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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' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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APA	Administrative Procedure Act
CEQ	Council on Environmental Quality
CMR	Chemistry and Metallurgy Research Building
CMRR	Chemistry and Metallurgy Research Replacement
CMRR-NF	Chemistry and Metallurgy Research Replacement Nuclear Facility
CTBT	Comprehensive Test Ban Treaty
DOE	Department of Energy
EIS	Environmental Impact Statement
LANL	Los Alamos National Laboratory
LASO	Los Alamos Site Office
NEPA	National Environmental Policy Act
New START	New Strategic Arms Reduction Treaty
NMSSUP	Nuclear Materials Safety and Security Upgrades Perimeter
NNSA	National Nuclear Security Administration
NPT	Nuclear Non-Proliferation Treaty
RLUOB	Radiological Laboratory Utility Office Building
RLWTF	Radioactive Liquid Waste Treatment Facility
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement
TA	Technical Area
TRU	Transuranic

INTRODUCTION

Plaintiff seeks the extraordinary and, indeed, *unprecedented* remedy of a preliminary injunction preventing the Department of Energy/National Nuclear Security Administration ("DOE/NNSA" or "NNSA") from planning and designing the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") at Los Alamos National Laboratory ("LANL") in New Mexico. In satisfaction of the National Environmental Policy Act ("NEPA"), NNSA approved construction and operation of CMRR-NF in a 2004 Record of Decision ("ROD") based on a detailed Environmental Impact Statement ("EIS") completed in 2003. Declaration of Donald L. Cook, NNSA Deputy Administrator for Defense Programs, Dkt. No. 9-1 ¶¶ 9, 10; Declaration of Herman LeDoux, Federal Project Director for CMRR, Los Alamos Site Office ("LASO")/NNSA, Exh. B hereto, ¶¶ 3, 4. And, in continuing compliance with NEPA, NNSA elected to prepare a Supplemental EIS ("SEIS") to further analyze potential environmental impacts as NNSA identifies design changes necessary to maintain and improve the safety of CMRR-NF, even though the proposed scope of operations, building location, and footprint have not substantially changed. Cook Decl. ¶¶ 13, 14. Consistent with NEPA implementing regulations, NNSA is preparing the SEIS following the same procedures as it would for a "new" EIS. See 40 C.F.R. § 1502.9(c). Despite these efforts and although construction of CMRR-NF is not occurring, Plaintiff--which advocates nothing less than complete nuclear disarmament--is not satisfied.

Plaintiff cannot meet its heavy burden of establishing, through clear and unequivocal evidence, any of the four requirements for the drastic remedy of a preliminary injunction: 1) a likelihood of success on the merits; 2) irreparable injury; 3) balance of harms; and 4) public interest. See Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008) (identifying requirements). Plaintiff will not succeed on the merits of its claims. As set forth in Federal Defendants' pending

Motion to Dismiss, Dkt. Nos. 9-11, Plaintiff's challenges to the 2003 EIS are barred by the applicable statute of limitations, its claim that NNSA must prepare a new EIS is mooted by preparation of the SEIS, and its assertions as to what that new EIS must contain will not be ripe until NNSA completes the SEIS and issues a new ROD. Even if Plaintiff's claims were justiciable, they would fail because the 2003 EIS comprehensively reviewed potential environmental impacts of CMRR-NF, and NNSA is analyzing all relevant environmental impacts associated with proposed changes in the SEIS. Preparation of an SEIS does not require NNSA to ignore that it had already properly analyzed and approved CMRR-NF in the 2003 EIS and 2004 ROD, to disclaim the critical importance of CMRR-NF to the United States' national security and international policy interests, or to halt planning and design which, if anything, will aid the SEIS decision-making process. NEPA "predetermination" is about prejudging what environmental analyses will show before those analyses are conducted, not about identifying the need and urgency for the underlying federal proposal. Rather than locking into any set alternative for CMRR-NF, NNSA has responded to new information by modifying plans and designs to address safety and environmental concerns, and will continue to do so during the SEIS process--the exact opposite of predetermination.

Plaintiff's claims of irreparable injury are equally untenable. To be cognizable as an irreparable injury for preliminary injunctive relief "an injury must be certain, great, actual and not theoretical," and must be "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." Heideman v. S. Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003) (emphasis in original; citations omitted); see also Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1250 (10th Cir. 2001) (stating that "the injury must be both certain and great, and . . . must not be merely serious or substantial" and must be one that "the district court cannot remedy . . . following a final determination on the merits") (citations omitted). Plaintiff has fallen

far short of meeting this standard. CMRR-NF is not under construction. No construction will be undertaken at least until the SEIS is completed and a new ROD issued. Cook Decl. ¶¶ 20-21. The previous excavation at the CMRR-NF site was completed in accordance with the 2003 EIS based on the configuration of CMRR-NF as approved in the 2004 ROD. Plaintiff can only speculate that future construction of the facility might result in "noise, dust, fumes, traffic, nighttime lighting, and offensive spoils and debris" that may affect one of its members, who lives many miles away. Pl. Br. at 20. Such unsubstantiated speculation about what *might* occur some day in the future, however, does not clearly and unequivocally establish that the alleged effects on this member are "imminent," that they would be "certain and great" injuries to Plaintiff's interests in nuclear disarmament, or that the possible construction effects could not be prevented following resolution of this case.

In contrast to Plaintiff's lack of cognizable injuries, a preliminary injunction would cause great harm to the United States and to the public interest. CMRR-NF is critical to the Nation's ongoing efforts to modernize its nuclear infrastructure and to ensure a safe, secure, and effective nuclear arsenal. Declaration of Roger E. Snyder, Deputy Site Manager, LASO/NNSA, Exh. A hereto ¶ 25. CMRR-NF implicates international policy concerns because it is critical to the United States' commitment to renew and strengthen the Nuclear Non-Proliferation Treaty and to enter into new treaty obligations. Id. ¶¶ 26, 27. Even a short preliminary injunction could result in at least a year of delay of CMRR-NF, the loss of more than 100 jobs, and tens of millions of dollars in additional costs borne by the American taxpayer. LeDoux Decl. ¶¶ 16-19.

In short, Plaintiff cannot establish any of the requirements for a preliminary injunction, let alone all four of them. Plaintiff's motion for a preliminary injunction should be denied.

BACKGROUND

Federal Defendants previously set forth the background of the present action in their

October 4, 2010 Motion to Dismiss and Reply. Dkt. No. 9 at 3-7; Dkt. No. 11 at 1-2.

STANDARDS OF REVIEW

I. PRELIMINARY INJUNCTIONS ARE EXTRAORDINARY REMEDIES

"It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2948, pp. 129-30 (2d ed. 1995)) (emphasis in original). "Because a preliminary injunction is an extraordinary remedy, 'the right to relief must be clear and unequivocal.'" Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army, 111 F.3d 1485, 1489 (10th Cir. 1997) (quoting SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991)). The movant's "requirement for substantial proof is much higher" for a motion for a preliminary injunction than it is for a motion for summary judgment. Mazurek, 520 U.S. at 972.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter, 129 S. Ct. at 374. If a plaintiff fails to meet its burden on any of these four requirements, its request must be denied. See, e.g., id. at 376 (denying injunctive relief on the public interest and balance of harms requirements alone, even assuming irreparable injury to endangered species and a violation NEPA); Chem. Weapons Working Group, 111 F.3d at 1489 (holding that the plaintiffs' failure on the balance of harms "obviat[ed]" the need to address the other requirements); Sprint Spectrum, L.P. v. State Corp. Comm'n, 149 F.3d 1058, 1060 (10th Cir. 1998) ("The district court ruled that the wireless providers failed to satisfy the first two preliminary injunction requirements. However, we need not address the second because the first--substantial likelihood of prevailing on the merits–clearly

supports the denial of the preliminary injunction."). These equitable rules are not altered by invocation of an environmental statute such as NEPA, and there is no presumption that an injunction automatically follows the violation of an environmental statute, if any. See Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982).[1]

II. REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT ("APA")

Where a statute, such as NEPA, does not provide for a private right of action, the APA, 5 U.S.C. §§ 701-706, provides for judicial review of the merits for challenges to final agency actions. See, e.g., State of Utah v. Babbitt, 137 F.3d 1193, 1203 (10th Cir. 1998). Pursuant to Olenhouse v. Commodity Credit Corp.,"[r]eviews of agency action in the district courts [under the APA] must be processed as appeals. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure." 42 F.3d 1560, 1580 (10th Cir. 1994).

In accordance with the APA, a reviewing court must affirm an agency decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, the scope of judicial review is narrow and deferential:

> A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." The agency must articulate a "rational connection between the facts found and the choice made." While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

[1] The Tenth Circuit's relaxed "serious questions" standard, see Pl. Br. at 9, did not survive Winter, which requires nothing less than a likelihood of success on the merits. 129 S. Ct. at 375-76 (stating that any lesser standards are "inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief"). Even if the serious questions standard were still viable, it would be inapplicable here, where NNSA is implementing a project in the public interest. See Heideman, 348 F.3d at 1189 ("Where . . . a preliminary injunction 'seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,' the less rigorous fair-ground-for-litigation standard should not be applied.") (citation omitted).

Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974) (citations omitted); Friends of the Earth v. Hintz, 800 F.2d 822, 831 (9th Cir. 1986) ("The court may not set aside agency action as arbitrary and capricious unless there is no rational basis for the action.").

A deferential approach is particularly appropriate where, as here, the challenged decision implicates substantial agency expertise. "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989). "Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'" Id. at 377 (citing Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)).

ARGUMENT

I. PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS

A. This Court Lacks Subject Matter Jurisdiction

Federal Defendants' Motion to Dismiss, Dkt. No. 9, identified three obvious jurisdictional flaws in Plaintiff's Complaint. Plaintiff's direct challenges to the 2003 EIS and 2004 ROD are barred by the six-year statute of limitations for NEPA claims. Id. at 10. Plaintiff's claim that NNSA must prepare a "new" EIS as a result of proposed changes in CMRR-NF design is moot because NNSA is preparing an SEIS. Id. at 20-26. And Plaintiff's allegations about the form and content of the "new" EIS will not be ripe until NNSA completes the SEIS and issues a new ROD. Id. at 11-20. Because of these jurisdictional defects, Plaintiff cannot succeed on the merits of its claims.

B. NNSA Is Preparing an SEIS in Satisfaction of NEPA

Even absent the jurisdictional defects, Plaintiff's NEPA claims are insubstantial and without merit. The crux of Plaintiff's case is that NNSA is required to prepare a "new" EIS instead of an

SEIS to address design changes since CMRR-NF was approved in the 2004 ROD. No such requirement exists. The relevant regulations governing NEPA compliance 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. These provisions establish that an SEIS is an appropriate vehicle for updating the 2003 EIS based on changes in the design of the proposed CMRR-NF. Marsh, 490 U.S. at 374 (stating that an SEIS furthers NEPA purposes by requiring agencies to "take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval.").

In a footnote, Plaintiff contends that "[t]he DOE regulations themselves contemplate a new EIS, with new scoping, where the project has changed dramatically, as has occurred in the present case." Pl. Br. at 2 n.2 (citing 10 C.F.R. § 1021.314). Plaintiff's interpretation requires willful blindness to the plain language of the cited regulation, which states:

> (a) DOE shall prepare a *supplemental* EIS if there are *substantial changes* to the proposal or significant new circumstances or information relevant to environmental concerns, as discussed in 40 CFR 1502.9(c)(1).
>
> (b) DOE may *supplement* a draft EIS or final EIS at any time, to further the purposes of NEPA, in accordance with 40 CFR 1502.9(c)(2).
>
> (c) *When it is unclear* whether or not an EIS supplement is required, DOE shall prepare a Supplement Analysis.
>
> > (1) The Supplement Analysis shall discuss the circumstances that are pertinent to deciding whether to prepare a supplemental EIS, pursuant to 40 CFR 1502.9(c).
> >
> > (2) The Supplement Analysis shall contain sufficient information for

> DOE to determine whether: (i) An existing EIS should be supplemented; (ii) A new EIS should be prepared; or (iii) No further NEPA documentation is required.

10 C.F.R. § 1021.314 (emphases added). The regulation plainly permits NNSA to supplement the 2003 EIS "at any time," as is the case here. Cook Decl. ¶ 16; 75 Fed. Reg. 60745-02 (Oct. 1, 2010).

NNSA's decision to supplement the 2003 EIS instead of preparing an entirely "new" EIS is neither arbitrary nor capricious. On the contrary, Plaintiff's own allegations support NNSA's decision to prepare an SEIS. Plaintiff's Complaint alleges that Federal 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." Dkt. No. 1 ¶ 55 (emphasis added). Plaintiff's Complaint also alleges that Federal Defendants "have not only made '*substantial changes*'. . . but there also exist '*significant new circumstances* [and] *information relevant to environmental concerns* and bearing on the proposed action or its impacts.'" Id. ¶ 56 (emphasis added). Plaintiff's allegations mirror the language in the NEPA regulations governing preparation of an SEIS for "substantial changes" and "significant new circumstances or information relevant to environmental concerns," as set forth above. See 40 C.F.R. § 1502.9(c)(1); 10 C.F.R. § 1021.314(a). Indeed, Plaintiff's Complaint cites the very CEQ regulation that allows for an SEIS--not a "new" EIS–under the circumstances here. Dkt. No. 1 ¶ 56 (citing 40 C.F.R. § 1502.9(c)).[2]

[2] Plaintiff's allegations and arguments--and, indeed, the entire foundation for its case and request for a preliminary injunction--rest on the flawed premise that NNSA has reached a decision on a new plan and design for CMRR-NF. As is readily apparent from the record, including Federal Defendants' declarations, the plans and design for CMRR-NF continue to evolve as new information develops. In such a fluid environment of planning and design, Plaintiff's claims--that NNSA is violating NEPA by "implementing" a new decision for CMRR-NF when no such decision (let alone implementation) exists and by "predetermining" the outcome of the SEIS process when NNSA is plainly open to accommodating new information as it arises--ring hollow. Given the fluidity of these developments, NNSA chose an appropriate time to prepare an SEIS, and Plaintiff's allegations about what environmental impacts will result from construction of CMRR-NF are nothing more than rank speculation and themselves a prejudging of the NEPA process.

Plaintiff's contention that scoping is required, Pl. Br. at 2 n.1, ignores the plain language of the relevant regulations. "A public scoping process is *optional* for DOE supplemental EISs." 10 C.F.R. § 1021.311(f) (emphasis added). Nonetheless, NNSA conducted a public scoping process, including two public hearings and an extended 30-day public comment period. 75 Fed. Reg. 60,745 (Oct. 1, 2010); 75 Fed. Reg. 67,711 (Nov. 3, 2010). Thus, whether required or not, NNSA conducted scoping for the SEIS that satisfies any scoping requirement for an SEIS or a "new" EIS.

The only mention of a "new" EIS in the relevant regulations occurs as one of three possibilities resulting from a Supplement Analysis performed under 10 C.F.R. § 1021.314(c). Plaintiff's assertion that NNSA must pursue an option from an inapplicable subsection is a clear misinterpretation of the governing regulation, since this portion of the regulation only comes into effect when an agency is undecided on whether to supplement an EIS. The preparation of an SEIS is expressly provided for under DOE's NEPA regulations, and the determination on how best to address evolving design changes to the proposed CMRR-NF is within the agency's expertise and discretion. Marsh, 490 U.S. at 377-78. Plaintiff's opinion on how NNSA should analyze new information coming to light since the CMRR-NF was approved in the 2004 ROD is entitled to no weight, and Plaintiff is not likely to succeed on the merits of this claim.

C. Plaintiff's Allegations of NEPA Deficiencies Are Factually and Legally Flawed

Even if the Court were to consider Plaintiff's allegations of deficiencies, Plaintiff is not likely to succeed on the merits because its allegations are factually and legally incorrect. See Pl. Br. at 12-19. For instance, throughout its brief, Plaintiff insists that design of the CMRR-NF is proceeding without a valid EIS. This spurious argument ignores the fact that NNSA completed an EIS in 2003 and issued a ROD in 2004 approving construction of CMRR-NF, and that the purpose and need of this project have not changed since it was authorized. Cook Decl. ¶ 13. NNSA is proceeding with

the planning and design analyses based on this ROD, which Plaintiff did not challenge.

Plaintiff incorrectly and misleadingly asserts certain characteristics of the proposed CMRR-NF have changed from the project since it was analyzed in the 2003 EIS. For example, Plaintiff contends that the square footage of the proposed CMRR-NF has roughly doubled in an attempt to give the mistaken impression that the size of the building has doubled as well. Pl. Br. at 5. Much of the possible increase in square footage would be the result of a hardened floor (rather than grated walkways) introduced to improve building stability and maintenance areas and from the relocation of water tanks for fire protection systems. LeDoux Decl. ¶¶ 10-12; see id. Attch. 1. Although not part of mission space used for operations, these additions would count as floor space within the building; mission floor space has actually decreased. Id. ¶¶ 8, 11. Plaintiff also contends that the proposed CMRR-NF project definitively includes a warehouse, an electrical substation, and realignment of Pajarito Road. Although these project additions are being considered and analyzed in the SEIS, no final determination has been made. Id. ¶ 14; Snyder Decl. ¶ 14.

Plaintiff asserts that Federal Defendants failed to prepare a single EIS to evaluate other projects at LANL. Pl. Br. at 15. Specifically, Plaintiff contends that the Radioactive Liquid Waste Treatment Facility ("RLWTF"), the TRU Waste Facility, the Technical Area ("TA")-55 Revitalization Project, and the Nuclear Materials Safety and Security Upgrades ("NMSSUP") barrier should have been considered in a single EIS because they are "connected actions" with respect to the CMRR-NF. Id. Under NEPA, "connected actions" are those that "(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). In the Tenth Circuit, "[r]eviewing courts apply an independent utility test to determine whether multiple actions

are so connected as to mandate consideration in a single EIS." Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1228 (10th Cir. 2008) (internal quotation and citation omitted); see also Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1183 (10th Cir. 2002) ("An inquiry into independent utility reveals whether the project is indeed a separate project, justifying the consideration of the environmental effects of that project alone.").

Here, Plaintiff's own brief demonstrates that the other projects are not "connected actions" with respect to the CMRR-NF. Plaintiff states that the NMSSUP has the "sole purpose of securing PF-4 *and* CMRR-NF;" that the RLWTF "will provide waste treatment for *these* nuclear facilities;" that the TRU Waste Facility "will receive waste from *these and other* nuclear facilities;" that TA-55 "addresses the *PF-4 plant*;" and that "[r]elocation of Pajarito Road would serve *the same nuclear facilities*." Pl. Br. at 15 (emphases added). By Plaintiff's own admission, these projects have independent utility of CMRR-NF because they serve other facilities, including PF-4, which has been in operation since 1978. Additionally, the projects identified by Plaintiff directly support existing operations regardless of a decision to construct CMRR-NF. For example, NMSSUP will replace the security perimeter around existing plutonium facilities, not the proposed CMRR-NF. Snyder Decl. ¶¶ 17, 19. The TA-55 Reinvestment Project addresses safety and environmental monitoring systems within existing TA-55 facilities that are approaching the end of their operational lives; this project is required regardless of any action relative to the proposed CMRR-NF. Id. ¶ 18. RLWTF is designed to replace the 50-year old existing facility and will serve multiple facilities, not just the proposed CMRR-NF. Id. ¶ 20. These projects therefore are not "connected actions" within the context of NEPA because they have utility independent of any developing plan for CMRR-NF.[3]

Plaintiff also contends that Federal Defendants "have given no public notice of any NEPA

[3] In any event, to the extent that a single EIS was required to address these projects, NNSA issued a site-wide EIS that addresses these projects. See LeDoux Decl. ¶ 5.

activities in connection with the CMRR-NF" since the 2004 ROD, Pl. Br. at 18, but this claim demonstrably false. As part of an agreement with the State of New Mexico concerning an air quality permit issued for CMRR-NF, NNSA has held nine bi-annual public meetings since the project was first authorized in 2004--many of which were attended by Plaintiff.[4] Moreover, NNSA has continued public outreach with preparation of the SEIS. NNSA initiated a full scoping process, which included two public hearings and an extended public comment period and followed the same procedures as it would for a "new" EIS. 75 Fed. Reg. 60745-02 (Oct. 1, 2010); 75 Fed. Reg. 67711-01 (Nov. 3, 2010). The SEIS process will also include a 45-day public comment period on a draft SEIS, the same as for a draft EIS. 75 Fed. Reg. at 60747. Plaintiff's claim that NNSA is not complying with NEPA public participation requirements is without merit.

D. Plaintiff's Allegation of Predetermination Has No Merit

Plaintiff asserts that NNSA's "choice to build the CMRR-NF has been predetermined." Pl. Br. at 11.[5] In support of this assertion, Plaintiff relies on expenditures for the ongoing design project and public statements by federal officials on the importance of CMRR-NF. Id. This claim is misplaced because NEPA "predetermination" is about prejudging what the environmental analyses will show before those analyses are conducted, not about identifying the need and urgency for the

[4] See Snyder Decl. ¶ 10; see id. Attch. 1 at 2 (list of nine public meetings on CMRR); id. at 3-5, 23-26, 35-36 (dates and agendas for these public meetings). Plaintiff's members admit to attending most of these meetings. First Aff. of Greg Mello, Dkt. No. 10-1 ¶ 41 ("I have been present personally at many if not most of these meetings, and other members of the Study Group have been present at others."). NNSA also has held other fora related to CMRR-NF that Plaintiff's members admit to attending. Id. ¶ 24 ("I and other staff and board members of my organization attended and videotaped" a June 16, 2010 construction forum in Espanola, New Mexico). The transcripts from the public meetings on the CMRR-NF also show the attendance and participation of Plaintiff's members. See, e.g., Snyder Decl. Attch. 1 at 6-22, 27-34, 37-44.

[5] As explained in Federal Defendants' Motion to Dismiss, Plaintiff's predetermination challenges can be reviewed *after* NNSA has completed the SEIS process, and thus are not ripe. See Dkt. No. 11 at 5-7. Even if the Court were to consider Plaintiff's premature challenge, Plaintiff has not shown an irreversible and irretrievable commitment of resources. See Dkt. No. 9 at 15; Dkt. No. 11 at 3-7.

underlying federal proposal. Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 712 (10th Cir. 2010) ("NEPA does not require agency officials to be subjectively impartial. An agency can have a preferred alternative in mind when it conducts a NEPA analysis.") (citations and internal quotations omitted). "[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. at 714 (emphasis altered from 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). "A petitioner must meet a high standard to prove predetermination." Forest Guardians, 611 F.3d at 714.

Ongoing design work and public statements of support for CMRR-NF show that the concept for CMRR-NF construction is evolving and has not been predetermined. As evidenced by preparation of the SEIS, NNSA continues to take the requisite "hard look" at environmental impacts with an open mind on where that analysis may lead. See Cook Decl. ¶¶ 16-18, 23.[6] Rather than

[6] Plaintiff has filed with the Court a letter from Plaintiff's counsel attacking Dr. Cook and undersigned counsel for asserting that NNSA will not prejudge the outcome of the SEIS process. See Dkt. No. 21-1. Plaintiff's counsel misapprehends the record and the NEPA process. NNSA has already approved CMRR-NF in the 2004 ROD. Even before that, the critical need for CMRR-NF to the United States' national security and international policy concerns was clear. See, e.g., Cook Decl. ¶ 8. As Forest Guardians and other case law cited by Federal Defendants demonstrates, preparation of an SEIS does not require a federal agency to disavow the vital importance of its proposed action, to halt design work that will help identify and clarify potential environmental impacts in furtherance of the NEPA process, or to stop seeking funding for that critical work. NNSA has amply demonstrated its willingness to examine alternatives to CMRR-NF, as the very developing design changes at issue in this litigation arose out of safety and environmental concerns. Cook Decl. ¶ 12. Plaintiff's counsel's accusations are misplaced and unfounded.

locking into any set configuration or idea for CMRR-NF, NNSA has demonstrated openness to new information and to adapting and modifying plans and designs as that new information has developed. Id. ¶¶ 12-13. This is the exact opposite of predetermination, and Plaintiff's claim has no merit.

II. PLAINTIFF CANNOT DEMONSTRATE IRREPARABLE INJURY

Because Plaintiff's NEPA claims are without merit, the Court may end its inquiry into whether it should issue an emergency injunction and deny Plaintiff's motion. See, e.g., Winter, 129 S. Ct. at 376; Sprint Spectrum, 149 F.3d at 1060 ("The district court ruled that the wireless providers failed to satisfy the first two preliminary injunction requirements. However, we need not address the second because the first--substantial likelihood of prevailing on the merits--clearly supports the denial of the preliminary injunction."). Even if Plaintiff could establish a likelihood of success on the merits, Plaintiff cannot meet its burden on the other requirements, including irreparable injury.

To constitute irreparable injury, "an injury must be certain, great, actual and not theoretical." Heideman, 348 F.3d at 1189 (citation and internal quotation marks omitted). "[T]he party seeking injunctive relief must [also] show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." Id. (quotation omitted; emphasis in original). Injury that is merely speculative in nature does not constitute irreparable harm sufficient to warrant granting a preliminary injunction. Id.

In support of its allegations of irreparable injury, Plaintiff submitted the affidavits of three individuals: Greg Mello, J. Gilbert Sanchez, and Jody Benson. Dkt. Nos. 13-1 ("Mello Aff."), 13-2 ("Sanchez Aff."), 13-3 ("Benson Aff.").[7] Jody Benson does not allege that she is a member of

[7] Although the "Federal Rules of Evidence do not apply to preliminary injunction hearings," Heideman, 348 F.3d at 1189, "[o]nce received . . . the question of how much weight an affidavit will be given is left to the trial court's discretion." 11A C. Wright, Fed. Prac. & Proc. Civ. § 2949. Courts "give hearsay statements less credence than direct allegations." Id. Plaintiff's exhibits are rife with objectionable material, including unauthenticated documents, groundless factual assertions, and multiple layers of hearsay. See, e.g., Mello Aff. ¶ 12(a) n.25 (blog post by "Joe" on effects of

Plaintiff's organization, see Benson Aff., and her allegations of irreparable injury are therefore irrelevant. Davis v. Mineta, 302 F.3d 1104, 1115 (10th Cir. 2002) ("Plaintiffs must still make a specific showing that the environmental harm results in irreparable injury *to their specific environmental interests*.") (emphasis added);[8] cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000) (holding that an organization has standing based on injury to its members only if, *inter alia*, "the interests at stake are germane to the organization's purpose"). Plaintiff has presented no evidence that its organizational purpose of nuclear disarmament encompasses its members' concerns with alleged construction impacts on dust, noise, traffic, cracked windshields, light pollution, hunting opportunities, or "sacred sites."

The remaining 29 pages of the Mello and Sanchez affidavits fail to provide a single allegation sufficient to establish any injury is imminent or "certain, great, actual and not theoretical" to Plaintiff's interests. Heideman, 348 F.3d at 1189.[9] The alleged injuries of Mr. Mello and Mr. Sanchez all concern potential effects from the future construction and operation of the proposed CMRR-NF. See Mello Aff. ¶¶ 12-16; Sanchez Aff. ¶ 10. However, "no construction is underway, nor will any occur as long as the SEIS is being prepared." Cook Decl. ¶ 21; Snyder Decl. ¶ 12 ("CMRR-NF construction will not be authorized or executed during the SEIS period."). The SEIS preparation period is expected to last at least until June 2011. Cook Decl. ¶ 25. Operation of

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climate change); ¶ 15 n.49 (screen shot of an article from Plaintiff's website pontificating on a secret program at LANL); ¶ 20 n.52 (newspaper article); ¶ 27 n.59 (website of energy requirements of cement plants). The Court should accord little or no weight to Plaintiff's "evidence."

[8] Likewise, the letters from the Jemez Pueblo and the Pajarito Group of the Sierra Club, Mello Aff. Attchs. 1 and 2, are irrelevant because there is no evidence they belong to Plaintiff's organization.

[9] The Mello affidavit is even inadequate for establishing the lesser injury to Plaintiff necessary to establish standing, because it fails to identify any particular member who would allegedly be harmed by CMRR-NF. See Summers v. Earth Island Inst., 129 S. Ct. 1142, 1152 (2009) (noting that affidavit from group "to establish standing would be insufficient because it did not name the individuals who were harmed by the challenged [action]").

CMRR-NF would not begin until 2022. Id. ¶ 23.

Throughout its filings in this matter, Plaintiff repeatedly conveys the misleading impression that construction of CMRR-NF is ongoing. Plaintiff is wrong: no such construction is occurring. For example, Plaintiff says that "[l]ight pollution from construction is already visible far from the site." Mello Aff. ¶ 12(f); Sanchez Aff. ¶ 10(d). This light pollution results from temporary security lighting related to construction of NMSSUP, not CMRR-NF. Snyder Decl. ¶ 24. Plaintiff asserts that Federal Defendants have "already excavated 90,000 cubic yards of earth and rock at the CMRR-NF site." Pl. Br. at 9. True, but Plaintiff fails to disclose that this excavation occurred in 2006, pursuant to the 2004 ROD, and was the basis for the seismic mapping of the site that contributed to the proposed design changes for CMRR-NF. Snyder Decl. ¶¶ 16, 22. That excavation is not ongoing, and is not the source of any claimed harm to Plaintiff. The remainder of Plaintiff's assertions speculate about potential environmental impacts from future construction of CMRR-NF. Because such construction is not imminent and will occur, if at all, following the completion of the SEIS and issuance of a new ROD identifying any design changes, it cannot be the source of any cognizable irreparable injury.[10] See Heideman, 348 F.3d at 1189 (finding no irreparable injury because plaintiffs presented no evidence of injury during the time it would take to litigate case).

In addition to failing to show any imminent injuries, Plaintiff's alleged injuries are not of the severity necessary to establish irreparable harm. Irreparable harm is more than "merely serious or

[10] There are a variety of construction activities occurring at LANL today, but none involving construction of CMRR-NF. See Snyder Decl. Attch. 2. The excavated area at the CMRR-NF site serves as the construction lay down area for RLUOB. Snyder Decl. ¶ 16. TA-55 has a number of ongoing projects, including construction of the NMSSUP security perimeter around existing plutonium facilities, RLWTF, the TA-55 Reinvestment Project that will address essential safety and environmental monitoring systems within existing TA-55 facilities, and removal and remediation of contaminants within LANL. Id. ¶¶ 17-22. Expansion of an existing parking lot to offset parking lost due to NMMSUP2 construction and to accommodate RLUOB staff is also underway. Id. ¶ 22. Well-drilling activities performed as part of site characterization in Material Disposal Area C are also occurring. Id. ¶ 23. *None* of these ongoing construction activities is connected to CMRR-NF.

substantial" harm. Id. Plaintiff's alleged injuries include such speculative and non-irreparable harms as: an inability to cycle or drive on government property that is frequently restricted from public use, Mello Aff. ¶ 12.C;[11] dust from construction, Sanchez Aff. ¶ 10.A; and temporary effects of light pollution, Mello Aff. ¶ 12.F, Sanchez Aff. ¶ 10.D. These alleged inconveniences, even if accurate, would not constitute injuries that rise to the level of "serious or substantial," let alone "certain, great, actual and not theoretical." Heideman, 348 F.3d at 1189.

Plaintiff cannot demonstrate that the evolving design activities associated with the proposed CMRR-NF present a credible threat of imminent, irreparable injury. Plaintiff's speculative concerns about possible future construction fail to provide "clear and unequivocal" evidence of irreparable harm. SCFC, 936 F.2d at 1098. Plaintiff has not met its burden on this requirement.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH HEAVILY AGAINST A PRELIMINARY INJUNCTION

A. An Injunction Would Severely Injure the United States and the Public Interest

Plaintiff's claims of alleged injuries are dwarfed by the harm that would be inflicted upon the United States and the public interest were even a temporary preliminary injunction to issue. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Weinberger, 456 U.S. at 312. It is well established that courts "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Goldman v. Weinberger, 475 U.S. 503, 507 (1986); see also Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence."); Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212, 1221 (10th Cir. 2007)

[11] DOE currently controls the entire area within the LANL boundaries, and Pajarito Road is presently restricted from public use for other reasons. Snyder Decl. ¶ 11.

("Courts have historically given special deference to other branches in matters relating to foreign affairs, international relations, and national security"); O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 1025 (10th Cir. 2004) (en banc) (McConnell, J., concurring) (international relations); Nat'l Fed'n of Fed. Employees v. Greenberg, 983 F.2d 286, 297 (D.C. Cir. 1993) ("Without clear congressional authorization, courts traditionally have demonstrated a reluctance to encroach on Executive prerogative in the area of military and national security affairs.") (Sentelle, J.) (concurring). Matters of national security are important considerations in evaluating the public interest prong in an action brought under NEPA. Winter, 129 S. Ct. at 377.

From the perspective of national security, both the "America's Strategic Posture: The Final Report of the Congressional Commission on the Strategic Posture Review" ("Strategic Posture Report") issued by the United States Institute of Peace and the "Nuclear Posture Review" issued by the Department of Defense confirm that moving forward with CMRR-NF is a key component of our Nation's security infrastructure. According to the Strategic Posture Report, the existing Chemistry and Metallurgy Research ("CMR") building, which CMRR-NF would replace, is "decrepit" and is "maintained in a safe and secure manner only at a high cost." Snyder Decl. ¶ 26 (citing Attch. 4 at 6). Failure to replace the CMR in a timely fashion would lead not only to a loss of the products of its research, but would endanger the very intellectual infrastructure that makes this research possible because this infrastructure "is in immediate danger of attrition." Id. The Nuclear Posture Review confirms that the CMRR-NF "is a critical component of the Nation's ongoing efforts to modernize the Nation's nuclear infrastructure and to ensure a safe, secure, and effective nuclear arsenal over the long term." Id. ¶ 25 (citing Attch. 3). The facility is key to reducing nuclear dangers and pursuing the goal of a world without nuclear weapons, while simultaneously advancing broader national security interests. Id. ¶ 27.

Timely construction of CMRR-NF is also critical to fulfilling our Nation's international commitments, such as renewing and strengthening the Nuclear Non-Proliferation Treaty ("NPT") and entering into new treaty obligations, including the New Strategic Arms Reduction Treaty ("New START") and the Comprehensive Test Ban Treaty ("CTBT"). Id. The United States is resolved to meeting its obligation to pursue nuclear disarmament under Article VI of the NPT and intends to make demonstrable progress toward this goal over the next decade. Id. Ensuring that NNSA can fulfill its mission is essential to Senate consideration of new treaty obligations. Id. Replacement of the nearly 60-year old CMR building in a timely manner is therefore a critical component of our Nation's leadership on the international stage. Id. ¶ 29.

Given these national and international considerations, it is imperative that the design process of the proposed CMRR-NF proceed while NNSA completes the SEIS. Delay or interruption of the CMRR-NF design process while the SEIS is being prepared would postpone the design schedule by at least 12 months. LeDoux Decl. ¶¶ 16, 18. This delay arises from the need to terminate existing contracts, solicit new bids from design firms, and reassemble a new design team. Id. ¶ 18. Such delay is unjustified because NNSA is proceeding under a valid 2004 ROD and is performing supplemental review in compliance with NEPA to assess design changes and new information. The circumstances of this case place it on all fours with Winter, in which the Supreme Court held that, even assuming a NEPA violation, "we see no basis for jeopardizing national security, as the present injunction does" and that its "analysis of the propriety of preliminary relief is applicable to any permanent injunction as well." 129 S. Ct. at 381-82. As in Winter, the serious national security and international policy implications of an injunction dictate that Plaintiff's request to enjoin CMRR-NF must be denied, regardless of whether the Court were to find a NEPA violation.

In addition to the serious national security and international policy consequences, a

preliminary injunction would have substantial negative economic consequences for northern New Mexico in a time of economic hardship. Currently, 283 personnel (including LANL contractors) are employed on the CMRR-NF Project. Cook Decl. ¶ 19. This includes approximately 125 contract employees dedicated to the CMRR-NF Project. LeDoux Decl. ¶ 17. An interruption in design activities might require laying off these personnel, which could lead to family disruption and lost economic activity. Id. Also involved in the CMRR-NF design process are approximately 170 architectural and engineering contract employees. Id. ¶ 16. Loss of these employees through termination or reassignment likely would cause LANL to lose their specialized expertise. Id. Finally, a delay would cost the American taxpayer approximately $1 million per month to maintain the availability of specialized engineering expertise and between $6 and 8 million per month due to escalation costs and the time value of money. Id. ¶¶ 16, 19.

B. Plaintiff's Allegations of Harms and Public Interest Merit No Weight

In contrast to the harms and balance of equities that sharply favor Federal Defendants, the harm Plaintiff alleges (even if cognizable) would not occur until either after the SEIS is complete, which is more than six months from now, or when the proposed CMRR-NF becomes operational in 2022. See Part II, *supra*. Denial of the requested injunction therefore will not harm Plaintiff.

Plaintiff contends that Federal Defendants have not complained of the temporal or financial effects of a delay. Pl. Br. at 22. Up until the filing of Plaintiff's motion for a preliminary injunction, however, the effects of a delay have been irrelevant.[12] Plaintiff next contends that any effects of

[12] Plaintiff also asserts that the decision to prepare an SEIS indicates that NNSA is prepared to accept some delay. Continuing the design process will provide beneficial and reliable information to assess the environmental impacts of the proposed CMRR-NF, including: reliability of engineering controls and equipment; possible realignment of Pajarito Road, even though initial analyses do not indicate that realignment will be necessary; potential construction of a new electrical substation; potential construction of two concrete batch plants, even though no decision has been made on whether two plants are necessary; and construction of new warehouse facilities, even though no decision has been made whether or where to construct these facilities. LeDoux Decl. ¶ 14.

delay would be a "self-inflicted injury" because NNSA has been aware of the alleged NEPA violations since Plaintiff's July 1, 2010 letter. Pl. Br. at 22-23 (citing Davis, 302 F.3d at 1116). The *possible* self-inflicted injuries described in Davis arose from the State's actions taken in reliance on a "pro forma" NEPA process in which a consultant "was contractually *obligated* to prepare a FONSI [Finding of No Significant Impact]," in plain violation of NEPA. 302 F.3d at 1112, 1116. Here, in contrast, NNSA had been proceeding with design work for CMRR-NF *for more than six years* before Plaintiff's letter, in accordance with the valid, unchallenged 2004 ROD. In continued compliance with NEPA, NNSA is timely preparing an SEIS, and the evidence indicates that the SEIS process is anything but "pro forma." Continued design of CMRR-NF is critical to advancing national security and international policy interests, a far cry from the circumstances in Davis.[13]

Plaintiff relies on the affidavit of Bob Peurifoy for the proposition that "there is no national security cost to a delay of a few years in Nuclear Facility construction." Pl. Br. at 25 (citing Dkt. No. 13-4 ("Peurifoy Aff.") ¶ 11). Mr. Peurifoy served as a vice president at Sandia National Laboratory at the time of his retirement almost 20 years ago. Peurifoy Aff. ¶ 1. His conclusion is based on papers authored more than a decade ago and his assessment, as a private citizen, of what NNSA should do to fulfill its mission of safeguarding our Nation's nuclear assets, preventing

[13] Davis also does not support Plaintiff's request for an injunction here because even after the Tenth Circuit's findings of prejudgment and other NEPA violations, it remanded the matter only "for entry of a preliminary injunction barring further road construction pending resolution of this case on the merits." 302 F.3d at 1126. Notably, the remand did not require an injunction against further planning and design as Plaintiff seeks here, only construction. "The proper inquiry in a NEPA case is therefore not whether an agency has focused on its preferred alternative, but instead whether it has gone too far in doing so, reaching the point where it actually has '[l]imit[ed] the choice of reasonable alternatives.'" Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 206 (4th Cir. 2005); see also id. at 202 (rejecting as overly broad a district court injunction, following the finding of a NEPA violation, that enjoined planning and development, in addition to construction, of a Navy aircraft landing training field, pending preparation of an SEIS). Plaintiff has not shown and cannot show that advancing planning and design by a mere 15 percent during that SEIS process, without any attendant construction or other contractual commitments, will in any way limit or prejudice the choice of reasonable alternatives or result in any irreparable injury.

nuclear proliferation, and powering the nuclear navy. See id. Mr. Peurifoy's personal opinion that the "CMRR-NF is not needed to maintain U.S. nuclear weapons for decades to come," id. ¶ 10, stands in stark contrast to the Department of Defense's 2010 Nuclear Posture Review and the 2009 Strategic Posture Report that is the product of a bipartisan commission of distinguished public servants, including two former Secretaries of Defense, two former Members of Congress, an ambassador, and distinguished scientists. See Snyder Decl. Attch. 3 and 4. Mr. Peurifoy's opinion also contradicts the NNSA's own determination that "[a] key near-term priority is to replace the 50-year old Chemistry and Metallurgy Research Facility, which has well-documented safety issues and supports an essential capability base, *with the CMRR-NF*." Id. Attch. 5 at 4 (emphasis added).

Plaintiff's use of Mr. Peurifoy's affidavit is a classic example of an attempt to second-guess an agency's reliance on its own experts, which is not permitted under NEPA or the APA. Marsh, 490 U.S. at 378 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1176-77 (10th Cir. 1999) ("[T]he fact that Appellants cite an expert who agrees with their position and alleges a lack of analysis is not dispositive. It merely reflects the crux of their complaint--they disagree with the Forest Service's decision."); Inland Empire Pub. Lands Council v. Schultz, 992 F.2d 977, 981 (9th Cir. 1993) ("We are in no position to resolve this dispute because we would have to decide that the views of Council's experts have more merit than those of the [government's] experts.") (internal quotations omitted). "Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'" Marsh, 490 U.S. at 377 (citing Kleppe, 427 U.S. at 412); see also Balt. Gas, 462 U.S. at 103 ("When examining this kind of scientific determination . . . a reviewing court must

generally be at its most deferential"). Mr. Peurifoy's personal opinion does not establish any error in the federal government's well-documented impact assessments.[14]

Finally, Plaintiff contends that the public interest favors an injunction because it will enforce compliance with NEPA. Pl. Br. at 23. As discussed above, NNSA is in full compliance with NEPA. The environmental impacts of the proposed CMRR-NF Project were analyzed at length in the 2003 EIS, and the project was authorized in an unchallenged 2004 ROD. The purpose and need of the CMRR-NF has not changed since it was first analyzed. NNSA continues its full compliance with NEPA with preparation of an SEIS that includes public scoping and comment periods, and will analyze the potential effects of proposed CMRR-NF design changes. Cook Decl. ¶ 16; 10 C.F.R. § 1021.314(b) ("DOE may supplement a draft EIS or final EIS at any time, to further the purposes of NEPA, in accordance with 40 CFR 1502.9(c)(2).").

Plaintiff's real purpose, it seems, is to advance its political agenda of complete nuclear disarmament. Although these political policy viewpoints are no doubt sincerely held, the Supreme Court has made clear that policy objections are to be aired in the political arena, not in environmental litigation. Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 777 (1983) ("Neither the language nor the history of NEPA suggest that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements.")

IV. PLAINTIFF IS REQUIRED TO POST A BOND

Prior to any preliminary injunction, Plaintiff must post a compensatory security bond:

> The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

[14] The Court should also dismiss Plaintiff's simplistic lay argument that moving PF-4 equipment around LANL would perform the same function as the mission-critical CMRR-NF. Pl. Br. at 24.

Fed. R. Civ. P. 65(c). Plaintiff's assertion that a bond is not required, Pl. Br. at 25, conflicts with the plain language of Rule 65(c) and recent case law holding that environmental plaintiffs are not exempt from posting a bond. Habitat Educ. Ctr. v. U.S. Forest Serv., 607 F.3d 453, 457 (7th Cir. 2010) ("We are not persuaded by Habitat's argument that nonprofit entities, at least those devoted to public goods of great social value, such as the protection of the environment, should be exempted from having to post injunction bonds."); Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1125-26 (9th Cir. 2005) (affirming requirement that environmental plaintiffs post a $50,000 security because "the district court considered the relative hardships and reached a conclusion as to an appropriate bond amount."); Utahns for Better Transp. v. U.S. Dep't of Transp., 2001 WL 1739458 *5 (10th Cir. 2001) (conditioning injunction on posting of a $50,000 bond).

Stopping design work for CMRR-NF would impose a substantial financial burden on Federal Defendants and the American taxpayer. See Part III.A, *supra*. In accordance with Rule 65(c), any preliminary injunction must be contingent on Plaintiff posting security in the amount that the Court considers proper to pay the costs and damages sustained by Federal Defendants should CMRR-NF design and planning be wrongfully enjoined. Coquina Oil Corp. v. Transwestern Pipeline Co., 825 F.2d 1461, 1462 (10th Cir. 1987) ("[T]he trial judge's consideration of the imposition of bond is a necessary ingredient of an enforceable order for injunctive relief.").

CONCLUSION

Plaintiff has failed to establish any of the requirements for emergency injunctive relief, and the Court should deny Plaintiff's motion for preliminary injunction.

Respectfully submitted on this 20th day of December, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 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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/s/ John P. Tustin
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LOS ALAMOS STUDY GROUP,

Plaintiff, **No. CIV-10-0760 JCH/ACT**

v.

UNITED STATES DEPARTMENT OF ENERGY; THE HONORABLE STEPHEN CHU, in his official 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.

MAGISTRATE JUDGES'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on the Honorable Judith Herrera's Order of Reference filed on November 17, 2010, pursuant to the provisions of 28 U.S.C. §§ 636(b)(1)(B). [Doc. 15.] The District Court referred this matter to the undersigned Magistrate Judge to submit proposed findings of fact and recommendations for disposition of Defendants United States Department of Energy, the Honorable Stephen Chu, the National Nuclear Security Administration, and the Honorable Thomas Paul D'Agostino's Motion to Dismiss for Lack of Jurisdiction and Brief in Support filed on October 4, 2010. [Doc. 9.]

I. Procedural Background

1. This action arises under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(f) ("NEPA"), 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. [Doc. 1 at ¶ 1.] This action also arises under the Administrative Procedure Act ("APA"), U.S.C.A. §§ 701 et seq. [*Id.*]

2. In its Complaint, Plaintiff challenges the adequacy of the Department of Energy/National Nuclear Security Administration's ("DOE/NNSA or "NNSA") analysis of potential environmental impacts from the construction and operation of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") at Los Alamos National Laboratory ("LANL"). [Doc. 1 at ¶ 2.] The National Nuclear Security Administration ("NNSA") is responsible for the management and security of the nation's nuclear weapons, nuclear nonproliferation, and naval reactor programs. [Doc. 9, Ex. A, and 50 U.S.C. § 2401(b).] NNSA is also responsible for the administration of LANL. [*Id.*]

3. The Complaint seeks a declaratory judgment and mandatory injunction requiring Defendants to prepare a new Environment Impact Statement ("EIS") regarding the CMRR-NF and also seeks to prohibit all further investments in the CMRR-NF. [Doc. 1 at ¶ 3.] Specifically, in Count I, Plaintiff alleges that Defendants violated NEPA and the APA by failing to prepare an applicable EIS for the CMRR-NF. It claims that Defendants' current proposal differs substantially from the 2003 EIS and the 2004 Record of Decision ("ROD") and that a new EIS should be prepared. [Doc. 1 ¶¶ 52-64.] In Count II, Plaintiff alleges that Defendants have failed to develop an EIS which addresses "connected actions" to the CMRR-NF and that Defendants should prepare a new EIS which address these actions. [Doc. 1 ¶¶ 65-71.] In Count III, Plaintiff alleges that Defendants failed to provide required mitigation measures and a mitigation action plan in the 2003 EIS and the 2004 ROD and that they should prepare a new

EIS which addresses reasonable mitigation measures. [Doc. 1 ¶¶ 72-79.] In Count IV, Plaintiff alleges that the Defendants' decision making processes for the CMRR-NF exceed the scope of the 2003 EIS and the 2004 ROD and that all activities should be stopped pending the completion of a new EIS and ROD. [Doc. 1 ¶¶ 80-90.] In Count V, Plaintiff alleges that the proposed CMRR-NF involves a much greater commitment of resources and has a far greater impact than what was analyzed in the 2003 EIS and the 2004 ROD. It alleges that the DOE authorized production of a Supplement Analysis which addresses the changed project parameters and allegedly determines if a Supplemental EIS ("SEIS") or a new EIS should be prepared has not been made public or provided to the Plaintiff. [Doc. 1 ¶¶ 91-95.]

4. Defendants filed a Motion to Dismiss [Doc. 9] which argues that (1) some of Plaintiff's claims are time-barred, (2) Plaintiff's claims are not ripe for review, (3) Plaintiff's claims are moot, and alternatively (4) Plaintiff's claims should be dismissed under the doctrine of prudential mootness.

5. Having considered the pleadings, the exhibits, and the relevant law, the undersigned Magistrate Judge recommends that Plaintiff's Complaint be dismissed pursuant to the doctrine of prudential mootness.

II. Factual Background

6. In 2002, NNSA published a Notice of Intent to prepare the CMRR-NF EIS and invited public comment on the CMRR-NF EIS proposal. [Doc. 9-1 at ¶ 9.] The Chemical and Metallurgy Research ("CMR") building which prompted Defendants to propose the CMRR-NF in 2002 was almost 60 years old and near the end of its useful life. [*Id.* at ¶ 6.] The CMR building is a facility which has "unique capabilities for performing special nuclear material

analytical chemistry, materials characterization, and actinide[1] research and development." [*Id.* at ¶ 5.] CMR supports various national security missions including nuclear nonproliferation programs; the manufacturing, development, and surveillance of pits (the fissile core of a nuclear warhead); life extension programs; dismantlement efforts; waste management; material recycle and recovery; and research. [*Id.*] NNSA's proposal to construct the replacement facility, CMRR-NF, was to insure that NNSA could "fulfill its national security mission for the next 50 years in a safe, secure, and environmentally sound manner." [*Id.* at ¶¶ 7 and 8.]

7. NNSA hosted two public meetings on the proposed CMRR in August of 2002 and published a Draft EIS. [*Id.* at ¶ 9.] NNSA issued a Final EIS in November 2003. [*Id.*] NNSA published its Record of Decision ("ROD") on the 2003 EIS in the Federal Register on February 12, 2004. [*Id.* at ¶ 10; 69 Fed.Reg. 6967 (Feb.12, 2004).]

8. 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 Radiological Laboratory Utility Office Building ("RLUOB"). [Doc. 9-1 at ¶ 10.]

9. Since the 2003 EIS and the 2004 ROD were published, Defendants acknowledge that new developments have arisen which require changes to the proposed CMRR. [*Id.* at ¶ 12.] A site-wide analysis of the geophysical structures that underlay the area occupied by LANL was prepared and revealed new geologic information regarding the seismic conditions at the site. [*Id.*;

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[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." [Doc. 9 at footnote 1.]

Doc. 10 at pp. 7-10.] As a result of the new geologic information, as well as more information on the various support functions, actions, and infrastructure needed for construction "changes were made to the proposed design of the CMRR-NF." [Doc. 9-1 at ¶ 12.] In addition, other changes were made to ensure that 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." Also, "sustainable design principles have been incorporated to minimize the environmental impacts of construction and operation of the proposed CMRR-NF." [*Id.*]

10. In light of the design changes, NNSA prepared a Supplement Analysis pursuant to 10 C.F.R. § 1021.314(c)(2) to determine (1) if the 2003 EIS should be supplemented, (2) if a new EIS should be prepared, or (3) if no further NEPA document was required. [*Id.* at ¶ 15.]

11. On July 1, 2010, counsel for Plaintiff wrote to the DOE and the NNSA and expressed concerns about the cost and adequacy of NNSA's NEPA analysis for the CMRR-NF. Plaintiff requested that DOE stop any and all CMRR-NF design activities, make no further contractual obligations, and seek no further funding until NNSA complete a new EIS for the CMRR-NF. [*Id.*]

12. On July 30, 2010, NNSA informed the Plaintiff that it was preparing a Supplement Analysis. [*Id.*]

13. Prior to NNSA's completion of the Supplement Analysis of how to proceed with possible changes to the proposed design of the CMRR-NF, Plaintiff filed its Complaint on August 16, 2010. [Doc. 1.]

14. On September 21, 2010, NNSA's Deputy Administrator for Defense Programs, Donald L. Cook, decided "for prudential reasons" that the NNSA should complete an SEIS "to

analyze the potential environmental impacts associated with the construction of the proposed CMRR-NF." [Doc. 9-1 at § 16.] A Notice of Intent to prepare an SEIS appeared in the October 1, 2010 issue of the Federal Register. [Doc. 9, Ex. 2.]

15. The preparation of the SEIS includes a public scoping process which involves "two public scoping meetings to assist NNSA in identifying potential impacts, alternatives, and mitigation strategies that should be analyzed in the SIS." [Doc. 9-1 at ¶ 17.] Other federal agencies, as well as state agencies, Native American tribes, and the general public, including Plaintiff, are on notice of the NNSA's intention to prepare an SEIS and can participate in determining the scope of the environmental analysis. Thereafter, the NNSA will make a draft of the SEIS available to the public for a 45-day comment period and all comments will be considered in the preparation of the Final SEIS. [*Id.*]

16. 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. [Doc.9-1, Ex. 1 ¶ 20.] No CMRR-NF construction is underway, and none will occur while the SEIS is being prepared. [*Id.* at ¶ 21.]

17. Between October 2010 and June 2011, the expected SEIS period, the overall design is expected to advance by only approximately 15 percent. [*Id.* at ¶ 25.] Construction of the CMRR-NF will not occur until after the SEIS is completed and a new ROD issued. [Doc. 9 at p. 27; Doc. 9-1 at ¶ 21.] If, after completion of the SEIS, NNSA decides to proceed with construction of the proposed CMRR-NF, the building is not expected to be occupied and operational until 2022. [*Id.* at ¶ 23; Doc. 10 at 11.] NNSA has expended money over the course of the past six years for the design of the proposed CMRR-NF. [Doc. 9-1 at ¶ 19.]

III. Legal Framework for Prudential Mootness.

18. Prudential mootness is a legal doctrine closely related to Article III mootness. However, prudential mootness arises from the doctrine of remedial discretion. *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997). Specifically, prudential mootness addresses "not the power to grant relief but the court's discretion in the exercise of that power." *Id., quoting Chamber of Commerce v. United States Dep't of Energy*, 627 F.2d 289, 291 (D.C.Cir.1980). Thus, even if a case is not constitutionally moot, a court may dismiss the case under the doctrine of prudential mootness if the case "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." (Emphasis in original.) *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010), *quoting Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997); *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d at 727, *quoting Chamber of Commerce v. United States Dep't of Energy*, 627 F.2d 289, 291 (D.C.Cir.1980).

19. The Tenth Circuit has expressly recognized the doctrine of prudential mootness, and has stated that "it has particular applicability in cases . . . where the relief sought is an injunction against the government." *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d at 727 (citations omitted). In fact, "[a]ll the cases in which the prudential mootness concept has been applied have involved a request for prospective equitable relief by declaratory judgment or injunction." *Building and Construction Department; AFL-CIO v. Rockwell International Corporation*, 7 F.3d 1487, 1492 (10th Cir. 1993) (citations omitted).

20. Under the prudential mootness doctrine, the central inquiry is whether "circumstances [have] changed since the beginning of litigation that forestall any occasion for

meaningful relief." *Fletcher v. United States,* 116 F.3d at 1321; *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d at 727. In cases involving prudential mootness, "a court may decline to grant 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." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d at 1122, *quoting Building and Construction Department*, 7 F. 3d at 1492.

21. "[E]ven if some remnant of the original controversy be still alive [sic], [circumstances may exist] where the courts, as a matter of prudence and sound discretion, should stay their hand and withhold drastic injunctive relief." *State of New Mexico v. Goldschmidt*, 629 F.2d 665, 669 (10th Cir. 1980), *citing United States v. W.T. Grant Co.*, 345 U.S. 62, 669 (1953).

22. The United States Supreme Court has stated that "sound discretion withholds the remedy where it appears that a challenged 'continuing practice' [of an administrative agency] is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted." *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961), *cited with approval in Chamber of Commerce v. United States Dep't of Energy*, 672 F.2d at 292.

23. Because the doctrine of prudential mootness is concerned with the court's discretion to exercise its power to provide relief, the Court's determination of prudential mootness is reviewed for an abuse of discretion. *Fletcher v. U.S.*, 116 F.3d at 1321; *see also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d at 1124; *United States v. W.T.Grant Co.*, 345 U.S. at 635-36.

IV. Analysis

24. Plaintiff's Complaint seeks declaratory and injunctive relief with regard to the Defendants' activities in connection with the design of the CMRR-NF on the grounds that the project exceeds its scope as defined in the 2003 EIS and the 2004 ROD.

25. Defendants are currently in the process of undertaking an SEIS, which would supercede the 2003 EIS and 2004 ROD, to ascertain how best to proceed with the proposed CMRR-NF in light of newly discovered geological information as well as design modifications that came to light after the completion of the 2003 EIS and 2004 ROD. After the SEIS is completed, NNSA will decide, based on that study, how best to proceed with the proposed CMRR-NF. Thus "circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief." *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d at 727.

26. "The purpose of an injunction is to prevent future violations." *United States v. W.T.Grant Co.*, 345 U.S. at 633. Here, there will be no future violations of the 2003 EIS and the 2004 ROD because the CMRR-NR project will be governed by the SEIS which is currently being conducted.

27. The claims in the Plaintiff's Complaint seek declaratory and injunctive relief to ensure that Defendants' design and planning of the CMRR-NR conform to Plaintiff's request for a court-ordered new EIS. However, because the Defendants are currently conducting an SEIS which has not yet been completed, it is premature for the Court to order the Defendants to prepare a new EIS. The SEIS may very well address the Plaintiff's concerns about CMRR-NF.

28. Plaintiff also requests that this court order Defendants to stop all activities in connection with the CMRR-NF pending the completion of a new EIS and ROD. [Doc. 1 ¶¶ 80-

90.] Under the doctrine of prudential mootness, the district court has the discretion to withhold injunctive relief "even if some remnant of the original controversy be still alive." *Goldschmidt*, 629 F.2d at 669, *citing United States v. W.T. Grant Co.*, 345 U.S. 629 (1953); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d at 1124, *quoting Goldschmidt*, 629 F.2d at 669. "[A] court may decline to grant 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." *Building and Construction Department v. Rockwell International Corp.*, 7 F.3d at 492. The court has the general discretion in "formulating prospective equitable remedies, especially with regard to the government of the United States where 'consideration of . . . comity for coordinate branches of government' come into play." *Id., quoting Chamber of Commerce*, 627 F.2d at 291. The moving party, in this case the Plaintiff, "must satisfy the court that relief is needed." *United States v. W.T. Grant Co.*, 345 U.S. at 633.

29. Here, the doctrine of prudential mootness counsels against a court issued injunction to halt all work. The Defendants are in the process of changing their policy in that they are conducting an SEIS which will supercede the 2003 EIS and 2004 ROD. The expected duration for the completion of the SEIS is from October 2010 to June 2011. [Doc. 9 at p. 26.] In addition, any on-going activities pending the completion and publication of the SEIS are preliminary. [Doc. 10 at p. 10.] The actual construction of the CMRR-NF will not occur until after the SEIS is completed and a new ROD issued. [Doc. 9 at p. 27.][2] Furthermore, construction will take

[2] Plaintiff states that "[t]he Infrastructure Package may begin in March 2011." (Emphasis added.) [Doc.10 at pp.10-11.] Not only is this assertion qualified (infrastructure "may" begin), it is also unsupported. Moreover, even if Defendants should acknowledge that such infrastructure work will begin in March, the work described by Plaintiffs which "may" take place is not sufficient enough to alter the undersigned Magistrate Judge's recommendation that the doctrine of prudential mootness counsels against a court issued injunction to halt all work.

more than a decade, and the facility is not expected to be occupied and operational until 2022. [Doc. 10 at p. 11; Doc 9 at p. 16-17.] Plaintiff will have ample opportunity to renew its complaint if it finds it necessary when the SEIS is filed and before any construction begins.

RECOMMENDED DISPOSITION

For the reasons stated above the undersigned Magistrate Judge recommends that the District Court dismiss Plaintiff's Complaint in its entirety based on the doctrine of prudential mootness.

Timely objections to the foregoing may be made pursuant to 28 U.S.C. § 636(b)(1)(c). Within fourteen days after a party is served with a copy of these proposed findings and recommendations that party may, pursuant to § 636(b)(1)(c), file written objections to such proposed findings and recommendations with the Clerk of the United State District Court, 333 Lomas N.W., Albuquerque, NM 87102. A party must file any objections within the fourteen-day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

ALAN C. TORGERSON
UNITED STATES MAGISTRATE JUDGE

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 STEVEN 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 REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Preliminary Statement

This memorandum is submitted on behalf of plaintiff, the Los Alamos Study Group ("plaintiff") in reply to Federal Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction ("D.Br."), Docket ("Dkt") No. 23.

Statement

The fundamental mandate of the National Environmental Policy Act ("NEPA") requires analysis before a project is undertaken. It is regrettable that instead of addressing their implementation of a multi-billion-dollar nuclear facility without a valid analysis of the environmental impacts of that project and its alternatives, defendants offer arguments based upon confusion and an appeal to prejudice. For example, plaintiff's commitment to the goal of nuclear disarmament clearly has no possible relevance to this case, yet it is no accident that defendants in

their brief refer twice to this commitment (D.Br. at 15, 23), as if it were a label of aspersion and a factor of weight. Similarly, defendants have no excuse for asserting repeatedly that they are in continuing compliance with NEPA (D.Br. at 1, 23) and that they have not begun to construct the Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF"). (D.Br. at 1, 15, 16). The undisputable facts on the ground show otherwise. Moreover, it not only contravenes the evidence but it also raises a serious question of candor for defendants to tell the Court that they have not "locked in" to any alternative for CMRR-NF (D.Br. at 14), have made "no such decision (let alone implementation)" (D.Br. at 8 n.2) when an extensive public record, including recent statements from the highest levels of government, Third Affidavit of Gregory Mello (Exhibit ("Ex.") 22) ("Mello Aff. 3" ¶¶ 95) shows that the truth is opposite. And the repeated claims that defendants would pursue detailed design of the CMRR-NF *to assist the NEPA process* (D.Br. at 2, 13, 19, 20), rather than pause the project and consider the alternatives as NEPA requires, cannot be regarded seriously when such design efforts manifestly serve *only* to harden their commitment to their improperly-chosen alternative and are expressly forbidden by defendants' own departmental NEPA guidance. There is even the denial that CMRR-NF construction is taking place, while defendants elsewhere state that their present construction activities are directed to the purpose of operating a future CMRR-NF.

While the defendants would substitute rhetoric and the cloak of serving national security for proof and proper argument, the public interest and defendants' interests are totally divergent here. Defendants have no evidence from "specialists" or "qualified experts" (D.Br. at 6, 17-18, 22) that their conduct is required by interests of national security. The public interest, as articulated by NEPA and the decisions in this Circuit, lies, instead, in requiring federal agencies to study and describe, and to disclose to the public, the consequences of their ambitious designs

before a decision is made to proceed. It lies in identifying, rigorously exploring and objectively evaluating "*all reasonable alternatives*" (40 C.F.R. § 1502.14(a))(*emphasis supplied*) to the proposed action. It lies in analyzing the direct and indirect environmental impacts, setting them down in writing, and inviting the public's comment and criticism. It lies in objective analysis, free from improper influences or predetermination, of the true suite of alternatives before making a commitment to one of them.

All sorts of baseless arguments have been raised, such as the contention that plaintiff must prove damages that are "certain, great, actual, and not theoretical" (D.Br. at 2, 15, 16, 17), when the courts have made clear that a NEPA plaintiff succeeds by showing an *increased risk* of injury. (See page 14, *infra.*) It is emphatically not plaintiff's burden to show the impacts that would have been described in an environmental impact statement, if defendants had prepared one as the law requires.[1] To label as "speculative" (D.Br. at 3, 16, 17) the adverse impacts of a massive construction project such as the CMRR-NF only shows defendants' contempt for those who suffer such consequences and for those that recognize the need to protect against them. And to argue that injuries from construction can be ignored because they would occur after defendants issue a supplemental EIS (D.Br. at 20) rejects the uniform case law holding that long-term consequences are highly relevant and betrays defendants' disdain for the NEPA process. (See page 13, *infra.*)

[1] This Court has ruled: "An agency's shortcomings in environmental inquiries should not turn out to be a detriment to plaintiffs expected to do better making the same inquiries. . . . NEPA requires federal agencies, not plaintiff consumer groups, to take the requisite 'hard look' at environmental consequences. An agency would have little incentive to make comprehensive environmental assessments when it can cast that burden onto a plaintiff trying to build a case for a NEPA violation. Shifting the congressional mandate of environmental analysis from federal agency to plaintiff perverts the statute's objective." *Los Alamos Study Group v. O'Leary,* U.S. District Court for the District of NM, No. 94-CV-D1306-ELM (Jan. 26, 1985)(slip opinion at 26).

Defendants assert that they intend to prepare a Supplemental Environmental Impact Statement ("SEIS")[2] to analyze the impact of "design changes" at the CMRR-NF. (*id.;* D.Br. at 19) Critically, defendants refuse to stop work on the CMRR-NF pending trial. For defendants to demand relief from the injunctive consequences of their NEPA violations, based on the transparent device of a supplemental EIS, when the SEIS shows no prospect of considering the actual "reasonable alternatives," and when defendants push forward the CMRR-NF project simultaneously with their supposed good-faith SEIS analysis, underscores their rejection of the fundamental purpose of NEPA.

Under NEPA, timing is everything. NEPA, in the words of Sen. Jackson, Chairman of the Senate Interior and Insular Affairs Committee at the time of enactment, demands examination of alternatives for federal action that can lead to environmental degradation "*before they get off the planning board.*" (115 Cong. Rec. S 29055 (1969)) (*emphasis supplied*). This Court has stated, in *Los Alamos Study Group v. O'Leary,* U.S. District Court for the District of NM, No. 94-CV-D1306-ELM (Jan. 26, 1985), a case bearing many similarities to this one, that DOE violated NEPA by beginning construction before it completed NEPA compliance and that tardy promises to prepare an EIS had little value:

> The decision by DOE to begin an EIS at this point does little to ameliorate the fact that it was not done before the DARHT project began. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 317 n.12 (the cessation of violations does not bar issuance of an injunction)(cit. omitted); *see also Public Service,* 825 F.Supp. at 1503-04 (agency's statements that it will perform the required NEPA analysis not sufficient to invoke voluntary cessation exception to mootness doctrine). Indeed, some of the damage NEPA seeks to prevent may already be done. Bias toward

[2] Defendants insist that they are "preparing the SEIS following the same procedures as it would for a 'new' EIS." (D.Br. at 1) However, defendants do not state that they will include a comparison of "all reasonable alternatives" to the current design of the CMRR-NF nor that they will disclose even basic data concerning such alternatives at the scoping stage so that federal and state agencies, tribes, and members of the public can comment on the alternatives to be studied. The scoping stage of the SEIS has passed without any analysis or even a list of possible reasonable alternatives. Two of the three alternatives mentioned in the Notice of Intent have already been abandoned as infeasible by defendants.

> one alternative or another may already exist as construction was allowed to start and progress without public input." (*Los Alamos Study Group v. O'Leary* at 20).

In *Los Alamos Study Group v. O'Leary,* this Court preliminarily enjoined DOE from all further construction of the Dual-Axis Radiographic Hydrotest ("DARHT") facility at Los Alamos National Laboratory "or from taking any other actions in furtherance thereof" where DOE had failed to issue an EIS analyzing the environmental impacts of the DARHT facility and reasonable alternatives.

Here, DOE and NNSA took the CMRR-NF project from the planning board long ago and thrust it into implementation without issuing an EIS analyzing the project they were planning and its reasonable alternatives, and in disregard of the Record of Decision ("ROD") that they issued in 2004. If their actions continue, they bid fair to make the project unstoppable. Only the Court's intervention, by a preliminary injunction, as was issued in *Los Alamos Study Group v. O'Leary*, can preserve the consideration of alternatives that Congress mandated.

The purpose of a preliminary injunction is to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). A prohibition on continued planning, design, and construction of the CMRR-NF is necessary to preserve the *status quo ante* and to "prevent the judicial process from being rendered futile by defendant's action or refusal to act." *O Centro Espirita Beneficiente Uniao de Vegetal v. Ashcroft,* 389 F.3d 973, 977 (10th Cir. 2004).

Plaintiff has met the standards for issuance of a preliminary injunction, namely: (1) substantial likelihood of success on the merits, (2) irreparable harm unless the injunction is issued, (3) the threatened injury outweighs the harms that the preliminary injunction may cause to the non-moving party, and (4) an injunction will not adversely affect the public interest. *Davis v. Mineta,* 302 F.3d 1104, 1111 (10th Cir. 2002).

Defendants' responding papers are remarkable for what they fail to contest. It is undisputed that federal officials from the Administration, DOE, and NNSA have declared their commitment to construct the CMRR-NF. The 2003 EIS analyzed an entirely different design that is smaller and cheaper than the present CMRR-NF, by an order of magnitude, and bears no resemblance to the current design. That seven-year-old EIS clearly does not support construction of the present CMRR-NF. There is no serious claim that the 2003 EIS, or the subsequent SWEIS[3] or the CTSPEIS[4], adequately analyzes the planned CMRR-NF and its reasonable alternatives. There is no response to plaintiff's listing of numerous NEPA regulations violated by defendants (Plaintiff's Motion for Preliminary Injunction ("Pl. MPI") at 12-14; Dkt. No. 13). While claiming that the purpose, location and footprint of the CMRR-NF are unchanged since the 2003 EIS (D.Br. at 1, 9, 23), defendants do not dispute that the project has blossomed far beyond the scope of 2003-04.

The CMRR-NF budget has exploded from $350 to 500 million to $3.7 to 5.8 billion. (White House Fact Sheet, Nov. 17, 2010). Construction will not take 34 months but 144 months, and it will not be completed in 2009 but 2023-24. (Exhibit ("Ex") 1: November 2010 Update to the National Defense Authorization Act of FY 2010 Section 1251 Report, at 6). Instead of a structure built 50 to 75 feet below grade (as previously analyzed), defendants plan to excavate to 125 to 140 feet and replace an entire unstable stratum with a giant block of concrete the width and breadth of a football field and 120 feet tall. The total volume excavated will not be 167,000 cubic yards but 579,000 to 703,500 cubic yards. (Ex 2: Supplemental Analysis at 19, table 2, Aug. 17, 2010 ("SA"); Ex 3: Bachmeier, C., Mar. 14, 2007 CMRR public meeting ("mtg"), Tr.

[3] Final Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory (DOE/EIS-0380)(May 2008)("SWEIS").
[4] Complex Transformation Supplemental Programmatic Environmental Impact Statement (DOE/EIS-0236-S4)(Oct. 2008)("CTSPEIS").

26). The "purpose and need" now include the "hotel concept," under which floor layouts can be altered to accommodate as-yet-unknown future missions; this concept caused significant seismic design problems and is the cause of some of the dramatic growth in project impacts. (DNFSB Staff Issue Report, April 16, 2008, at 5). Concrete requirements have increased from 3,194 cubic yards to 371,000 cubic yards; steel requirements have increased from 242 tons to 18,539 tons (Pl. MPI) (Dkt. No. 13 at 5, citing SA at 7, 30; 2003; EIS at 2-21). Such increases will magnify impacts from resource production and transportation and construction. The affected area has increased from 26.75 acres in 2003 to approximately 96 acres. (Pl. MPI, Dkt. No. 13, Mello Aff. 2 at Paragraph ("Par") 12h *citing* 2003 EIS at S-31; at Par. 4g *citing* SA at 11, at Par. 12a *citing* 17). The peak construction work force has increased from 300 to 1000. (Pl. MPI at 5, Dkt. No. 13 *citing* 2003 EIS at 2-21; Pl. MPI, Dkt. No. 13, Mello Aff. 2 at Par. 14b *citing* SA at 25). Plans now include two concrete batch plants, a craft worker facility, and an additional truck inspection site. (Ex 4: McKinney presentation, Sept. 8, 2010, at 5; Pl. *Response to Motion to Dismiss* ("Re-MTD") Dkt. No. 10, Mello Aff 1 at Par 71, *citing* Bretzke presentation, June 16, 2010, at 7).[5] Defendants' latest filing includes a map showing another previously undisclosed CMRR component (the "CMRR/TA-48 Office Complex") of unstated size and yet another large previously undisclosed connected action ("TA-55 Cold Hardened Shop") with outside dimensions only slightly smaller than the CMRR-NF itself (Snyder Decl., Att. 2). These latest elements have never been disclosed or analyzed under NEPA.

Defendants have been implementing the CMRR-NF project since 2004. In February, 2004, they issued a ROD based on the 2003 EIS, deciding to construct the CMRR-NF. (69 Fed.

[5] Defendants now claim that the need for an electrical substation, warehouse, and the realignment of Pajarito Road is being reconsidered (D.Br. at 10), but there is no doubt about the magnitude of the project and no dispute that significant environmental impacts, not analyzed in the 2003 EIS, will ensue from defendants' current plans. The volatility of defendants' plans illustrates the need to reexamine the premises of the project.

Reg. 6967 (Feb. 12, 2004)). Later that year, NNSA requested construction funding from Congress for the CMRR-RLUOB. (Ex 5: NNSA FY 2005 Congressional Budget Request ("CBR"), Weapons Activities, RTBF, 04-D-125, CMRR, at 219) On June 17, 2005 DOE issued Critical Decision 1, approving the alternative selection and the cost range for the CMRR-NF, the CMRR-RLUOB and hardware for both. (Ex 6: NNSA FY 2009 CBR, Weapons Activities, RTBF, 04-D-125, CMRR, at 298). In November 2005, NNSA entered into a design-build contract with Austin Commercial to construct the RLUOB. (Ex 7: CMRR Project Brochure, LALP-06-006, Mar. 9, 2006, CMRR mtg, Vol 1, at 16). On January 12, 2006 NNSA broke ground for the RLUOB; construction went forward without interruption. (Ex 8: http://www.lanl.gov/news/index.php/fuseaction/nb.story/story_id/7771/nb_date/2006-01-13, LANL News Bulletin, Jan. 13, 2006). In 2006, NNSA excavated the location of the CMRR-NF. (D.Br. at 16).

Defendants are now emboldened by the Magistrate's recommendation that the case ought to be dismissed for "prudential" reasons, because this massive project is in a benign design phase rather than construction or other irreversible implementations. But this is demonstrably contrary to the facts. The CMRR-RLUOB and the CMRR-NF were designed together and operate as a single facility. For example, utilities for both structures are contained in the CMRR-RLUOB. Offices in the RLUOB serve both personnel in that structure and those who work in CMRR-NF. Fuel and water tanks and emergency facilities in the RLUOB serve both facilities. A tunnel will connect the RLUOB and the CMRR-NF; this is now half built. Parts of the laboratory facilities in the RLUOB are identical to those in the NF for the purposes of training personnel and testing equipment for NF operations. Construction of the RLUOB (which is complete, although installation of specialized equipment will continue for three years) has included numerous

elements that serve the CMRR-NF. (Mello Aff. 3 ¶ 19). The RLUOB is described by defendants as a "support building for the major building of the nuclear facility." (Mello Aff. 3 ¶ 4). Thus, construction of the CMRR-RLUOB constitutes an irreversible and irretrievable commitment of resources to the construction of the CMRR-NF.

In this context defendants offer several erroneous contentions against a preliminary injunction. We address them herein:

I. Plaintiff is likely to prevail on the merits.

The 2003 EIS, the 2008 CTSPEIS, and the 2005 SWEIS all fail to analyze the impacts of the CMRR-NF as now planned. However, defendants seek to avoid jurisdiction under the Administrative Procedure Act[6], which authorizes review of a "final agency action" (5 U.S.C. § 704), asserting that they have made no decision on what to build:

> "In such a fluid environment of planning and design, Plaintiff's claims—that NNSA is violating NEPA by 'implementing' a new decision for CMRR-NF when no such decision (let alone implementation) exists and by 'predetermining' the outcome of the SEIS process when NNSA is plainly open to accommodating new information as it arises—ring hollow." (D.Br. at 8 n.2).

(Defendants ignore that they made a ROD in 2004 that has never been revoked and has been the basis for years of appropriations by Congress.) As of 2010, it is clear that another decision has been made as to the CMRR-NF of 2010—the CMRR-NF of the multi-billion-dollar price tag—and is now being carried out. The Vice President has publicly declared in a letter to the Senate Foreign Relations Committee that the Administration gives its "unequivocal support" to the CMRR-NF (Letter, Sept. 15, 2010). The White House on November 17, 2010 expressly stated its commitment to CMRR-NF:

> Today's release of updated investment plans (in an update to the 'Section 1251 Report to Congress') shows this Administration's commitment to requesting the

[6] Defendants restate arguments made in their motion to dismiss on jurisdictional grounds. (D.Br. at 6) Plaintiff respectfully refers the Court to its response brief, filed on Oct. 21, 2010.

> funding needed to sustain and modernize the nuclear complex. In particular, the Administration plans will:
>
> . . .
>
> - Increase funding by $4.1 billion increase over the next five years relative to the plan provided to Congress in May—including an additional $315 million for the Uranium Processing Facility (Tennessee) and the Chemistry and Metallurgy Research Replacement (CMRR) facility (New Mexico); and
>
> . . .
>
> The above plans provide the best current estimate of costs for the nuclear weapons stockpile and infrastructure. As the UPF and CMRR facilities are only at the 45 percent design level, the Administration recognizes that the costs could change over time. At the present time, the range for the Total Project Cost for CMRR is $3.7 billion to $5.8 billion and the range for the UPF is $4.2 billion to $6.5 billion. The Administration is committed to requesting the funds necessary to ensuring completion of these facilities. . . (Fact Sheet: An Enduring Commitment to the U.S. Nuclear Deterrent, White House, Office of the Press Secretary, Nov. 17, 2010).

Since the Administration is publicly committed to "ensuring completion of these facilities," a decision to build the CMRR-NF *has* been made.[7] The Administration's commitment was made to obtain the support of certain Senators for the New START weapons treaty, which has since been ratified, and so is irreversible. (Ex 10: Nuclear Weapons & Materials Monitor, Nov. 29, 2010, at 2-3). NNSA's program directive states: "Plan for CMRR-NF completion by 2020 with operations in 2022." (Ex 12: Holmes presentation, June 10, 2010, at 4). Under NNSA's agreement with Los Alamos National Security, LLC ("LANS"), to manage and operate LANL, it is an "essential" contract requirement that LANS "effectively manages CMRR-NF/SFE progress in support of NNSA strategic objectives." NNSA has committed to pay LANS an additional $300,000 in bonuses for achieving intermediate targets in the CMRR-NF project in 2010. (FY 2010 Performance Evaluation Plan at 40, 121). To date,

[7] Defendants have announced CMRR-NF construction as imminent and certain in several public presentations in 2010. (*e.g.*, Holmes presentation, June 10, 2010, Bretzke presentation, June 16, 2010, McKinney presentations, June 16, 2010 and Sept. 8, 2010, Ex 11: Overview of CMRR, Dec. 2, 2010)

$289.5 million has been appropriated for the CMRR-NF project, and another $168.5 million is appropriated for FY 2011. (Mello Aff. 1 ¶ 54).

Further, construction has begun; defendants admit that the CMRR-NF excavation has been dug (D.Br. at 16), and the joint facilities contained in the CMRR-RLUOB have been built. The utilities for both buildings and offices for personnel in both buildings are contained in the RLUOB, which as a structure is finished. There is also a tunnel connecting both buildings, which has been built partway to the CMRR-NF site. (Ex 13: Bachmeier, C., NNSA CMRR mtg, Mar. 14, 2007, Tr. 10). As stated, the CMRR-RLUOB contains many components that would serve the CMRR-NF, the CMRR-NF site has been partially excavated, and detailed design is continuing. These commitments likewise constitute irreversible and irretrievable commitments of resources (42 U.S.C. § 4332(2)(C)(v)) and constitute final agency action under NEPA.

DOE/NNSA's failure to issue an EIS describing the impacts of the 2010 version of the CMRR-NF and all reasonable alternatives constitutes final agency action. An agency must assess environmental impacts before an "irretrievable commitment of resources." 42 U.S.C. § 4332(2)(C)(v). Judicial review may start when the agency fails to do so. Specifically, an "alleged failure to comply with NEPA constitutes 'final agency action,' see 5 U.S.C. § 551(13)," *Catron Cnty. Bd. of Comm'r v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996) (Failure to issue EIS before agency designation of critical habitat constitutes final agency action). *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009) (Failure to issue EIS before mineral lease held a NEPA violation, since "assessment of all 'reasonably foreseeable' impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made."); *Sierra Club v. U.S. Dept. of Energy*, 287 F.3d 1256, 1263, 1265 (10th Cir. 2002)(Failure to issue EIS before easement was

granted for mining road violates NEPA; "a challenge to the failure of an agency to comply with the NEPA procedure becomes ripe at the time the failure takes place"). Thus, "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).

Defendants also argue that the series of projects ongoing in the Pajarito Corridor are not "connected actions" requiring analysis in a single EIS. (D.Br. at 10-11). But the projects are admittedly "near concurrent activities" (Ex 14: Bretzke presentation, June 16, 2010, at 3; McKinney presentation, June 16, 2010, at 3; Sept. 8, 2010, at 4) that include the CMRR-NF, CMRR-RLUOB, the Nuclear Materials Safety and Security Upgrade ("NMSSUP") Phase II, the TA-55 Revitalization Project ("TRP") Phase II and III for the PF-4 Plutonium Facility, the new Radioactive Liquid Waste Treatment Facility ("RLWTF"), the Transuranic ("TRU") Waste Facility, and smaller projects. Defendants are clearly managing many aspects of their construction as a coordinated whole. These facilities depend upon and serve one another, are served by the same roads and utilities, and all of them are scaled and designed to match the size of the CMRR-NF. For example, the NMSSUP upgrade to the TA-55 security perimeter (under construction) would also protect the planned CMRR-NF, and much of it would not be built without the CMRR-NF. Defendants dispute interdependence, saying that these projects "serve other facilities, including PF-4, which has been in operation since 1978." (D.Br. at 11). However, the TA-55 Revitalization Project consists of improvements to PF-4. Thus, PF-4 is being configured to operate interdependently with the CMRR-NF, the RLUOB, the RLWTF, and the solid waste facilities as a system of interdependent facilities (Ex 15: 1251 Report at 23-24) to assess, surveil, manufacture, and refurbish plutonium weapons components (at 28), and

should be analyzed together. *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1228 (10th Cir. 2008).

Defendants also argue that plaintiff errs in claiming that the public was not involved in post-2005 NEPA processes by means such as 40 C.F.R. § 1502.9(c)(1), which addresses EIS supplements. They refer to various meetings involving an air quality permit (D.Br. at 11-12), but these meetings have nothing to do with NEPA.

II. Plaintiff will be irreparably injured if there is no preliminary injunction:

Defendants tell the Court to ignore the long-term injuries from construction and operation of the CMRR-NF in considering a preliminary injunction. (D.Br. at 16). However, those injuries are clearly NEPA damages. Moreover, if defendants cease working on the design of the CMRR-NF and review alternatives objectively and in good faith, it will be less likely that they will complete the CMRR-NF and cause such long-term injuries. In *Davis v. Mineta,* defendants opposed a preliminary injunction of Phase I of a project, arguing that plaintiffs would be injured only by long-term damages from Phase II. The court ruled that an injunction was required, because allowing *any part* of the project to go forward there would make injury to plaintiffs more likely:

> If 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 will be skewed toward completion of the entire project. (302 F.3d at 1115 n.7)

Here, similarly, an injunction should issue to bar all current activities, because doing them would skew analysis of alternatives toward construction of CMRR-NF, which would cause long-term damages.

Defendants state frankly that, without an injunction, they plan to continue construction of the CMRR-NF. (D.Br. at 3, 15, 16). (They do not mention their current CMRR construction

designed solely to support CMRR-NF.) This would give the CMRR-NF a further advantage in NEPA analysis. Injuries from construction are in no sense speculative (D.Br. at 3, 16, 17). In *Greater Yellowstone Coal. v. Flowers,* 321 F.3d 1250 (10th Cir. 2003), the court emphasized that such injuries require an injunction: "Disturbances associated with the construction would be in the form of noise, human activities, ground disturbance, and tree removal . . . " (at 1260, 1261). Such impacts are expected here. (*See* Mello Aff. 2 ¶¶ 12-14, Sanchez Aff. ¶¶ 6-10).

Defendants repeatedly argue that injury to plaintiff must be "certain, great, actual, and not theoretical," citing *Heideman v. South Salt Lake City,* 348 F.3d 1182, 1189 (10th Cir. 2003) (D.Br. at 2, 14, 15, 16, 17). This is simply incorrect. *Heideman* is not a NEPA case. Under NEPA, "plaintiffs need only establish a sufficient likelihood of harm. . . . Proof that significant effects on the human environment will in fact occur is not essential." *Los Alamos Study Group v. O'Leary,* No. 94-1306-M Civil (Jan. 26, 1985)(slip opinion at 21).[8] Thus, 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. "The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury the [NEPA] was designed to prevent." *Comm. to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 448-49 (10th Cir. 1996). "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." *Sierra Club v. U.S. Dep't. of Energy,* 287 F.3d 1256, 1265 (10th Cir. 2002). *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573 n.7

[8] Thus, the Supreme Court in *Winter v. Natural Res. Def. Council,* 129 S.Ct. 365 (2008), confirmed that the "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." (at 376). The occurrence of an increased risk of harm constitutes such injury. *Sierra Club v. Marsh,* 872 F.2d 497, 500-01 (1st Cir. 1989)("the harm consists of the added risk to the environment that takes place when government decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision on the environment.")

(1992)(NEPA plaintiff need not show that injury from failure to issue EIS is certain or immediate).

Defendants seek to avoid an injunction, telling the Court that their design efforts "will aid the SEIS decision-making process" (D.Br. at 2) and "will help identify and clarify potential environmental impacts in furtherance of the NEPA process" (*id.* 13 n. 6; see *id.* 20 n.12). But defendants' design work would only involve the CMRR-NF, not any alternatives, and therefore would only increase the likelihood of constructing the CMRR-NF. Design work on the CMRR-NF project is governed by DOE Order 413.3B (Nov. 29, 2010). Under that order, DOE has scheduled Critical Decisions 2 and 3 ("CD-2/3")—establishment of the Project Baseline and Start of Construction/Execution—for the Infrastructure Package[9] for March 2011. (Pl. Re-MTD Dkt. No. 10, Mello Aff. 1 ¶ 71, *citing* Bretzke presentation, June 16, 2010, at 7). At that point, "[t]he project scope should be finalized and changes . . . should be permitted only for compelling reasons . . ." (Order 413.3B, at C-6). Thus, by March 2011 the design of the Infrastructure Package will be fixed. Already, the CMRR project manager has announced on March 3, 2010, "The infrastructure package [baseline design] is done." (Mello Aff. ¶ 27). The design of successive packages (Pajarito Road, Basemat, Structure Package) would become fixed in order (Pl. Re-MTD Dkt. No. 10, Mello Aff. 1 ¶ 71, *citing* Bretzke presentation, June 16, 2010, at 7). Detailed design would proceed, but there is no room for consideration of "reasonable alternatives," such as placement of CMRR-NF functions in another location or elsewhere in the NNSA weapons complex or management of existing space and facilities to suit NNSA's needs.

This Court has ruled: "Under NEPA regulations, it is illegal for an agency to continue an activity while an EIS is being prepared unless such action 'will not prejudice the ultimate

[9] The Infrastructure Package includes a 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)

decision on the program.' 40 C.F.R. § 1506.1(c); see also 10 C.F.R § 1021.211." *LASG v. O'Leary* (slip op. at 19). Defendants assert that "advancing planning and design" of the CMRR-NF before NEPA analysis will not "limit or prejudice the choice of reasonable alternatives or result in any irreparable injury." (D.Br. at 21 n.13). This statement flatly contradicts DOE's own NEPA guidance.[10] DOE guidance states that "an interim action must be one that would not adversely affect the environment nor limit the choice of reasonable alternatives" (at 1). It prohibits interim design work because it tends to exclude other alternatives and to give a schedule advantage to the agency's favorite, here the CMRR-NF:

> Proceeding with detailed design under DOE O 413.3, Program and Project Management for the Acquisition of Capital Assets, before the NEPA review process is completed (in contrast to conceptual design noted above) is normally not appropriate because the choice of alternatives might be limited by premature commitment of resources to the proposed project and by the resulting schedule advantage relative to reasonable alternatives. (at 4)

Plaintiff is clearly injured by defendants' continued work on the CMRR-NF.

III. Neither defendants nor the national interest will be injured by a preliminary injunction:

Defendants offer statements of opinion about the importance of the CMRR-NF to national security, with which defendants seek to avoid an injunction. (D.Br. at 17-20)(Snyder Aff. ¶¶ 25-32) Under Rule 702, opinion testimony may be presented by

> a witness qualified as an expert by knowledge, skill, experience, training, or education, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (Rule 702, Fed R. Evidence).

Mr. Snyder's education is in civil engineering. (Aff. ¶ 1) There is no indication of any training or experience in matters of national or international security policy. Neither is there any

[10] Ex 17: Guidance Regarding Actions That May Proceed During the National Environmental Policy Act (NEPA) Process: Interim Actions, DOE Memorandum, Office of NEPA Policy and Compliance, June 17, 2003.

explanation of the methods he used to evaluate risks to national security. The evidence is inadmissible under Rule 702. *103 Investors v. Square D Co.*, 470 F.3d 985, 990-91 (10th Cir. 2006); *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 884-86 (10th Cir. 2005).

Further, the stated conclusions are not supported by facts or reasoning. The statements in Dr. Snyder's affidavit refer to certain DOE/NNSA publications. The congressional commission report, America's Strategic Posture (May 2009), refers to plans for the CMRR-NF but does not say when it is needed or specify a schedule for its construction (Ex 18: at 49-51).[11] The 2010 Nuclear Posture Review (April 2010) calls for "increased funding" for the CMRR-NF (Ex 19: at xv) and states that the CMRR-NF must be completed by 2021 (Ex 19: at 42); however, the reasons supporting this date are not stated.[12] It is known that DOE/NNSA have been working on the issue for "*more than six years*" (D.Br. at 21) and have extended the completion date from 2009 to 2023 and the construction schedule from less than three years to more than 12 years; there is no known factual basis for asserting that a year or two of further work on a project that would not bear fruit until 2023 will raise a security threat. "The lack of explanation drastically weakens, if not eliminates, any authority behind the conclusions reached by DOE," *see LASG v. O'Leary* (slip op. at 17).

Dr. Snyder states that a delay would require NNSA to "reconstitute" capabilities within the CMR, that "commitments . . . to address failing infrastructure . . . would be abrogated," that some CMR characterization and chemistry capabilities are not available, and that NNSA had assumed that CMRR-NF operations would begin in 2022. (Snyder Aff. ¶¶ 29-31). Nothing in

[11] The chair of the commission, William Perry, and a commission member, Richard Mies, are LANS directors.

[12] The latest amendment to the "Section 1251 report" now states that the CMRR-NF would be completed in 2023. (Ex 1: Nov. 2010 update to the National Defense Authorization Act of FY 2010 Section 1251 report, at 6).

this discussion states that national security cannot tolerate a postponement to accommodate the law.

Again, the broad statement that defendants' construction schedule is "critical to fulfilling our Nation's international commitments" (D.Br. at 19) fails to explain their supposed fears for our "leadership on the international stage." (*id.*) The New START Treaty has been ratified, and there is no claim that another treaty may soon come before the Senate, nor that the CMRR-NF may bear on such treaty. The supposed "connection" between CMRR-NF and the Non-Proliferation Treaty or the Comprehensive Test Ban Treaty is simply speculation. In fact, the Non-Proliferation Treaty was renewed indefinitely in 1995 and requires no further Senate action.[13] Defendants have previously described proposed projects as "critical" to national security, only to abandon them without explanation.[14]

Defendants' misplaced reliance upon *Winter v. NRDC,* 129 S.Ct. 365 (2008)(D.Br. at 19), confuses specific military training needs with ephemeral claims about international prestige.[15] It is not true that, in a debate over NEPA compliance, the defense agency always wins. (*Winter,*

[13] Representatives of plaintiff were present at the deliberations about NPT renewal, working to educate diplomats and other participants, as plaintiff has done in other treaty deliberations.

[14] Ex 20: The Modern Pit Facility was announced contemporaneously with the CMRR and touted as critical to national security: "If constructed and operated, a MPF would address a critical national security issue by providing sufficient capability to maintain, long-term, the nuclear deterrent that is a cornerstone of U.S. national security policy. A MPF would provide the necessary pit production capacity and agility that cannot be met by pit production capabilities at LANL." *Draft Supplemental Programmatic Environmental Impact Statement on Stockpile Stewrdship and Management for a Modern Pit Facility,* May 2003, at S-15, DOE/EIS-236-S2.

[15] Defendants cite other cases (D.Br. at 17-18), arguing that courts respect the province of the military, but none authorize the military to violate NEPA. *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982), holds that injunctions under the Clean Water Act, 33 U.S.C. § 1251 *et seq.,* are governed by equitable principles; *Goldman v. Weinberger,* 475 U.S. 503 (1986), upholds the discipline of military personnel against a claim based in First Amendment principles of free exercise of religion; *Gilligan v. Morgan,* 413 U.S. 1 (1973), concerns the non-justiciability of claims seeking judicial regulation of members of the National Guard; *Citizens for Peace in Space v. City of Colorado Springs,* 477 F.3d 1212 (10th Cir. 2007), involves regulation of free speech at a NATO conference; *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft,* 389 F.3d 973 (10th Cir. 2004), involves a preliminary injunction of federal regulation of the importation of the drug hoasca for religious purposes; and *Nat'l Fed'n of Fed. Emp. v. Greenberg,* 983 F.2d 286 (D.C. Cir. 1993), concerns issues of security clearances.

129 S.Ct. at 378). Rather, the Court must scrutinize "specific, predictive judgments about" risks to defense interests. (*id.*) Normally, agency determinations that contain neither facts nor reasoning fail the test for "reasoned decisionmaking" under the APA. *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378 (1989). Here, the facts and reasoning of NNSA are not stated and its conclusions cannot be sustained.[16] Moreover, where, as here, the agency has predetermined the need to build the CMRR-NF regardless of the environmental impacts, no deference is due. *Davis v. Mineta,* 302 F.3d at 1112. Defendants' conclusory statements do not conflict with the considered view of Bob Peurifoy, experienced in nuclear weapons for almost four decades and under whom most of the country's nuclear arsenal was built, that CMRR-NF is not needed to maintain U.S. nuclear weapons for decades to come. (Peurifoy Aff. ¶¶ 10, 11).[17]

Defendants complain of the economic impacts of halting this project. (D.Br. at 19-20). Defendants apparently take the position that for plaintiff to question their right to spend $5 billion of the public funds without analyzing the project and comparing it with "all reasonable alternatives" in accordance with law, imposes an inequity and an injury upon them. But NEPA is a statutory requirement; it cannot be inequitable or injurious to require NEPA compliance. NEPA is a condition of all federal action having a significant impact on the environment and is intended to facilitate "informed decision-making." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.,* 565 F.3d 683, 703 (10th Cir. 2009). Moreover, self-inflicted injuries carry no

[16] As Judge Mechem put it in the DARHT case, "Although completing an EIS will delay moving the program into full operation, DOE has not presented the court with enough evidence amounting to a reason to fear that the delay has threatened or will threaten national security by endangering plans for the Comprehensive Test Ban Treaty. There is also no reason to believe that a delay resulting from a NEPA review will result in a loss of intellectual resources, as defendants allege." *LASG v. O'Leary* (slip op. at 30).

[17] Thus, this is not an instance of an agency relying on the valid opinions of its own experts (D.Br. at 22), because the opinions here are neither admissible under Rule 702 nor can they pass the arbitrary and capricious test, being stated without factual basis or explanation.

equities. *Davis v. Mineta,* 302 F.3d at 1116. No one could claim that DOE and NNSA rushed to build CMRR-NF in innocence of the need for NEPA compliance.

III. No bond should be required.

An injunction here should carry at most a nominal bond. In fact, a bond is unnecessary in the absence of proof showing a likelihood of compensable harm to the enjoined party. *Coquina Oil Corp. v. Transwestern Pipeline Co,* 825 F.2d 1461, 1462 (10th Cir. 1987). Here, it is clear that defendants have neglected their NEPA responsibilities, making the likelihood of plaintiff's success high and the likelihood of recovery on the bond correspondingly low. (*id.*)

Moreover, *Davis v. Mineta,* 302 F.3d at 1126, holds that a minimal bond should be considered where a party seeks to vindicate the public interest served by NEPA. That is plaintiff's role. In *LASG v. O'Leary,* this Court held:

> Posting a substantial bond on non-profit environmental groups might chill the private mechanisms of enforcement NEPA has traditionally encouraged. *See Natural Resources Defense Council v. Morton,* 337 F.Supp. 167, 169 (D.C.D.C. 1971); *Wilderness Soc'y v. Tyrrel,* 701 F.Supp. 1473, 1492 (E.D. cal. 1988), *rev'd on other grounds,* 918 F.2d 813 (9th Cir. 1990). (slip op. at 34)

Accord: People ex rel. van de Kamp v. Tahoe Reg'l Planning Agency, 766 F.2d 1319, 1325-26 (9th Cir. 1985). Further, a bond must not be so high as to deny plaintiff its right to present its claims. *Utahns for Better Transp. v. U.S. Dep't of Transp.,* 2001 WL 1739458 (10th Cir. 2001). *See also Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 1113, 1126 9th Cir. 2005). A bond of any significant amount would make it impossible for a nonprofit organization like plaintiff to enforce NEPA.

IV. Defendants' SEIS will not satisfy NEPA:

After years of NEPA noncompliance, defendants ask the Court to withhold a preliminary injunction on the basis of their plan to issue a SEIS. They argue that the 2003 EIS analyzed all impacts of the CMRR-NF as then conceived, and the SEIS will analyze all changes since 2004, so that, after the SEIS, they will have satisfied all NEPA requirements. (D.Br. at 1, 2, 19, 21, 23) But, clearly, the 2003 EIS concerned a project an order of magnitude smaller and cheaper than the CMRR-NF of 2010, *all* alternatives in the 2003 EIS have been rejected, and that EIS is now irrelevant. Moreover, the decision to build the $3.7 to $5.8 billion CMRR-NF of 2010 makes reasonable a range of fresh alternatives on a similar multi-billion-dollar scale and decade-long schedule. Possible alternatives include renovation of existing facilities, using existing poorly-used capacity, reprioritizing program commitments that waste space and create schedule conflicts, and distributing some functions to other locations, as defendants have previously done. Scoping alone would require functional analysis of these options. The SEIS Notice of Intent mentions just three alternatives: the CMRR of 2004, the existing CMR, or an upgraded CMR (Ex 21: 75 Fed. Reg. 60745 (Oct. 1, 2010)). Defendants have already rejected the first two; only the last could compare with the CMRR-NF of 2010. *Many* other alternatives are not even mentioned. (Mello Aff. 3 ¶¶ 80, 83).

More fundamentally, the purpose and need of the proposal must be reconsidered in light of, *e.g.,* new information on pit lifetimes and pit production policies. (Peurifoy Aff. ¶¶ 4-10). Defendants assert in their Notice of Intent (Ex 21: 75 Fed. Reg. at 60746) that the purpose and need for a plutonium facility have not changed since 2003, but in fact both the size of the U.S. nuclear stockpile and the pit production volume required have markedly decreased. There is no

need for pit production for several decades, and without pit production the facility loses its raison d'être. (*See* Ex. 23, Von Hippel Aff. ¶¶ 5-7).

The SEIS process is also defective because defendants insist on continuing their design work and construction of the CMRR-NF. This Court stated in the DARHT case:

> "The problems associated with starting an EIS *in medias res* are further compounded as DOE continues construction of the DARHT facility. Work progresses, and the risk of harm increases, as certain alternatives become less workable." *LASG v. O'Leary* (slip op. at 27).

In that case, the Court solved the problem by issuing a preliminary injunction.

Defendants' insistence on continuing work on CMRR-NF shows that they have predetermined the outcome of NEPA analysis. An agency which "prejudge[s] the NEPA issues," produces "an environmental analysis . . . tainted with bias." *Forest Guardians v. U.S. Fish and Wildlife Serv.,* 611 F.3d 692, 713 (10th Cir. 2010). Predetermination occurs when an agency

> "irreversibly and irretrievable 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—which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency's proposed action." (*id.* 714) *See Davis v. Mineta,* 302 F.3d 1104 (10th Cir. 2002); *Metcalf v. Daley,* 214 F.3d 1135 (9th Cir. 2000).

Defendants argue that predetermination only occurs when an agency prejudges the environmental impacts of its plans, not when the agency decides that its project is necessary and urgent. (D.Br. at 12-13). Defendants' formulation makes no sense and finds no support in NEPA. Defendants are plainly implementing the CMRR-NF project without completing the required NEPA analysis,[18] showing that they have decided *both* that the CMRR-NF is necessary

[18] Predetermination is not the same as a preferred alternative. (D.Br. at 13). A preferred alternative is the NEPA term for an alternative that a federal agency may favor, while keeping an open mind during the NEPA process. *Forest Guardians v. U.S. Fish and Wildlife Serv.,* 611 F.3d 692, 712-19 (10th Cir. 2010). In such a case, to avoid a finding of predetermination, the "hard look mandated by Congress and required

and urgent, that available alternatives have been considered, *and* that the environmental consequences are irrelevant. Defendants' immediate plan of action includes making contracts, issuing directives, carrying out planning, and doing construction. These actions plainly amount to "irreversible and irretrievable commitments of resources." (42 U.S.C. § 4332(2)(C)(v)) The outcome of the SEIS process is predetermined, and it cannot produce a valid decision. Thus, the Court should not assume that defendants will quickly bring legality to their NEPA posture, because the SEIS cannot do that.

Conclusion

Defendants are deep in default under NEPA. No NEPA analysis of the planned CMRR-NF or its reasonable alternatives exists. NEPA requires them to faithfully examine the reasonable alternatives and, only thereafter, to commit to a choice. 42 U.S.C. ¶ 4332(2)(C). They have failed to do this. Irreparable harm to plaintiff and the environment is likely from defendants' continued design, construction and operation of the CMRR-NF. Defendants have committed themselves to a specific alternative without conducting the required NEPA analysis, and they have predetermined the outcome of future NEPA analyses. Preliminary relief should be granted to preserve the status quo pending resolution of this case on the merits.

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by NEPA must be timely, and it must be taken objectively and in good faith, not as an exercise of form over substance, and not as a subterfuge designed to rationalize a decision already made." (at 712) But there emphatically is predetermination "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 that agency has completed that environmental analysis" (at 714). An agency which "predetermines the NEPA analysis by committing itself to an outcome" has probably "failed to take a hard look at the environmental consequences of its action due to its bias in favor of that outcome and, therefore, has acted arbitrarily and capriciously." (*id.* 713)

Respectfully submitted,

[*Electronically Filed*]

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Certificate of Service

I hereby certify that on this 14th day of January, 2011, I filed the foregoing PLAINTIFF'S REPLY MEMORANDUM ON MOTION FOR PRELIMINARY INJUNCTION 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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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' OBJECTIONS TO THE MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION [DKT. No. 25]

On January 6, 2011, the Magistrate Judge recommended granting the Federal Defendants' Motion to Dismiss and dismissing Plaintiff's Complaint in its entirety based on the doctrine of prudential mootness. (Dkt. No. 25, ¶ 5). Federal Defendants note that the Magistrate Judge based his recommendation solely upon the doctrine of prudential mootness and did not address the other

grounds for relief raised in Federal Defendants' motion to dismiss. Dkt. No. 25, ¶¶ 4, 5; see Dkt. No. 9, at 9-24 (asserting that some of Plaintiff's claims are time-barred; Plaintiff's claims are not ripe for review; and Plaintiff's claims are moot). The other grounds raised in Federal Defendant's motion to dismiss provide additional, alternative grounds for the Court to dismiss Plaintiff's Complaint.

Upon review of the Proposed Findings and Recommended Disposition, Federal Defendants observed two minor inaccuracies that warrant correction but do not affect the outcome of the findings or recommendation. First, the Magistrate Judge found that the Chemistry and Metallurgy Research ("CMR") Building was almost 60 years old in 2002. Dkt. No. 25, ¶ 6. The CMR Building was almost 60 years old in 2010, not 2002. See Declaration of Donald L. Cook (hereinafter, "Cook Decl."), Dkt. No. 9-1, ¶ 6. Second, the Magistrate Judge found that Plaintiff Los Alamos Study Group wrote to Federal Defendants Department of Energy and the National Nuclear Security Administration ("DOE/NNSA" or "NNSA") on July 1, 2010, to express concerns about the cost and adequacy of NNSA's analysis under the National Environmental Policy Act ("NEPA") of the CMR Building's proposed replacement, the Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF"). Dkt. No. 25, ¶ 11. Plaintiff's July 1, 2010 letter expressed concerns about the cost of the CMRR-NF and the adequacy of Federal Defendants' NEPA analysis, not the cost of the NEPA analysis. See Cook Decl., ¶ 15; see also Complaint ("Compl."), Dkt. No. 1, ¶¶ 15, 16; Affidavit of Gregory Mello, Dkt. No. 10-1, ¶ 26.

Federal Defendants wish to correct these two minor factual inaccuracies so that the District Court can be fully informed in its review of the Magistrate Judge's Proposed Findings and Recommended Disposition, which are well-reasoned and should be adopted.

Respectfully submitted on this 20th day of January, 2011.

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I hereby certify that on January 20, 2011, 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 Filing 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 STEVEN CHU, in his capacity as SECRETARY, DEPARTMENT OF ENERGY; NATIONAL NUCLEAR SECURITY ADMINISTRATION; THE HONORABLE THOMAS PAUL D'AGOSTINO, in his Capacity as ADMINISTRATOR, NATIONAL NUCLEAR SECURITY ADMINISTRATION,

Defendants.

PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

Pursuant to 28 U.S.C. § 636(b)(1)(c), plaintiff the Los Alamos Study Group ("plaintiff") respectfully objects to the Proposed Findings and Recommended Disposition of the Honorable Alan C. Torgerson, filed January 6, 2011, (Docket No. 25) recommending dismissal of plaintiff's complaint based on the doctrine of prudential mootness (the "Magistrate's Report"): ¶ 5, 15, 16, 17, 25, 26, 27, and 29.

Specific Findings and Conclusions

Pursuant to 28 U.S.C. § 636(b)(1)(c), plaintiff is entitled to *de novo* review of the findings and conclusions to which plaintiff objects. Plaintiff respectfully objects to the description of the District Judge's consideration of the Magistrate's Report as "appellate

review," which is incorrect. Plaintiff objects to the following Findings and Conclusions in the Magistrate's Report and identifies separately the section of legal argument directed to each finding and conclusion.

Introduction

The Magistrate's Report incorrectly employs the seldom-used doctrine of "prudential mootness" to dismiss claims of ongoing violations by defendants of the National Environmental Policy Act ("NEPA"). Plaintiff's suit is based on the well-known principle that NEPA, as our most important national environmental statute, imposes an obligation on all federal agencies to comply with and analyze all reasonable alternatives *before* implementing a major federal action. Although defendants have clearly not complied with this requirement, they have announced that they plan to do further NEPA analyses and issue a Supplemental Environmental Impact Statement ("SEIS"). Based on defendants' assurance, the Magistrate recommends that the Court apply the doctrine of "prudential mootness" and that this case be dismissed as moot. *See* Magistrate's Report ¶ 5. But established case law holds that a NEPA claim cannot be held moot on the ground that the defendant agency promises to issue further NEPA documents. It is easy to promise to issue a new NEPA analysis. Plaintiff respectfully submits that the Magistrate's mistaken application of "prudential mootness" could easily be used to nullify any NEPA claim – overriding NEPA's direction to federal agencies to analyze all alternatives prior to decision-making – and would render the NEPA a paperwork nuisance whose substance can easily be avoided.

The Magistrate's Report misapplies the doctrine of prudential mootness because defendants are engaged in ongoing NEPA violations. There is no basis to find that the

defendants have in any way changed their commitment to the federal project that is in dispute, and meaningful relief can be afforded to plaintiff.

The Magistrate's Report disregards the record evidence demonstrating that the construction of the CMRR-NF and interconnected components has begun in direct contravention of NEPA. It incorrectly sanctions an irretrievable commitment to further detailed design in violation of defendants' own departmental guidance for the NEPA process. The Magistrate's Report also misapprehends the limited role of a SEIS, which does not include a consideration of currently available and realistic alternatives and may prevent judicial review of defendants' failure to consider those alternatives. Plaintiff submits that the Court's *de novo* review of this matter should result in rejection of the Magistrate's Report in its entirety.

I. The Magistrate's Report Misconstrues and Misapplies the Doctrine of Prudential Mootness.

The Magistrate's Report does not cite any NEPA case supporting discretionary dismissal under the doctrine of prudential mootness. Since NEPA requires agency analysis of environmental impacts *before* committing to a project, NEPA cases (discussed below) generally become moot only when the project is substantially completed. It is emphatically not the law that a NEPA case becomes moot when an agency states that it hopes, in the future, to fulfill its NEPA obligations. *Blue Ocean Preservation Soc'y v. Watkins,* 767 F. Supp. 1518, 1523-24 (D. Haw. 1991) so explains:

> 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 a 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 (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 Bd.,* 665 F.2d 1280 (D.C. Cir. 1981); *Upper Pecos*

> *Ass'n v. Stans,* 500 F.2d 17 (10th Cir. 1974). Here, of course, the EIS process is not only unfinished, it has not begun.

Thus, a defendant's plan to carry out future NEPA analyses does not excuse its current violations. *Portland Audubon Soc'y v. Babbitt,* 998 F.2d 705, 709 (9th Cir. 1993).

The doctrine of prudential mootness applies only when "circumstances have changed since the beginning of litigation that forestall meaningful relief." *Southern Utah Wilderness Alliance v. Smith,* 110 F.3d 724, 727, 729-30 (10th Cir. 1997) (defendants satisfied Endangered Species Act consultation requirement after lawsuit was filed). For prudential mootness, the court must determine that circumstances have so changed that injunctive relief can serve no purpose; then the court may stay its hand and withhold the relief it has the *power* to grant. *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation,* 601 F.3d 1096, 1121 (10th Cir. 2010) (emphasis in original) (citing *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997). No such situation is presented here.

Prudential mootness may occur in a NEPA case if circumstances change so that the project is essentially completed. In *Sierra Club v. U.S. Army Corps of Eng'r*, 2008 W.L. 2048359, at *1-2 (3d Cir. 2008), the only case found by plaintiff where the court applied prudential mootness to dismiss a NEPA claim, the plaintiff's NEPA, APA, and Clean Water Act claims challenging a permit to fill wetlands were held prudentially moot. *Id.* During the litigation, all but 0.12 acres of 7.69 acres of the wetlands had been filled. Since the project had been completed, no opportunity existed for "meaningful relief." *Id.* In contrast, in *Crutchfield v. U.S. Army Corps of Eng'r*, 192 F.Supp. 2d 444 (E.D. Va. 2001), the plaintiff's NEPA, Clean Water Act, and National Historic Preservation Act claims *were not* prudentially moot because work *remained to be done on defendant's project.* Similarly, in *Sierra Club v. Babbitt*, 69 F.

Supp. 2d 1202 (E.D. Cal. 1999), the court rejected defendant's contention that plaintiff's NEPA and Wild and Scenic River Act claims were prudentially moot, even though defendant had already constructed most of the highway project. As to the remaining percentage that was not substantially complete, meaningful relief could be accorded under NEPA, and plaintiffs were entitled to a preliminary injunction. *Id.*

The facts here are wholly inconsistent with application of prudential mootness. The project has not been completed, nor has it progressed to the point where injunctive relief based on NEPA would be meaningless. To the contrary, injunctive relief could not be more timely to prevent an outcome like that in *Sierra Club v. U.S. Army Corps of Eng'r*, or even in *Sierra Club v. Babbitt*, where substantial completion of their respective projects rendered injunctive relief meaningless.

And, contrary to the Magistrate's recommended findings, defendants have consistently been, and remain, committed to construction of the CMRR-NF project as currently proposed. There has been no change in that agency policy. But the principles of prudential mootness ask whether the defendants have so changed the policies assailed by the plaintiff that there is no purpose to an injunction. Plaintiff's complaint seeks an injunction against the implementation of the CMRR-NF project, based upon (1) lack of an applicable EIS or ROD, (2) failure to address cumulative impacts, (3), lack of a mitigation plan, (4) failure to integrate NEPA analysis into decision making, and (5) lack of public participation. These are the claims that defendants argue are moot, but they are clearly not moot. Here, plaintiff's claims, and the demonstrable facts, are that defendants have plunged forward with design and construction of the CMRR-NF without

doing the analysis called for by NEPA, and there is nothing to show that defendants have slackened in the slightest in their determined implementation of the project.

II. Plaintiff's Claims for Injunctive Relief are Timely and Ripe for Consideration.

Although the Magistrate's Report speaks in terms of prudential mootness, the findings and conclusions suggest, albeit incorrectly, that is the suit is not ripe for consideration. Plaintiff's claims are clearly ripe. The NEPA violations cannot be disputed. The CMRR-NF budget has exploded from $350-$500 million to $3.7-$5.8 billion, both because of geological conditions, and because the "purpose and need" of the facility have greatly expanded to include the so-called "hotel concept," which was not mentioned, analyzed, or even considered in the 2003 EIS. There has been an increase in concrete requirements from 3,194 cubic yards to 371,000 cubic yards, an increase in steel requirements from 242 tons to 18,539 tons, and the use of more steel than the Eiffel Tower. These massive changes and the current alternatives to them have never been analyzed in any EIS, nor have they been compared to any reasonable alternatives that presently exist in view of the exponential cost increases for the project. The Magistrate's Report suggests that the SEIS will address ordinary "design modifications that came to light after the completion of the 2003 EIS," which were precipitated by "newly discovered geological information." But the changes are much greater than this statement suggests. The 2003 EIS analyzed an entirely different design from the present CMRR-NF, with the only similarities being (i) the name of the facility, (ii) the location of the facility, and (iii) the general purpose of the facility.[1] That eight-year old EIS clearly does not support construction of the

[1] Even the purpose of the facility has changed dramatically. The current iteration of the CMRR-NF is based on the "hotel concept" to accommodate future unknown missions.

present CMRR-NF, and there is no claim that the subsequent SWEIS or the CTSPEIS, adequately analyzes the planned CMRR-NF and its reasonable alternatives.

Defendants have made and are continuing to make an "irretrievable commitment of resources" to the CMRR-NF, in plain violation of NEPA. 42 U.S.C. § 4332(2)(C)(v). Defendants have engaged in "final agency action" by implementing the 2010 CMRR-NF in violation of NEPA. *Catron Cnty. Bd. of Comm'rs v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996) ("alleged failure to comply with NEPA constitutes 'final agency action,' see 5 U.S.C. § 551(13)"). *See New Mexico, ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009) ("assessment of all 'reasonably foreseeable' impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made."). Consequently, the continued construction of the CMRR-NF and related facilities creates a claim that is undeniably ripe for adjudication.

Defendants' own conduct demonstrates an irrevocable commitment to the present iteration of the CMRR-NF. Under DOE Order 413.3B (November 29, 2010), DOE has scheduled Critical Decisions 2 and 3 ("CD 2-3") – establishment of a project baseline and start of construction/execution – for the infrastructure package for March 2011. Plaintiff's Response to Motion to Dismiss, Mello Aff. 1, ¶ 71 citing Bretsky presentation, June 16, 2010 at 7 (Docket No. 10). DOE acknowledges that, at this time, and even before completion of the SEIS, the "project scope should be finalized and changes . . . should be permitted only for compelling reasons . . . ." Plaintiff's Reply in Support of Preliminary Injunction (Order 413.3B, at C-6) (Docket No. 30). This is not "preliminary" design activity pending the completion of the SEIS, as concluded in the Magistrate's Report. *See* Magistrate's Report, ¶ 29. On the contrary, by

March 2011, the design of the infrastructure package will be fixed, as a compliment to other already-constructed aspects of the CMRR-NF, including the RLUOB. Moreover, the design of successive packages, Pajarito Road, basemat, structure package, would become fixed in order. In this process there certainly is no room for the consideration of "reasonable alternatives," including a placement of CMRR-NF functions in another location or elsewhere in the NNSA weapons complex, or the management of existing space and facilities at LANL to suit NNSA's needs.

The fact that construction of the CMRR-NF has been and remains ongoing is underscored by the nature of the construction that the 2004 ROD authorized. The Magistrate's Report correctly notes, in Finding No. 8, as follows:

> The 2004 ROD announced that the *CMRR project would consist of two buildings*: a single, above-ground consolidated special material-capable, hazardous category 2 laboratory building (the CMRR-NF), and a separate but adjacent administrative office and support building, the radiological laboratory utility office building ("RLUOB"). [Doc. 9-1 at ¶ 10.]

Magistrate Report ¶ 8 (emphasis added). Thus, the CMRR-RLUOB and the CMRR-NF were designed to operate as a single facility, and construction of the CMRR-RLUOB amounts to partial construction of the CMRR-NF. The CMRR-NF excavation has been dug, and the joint facilities contained within the CMRR-RLUOB have been built. The tunnel connecting both buildings has already been built halfway to the CMRR-NF site. The utilities for both buildings, and the offices for personnel in both buildings, are all contained within the RLUOB, which as a structure is finished. Thus, the Magistrate incorrectly states that these "on-going activities . . . are *preliminary*." Magistrate's Report ¶ 29 (emphasis added). His statement that the "actual construction of the CMRR-NF will not occur until after the SEIS is completed and a new ROD

issued" (*id.*) is also clearly incorrect. The Magistrate's remark that the defendants may continue with the infrastructure package in March 2011 without judicial intervention[2] is not supported by the law: Construction has begun on the interconnected projects, and it is inappropriate to allow any further implementation without NEPA compliance.

The Tenth Circuit addressed the issue of project implementation in *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002), and reached a conclusion directly contrary to the Magistrate' Report in the present case. In *Davis*, defendants opposed a preliminary injunction of Phase I of a project, arguing that plaintiffs would be injured only by long-term damages from Phase II. Contrary to the Magistrate Report's recommendation in the present case, the Tenth Circuit in *Davis* ruled that an injunction was required, because allowing *any part* of the project to go forward would make injury more likely:

> If 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 will be skewed toward completion of the entire project.

Davis v. Mineta, 302 F.3d at 1115, n. 7.

The Magistrate erroneously concluded that defendants are merely engaged in what the Magistrate considered benign design activities, which the Magistrate somehow believed do not prejudice their selection of alternatives. However, "under NEPA regulations, it is illegal for an agency to continue an activity while an EIS is being prepared unless such action 'will not

[2] The Magistrate's Report criticized plaintiff for suggesting that the infrastructure construction package for CMRR-NF may begin in March 2011, although counsel was being candid because plaintiff does not have access to DOE and NNSA documents demonstrating the exact date of infrastructure activities. It also is very unlikely that defendants would voluntarily relinquish that information.

prejudice the ultimate decision on the program.' 40 C.F.R. § 1506.1(c); *see also* 10 C.F.R. § 1021.211." *Los Alamos Study Group v. O'Leary* (Slip Op. at 19). Defendants have asserted, and the Magistrate's Report apparently accepted, that "advancing planning and design" of the CMRR-NF before NEPA analysis will not "limit or prejudice the choice of reasonable alternatives or result in any irreparable injury." (Defendants' Brief in Opposition to Motion for Preliminary Injunction at 21, n. 13) (Docket No. 23). This statement flatly contradicts DOE's own NEPA guidance. Plaintiff's Reply in Support of Motion for Preliminary Injunction (Guidance Regarding Actions That May Proceed During the National Environmental Policy Act (NEPA) Process: Interim Actions, DOE, Office of NEPA Policy and Compliance, June 17, 2003) (Docket No. 30). The DOE guidance prohibits interim design work pending NEPA compliance because it tends to exclude other alternatives and to give a schedule advantage to the project under design, *i.e.,* the CMRR-NF as currently proposed:

> Proceeding with detailed design under DOE 0413.3, program and project management for the acquisition of capital assets, before the NEPA review process is completed (in contrast to conceptual design noted above) is normally not appropriate because the choice of alternatives might be limited by premature commitment of resources to the proposed project and by the resulting schedule advantage relative to reasonable alternatives. (at 4).

Thus, detailed design work, which defendants misleadingly promote as "aid[ing] the SEIS decision-making process," and "helping to identify and clarify potential environmental impacts in furtherance of the NEPA process" (*id.* 13 n. 6; *see id.* 20 n. 12), here will *only* involve the CMRR-NF, not any alternatives, and will only entrench defendants' commitment to that project and increase the likelihood of constructing the CMRR-NF as presently proposed. It should not be permitted, consistently with defendants' own guidance.

III. The SEIS is a smokescreen to fend off an injunction.

Defendants point to their plan to prepare a SEIS as somehow mooting the dispute over their unquestionable NEPA violations and the appropriate remedy. One who claims mootness bears the "heavy burden of persuad[ing] the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Env't Serv.,* 528 U.S. 167, 189 (2000). Defendants in this case do not claim that they have stopped *any* of the conduct in issue. Even voluntary cessation of an alleged illegal practice, which defendant is free to resume, does not cause mootness. *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1115 (10th Cir. 2010). Voluntary cessation of the challenged conduct does not moot litigation unless it is clear that "defendant has not changed course simply to deprive the court of jurisdiction," *Nat'l Adver. Co. v. City of Miami,* 402 F.3d 1329, 1333 (11th Cir. 2005). Here, defendants have stopped nothing of the challenged conduct. *A fortiori* there is no mootness. *See Cnty. of Los Angeles v. Davis,* 440 U.S. 625, 632 (1979). Even where there is a cessation of illegal actions, there is no mootness unless there is "no reasonable expectation that the alleged violation will recur." *Los Angeles,* 440 U.S. at 631. Here, the illegalities are recurring daily as defendants move forward with design and construction. Neither is there even an inadequate "informal promise or assurance" to cease implementing the project, *Silvery Minnow,* 601 F.3d at 1118; instead, defendants are openly proceeding to implement by design and construction. It cannot be concluded that plaintiff's claims are moot based on the prospect of a SEIS.

According to the Magistrate's Report, the future SEIS will cure all NEPA deficiencies and thus "circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief." *See* Magistrate's Report ¶ 25 (citing *Southern Utah Wilderness*

Alliance v. Smith, 110 F.3d at 727). But the promise of future compliance, here without a cessation of illegalities, does not moot an existing dispute. The SEIS is merely a smokescreen to blind the Court to the present and actual NEPA violations. This Court stated, in *Los Alamos Study Group v. O'Leary,* No. 94-CV-D1306 (ELM) (D.N.M. January 26, 1985) (Exhibit A), that DOE violated NEPA by beginning construction of the Dual-Access Radiographic Hydrodust Test (DARHT) project before it completed NEPA compliance and that an injunction must issue, regardless of DOE's promises to prepare further NEPA documentation:

> The decision by DOE to begin an EIS at this point does little to ameliorate the fact that it was not done before the DARHT project began. *See Weinberger v. Romero-Barcelo,* 4056 U.S. 305, 317 n. 12 (the cessation of violations does not bar issuance of an injunction (citations omitted); *see also Public Serv.,* 825 F.Supp. at 1503-04 (agency's statements that it will perform the required NEPA analysis is not sufficient to invoke voluntary cessation exception to mootness doctrine). Indeed, some of the damage NEPA seeks to prevent may already have been done. Biases toward one alternative or another may already exist as construction was allowed to start and progress without public input.

Thus, in *Los Alamos Study Group*, Judge Mechem preliminarily enjoined DOE from all further construction of the DARHT facility, "or from taking any other actions in furtherance thereof" where DOE had failed to issue an EIS analyzing the environmental impacts of the proposed facility and the reasonable alternatives to it.

Here, defendants' promise to prepare a SEIS comes with no commitment to pause the project while they prepare a SEIS and then weigh the results of their analysis. Indeed, the analysis promises very little, because defendants' Notice of Intent to prepare a SEIS identifies only three alternatives: the CMRR as originally selected in the 2004 ROD, the existing CMR building without renovation, or some unspecified upgrade of the existing CMR building

Plaintiff's Reply in Support of Motion for Preliminary Injunction (Ex. 21: 75 Fed. Reg. 60745 (Oct. 1, 2010)) (Docket No. 30). No one disputes that the CMRR as analyzed in the 2003 EIS is no longer a viable alternative and will not be built. Use of the existing CMR was already rejected by defendants in the 2004 ROD, so that alternative is likewise off the table. Finally, upgrading the CMR building may be feasible, but there are clearly many other reasonable alternatives. There is not likely to be consideration of a range of fresh alternatives, including those comparable to the multi-billion dollar scale and decade long schedule for the new CMRR-NF and others smaller in scale, such as usage and renovation of other existing facilities, utilization of poorly-used capacity at LANL, and the distribution of functions to locations other than LANL. Thus, the SEIS can play little role, because it will exclude the analysis of all reasonable alternatives that would be contained in a new EIS, and it will only further entrench defendants in their decision to continue implementing the CMRR-NF without NEPA compliance.

The Magistrate's finding is incorrect that the preparation of the SEIS "includes a public scoping process which involves alternatives." *See* Magistrate's Report ¶ 15. The alternatives proposed by defendants are hollow. And plaintiff surely cannot "participate in determining the scope of the environmental analysis," as the scope has been pre-determined to include the three unrealistic choices. Such limitations reduce the SEIS to a ceremonial nod to the idea of NEPA compliance.

Defendants' additional paperwork—the unsigned and unissued supplement analysis (which concludes that no further NEPA studies whatsoever are required for the 2010 CMRR-NF), and defendants' supposed "prudential decision" to conduct a SEIS – shows no promise of

having the slightest influence on defendants' announced implementation of their decision to build the CMRR-NF. Any finding that defendants have changed their policy to implement the CMRR-NF project would be clear error. And it is wholly implausible for the Magistrate to state that "the SEIS may very well address the plaintiff's concerns about the CMRR-NF," because the presently-proposed facility and its alternatives have never been analyzed under an EIS, and the Notice of Intent gives no reason to hope that such analysis will ever happen. Magistrate's Report ¶ 27. It follows that the statement that "Plaintiff will have ample opportunity to renew its complaint if it finds it necessary when the SEIS is filed and before any construction begins," Magistrate's Report ¶ 29, is either wrong or irrelevant.

Moreover, the Magistrate's Report misapprehends the nature and purpose of a SEIS. Magistrate's Report ¶¶ 25, 29. It repeatedly refers to the SEIS as "superseding" the archaic 2003 EIS. The SEIS, however, would do no such thing. The SEIS is designed to supplement the 2003 EIS based on changed circumstances. Therefore, CEQ regulations on a SEIS do not require additional scoping, *i.e.*, the examination of a fresh suite of alternatives. Rather, the SEIS need only address the incremental environmental impacts of changed circumstances on the already-chosen project. Thus, the Magistrate's Report has provided a recipe for defendants to avoid judicial review altogether: Defendants prepared an EIS eight years ago, and issued a ROD based on scoping and consideration of all reasonable alternatives at that time. Eight years later, defendants abandoned the previously-approved project altogether, save for the name (CMRR-NF), the location of the project (Los Alamos, New Mexico), and the general purpose (support for pit manufacturing). Defendants then dramatically changed the entire project and transmuted it into a $6 billion endeavor that bears no relationship to the project approved eight years earlier.

They then issued a Notice of Intent to prepare a SEIS to analyze alternatives that are mostly impracticable, implausible, and illusory. After the SEIS is issued, an injured party cannot complain about the failure to examine reasonable alternatives because the CEQ regulations do not require the SEIS to include any scoping whatsoever.

Plaintiff has valid NEPA claims *now,* and the SEIS is only a device to deflect injunctive relief. The Magistrate's Report, if accepted by the Court, would eviscerate NEPA's fundamental purpose of scrutinizing alternatives for federal action "before they get off the planning board." Plaintiff's Reply in Support of Preliminary Injunction (Statement of Sen. Jackson, Chairman of Senate Interior and Insular Affairs Committee at the time of NEPA enactment, 115 Cong. Rec. S 29055 (1969)) (emphasis added) (Docket No. 30). The Report should be rejected.

IV. Plaintiff's Claims for Injunctive Relief are Ripe for Consideration.

Although the Magistrate's Report speaks in terms of prudential mootness, the findings and conclusions suggest, albeit incorrectly, that is the suit is not ripe for consideration. Thus, the Magistrate's Report seems to turn on some concept of prematurity, stating that "because defendants are currently conducting a SEIS which has not yet been completed, it is *premature* for the Court to order defendants to prepare a new EIS." Magistrate's Report ¶ 27. The Report also accepts as fact defendants' claims that they have not decided whether to build the proposed CMRR-NF, and that their decision would be based on the SEIS. It states, "If, after completion of the SEIS, NNSA *decides to proceed* with the construction of the proposed CMRR-NF, the building is not expected to be occupied and operational until 2022." Magistrate's Report ¶ 17 (emphasis added). It states that NNSA will decide, "based on that [SEIS], *how best to proceed* with the proposed CMRR-NF." Magistrate's Report ¶ 25. It also states that "Construction of the

CMRR-NF will not occur until *after* the SEIS is completed and a new ROD issued." Magistrate's Report ¶ 29 (emphasis in original). These statements stand in direct contrast to the incontrovertible evidence that defendants have already committed to build the CMRR-NF, that irretrievable commitments of resources have been made, and that construction is proceeding. The case is ripe for decision, and the Court should exercise of its jurisdiction accordingly

Conclusion

Plaintiff respectfully submits that it has established the existence of NEPA violations and the need for a new environmental analysis of the 2010 CMRR-NF, which has never received consideration under any environmental study. The proposed SEIS and the notice of intent to prepare it give no promise of future NEPA compliance and are designed to entrench defendants' predetermination for the 2010 CMRR-NF. Most importantly, the possibility of future NEPA documents does not moot a suit about defendants' existing NEPA violations.

If, as defendants suggest, the present iteration of the CMRR-NF is the best alternative among those available, then surely there should be no concern that the CMRR-NF would emerge as the successful candidate in a record of decision based on a new EIS. To issue a new EIS would comply with the stated purpose of our country's most important environmental statute, which is to inform federal agencies in the decision-making process, by analyzing currently available alternatives and associated environmental impacts.

Plaintiff has demonstrated, in its memorandum in opposition to defendants' motion to dismiss and in plaintiff's motion and memoranda in support of preliminary injunctive relief, that defendants have been and remain in violation of NEPA. The Magistrate's recommendation would condone those violations in circumstances that no court has ever termed mootness. There

can be no doubt that the case is ripe for consideration. Plaintiff respectfully requests that the Court reject the Magistrate's Report in its entirety and proceed expeditiously to the preliminary injunction stage of this case.

Respectfully submitted,
[***Electronically Filed***]

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Certificate of Service

I hereby certify that on this 20th day of January, 2011, I filed the foregoing PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION 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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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' RESPONSE TO PLAINTIFF'S JANUARY 20, 2011 OBJECTIONS TO MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION [DKT. NO. 33]**

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STATUTES

REGULATIONS

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

Pursuant to Federal Rule of Civil Procedure 72(b)(2), Federal Defendants hereby respond to Plaintiff's January 20, 2011 "Objections to Magistrate Judge's Proposed Findings and Recommended Disposition," Dkt. No. 33 (hereinafter, "Pl. Obj."), as follows:

INTRODUCTION

The Honorable Alan C. Torgerson, United States Magistrate Judge, correctly recommends that Plaintiff's Complaint should be dismissed based on the doctrine of prudential mootness.[1] In this litigation, Plaintiff seeks to interject itself and the Court into the ongoing administrative agency review of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") at Los Alamos National Laboratory ("LANL") in New Mexico being conducted by the Department of Energy/National Nuclear Security Administration ("DOE/NNSA" or "NNSA") in accordance with the National Environmental Policy Act ("NEPA"). Plaintiff's improper attempt to interpose itself and this Court into the middle of a federal agency's ongoing NEPA decision-making process renders Plaintiff's claims infirm under a host of constitutional, statutory, and jurisprudential doctrines, including prudential mootness.

The record before the Court details an orderly--and ordinary--decision-making process conducted in full compliance with NEPA: (1) CMRR-NF was approved in a 2004 unchallenged Record of Decision ("ROD") following completion of a comprehensive environmental impact statement ("EIS") in 2003; (2) pursuant to the 2004 ROD, NNSA partially excavated the CMRR-NF site in 2006 to allow for site characterization and seismic mapping; (3) new information developed from this excavation and corresponding new building safety requirements led to evolving design

[1] See January 6, 2011 "Magistrate Judges's Proposed Findings and Recommended Disposition," Dkt. No. 25 (hereinafter "F&R").

changes for CMRR-NF; (4) as a result of these design changes, NNSA began reviewing whether it should prepare a supplemental EIS ("SEIS"), prior to this lawsuit; (5) while the draft "Supplement Analysis" concluded that the potential environmental impacts from construction of CMRR-NF in accordance with the evolving design changes were adequately bounded and addressed in the 2003 EIS, NNSA nonetheless decided to prepare an SEIS; (6) on October 1, 2010, NNSA published a Notice of Intent in the Federal Register to prepare an SEIS; and (7) NNSA committed that it would make no irreversible and irretrievable commitment of resources to CMRR-NF, including construction, until the SEIS process was completed through issuance of a new decision.[2] In the middle of this decision making process, Plaintiff filed its Complaint. Dkt. No. 1. Although Plaintiff's papers lack factual and legal support for a claim that NNSA was required to have prepared a new EIS sooner, the Magistrate Judge rightly determined that NNSA's commitment to preparing an SEIS and to foregoing construction until NNSA completed the reopened NEPA decision-making process was a significant event that left Plaintiff's claims moot under the doctrine of prudential mootness.

In short, NNSA has been in compliance with NEPA throughout its development of CMRR-NF. Its decision to approve CMRR-NF construction and operation in the 2004 ROD was made more than six years ago, and thus is unassailable pursuant to the applicable statute of limitations. See Mot. to Dismiss, Dkt. No. 9 at 10. To the extent that Plaintiff claims that NNSA must complete additional NEPA analysis as a result of new information and changes in CMRR-NF design, the Magistrate Judge correctly concluded that NNSA's commitment to prepare an SEIS and to delay

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[2] See Declaration of Donald L. Cook, NNSA Deputy Administrator for Defense Programs, Dkt. No. 9-1 (hereinafter, "Cook Decl.") ¶¶ 9, 10, 12, 15, 16, 21.

construction of CMRR-NF until that process is complete prudentially moots Plaintiff's Complaint. See F&R ¶¶ 24-29. As the Magistrate Judge found, the doctrine of prudential mootness sweeps broadly enough to encompass Plaintiff's subservient claims about what that new NEPA process must involve because "Plaintiff will have ample opportunity to renew its complaint if it finds it necessary when the SEIS is filed and before any construction begins." Id. ¶ 29. Alternatively, and in addition to the prudential mootness grounds for dismissal found by the Magistrate Judge, Plaintiff's claims do not survive on ripeness and constitutional mootness grounds, because until NNSA completes the SEIS process, the Court cannot find fault with that process or proscribe what it must entail in an advisory opinion. For any or all of these reasons, the Court should grant Federal Defendants' October 4, 2010 Motion to Dismiss and dismiss Plaintiff's Complaint in its entirety.

ARGUMENT

I. THE DOCTRINE OF PRUDENTIAL MOOTNESS BARS PLAINTIFF'S CLAIMS

Plaintiff's criticism of the Magistrate Judge's findings and recommendation asserts that the doctrine of prudential mootness only applies to NEPA cases when the project in question is substantially complete. See Pl. Obj. at 3-6.[3] This criticism is misplaced.

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[3] Relying on Blue Ocean Preservation Society v. Watkins, 767 F. Supp. 1518, 1523-24 (D. Haw. 1991), Plaintiff states that "it is emphatically not the law that a NEPA case becomes moot when an agency states that it hopes, in the future, to fulfill its NEPA obligations." Pl. Obj. at 3. Federal Defendants previously distinguished Plaintiff's improper reliance on this case. Dkt. No. 11 at 11-12. In Blue Ocean, a *constitutional* mootness case, DOE had never prepared an EIS for a proposed geothermal power plant, so there was no EIS to supplement and the Court found it compelling that the agency had not committed to preparing an EIS by publishing a Notice of Intent in the Federal Register. See 767 F. Supp. at 1523 and n.3 ("This is not a case in which the government has already prepared an EIS, or even commenced such preparation [with the publication of a notice in the Federal Register]."). As the Magistrate Judge finds in this case, NNSA completed an EIS in 2003 for the proposed CMRR-NF and, based on new information and changes to the original design, commenced preparation of an SEIS by publishing Notice in the Federal Register. F&R ¶¶ 7-14; Cook Decl. ¶¶ 9, 12, 16.

As Plaintiff itself recognizes and then ignores, the central inquiry asked by the doctrine of prudential mootness is whether circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief. Pl. Obj. at 4 (citing S. Utah Wilderness Alliance v. Smith, 110 F.3d 724, 727 (10th Cir. 1997) and Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation, 601 F.3d 1096, 1121 (10th Cir. 2010)). The doctrine of prudential mootness is one of remedial discretion that has particular applicability where, as here, the relief sought is an injunction against the government. Chamber of Commerce v. U.S. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980) (prudential mootness addresses "not the power to grant relief but the court's discretion in the exercise of that power"); Bldg. & Constr. Dep't v. Rockwell Int'l Corp., 7 F.3d 1487, 1492 (10th Cir. 1993) ("We have expressly recognized the doctrine of prudential mootness, and have stated that it has particular applicability in cases . . . where the relief sought is an injunction against the government.").

Plaintiff makes the leap of logic that the *circumstances* examined in the prudential mootness inquiry equate to project *completion*, Pl. Obj. at 4-5, but nothing in the relevant case law suggests such a narrow standard. Plaintiff extrapolated this incorrect interpretation of the doctrine of prudential mootness from a constrained reading of three out-of-circuit cases and its repeated--and plainly wrong--assertion that construction of CMRR-NF has begun. Plaintiff first cites to Sierra Club v. U.S. Army Corps of Engineers as "the only case found by plaintiff where the court applied prudential mootness to dismiss a NEPA claim" and then argues that the project's near completion is what rendered that case prudentially moot. Pl. Obj. at 4 (citing 277 Fed. Appx. 170, No. 06-4887, 2008 WL 2048359, at *1-2 (3d Cir. May 14, 2008)). In Sierra Club, the court could not offer plaintiff's members any meaningful relief because the subject matter of the litigation (a parcel of

wetlands) had been destroyed. In this case, prudential mootness likewise counsels in favor of dismissal because construction of CMRR-NF will not occur at least until NNSA renders a new decision based on the SEIS, not on the existing 2004 ROD that is the source of Plaintiff's claims and alleged injuries. Because there will be no construction or irreversible commitment of resources until NNSA issues a new decision pursuant to NEPA, there is no meaningful relief that this Court can grant Plaintiff, as in Sierra Club.

While Plaintiff insinuates that Sierra Club somehow is an aberration, Pl. Obj. at 4, Federal Defendants note that a quick search on Westlaw uncovered at least one published case within this circuit where a court dismissed a NEPA claim based on prudential mootness. In Willow Creek Ecology v. U.S. Forest Service, the court applied the doctrine of prudential mootness to a NEPA claim where the agency voluntarily withdrew a Decision Notice for an Environmental Assessment. 225 F. Supp. 2d 1312, 1318 (D. Utah 2002). The court in Willow Creek Ecology reasoned that the withdrawal of the underlying NEPA authorization document meant that "the challenged practice has 'undergo[ne] significant modification so that its ultimate form cannot be predicted.'" Id. (citing A.L. Mechling Barge Lines v. United States, 368 U.S. 324, 331 (1961)). Similarly, in this case, the circumstances surrounding Plaintiff's challenge to NNSA's prior approval of the proposed CMRR-NF have changed with the official reopening of the NEPA process, and the outcome of that process cannot be predicted. The preparation of an SEIS likely will address many, if not all, of Plaintiff's concerns about the possible environmental effects of the proposed CMRR-NF and, given NNSA's demonstrated responsiveness to new information in modifying CMRR-NF's design, the SEIS process cannot be said to be a meaningless endeavor. Plaintiff is obligated to participate in the process to ensure that its perspectives are heard. As in Willow Creek, there will be no construction

of the challenged project until the federal agency issues a new decision based on the SEIS, so there is no possibility of irreparable harm to the environment and nothing for the Court to enjoin.

Plaintiff next cites Crutchfield v. U.S. Army Corps of Engineers, 192 F. Supp. 2d 444 (E.D. Va. 2001), for Plaintiff's flawed contention that project completion is the measure courts use to determine whether prudential mootness applies. Pl. Obj. at 4-5. In Crutchfield, the court found that the doctrine of prudential mootness did not apply because the defendant county continued with construction on a wastewater treatment plant component prior to obtaining the necessary permit from the Army Corps of Engineers to dredge and destroy wetlands impacted by the project. 192 F. Supp. 2d at 448, 466. Here, not only did NNSA approve construction and operation of the CMRR-NF in a 2004 ROD in full satisfaction of NEPA, but construction on the proposed CMRR-NF will not occur until after the SEIS is completed and a new ROD issued. Cook Decl. ¶ 21. Plaintiff also cites Sierra Club v. Babbitt, but in that case, the court based its prudential mootness finding not on the construction status of a highway running through Yosemite National Park, but on the fact that effective relief was still available to plaintiff. 69 F. Supp. 2d 1202, 1244 (E.D. Cal. 1999). In Babbitt, there was no indication that the defendant had changed its NEPA decision-making process, in contrast to the circumstances here.

Even if the Court were to adopt Plaintiff's flawed requirement of "substantial completeness," such an incorrect standard would not apply to this case. Construction on the proposed CMRR-NF is not underway, nor will any occur until the completion of the SEIS and issuance of the new ROD. F&R ¶¶ 17, 29; Cook Decl. ¶ 21. Moreover, the proposed CMRR-NF is not expected to be operational until 2022, more than a decade from now. F&R ¶¶ 17, 29; Cook Decl. ¶ 23. The instant situation of more than a decade to construct and outfit the challenged facility is therefore quite

unlike the projects cited by Plaintiff that were, or could have been, rapidly completed. See Sierra Club, No. 06-4887, 2008 WL 2048359 at *1-2 (fill of a 7.69 acre parcel of wetland); Crutchfield, 192 F. Supp. 2d at 448, 466 (construction of one component of a wastewater treatment plant); Babbitt, 69 F. Supp. 2d at 1207 (construction of a portion of highway running through national park).

Plaintiff also faults the Magistrate Judge's findings and recommendation for failing to cite any NEPA case law supporting discretionary dismissal under the doctrine of prudential mootness. Pl. Obj. at 3. This argument is a red herring. Courts routinely apply prudential mootness where relief sought is an injunction against the government. Bldg. & Constr. Dep't, 7 F.3d at 1492. This includes cases involving statutes that provide their own right of action as well as those, such as NEPA, that are brought pursuant to the Administrative Procedure Act ("APA"). See, e.g., Rio Grande Silvery Minnow, 601 F.3d 1096 (prudential mootness applied to claim brought under Endangered Species Act's citizen suit provision); Smith, 110 F.3d 724 (same); Willow Creek, 225 F. Supp. 2d 1312 (NEPA claim brought pursuant to APA).

The Magistrate Judge applied the appropriate legal standards and correctly recognized that the SEIS that is currently underway presents changed circumstances in this ligation. It is likely that the SEIS will address Plaintiff's concerns about the proposed CMRR-NF, which is not expected to become operational for more than ten years. F&R ¶¶ 25, 26, 27. The Magistrate Judge correctly applied these standards and found that the doctrine of prudential mootness counseled against a court-issued injunction, F&R ¶¶ 28, 29, and his findings and recommendation should be adopted by the Court.

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

Plaintiff next asserts that the Magistrate Judge's well-reasoned findings and recommendation erred in its consideration of whether the present case is ripe for adjudication. Pl. Obj. at 6-10, 15-16. The Magistrate Judge's findings and recommendation, however, did not recommend dismissal of Plaintiff's complaint on the grounds of ripeness. See generally F&R. To the extent that the Court considers ripeness as an alternative grounds for dismissal of this case, Plaintiff's objections should be overruled because ripeness examines factors similar to prudential mootness, and both doctrines are applicable to bar Plaintiff's ill-founded NEPA claims. See Mot. to Dismiss, at 11-20; Reply, Dkt. No. 11 at 3-9.

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, 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). 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). "[I]f 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 Mgmt., 459 F. Supp. 2d 1102, 1116-1117 (D.N.M. 2006) (vacated in part and reversed in part on other grounds, 565 F.3d 683 (10th Cir. 2009).

In this case, Plaintiff's claims are not ripe because NNSA is in the process of completing an SEIS to analyze the potential environmental impacts associated with the construction of the proposed CMRR-NF. Cook Decl. ¶ 16. The NNSA's environmental analysis of the proposed CMRR-NF is ongoing and is not expected to be complete until June 2011. Cook Decl. ¶ 25.

Despite these incontrovertible facts, Plaintiff contends that its claims are ripe because, according to Plaintiff, the purpose and need of the proposed CMRR-NF have changed. Pl. Obj. at 6-7. Plaintiff's allegation directly contradicts the sworn declaration of Dr. Donald Cook, which states "the purpose and need for the CMRR Project have not changed, nor has the scope of operations to be carried out in the proposed CMRR-NF. The quantity of special nuclear material that could be handled and stored in the CMRR-NF would remain constant at six metric tons." Cook Decl. ¶ 14. The CMRR-NF will replace and relocate mission-critical capabilities that currently take place in the CMR building, which is almost 60 years old. Cook Decl. ¶¶ 6, 8. Plaintiff's allegation of a changed purpose and need rests upon the fact that the projected cost and materials for the proposed CMRR-NF have increased and that the project now includes a nebulous "hotel concept." Pl. Obj. at 6. The increase in projected cost and expected materials necessary for construction result from changes to the structural aspects of the original design, not from any changes to the mission or purpose. Cook Decl. ¶¶ 12, 13. The "hotel concept" does not represent an expansion of the purpose and need for the proposed CMRR-NF, which is to replace the mission critical capabilities of the aging CMR Building.

In any event, whether the purpose and need for the CMRR-NF have changed does not affect whether Plaintiff's claims are ripe for judicial review. The SEIS process is ongoing, and it is well-settled that until that process is complete, there is no ripe "final agency action" pursuant to the

Administrative Procedure Act ("APA"), 5 U.S.C. § 704, for this Court to review. See Coal. for Sustainable Res., Inc. v. U.S. Forest Serv., 259 F.3d 1244, 1250 (10th Cir. 2001) (holding that ripeness test includes whether there is "final agency action" under the APA). "[I]t appears well-established that a final EIS or the ROD issued thereon constitute the 'final agency action' for the purposes of the APA." Sierra Club v. Slater, 120 F.3d 623, 631 (6th Cir. 1997) (citing Or. Natural Res. Council v. Harrell, 52 F.3d 1499, 1504 (9th Cir. 1995)).

Here, NNSA issued a scoping notice and conducted a 45-day public scoping process that included two public scoping meetings. This scoping process will be followed by no less than the publication of a draft SEIS and a 45-day public comment period on the draft SEIS. The comments received on the draft SEIS will be considered in preparing and issuing a final SEIS, and a new ROD containing the decision on how NNSA intends to proceed with the CMRR-NF. Plaintiff's complaints now, before the draft SEIS is even published for comment, are simply premature. Scoping "mark[s] the infancy, not the termination, of the NEPA process." Muhly v. Espy, 877 F. Supp. 294, 300 (W.D. Va. 1995).

> This is clear when one considers what remains to be done. Among the stages left to be completed are: the issuance of a [draft EIS]; public comment during a compulsory forty-five day waiting period; and the issuance of a [final EIS]. All of these stages require substantial input from the public, during which, the Plaintiffs could conceivably cure any of the defects in the NEPA process they believe have taken place so far.

Id.; see also Bennett Hills Grazing Ass'n v. United States, 600 F.2d 1308, 1309 (9th Cir. 1979) (finding that a draft EIS was not a final agency action subject to judicial review).[4] Until NNSA

[4] Plaintiff cites Catron County Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1434 (10th Cir. 1996), for the proposition that "Defendants have engaged in a 'final agency action' by implementing the 2010 CMRR-NF in violation of NEPA." Pl. Obj. at 7. Catron County, however, involved a challenge to a final agency rule that had been promulgated without an EIS being completed because the agency did not believe that NEPA applied to the

completes the final SEIS and issues a new ROD, there will be no final agency action for purposes of judicial review under the APA. See, e.g., Center for Marine Conservation 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."); Coliseum Square Ass'n, Inc. v. Dep't of Housing and Urban Dev., 2003 WL 715758, at *6 (E.D. La. 2003) (holding that judicial review of NEPA claims was "inappropriate in light of the reopened [NEPA] reviews"), aff'd, 465 F.3d 215 (5th Cir. 2006).[5]

Plaintiff next contends that its claims are ripe because NNSA is engaged in an irretrievable commitment of resources. Pl. Obj. at 7-8. 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).

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final rule, which is plainly a "final agency action." See 75 F.3d at 1432. In this case, NNSA is conducting a NEPA process by preparing an SEIS, and its final decision of whether and how to proceed with CMRR-NF will be made following completion of that SEIS. This case therefore falls in the ordinary category of NEPA cases in which there is no final agency action, and thus no judicial review, until NNSA issues a new ROD based on the SEIS. See, e.g., Goodrich v. United States, 434 F.3d 1329, 1335 (Fed. Cir. 2006) (collecting "case law from our sister circuits holding that, for purposes of the [APA] a ROD is a 'final agency action'"); Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 187 (4th Cir. 1999) (holding that the "designation of the ROD as final agency action under the APA is generally recognized"); Utah v. U.S. Dep't of the Interior, 210 F.3d 1193, 1196 (10th Cir. 2000) (holding that "judicial review of final agency action under the [APA] . . . provides the proper procedure to challenge the sufficiency of an EIS.").

[5] See also Puget Sound Energy, Inc. v. United States, 310 F.3d 613, 624-25 (9th Cir. 2002) ("The Supreme Court has held in other contexts, [and so has the Ninth Circuit], that if an initial agency action may be modified or reversed during administrative reconsideration or review it is rendered non-final while such review is pending.") (citing I.C.C. v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 284-85 (1987)).

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).

Here, NNSA has not reached a critical stage of the decision because it 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. Cook Decl. ¶ 20. No CMRR-NF construction is underway, and none will occur while the SEIS is being prepared. Id. ¶ 21. 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. See, e.g., 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"). See also Mot. to Dismiss, at 15-16; Reply, at 5.

Plaintiff's spurious allegations of what it perceives as irretrievable commitments of resources are easily dismissed. Citing to a comment from a DOE employee at a June 16, 2010 presentation, prior to the reopening of the NEPA process, Plaintiff contends that NNSA will finalize the design of the project and begin construction in March 2011. Pl. Obj. at 7-8. As set forth in the October 4, 2010 sworn declaration of Dr. Donald Cook, the Deputy Administrator for Defense Programs who

oversees the Los Alamos National Laboratory and all of its infrastructure, "[n]o CMRR-NF construction is underway, nor will any occur as long as the SEIS is being prepared." Cook Decl. ¶ 21. The SEIS is not expected to be complete until June 2011, after which NNSA will decide how best to proceed. Id. ¶¶ 23, 25. Plaintiff's contention that construction will begin in March 2011 rests on outdated hearsay that predates the decision to prepare the SEIS and a sworn declaration from a member of NNSA's leadership.

Plaintiff next contends that its Complaint is ripe because NNSA is engaged in more than design of the CMRR-NF. Pl. Obj. at 8-10. Plaintiff first distorts the Magistrate Judge's finding on the Radiological Laboratory Utility Office Building ("RLUOB"). The Magistrate Judge found that the CMRR Project consisted of the CMRR-NF and the "separate but adjacent" RLUOB, an administrative office and support functions building. F&R ¶ 8. Construction of the RLUOB is complete, and building outfitting is currently underway. Cook Decl. ¶ 22; see also Compl. ¶ 14 ("The RLUOB structure is physically complete and is being outfitted."). Plaintiff contends that the completion of RLUOB is an example of ongoing or partial construction of the CMRR-NF. Pl. Obj. at 8-9. This nonsensical and novel argument ignores the fact that Plaintiff's Complaint challenges the separate *nuclear facility*, not the CMRR *Project*, and that construction on the CMRR-NF has not begun. Although analyzed together with CMRR-NF in the 2004 EIS, RLUOB has independent utility for servicing the existing CMR and the PF-4 facilities, as demonstrated by RLUOB's anticipated beginning operation date for radiological operations in 2013, almost a decade before CMRR-NF. See Cook Decl. ¶ 22. Therefore it and CMRR-NF are not connected actions, even though one will benefit the other. See, e.g., Sylvester v. U.S. Army Corps of Eng'rs, 884 F.2d 394, 400 (9th Cir. 1989) (holding federal agency was not required to consider both the

effects of a proposed golf course and the accompanying proposed resort in the same EIS because "each could exist without the other, although each would benefit from the other's presence").

Construction of RLUOB was authorized in the 2004 ROD, completed consistent with that ROD (and Plaintiff does not allege otherwise), and any challenge to this aspect of the CMRR Project is time barred and moot. 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)). The fact remains that the CMRR-NF, the subject of Plaintiff's Complaint, is still undergoing design. Cook Decl. ¶¶ 20, 21. Plaintiff concedes as much in its Complaint. See Compl. ¶¶ 19-20 (alleging that CMRR-NF "has never progressed through defendants' 'preliminary design' stage" and that "Defendants have not made what they call 'Critical Decision 2' or 'Critical Decision 3,' which formally allow detailed design and construction, respectively, and Congress has never authorized or appropriated funds for the actual construction of the proposed [CMRR-NF]").

Plaintiff cites an unpublished case for the proposition that an agency cannot continue activity while an EIS is being prepared. Pl. Obj. at 9-10 (citing Los Alamos Study Group, et al. v. O'Leary, No. 94-1306-M (D.N.M. Jan 26, 1995) (unpub.), attached as Dkt. No. 33-1). In O'Leary, the Court granted a preliminary injunction on the DOE's Dual-Axis Radiographic Hydrotest ("DARHT") facility. O'Leary, at 33-34. O'Leary is easily distinguishable from the present action. In O'Leary, DOE had not conducted an EIS for the challenged DARHT project, but had completed one phase of the project *and was currently constructing the second and third phases of the project without completing an EIS.* Id. at 2. The O'Leary court found that the lack of an EIS for the project violated NEPA, and was faced with the question of whether to enjoin ongoing construction. And, contrary

to Plaintiff's assertions, O'Leary did not address or enjoin planning and design of the project.

In this case, the 2003 EIS and 2004 ROD authorized construction of the CMRR-NF and, in light of new information resulting in design changes to the proposed building, NNSA has opted to prepare an SEIS, in full and continuing compliance with NEPA. Unlike the DAHRT project at issue in O'Leary, here NNSA has taken no action that was not analyzed and approved in the 2003 EIS and 2004 ROD, and no CMRR-NF construction is occurring, nor will any occur until after the SEIS is completed and a new decision issued. Cook Decl. ¶ 21. As the Magistrate Judge accurately found, "No CMRR-NF construction is underway, and none will occur while the SEIS is being prepared." F&R ¶ 16. Thus, unlike O'Leary, in this case NNSA has followed the proper procedure of approving CMRR-NF pursuant to the 2003 EIS and 2004 ROD and then delaying construction while it analyzes potential design changes in the SEIS.[6]

Plaintiff characterizes its case as alleging that NNSA must (1) prepare an "applicable" EIS and ROD, (2) address "cumulative impacts," (3) develop a "mitigation plan," (4) integrate the NEPA analysis into its decision-making process, and (5) include "public participation" in that process. Pl. Obj. at 5. As the Magistrate Judge correctly determined, all of these claims are prudentially mooted

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[6] As it has in prior filings, Plaintiff again erroneously relies on Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002), for the proposition that "[t]he Magistrate [sic] erroneously concluded that defendants are merely engaged in what the Magistrate [sic] considered benign design activities, which the Magistrate [sic] somehow believed do not prejudice their selection of alternatives." Pl. Obj. at 9 But in Davis the Tenth Circuit--even after finding a NEPA violation that is not present here--remanded only "for entry of a preliminary injunction barring further road construction pending resolution of this case on the merits." 302 F.3d at 1126. Notably, the remand did not require an injunction against further planning and design, only construction of the challenged project, and therefore, like O'Leary, Davis does not support Plaintiff's proposition. See also Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 202 (4th Cir. 2005) (rejecting as overly broad a district court injunction, following the finding of a NEPA violation, that enjoined planning and development, in addition to construction, of a Navy aircraft landing training field, pending preparation of an SEIS).

by preparation of the SEIS, which will address all of these issues. For the same reasons, these claims are not ripe until NNSA completes that SEIS and issues a new ROD, which Plaintiff may choose to challenge in a new lawsuit if its concerns are not addressed.

III. PLAINTIFF'S CLAIMS ARE CONSTITUTIONALLY MOOT

In a rhetorical flourish, Plaintiff next contends that its claims are not moot because the "SEIS is a smokescreen to fend off an injunction." Pl. Obj. at 11. As with ripeness, the Magistrate Judge's findings and recommendation did not recommend dismissal of Plaintiff's complaint on the grounds of mootness. See generally F&R. To the extent that the Court considers constitutional mootness as grounds for dismissal of the action, Plaintiff's objections should be overruled. See Mot. to Dismiss, at 20-24; Reply, at 9-12.

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 in the case 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 v. Thompson, 187 F.3d 1213, 1216 (10th Cir. 1999). 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, 110 F.3d at 728 ("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."). Thus, for example, when a new agency decision supersedes an older decision, challenges to the older decision are moot. See Rio Grande Silvery Minnow, 601 F.3d at 1113 (challenge to a Biological Opinion is moot when that opinion has been superseded by a later

Biological Opinion); 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 id. (holding that review of earlier decision document "would be especially inappropriate" because it had been superseded).

Plaintiff contends that its claims are not moot because circumstances of the case have not changed. Pl. Obj. at 11. This is flatly contradicted by the fact that NNSA is preparing an SEIS to analyze the potential environmental impacts of the updated and ongoing design of the proposed CMRR-NF. Cook Decl. ¶¶ 15, 16. The central claim of Plaintiff's Complaint is that NNSA must prepare a NEPA analysis for the CMRR-NF as presently proposed. Compl. ¶ 4. Because NNSA is doing just that--preparing an SEIS and issuing a new decision based on that SEIS--Plaintiff's Complaint is moot. 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."). Any complaints about what the new NEPA process must be or how it must progress, or what must be included in the new NEPA analysis, are premature until NNSA renders a new final decision, as discussed above.

Plaintiff next contends that its action is not moot because the SEIS is merely voluntary cessation of a challenged practice. Pl. Obj. at 11-12. 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). 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, 601 F.3d at 1118; 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") (internal citation omitted).

Plaintiff then proceeds to attack the adequacy of the SEIS process, contending that it identifies only three alternatives. Pl. Obj. at 12-13. NNSA's Notice of Intent to prepare an SEIS appeared in the Federal Register. 75 Fed. Reg. 60745 (Oct. 1, 2010); see Dkt. 9-2, Decl. Ex. 2. The SEIS process has already included a scoping process and two public meetings, and will also include 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. Id.; Cook Decl. ¶ 17. It is during this public participation process where the members of the public, including Plaintiff's members, have had and will have the opportunity to submit input on the SEIS, such as on the range of alternatives. See, e.g., Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1117 (9th Cir. 2002) (stating that scoping "begin[s] a meaningful dialogue with members of the public about a proposed action"). Again, questions such as whether the NEPA process being undertaken now analyzes a reasonable range of alternative pursuant to NEPA are not properly before the Court, and must await another day.

The SEIS is not, as Plaintiff contends, "only a device to deflect injunctive relief." Pl. Obj. at 15. It is an integral part of NNSA's continuing compliance with NEPA that will further analyze the potential environmental impacts of the proposed CMRR-NF that was authorized in the 2004 ROD. Because NNSA is conducting further environmental review of the Project, Plaintiff's claims are moot.

CONCLUSION

For the forgoing reasons, the Court should overrule Plaintiff's objections and adopt the Magistrate Judge's well-reasoned findings and recommendation as those of this Court.

Respectfully submitted on this 7th day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2011, 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 Filing 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 STEVEN 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 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

Plaintiff The Los Alamos Study Group ("plaintiff") hereby moves the Court to enter an order compelling counsel for the defendants to confer as soon as practicable to formulate a discovery plan and other matters required under Fed.R.Civ.P. 26(f), and for the issuance of a scheduling order under Fed.R.Civ.P. 16(b)(1). As grounds for this motion, plaintiff states:

1. Counsel for plaintiffs has requested that counsel for defendants participate in an initial conference of the parties, pursuant to Rule 26(f)(1), to develop a discovery plan and other matters necessary for the efficient prosecution of this litigation.

2. Rule 16 requires the issuance of a scheduling order "within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared." Fed.R.Civ.P. 16(b)(1).

3. No such scheduling order has been issued, and counsel for defendants refuses to participate in a conference of the parties to develop a discovery plan and to confer on other matters required under Rule 26, despite the requirement under Rule 26(f)(1) that the parties confer "as soon as practicable." Fed.R.Civ.P. 26(f)(1).

4. As a consequence of the absence of a scheduling order and defendants' refusal to confer, plaintiff has been constrained to rely solely upon publicly available information to support its motion for injunctive relief under the National Environmental Policy Act. This constraint has unjustly impeded plaintiff's efforts to present factual matters to the Court, given that there is no administrative record concerning defendants' implementation of the current iteration of the Chemistry and Metallurgy Research Replacement ("CMRR") project at Los Alamos National Laboratory, and particularly its Nuclear Facility component ("CMRR-NF"). Moreover, plaintiff is unable to obtain documents from defendants through traditional means of discovery, including depositions of defendants' representatives who possess peculiar knowledge about the current design and implementation of the present iteration of the CMRR-NF.

5. Counsel for the defendants responded to plaintiff's counsel's request for a conference of the parties by stating that this matter is allegedly exempt from the requirements of Rule 26(f) because, in defendants' view, it is "an administrative record review case under the APA." However, plaintiff does not challenge the administrative record supporting the obsolete 2003 EIS and the 2004 ROD. Plaintiffs seek injunctive relief preventing defendants' continuing

prejudicial commitment of resources to the on-going detailed design of the current CMRR-NF. There is no administrative record available that supports defendants' current actions in violation of NEPA.

6. Counsel for defendants have also stated that they will not participate in a conference of the parties because, "in any event, there is no case management order from the court." The parties, however, have an independent obligation to confer "as soon as practicable," regardless of whether any such scheduling order has been issued by the Court. Moreover, Rule 16 provides that a scheduling order must be issued within 90 days after the defendants have appeared. Fed.R.Civ.P. 16(b)(1). Defendants' counsel appeared in this case on August 27, 2010.

WHEREFORE, plaintiff respectfully requests that the Court require counsel for the defendants to participate expeditiously in an initial conference of the parties, to develop in good faith a discovery plan, and to submit a report outlining the plan pursuant to Rule 26(f)(2). Plaintiff also requests that the Court thereafter issue a scheduling order pursuant to Rule 16(b)(1), based on the parties' report, so that plaintiff may obtain information relevant to this NEPA case which is not publicly available, .

Respectfully submitted,
[***Electronically Filed***]

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Certificate of Service

I hereby certify that on this 11th day of March, 2011, I filed the foregoing PLAINTIFF'S 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 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.

John P. Tustin

Andrew A. Smith

/s/ Thomas M. Hnasko
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