especially in light of new information and to further the purposes of NEPA; "[o]therwise judicial review is turned into a game in which an agency is 'punished' for procedural omissions by being forced to defend them well after the agency has decided to reconsider." Citizens Against the Pellissippi Parkway Extension v. Mineta, 375 F.3d 412, 416 (6th Cir. 2004).

D. Any Contention That a "New" EIS Is Required Must Wait for a New ROD Based on the SEIS

To the extent that Plaintiff contends a "new" EIS is required and that an SEIS is insufficient to remedy alleged NEPA violations of the 2003 CMRR EIS (see Compl. ¶ 57), this contention has no basis in law and must, in any event, wait until NNSA issues a new ROD based on the SEIS. The relevant regulations governing NEPA compliance for the DOE state that agencies:

(1) Shall prepare *supplements* to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare *supplements* when the agency determines that the purposes of the Act will be furthered by doing so.

40 C.F.R. § 1502.9(c) (emphasis added); accord 10 C.F.R. §§ 1021.103, 1021.314. The plain language of the governing regulations and well-established case law make it clear that an SEIS is sufficient to remedy any alleged deficiencies of the 2003 EIS. Id.; Marsh, 490 U.S. at 374 (SEIS furthers the purposes of NEPA by requiring agencies to "take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval."); Citizens' Comm., 513 F.3d at 1178 (NEPA "requires only that an agency take a 'hard look' at the environmental consequences before taking a major action.").

NNSA based its determination to prepare an SEIS on the discretionary aspect of the relevant regulation. See 40 C.F.R. § 1502.9(c)(1), (2). Because elements of the proposed CMRR-NF design have changed since the 2004 ROD was issued, NNSA decided for prudential reasons to prepare an SEIS. Decl. ¶ 16. The planned SEIS will provide a "hard look" for the updated proposed CMRR Project and will inform the decision makers at DOE and NNSA on how best to proceed with the Project. Plaintiff's attempt to distort the provisions for an SEIS into a requirement for a "new" EIS has no basis, and any challenge to the adequacy of the SEIS is not ripe until NNSA issues a new ROD based on the SEIS.

Based on the foregoing, it is evident that Plaintiff's claims are not ripe for judicial review. The challenged issues are not fit for judicial decision at this time because there is no final agency action for the updated CMRR-NF, and NNSA has not made an irretrievable commitment of resources. The hardship imposed by judicial review at this time would harm NNSA's decision-making process, while Plaintiff would suffer no injury. Plaintiff's Complaint should therefore be dismissed pursuant to Rule 12(b)(1) as unripe for review.

III. PLAINTIFF'S REQUEST FOR FURTHER ENVIRONMENTAL ANALYSIS OF THE PROPOSED CMRR PROJECT IS MOOT

Plaintiff's requested relief of further environmental analysis of the proposed CMRR Project has been satisfied by NNSA's determination to prepare an SEIS. Plaintiff's Complaint is therefore moot and should be dismissed.

A. NNSA's Decision to Prepare an SEIS Removed Any Live Case or Controversy That May Have Been Present When Plaintiff Filed Its Complaint

A federal court's jurisdiction must persist throughout all stages of the litigation. Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review." (quotations and citation omitted)); Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990) (same) McAlpine v. Thompson, 187 F.3d 1213, 1216 (10th Cir. 1999) (same). A federal court lacks jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue before it." Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (quotations and citation omitted). If an order in plaintiff's favor would do no good or serve no purpose, the appeal is moot. McAlpine, 187 F.3d at 1216. See also Horstkoetter v. Dep't of Pub. Safety, 159 F.3d 1265, 1277 (10th Cir. 1998) (holding that challenge to regulation was moot because "any injunction that we

might issue in this case . . . would be meaningless"); S. Utah Wilderness Alliance v. Smith, 110 F.3d 724, 728 (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."); Cent. Wyo. Law Assocs. v. Denhardt, 60 F.3d 684, 687-88 (10th Cir. 1995) (holding that challenge to warrant was moot where warrant had expired). "The crucial question is whether 'granting a present determination of the issues offered . . . will have some effect in the real world.'" Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1182 (10th Cir. 2000) (quoting Kennecott Utah Copper Corp. v. Becker, 186 F.3d 1261, 1266 (10th Cir. 1999)) (omission in citation).

Thus, for example, when a new agency decision supersedes an older decision, challenges to the older decision are moot. See Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1113 (10th Cir. 2010) (challenge to a Biological Opinion is moot when that opinion has been superseded by a later Biological Opinion); see also Aluminum Co. of Am. v. Bonneville Power Admin., 56 F.3d 1075, 1078 (9th Cir. 1995) (challenge to an agency decision is moot when current actions are being undertaken pursuant to a new, superseding decision). When an agency is no longer relying on an old decision, any challenges to that old decision do not present a live controversy. See Aluminum Co. of Am., 56 F.3d at 1078 (holding that review of earlier decision document "would be especially inappropriate" because it had been superseded); Ramsey v. Kantor, 96 F.3d 434, 445- 46 (9th Cir. 1996) (claim is moot when an agency "will be basing its rulings on different criteria or factors in the future"); Spencer v. Kemna, 523 U.S. 1, 18 (1998) ("[Federal courts] are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong."). "[I]f extra-record evidence shows that an agency has rectified a NEPA violation after the onset of legal proceedings, that evidence is relevant to the

question of whether relief should be granted." Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560-61 (9th Cir. 2000) (claim that Forest Service failed to prepare an SEIS mooted when the federal agency subsequently prepared the document).

Plaintiff's case is moot because the constitutionally required "case or controversy" that provides federal court jurisdiction over the case is no longer live. U.S. Const. art. III, § 2. See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000). The Complaint alleges that NNSA failed to conduct a new analysis of the proposed CMRR-NF Project under the requirements of NEPA. Plaintiff, with full knowledge that NNSA was in the process of preparing a Supplement Analysis to evaluate the need for further consideration of the updated CMRR Project pursuant to NEPA, filed suit to compel further environmental analysis. Shortly after Plaintiff's premature initiation of its action, NNSA decided to prepare an SEIS complete with a public scoping process. Decl. ¶¶ 16, 17. NNSA's decision rendered Plaintiff's Complaint moot because it healed any alleged injuries set forth thereafter in the Complaint. S. Utah Wilderness Alliance, 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."). In the future, when NNSA decides how best to proceed with the proposed CMRR-NF Project, the SEIS will serve as the basis for that new decision. Decl. ¶ 18. Any relief granted by this Court with respect to the continued sufficiency of the 2003 EIS therefore would be meaningless, and would have no "effect in the real world." See Citizens for Responsible Gov't, 236 F.3d at 1182 (quotations and citation omitted). Plaintiff's case is moot and should be dismissed for lack of jurisdiction. McAlpine, 187 F.3d at 1216.

B. Neither of the Narrow Exceptions to the Mootness Doctrine Apply

Neither of the two recognized extraordinary exceptions to the mootness doctrine applies to the present situation. The first exception provides that the voluntary cessation of a challenged practice does not necessarily render a case moot because the defendant would then be free to resume the challenged activity after the dismissal of the litigation. Laidlaw, 528 U.S. at 189 (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)). If a defendant can show that there is no reasonable expectation that it will resume the challenged conduct, the case is moot. Comm. for the First Amendment v. Campbell, 962 F.2d 1517, 1524 (10th Cir. 1992) (voluntary cessation does not moot a case "unless defendants can establish no reasonable expectation of the wrong's recurrence" (citation omitted)). See also Camfield v. City of Okla. City, 248 F.3d 1214, 1223-24 (10th Cir. 2001) (voluntary cessation exception not applicable where no evidence defendant intends to return to challenged conduct).

Here, the case became moot because NNSA decided to prepare an SEIS, complete with a public involvement process. Decl. ¶¶ 16, 17. NNSA initiated this process in the ordinary course of business in accordance with its procedures for determining whether to prepare an SEIS. NNSA will not "resume" any actions because any future decision on the updated CMRR Project will be based upon the results of the SEIS and new ROD. Id. ¶ 18.

The second exception, that a case is not moot when it is "capable of repetition, yet evading review," also does not apply. Under this narrow exception, an action is not moot when (1) the type of action challenged is too short in duration "to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. McAlpine, 187 F.3d at 1216 (citing Spencer, 523 U.S. at 17) (alteration omitted).

This exception to the mootness doctrine applies only in "exceptional situations." Id. at 1216 (quoting Los Angeles v. Lyons, 461 U.S. 95, 109 (1983)). Because there will be an SEIS, there is no reasonable expectation that the NNSA will approve the CMRR-NF Project based on an environmental analysis identical to the 2003 EIS and 2004 ROD. This case does not present the type of "exceptional situation" where this narrow exception applies.

NNSA's independent determination to prepare an SEIS of the proposed CMRR-NF moots Plaintiff's request for further environmental analysis of the facility. Neither of the two recognized exceptions to the mootness doctrine apply. The Court should therefore dismiss Plaintiff's Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

C. Plaintiff's Claims Should Be Dismissed Under the Doctrine of Prudential Mootness

Even if this Court were to find that Plaintiff's claims were not moot under Article III, this Court should exercise its discretion and dismiss Plaintiff's claims under the doctrine of prudential mootness. Prudential mootness is "closely related to Article III mootness" and arises from the doctrine of remedial discretion. S. Utah Wilderness Alliance, 110 F.3d at 727. Prudential mootness addresses "not the power to grant relief but the court's discretion in the exercise of that power." Chamber of Commerce v. U.S. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980). In some circumstances, a controversy, though not moot in the 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." S. Utah Wilderness Alliance, 110 F.3d at 727 (quoting Chamber of Commerce, 627 F.2d at 291).

The doctrine of prudential mootness applies to requests for prospective equitable relief by

declaratory judgment or injunction. See, e.g., id.; Bldg. & Constr. Dep't v. Rockwell Int'l Corp., 7 F.3d 1487, 1492 (10th Cir. 1993). Courts routinely decline declaratory or injunctive relief where it appears that a defendant, usually the government, has already changed or is in the process of changing its policies or where it appears that any repeat of the actions in question is otherwise highly unlikely. See United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). Thus, prudential mootness arises out of a court's general discretion in formulating prospective equitable remedies, especially with regard to cases involving the United States as a defendant, where "considerations of . . . comity for coordinate branches of government." Chamber of Commerce, 627 F.2d at 291.

NNSA has already taken action that changes the context of Plaintiff's claims. In July 2010, when Plaintiff complained about the environmental analysis in the 2003 EIS, NNSA was well underway in preparing a Supplement Analysis to assess how new geologic information and design modifications might require further environmental analysis in accordance with NEPA. Decl. ¶¶ 12, 13, 15. Although the purpose of the CMRR-NF has not changed, given the changes in design and newly available information, NNSA determined that the prudent course of action would be to prepare an SEIS, complete with a public participation process. Id. ¶¶ 16, 17. Once the SEIS is complete, NNSA will decide how best to proceed with the proposed CMRR-NF. Id. ¶ 18. It is very likely that the SEIS will address Plaintiff's concerns about the CMRR-NF; if it does not, Plaintiff may choose to bring a new suit, after exhausting administrative remedies and satisfying other requirements of justiciability, to challenge the adequacy of the SEIS and new ROD. Such a challenge would be based on a more developed administrative record of the CMRR-NF for the Court's review.

Accordingly, this Court should exercise its discretion under the doctrine of prudential

mootness and dismiss Plaintiff's claims. NNSA is preparing an SEIS for the updated proposed CMRR-NF, and any repeat of the circumstance under which Plaintiff brought its claims is highly unlikely. W.T. Grant Co., 345 U.S. at 633. Moreover, the exercise of discretion in dismissing Plaintiff's claims is particularly appropriate here, where Plaintiff cannot demonstrate that the award of equitable relief would redress any injury, and considerations of comity for DOE and NNSA come into play. Chamber of Commerce, 627 F.2d at 291.

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

Respectfully submitted on this 4th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2010 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Fling to the following CM/ECF registrants:

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Dated: October 4, 2010.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v. Case No. 1:10-CV-0760-JH-ACT

UNITED STATES DEPARTMENT OF ENERGY; THE HONORABLE STEPHEN CHU, in his capacity as SECRETARY, DEPARTMENT OF ENERGY; NATIONAL NUCLEAR SECURITY ADMINISTRATION; THE HONORABLE THOMAS PAUL D'AGOSTINO, in his Capacity as ADMINSTRATOR, NATIONAL NUCLEAR SECURITY ADMINISTRATION,

Defendants.

PLAINTIFF'S RESPONSE TO
FEDERAL DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Defendants have been pursuing their plan to construct a Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF" or "Nuclear Facility") building since 2001, and their efforts continue unabated and have recently intensified—still without any adequate environmental impact statement ("EIS") or any lawful Record of Decision ("ROD") authorizing the CMRR-NF. Through September 30, 2010, defendants received $289 million in appropriations for this project. In a dramatic increase, defendants have now received an additional $169 million for fiscal year 2011, which amount was obtained on an emergency basis last month. Some 283 employees or contractors are now at work on the project. Despite defendants' assertions that construction has not begun, it is clear to anyone observing from

Pajarito Road that a major construction program is under way at the site. This major federal effort is also part of an integrated and connected suite of projects—each of which affects the design of every other one—on which construction has already begun. The Nuclear Facility is by far the largest project in this suite.

Defendants' motion, seeking dismissal on jurisdictional grounds, seriously misconstrues the basis for this lawsuit. The Nuclear Facility is not covered by *any* EIS under the National Environmental Policy Act ("NEPA"), although the law clearly requires it. The 2003 EIS did not purport to address the current project, nor did the 2004 ROD approve it. Rather, the 2003 EIS concerned what amounts to a very different project with much smaller environmental impacts, and alternative versions of that project, but it did not address the massive venture now in progress, which was conceived later. Plaintiff Los Alamos Study Group has sued to require defendants to comply with NEPA and cease all design, planning, and construction activity before the project goes any further. Defendants assert that the Court has no jurisdiction, because they promise to create some more NEPA paperwork, which they say will retroactively legitimize the massive project. Defendants' strategy would prevent NEPA from guiding agency decision-making and relegate it to a meaningless *post-hoc* role.

By their motion, defendants inconsistently argue that this lawsuit comes too late—and also comes too soon. They assert that the statute of limitations has passed, because this case involves inapplicable NEPA documents issued more than six years ago. They also argue that this case comes too soon, because it should await defendants' next set of NEPA documents, which they promise for next year. They argue that the CMRR-NF project is critical to national security—and simultaneously assert that they have not really decided whether they want to build the CMRR-NF at all.

None of defendants' arguments has any credible basis, as we show herein. This project, to which the defendants are clearly committed, is undeniably a major federal action significantly affecting the quality of the human environment and is required to be preceded by an environmental impact statement ("EIS") under 42 U.S.C. § 4332(2)(C). Under NEPA, that EIS must be prepared and reviewed by the decision makers *before* they make a decision whether to proceed. 42 U.S.C. § 4332(2)(C). Defendants have caused a breakdown in that statutorily-mandated process. They purported to decide in 2004 to construct the simpler CMRR described in the 2003 EIS—but since then defendants have changed their plans out of the public eye, and plunged forward with a massive new CMRR-NF project that departs wholesale from the 2004 decision and far exceeds, in the resources it requires and the impacts it will create, anything contemplated by the 2003 EIS. The extent of their departure has only become public this year, and plaintiff promptly brought suit to enforce NEPA.

We show herein that the case is not time-barred and is ripe for decision, and that defendants' claim of mootness is merely another ploy to avoid scrutiny and maintain the project's momentum until scrutiny becomes pointless. Contrary to defendants' arguments, this case is well within the Court's jurisdiction and presents a problem calling for the Court's prompt attention.

LEGAL STANDARD

Defendants' Motion to Dismiss is appropriately denied where a preponderance of the evidence demonstrates that the Court has subject matter jurisdiction in this case. *Port City Properties v Union Pacific R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008); *Lindstrom v. United States*, 510 F.3d 1191, 1193 (10th Cir. 2007); *Clark v. Meijer, Inc.*, 376 F.Supp.2d 1088, 1093 (D.N.M. 2005). Justiciability is demonstrated by "alleging the facts essential to show

jurisdiction and supporting those facts with competent proof." *U.S. ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 797-98 (10th Cir. 2002). The Court has broad discretion to freely weigh affidavits and other documents in resolving the jurisdictional issue. *Begay v. Public Serv. Co. of N.M.*, 2010 WL 1781900, at *7 (D.N.M. 2010); *Pettit v. New Mexico*, 375 F.Supp.2d 1140, 1145 (D.N.M. 2004). In the following Response and documenting submittals, plaintiff has provided significantly more than a preponderance of evidence that this Court has subject matter jurisdiction over this litigation.

FACTUAL BACKGROUND

Plaintiff is the Los Alamos Study Group, a citizen organization which seeks to determine the facts surrounding Department of Energy ("DOE") programs, including those at Los Alamos National Laboratory ("LANL") and to educate the public and persons in public office about those programs and policy questions. Plaintiff has about 2,691 members within 50 miles of LANL and about 2,341 within 30 miles of LANL. Plaintiff's members stand to be adversely affected by the short and long-term environmental impacts of the CMRR-NF project and related projects.

The CMRR project involves two new buildings at LANL Technical Area 55 whose purpose will involve operations with Plutonium. These are the Radiological Laboratory, Utility, and Office Building ("RLUOB"), which has been constructed and is now being outfitted, and the Nuclear Facility ("NF"), which is a subject of this litigation. Defendants are required to comply with NEPA in planning and carrying out federal projects, including the CMRR-NF project.

The CMRR-NF, as now planned, will store, manage, and process plutonium in quantities amounting to several metric tons. Actions planned for the CMRR-NF include analytical chemistry and materials characterization in aid of nuclear weapons design and

fabrication. The Nuclear Facility will increase LANL's capacity to manufacture new plutonium "pits," which are the core of the primary section of a nuclear weapon. Defendants have sought $225 million for the CMRR-NF project from Congress for Fiscal Year 2011, which began on October 1, 2010. Congress has passed, and the President signed, a Continuing Resolution that provides the full amount requested for nuclear weapons programs, including the CMRR-NF. The total includes $169 million for the proposed Nuclear Facility. (The FY 2011 amount may be compared with the FY 2010 appropriation of $58.2 million.) Total appropriations for the Nuclear Facility since 2000 have been $296 million.[1] Mello Affidavit, pp. 24-25, 35.

The 2003 EIS—the purported NEPA support for the construction of the CMRR-NF—analyzes certain construction alternatives, each of which includes largely similar facilities at one of two nearby technical areas. The facilities considered were "above-ground" structures, *i.e.*, construction would go no deeper than 50 feet, or "below ground," to 75 feet deep. There was no discussion of excavation deeper than this, and no acknowledgment that "below ground" construction would entail penetrating to a layer of poorly-consolidated volcanic ash and would thus generate extensive additional project requirements, costs, and environmental impacts. The 2004 ROD selected an alternative involving "above ground" construction, which was described as providing an upper bound on environmental impacts.[2] (69 Fed. Reg. 6967-72)(Feb. 12, 2004).

Defendants advised Congress in 2002 that *both* buildings of the CMRR-NF project could be constructed for approximately $350-500 million plus administrative costs. In 2003, they advised that the total for both buildings, with administrative costs, would be $600 million. In

[1] The $296 million includes an initial $7 million in an account that defendants were using, until 2002, to provide much-needed safety upgrades in the existing CMR building. Those safety upgrades were abruptly halted in favor of the CMRR project, described to Congress in 2002 as costing one-tenth as much as it actually will cost and requiring a decade less to complete. *See* Mello Affidavit, pp. 5-6, 10-11.

[2] Previously, in 1997, Defendants' NEPA analysis found that construction of a new Nuclear Facility would be too expensive, take too long, present too many risks to ongoing programs, and have too many environmental impacts. Environmental Assessment for the Proposed CMR Building Upgrades at the Los Alamos National Laboratory, Los Alamos, New Mexico, prepared February 4, 1997.

February of 2010, defendants estimated total costs of just the CMRR-NF at $3.4 billion. Authoritative press reports state that defendants are now using estimates significantly exceeding $5 billion. Mello Affidavit, pp. 10-11.

Defendants advised Congress in 2003 that both buildings of the CMRR-NF project would be completed in 2010, and the 2003 EIS estimated that the completion of construction would occur in 2009. Defendants now expect construction of the CMRR-NF to extend until 2020, with operations commencing in 2022. The delay of more than ten years has its own impacts, which must be analyzed, and creates the need for interim use of the existing CMR Building and, therefore, interim safety and efficiency measures that also are not discussed in the 2003 EIS. *Id.* at 11, 18.

After the issuance of the 2003 EIS, defendants changed the "design basis threat" standard for nuclear facilities so that above-ground facilities are now disfavored. Thereafter, defendants abandoned the selected "above-ground" design for the Nuclear Facility and moved to a design calling for excavation to 75 feet. Later, defendants decided that ground conditions require them to excavate to a depth of 125 feet. These changes fundamentally altered the facility design problem from that on which the 2003 EIS was premised and caused and will continue to cause major cost increases and environmental impacts.

In 2008, NNSA issued a Site Wide EIS ("SWEIS") for LANL. The SWEIS incorporated the publicly announced plan of 2003 for the CMRR-NF, without change or updating. Also in 2008, DOE's Complex Transformation Supplemental Programmatic EIS ("CTSPEIS") was issued. Again, DOE's EIS included the publicly announced plan of 2003 for the CMRR-NF, without change or updating. DOE then stated that "because there will be no change to what has already been analyzed, no further facility NEPA analysis is planned." In December 2008, NNSA

issued two RODs pursuant to the CTSPEIS which included a decision to proceed with design, construction, and operation of a Nuclear Facility at LANL—as analyzed in the 2003 EIS, and included, but not analyzed, in the SWEIS, and CTSPEIS.

Since 2003, new information has raised questions about the configuration and the very mission of the CMRR-NF. DOE's JASON advisory group issued a public report in 2006, stating that plutonium pits have a lifetime in excess of 100 years and will not need replacement within the lifetime of the CMRR-NF. Mello Affidavit, p. 8.

In 2007, a new Probabilistic Seismic Hazard Analysis was issued for LANL, containing a significantly increased estimate of the seismic hazard in probability and acceleration. The seismic information directly affects the engineering design, imposes significant additional demands for concrete and steel, and raises to great significance the thick layer of poorly consolidated volcanic ash beneath the site.

The current design for the CMRR-NF uses a "hotel concept," which incorporates large unsupported floor areas to accommodate different missions. *Id.* at 9. Under the newly-discovered seismic circumstances, this approach requires large increases in structural concrete and steel from amounts assumed in the 2003 EIS, with consequent environmental impacts.

The Defense Nuclear Facilities Safety Board ("DNFSB") in 2008 expressed concern about the CMRR-NF design from the viewpoints of seismic and other safety issues. In early 2009, the combination of seismic and safety issues had become so intractable that defendants stated that meeting industry-standard safety criteria might not be economically feasible. Congress subsequently required NNSA and DNFSB to certify that the questions had been resolved. *Id.* Certification was made in September 2009, based upon several major design

changes, including excavation of the layer of unconsolidated ash beneath the site and its replacement with concrete. Mello Affidavit, p. 9.

In May 2009, the Obama Administration formally ended the Reliable Replacement Warhead program, which had been the only large-scale pit production mission intended for the CMRR-NF. *Id.* at 9. Defendants then stated to Congress that they had not yet determined whether to proceed with the CMRR-NF project. *Id.* at 9-10.

In September 2009, DOE's JASON advisory group reported to NNSA that new pit production was not necessary for the indefinite maintenance of the nuclear weapons stockpile. *Id.* at 10. Defendants thereafter advised Congress that they planned to end pit production in FY 2011. *Id.* Defendants adopted a policy of managing the stockpile without pit manufacturing, which would recommence only at the direction of the President and Congress. Defendant NNSA in February 2010 began a review of the CMRR-NF project. In May 2010, the Senate Armed Services Committee noted that the question of project size of the CMRR-NF was an open one and reported its concern that defendants follow DOE Order 413.3, requiring the preparation of a complete project baseline, including an accurate cost estimate.

A public meeting in June 2010 revealed new aspects of the CMRR-NF project, including additional project elements, some of the impacts of these new elements, and several closely-connected projects on Pajarito Road and their impacts. The scope of the CMRR-NF and its direct and indirect environmental impacts have changed as follows:

1. The acreage required for construction or operations has increased significantly for construction yards and office space, parking lots, concrete plants, utilities, security, spoil disposal, storm water retention, housing of construction workers, and road realignment. *Id.* at 16-17.

2. Construction impacts will extend beyond TA-55 to TA-48, T-63, TA-66, TA-46, TA-50, and TA-54 or TA-36. Mello Affidavit, p. 17.

3. Concrete and soil/grout requirements have increased from 6,255 cubic yards to 347,000 cubic yards. *Id.* Production of the increased amount of cement and delivery of aggregate is likely to generate more than 100,000 MT of carbon dioxide in addition to mining impacts and other transport impacts. *Id.*

4. Steel requirements have increased from 558 tons to approximately 13,000 tons. *Id.* at 7-8, 17.

5. Construction employment has increased from a peak of 300 to 844. The increase will have impacts on local housing and infrastructure. *Id.* at 17.

6. The construction period has increased from 34 months to 144 months. *Id.* at 18.

7. Excavation spoils to be stored and disposed have increased from the vicinity of 100,000 cubic yards to the vicinity 400,000 cubic yards. *Id.* at 16, 18. The increase will have transport, storage, and disposal impacts, raising environmental, traffic, aesthetic and cultural issues. Defendants may use spoil to cap some of the LANL material disposal areas for radioactive and hazardous waste that will be undergoing closure (*id.* at 18), an action requiring its own environmental analysis.

8. The completion date of CMRR-NF construction has moved from 2009 to 2020, with operations beginning in 2022 at the earliest. *Id.* Interim facilities to be used in 2010 through 2022 have not been identified, nor have the impacts of interim use been analyzed.

9. Ancillary facilities now required for the CMRR-NF include a craft worker facility, an electrical substation, a truck inspection facility, and a warehouse. *Id.*

10. Pajarito Road is expected to be closed for two years; temporary or permanent bypasse(s) may be built. Mello Affidavit, pp. 16, 18.

11. Operations in other facilities along Pajarito Road may be displaced during construction, causing additional impacts. *Id.* at 18.

12. The expanded nature of the CMRR-NF calls for additional analysis of the impacts of decontamination and demolition of the facility. *Id.* at 7-8, 16-18, 36.

Thus, there are major aspects of the expanded-scope CMRR-NF that were not and could not have been mentioned, let alone analyzed, in the 2003 EIS, because the project has changed so greatly from the one analyzed then. Further, NNSA's willingness to proceed with a project of this much-enlarged scale means that there is a range of unexamined alternative projects of similar or lesser magnitude, cost, and duration that should be analyzed in NEPA documentation.

Despite their NEPA noncompliance, defendants are wholly committed to the CMRR-NF project in its current form. The project is now going forward, full steam ahead. Approximately 100 craft employees were at work on the CMRR-NF during Fiscal Year 2010, just ended, and in FY 2011 the number will rise to an estimated 125. (Bretzke presentation, slide 4) Support services are at 150 to 200 people. (*id.*, slide 5) Design projects now ongoing are the Infrastructure Package, the Pajarito Road Relocation, and the Basemat Package. (*id.*, slide 7). The Infrastructure Package Construction may begin in March 2011 and at a minimum includes:

1. A concrete batch plant—one of two;
2. Temporary utility installation;
3. Site preparation lay down;
4. Site utility relocation;
5. Site excavation; and

6. Soil stabilization.

DOE will issue Requests for Proposals for construction contracts in mid-2011 to cover:

7. Temporary utilities;

8. Nuclear Facility Utilities Relocation;

9. Nuclear Facility Site Excavation and Storm Pond;

10. Nuclear Facility Construction Offices; and

11. Elevators (late 2011).

Other project elements continue in FY 2012, including DOE's plans to award 35 separate construction packages. (McKinney presentation, slide 8)

NNSA headquarters has directed that LANL personnel plan for completion of the CMRR-NF by 2020, with operations to commence in 2022. (Holmes presentation slide 4). The Technical Safety Strategy is ready for the Definitive Design stage, consistent with NNSA and DNFSB validation. (*id.*) The plan is sufficiently complete that NNSA has completed a Documented Safety Analysis and a Preliminary Safety Analysis Report. (*id.*, slide 15) Technical baseline documents were scheduled for completion in summer of 2010.

The Obama Administration has made public its commitment to the CMRR-NF. Its position is stated in an exchange of letters with certain Republican Senators, whose support is sought in ratification of the strategic arms limitation treaty with Russia. To be explicit: In exchange for Senatorial promises to support New START, the Administration has committed to a nuclear weapons modernization program, of which the CMRR-NF is a major part. Thus, when NNSA personnel assert that NNSA is still considering whether to go forward with the CMRR-NF proposal (*e.g.*, D.Br. 2, 13, 16, 18, affidavit of D. Cook), such statements must be greeted

with disbelief: The Administration, at a very high level, has declared the project to be critical and is acting accordingly, in every way. Defendants may not pretend that it is an open question.

ARGUMENT

A. No Period of Limitations Supports Dismissal of this Case

Defendants seriously misapprehend the applicable statute of limitations and the fundamental nature of NEPA enforcement. Plaintiff is not challenging the 2003 EIS as inadequate in the abstract; rather, defendants are implementing a major federal action that has no NEPA support because the present iteration of the project was neither analyzed in the 2003 EIS, nor selected in the 2004 ROD. Thus, to the extent the 2003 EIS and the 2004 ROD are deficient, they have been rendered so by the federal defendants' 2009-10 decisions not to follow them. Consequently, plaintiff is not merely complaining about a deficient NEPA document, but because defendants are carrying out "major federal actions significantly affecting the quality of the human environment" without first basing their decisions upon a "detailed statement by the responsible official on (i) the environmental impact of the proposed action, (ii) the adverse impacts . . . (iii) alternatives," and other required analyses. 42 U.S.C. § 4332(C).

The continuing NEPA violations consist of defendants' programs of on-going design and construction—that were supposed to be analyzed in NEPA documentation but were not. Under NEPA, the period of limitations commences not from the issuance of NEPA documentation, but from the time the federal action fails to comply with the NEPA determination. Thus, in *Or. Natural Res. Council v. U.S. Forest Serv.,* 445 F.Supp.2d 1211 (D. Or. 2006), citizen groups sued under the APA, alleging that the Forest Service failed to comply with NEPA in awarding six timber sales. The Forest Service argued that the claims were barred under 28 U.S.C. § 2401(a). The court rejected the argument, stating the following:

> The Forest Service argues that the six year statute of limitations in 28 U.S.C. § 2401(a) bars the claims in the Third Amended Complaint, which ONRC filed on August 2, 2004. The agency claims that because the EAs which ONRC challenges in Count Two of the Third Amended Complaint were prepared more than six years before the filing of that amended complaint, the statute of limitations applies. However, the actions targeted in ONRC's claims in its Third Amended Complaint are the Forest Service's decisions to award the timber sales based on the original, inadequate EAs and then to proceed with the timber sales after preparing the SEAs. ONRC claims that these decisions were arbitrary and capricious because they were based on EAs and SEAs which, taken together, were flawed and inadequately supplemented and, as a result, violated NEPA. The Forest Service decisions to award five of the six timber sale contracts, the decisions to allow some logging of reduced areas to proceed on all six sales after the preparation of the SEAs in April 2004, and the alleged failure to supplement the EAs, all occurred within the six years prior to the filing of ONRC's Third Amended Complaint. Accordingly, the six-year statute of limitations does not bar ONRC's claims. 445 F.Supp.2d at 1230-31.

The same rule applies here. The original, now inadequate, EIS was issued in 2003 and the ROD in 2004, but the actions targeted in plaintiff's complaint are NNSA's present decisions to go forward with the construction of the drastically modified CMRR-NF, based on the now-inadequate EIS. As in *ONRC,* plaintiff contends that these decisions were based upon an EIS which has been rendered deficient and inapplicable by defendants' subsequent actions. NNSA's actions were all taken within six years of the filing of the complaint. Accordingly, the six-year statute of limitations does not bar plaintiff's claims. *Accord: Mont. Wilderness Ass'n v. Fry,* 310 F.Supp.2d 1127, 1143 (D. Mont. 2004) (NEPA claim is not limited by a statute of limitations as long as the final agency action that requires the NEPA process is within that period).

Moreover, if defendants' illogical theory applied, an agency could issue an EIS and, after a six-year wait, proceed with an entirely different project whose impacts had never been analyzed in that EIS. Thus, the period of limitations cannot begin to run until the plaintiff has had an opportunity to learn of the defendant's decision to proceed with a project that has not

been analyzed in an EIS or selected in any ROD. As stated by Mandelker, D.R., in NEPA Law and Litigation at 4-134 (West 2010):

> [A] court may not apply the statute if the plaintiff had no way of discovering the existence of a cause of action until some time after it arose. In those cases, the cause of action accrues when a plaintiff knows or had reason to know of the injury that is the basis of the complaint.

Here, the Mello Affidavit makes clear that plaintiff was unable to learn of all of the changes in the CMRR-NF program, or the magnitude of the entire Pajarito Corridor program, until earlier in 2010, when NNSA began to make public the extent of the changes. Mello Affidavit, pp. 2-3, 19-23. These are closely guarded projects involving nuclear weapons production. There was no way plaintiff could have learned of the scope and nature of planned changes unless defendants announced them. That did not happen until early 2010, and any period of limitations began to run at that time.

In addition, the statute of limitations does not apply to continuing NEPA violations. Mandelker at 4-134. The violation here is undeniably a continuing one. Defendants have not complied with NEPA, but they show no inclination to pause, analyze the post-2004 changes to the CMRR-NF project, and reconsider their decision to build the CMRR-NF in light of presently viable alternatives. Instead, they rush forward to complete construction by an arbitrary deadline imposed by the Administration, regardless of the environmental consequences. Such action is a continuing violation of NEPA and the statute of limitations is not applicable to foreclose a remedy for that violation.

B. The Case is Ripe for Consideration.

In contrast to their untimeliness argument, defendants also ask the Court to dismiss this action for lack of ripeness. The doctrine of ripeness exists to protect agencies from "judicial interference until an administrative decision has been formalized and its effects felt in a concrete

way by the challenging parties," lest the Court adjudicate "abstract disagreements over administrative policies," *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-49 (1967). This is not an abstract dispute.

Defendants claim that there can be no judicial review until there is "final agency action" (5 U.S.C. § 704), citing *Bennett v. Spear,* 520 U.S. 154 (1997), and that there has been no such action on the updated CMRR-NF project until defendants issue a pre-ordained SEIS in an attempt to legitimize their action.[3] (D.Br. 12). But defendants are clearly proceeding with the CMRR-NF based upon an agency decision, and have not followed NEPA-mandated procedures in doing so. "The result of that process is one that will directly affect the parties." *Franklin v. Massachusetts,* 505 U.S. 788, 797 (1992). The Supreme Court has emphasized the difference between NEPA and other statutes, stating that a NEPA case is ripe at this stage: "Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 733 (1998). Here, defendants' "irreversible and irretrievable commitments of resources" (D.Br. 15), without required NEPA compliance, are underscored by the fact that defendants have already spent on the CMRR-NF the *entire amount* that was estimated in 2003 to pay for the *entire* CMRR facility. *See* Mello Affidavit, pp. 5-6, 24.

Defendants seek to distract the Court from their NEPA failures by calling attention to a different, and future, NEPA process, stating that "NNSA had not completed its decision-making process," that "the decision-making process on the updated proposed CMRR-NF will not be complete until the SEIS is finished and a new ROD is issued" (D.Br. 13), and that NNSA is "still evaluating the aspects of relative sizing and layout" (D.Br. 16). But defendants are well down

[3] Of course, a ROD issued in 2004 authorized the CMRR-NF as originally planned. Normally, review may take place when a ROD is issued. (40 CFR § 1500.3) However, Defendants have not followed that ROD and may not elevate their departure from the terms of the 2004 ROD into a device to escape judicial review.

the road in executing a major federal action without NEPA support. Moreover, defendants' claims that their plans are uncertain are disingenuous in light of their statements that the CMRR-NF is critical to the national security (D.Br. 1), their headlong rush to carry out construction, and public commitments from high-level members of the Administration. Mello Affidavit, pp. 26-30.

Further, defendants have already decided the outcome of the forthcoming NEPA process. It is a NEPA violation for defendants to predetermine the result of the future NEPA process before the NEPA documentation is complete. *See: Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010); *Silverton Snowmobile Club v. U.S. Forest Serv.,* 433 F.3d 772, 780-81 (10th Cir. 2006); *Lee v. U.S. Air Force,* 354 F.3d 1229, 1240 (10th Cir. 2004); *Davis v. Mineta,* 302 F.3d 1104, 1112 (10th Cir. 2002); *See Metcalf v. Daley,* 214 F.3d 1135, 1143 (9th Cir. 2000); *Int'l Snowmobile Manufacturers' Ass'n v. Norton,* 340 F.Supp.2d 1249, 1260 (D. Wyo. 2004). Since defendants have predetermined the question and have already decided to build the CMRR-NF in accordance with their internal plans, a NEPA violation is occurring now, and there is no point in waiting for new documents and a supposed new decision that merely rubber-stamps that which is already in motion.

If the CMRR project goes forward as defendants intend, the process will make it increasingly certain that the CMRR will be constructed as defendants plan and that plaintiff's members will undergo the pains and risks of that project. When and if NEPA compliance is achieved, the project may have gone so far that irreparable injury will be sustained, *see Highway J Citizens Grp. v. U.S. Dep't of Trans.,* 656 F.Supp.2d 868, 878 (E.D. Wis. 2009), merely reducing NEPA to an empty formality. Consequently, NNSA's action in proceeding with its

CMRR project itself "predetermines the future" (Mandelker at 4-113) by limiting the choices available. *See Laub v. U.S. Dep't of the Interior,* 342 F.3d 1080, 1091 (9th Cir. 2003).

It is recognized that "the hardship to the parties of withholding court consideration," *Abbott Laboratories,* 387 U.S. at 149, is a critical consideration in determining ripeness. (D.Br. 17) Defendants state that there is no "concrete agency action that harms or threatens to harm Plaintiff's interests." (D.Br. 14) But the hardship is real. Members of the plaintiff organization are exposed to:

A. Immediately forthcoming impacts of the construction effort, including the closure of Pajarito Road to all but construction workers; the onset of large-volume truck traffic as massive quantities of concrete and other construction materials are brought to the site; years of dust, noise, fumes, and air pollution attendant upon major construction work; the visual impact of removal and relocation of huge volumes of excavated spoil; and the destruction of large swaths of vegetation, impacting vistas and native wildlife;

B. Short-term risks of the continued operation of the existing CMR Building, which defendants have failed to maintain in condition that meets current standards for seismic risk and for risk of nuclear accident and release of radionuclides;

C. Fifty years of enhanced risks of installation and operation of an enlarged plutonium storage, research, and fabrication facility in Los Alamos, containing at least twice the plutonium capacity of the current CMR building, and capable of carrying out large volume plutonium pit refurbishment and production, operations that entail significant risks of nuclear accident and release of radionuclides; and

D. Risks of releases of radioactivity and hazardous substances in the demolition of the existing CMR Building and the ultimate demolition of the CMRR-NF Building, when its life is concluded.

Cases in the Tenth Circuit confirm that plaintiff's NEPA claim is ripe. *Friends of Marolt Park v. U.S. Dep't of Trans.*, 382 F.3d 1088, 1095(10th Cir. 2004), holds that a claim that an agency violated NEPA's procedural requirements becomes ripe when the alleged procedural violation occurs, assuming the plaintiff has standing to bring the claim.[4] Again, in *Sierra Club v. U.S. Dep't of Energy,* 287 F.3d 1256, 1264-65 (10th Cir. 2002), the case was ripe where DOE, without NEPA analysis, granted a road easement that might be used to construct a mine, even though a further NEPA analysis might be required before a road is built, and the harm to plaintiff might not occur until years in the future: "In the context of a NEPA claim, the harm itself need not be immediate, as 'the federal project complained of may not affect the concrete interest for several years,'" at 1265, *quoting from Comm. to Save Rio Hondo v. Lucero,* 102 F.3d 445, 449 n.4 (10th Cir. 1996). *See also Catron County Bd. of Commissioners v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1433 (10th Cir. 1996) (ripeness found where plaintiff County asserted that agency action would in the future prevent the diversion and impoundment of water by the county, in case of future flooding). Here, the harm is both immediate and prospective, since construction is ongoing and the CMRR will have a 50-year life.

Another factor is the "fitness of the issues for judicial decision," *Abbott Laboratories,* 387 U.S. at 149. This is, in essence, a classic NEPA case. The NEPA analysis supposedly

[4] *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573 n. 7 (1992): "There is much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for rederessability and immediacy. Thus, under our case law one living adjacent to the site for the proposed construction of a federally licensed dam has standing to challenge the licensing authority's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years."

supporting the defendants' actions is clear: it is the 2003 EIS and 2004 ROD. No other basis exists for the defendants' current activities. And the nature of the defendants' "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C), can readily be made clear.

It does not defeat ripeness that additional, albeit hollow, NEPA analyses may be promised. In *Sierra Club,* where additional NEPA analyses would be required in the future, the Tenth Circuit said that the dispute was nevertheless ripe. (287 F.3d at 1264). Here, likewise, defendants assert that further NEPA processes show that the dispute is unripe. (D.Br. 12-20) But, contrary to their intimations to this Court, defendants do not propose to cease the planning, design, and construction of the CMRR-NF while they carry out belated NEPA efforts. No precedent supports dismissal of a NEPA case where the defendant agency has failed to comply with NEPA, makes no offer to suspend its NEPA-unsupported federal action, and merely proposes to issue new NEPA documents in another year.

To dismiss this case would only cause yet more delay in the legally-required NEPA processes, a delay which would only add to the project's momentum and further entrench defendants' resolve, unsupported by NEPA analysis, to carry out the CMRR-NF project, creating several certain environmental harms and raising a serious risk of other such harms.

C. This Case is Presently Justiciable.

Defendants assert that plaintiff's claim is moot, because defendants intend to conduct additional NEPA inquiries. Importantly, "the burden to prove mootness is on the defendant" Mandelker, at 4-123. A party asserting mootness has the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.,* 528 U.S. 167, 189 (2000).

There is no mootness here. Defendants (a) do not propose to discontinue their ongoing planning, design, and construction activities pursuant to their internal and nonpublic decision to enlarge the CMRR-NF project far beyond the alternatives discussed in the 2003 EIS, and (b) do not propose to prepare a new EIS consistent with DOE regulations; rather, they propose to prepare a supplement to the 2003 EIS, which they hope to complete some time in 2011 to rubber-stamp the on-going project and as a pretext designed to avoid meaningful examination of alternatives to the behemoth CMRR-NF project. The schedule for the SEIS, of course, cannot be guaranteed.

Defendants state that a case is moot when an agency is no longer relying on an old decision. (D.Br. 21) But, the CMRR project has no NEPA foundation except for the 2003 EIS—on which the defendants have relied in obtaining multi-million dollar appropriations from Congress and are currently relying to continue with planning and construction activities. Defendants do not even propose to stop their unlawful conduct of proceeding with the CMRR-NF project as a *fait accompli*. Instead, defendants intend to continue with the CMRR-NF project in its current much-expanded form for the foreseeable future and certainly while the SEIS is in preparation. It is beyond dispute that the 2003 EIS is wholly inadequate and that defendants have predetermined the outcome of any further analyses to support their current undertakings. The CMRR-NF project is, therefore, an ongoing NEPA violation, and one that causes significant injury to plaintiff and its members. Plaintiff has sued to stop that project. That claim is not moot by any possible standard.

The Tenth Circuit explained circumstances giving rise to mootness in *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096 (10th Cir. 2010). There, a challenged biological opinion issued pursuant to 50 CFR § 402.14(g)(4) by the Fish and Wildlife Service

had been succeeded by a new, and apparently compliant, biological opinion. The court determined that litigation challenging the prior opinion had become moot. (*Id.* at 1111-15). However, *Silvery Minnow* explains that a defendant's "voluntary cessation" of an illegal practice does not normally render the case moot. (*Id.* at 1115). Such cessation can only result in mootness if "(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." (*id., quoting from City of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979)); *see also Chihuahuan Grasslands Alliance v. Kempthorne,* 545 F.3d 884 (10th Cir. 2008); *Wyoming v. U.S. Dep't of Agriculture,* 414 F.3d 1207, 1212 (10th Cir. 2005); *Colo. Off-Highway Vehicle Coal. v. U.S. Forest Serv.,* 357 F.3d 1130, 1135 (10th Cir. 2004).

Clearly, defendants' proposal to *keep going* with their unlawful CMRR-NF project, causing continuing damage to the environment and to plaintiff and its members, fails to meet that test. Just as plainly, defendants' plan to issue a SEIS next year gives no reasonable prospect of repairing the NEPA violation; instead, defendants have merely sought to, in small degree, "change[] course simply to deprive the court of jurisdiction." *Nat'l Adver. Co. v. City of Miami,* 402 F.3d 1329, 1333 (11th Cir. 2005). Most basically, the violations have not been corrected, and there is no reason to expect that they will be.

Thus, defendants cannot render this case moot simply by saying that they will generate additional documents. To promise more paperwork does not "heal[] any injuries" (D.Br. 22), nor may it equate to ceasing the challenged conduct. (D.Br. 23). Indeed, a defendant may not render a case moot simply by voluntarily ceasing the challenged activities. But defendants do not even propose to cease their illegal activities. Thus, there is no question of "resuming" the challenged

conduct (D.Br. 23), because defendants do not propose to stop even for a moment. Their actions are a continuing violation, and the suit is not moot.

In addition, defendants propose to prepare only a SEIS—not a new EIS. But defendants have chosen to carry out a CMRR project that far exceeds in scope, budget, and duration any of the alternatives in the 2003 EIS. By defendants' actions the range of reasonable alternatives (40 CFR § 1500.2) has been dramatically enlarged. Yet defendants propose to achieve NEPA compliance by preparing, in effect, an addendum to the 2003 EIS, without making any commitment to examine the alternatives that are presently available to fit the reality of their decision.

Defendants do not even agree that they are legally required to prepare a SEIS. "It has long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct." *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 43 (1944). *See also Alton & S. Ry. v. Int'l Assoc. of Machinists and Aerospace Workers,* 463 F.2d 872, 879 n.13 (D.C. Cir. 1972)("a deliberate and persistent official interpretation is more likely to identify a 'recurring controversy' situation.").

Of course, when and if defendants achieve full NEPA compliance–by completing a new EIS examining all alternatives for the new project–claims as to the unlawfulness of action taken on the basis of the 2003 EIS may become moot. *See Greater Yellowstone Coal. v. Tidwell,* 572 F.3d 1115, 1121 (10th Cir. 2009). That has not yet happened. The hope or expectation of future compliance does not defeat this Court's jurisdiction over the present failure of compliance:

> This is not a case in which the government has already prepared an EIS, or even commenced such preparation. Plaintiffs cite numerous cases for the proposition that a suit to compel future action is moot only after it has been 'fully and irrevocably carried out.' *E.g., Univ. of Tex. v. Camenisch,* 451 U.S. 390, 398

> 398 (1981). To the court, this seems axiomatic. Accordingly, a suit to compel an EIS is rendered moot *when the EIS is completed* and filed. *Romero-Barcelo v. Brown,* 643 F.2d 835, 862 (1st Cir. 1981); *City of Newport Beach v. Civil Aeronautics Board,* 665 F.2d 1280 (D.C. Cir. 1981); *Upper Pecos Association v. Stans,* 500 F.2d 17 (10th Cir. 1974). Here, of course, the EIS process is not only unfinished, it has not begun. *Blue Ocean Preservation Society v. Watkins,* 767 F.Supp. 1518, 1523-24 (D. Haw. 1991) (*footnotes omitted*).

A defendant's "assertion that it hopes to fulfill, or even will fulfill, its NEPA obligations in the future does not address its current failures to act." *S. Utah Wilderness Alliance v. Norton,* 301 F.3d 1217, 1239 (10th Cir. 2002). There is a continuing and live controversy here that requires adjudication.

Finally, defendants invoke the doctrine of "prudential mootness." (D.Br. 24-26). But there is no indication that the defendants have "already changed or [are] in the process of changing [their] policies." (D.Br. 25) Since the central inquiry is, "have circumstances changed since the beginning of litigation that forestall any occasion for meaningful relief" (*Silvery Minnow* , 601 F.3d at 1122), and, specifically, "the likelihood that defendants will recommence the challenged, allegedly offensive conduct" (*id.*), and since defendants' unlawful conduct continues unabated, prudential mootness is inapplicable.

CONCLUSION

For the reasons set forth above and in the affidavit and exhibits submitted in support of this response, plaintiff respectfully requests that the Court enter an order denying the motion to dismiss.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 21st day of October, 2010, I filed the foregoing *Plaintiff's Response to Federal Defendants' Motion to Dismiss* electronically through the CM/ECF System, which caused the following parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP, Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, et al., Federal Defendants.	Case No. 1:10-CV-0760-JH-ACT **FEDERAL DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

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LIST OF ACRONYMS

APA	Administrative Procedure Act
CMR	Chemistry and Metallurgy Research Building
CMRR	Chemistry and Metallurgy Research Replacement
CMRR-NF	Chemistry and Metallurgy Research Replacement Nuclear Facility
DOE	Department of Energy
EA	Environmental Assessment
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
NNSA	National Nuclear Security Administration
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION

Because federal courts are courts of limited jurisdiction, "the presumption is that they lack jurisdiction unless and until a plaintiff pleads sufficient facts to establish it." Celli v. Shoell, 40 F.3d 324, 327 (10th Cir. 1994). Plaintiff has fallen far short of meeting this burden. Relying on unsubstantiated statements, hearsay, and arguments in an affidavit from its Executive Director that goes far beyond what a court might consider to establish jurisdiction,[1] Plaintiff mischaracterizes the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") and belies a fundamental misunderstanding of the National Environmental Policy Act ("NEPA").

As set forth in Federal Defendants' opening brief, the Department of Energy/National Nuclear Security Administration ("DOE/NNSA" or "NNSA") has already completed extensive environmental review of the CMRR-NF, including an environmental impact statement ("EIS") in 2003. While new developments and information have necessitated modifications in the design of the CMRR-NF, the purpose and need have not changed, nor has the scope of operations to be carried out in the facility. Cook Decl., Dkt. No. 9-1, ¶¶ 13, 14. No construction is occurring, and design of the proposed project is less than 50 percent complete. Id. ¶ 20. To assess the potential environmental effects of the design modifications, NNSA is preparing a supplemental EIS ("SEIS") and is currently receiving comments and suggestions from the public on the scope. 75 Fed. Reg. 60,745 (Oct. 1, 2010). The time to submit such comments recently was extended

[1] A court has wide discretion to consider affidavits to resolve disputed jurisdictional facts when considering a Rule 12(b)(1) motion to dismiss. Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995). In reviewing such a motion, however, a court "may not rely on conclusory or hearsay statements contained in the affidavits." J.S. ex rel. N.S. v. Attica Central Schs., 386 F.3d 107, 110 (2d Cir. 2004). Plaintiff's affidavit consists almost entirely of hearsay, ill-informed speculation, argument, and legal conclusions, and the Court should accord it no weight.

by 15 days. 75 Fed. Reg. 67,711 (Nov. 3, 2010).

Plaintiff's response presents nothing to address the Complaint's fatal jurisdictional defects. Federal Defendants moved for dismissal based on the statute of limitations for challenges to the 2003 EIS and 2004 Record of Decision ("ROD"). Federal Defendants also moved for dismissal because Plaintiff's challenge to the adequacy of the SEIS is not ripe for review, and because Plaintiff's claim that further environmental analysis of the proposed CMRR-NF is required were mooted by NNSA's decision to prepare an SEIS. Plaintiff's response mischaracterizes the limitations argument and presents a false dichotomy that claims cannot simultaneously be unripe and moot. Well-established case law and the facts show that Federal Defendants' jurisdictional arguments present the Court with the basis for dismissing all of the claims in this case, as Plaintiff has not established jurisdiction. Moreover, even had Plaintiff met this burden, the Court has the inherent power, through the doctrine of prudential mootness, to dismiss this case because NNSA is preparing an SEIS that will address the potential environmental effects of the design changes to the proposed CMRR-NF.

I. PLAINTIFF'S CHALLENGES TO THE 2003 EIS ARE TIME-BARRED

Plaintiff mischaracterizes Federal Defendants' statute of limitations defense. See Pl. Br. at 12-14. Federal Defendants' limitations defense focuses on Plaintiff's challenges to the 2003 EIS and 2004 ROD themselves. See Fed. Def. Br. at 10 (asserting statute of limitations to ¶¶ 65-79, 90 of Complaint). Because Plaintiff waited more than six years to bring these claims, they are time barred. 28 U.S.C. § 2401(a); Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army, 111 F.3d 1485, 1494-95 (10th Cir. 1997). See, e.g., Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 186-87 (4th Cir. 1999) (challenge to adequacy of NEPA analysis for

project arises on date of ROD, which constitutes the "final agency action" for the project pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 704); Friends of Tims Ford v. Tenn. Valley Auth., 585 F.3d 955, 964-65 (6th Cir. 2009) (same).

Plaintiff contends that these claims are not time barred because there is a continuing NEPA violation consisting of "on-going design and construction." Pl. Br. at 12. This contention is flawed. The two out-of-circuit cases Plaintiff cites in support of this argument are easily distinguishable. In both Oregon Natural Resources Council v. U.S. Forest Service, 445 F. Supp. 2d 1211, 1230-31 (D. Or. 2006), and Montana Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127, 1143 (D. Mont. 2004), the courts determined that the challenged final agency actions all took place within the six year statute of limitations. Here, the alleged failures of the 2003 EIS to comply with NEPA, as set forth in paragraphs 65-79 and 90 of the Complaint, all accrued on the date of the ROD, February 12, 2004, more than six years prior to the filing of the instant action. Federal Defendants do not raise a statute of limitations defense to Plaintiff's claims that DOE was required to prepare a new or supplemental EIS based on new information arising *after* the date of the ROD, which are the types of claims that were at issue in the cases that Plaintiff cites. Cf. Sierra Club v. Slater, 120 F.3d 623, 631 (6th Cir. 1997) (holding that the plaintiff's position that the statute of limitations did not bar claims about the adequacy of the original EIS "defies logic because they complain of actions taken by the [federal agency] at the time the final EIS was approved and the ROD was issued"). That Plaintiff may have some claims that are not barred does not revive claims for which the limitations period has expired.

II. PLAINTIFF'S CLAIMS ARE NOT RIPE FOR JUDICIAL REVIEW

In the motion to dismiss, Federal Defendants demonstrated that Plaintiff's claims that changes to the proposed CMRR project dictate a new NEPA analysis are not ripe for review because

there is no final agency action on DOE's new NEPA analysis, DOE/NNSA is not irretrievably committing resources, and judicial review at this stage would seriously harm DOE/NNSA. Fed. Def. Br. at 12-18. Plaintiff fails to rebut these arguments. See Pl. Br. at 14-18.

A. Plaintiff Has Not Shown that Its Claims Are Fit for Judicial Decision

Plaintiff glosses over its burden to identify a final agency action on the updated CMRR-NF Project. Colo. Farm Bureau Fed'n v. U.S. Forest Serv., 220 F.3d 1171, 1173 (10th Cir. 2000) (granting motion to dismiss since plaintiff failed to demonstrate that the challenged agency action was final). Instead, Plaintiff offers a wholly conclusory statement that "[Federal D]efendants are clearly proceeding with the CMRR-NF." Pl. Br. at 15. Plaintiff provides no factual support for this statement, let alone explains how the preliminary design work on the proposed CMRR-NF constitutes "final agency action." See id. The actions challenged in Plaintiff's Complaint do not mark the consummation of NNSA's decision-making process and do not determine rights and obligations or result in legal consequences. Fed. Def. Br. at 13 (citing Bennett v. Spear, 520 U.S. 154, 177-78 (1997); Franklin v. Massachusetts, 505 U.S. 788, 797 (1992); Ctr. for Native Ecosystems v. Cables, 509 F.3d. 1310, 1329 (10th Cir. 2007)).

Design work is not a "final agency action" because NNSA still must issue final approval for the proposed CMRR-NF before construction. 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). Under analogous circumstances, the Second Circuit rejected the notion that design work constitutes final agency action that would be ripe for judicial review:

> [T]he proposed [study] may reaffirm the [project], reform it, or even recommend that it not be constructed. We are asked to intervene in an administrative process which

> at this point has created no rights or obligations and involves no legal consequences .... We conclude that no final agency action has been taken, that the issues are not ripe for adjudication and that our intervention would not only be a waste of judicial resources but an untoward interference in the administrative process.

Envtl. Def. Fund, Inc. v. Johnson, 629 F.2d 239, 241 (2d Cir. 1980).

Not only does Plaintiff fail to identify any final agency action, it also fails to show that NNSA has made irreversible and irretrievable commitments of resources. Plaintiff alleges only that large amounts of money have been expended on preliminary design work for the proposed CMRR-NF, allegations that include inaccurate past amounts and speculative, unappropriated funds in the total. Pl. Br. at 15; see Mello Aff. ¶ 54. This conclusory statement, with no supporting case law, is at odds with case law holding that even the expenditure of substantial amounts of money is not an irretrievable commitment of resources. See WildWest Inst. v. Bull, 547 F.3d 1162, 1169 (9th Cir. 2008) (pre-marking of [hazard] trees did not irretrievably commit agency to a particular course of action, notwithstanding expenditure of over $200,000 to mark the trees); Haw. County Green Party v. Clinton, 124 F. Supp. 2d 1173, 1198 (D. Haw. 2000) (spending $350 million on a weapons system was not an irretrievable commitment of resources, because "doing research and building a ship do not mark the consummation of agency decision making on deployment").

Absent final agency action or an irreversible and irretrievable commitment of resources, Plaintiff cannot establish that its claims are fit for judicial decision. Therefore, Plaintiff's claims are not ripe for judicial review.

B. Plaintiff Has Failed to Meet Its Heavy Burden to Show Predetermination

Plaintiff contends that its claims are ripe for review because NNSA has predetermined the outcome of the SEIS. Pl. Br. at 16-17. This contention is not supported by the facts or controlling case law. Under circumstances not present here, evidence of predetermination can be used to show

that an agency failed to take the requisite "hard look" at environmental impacts, and therefore acted arbitrarily and capriciously in violation of the APA. Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 713 (10th Cir. 2010). Any challenge based on predetermination, however, can only be reviewed *after* an agency has completed the NEPA process. See id. at 714 (considering predetermination of the *result* of an environmental analysis).

Even assuming that Plaintiff could assert predetermination at this stage, "[a] petitioner must meet a high standard to prove predetermination." Id. "[P]redetermination occurs only when an agency *irreversibly and irretrievably* commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, *before* the agency has completed that environmental analysis." Id. (emphases in original). Predetermination is not "present simply because the agency's planning, or internal or external negotiations, seriously contemplated, or took into account, the *possibility* that a particular environmental outcome would be the result of its NEPA review of environmental effects." Id. at 715 (emphasis in original). Nor is predetermination present when an agency enters into a series of agreements that are contingent upon the completion of NEPA requirements. Lee v. U.S. Air Force, 354 F.3d 1229, 1240 (10th Cir. 2004).

To establish that NNSA has predetermined the outcome of the SEIS, therefore, Plaintiff must show an irreversible and irretrievable commitment of resources. As discussed in Part II.A, supra, Plaintiff cannot meet this requirement.[2] Plaintiff therefore failed to meet the stringent standard

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[2] Plaintiff speculates that the proposed CMRR-NF will have proceeded far enough to inflict an irreparable injury by the time the SEIS is completed. Pl. Br. at 16. Even if this were true, which it is not, see Cook Decl. ¶ 21 (stating that there will be no construction during the SEIS period), it has no bearing on the predetermination inquiry because an irreparable *injury* does not constitute an irreversible and irretrievable commitment of *resources* – the relevant standard for predetermination.

required for a finding of predetermination. Forest Guardians, 611 F.3d at 714.

C. Plaintiff Will Not Suffer Any Hardship During The SEIS Process

Plaintiff contends that if judicial review is withheld until completion of the SEIS, members will be exposed to: (1) impacts from construction; (2) short-term risks of the continued operation of the existing CMR Building; (3) enhanced risk from the CMRR-NF; and (4) risk from the demolition of the CMR Building and CMRR-NF. Pl. Br. at 17-18. These alleged harms are speculative, unrelated to the present action, and not immediate.

The first allegation of hardship is inaccurate, because no construction will occur at least until June 2011, the end of the expected SEIS period. Cook Decl. ¶ 21, 25. The second allegation is unrelated to the design, construction, and operation of the proposed CMRR-NF because the present action challenges the NEPA process of the proposed CMRR-NF, not the CMR Building. See Compl. Moreover, Plaintiff ignores the analysis of this issue in the 2003 EIS and decision in the 2004 ROD. The third allegation is more than ten years away because the CMRR-NF, if authorized after completion of the SEIS, will not be operational until at least 2022. Cook Decl. ¶ 25. The fourth allegation is even more remote. See id. ¶¶ 8, 23 (if authorized, proposed CMRR-NF has a life expectancy of at least 50 years).

Plaintiff's speculative, unrelated, and distant harms are not the certain or immediate hardships courts consider when evaluating ripeness. Utah v. U.S. Dep't of the Interior, 535 F.3d 1184, 1197-98 (10th Cir. 2008) (hardship element generally falls into one of two categories: (1) where "parties would have faced significant costs, financial or otherwise, if their disputes were deemed unripe for adjudication"; and (2) where "the defendant had taken some *concrete action* that threatened to impair – or had already impaired – the plaintiffs' interests.")

(citations omitted; emphasis in original). Plaintiff has not identified any significant costs or threats to its interests that will occur during the SEIS period. On the other hand, allowing NNSA to complete the SEIS will have tangible benefits to judicial economy because it will allow further factual development of the potential environmental effects from the design changes to the proposed CMRR-NF. Id. at 1198; Fed. Def. Br. at 18-19.

D. Plaintiff Has Not Suffered a Procedural Injury

The only argument that Plaintiff can muster that its claims are ripe for review is that it has suffered an unspecified procedural injury. Pl. Br. at 18. The case cited by Plaintiff to support this argument, however, only confirms that Plaintiff has *not* suffered a procedural injury. In Friends of Marolt Park v. U.S. Dep't of Transp., 382 F.3d 1088, 1095 (10th Cir. 2004), the Tenth Circuit found the NEPA claim ripe for review because the agency should have issued an SEIS that would have further considered the environmental impacts of the proposed project. Here, the *exact opposite* is occurring. NNSA is already preparing an SEIS to analyze the potential environmental impacts of design changes to the proposed CMRR-NF. Cook Decl. ¶ 16. As part of this process, Plaintiff (and the public) will be afforded an opportunity to comment on the draft SEIS, and DOE also added an extended, pre-draft SEIS public scoping process, including two public meetings. Id. ¶ 17.

Plaintiff also contends that its claims are ripe for review because NNSA will complete only "additional, albeit hollow, NEPA analyses" in the future. Pl. Br. at 19. Plaintiff cites Sierra Club v. U.S. Dep't of Energy, 287 F.3d 1256, 1264 (10th Cir. 2002), for the proposition that it has already suffered a procedural injury even though NNSA will complete an SEIS for the proposed CMRR-NF project. See id. In Sierra Club, the Tenth Circuit found that the plaintiff's procedural claim was ripe because it challenged the granting of an easement, a final agency action that had already taken place

without an EIS being prepared. 287 F.3d at 1264-65. The Sierra Club Court itself distinguished the precise situation at issue here, noting that in Utah v. U.S. Dep't of the Interior, 210 F.3d 1193, 1196-97 (10th Cir. 2000), it had held that "the matter was not ripe for adjudication because the [federal agency] was performing a NEPA analysis and the NEPA procedure would give the [plaintiff] adequate opportunity to raise its concerns." 287 F.3d at 1264. Unlike Sierra Club (but like Utah), NNSA is preparing an SEIS that will provide Plaintiff and the public ample opportunity to comment on the design changes to the proposed CMRR-NF before a final decision is made to begin construction. See Part II.A, supra; Cook Decl. ¶ 17. Plaintiff's claims are not ripe.[3]

III. PLAINTIFF'S CLAIMS ARE MOOT BECAUSE NNSA IS PREPARING AN SEIS

Plaintiff contends that its claims are not moot because NNSA "do[es] not propose to discontinue [its] ongoing planning, design, and construction activities," and because NNSA must prepare a "new" EIS rather than an SEIS. Pl. Br. at 20. Neither assertion is correct.

A. The Extraordinary Exception of Voluntary Cessation Does Not Apply

Where, as here, the conduct at issue is highly fact- and context-specific, and not likely to "recur" under similar circumstances, the voluntary cessation doctrine is inapplicable. Unified Sch. Dist. No. 259, Sedgwick County, Kan. v. Disability Rights Ctr. of Kan., 491 F.3d 1143, 1150 (10th Cir. 2007). Plaintiff's alleged violations of NEPA are no longer extant because the SEIS will

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[3] See also Coliseum Square Ass'n, Inc. v. Jackson, 465 F.3d 215, 245 (5th Cir. 2006) (holding that a NEPA claim was not ripe because it "would have inappropriately interfered with agency action, *viz.*, the reopened NEPA . . . review process[]"); Western Radio Services Co., Inc. v. Glickman, 123 F.3d 1189, 1197 (9th Cir. 1997) (noting that a federal agency had "not concluded its [NEPA process] with respect to [an] access road," and thus "[u]ntil the [federal agency] actually makes a final decision regarding the road, a challenge to the access road under NEPA is not ripe for review"); Center for Marine Conserv. v. Brown, 917 F. Supp. 1128, 1150 (S.D. Tex. 1996) ("Of course, any challenge to the supplemental EIS itself is not ripe for review, because there is no final agency action to review until the EIS is actually issued.").

address the potential environmental effects of the proposed design changes to the CMRR-NF. Any future decision to construct the CMRR-NF will be informed by the SEIS. Cook Decl. ¶ 18. NNSA's decision to prepare an SEIS, and inform future decisions based on the SEIS, is no "mere informal promise," but a concrete, intervening event that moots Plaintiff's claims. Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1118 (10th Cir. 2010); see also id. at 1117 n.15 (noting that "courts have expressly treated governmental officials' voluntary conduct 'with more solicitude' than that of private actors").[4] The voluntary cessation doctrine is not applicable.

B. Plaintiff's Demand for a "New" EIS Has No Basis In Law

Plaintiff repeatedly asserts that NNSA must prepare a "new" EIS to address the changes from the original proposed CMRR-NF design. Pl. Br. at 22-23.[5] This assertion has no basis in law. See Fed. Def. Br. at 18-19 (citing 40 C.F.R. § 1502.9(c) (authorizing preparation of an SEIS for substantial changes to a project)). Plaintiff has not identified any regulation that requires NNSA to complete a "new" EIS, because no such regulation exists. Rather, NEPA regulations confirm that preparing an SEIS, not creating a new EIS, is the appropriate procedure where there are "substantial changes to the proposal or significant new circumstances or information relevant to environmental

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[4] Plaintiff also wrongly contends that this case is not moot because planning and construction activities are ongoing. Pl. Br. at 20. The Assistant Director of NNSA has made a sworn statement that no construction will occur during preparation of the SEIS, and design work (which, as discussed in Part II.A, supra, does not constitute an irreversible and irretrievable commitments of resources under NEPA) will only advance by approximately 15 percent. Cook Decl. ¶¶ 20, 21, 25.

[5] Although Plaintiff raises this argument in its section on mootness, it is properly considered under ripeness because any such challenge to the adequacy of the SEIS must wait until NNSA issues a new ROD based on the SEIS. See Fed. Def. Br. at 18-19.

concerns." 10 C.F.R. § 1021.314(a); see also 40 C.F.R. § 1502.9(c). "DOE may supplement a draft or final EIS at any time to further the purposes of NEPA." 10 C.F.R. § 1021.314(b).

The CMRR-NF as currently proposed is not an entirely new proposal, as Plaintiff contends. Rather, NNSA is merely exploring an altered design of a building that will sit in the same location and serve the same purpose and need as the one contemplated in the 2003 EIS. Cook Decl. ¶¶ 13, 14. When faced with design changes far more substantial than those at issue here, courts have consistently found an SEIS to be the appropriate NEPA approach. See, e.g., Nat. Wildlife Fed. v. Marsh, 721 F.2d 767, 782-84 (11th Cir. 1983) (SEIS appropriate where agency proposal would increase acreage affected, change character of land, and change type of activity on land); Envtl. Def. Fund v. Marsh, 651 F.2d 983, 987-88, 1005-06 (5th Cir. 1981) (SEIS appropriate where agency proposing adopted substantial design changes that would, *inter alia*, increase land use by one half, flood an additional 5,000 acres, and cost an additional $330 million). Consistent with this law, an SEIS will allow NNSA to build upon the 2003 analysis, taking into account the design changes, while affording Plaintiff no less opportunity for comment and participation than a "new" EIS.

Plaintiff's reliance on Blue Ocean Preservation Society v. Watkins, 767 F.Supp. 1518, 1523-24 (D. Haw. 1991), for the proposition that NNSA is compelled to prepare a new EIS is misplaced. Pl. Br. at 22-23. In Blue Ocean, DOE never completed an EIS for a proposed geothermal power plant, so there was no EIS to supplement. 767 F. Supp. at 1520; see 754 F. Supp. 1450, 1452-53 (D. Haw. 1991) (providing factual background of project). Here, NNSA completed an EIS in 2003 for the proposed CMRR-NF and, based on new information and changes to the original design, decided

to supplement the 2003 EIS to address those changes. Cook Decl. ¶¶ 9, 12, 16.[6]

Finally, Plaintiff contends that the doctrine of prudential mootness is inapplicable because circumstances have not changed since the beginning of this litigation. Pl. Br. at 23. This contention is incorrect because the NNSA decided to prepare an SEIS to address design changes to the proposed CMRR-NF. Cook Decl. ¶ 16, 17. If Plaintiff decides that its concerns are not adequately addressed in the SEIS, Plaintiff may file a new action, after exhausting administrative remedies and satisfying other requirements of justiciability. Any future possible actions do not mean that the instant Complaint presents justiciable claims. NNSA's decision to prepare an SEIS shows that the controversy on which Plaintiff filed suit, the environmental analysis of the design changes to the proposed CMRR-NF, 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." S. Utah Wilderness Alliance v. Smith, 110 F.3d 724, 727 (10th Cir. 1997) (quoting Chamber of Commerce v. U.S. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980)).

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

Respectfully submitted on this 8th day of November, 2010.

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[6] Plaintiff also cites S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217 (10th Cir. 2002), for the proposition that there is a continuing and live controversy. Pl. Br. at 23. Not only is the fact pattern of this case different from the present action because NNSA continues to comply with NEPA with its decision to prepare an SEIS, but this case was reversed by the Supreme Court on the grounds that there was no ongoing federal action that could require supplementation. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 72-73 (2004).

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I hereby certify that on November 8, 2010, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, which transmittal of a Notice of Electronic Fling to the following CM/ECF registrants:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v. Case No. 1:10-CV-0760-JH-ACT

UNITED STATES DEPARTMENT OF ENERGY; THE HONORABLE STEPHEN CHU, in his capacity as SECRETARY, DEPARTMENT OF ENERGY; NATIONAL NUCLEAR SECURITY ADMINISTRATION; THE HONORABLE THOMAS PAUL D'AGOSTINO, in his Capacity as ADMINSTRATOR, NATIONAL NUCLEAR SECURITY ADMINISTRATION,

Defendants.

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM IN SUPPORT

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40 C.F.R. § 1505.1(e).....13

40 C.F.R. § 1505.2(b).....13

40 C.F.R. § 1505.2(c).....16

40 C.F.R. 1506.1.....14, 21

40 C.F.R. § 1506.1(a), (c).....14

40 C.F.R. § 1506.6.....21

40 C.F.R. § 1508.23.....12

40 C.F.R. § 1508.25(a)(1).....15

LIST OF ACRONYMS

APA	Administrative Procedures Act
CBR	Congressional Budget Request
CD	Critical Decision
CEQ	Council on Environmental Quality
CMR	Chemistry and Metallurgy Research building
CMRR	Chemistry and Metallurgy Research Replacement project
CMRR EIS	Chemistry and Metallurgy Research Replacement Environmental Impact Statement
CMRR-NF	Chemistry and Metallurgy Research Replacement Nuclear Facility
CR	Continuing Resolution
CTSPEIS	Complex Transformation Supplemental Programmatic Environmental Impact Statement
CWC-TRU	Consolidated Waste Capability-Transuranic Waste Facility
DBT	Design Basis Threat
DNFSB	Defense Nuclear Facilities Safety Board
DOD	Department of Defense
DOE	Department of Energy
DOJ	Department of Justice
DP	DOE Defense Programs
EIS	Environmental Impact Statement
FOIA	Freedom of Information Act
LANL	Los Alamos National Laboratory
LANS	Los Alamos National Security,LLC
LASG	Los Alamos Study Group
LASO	Los Alamos Site Office
LEP	Life Extension Program
MDA	Material Disposal Area
MPF	Modern Pit Facility
NEPA	National Environmental Protection Act
NF	Nuclear Facility
NMED	New Mexico Environment Department
NMSSUP	Nuclear Materials Safeguards and Security Upgrades Project
NNSA	National Nuclear Security Administration
NOI	Notice of Intent
PDS	Project Data Sheet
PF-4	Plutonium Facility Building 4
PSHA	Probabilistic Seismic Hazard Assessment
RFI	Request for Interest
RFP	Request for Proposals
RLUOB	Radiological Laboratory Utility Office Building
RLWTF	Radioactive Liquid Waste Treatment Facility
ROD	Record of Decision

RRW	Reliable Replacement Warhead
SA	Supplemental Analysis
SEAB	Secretary of Energy Advisory Board
SEIS	Supplemental Environmental Impact Statement
New START	Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms
SWEIS	Site-Wide Environmental Impact Statement
TA	Technical Area
TRP	TA-55 Reinvestment Project
UPF	Uranium Processing Facility

Preliminary Statement

Plaintiff The Los Alamos Study Group moves the Court for entry of a Preliminary Injunction, prohibiting defendants from expending any funds for the purposes of design or construction of the Chemistry and Metallurgy Research Replacement-Nuclear Facility ("CMRR-NF") and that portion of the Nuclear Materials Safety and Security Upgrades (NMSSUP), a security perimeter project, which is needed solely for CMRR-NF construction, until this case has been tried and judgment has been entered in this Court. Plaintiffs also request that the Court hold an evidentiary hearing on this matter and allow the introduction of the significant documentary evidence supporting this motion for a preliminary injunction.

Introduction

Defendants are currently engaged in one of the most massive and expensive violations of the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* ("NEPA"), that has ever been imposed on the American people. The violations consist of the continuing design and construction of the Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF"), by far the largest of a connected group of construction projects along Pajarito Road at Los Alamos National Laboratory ("LANL"). NEPA, put simply, requires federal projects of this type, which have a significant impact on the human environment, to be *preceded* by an environmental impact statement ("EIS") that analyzes the impact of the project and its reasonable alternatives. 42 U.S.C. § 4332. Under NEPA, agency decisionmakers must take a "hard look" (*Kleppe v. Sierra Club,* 427 U.S. 390, 410 n. 21 (1976)) at the analysis and select an alternative action *before* the agency makes irreversible and irretrievable commitments of resources that render their action a *fait accompli.*[1]

[1] NEPA also requires an agency issuing an EIS to *continue* to take a "hard look" at a project and to issue new NEPA documents if existing documents are overtaken by new information or changes in the project. *Norton v. Southern*

Defendants have ignored these requirements, which are mandatory and enforceable. Defendants have committed the National Nuclear Security Administration ("NNSA") to contracts that will bind the taxpayers to pay millions for the design and construction of major components of the CMRR-NF. Further contracts are pending. No one seriously claims – not even Defendants - that there is adequate NEPA documentation for the CMRR-NF, and certainly not for the entire Pajarito Corridor project.[2]

Defendants have tried to avoid the consequences of their continuing violations by asserting that they will prepare the required documentation *next year*—while they go forward with the project, pursuing increased "emergency" appropriations and accelerating their rate of spending, as they simultaneously claim to conduct an objective NEPA analysis. Preparing the necessary environmental analyses *after* the agency has made commitments toward its completion violates the fundamental principles of NEPA. However, if Defendants proceed with the project, they will create "equities in favor of completion of a partially-completed project," *Davis v. Mineta,* 302 F.3d 1104, 1116 (10th Cir. 2002), so that they can argue that "the public interest in favor of continuing the project is much stronger," *Valley Community Preservation Commission v. Mineta,* 373 F.3d 1078, 1087 (10th Cir. 2004), making the project almost unstoppable and NEPA, therefore, illusory and unenforceable. The actual public interest, as declared in NEPA, would then be rendered irrelevant. An injunction is necessary to protect the public from the impacts of this massive and inadequately examined project.

Utah Wilderness Alliance, 542 U.S. 55, 72-73 (2004); *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 371, 374, 385 (1989). The DOE regulations themselves contemplate a new EIS, with new scoping, where the project has changed dramatically, as has occurred in the present case (10 C.F.R. § 1021.314).

[2] Roger Snyder, Deputy Manager of the NNSA Los Alamos Site Office, concedes in an October 9, 2010 interview with the *New Mexican* that defendants have not complied with NEPA, charitably characterizing defendants' actions to date as only "partially covered" by the 2003 EIS.

The Present Situation

The defendants issued an EIS in 2003 and followed it with a Record of Decision ("ROD") in 2004. (http://nepa.energy.gov/finalEIS-0350.htm; 69 Fed. Reg.6967; Feb. 12, 2004; http://edocket.access.gpo.gov/2004/pdf/o4-3096.pdf). The EIS concerns structures to be built no deeper than 50 to 75 feet below grade. There was no discussion of deeper excavation and no reference to a layer of volcanic ash known to underlie the site that would greatly complicate plans to construct at a greater depth, or meet seismic safety criteria. The ROD stated that "[b]ased on the CMRR EIS, the environmental impacts of the preferred alternative" (built 50 feet or less deep) would be "minimal" and "small." (69 Fed. Reg. at 6969). The ROD described the impacts of the preferred alternative:

> Construction activities would result in temporary increases in air quality impacts, but resulting criteria pollutant concentrations would be below ambient air quality standards. Construction activities would not impact water, visual resources, geology and soils, or cultural and paleontological resources. Minor indirect effects on potential Mexican spotted owl habitat could result from the removal of a small amount of habitat area, increased site activities, and night-time lighting near the remaining Mexican spotted owl habitat areas. The socioeconomic impacts associated with construction would not cause any major changes to employment, housing, or public finance in the region of influence.

(*Id.*)

With this description of minimal impacts, NNSA selected its preferred alternative, the then-contemplated "above ground" CMRR-NF.

Since 2004, the project has fundamentally changed.[3] In 2002, the budget for both the administrative building and the nuclear facility was estimated at $350-500 million. (FY 2003 NNSA Congressional Budget Request ("CBR"), Project, 03-D-103). In 2003, defendants told

[3] NNSA did issue a Supplement Analysis in January 2005 to consider a change in the location of CMRR "Phase A" (*i.e.*, RLUOB) structures. (DOE/EIS-0350-SA-01) NNSA claimed that the impacts of the proposed changes were adequately bounded by the impacts analyzed in the CMRR EIS. From 2005 until 2010, however, the project underwent major changes, but no further supplemental analyses were issued.

Congress that the total cost, including administrative costs, would be $600 million. (FY 2004 NNSA CBR at 347). The EIS stated construction would be completed in 2009. (at S-28). In 2003, NNSA stated that the Nuclear Facility would have 60,000 square feet of Hazard Category 2 space within 200,000 square feet of gross area. (EIS at 2-20; FY 2004 NNSA CBR at 349).

The project at present is depicted in defendants' 2010 presentations, showing construction along the "Pajarito Corridor." The principal connected activities include the CMRR-NF, the Nuclear Materials Safeguards and Security Upgrade ("NMSSUP") Phase II, the TA-55 Revitalization Project ("TRP") Phase II and III, the Radioactive Liquid Waste Treatment Facility ("RLWTF"), the Transuranic (TRU) Waste Facility, and other projects, including the relocation of Pajarito Road itself. (McKinney presentation, June 16, 2010; Bretzke presentation, June 16, 2010). These actions encompass Technical Areas ("TAs") 46, 48, 50, 52, 55, 63, 64, and 66, plus possibly others. (Mello Aff. Ex. 4). LANL's "Timeline of Major Projects on Pajarito Corridor through 2020" shows construction of the CMRR-NF lasting through 2020. The construction period has increased from 34 months to 144 months. A two year prove-in period and a four-year transition period are then planned. The schedule implies that the existing CMR must be used until at least 2022, probably longer, raising questions as to impacts of such use and the improvements required for safety, including structural safety.

The CMRR-NF has changed from a structure to be built to a depth of 50 feet to a structure requiring an excavation to 125 feet, with the bottom 50-60 feet of the hole filled with concrete. (Cook Aff. ¶ 13)(DNFSB CMRR Facility Project Certification Review, Report, Sept. 4, 2009, at 2-4, 2-6). As a result, the total volume of excavation for the CMRR-NF increased from about 167,000 cubic yards in 2003, to 579,000 to 704,000 cubic yards in 2010, a three- to

four-fold increase in construction equipment usage, spoil haulage, and disposal needs. The volume now remaining to be excavated has increased six-fold.

Changes in the basic concept for the CMRR-NF have included the introduction of the "hotel concept" that would accommodate various unknown future uses, but requires large open floor areas and therefore requires large increases in concrete and steel. (DNFSB Staff Issue Report, April 16, 2008). The concrete now needed is 371,000 cubic yards, up from 3,194 cubic yards (SA at 7); the steel needed is 18,539 tons, up from 242 tons. (SA at 30, CMRR EIS at 2-21). The increases in materials by two orders of magnitude mean construction will require far more mining of concrete components and a massive trucking effort over many years.

In late 2009, defendants stated that the area of the CMRR-NF would be 270,000 square feet, with 38,500 square feet of Hazard Category 2 space (CMRR Project Update, March 20, 2009, Fong slide 21; Mello #1 Aff. 23). Thus, Hazard Category 2 space would decrease by 36% from the building analyzed in the 2003 EIS, and total area would increase 44%. Since then the gross area has increased to 381,130 sq. ft. (SA Table 1, at 6), roughly doubling the size analyzed in the 2003 EIS. (CMRR EIS at 2-19)

The CMRR-NF construction project now includes two concrete batch plants, a warehouse, a craft worker facility, an electrical substation, and an additional truck inspection site (McKinney presentation, Sept. 8, 2010, at 5; Bretzke presentation, June 16, 2010, at 7). The area required for the project itself, plus construction yards and office space, parking lots, concrete plants, utilities, security, spoil disposal, storm water retention, housing, and road realignment has more than quadrupled since the 2003 EIS estimated that only 22.75 acres, in addition to the 4

acres already taken for the first CMRR building, would be disturbed[4] (Bretzke presentation, June 16, 2010, at 8; CMRR Nuclear Facility Project Overview, Oct. 2010; Exh. A, Mello #2 Aff. at 12a). Presently, Pajarito Road is expected to be closed for two years, affecting traffic flow to and around Los Alamos, a requirement not mentioned in the 2003 EIS.

NNSA now plans for 1000 construction workers to be involved in the CMRR-NF project (SA at 25), an increase from 300 estimated in the 2003 EIS (at 2-21). Such an increase will may require temporary worker housing and affect infrastructure usage and economic activities.

Cost estimates for the CMRR-NF illustrate the scope of the dramatic changes. In February 2010, defendants estimated the cost at $3.4 billion (FY 2011 CBR, 227), about ten times the original estimate. Press accounts now say that the cost may exceed $5 billion. (*Nuclear Weapons and Materials Monitor* ("NWMM"), Oct. 25, 2010, at 2) Thus, today's CMRR-NF project bears little resemblance to the preferred alternative of the 2003 EIS and 2004 ROD. There has been no environmental analysis of the CMRR-NF that defendants are now building. There is no indication that, after the minor Supplement Analysis of early 2005, defendants gave any consideration to further NEPA analysis, as the project assumed its present greatly-expanded form.[5]

Defendants' Current Plans

The Obama Administration is publicly committed to construction of the CMRR-NF. Vice President Biden sent a letter to the Chairman and Ranking Member of the Senate Foreign Relations Committee, declaring the Administration's "unequivocal" support for the CMRR-NF

[4] The SA states that the laydown area in TA-63/46 will occupy an estimated 40 acres, and the laydown area in TA-48/55 will occupy an estimated 15 acres. Further, the cement plant in TA-63 will occupy about 15 acres, and the cement plant in TA-48/55 will occupy about five acres. (Pages 12, 13).

[5] When litigation impended, defendants apparently became motivated to draft a Supplement Analysis (SA), which they produced to plaintiff's counsel. The draft unctuously asserts that all of the impacts of the new greatly expanded project are "bounded" by the impacts disclosed in the 2003 EIS. This draft SA has never been signed. Defendants do not rely upon it.

project, shortly before a Foreign Relations Committee vote on ratification of the "New START" arms treaty (Vice President's Letter, Sept. 15, 2010). The Vice President promised that the Administration would seek additional funding to cover increased costs in future years. He stated that the President is committed to the "immediate start" of nuclear weapons modernization actions, including construction of the CMRR-NF. (*Id.*) DOE "weapons activities" are specifically included in the Continuing Resolution, which finances government operations at previous year levels, but appropriates an increase for weapons activities and the CMRR-NF. (HR. 3081, Sept. 29, 2010). The rate of spending, if continued through FY 2011, would increase the annual spending on nuclear weapons at LANL by $338 million. Despite the CMRR-NF's massive cost increases, the Administration persists in its unwavering support.

NNSA Headquarters has issued its program directive: "Plan for CMRR-NF completion by 2020 with operations in 2022." (Holmes presentation, June 10, 2010, at 4) NNSA has telescoped planning processes to accelerate construction of the CMRR-NF. Thus, it has combined two project management stages under DOE Order 413.3A of "approve performance baseline" and "approve start of construction" so that construction may proceed as soon as the baseline is established. In addition, NNSA has divided the CMRR-NF project into five separate "packages" so that construction on some parts may go forward, even if the baseline has not been established for other parts. (Bretzke presentation, June 16, 2010, at 7). As a result, it has been decided that the footprint of the CMRR-NF shall be 342 feet by 304 feet (Cook Aff. ¶ 13) and that all future design and construction must necessarily conform, without NEPA analyses. Contracts for interior fixtures have been let. (Snodgrass interview cited in Exh. A, Mello Aff. #2, Exh. 3).

A NNSA Performance Evaluation Plan ("PEP") governs the compensation of the LANL Management and Operating contractor, Los Alamos National Security, LLC ("LANS"). The FY 2010 PEP calls upon LANS to develop integrated planning to support Pajarito Corridor construction. (PEP at 121). LANS is to:

> Institute [] a process to manage the institutional interfaces and resolve issues for TA-50-55 related projects (CMRR, TA-55 Reinvestment, RLWTF, New TRU, and NMSSUP2) that enhance overall site project performance and minimize operational impacts for the next decade.

LANS is being rewarded for producing planning tools for these construction elements:

1. laydown, staging and warehousing;
2. concrete batch plant strategy;
3. parking and workforce transportation;
4. security strategy;
5. scope or schedule conflicts;
6. master integrated schedule;
7. multi-year staffing plan; and
8. FY 2011 and FY 2012 budgets.

If LANS meets each measure, it will receive an additional $300,000. That is, LANS will be compensated for enabling construction of the CMRR-NF and other Pajarito Corridor projects to proceed unchanged. NNSA and LANS have, in substance, unlawfully predetermined the impacts of the CMRR-NF project and agreed to disregard any future EIS or supplemental EIS (SEIS). *Davis v. Mineta,* 302 F.3d 1104, 1112-13 (10th Cir. 2002).

Defendants state that the CMRR-NF design is approaching "50 percent" completion. The cost to date has been $210 million; funds appropriated and obligated are more than that. A staff of 283 is working now. If they continue to work until June 2011, the design will be advanced by

about another 15 percent. (Cook Aff. ¶¶ 19, 20, 25) Further, 125 craft workers are scheduled to work on the CMRR-NF site in FY 2011, and 308 at all Pajarito Corridor projects. (Bretzke presentation, June 16, 2010, at 4).

NNSA has already excavated 90,000 cubic yards of earth and rock at the CMRR-NF site. (H.R. Report No. 110-185, June 11, 2007, at 105). Thirty-five separate construction contract packages are planned for award. (McKinney presentation, June 16, 2010, at 8). Approval of the first baseline and the beginning of construction of the Infrastructure Package is scheduled for March 2011. This package includes one concrete batch plant, temporary utilities, site preparation laydown, site utility relocation, site excavation, soil stabilization, warehouse design/build, and substation design/build. (Bretzke presentation, June 16, 2010, at 7).

Argument

Plaintiff has met the following standards for the issuance of a preliminary injunction in this NEPA case: (1) a substantial likelihood of success on the merits; (2) likelihood of irreparable harm to the movant if the injunction is denied; (3) threatened injury outweighs the harms that the preliminary injunction may cause the opposing party; and (4) an injunction will not adversely affect the public interest. *Winter v. Natural Resources Defense Council,* 129 S.Ct. 365, 374, 375 (2008); *Wilderness Workshop v. BLM,* 531 F.3d 1220, 1224 (10th Cir. 2008); *Greater Yellowstone Coalition v. Flowers,* 321 F.3d 1250, 1255 (10th Cir. 2003); *Davis v. Mineta,* 302 F.3d 1104, 1111 (10th Cir. 2002). Moreover, if the last three factors "tip strongly" in a plaintiff's favor, it may establish likelihood of success "by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Greater Yellowstone,* 321 F.3d at

1256, *quoted in Valley Community Preservation Commission v. Mineta,* 373 F.3d 1078, 1083-84 (10th Cir. 2004). Plaintiff here meets all of these requirements.

I. Plaintiff is Likely to Prevail on the Merits.

The complaint states the following five claims: (a) failure to prepare an applicable EIS and to implement the alternative chosen in the ROD; (b) failure to prepare an EIS addressing connected actions and cumulative environmental impacts; (c) failure to provide required mitigation measures and mitigation action plan; (d) failure to integrate NEPA analyses with decision-making processes for the CMRR-NF; and (e) failure to provide opportunities for public, tribal, and other government review and comment on the new CMRR-NF. The uncontradicted facts support all of plaintiff's claims.

A. Claim 1: Defendants Have No Applicable EIS Nor Are Defendants Following Any ROD.

The law is unambiguous that defendants are prohibited from continuing to commit resources and implement a major federal action without first preparing an EIS analyzing available alternatives and issuing a ROD that selects the preferred alternative. "The environmental impact statement often has been compared to the financial disclosure statement required by federal statute for corporate securities." Mandelker, D.R., NEPA Law and Litigation at 2-14 (West 2010). Before allowing a federal action to proceed, the court must "ascertain whether the agency has made a good faith effort to take into account the values NEPA seeks to safeguard." *Silva v. Lynn,* 482 F.2d 1282 (1st Cir. 1973). An injunction is appropriate where NEPA disclosure has not been made and the equitable requirements, including irreparable injury and inadequacy of damages, are met. *Monsanto Co. v. Geertson Seed Farms,* 130 S.Ct. 2743, 2756 (2010); see cases collected at Mandelker, at 4-224 through 4-229.

Defendants steadfastly ignore NEPA's mandate to analyze available alternatives and instead are proceeding unabated with the CMRR-NF, while promising to create more paperwork, after-the-fact, by conducting a SEIS to rubber-stamp retroactively the very project they are implcmenting today. Defendants' actions are plainly far out of compliance with NEPA. The 2003 EIS addressed a project that is far smaller, far less expensive, consumes far less materials, and causes far fewer and smaller impacts for a far shorter time than the 2010 CMRR-NF and connected actions in the Pajarito Corridor. None of the alternatives analyzed then is reasonable or even feasible. Defendants have rejected all of them. The 2003 EIS is now irrelevant. Defendants' current project is much changed since 2003, driven by new needs and priorities, and simply is not discussed in the 2003-04 documents, nor are any alternatives of similar scope. "The entire efficacy of the EIS process is called into question when changes are made to a project after the publication of a final impact statement." Andreen, The Pursuit of NEPA's Promise, 64 Ind. L.J. 205, 247-48 (1989), *quoted in Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 371 n. 14 (1989). .

Moreover, defendants are plainly committed to the project of 2010, and they do not intend to consider any alternatives to this $5 billion-plus project, even in this era of concern over the size of the federal deficit. The Administration stands behind the immediate construction of weapons modernization facilities—specifically, the CMRR-NF. Hundreds are at work on the CMRR-NF design. Defendants are poised to let additional contracts for design and construction, unless they are enjoined. Unprecedented funding was sought and received under the Continuing Resolution. Clearly, the choice to build the CMRR-NF has been predetermined. "Predetermination" is the violation of NEPA that occurs when an agency commits to a project before NEPA analysis of alternatives is conducted. *See: Forest Guardians v. U.S. Fish &*

Wildlife Service, 611 F.3d 692, 712 (10th Cir. 2010); *Silverton Snowmobile Club v. U.S. Forest Service,* 433 F.3d 772, 780-81 (10th Cir. 2006); *Lee v. U.S. Air Force,* 354 F.3d 1229, 1240 (10th Cir. 2004); *Davis v. Mineta,* 302 F.3d 1104, 1112 (10th Cir. 2002); *See Metcalf v. Daley,* 214 F.3d 1135, 1143 (9th Cir. 2000); *International Snowmobile Manufacturers' Association v. Norton,* 340 F.Supp.2d 1249, 1260 (D. Wyo. 2004).

As set forth in plaintiff's complaint, defendants have been and are continuing to violate numerous, central aspects of NEPA and its implementing regulations:

1. Defendants must prepare an applicable, accurate EIS before decisions are made or actions taken: 40 C.F.R. § 1500.1(b); no such EIS exists;

2. NEPA analysis and decisionmaking must be integrated into the agency's early planning. 40 C.F.R. §§ 1501.1(a), 1501.2, 1502.5; defendants abandoned the project they analyzed and began a quite different one;

3. An EIS must work as an action-forcing device that is used to plan actions and make decisions (40 C.F.R. § 1502.1); decisions are proceeding independently from any EIS;

4. An EIS must be prepared in time so that it is included in any recommendation or report on a proposal. 40 C.F.R. § 1508.23. DOE shall include sufficient time for proper NEPA review. 10 C.F.R. § 1021.200. DOE shall complete NEPA review before making a decision. 10 C.F.R. § 1021.210(b), (c). None of this was or is being done;

5. The proposal that is the subject of an EIS must be properly defined. 40 C.F.R. § 1502.4(a). Here, the proposal of 2003 involved different requirements from those of the 2010 project, *e.g.,* "hotel concept"; seismic resistance; and safety class systems;

6. An EIS must include all reasonable alternatives. 40 C.F.R. § 1502.14(a). This has not been done; the vastly-increased cost of the 2010 CMRR-NF makes many alternatives, and additional means of construction, reasonable;

7. The alternatives considered by the decisionmaker must be encompassed by the alternatives discussed in the relevant environmental documents. 40 C.F.R. § 1505.1(e); 10 C.F.R. § 1021.210(d). Here, the decisionmakers of 2009-10 have chosen an alternative not discussed in any EIS;

8. A ROD is required to identify all alternatives considered and state which is environmentally preferable. 40 C.F.R. § 1505.2(b). Here, the ROD of 2004 does not even address the project defendants are implementing in 2009-10;

9. Environmental consequences must be set forth. 40 C.F.R. § 1502.16. Here, the impacts of the massive construction project of 2010 have not been evaluated, and mitigation methods have not been explored;

10. No cost-benefit analysis of the 2010 CMRR project is incorporated or referred to in any EIS, as required by 40 C.F.R. § 1502.23. Any such analysis must consider all reasonable alternatives. Industry reports state that several cost-benefit analyses have been and are now being undertaken by, *e.g.,* DOE's Office of Cost Analysis, the Pentagon's Cost Analysis and Performance Evaluation group, and NNSA and DOE leadership (*NWMM*, Oct. 25, 2010, at 2);

11. The ROD must choose an alternative that is among those discussed in the EIS (40 C.F.R. § 1505.1(e)), but DOE has chosen and is pursuing an alternative that was not discussed in the EIS, nor chosen, nor even mentioned, in the ROD;

12. Defendants are prohibited, without a valid EIS, from committing resources which would prejudice selection of alternatives, or from taking actions that have an adverse

environmental impact or which would limit the available alternatives. 40 C.F.R. §§ 1502.2(f); 1506.1(a), (c). Here, defendants have spent hundreds of millions of dollars on design, have put hundreds of staff to work, have partially excavated the site, and are about to let construction contracts—without a valid EIS for this predetermined major federal action;

13. DOE "shall take no action concerning the proposal that is the subject of the EIS before issuing a ROD, except as provided at 40 C.F.R. § 1506.1." 10 C.F.R. § 1021.211. Clearly, DOE has acted outside the scope of permission under 40 C.F.R. § 1506.1, which allows only action that will not prejudice the ultimate decision on the program;

14. An EIS is used to assess impacts of proposed action alternatives, not to justify decisions already made. 40 C.F.R. §§ 1502.2(g), 1502.5. DOE, however, wishes to issue additional NEPA documents for the sole purpose of justifying its existing plans.

Based on the foregoing violations and defendants' own concession that the CMRR-NF is not authorized by any existing ROD, the conclusion is clear that defendants have violated NEPA and are continuing to violate NEPA by proceeding with the current CMRR-NF without an applicable EIS that has analyzed all available alternatives, and without a ROD authorizing the current CMRR-NF. Accordingly, plaintiff has demonstrated violation of NEPA's central requirement.

B. Claim 2: Defendants Have No EIS Addressing Cumulative Impacts.

NEPA regulations require agencies to include in an EIS "connected actions." Connected actions are those which:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). "The crux of the test is whether each of the two projects would have taken place with or without the other and thus had independent utility." *Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 969 (9th Cir. 2006), *quoted in Wilderness Workshop,* 531 F.3d at 1229.

In addition to having no applicable EIS for the CMRR-NF itself, many, and probably most, of the projects encompassed by the Pajarito Corridor project are interrelated and connected so that they constitute a "single course of action" and should be evaluated in a single EIS. For example, the Nuclear Materials Safety and Security Upgrades ("NMSSUP") Phase II barrier has the sole purpose of securing PF-4 and CMRR-NF. The Radioactive Liquid Waste Treatment Plant ("RLWTF") will provide waste treatment for these nuclear facilities. The TRU Waste Facility will receive waste from these and other nuclear facilities. The TA-55 Revitalization Project ("TRP II and III") addresses the PF-4 plant, which is part of the plutonium complex, of which the CMRR-NF would be a key element. Relocation of Pajarito Road would serve the same nuclear facilities. These projects, including the CMRR-NF, are coordinated with one another in their construction and operation.

Defendants' FY 2011 Biennial Plan and Budget Assessment on the Modernization and Refurbishment of the Nuclear Security Complex, May 2010 ("1251 Report") describes the PF-4 plant, the CMR and its successor CMRR, the RLWTF, and solid radioactive waste management collectively as an "overall system" that comprises several interdependent facilities. (1251 Report

at 23-24) It describes the PF-4 plant, the CMRR-RLUOB, the CMRR-NF, the RLWTF, and the TRU Waste Facility as an interrelated system of plutonium programs: "the larger system of nuclear facilities used to assess, surveil, manufacture, and/or refurbish plutonium components used in nuclear weapons." (at 28) Clearly, major work on any one of the elements of this system is one part of a set of connected actions under NEPA; defendants are treating these actions as interrelated, and a CMRR-NF EIS must therefore encompass all of these projects. We single out in particular that portion of the NMSSUP – moving hundreds of feet of security perimeter to a temporary new location, costing many millions of dollars, which has no other purpose than facilitating CMRR-NF construction.

C. Claim 3: Defendants Have Failed to Provide Mitigation Measures as Required by NEPA.

No mitigation measures are mentioned in the 2004 ROD, because the ROD says that there is nothing to mitigate. (69 Fed. Reg. 6967, 6972 (Feb. 12, 2004)). Plans have dramatically changed since 2004, and now the project, properly analyzed, includes a massive construction effort, with two cement plants, fed by legions of heavy trucks, ranks of excavation equipment, a work force three times the original size, ancillary buildings, road relocation, and construction of the CMRR-NF, the NMSSUP, the RLWTF, the CWC-TRU, and the TRP. The project will now extend until 2020. In this situation, a duty to examine and specify mitigation measures arises. (40 C.F.R. §§ 1502.14(f), 1502.16(e)-(h)). The agency must specify in the ROD what mitigation measures it is committed to adopt. (40 C.F.R. § 1505.2(c)). *See Robertson v Methow Valley Citizens Council,* 490 U.S. 332, 350-52 (1989); *Davis,* 302 F.3d at 1125; *Holy Cross Wilderness Fund v. Madigan,* 960 F.2d 1515, 1523 (10th Cir. 1992). DOE's regulations also require a mitigation action plan. (10 C.F.R. § 1021.331). Additionally, contrary to defendants' statements, DOE regulations also contemplate a new EIS in the face of these dramatic changes,

together with the comprehensive mitigation measures that must be set forth in a new ROD. 10 C.F.R. § 1021.314(c)(2). Defendants are out of compliance with these requirements.

D. Claim 4: Defendants Have Failed to Integrate Appropriate NEPA Analyses into Their Decision-Making Process.

Under NEPA, timing is critical: "Before an agency may take 'major Federal actions significantly affecting the quality of the human environment,' an agency must prepare an environmental impact statement . . . " *Silverton Snowmobile Club v. U.S. Forest Service,* 433 F.3d 772, 780 (10th Cir. 2006). The purpose of the EIS is "(1) to inject environmental considerations into the federal agency's decision-making process and (2) to inform the public that the agency has considered environmental concerns in its decision-making process." *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service,* 75 F.3d 1429, 1434 (10th Cir. 1996). Here, the record demonstrates, to the contrary, that defendants have failed to use NEPA processes to evaluate "proposed agency actions, rather than justifying decisions already made." (40 C.F.R. § 1502.2(g)).

Federal agencies must also integrate NEPA requirements with other agency planning procedures so that the processes run concurrently. (40 C.F.R. § 1500.2). But the 2004 ROD does not reflect the defendants' decision, because defendants' decision-making process continued long after 2004, resulted in fundamental changes in the CMRR-NF project, and ultimately abandoned the 2004 ROD altogether. Plainly, defendants have not carried forward any NEPA analyses concurrently with their evolving decision-making. Defendants' actual decision is to construct a CMRR-NF that lies far beyond the range of alternatives considered in the 2003 EIS, contrary to 40 C.F.R. § 1502.2(e).

E. Claim 5: Defendants Have Failed to Provide Required Opportunities for Public, Tribal, and Governmental Notice, Review and Comment.

It is uncontradicted that, after the ROD of 2004 and the first SA of 2005 and before this litigation, defendants have given no public notice of any NEPA activities in connection with the CMRR-NF. One purpose of an EIS is to provide "full and fair discussion of significant environmental impacts and . . . inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." (40 C.F.R. § 1502.1) There are provisions for public involvement in scoping (40 C.F.R. § 1501.7), preparation of the EIS (40 C.F.R. § 1503.1), and response to comments (40 C.F.R. § 1503.4). Here, plaintiff and its members have had no involvement, through the required NEPA processes, in defendants' post-2005 decisions to enlarge the CMRR-NF, to coordinate the CMRR-NF with the connected projects in the Pajarito Corridor, and to pursue a massive construction project that will continue through 2020. Failure to follow NEPA disclosure requirements directly injures plaintiff in its core functions of research and communication.

The Tenth Circuit recognized a similar NEPA violation, where a project had been modified but no NEPA disclosure was made, in *New Mexico ex rel. Richardson v. Bureau of Land Management,* 565 F.3d 683, 707 (2009):

> If a change to an agency's planned action affects environmental concerns in a different manner than previous analyses, the change is surely "relevant" to those same concerns. 40 C.F.R. § 1502.9(c)(1)(i). We would not say that analyzing the likely impacts of building a dirt road along the edge of an ecosystem excuses an agency from analyzing the impacts of building a four-lane highway straight down the middle, simply because the type of impact—habitat disturbance—is the same under either scenario. . . . NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide these from the public, simply because it understands the general type of impact likely to occur. Such a state of affairs would be anathema to NEPA's "twin aims" of informed agency decisionmaking and public access to information. *See Marsh,* 490 U.S. at 371; *Balt. Gas & Elec. Co.,* 462 U.S. at 97; *Citizens Comm.,* 513 F.3d at 1177-78.

The court continued: "While we agree that BLM's communication with the public, as far as it went, furthered NEPA's goals, it was no substitute for the substantive analysis required by section 1502.9(c)(1)(i). A public comment period is beneficial only to the extent the public has meaningful information on which to comment, and the public did not have meaningful information . . . ." (*id.* 708). Likewise, NEPA does not allow defendants to hide the impacts of its massive project from the public; the public was denied meaningful information, and the violation is clear. *See also Davis,* 302 F.3d at 1115 n. 5.

II. Plaintiff Will be Irreparably Injured if an Injunction is Not Granted.

It is readily apparent that defendants' continued activity on the CMRR-NF project will further entrench defendants' commitment towards its construction. Defendants are clearly making "irreversible and irretrievable commitments of resources." 42 U.S.C. § 4332(2)(C)(v). Defendants have already completed something less than 50% of the design effort; by mid-2011 they would complete another 15%. Additional final design contracts were scheduled for award in October 2010. Further detailed design and construction contracts will be awarded. At present 283 people are working on design efforts (Cook Aff. ¶ 19), and 125 craft workers are carrying out construction. (Bretzke presentation, June 16, 2010, at 4). NNSA has already excavated 90,000 cubic yards at the CMRR-NF site and stated it will issue RFPs for another $60 million in construction activities in October and November 2010. Thirty-five separate construction contract packages are planned for award. (McKinney presentation, June 16, 2010, at 8).

Plaintiff has submitted three affidavits by individuals, identifying how each of them will suffer harm if the CMRR-NF project continues on its present path. J. Gilbert Sanchez has filed an affidavit, stating that he resides at the Pueblo of San Ildefonso and is a former Governor of the Pueblo. *See* Exh. B. He fully supports the effort to require NEPA analysis of the CMRR-NF

and connected projects on the Pajarito Corridor. He states that the project, as now envisioned, will threaten sacred spaces and sites of his Pueblo. As a nearby resident, he regularly uses roads in the area and would suffer from the construction activity with its noise, dust, fumes, traffic, nighttime lighting, and offensive spoils and debris. He specifically points out that thousands of haulage trucks will bring material on roads near his home for about a decade, huge spoil piles would accumulate, construction lights will intrude upon the nights of New Mexico, and numerous facilities will generate airborne dust for a decade. Moreover, he frequents wild areas near Pajarito Canyon to collect game, wood and plants, and the construction and operation of the CMRR will inhibit wildlife from entering such sacred areas. In addition, both normal operation and possible accidents will cause releases of radioactivity, which will reach his home, which is less than 10 miles downwind of the CMRR-NF site.

Jody Benson, a Los Alamos school board member, makes an affidavit, pointing out impacts upon the Los Alamos community and upon herself personally from the planned construction, namely: traffic impacts, housing impacts, social impacts on local schools, impacts on local construction, loss of cycling opportunities, and the direct construction impacts of dust, noise, fumes, bright lights at night, and loss of wetlands and animal life. *See* Exh. C.

The Governor of the Pueblo of Jemez/Walatowa wrote to the defendants, pointing out their regulatory duty to present a draft EIS to affected Indian tribes, 40 C.F.R. §§ 1501.7, 1502.19, 1503.1, which was not done here—because no EIS covers the project now under way. He states his concern for water supplies for Jemez Pueblo, which originate in the Valles Caldera. He states that plutonium and uranium concentrations have been measured in the Valles Caldera at several times their regional mean concentrations, and he is concerned about the risk that

operations at the CMRR-NF will cause releases of such radionuclides. He requests that expenditures halt and a new EIS be prepared. (Exh. A, Mello #2 Aff. ¶19).

The Pajarito Group of the Sierra Club submitted comments to DOE detailing the fundamental transmutation of the CMRR-NF project and its departure from the 2003 EIS. They emphasize that DOE failed to provide notice to national organizations reasonably expected to be interested in the matter, as required by 40 C.F.R. § 1506.6. Moreover, the Pajarito Group's comments underscore the need, consistent with DOE's own regulations, to perform a new EIS to consider the "profound changes in the original project" and that DOE should alleviate the prejudice to affected parties by immediately ceasing all action that further entrenches DOE and NNSA's commitment to this project. *See* 40 C.F.R. §1506.1. (Exh. A, Mello #2 Aff., ¶ 20, Exh. 2).

As set forth in the affidavits and record evidence, the injuries here are highly foreseeable, including the effects of a massive construction project; such impacts establish irreparable harm. *Davis,* 302 F.3d at 1115. However, other effects consist of environmental risks, including the future loss of wildlife from nearby canyons or the release of radioactivity. Under NEPA, the "irreparable harm requirement is met if a plaintiff demonstrates a *significant risk* that he or she will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone,* 321 F.3d at 1258.

Moreover, the Tenth Circuit has made clear that, "[i]f construction goes forward on Phase I, or indeed if any construction is permitted on the Project before the environmental analysis is complete, a serious risk arises that the analysis of alternatives required by NEPA would be skewed toward completion of the entire project." *Davis v. Mineta,* 302 F.3d 1104, 1115 (10th Cir. 2002). There, the court stated that "harm to the environment may be presumed when an

agency fails to comply with the required NEPA procedure" (*id.*). The court found that plaintiffs had shown that "the environmental harm results in irreparable injury to their specific environmental interests" (*id.*), where plaintiffs' property was impacted by the project, and the court reversed and remanded for entry of a preliminary injunction. (*id.* 1126). Here, knowledgeable Los Alamos area residents and members of the plaintiff organization have made affidavits that they live or work nearby and the project will cause environmental damage that directly and personally affects them. Injunctive relief is therefore appropriate.

III. Defendants Will Not be Harmed by a Preliminary Injunction.

Based on defendants' statements to the Court that they supposedly are not "irretrievably committed" to the CMRR-NF, one would expect defendants to consent to the entry of a preliminary injunction so that they can conduct appropriate NEPA analyses and fully vet the available alternatives. We expect that defendants will refuse to do so, notwithstanding their attempt, under the threat of this litigation, to block further scrutiny by preparing a superficial SEIS to justify decisions already made. But even that hollow and insufficient gesture will cause a delay in construction of the CMRR-NF project by at least nine months, and there is no suggestion whatsoever that preparing a new EIS for this new project would delay it further. Moreover, if the current version of the CMRR-NF is the best choice – as defendants maintain - there is no plausible explanation why defendants should not immediately cease all CMRR-NF activities, consent to an injunction, and examine currently available alternatives with a fresh EIS.

Moreover, defendants have not complained of the prospect of economic loss, should the CMRR-NF project be postponed while they meet NEPA requirements. In any event, defendants have known since plaintiff cautioned them about NEPA violations in a letter dated July 1, 2010 that any contractual commitments would be made at their own risk, so that any costs thereof

would be a conscious "self-inflicted" injury, entitled to no equitable consideration. *Davis,* 302 F.3d at 1116. Indeed, defendants acknowledge the need for more NEPA analysis (D.Br. on Mot.. to Dismiss at 16, 17, Oct. 4, 2010), indicating that they are already prepared to accept some delay of the CMRR-NF project pending this Court's determination whether NEPA compliance can be achieved absent a new EIS with new scoping and consideration of currently available alternatives.

IV. The Public Interest Supports an Injunction.

It is established that "the public interest favors compliance with NEPA," *Davis,* 302 F.3d at 1116. An injunction here is consistent with the public interest and is clearly required to forestall a massive NEPA violation. *See Winter v. NRDC,* 129 S.Ct. at 377-81.

Defendants insist that construction of the CMRR-NF has not begun and will not begin until a SEIS is completed. (D.Br. on Mot. to Dismiss at 16, 17, Oct. 4, 2010; Cook Aff. ¶¶ 21, 23, 25) It is clear, however, that construction has already begun, albeit to an early and limited extent. Thus, the Court is not "confronted with equities in favor of completion of a partially-completed project." *Davis,* 302 F.3d at 1116, *quoted in Valley Community Preservation Council v. Mineta,* 373 F.3d 1078, 1087 (10th Cir. 2004).

Neither can it be argued that the national defense requires the CMRR-NF to be constructed on defendants' schedule. In the first place, defendants maintain that they have not made up their mind whether to construct the CMRR-NF. (D.Br. on Mot. to Dismiss at 2, 13, 16, 18, 19, Oct. 4, 2010; Cook Aff. ¶¶ 18, 20, 23) Thus, they cannot assert that national security requires it to be built, or to be completed by a given date.

Moreover, the CMRR-NF has a support function, namely: analytical chemistry and materials characterization in support of operations at the Plutonium Processing Facility ("PF-

4")(1251 Report at 25-26.). The PF-4 plant carries out the manufacturing or refurbishment of plutonium components of nuclear weapons. (1251 Report at 26). NNSA's phased approach will provide continuous support to plutonium programs through 2020:

> The overall strategy associated with CMRR is to provide a pathway for continuous support to plutonium programs between now and 2020. This requires a phased approach to moving existing operations out of the CMR facility and into the CMRR facilities. Presently, we rely completely on the CMR facility for support services to plutonium programs. When the RLUOB is fully equipped and operational in 2012, it will replace a portion of the existing CMR functions, thus reducing the risk exposure in the aging CMR facility. As the CMRR-NF comes on-line the remaining functions in CMR will transition to the new building and the CMR facility will be available for decommissioning. (*id.*)

Thus, NNSA has a strategy to support PF-4, even with a delay in a replacement for the existing CMR. Increases in PF-4's capacity to produce plutonium pits will take place through the PF-4 Recapitalization, known as the TA-55 Reinvestment Project ("TRP") Phases I, II, and III:

> The existing PF-4 facility is fully capable of producing pits and will complete a War Reserve production campaign on the W88 program in 2011. However, the existing program is limited to about 10-20 pits per year. The PF-4 Recapitalization will support the process equipment and other production enhancements inside of PF-4 to achieve the [Nuclear Posture Review] requirements. The strategy for doing this is to add additional equipment to augment the existing manufacturing line inside PF-4. (*id.* 27)

Thus, the addition of equipment to PF-4, not the construction of CMRR-NF, will enable NNSA to increase pit production capability from the present level of 10-20 pits per year to 80 pits per year. "Plutonium pit work is a concern because it is today's main rate-limiting capacity. The upgrades to PF-4 will address this capability and provide the required capability-based capacity." (*id.* 6. *See also* Table D-2)

The affidavit of Bob Peurifoy, whose credentials include heading bomb design at Sandia National Laboratories ("Sandia") from 1951-91, supports this conclusion and shows that there is no current national security need for the CMRR-NF. Mr. Peurifoy was Sandia's vice president

for technical support, which included safety and reliability assessments, stockpile surveillance, effects testing at Nevada Test Site, development and remote range testing, and military liaison. He directed the Sandia weapons development program; five of the eight nuclear weapons types now in the arsenal were designed in his organization. (¶ 1). Based upon a review by DOE's JASON Committee of studies conducted by LANL and Lawrence Livermore National Laboratory, he states that most plutonium pits have a credible lifetime of at least 100 years. (¶ 4). Thus, to date no pit aging problems have been reported, all warheads and bombs have been recertified based on 14 annual assessments by the lab directors, and no Life Extension Projects for stockpile warheads have involved the pits. (¶ 6-8). He concludes that a steady-state pit production capability of 60 pits per year would satisfy all stockpile needs, and this rate can be met by the LANL PF-4 facility without the CMRR-NF. (¶ 9). According to Mr. Peurifoy, "[B]eyond question, there is no national security cost to a delay of a few years in Nuclear Facility construction." (Exh. D, ¶ 11).

V. No Bond Should be Required for an Injunction.

Plaintiff is a nonprofit organization with principal interests in the operations and impacts of LANL as a nuclear weapons laboratory. The interests in issue here are those that are protected by NEPA. In a NEPA case, a bond for a preliminary injunction is generally not required because of the important public interest being vindicated and the statutory policy in favor of private enforcement and judicial review of agency action. The Tenth Circuit has stated: "Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered." *Davis,* 302 F.3d at 1126. Other pertinent factors apply here as well; thus, "plaintiffs' strong showing on the merits and the defendants' apparent prejudgment to

proceed prematurely with the Project before the required environmental studies were considered suggest that a large bond should not be required" (*id.*). This is such a case.

Conclusion

Defendants have placed the CMRR-NF on track for design and construction to proceed in tandem, and they plan to make further commitments of money and other resources in FY 2011 to carry out their commitment to the CMRR-NF project as they now envision it. They have effectively determined the course that the project should take and, unless the Court intervenes, they have no intention of considering the environmental impacts of the CMRR-NF project, the other Pajarito Corridor projects, or any reasonable alternatives. Only if the Court directs a halt to their rush to complete the project and enforces Congress's direction to the defendants to base their decisions upon complete environmental analyses will defendants meet their legal obligations under NEPA.

If defendants proceed unhindered with their massive plans, the environmental consequences will be manifold and huge, and no consideration will be given to less damaging alternatives. Plaintiff respectfully requests that this Court hold a hearing on this matter to allow the introduction of the voluminous documents in support of this motion and thereafter enter a preliminary injunction requiring that no further expenditures be made on the CMRR-NF project and those portions of the NMSSUP project needed only for CMRR-NF construction until defendants have complied with their NEPA obligations by preparing and reviewing a complete EIS for the CMRR-NF. No bond should be required, in view of the public interests served by such relief.

Respectfully submitted,

[*Electronically Filed*]

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Certificate of Service

I hereby certify that on this 12 day of November, 2010, I filed the foregoing *Plaintiff's Motion for Preliminary Injunction and Memorandum in Support* electronically through the CM/ECF System, which caused the following parties or counsel of record to be served by electronic means as more fully reflected in the Notice of Electronic Filing.

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