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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. Defendants.	)	Case No. 1:10-CV-0760-JH-ACT FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL RULE 26(f) CONFERENCE AND SCHEDULING ORDER [DKT. NO. 46]

INTRODUCTION

On August 16, 2010, Plaintiff Los Alamos Study Group initiated this litigation by filing a "Complaint for Declaratory and Injunctive Relief," Dkt. No. 1. In its Complaint, Plaintiff alleges Federal Defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-

4370(f), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, for actions related to the approval and design of the Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") at the Los Alamos National Laboratory in northern New Mexico. Compl. ¶¶ 52-95.

Federal Defendants filed a motion to dismiss Plaintiff's claims on the grounds of exhaustion, ripeness, and mootness. Dkt. Nos. 9, 11. On January 6, 2011, the Magistrate Judge recommended that this Court grant Federal Defendants' motion to dismiss on the basis of prudential mootness. Dkt. No. 25. The Parties filed objections, see Dkt. Nos. 32, 33, 39, which this Court will consider at the April 27, 2011 hearing, in conjunction with Plaintiff's fully-briefed motion for a preliminary injunction. See Dkt. Nos. 13, 23, 30, 45.

On March 11, 2011, approximately seven months after filing its Complaint, Plaintiff filed the instant motion seeking "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)." Pl. Mot. at 1.

If Plaintiff's claims are subject to judicial review at all, such review is governed by the provisions of the APA and the procedure set forth in Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560 (10th Cir. 1994). If Plaintiff's case survives Federal Defendants' motion to dismiss, the path forward for this Court would be to determine the merits of Plaintiff's claims based on a review of an Administrative Record that would be compiled and lodged by the United States. Pursuant to the express admonition of the Tenth Circuit in Olenhouse, the Federal Rules of Civil Procedure cited by Plaintiff governing pretrial procedure do not apply to this litigation. There can be no trial in this case and, hence, no basis for applying the pretrial procedures that Plaintiff seeks to impose. Plaintiff's motion to compel therefore is misplaced and should be denied.

ARGUMENT

I. THE APA AND OLENHOUSE LIMIT JUDICIAL REVIEW OF AGENCY ACTIONS AND INACTION TO THE ADMINISTRATIVE RECORD

Each of the claims raised in Plaintiff's Complaint is subject to judicial review, if at all, pursuant to the scope and standards for judicial review set forth in the APA. See Compl. ¶¶ 52-64 (alleging violations under NEPA and the APA), id. ¶¶ 65-94 (alleging violations under NEPA); Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125, 1134 (10th Cir. 2006) ("Because none of the statutory or regulatory provisions in question [including NEPA] provide for a private cause of action, the judicial review provisions of the APA govern this suit."); State of Utah v. Babbitt, 137 F.3d 1193, 1203 (10th Cir. 1998) ("Because [NEPA does not] provide for a private right of action, Plaintiffs rely on the judicial review provisions of the APA in bringing their claims."); Catron County v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1434 (10th Cir. 1996) ("Because NEPA does not provide a private right of action for violations of its provisions, the County claims a right to judicial review under the APA.").

Section 706 of the APA imposes a narrow and deferential standard of review of agency action or inaction, and the courts' role is solely to determine whether the challenged actions or inactions meet this standard based on a review of the administrative record that the agency provides to the court. Camp v. Pitts, 411 U.S. 138, 142 (1973). See Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977) (review of an action brought pursuant to the APA is "based on the full administrative record that was before the Secretary at the time he made his decision"); Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 972-73 (10th Cir. 1992) (*en banc*); Lodge Tower Condominium Ass'n v.

Lodge Properties, Inc., 880 F. Supp. 1370, 1374 (D. Colo. 1995). The APA expressly directs that, in reviewing final agency action or agency inaction, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The Supreme Court has held that "in cases where Congress has simply provided for review [under the APA], . . . [judicial] consideration is to be confined to the administrative record and . . . no *de novo* proceedings may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citations omitted).

"The complete administrative record consists of all documents and materials directly or indirectly considered by the agency." Bar MK Ranches v. Yeutter, 994 F.2d 735, 739 (10th Cir. 1993). The Supreme Court has held that the agency determines what constitutes the record and that courts are to base their review on that record. "The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the court." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (citations omitted). The agency's designation of an administrative record is entitled to a presumption of regularity. "The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." Bar MK Ranches, 994 F.2d at 740.

The Tenth Circuit recognized the unique procedures for judicial review of challenges to federal agency actions and inactions in the landmark case of Olenhouse, 42 F.3d at 1580. In Olenhouse, a class of farmers sought review under the APA of a decision by the Agriculture Stabilization and Conservation Service concerning wheat crop payments. Id. at 1572. The farmers asserted claims that, *inter alia*, the agency's action failed to comply with applicable laws and regulations, was unsupported by the record, and violated the farmers' rights under the Fifth Amendment of the United States Constitution. Id. The Tenth Circuit determined that judicial review

of this informal agency action was subject to judicial review pursuant to Section 706 of the APA. Id. at 1573. The Court found that informal agency action[1] must be "set aside if it fails to meet statutory, procedural or constitutional requirements or if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. at 1573-74 (quoting Overton Park, 401 U.S. at 413-14).

The Tenth Circuit in Olenhouse expressly stated that:

> A district court is not exclusively a trial court. In addition to its *nisi prius* functions, it must sometimes act as an appellate court. Reviews of agency action in the district court must be processed *as appeals*. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure.

Id. at 1580 (emphasis in original). The Tenth Circuit found that the process employed by the district court in reviewing the case, which included the use of pretrial motions practice, allowing discovery, and a motion for summary judgment, is, "at its core . . . inconsistent with the standards for judicial review of agency action under the APA [and] invites (even requires) the reviewing court to rely on evidence outside the administrative record." Id. at 1579-80. The Olenhouse court held, in no uncertain terms, that when a district court is reviewing agency action or inaction, it acts as a court of appeal and "it is improper for a district court to use methods and procedures designed for trial." Id. at 1564, 1580. See also Lodge Tower Condominium Ass'n, 880 F. Supp. at 1374 (district court does not sit as a finder of fact because agency action is "reviewed, not tried," rather, "the issue is not whether the material facts are disputed, but whether the agency properly dealt with the facts"). The principles of judicial review outlined in Olenhouse apply to both a petition to compel agency action unlawfully held or unreasonably delayed under 5 U.S.C. § 706(1) and to a petition to hold unlawful

[1]/ For a distinction between formal and informal agency action, see Olenhouse, 42 F.3d at 1574 n.22.

or set aside agency action under 5 U.S.C. § 706(2). See Kane County Utah v. Salazar, 562 F.3d 1077, 1086 (10th Cir. 2009); Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167, 1170 (10th Cir. 1997); Sierra Club v. U.S. Dep't of Energy, 26 F. Supp. 2d 1268, 1271 (D. Colo. 1998) ("The judicial review provisions of the APA do not distinguish between a claim that an agency unlawfully failed to act and a claim based on an action taken. In both cases, the court's review of the defendant agencies' action is generally confined to the administrative record.").[2]/

As in Olenhouse, Plaintiff's claims here seek judicial review of Federal Defendants' actions, or alleged inactions. These claims are thus subject to judicial review, if at all, pursuant to judicial review provisions of the APA, 5 U.S.C. § 706. Indeed, Plaintiff states that the APA provides a basis for the Court's jurisdiction of these actions. See Compl. ¶ 5. Olenhouse requires actions such as this one brought pursuant to the APA to proceed as appeals, not using methods and procedures designed for trial. Plaintiff's invocation of Federal Rules of *Civil* Procedure 16 and 26(f), which govern pretrial procedures, is therefore misplaced, and Plaintiff cannot compel either Federal Defendants or this Court to act pursuant to these rules. See also, e.g., Colo. Wild v. Vilsack, 713 F. Supp. 2d 1235, 1237, 1242-43 (D. Colo. 2010) (stating that, pursuant to Olenhouse, the court would "apply the Federal Rules of Appellate Procedure and, generally, limit [its] review to the evidence relied upon by the [federal agency] in reaching the challenged decision," and holding that reviewing whether the plaintiffs waived issues by inadequately noticing them in the district court was properly based on the

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[2]/ While Olenhouse outlines the principles of judicial review of final agency action or inaction under the APA, "nothing in Olenhouse (or, for that matter, other controlling case law or the APA itself) precludes an APA-based complaint from being summarily dismissed pursuant to Federal Rule of Civil Procedure 12(b)." Kane County, 562 F.3d at 1086.

Federal Rules of Appellate Procedure, not the Federal Rules of Civil Procedure).[3]

II. COMPILING THE ADMINISTRATIVE RECORD NOW WOULD BE PREMATURE, WOULD INTERFERE WITH THE ONGOING AGENCY DECISION-MAKING PROCESS, AND MAY ULTIMATELY BE UNNECESSARY

In its motion, Plaintiff alleges that "there is no administrative record concerning defendants' implementation of the current iteration" of the CMRR-NF and that "there is no administrative record available that supports defendants' current actions." Pl. Mot. ¶¶ 4, 5. Plaintiff's assertion that there is no administrative record is simply wrong.

The U.S. Department of Energy/National Nuclear Security Administration ("DOE/NNSA") has already completed extensive environmental review of the proposed CMRR-NF in accordance with NEPA. The original review culminated in a November 2003 Environmental Impact Statement ("EIS") and a February 12, 2004 Record of Decision ("ROD") that approved construction of CMRR-NF and the associated Radiological Laboratory Utility Office Building ("RLUOB"). Since the 2004 ROD, new developments and information have necessitated modifications in the design of the proposed CMRR-NF. In continuing compliance with NEPA, DOE/NNSA elected to prepare a Supplemental EIS ("SEIS") to further analyze potential environmental impacts as DOE/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. The documents and decisions supporting the 2003 EIS, 2004 ROD, and soon to be issued SEIS all

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[3] In addition to being contrary to clear admonitions of the Tenth Circuit in Olenhouse, Plaintiff's motion for a pretrial scheduling conference and order also fails under the plain language of Rule 26(f) itself, which expressly exempts actions for review on an administrative record from initial disclosure and conference of the parties. Fed. R. Civ. P. 26(f)(1) (requiring a conference of the parties "[e]xcept in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)"); Fed. R. Civ. P. 26(a)(1)(B)(i) (exempting "an action for review on an administrative record").

exist and would be compiled, certified, and lodged as an Administrative Record at a time designated by the Court should this case proceed beyond a ruling on Federal Defendants' pending motion to dismiss.

The compilation of an Administrative Record for such a complex and lengthy ongoing administrative decision-making process, which dates back well more than a decade, is an expensive and time-intensive process. Importantly, the same DOE/NNSA personnel who would be tasked with compiling this Administrative Record are also involved with preparation of the SEIS. As a result, unnecessarily and prematurely compiling an Administrative Record for Plaintiff's claims would not only come at substantial taxpayer expense, but would also divert resources and personnel dedicated to advancing the NEPA process for the CMRR-NF. While a delay in the decision-making process may serve Plaintiff's avowed interests in obstructing this project, it would plainly prejudice the United States' significant national security and international policy interests in reaching a timely decision as to how to move forward with this critical facility. Indeed, the same considerations that dictate that this appeal should be dismissed on mootness and/or ripeness grounds dictate that Plaintiff's request to proceed with the merits portion of this case is premature and potentially unnecessary, and should be denied to prevent interference with the ongoing federal agency administrative proceedings and compliance with NEPA.

Plaintiff baldly asserts that "as a consequence of the absence of a scheduling order and defendant's refusal to confer, Plaintiff has been constrained to rely solely upon publicly-available information to support its motion for injunctive relief." Pl. Mot. ¶ 4. Plaintiff, however, did not request a Rule 26(f) conference *until March 8, 2011*, just three days before filing the motion to compel, and almost four months after Plaintiff filed its motion for preliminary injunctive relief and two

months after it filed its reply in support of injunctive relief. See Dkt. No. 13 (filed Nov. 12, 2010), Dkt. No. 30 (filed Jan. 14, 2010). Thus, even if Federal Defendants had immediately agreed to Plaintiff's request to engage in pretrial procedures that the Tenth Circuit in Olenhouse called "illicit," see 42 F.3d at 1579,[4]/ it would not have obtained any additional materials in the three days prior to its filing of its motion to compel. Plaintiff's attempt to fault Federal Defendants for its unsubstantiated and unexplained claim that it did not have enough materials to support its motion for a preliminary injunction--which Plaintiff supported with a deluge of hundreds of pages of exhibits--is contrived, at best.

CONCLUSION

For the foregoing reasons, Plaintiff's motion to compel should be denied. If Plaintiff's appeal should survive Federal Defendants' motion to dismiss, the Parties can confer on a time line for Federal Defendants to the expense and time of compiling and producing the Administrative Record for Plaintiff's claims, and a schedule can be developed for briefing Plaintiff's claims on the merits. Until that time, Plaintiff's attempt to compel inapplicable pretrial procedural requirements is both misplaced and premature.

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[4]/ See id. ("The District Court's reliance on arguments, documents and other evidence outside the administrative record is due, at least in part, to the *illicit procedure* it employed to determine the issues for review [which included] process[ing] the . . . appeal as a separate and independent action, initiated by a complaint and subjected to discovery and a 'pretrial' motions practice.") (emphasis added); see also id. at 1579-80 ("This process, at its core, is inconsistent with the standards for judicial review of agency action under the APA. The use of [dispositive motions practice based on discovery and other pretrial procedures] permits the issues on appeal to be defined by the appellee and invites (even requires) the reviewing court to rely on evidence outside the administrative record. Each of these impermissible devices works to the disadvantage of the appellant. We have expressly disapproved of the use of this procedure in administrative appeals in the past, and explicitly prohibit it now.") (footnotes omitted).

Respectfully submitted on this 28th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2011, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, which transmitted a Notice of Electronic Fling to the following CM/ECF registrants:

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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

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

UNITED STATES DEPARTMENT OF ENERGY; THE HONORABLE 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 REPLY MEMORANDUM ON 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 Los Alamos Study Group submits this Reply Memorandum in response to contentions contained in the defendants' opposition brief dated March 28, 2011(Docket ("Dkt.") No. 47) ("D.Br.").

Defendants assert that this matter involves judicial review of an agency action under the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"), and that the Court may not receive evidence outside a yet-to-be-compiled administrative record, so that there is no need to schedule

discovery to obtain such evidence. Therefore, they maintain, there is no need for a meeting of counsel under Rule 26(f)(1) and no need for a scheduling order under Rule 16. (D.Br. at 2).

Defendants' portrayal of the nature of this litigation, and their forecast of its path, are appallingly misjudged. This case comes before the Court for judicial review under the APA and the National Environmental Policy Act (NEPA), and the Court will examine defendants' compliance with NEPA under the standards of 5 U.S.C. § 706. But to assume the model of the *Olenhouse* case seriously misconceives the nature of the issues. *Olenhouse* was no NEPA case; it involved specific agency decisions determining price support payments for agricultural commodities; there was no question about the process that had been followed to establish the facts, the contents of the record before the agency, or the substance of the decisions that the agency had made. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994). Here, in direct contrast, the Court must apply NEPA to adjudicate the lawfulness of an agency decision or decisions, nearly all of which are non-public, made somewhere within a mammoth federal bureaucracy and the huge privatized workforce that does most of the actual planning, design, and construction, to carry out a huge construction project, without any semblance of NEPA compliance—no public meetings, no scoping process, no study of alternatives, no draft EIS, no final EIS, no Record of Decision, and no Administrative Record compiled by the agency to show the basis for its decision.

Plaintiff alleges that:

1. Defendants have no applicable EIS and are not following any applicable Record of Decision. They have committed to the current version of the Nuclear Facility project without conducting a NEPA analysis of its impact or those of alternatives.

2. Defendants have not analyzed the cumulative impacts of connected actions.

3. Defendants have failed to provide mitigation measures.

4. Defendants have failed to integrate NEPA analyses into their decision-making process.

5. Defendants have failed to provide the required timely opportunities for meaningful participation by other federal agencies, state and local government, tribes, or the public.

To determine the lawfulness of the agency actions in issue, the Court may need to pursue inquiries including but not limited to the following:

a. What decision has been made by the agency? Defendants sometimes urge that no decision has actually been made, that they are still considering various alternatives which would not build CMRR-NF. Defendants' Response in Opposition to Motion for Preliminary Injunction at 8 n. 2, 13-14 (Dec. 20, 2010) (Dkt. No. 23) ("D. Opp. MPI"). At other times, and at all times before Congress, they insist that the Nuclear Facility is "critical" (D. Opp. MPI at 8) and essential for national security—language that describes a policy firmly adopted.

b. What were the bases for the agency's decision and how might they have changed in the past decade? What precise purposes and needs did the agency assume were to be met? How might these change if funding for all of NNSA's proposed projects is not available, or if some purposes turn out to entail larger expenses in connected actions than previously understood? When decisions were being made to drastically increase the scope of the Nuclear Facility project, did the agency consider alternatives and, if so, what alternatives? What impacts were considered for the project now going forward or for alternative projects?

c. What commitments of resources have been made toward the construction of this Nuclear Facility? Defendants claim none; they say that their partial excavation of the Nuclear Facility site, the construction of the RLUOB to serve the Nuclear Facility, and their ongoing expenditure of millions of dollars in detailed final design work signify no prejudicial commitment. (D. Opp. MPI at 2, 13).

d. What other facilities and projects have been and will be pressed into design and construction by virtue of the Nuclear Facility's construction—*i.e.*, which ones are interdependent with the Nuclear Facility and so should be analyzed jointly in a single EIS? Plaintiff asserts that other projects within the Pajarito Construction Corridor are linked in function, scale, cost, impacts, and timing to construction of the Nuclear Facility. Moreover, several facilities that would function jointly with the Nuclear Facility must be brought into compliance with federal seismic standards to match the Nuclear Facility, action which may require additional large expenses, not yet planned and budgeted.[1]

e. What decisions have been predetermined in disregard of NEPA requirements for analysis of environmental impacts? Plaintiff contends that defendants have decided to construct the Nuclear Facility and, by their contractual arrangements and planning commitments, have placed their agency on a one-way track to build the Nuclear Facility, despite their claims that they are keeping an open mind.

[1] To cite just one example, the DNFSB February 18, 2011 Weekly Site Report for LANL contains this passage: "LANL also recently submitted the conceptual design for upgrading a portion of the Plutonium Facility confinement ventilation system to safety class including seismic upgrades to meet Performance Category (PC)-3 requirements . . . . Based on the preliminary cost estimate for these upgrades (which cannot be finalized until SAFER analysis for the building structure is completed), LANL notes that a capital asset line item project subject to DOE Order 413.3 would be required to implement a safety class ventilation system that meets PC-3 seismic requirements."

These and other questions clearly require investigation by document production and other discovery methods. Further, time is of the essence, since defendants are unquestionably proceeding—in violation of their own guidance[2]—to complete detailed design and they intend to commence construction later this year.[3] At the same time, defendants have not begun to compile the administrative record. (D.Br. at 8).

In such a situation, courts are not reluctant to receive evidence outside the administrative record to determine NEPA issues. Nor do they hesitate to call for discovery, either to determine the proper extent of the administrative record or to allow extra-record evidence to be obtained. The Tenth Circuit has listed some of the circumstances calling for consideration of extra-record materials:

> A recent law review article discusses the problem that we, and all other appellate courts, face in determining whether and how to use extra-record citation. Stark & Wall, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action,* 36 Ad. L. Rev. 333, 335 (1984). The article notes that, on review, parties have offered extra-record studies and other evidence under a number of justifications, including: (1) that the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials . . . (2) that the record is deficient because the agency ignored relevant factors it should have considered in making its decision, . . . (3) that the agency considered factors that were left out of the formal record, . . . (4) that the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues, . . . and (5) that evidence coming into existence after the agency acted demonstrates that the actions were right or wrong . . . .

[2] Defendants' guidance bars continuing with detailed design pending completion of NEPA studies. 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. Defendants have never addressed this issue of noncompliance with their own guidance.

[3] Todd Jacobson, *NNSA Officials Defend Potential Relaxed Requirements at CMRR-NF: Changes that Have Drawn Concern of Defense Board Still Being Studied,* Nuclear Weapons & Materials Monitor, March 11, 2011, at 3.

American Mining Congress v. Thomas, 772 F.2d 617, 626 (10th Cir. 1985); *see also Lee v. U.S. Air Force,* 354 F.3d 1229, 1242 (10th Cir. 2004). The District of Columbia Circuit has noted that extra-record evidence is particularly necessary where an agency action is attacked as procedurally defective, and it similarly cataloged occasions calling for receipt of such evidence. One category includes all NEPA litigation:

> Not surprisingly then, the courts have developed a number of exceptions countenancing use of extra-record evidence to that end. As recently summarized by two commentators, exceptions to the general rule have been recognized (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989).

Extra-record evidence is admissible on several grounds. For example, the administrative record "properly consists of all relevant documents before the agency at the time of the decision, not simply those that the agency relied upon in reaching its decision." *Wilderness Soc'y v. Wisely,* 524 F. Supp. 2d 1285, 1295 (D. Colo. 2007); *Fund for Animals v. Williams,* 391 F. Supp. 2d 191, 196-97 (D.D.C. 2005). The Supreme Court ruled in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), that since the APA requires that review be based on the "whole record" (5 U.S.C. § 706), the reviewing court should accept supplementary evidence, beyond that contained in the administrative record, to explain the agency's decision:

> But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the

scope of his authority and if the action was justifiable under the applicable standard.

Id. at 420; *see also Camp v. Pitts,* 411 U.S. 138, 143 (1973). Thus, a court may take extra-record evidence to explain an unclear administrative record. Such evidence may either explain the nature of the decision made by the agency or clarify the factors considered by the agency. Mandelker, D.R., NEPA Law and Litigation § 4:36, at 4-138 through 4-139 and notes 21, 22 (2010). Numerous decisions uphold the practice. *Sierra Club v. Marsh,* 976 F.2d 763, 774 (1st Cir. 1992).

Also, a court may admit evidence not contained in the administrative record when the record itself is not complete. *National Audubon Society v. Hoffman,* 132 F.3d 7, 14 (2d Cir. 1997); *Public Power Council v. Johnson,* 674 F. 2d 791, 794 (9th Cir. 1982); Mandelker, at 4-136.5 through 4-137 note 14. Extra-record evidence is also admissible to explain a complex, technical, or voluminous record. *See Sierra Club v. U.S. Forest Service,* 535 F. Supp. 2d 1268, 1291 (N.D. Ga. 2008); *Missouri Coalition for the Environment v. U.S. Army Corps of Engineers,* 866 F.2d 1025, 1031 (8th Cir. 1989). Similarly, an agency that is said to have acted in bad faith, as Plaintiff has alleged (Plaintiff's Reply in Support of Motion for Preliminary Injunction ("Pl. Reply in Support of MPI") at 2-4, (Jan. 14, 2011) (Dkt. No. 30) may not exclude extra-record evidence. *National Audubon Society v. Hoffman,* 132 F.3d 7, 14 (2d Cir. 1997); *County of Suffolk v. Department of the Interior,* 562 F.2d 1368, 1384-85 (2d Cir. 1977).

Most importantly in this case, extra-record evidence is frequently admitted in NEPA cases[4] to achieve the fundamental purpose of NEPA litigation. As the Fourth Circuit has observed:

> a NEPA case is inherently a challenge to the adequacy of the administrative record. That is why, in the NEPA context, 'courts generally have been willing to look outside the record when assessing the adequacy of an EIS or a determination that no EIS is necessary."

Ohio Valley Environmental Coal Co. v. Aracoma Coal Co., 556 F.3d 177, 201 (4th Cir. 2009).

The Second Circuit has explained that NEPA litigation often requires the court to conduct an extra-record investigation:

> Deviation from this 'record rule' occurs with more frequency in the review of agency NEPA decisions than in the review of other decisions. *See generally* Susannah T. French, Comment, Judicial Review of the Administrative Record in NEPA Litigation, 81 Cal. L. Rev. 929 (1993). This occurs because NEPA imposes a duty on federal agencies to compile a comprehensive analysis of the potential environmental impacts of its proposed action, and review of whether the agency's analysis has satisfied this duty often requires a court to look at evidence outside the administrative record. To limit the judicial inquiry regarding the completeness of the agency record to that record would, in some circumstances, make judicial review meaningless and eviscerate the very purposes of NEPA. The omission of technical scientific information is often not obvious from the record itself, and a court may therefore need a plaintiff's aid in calling such omissions to its attention. Thus, we have held that the consideration of extra-record evidence may be appropriate in the NEPA context to enable a reviewing court to determine that the information available to the decisionmaker included a complete discussion of environmental effects and alternatives.

National Audubon Soc'y v. Hoffman, 132 F.3d 7, 14-15 (2d Cir. 1997).

Thus, in a NEPA case, evidence outside the record may be introduced to show that the agency failed to consider significant issues:

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[4] "[A] great many of the cases allowing extra-record evidence are NEPA cases." Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise of and Actual Status of Overton Park's Requirement of Judicial Review 'On the Record,'* 10 Admin. L.J. Am. U. 179, 227 (1996).

> In NEPA cases, by contrast, a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of the environmental effects and alternatives . . . which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored.
>
> A suit under NEPA challenges the adequacy of part of the administrative record itself the EIS. Glaring sins of omission may be evident on the face of the statement, other defects may become apparent when the statement is compared with other parts of the administrative record . . . . Generally, however, allegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept 'stubborn problems or serious criticisms . . . under the rug' . . . raise issues sufficiently important to permit the introduction of new evidence by the district court, including expert testimony with respect to technical matters, both in challenges to the sufficiency of an environmental impact statement and in suits attacking an agency determination that no such statement is necessary.

County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1384-85 (2d Cir. 1977). Likewise, the Tenth Circuit noted in *Lee v. United States Air Force,* 354 F.3d 1229, 1242 (10th Cir. 2004) that review of extra-record evidence "may illuminate whether 'an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism . . . under the rug.'" *See also* Mandelker at 4-142 and note 31; *accord Hiram Clarke Civic Club, Inc. v. Lynn,* 476 F.2d 421 (5th Cir. 1973); *Fund for Animals v. Williams,* 391 F. Supp. 2d 191, 198-99 (D.D.C. 2005).

These recognized bases for admitting extra-record evidence apply directly to this case. No administrative record has been assembled, time is passing quickly, and important environmental interests are at stake. Most fundamentally, this is a NEPA case, and "a NEPA case is inherently a challenge to the adequacy of the administrative record." *Ohio Valley Environmental Coal Co. v. Aracoma Coal Co.,* 556 F.3d 17, 201 (4th Cir. 2009). Here, there are fundamental questions as to the nature of the decisions made and the bases for the decision or

decisions. There are serious claims that, in electing to proceed with its much-expanded 2010 version of the Nuclear Facility, defendants failed to consider significant environmental impacts of that project, and that they failed to consider alternatives that are reasonable—especially in light of the massive budget of the current plan. Matters that defendants failed to consider can only be demonstrated by extra-record evidence. Moreover, there is every reason to believe that DOE will continue attempting to conceal the nature of its decisions, claiming at the same time that the Nuclear Facility is critical for national security and must be built and simultaneously that no decision has been made to proceed with construction. (D. Opp. MPI at 2, 8 n. 2, 13-14, 17-19).

Discovery is proper in this situation to enable the extra-record evidence to be obtained. Thus, in *Public Power Council v. Johnson,* 674 F.2d 791 (9th Cir. 1982), on review of agency actions, petitioners requested discovery to obtain evidence outside the administrative record. The court recognized that "even when judicial review is confined to the record of the agency, as in reviewing informal agency actions, there may be circumstances to justify expanding the record or permitting discovery." (*Id.* at 793). It cited the instances discussed above, *i.e.,* evidence necessary to explain agency action, to show whether the agency considered all relevant factors, to show reliance upon documents or materials not included in the record, to explain technical terms or agency interpretations, and when agency bad faith is claimed. (*Id.* at 793-95). Such circumstances were presented, and the court directed that deposition and document production take place in aid of judicial review. (*Id.* at 796). Other courts recognize that the "administrative record may be 'supplemented, if necessary, by affidavits, depositions, or other proof of an explanatory nature.'" *Sierra Club v. Marsh,* 976 F.2d at 772; *accord Arkla Exploration Co. v.*

Texas Oil & Gas Corp., 734 F.2d 347, 357 (8th Cir. 1984); *Harrisonville Telephone Co. v. Illinois Commerce Commission,* 472 F. Supp. 2d 1071, 1075-76 (S.D. Ill. 2006); *Pension Benefit Guaranty Corp. v. LTV Steel Corp.*, 119 F.R.D. 339, 341-43 (S.D.N.Y. 1988).

It would be error for this Court to refuse to require a discovery conference, and to shut the door on discovery in this case. Such action would prevent the application of case law allowing the obtaining and presentation of extra-record evidence, and it would reject decades of practice under NEPA and frustrate its fundamental purpose.

Conclusion

For the reasons set forth herein, the Court should enter its order directing the parties to confer in accordance with Rule 26(f)(1) and to complete all subsequent procedures called for by the Civil Rules.

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

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Certificate of Service

I hereby certify that on this 4th day of April, 2011, I filed the foregoing PLAINTIFF'S REPLY MEMORANDUM ON MOTION TO COMPEL 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.

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

THE LOS ALAMOS STUDY GROUP, Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, et al. Federal Defendants.	)	Case No. 1:10-CV-0760-JH-ACT FEDERAL DEFENDANTS' MOTION FOR LEAVE TO FILE A THREE-PAGE SURREPLY TO PLAINTIFF'S REPLY ON MOTION TO COMPEL [DKT. NO. 48]

On April 4, 2011, Plaintiff Los Alamos Study Group filed a reply in support of its motion to compel Federal Defendants to participate in a Rule 26(f) conference pursuant to the Federal Rules of Civil Procedure. See Dkt. No. 48. In its reply, Plaintiff raised a new and unexpected argument

that the Tenth Circuit's strongly-worded admonition in Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560 (10th Cir. 1994), that challenges to federal agency action must be treated as appeals, and *not* pursuant to the Federal Rules of Civil Procedure, does not apply to claims brought pursuant to the National Environmental Policy Act ("NEPA"). Pl. Reply at 2. Plaintiff's argument that Olenhouse does not apply to NEPA cases is plainly at odds with a well-established body of Tenth Circuit case law *expressly* applying Olenhouse to NEPA cases, and reiterating Olenhouse's admonishment that such cases *must* be processed as appeals based on judicial review of the Administrative Record. Pursuant to D.N.M.LR.-Civ. 7.4(b), Federal Defendants respectfully request leave to file a three-page surreply to address Plaintiff's anomalous arguments that Olenhouse does not apply to Plaintiff's NEPA claims, that Federal Rules of Civil Procedure 16 and 26 govern these proceedings, and that judicial review need not be based on an Administrative Record. In accordance with D.N.M.LR.-Civ. 7.1(a), Federal Defendants have conferred with Plaintiff, who opposes this motion.

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

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2011, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, which transmitted a Notice of Electronic Fling to the following CM/ECF registrants:

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

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,

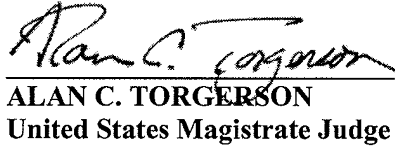
Defendants.

ORDER

THIS MATTER comes before the Court on Defendants' Motion for Leave to file a Three-Page Surreply to Plaintiff's Reply on Motion to Compel ("Defendants' Motion") [Doc. 49]. Defendants' Motion is opposed by the Plaintiff. [*Id.* at p. 3.]

The undersigned has reviewed the 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 ("Motion to Compel") [Doc. 46], Federal Defendants' Response in Opposition [Doc. 47] and Plaintiff's Reply. [Doc. 48.] Further briefing on this matter is not necessary.

THEREFORE, IT IS ORDERED that Defendants' Motion for Leave to file a Three-Page Surreply to Plaintiff's Reply on Motion to Compel is DENIED.



ALAN C. TORGERSON
United States Magistrate Judge

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.

ORDER

THIS MATTER comes before the Court on 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 ("Motion to Compel") [Doc. 46], Federal Defendants' Response in Opposition [Doc. 47] and Plaintiff's Reply. [Doc. 48.]

This action commenced with Plaintiff's Complaint for Declaratory Judgment and Injunctive Relief Under the National Environmental Policy Act of 1969 [Doc.1]. Defendants filed a Motion to Dismiss [Doc. 9] which the undersigned recommended be granted on the grounds of prudential mootness. [Doc. 25.] Plaintiff and Defendants filed Objections to the Report and Recommendations. [Doc. 32, Doc. 33, and Doc. 39.] Plaintiff has also filed a Motion for Preliminary Injunction. [Doc. 13.] All these matters are scheduled for a hearing before the Honorable Judith C. Herrera on April 27, 2011. [Doc. 43].

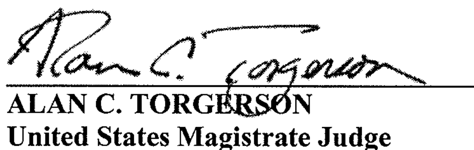
Plaintiff now seeks a scheduling order pursuant to the Federal Rules of Civil Procedure, relying on Fed.R.Civ.P. 26(f) and 16(b)(1). [Doc. 46.] Plaintiff argues that, pursuant to Fed.R.Civ.P. 26(f), it is necessary for the parties to participate in an initial conference and to develop a discovery plan and that Fed.R.Civ.P. 16(b)(1) requires the issuance of a scheduling order. Defendants respond that Plaintiff's Complaint is subject to judicial review pursuant to the scope and standards for judicial review set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and is not governed by the Federal Rules of Civil Procedure. However, neither position is applicable to the case at this time.

What neither the Plaintiff nor the Defendants have done is refer to the Local Rules of Civil Procedure for this district. D.N.M.LR-Civ. 16.3(r) states that "[p]roceedings requesting injunctive or other emergency relief" are "excluded from pretrial case management procedures described in D.N.M.LR-Civ.16 unless the parties request, or the assigned Judge determines, that the case should be governed by this rule." The fact that neither party made reference to D.N.M.LR-Civ.16.3(r), suggests to the Court that neither party read the Local Rules of Civil Procedure. This action for declaratory judgment and injunctive relief is explicitly excluded from pretrial case management procedures.

Even if the undersigned should deem that Plaintiff's Motion to Compel constitutes a request to manage this action pursuant to Fed.R.Civ.P. 16 and D.N.M.LR-Civ. 16, it is not clear to this Court that the Federal Rules of Civil Procedure would apply to this case. However, the Court need not address that issue at this point. Because Plaintiff has not requested that this case not be excluded from case management procedures and because of the pending matters scheduled to be heard before Judge Herrera on April 27, 2011, the undersigned will, as a matter prudence and sound discretion, deny the Motion to Compel pending the District Court's decision

on the Defendants' Motion to Dismiss [Doc. 9], the parties' Objections [Doc. 32, Doc. 33, and Doc. 39] and the Plaintiff's Motion for Preliminary Injunction [Doc. 13].

IT IS ORDERED that 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 [Doc. 46] is DENIED.



ALAN C. TORGERSON
United States Magistrate Judge

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

LOS ALAMOS STUDY GROUP,

Plaintiff,

v. **No. 10-CV-760 JCH/ACT**

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

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiff Los Alamos Study Group's *Objections to Magistrate Judge's Proposed Findings and Recommended Disposition*, filed January 20, 2011 [Doc. 33]. On November 17, 2010, the Court referred Defendants' *Motion to Dismiss for Lack of Jurisdiction* [Doc. 9] to the Magistrate Judge for proposed findings of fact and a recommended disposition pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B). *See* Doc. 15. On January 6, 2011, the Magistrate Judge filed his Proposed Findings and Recommended Disposition (hereinafter referred to as "F&R"), recommending that Plaintiff's Complaint be dismissed in its entirety based on the doctrine of prudential mootness. *See* Doc. 25. Plaintiff timely filed its objections.[1]

[1] Defendants also timely filed *Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition* [Doc. 32]. These Objections focus only on two minor

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed *de novo* the findings and recommendations to which Plaintiff objects. In addition to exhaustively reviewing the briefs and voluminous exhibits submitted by the parties, the Court held hearings on April 27, 2011 and May 2, 2011, at which both sides were heard and during which the parties submitted additional material.[2] Having carefully considered the Objections, briefs, relevant law, arguments of the parties at the hearings, and the submitted exhibits, and being otherwise fully informed, the Court finds that Plaintiff's Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition are not well taken and will be DENIED. Because this denial results in Plaintiff's Complaint being dismissed in its entirety, the Court does not reach Plaintiff's *Motion for Preliminary Injunction* [Doc. 13].

BACKGROUND[3]

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, 40 C.F.R. §§ 1500-08, and regulations issued by the Department of Energy ("DOE"), 10 C.F.R. § 1021. This action also arises under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*

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inaccuracies in the factual section of the F&R, but do not object to the recommended disposition. The two minor inaccuracies are corrected in this Court's statement of facts.

[2] At the April 27, 2011 hearing, Plaintiff presented the Court with three binders of materials: (1) Plaintiff's Opening Statement Exhibits; (2) Gregory Mello Testimony Exhibits; and (3) Frank Von Hippel Testimony Exhibits. In addition, the Court received a copy of Defendants' Draft Supplemental Environmental Impact Statement. While these materials were not formally moved into evidence, both counsel referred to the exhibits, as did the witnesses, and the Court considered them in making its ruling. Thus, they will be considered part of the record.

[3] This background section is taken largely from the Magistrate Judge's thorough but concise summation of the facts as laid out in Doc. 25 at 1-6.

In its Complaint [Doc. 1], 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"). Complaint at ¶ 2. The NNSA is responsible for the management and security of the nation's nuclear weapons, nuclear nonproliferation, and naval reactor programs. *See* Declaration of Donald L. Cook, attached as Ex. 1 to Deft. Mot. to Dismiss [Doc. 9] (hereinafter "Cook Decl.") at ¶ 3; 50 U.S.C. § 2401(b). NNSA is also responsible for the administration of LANL. *Id* at ¶ 4.

Plaintiff's 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 project, including any funds for detailed design or construction, until a new EIS is completed. Complaint 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 that considered in the project's 2003 EIS and the accompanying Record of Decision ("ROD") that was released in 2004, so that a new EIS must be prepared. Complaint at ¶¶ 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 must prepare a new EIS to address them. Complaint at ¶¶ 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 must prepare a new EIS which addresses reasonable mitigation measures. Complaint at ¶¶ 72-79. Count IV 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. Complaint at ¶¶ 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 Plaintiff. Complaint at ¶¶ 91-95.

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.

In 2002, NNSA published a Notice of Intent to prepare the CMRR-NF EIS and invited public comment on the CMRR-NF EIS proposal. Cook Decl. at ¶ 9. At the time NNSA published the Notice of Intent, the Chemical and Metallurgy Research ("CMR") building that Defendants sought to replace was over 50 years old and allegedly nearing 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[4] research and development." *Id.* at ¶ 5. The CMR building 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;

[4] "Actinide" refers to the 14 elements with atomic numbers from 90 to 103. Uranium and Plutonium are actinides. *See* Doc. 9 at 3 n.1.]

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.

NNSA hosted two public meetings on the proposed CMRR project 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).

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"). Cook Decl. at ¶ 10.

Defendants contend that, since the 2003 EIS and the 2004 ROD were published, new developments have arisen that require changes to the proposed CMRR-NF structure. *Id.* at ¶ 12. Specifically, a site-wide analysis of the geophysical structures that underlie the area occupied by LANL revealed new geologic information regarding the seismic conditions at the site. *Id.*; Pl. Resp. to Deft. Mot. to Dismiss [Doc. 10] at 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." Cook Decl. at ¶ 12. In addition to addressing the seismic issues, other changes were made to "implement[] DOE's nuclear safety management design requirements for increased facility engineering controls to ensure protection of the public, workers, and the environment." *Id.* Also,

"sustainable design principles have been incorporated to minimize the environmental impacts of construction and operation of the proposed CMRR-NF." *Id.*

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 additional NEPA document was required. *Id.* at ¶ 15. On July 1, 2010, counsel for Plaintiff wrote to the DOE and the NNSA and expressed concerns about the adequacy of NNSA's NEPA analysis and the increased cost and scope of the CMRR-NF project. 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.* On July 30, 2010, NNSA informed the Plaintiff that it was preparing a Supplement Analysis. *Id.* 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. *See* Doc. 1.

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." Cook Decl. at ¶ 16. A Notice of Intent to prepare an SEIS appeared in the October 1, 2010 issue of the Federal Register. *See* Ex. 2 attached to Doc. 9.

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 SEIS." Cook Decl. 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 are able to participate in

determining the scope of the environmental analysis. On April 22, 2011, the NNSA released a draft of the SEIS to the public. *See* National Nuclear Security Administration, *Draft Supplemental Environmental Impact Statement for the Nuclear Facility Portion of the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, New Mexico (CMRR-NF SEIS)* (DOE/EIS-0350-S1) (2011) (hereinafter "Draft SEIS"), *available at* http://www.nnsa.energy.gov/nepa/cmrrseis. Release of this draft began a comment period scheduled to last at least 45days. All public comments must be considered in the preparation of the Final SEIS. Cook Decl. at ¶ 17.

Significantly, 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. *Id.* at ¶ 20. In fact, the Draft SEIS contains a new proposed design option for the CMRR-NF that requires significantly less excavation than the option that had been considered prior to the commencement of the SEIS process. *See* Draft SEIS at 2-14 to 2-19. Unquestionably, the CMRR-NF as currently envisioned will require an expenditure of resources and create a potential environmental impact greater than the project as envisioned in the 2003 EIS and 2004 ROD, prior to discovery of the seismic issues. However, no CMRR-NF construction is underway, and none will occur until after the SEIS is finalized. Cook Decl. 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; Pl. Resp. to Deft. Mot. to Dismiss [Doc. 10] at 11. Thus, no construction or other irrevocable actions appear to be ongoing while Defendants are engaging in the SEIS process.

ANALYSIS

A. Prudential Mootness

In his F&R, the Magistrate Judge found that Plaintiff's Complaint should be dismissed based on the doctrine of prudential mootness. Prudential mootness differs from the concept of the more common constitutional mootness. Specifically, prudential mootness addresses a court's discretion in the exercise of granting or withholding relief, rather than the power to grant relief. *See Southern Utah Wilderness Alliance v. Smith,* 110 F.3d 724, 727 (10th Cir. 1997). 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." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010) (citations omitted) (emphasis in original). The doctrine of prudential mootness "has particular applicability in cases...where the relief sought is an injunction against the government." *Southern Utah Wilderness Alliance*, 110 F.3d at 727.

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 1315, 1321 (10th Cir. 1997); *Southern Utah Wilderness Alliance*, 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*, 601 F.3d at 1122, *quoting Building and Construction Department v. Rockwell Int'l Corp.*, 7 F. 3d 1487, 1492 (10th Cir. 1993). A court's "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).

The Magistrate Judge noted that Plaintiff seeks relief on the grounds that the project exceeds its scope as laid out in the 2003 EIS and 2004 ROD and that Plaintiff requests the Court to order Defendants to stop all activities in connection with the CMRR-NF pending completion of a new EIS and ROD. The F&R found that, because Defendants are currently in the process of undertaking an SEIS that would supercede the 2003 EIS and 2004 ROD by taking into account geological information and necessary design modifications that came to light after the completion of the 2003 EIS and 2004 ROD, "circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief," and dismissal based on prudential mootness is appropriate. F&R ¶ 25 (quoting *Southern Utah Wilderness Alliance*, 110 F.3d at 727). In other words, because Plaintiff seeks injunctive relief to ensure that Defendants' design and planning of the CMRR-NF are made pursuant to an EIS, and Defendants are now conducting an SEIS that will govern the CMRR-NF project, the F&R finds that dismissal is proper because Defendants have changed their previous actions by ordering an SEIS. *See id.* ¶ 29. The Magistrate Judge based his ruling in part on his finding that construction of the CMRR-NF will not occur until after the SEIS is completed and a new ROD issued. *See id.* Thus, he concluded, "Plaintiff will have ample opportunity to renew its complaint if it finds it necessary when the SEIS is filed and before any construction begins." *See id.* ¶ 29.

Plaintiff's Objections assert that the F&R misapplies the doctrine of prudential mootness because Defendants are engaged in ongoing NEPA violations, so that a promise to conduct NEPA analysis in the future cannot undo Defendants' failure to comply with NEPA prior to irretrievably committing resources to the CMRR-NF project. Plaintiff contends that, with

respect to NEPA claims, the doctrine of prudential mootness applies only when a project is so close to completion that any meaningful relief is precluded. *See* Pl. Obj. [Doc. 33] at 4-5.

Plaintiff argues that, in this case, injunctive relief is appropriate because the project is still in its early stages and pausing the project to require Defendant to comply with its NEPA obligations would afford it meaningful relief. Plaintiff also characterizes Defendants' preparation of an SEIS as a "smokescreen" to defeat an injunction, and alleges that Defendants will continue to be in violation of NEPA as they move forward with design and construction of the CMRR-NF project so that preparation of an SEIS cannot make its Complaint moot. *Id.* at 11-13.

Plaintiff's Objections rely on two fundamental assertions that do not bear up under scrutiny: first, that NEPA requires Defendants to undertake a new EIS from scratch before moving forward with the project, and second, that Defendants are currently moving forward with final design and construction in violation of NEPA. Because neither of these is correct, the Magistrate Judge properly applied the doctrine of prudential mootness to dismiss this case.

The record before the Court demonstrates that Defendants have followed an orderly process as contemplated by NEPA with respect to the project in question. Following the completion of a comprehensive EIS in 2003, the CMRR-NF project was approved in an unchallenged 2004 ROD.[5] Pursuant to the 2004 ROD, NNSA partially excavated the CMRR-NF

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[5] Defendants correctly point out that any challenges Plaintiff makes to the sufficiency of the original EIS and ROD are time-barred. NEPA claims are subject to the APA's general six-year limitation period under 28 U.S.C. § 2401(a). *See Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1123 n.3 (10th Cir. 2009); *Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494-95 (10th Cir. 1997). Defendants published the 2004 ROD in the Federal Register on February 12, 2004, so that any challenge to the adequacy of the 2003 EIS would have had to have been made by February 12, 2010, prior to the date Plaintiff filed the instant action. That said, the Court notes that Plaintiff's contention is that the 2003 EIS and

site in 2006 to allow for site characterization and seismic mapping. New information developed from this excavation and corresponding new building safety requirements led to significant evolving design changes for the CMRR-NF. As a result of these design changes, prior to this lawsuit, NNSA began reviewing whether it should prepare an SEIS. Although the NNSA's draft Supplement Analysis allegedly concluded that the potential environmental impacts from construction of the CMRR-NF in accordance with the evolving design changes were adequately bounded and addressed in the 2003 EIS, NNSA nonetheless committed to preparing an SEIS through a Notice of Intent published in the Federal Register.

Unquestionably, the scope of the CMRR-NF project has changed significantly since the 2003 EIS and 2004 ROD. Had Plaintiff come before the Court seeking an injunction requiring NNSA to complete an SEIS in the face of its continued refusal, the Court would be in a position of having to determine whether NEPA requires an SEIS under such changed circumstances. However, that is not the case currently before the Court. Defendants are proceeding with an SEIS, and are not moving forward with final design or construction pending completion of that process. Instead, Plaintiff contends that undertaking an SEIS does not satisfy Defendants' NEPA obligations, because the changed circumstances are such that NEPA requires Defendants to prepare a new EIS from scratch for the CMRR-NF project. However, Plaintiff has come forward with no legal support for its claim that Defendants are in violation of NEPA for not having prepared a new EIS in the face of the project's modifications.

Under 10 C.F.R. § 1021.314, which is part of the NEPA implementation procedures for DOE projects, "DOE shall prepare a supplemental EIS if there are substantial changes to the

2004 ROD are not applicable to the CMRR-NF as currently envisioned.

proposal or significant new circumstances or information relevant to environmental concerns," and "DOE may supplement a draft EIS or final EIS at any time, to further the purposes of NEPA." 10 C.F.R. §§ 1021.314(a), (b). In this case, whether doing so was voluntary or mandatory, Defendants are currently preparing a supplement to the initial EIS in response to changed circumstances, exactly as the NEPA regulations contemplate.

Plaintiff's contention that "[i]t 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, and its reliance on *Blue Ocean Soc'y v. Watkins*, 767 F. Supp. 1518 (D. Haw. 1991) for that proposition, is misguided. First, *Blue Ocean* did not address prudential mootness, but instead was a constitutional mootness case. *See* 767 F. Supp. at 1522. Second, not only had the defendant in *Blue Ocean* not prepared an EIS for the project in question, it had not commenced preparation of an EIS through publication of a notice in the Federal Register at the time of the decision. *See id.* at 1523. Not surprisingly, the *Blue Ocean* court held that a mere promise to correct a NEPA violation at some point in the future was insufficient to render a case constitutionally moot. In the instant case, however, Defendants initially prepared an EIS for the project and are currently following a well-defined process of supplementing that EIS based on new information related to the initial project design. Defendants are not currently out of compliance with NEPA, nor is their commitment to supplementing the EIS merely aspirational.

Plaintiff's contention that the doctrine of prudential mootness only applies in NEPA cases in which the project in question is substantially complete is similarly misguided. Plaintiff cites three cases from outside of the Tenth Circuit to make its argument: *Sierra Club v. U.S. Army Corps of Eng'r*, 2008 WL 2048359 (3d Cir. May 14, 2008), *Crutchfield v. U.S. Army Corps of Eng'r*, 192 F. Supp. 2d 444 (E.D. Va. 2001), and *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202

(E.D. Cal. 1999). In *Sierra Club v. U.S. Army Corps of Engineers*, the court found the plaintiff's claims challenging a permit to fill wetlands to be prudentially moot because all but .12 of the 7.69 acres of the wetlands had been filled, preventing any opportunity for meaningful relief for the plaintiff. However, the *Sierra Club* court did not limit the doctrine of prudential mootness to the narrow circumstances of a nearly-completed project, as Plaintiff seeks to do. Instead, the court recognized that "the central question in a prudential mootness analysis is 'whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief.'" 2008 WL 2048359 at *2 (citation omitted). This is the same general analysis the Magistrate Judge applied in this case. *See* F&R at ¶ 20 (quoting *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997)).

Plaintiff characterizes *Crutchfield* as holding that NEPA claims "*were not* prudentially moot because *work remained to be done on defendant's project*." Pl. Obj at 4 (emphasis in original). However, it is misleading to suggest that *Crutchfield* uses project completion as the barometer for whether prudential mootness applies. The *Crutchfield* court did not find prudential mootness to be inapplicable to the dispute simply because work remained to be done on the challenged project; instead it found that the case was not prudentially moot 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 466. Secondly, at the time the request for an injunction was heard, the same court had previously held that the Corps had not conducted the requisite environmental assessments of the project and had, when "confronted with considerable pressure from the County, made permitting decisions that defied logic and law." *Id.* at 462. In contrast, in this case, NNSA has approved the CMRR-NF project in full satisfaction of NEPA,

and construction of the project is on hold pending completion of the SEIS and issuance of a new ROD.

Plaintiff's reliance on *Sierra Club v. Babbitt* is similarly misplaced. *Babbitt* concerned the construction of a highway through Yosemite National Park. Despite finding that the defendants had violated NEPA by failing to prepare an EIS for the project, the court declined to enjoin work on several portions of the road or to order that an EIS be prepared. *See* 69 F. Supp. 2d at 1259-60. The court did not apply the doctrine of prudential mootness because it found that effective relief was still available to the plaintiff on one portion of the project. *See id.* at 1244. Because the court found that the defendants remained out of compliance with NEPA and with the Wild and Scenic Rivers Act, and because it found that most of the work to be performed on that portion of the project had already been abandoned so that an injunction would result in little burden on the defendants, the court found that injunctive relief on that portion of the project pending compliance was appropriate. In this case, there has been no finding of noncompliance with NEPA, and additional environmental studies are already underway.

The three cases cited by Plaintiff related to substantial completion as a requirement for prudential mootness in the NEPA context are distinguishable in another way as well. All three of the cases concerned projects that involved ongoing construction and that either were, or could have been, rapidly completed. In the instant case, not only are Defendants holding off on construction of the CMRR-NF pending completion of the SEIS and accompanying ROD, but the project is expected to take at least ten years after the start of construction to become operational. *See* Cook Decl. at ¶ 23. Thus, the danger of rendering an otherwise valid case moot through project completion is much reduced in this case compared to the cases cited by Plaintiff.

The Magistrate Judge correctly recognized that Defendants' undertaking of an SEIS

means that "circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief." F&R ¶ 25 (quoting *Southern Utah Wilderness Alliance*, 110 F.3d at 727). The Court agrees 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." *Id.* ¶ 22 (quoting *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961)). The final form and conclusion of the SEIS cannot currently be known. Plaintiff has the ability to actively participate in the process to ensure that its perspectives are heard. Thus, the SEIS process may address many, if not all, of Plaintiff's concerns about the environmental effects of the proposed CMRR-NF project. If, upon completion of the SEIS and issuance of the ROD, Plaintiff believes that its perspectives were not adequately considered, it will have the opportunity to file a new complaint. The Court agrees with the Magistrate Judge that it would be imprudent to halt all work, including design analysis, and to issue what would essentially be an advisory opinion while the SEIS process (which had not yet begun at the start of litigation) is ongoing.

B. Ripeness

Although the Magistrate Judge did not base his decision on Defendants' assertion that this case is not yet ripe for adjudication, this would have been an equally valid ground for dismissal. The doctrine of ripeness is premised on justiciability and is intended "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) (citations omitted). If a claim rests "upon contingent future events that may not occur as anticipated, or indeed may not occur at all," it is not considered ripe. *Texas v. United States*, 523 U.S. 296, 300 (1998) (citations omitted). In this case, the NNSA is in the process of completing an SEIS to analyze the potential environmental impacts associated with the construction of the proposed CMRR-NF project. The process is still open to public participation and it is unclear at this point what form the SEIS and associated ROD will take.

While the SEIS process is ongoing, there is no ripe "final agency action" for the Court to review pursuant to the Administrative Procedure Act, 5 U.S.C. § 704. *See, e.g., Coal. for Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1250 (10th Cir. 2001) (holding that the ripeness test includes whether there is a "final agency action" under the APA); *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) ("[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"); *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).

Plaintiff contends that the "final agency action" undertaken by Defendants was their implementation of the CMRR-NF project in violation of NEPA. *See* Pl. Obj. at 7. For this contention, it cites *Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996), which it characterizes as holding that a failure to comply with NEPA could constitute a "final agency action" under 5 U.S.C. § 551(13). However, *Catron County* involved a challenge to a final agency rule (designation of critical habitat under the Endangered Species Act) that had been promulgated without undertaking an EIS. *See* 75 F.3d at 1432-33. In *Catron County*, there was no question that the agency had taken a final action (designating habitat); the only question was whether undertaking such a final agency action required it to

comply with NEPA, and the court found that the final action did require such compliance. In this case, there has been no showing of a NEPA violation, and no final agency action. *See, e.g., N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 459 F. Supp. 2d 1102, 1116-1117 (D.N.M. 2006) ("[I]f there is still a real possibility that the agency will conduct further environmental analysis, the NEPA claim is not yet ripe"), *vacated in part and reversed in part on other grounds,* 565 F.3d 683 (10th Cir. 2009); *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); *Ctr. 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").

Plaintiff next contends that its claims are ripe because Defendants are currently engaged in making an irretrievable commitment of resources related to the CMRR-NF project. *See* Pl. Obj. at 7 (citing *New Mexico ex rel. Richardson v. Bureau of Land Management*, 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.") (citations omitted). However, Defendants have presented evidence that NNSA is still evaluating aspects of the sizing and layout of the proposed CMRR-NF project, and that the overall project design is less than 50 percent complete. *See* Cook Decl. at ¶ 20. The Draft SEIS published by NNSA indicates that two construction options, a deep excavation option and a shallow excavation option, are currently under consideration by NNSA, with the shallow option having been added since the issuance of the Notice of Intent to Prepare an SEIS in October, 2010. Further design options could emerge by the end of the SEIS process as a result of public

participation, including participation by Plaintiff. Clearly, the CMRR-NF project is still in some state of flux. Plaintiff admits that Defendants have still not made what they call "Critical Decision 2" or "Critical Decision 3," which formally allow detailed design and construction, and that Congress has never authorized or appropriated funds for the actual construction of the proposed CMRR-NF. Complaint at ¶ 20. As the Magistrate Judge found, no CMRR-NF construction is underway, and none will occur while the SEIS process is ongoing. *See* F&R at ¶ 16. Although NNSA has spent approximately $210 million over the past 6 years on the CMRR-NF project, this has been for building design and analysis. *See* Cook Decl. at ¶ 19. However, the expenditure of even large amounts of money on design does not indicate that NNSA has made an "irreversible and irretrievable commitment of resources," because design work is ongoing and neither a final SEIS nor a final approval for construction has been issued. In other words, the design work undertaken by Defendants over the past six years is not a "final agency action," and therefore does not present an action ripe for review. *See Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1329 (10th Cir. 2007) (in order to constitute a final agency action, an action must satisfy two requirements: "the action must mark the consummation of the agency's decisionmaking process–it must not be of a merely tentative or interlocutory nature...and the action must be one by which rights or obligations have been determined, or from which legal consequences will flow") (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

In a closely related vein, Plaintiff also argues that Defendants have violated NEPA by predetermining the result of its environmental analysis, so that the SEIS process is essentially a sham. Predetermination 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." *Forest*

Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 714 (10th Cir. 2010) (emphasis in original). In order to prove predetermination, "[a] petitioner must meet a high standard." *Id.* Predetermination generally refers not to the agency having a preferred alternative, but rather to an agency entering into a binding agreement with an outside group committing it to a particular action prior to conducting an environmental analysis. *See id.* at 713-15 (citing *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 780-81 (10th Cir. 2006); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1240 (10th Cir. 2004); *Metcalf v. Daley*, 214 F.3d 1135, 1144 (9th Cir. 2000)). Plaintiff has come forward with no evidence of any such agreement in this case.

Plaintiff relies heavily on *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2004) for the proposition that allowing a project to go forward pending an environmental analysis creates a serious risk that the analysis of alternatives required by NEPA will be skewed toward completion of the project that is already underway. Certainly, preservation of the ability of an agency to take a hard look at genuine alternatives is essential to the NEPA process. However, *Davis* arose in a very different context than the situation the Court is confronted with in this instance. *Davis* concerned an attempt to enjoin a highway construction project. The *Davis* defendants never completed an EIS related to the project. Instead, they issued a Finding of No Significant Impact ("FONSI") that enabled them to forego production of an EIS. *See* 302 F.3d at 1109. The *Davis* court found that the defendants had predetermined the NEPA issues because the contractor hired to conduct the environmental analysis was contractually obligated to prepare a FONSI, so that the decision to forego an EIS had already been made prior to conducting an environmental analysis and prior to receiving any public comments. *Id.* at 1112. Ultimately, the court enjoined construction while the defendants performed a proper environmental analysis. *Id.* at 1126.

Unlike *Davis*, in which the court had to rule on the adequacy of a final agency action (the issuance of a FONSI), the Court here is asked to step in while Defendants are still in the process of completing an SEIS as contemplated by NEPA. This action would be premature. Further, the continuation of design activities as part of the SEIS process is hardly a showing of predetermination of the type at issue in *Davis*. An agency may legitimately have a preferred alternative in mind when it is conducting a NEPA analysis. *See Forest Guardians*, 611 F.3d at 712. A reviewing court must ultimately determine whether an agency truly took a hard look at alternatives as part of the decision making process, rather than merely justifying decisions it had already made. *Id.* However, this is a determination to be made at the completion of the process, as opposed to while it is ongoing. Notably, even the *Davis* court, which expressed concern about prejudicing the selection of alternatives through ongoing work, only enjoined actual construction pending completion of an environmental analysis; it did not order a halt to planning and design. *See* 302 F.3d at 1126. Such a halt would not be appropriate in this case either, especially in the absence of a finding of a NEPA violation. *Cf. Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 202-03 (4th Cir. 2005) (rejecting as overly broad an injunction, following the finding of a NEPA violation, enjoining planning and development, in addition to construction, of a Navy aircraft landing field, pending preparation of an SEIS).

Plaintiff also relies on the unpublished case of *Los Alamos Study Group v. O'Leary*, No. 94-1306-M (D.N.M. Jan. 26, 1995), for the proposition that "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 decision on the program.'" *O'Leary,* Slip Op. at 19 (citations omitted). *O'Leary* also arises in a different context than this case. *O'Leary* concerned a project for which the DOE never conducted an EIS. Despite failure to complete an EIS, the defendant

had already completed one phase of the project and was in the process of constructing the two remaining phases of the project. *See id.* at 2. The court enjoined construction of the project (but not planning or design), pending completion of the required EIS. In this case, NNSA has taken no action that was not already analyzed and approved in the 2003 EIS and 2004 ROD, and no CMRR-NF construction is occurring. Thus, unlike the defendant in *O'Leary*, NNSA has followed the proper procedure of approving the project pursuant to an EIS and delaying construction while analyzing potential design changes in the SEIS.

Because the Court does not know what form the SEIS will ultimately take, and because Plaintiff has not demonstrated the type of irreversible and irretrievable commitment to a particular plan as discussed in the case law, the Court finds that any claim of predetermination is not ripe at this point. Significantly, even if the Court could make a finding of predetermination at this point, such a finding would not automatically mean that an agency's analysis was arbitrary and capricious, it only means that a court reviewing the final agency decision "is more likely to conclude that the agency failed to take a hard look at the environmental consequences of its actions and, therefore, acted arbitrarily and capriciously." *Forest Guardians*, 611 F.3d at 713 n.17. As previously discussed, the Court is not reviewing a final agency decision. Thus, the issue of whether Defendants conducted an adequate analysis in compiling their SEIS, of which the question of predetermination is a component, is not ripe at this point.

CONCLUSION

In rendering its decision in this case, the Court has not considered any of the policy considerations raised in this action, such as whether the proposed new nuclear facility is necessary for national security, whether a delay in construction will be detrimental to research, or whether the existing facility can be modified sufficiently to serve LANL's needs thereby

eliminating the need for a new facility. Such policy debates are not relevant to this litigation. Instead, the Court bases its decision solely on what NEPA requires and where this case currently is in the NEPA process.

Plaintiff's interpretation of NEPA would condemn agencies to the role of the mythical Sisyphus, forever advancing projects up a hill, only to be forced to start over from scratch when they encounter new information that results in design challenges. This is not what NEPA requires. Instead, the NEPA regulations contemplate that agencies will address significant new circumstances through the issuance of an SEIS, just as Defendants are in the process of doing in this case. Some of the concerns raised by Plaintiff may be addressed by the issuance of the SEIS and accompanying ROD; it is too early to tell while the process is ongoing. On the other hand, it may well be that at the end of the process, Plaintiff will continue to have concerns about whether Defendants sufficiently considered alternative proposals and the potential environmental impacts of their chosen design. If so, judicial review of the agency's final decision will be available at that point. The Magistrate Judge was correct in finding that Plaintiff's Complaint should be dismissed on the grounds of prudential mootness because Defendants are undertaking an SEIS. Dismissal is also appropriate because, until the completion of the SEIS process, this case is not yet ripe for review.

IT IS THEREFORE ORDERED that Plaintiff's *Objections to Magistrate Judge's Proposed Findings and Recommended Disposition* [Doc. 33] are overruled, and that the Magistrate Judge's Proposed Findings and Recommended Disposition [Doc. 25] is adopted. IT IS FURTHER ORDERED that Defendants' *Motion to Dismiss for Lack of Jurisdiction* [Doc. 9] is hereby granted.

UNITED STATES DISTRICT JUDGE

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

LOS ALAMOS STUDY GROUP,

Plaintiff,

v. **No. 10-CV-760 JCH/ACT**

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

Defendants.

FINAL JUDGMENT

Having adopted the Magistrate Judge's Proposed Findings and Recommended Disposition, and having granted Defendants' *Motion to Dismiss for Lack of Jurisdiction* [Doc. 9] by a Memorandum Opinion and Order dated May 23, 2011,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that final judgment is entered in favor of Defendants, and that Plaintiff's claim is dismissed with prejudice.

UNITED STATES DISTRICT JUDGE