

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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v.

Case No. _____

UNITED STATES DEPARTMENT OF
ENERGY; THE HONORABLE STEVEN
CHU, SECRETARY, DEPARTMENT OF
ENERGY; THE NATIONAL NUCLEAR
SECURITY ADMINISTRATION; THE
HONORABLE THOMAS P. D'AGOSTINO,
ADMINISTRATOR,

Defendants.

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

I.

PRELIMINARY STATEMENT

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

2. This action challenges Defendants' reliance on a 2011 Supplemental Environmental Impact Statement ("2011 SEIS" or "SEIS") and subsequent amended record of decision ("amended ROD") as a purported justification for Defendants' continuing and unabated

implementation of the 2010-11 Chemistry and Metallurgy Research Replacement (“2010-11 CMRR”) project at Los Alamos National Laboratory (“LANL”).

3. The purpose of the CMRR project is to increase LANL’s capability to conduct experimental and industrial processes involving large quantities of plutonium, primarily in support of nuclear warhead core (“pit”) manufacturing. Since 2004, the CMRR project has consisted of two main buildings, the CMRR Nuclear Facility (“CMRR-NF”) and a support facility called the CMRR Radiological Laboratory, Utility, and Office Building (“CMRR-RLUOB”), together with ancillary buildings, facilities, and utilities. The CMRR-NF would include a storage vault for up to six metric tons of plutonium. CMRR-NF would function in tandem with LANL’s existing main plutonium facility, PF-4, which is being substantially upgraded. All three facilities (CMRR-NF, CMRR-RLUOB, and PF-4) would be adjacent to one another in LANL’s Technical Area 55 (TA-55), connected by tunnels.

4. The CMRR project has been conceived, designed, funded by Congress, and analyzed under NEPA as a single project. Defendants initially prepared an environmental impact statement (“EIS”) under NEPA in 2003 for a CMRR (the “2003 CMRR EIS”) that would have been much simpler and less environmentally impactful than the current version. A Record of Decision (the “2004 CMRR ROD”) was issued in early 2004, containing Defendants’ decision to proceed with that 2003 project.

5. Between 2004 and 2010 the scale and scope of the CMRR-NF project increased dramatically. There are several reasons for these changes: DOE/NNSA’s original environmental analyses and assumptions in the 2003 CMRR EIS were critically deficient. Their estimates of material requirements were grossly in error. New design requirements were also discovered or

imposed. For example, DOE/NNSA determined that their estimate of seismic hazard was significantly too optimistic. DOE/NNSA discovered that the thick stratum of loose volcanic ash beneath the proposed site created seismic vulnerabilities. Safety standards, such as the requirement for a “safety class” ventilation system, posed new challenges. New mission flexibility requirements were added. The electricity and water requirements of the new building had been greatly underestimated. A new transmission line to Los Alamos may be needed, a major project in itself.

6. Because of the imperatives arising from these and other factors, all alternatives presented in the 2003 CMRR EIS have now been rejected by Defendants. The CMRR EIS of 2003 is obsolete and irrelevant.

7. Since 2004, DOE/NNSA have greatly expanded the scale, scope, cost, and geographic footprint of the CMRR-NF, adding new buildings, construction yards, parking, and other project elements. Cost estimates have increased by a factor of ten or more. These enlarged plans have also greatly lengthened the design and construction schedule, moving the projected completion date from 2009 to 2023.

8. At the same time, nuclear weapons policy has significantly changed since 2003, requiring DOE/NNSA to reconsider the purpose and need for CMRR-NF. The Reliable Replacement Warhead (“RRW”), once a core justification for CMRR-NF, has been canceled. By the early 2020’s when CMRR-NF might be completed, nearly the whole weapons stockpile will have been upgraded by existing means, without CMRR-NF. There is a scientific consensus that existing pits will last far longer than previously expected and that stockpile maintenance

methods, which do not use new pits, will be effective indefinitely. The Administration's 2010 Nuclear Posture Review declares the policy, in general, not to manufacture plutonium pits.

9. Cost estimates for the 2010-11 CMRR-NF have reached \$6 billion and are widely expected to rise further. Public officials now acknowledge the need to reassess whether CMRR-NF is truly needed, and, if so, when. Defendants, at the request of congressional committees and other authorities, are conducting studies of the proposed timing and cost of the CMRR-NF and alternative means of constructing it. The House of Representatives has voted to delay construction until a later fiscal year. The Government Accountability Office is currently reviewing the CMRR-NF project.

10. The massive scale, cost, and impacts of the 2010-11 CMRR-NF make it an entirely different proposal from that of 2003. Defendants have never analyzed the full range of reasonable alternatives to the 2010-11 CMRR-NF, with the impacts of those alternatives weighed against the contemporary calculation of the need for such a facility.

11. NEPA demands such an analysis. The fundamental purpose of NEPA is to require federal agencies to analyze the reasonable alternatives fully, and to choose from among those alternatives, *before* the agency commits to a specific project. NEPA analysis properly takes place early in the design process. (40 C.F.R. § 1501.2). NEPA requires the agency to make an informed decision about fundamentally different approaches to serving the agency's need, based on an analysis of "all reasonable alternatives" (40 C.F.R. § 1502.14(a)), even alternatives outside the agency's current mandate. (Council on Environmental Quality, "NEPA's Forty Most Asked Questions, at 2b). NEPA also requires Defendants to refrain from taking

action that has an adverse environmental impact or limits their choice of alternatives until they have completed NEPA compliance.

12. Plaintiff previously sued Defendants in 2010 in Civil Action No. 1:10-CV-0760-JH-ACT in this Court, asserting NEPA claims based upon Defendants' implementation of the 2010-11 CMRR-NF project without any NEPA analysis of that project and its reasonable alternatives. Defendants then announced that they would supplement the 2003 CMRR EIS with a 2011 SEIS. The Final SEIS was issued on August 30, 2011, and on October 18, 2011 Defendants issued the amended ROD, announcing their decision to construct the 2010-11 CMRR-NF.

13. The SEIS contains neither any reasonable alternatives, nor a no action alternative, nor a contemporary discussion of purpose and need. The supposed "no action" alternative in the SEIS is construction of the 2003 CMRR-NF, the alternative chosen in the 2004 CMRR ROD but long since abandoned as unworkable. Defendants state in the SEIS that none of the alternatives in the 2003 CMRR EIS is reasonable, but they fail to analyze any current-day realistic alternatives. They also state, contradictorily, that they rely upon the analysis in the 2003 CMRR EIS in choosing to construct the current, and very different, 2010-11 CMRR-NF. Crucially, the SEIS *followed*, rather than *preceded*, Defendants' decision to construct the 2010-11 CMRR-NF, contrary to the purpose of NEPA.

14. Thus, the agencies' work called for by NEPA remains to be done. DOE/NNSA must objectively evaluate the 2010-11 CMRR-NF and all reasonable alternatives before making a further irrevocable commitment of resources and further prejudicing the objective analysis that NEPA requires. The EIS must "[r]igorously explore[s] and objectively evaluate[s] all reasonable

alternatives” (40 C.F.R. § 1502.14) to the 2010-11 CMRR-NF. That EIS has not been written; clearly, the SEIS does not provide the required NEPA analysis.

15. Nevertheless, Defendants have shown an unrelenting determination to build the CMRR-NF, despite the ballooning costs and widening environmental impacts. They have made irrevocable commitments of resources to this massive program, before, during, and after the 2011 SEIS, disregarding the lack of current and applicable NEPA analysis.

16. Defendants have built the CMRR-RLUOB, comprising approximately 6-9% of the total CMRR project cost, and are outfitting it for use. Defendants plan to proceed with the 2010-11 CMRR-NF, which is expected to ultimately comprise 91-94% of the total CMRR project cost, of which roughly 10% has been spent so far. CMRR-NF construction is currently expected to begin in late 2011 or early 2012 and conclude in the early 2020s.

17. When Defendants announced that they were preparing a SEIS, this Court dismissed the Plaintiff’s previous case based upon doctrines of prudential mootness and ripeness, stating that, should the SEIS prove unsatisfactory, Plaintiff could sue again. Judge Herrera’s Memorandum Opinion and Order dated May 23, 2011, at 15, 22) (Case No. 1:10-CV-760-JH-Act, Dkt. No. 55).

18. The SEIS is totally unsatisfactory as supposed NEPA compliance. The SEIS contains no analysis of reasonable alternatives to the 2010-11 CMRR-NF. In the SEIS, that 2010-11 CMRR-NF is the *only* alternative that Defendants consider reasonable. This is clearly not NEPA compliance. The SEIS fails to satisfy basic NEPA requirements in numerous other ways, detailed herein.

19. The Study Group has never had the opportunity to challenge the lack of NEPA analysis of the 2010-11 CMRR-NF. Defendants have never made a NEPA analysis of that project and its reasonable alternatives. Their course of conduct falls far short of the public environmental review that NEPA requires of federal decisionmakers before they can commit significant federal resources. Consequently, Plaintiff commences this new action to seek enforcement of NEPA and NEPA regulations.

20. This Complaint seeks a declaratory judgment and mandatory injunction, requiring Defendants to comply with NEPA by preparing an EIS that compares environmental impacts of the 2010-11 CMRR-NF and reasonable alternatives to it, including the alternative of no action, *before*, and not after, the decision whether to construct one of the alternatives. This Complaint also seeks an injunction, directing Defendants to rescind their prior decision to construct CMRR-NF and prohibiting all further investment in the CMRR and its support facilities, including all detailed design, construction, and obligation of funds, until an EIS based on development of reasonable alternatives is prepared and an alternative is validly selected.

II.

JURISDICTION AND VENUE

21. This Court has jurisdiction over this action pursuant to 28 U.S.C.A. § 1331 (federal question), 28 U.S.C.A. § 1361 (mandamus); and 28 U.S.C.A. § 1651 (all writs); and may issue a declaratory judgment and a preliminary and permanent injunction and further relief pursuant to 5 U.S.C.A. §§ 701 *et. seq.* (Administrative Procedure Act), 28 U.S.C.A. § 2201 (declaratory relief) and 28 U.S.C.A. § 2202 (injunctive relief). There is a present and actual

controversy between the parties. Venue is proper in this Court pursuant to 28 U.S.C.A. § 1391(e).

III.

PARTIES

22. Plaintiff the Los Alamos Study Group (“the Study Group”) is a non-profit corporation organized under the laws of the State of New Mexico. The Study Group sues as a representative of its members. The purposes of the Study Group include protecting the environment in and around LANL from adverse impacts and educating the general public, federal and contractor management, members of Congress, and others on a range of interrelated policy issues, including Department of Energy (“DOE”) and National Nuclear Security Administration (“NNSA”) missions, programs, and infrastructure. The Study Group has approximately 2,691 members and supporters within a 50-mile radius of LANL, approximately 2,341 of whom live within a 30-mile radius of LANL. The Study Group and many of its members have been intimately involved in analyses and education regarding LANL plutonium infrastructure and programs since October 1989. Given their proximity to LANL and the CMRR, Study Group members are adversely affected and will be irreparably harmed and aggrieved by the environmental impacts of planning, constructing, and operating the CMRR-NF. Additionally, the Study Group and its members have no adequate remedy at law and must seek equitable relief to prevent the environmental consequences of Defendants' continuing efforts to plan, construct and operate the proposed 2010-11 CMRR-NF without preparing an applicable and adequate EIS before, not after, the decision to construct this or any alternative not previously analyzed under NEPA, an EIS that includes reasonable alternatives and an alternative of no

action, preceded by a NEPA scoping process and with sufficient detail to compare the environmental impacts of alternatives objectively.

23. The Study Group and its members have commented to NNSA and its predecessor, DOE Defense Programs, regarding the matters raised in this Complaint over the last two decades. The Study Group commented on the scope of the now-obsolete 2003 EIS and has discussed the Nuclear Facility issues with NNSA officials on numerous occasions. Study Group representatives have traveled numerous times to Washington, D.C. to meet with NNSA and other executive branch officials, as well as members of Congress, their staffs, and congressional research, auditing, and oversight agencies regarding issues raised in this Complaint. To the limit of the Study Group's resources and abilities, and within the limits of the information available to the Study Group and to its members, the Study Group has carefully followed and engaged with the federal government on CMRR issues. The Study Group has diligently pursued and exhausted administrative remedies available to it over a decade-long period specifically concerning the CMRR.

24. Defendant DOE is an executive branch department with jurisdiction and authority over LANL. DOE has a duty to comply with NEPA at its facilities, including LANL, where the 2010-11 CMRR-NF would be built.

25. Defendant the Honorable Steven Chu is the Secretary of the Department of Energy and is named as a Defendant in his official capacity.

26. Defendant NNSA is the agency within the DOE with direct jurisdiction and authority over all aspects of the proposed construction and operation of the CMRR-NF, including NEPA compliance.

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

IV.

FACTUAL BACKGROUND

A. Origins of the CMRR Project

28. The CMRR project was first announced in 1999. Congress provided conceptual planning funds in 2000. CMRR was first funded by Congress as a formal engineering and design project in 2002 and first funded as a construction line item in 2003.

29. On July 23, 2002, NNSA published a Notice of Intent ("NOI") to prepare an EIS for the CMRR project. The CMRR EIS was issued on November 14, 2003. In that EIS, all of the construction alternatives analyzed are basically similar. Each would construct facilities of the same type and size, differing only in maximum construction depth (50 ft. vs. 75 ft.) and in whether the capabilities are to be housed in two new buildings or in three, at either of two adjacent technical areas at LANL. The 2003 EIS reported that the "above-ground" design (defined as less than 50 ft. deep) had the greatest impacts.

30. A ROD was issued on February 12, 2004 ("2004 CMRR ROD"), 69 Fed. Reg. 6967. In the 2004 CMRR ROD, NNSA chose its preferred alternative, which included "above-ground" construction of two buildings, a CMRR-NF and a support facility, now called CMRR-RLUOB, neither of which would exceed 50 feet in depth.

31. In 2002 Defendant agencies ("DOE/NNSA") told Congress that the total cost of both CMRR buildings would be "\$350-500" million, not including administrative costs. In

2003, DOE/NNSA estimated the cost of both buildings at “\$600 million,” including administrative costs.

32. In early 2003, Defendants reported to Congress that both buildings comprising the CMRR would be completed by the end of calendar year 2010. In their 2003 CMRR EIS, Defendants assumed that construction would be completed even earlier, by the end of 2009.

B. Extension of the Schedule for the CMRR-NF

33. DOE/NNSA deferred implementation of the decision contained in the 2004 CMRR ROD to construct the CMRR-NF. In 2008 DOE/NNSA completed a LANL Site-Wide EIS (the “2008 SWEIS”), which imported by reference and without change the assumptions and findings of the 2003 CMRR EIS concerning the 2003 CMRR-NF. Also in 2008, DOE/NNSA completed the Complex Transformation Supplemental Programmatic EIS (“CTSPEIS”), which stated that since there had been no “footprint” changes in the CMRR since the 2003 EIS no reanalysis of impacts was necessary and none was planned. In a December 19, 2008 CTSPEIS ROD, DOE announced that it would proceed to construct the CMRR-NF. However, in May 2009, Defendants told Congress that any decision to proceed would depend on the outcome of a new Nuclear Posture Review (completed in April 2010) and other strategic decision making.

C. Changes in Design Requirements

34. In 2003 through 2010 the CMRR-NF underwent numerous changes in design. Defendants increased their security requirements, disadvantaging “above ground” (less than 50 feet deep) construction. Defendants adopted a “hotel concept,” requiring CMRR-NF to accommodate unstated future missions, using wide unsupported floor and roof spans. The Defense Nuclear Facilities Safety Board (“DNFSB”) showed the need to upgrade several safety

systems so they would function in event of a fire or earthquake, including part of the ventilation system.

D. Seismic Issues; Defendants' Response

35. In May 2007, DOE/NNSA published an updated Probabilistic Seismic Hazard Assessment for LANL; the overall seismic hazard "increased significantly" from that reported in the 2003 CMRR EIS. Design-basis accelerations roughly doubled, affecting every aspect of the structure and its equipment. Moreover, Defendants learned of the adverse engineering properties of a 50-foot-thick layer of poorly-consolidated volcanic ash beneath the site, which would amplify the seismic accelerations and may allow a building to slide laterally. These design issues were provisionally resolved, inter alia, by planning intensive remediation or replacement of the 50-foot stratum of unconsolidated volcanic ash. It subsequently proved impossible even to build the facility to 75 feet in depth without complete replacement of the earth to a depth of 130 feet, requiring an additional 250,000 cubic yards of concrete. A shallower construction option is now also being considered.

E. The 2003 CMRR EIS Misstated the Scale of Construction Required

36. The 2003 EIS greatly understates the materials required (concrete, steel, land, water, electricity, fuel, transportation, etc.) for construction of the CMRR-NF and the CMRR-RLUOB. The 2005 Performance Baseline for CMRR-RLUOB required more than five times as much concrete and nine times as much steel as had been claimed necessary in the 2003 CMRR EIS. Further, the estimated quantities of these key materials for CMRR-NF in the 2003 EIS were very similar to those for CMRR-RLUOB, even though CMRR-NF has always been the far larger building. Thus, by May 2005, the design process had shown that the scale of construction

for both CMRR buildings would be far greater than estimated in the 2003 CMRR EIS, indicating much greater environmental impacts and increased schedule and cost.

F. Purpose and Need

37. Since 2004, the purpose and need of the CMRR have become uncertain. Its primary mission is to increase LANL's plutonium pit production rate. But in 2008 Los Alamos National Security, LLC ("LANS"), the Management and Operating contractor at LANL, met a contract requirement for pit capacity of 80 pits per year. Moreover, in May 2010 NNSA stated that 60 pits per year could be produced at LANL's PF-4 Plutonium Facility by 2021, without CMRR-NF.

38. In November 2006, the JASON defense advisory group, at the request of Congress, articulated a new scientific consensus that most plutonium pits have credible lifetimes in excess of 100 years—longer than the CMRR-NF's useful life. (Pit Lifetime, JSR-06-335). This consensus, developed three years after the 2003 CMRR EIS, dramatically increased the range of reasonable alternatives to the CMRR-NF and eliminated its main purpose.

39. In May 2009, the Administration formally ended the Reliable Replacement Warhead ("RRW") program. Previously, pits for RRW were planned to be manufactured at LANL's TA-55, with several plutonium handling activities occurring in the CMRR-NF. This was the only large-scale pit production mission ever planned for TA-55, and none has been authorized since. DOE/NNSA acknowledged to Congress:

It is recognized that many of the prior [CMRR project] planning assumptions have changed....The decision about how far to proceed into final design [of the proposed Nuclear Facility] will be based on numerous ongoing technical reviews and other ancillary decisions NNSA management will be making during the period of

FY 2009 - 2010. A future decision to proceed with construction of the Nuclear Facility and associated equipment has been deferred pending the outcome of the current ongoing Nuclear Posture Review and other strategic decision making. (May 2009 Congressional Budget Request).

40. In September 2009, the JASON advisory group reported that the nuclear weapons stockpile could be maintained indefinitely without new pit production. (Lifetime Extension Program, JSR-09-334). DOE/NNSA ended stockpile pit production at the end of FY2011.

41. In the Nuclear Posture Review Report (April 2010), the Department of Defense (“DOD”) and DOE/NNSA established a policy giving “strong preference” to stockpile management without pit manufacturing, which would be allowed only, “if critical... goals could not otherwise be met, and [only] if specifically authorized by the President and approved by Congress.”

G. The Configuration of the 2010-11 CMRR-NF

42. The 2010-11 CMRR-NF project differs radically from the project analyzed in the 2003 CMRR EIS and 2004 CMRR ROD. Consequently, environmental impacts of the CMRR-NF have increased significantly from those in the 2003 EIS. In light of the massive changes, an analysis of reasonable alternatives, and the impacts of such alternatives, should have been undertaken by DOE/NNSA, but this has not been done. Examples of the changes include:

a. Increased overall acreage requirements for construction yards and offices, parking lots, concrete batch plants, utilities, security infrastructure, excavation spoil disposal, storm water retention basins, and road realignments. In 2003, 27 acres were expected to be committed to construction; now at least 108 - 147 acres would be needed under the 2010-11 CMRR-NF plan. In the 2003 plan an additional 77,000 cubic yards or so would need excavation;

while in the current plan from 236,000 to 545,000 additional cubic yards would be excavated, beyond the 175,000 cubic yards already excavated.

b. The locations directly affected by construction have greatly expanded. The 2003 EIS anticipated direct construction impacts in TA-48, TA-50 and TA-55. NNSA now expects direct construction impacts in TA-3, TA-5, TA-36, TA-46, TA-48, TA-50, TA-51, TA-52, TA-54, TA-55, TA-63, TA-64, and TA-72, i.e. much of LANL.

c. Concrete and soil grout requirements have greatly increased, from 3,194 cubic yards in the 2003 EIS to 236,000 to 400,000 cubic yards, a factor of 74 to 125.

d. The manufacture of the additional concrete generates significant additional greenhouse gas emissions, an impact not mentioned or analyzed in the 2003 CMRR EIS. Commonly-used analyses under applicable assumptions show that production and delivery of concrete and grout for the 2010-11 CMRR-NF will produce more than 100,000 metric tons of carbon dioxide, more than four times CEQ's proposed source threshold for EIS analysis and roughly 74 - 125 times the emissions expected from the construction of the 2003 project from this component alone.

e. The manufacture of this much additional concrete will result in significant aggregate mining impacts, which were not analyzed in the 2003 CMRR EIS.

f. Steel requirements have greatly increased from an estimated 267 tons in the 2003 EIS to 18,560 tons for the CMRR-NF today.

g. The gross square footage of the CMRR-NF had been projected to be 200,000 square feet. Current plans call for a building of 408,000 sq. ft.

h. Expected peak employment during 2010-11 CMRR-NF construction has increased, according to NNSA, from an estimated 300 in the 2003 EIS to an estimated 790 today. According to NNSA, this increment in transient workforce could affect local housing markets, possibly requiring temporary worker housing.

i. The anticipated construction period during which these construction impacts will occur has been lengthened from 34 months in the 2003 EIS to 108 months today.

j. Increasing the depth of excavation from “less than 50” feet to 58 or 130 feet has increased the total excavation spoils to be disposed of from roughly 252,000 cubic yards to 411,000 to 720,000 cubic yards. Transport, storage, disposal, and reclamation of this waste will have significant environmental, aesthetic, and cultural impacts.

k. Defendants expect to use a major part of these excavation spoils to cap LANL hazardous and radioactive waste disposal areas, MDAs C and G, which contain roughly 14 million cubic feet of diverse radioactive and chemical wastes, including transuranic wastes. Decisions to: (a) leave these wastes in place; and (b) cover these sites with volcanic ash removed from the 2010-11 CMRR-NF excavation, were not mentioned or analyzed in the 2003 CMRR EIS. The much greater quantities of excavation spoils now foreseen prejudice these connected cleanup and capping decisions – major federal actions with significant environmental impacts – even more than in 2003.

l. The 2010-11 CMRR-NF would not begin operations until at least 2023. The 2003 CMRR EIS assumed this would occur more than a decade sooner. The CMRR-NF project therefore now assumes continued operation of the existing CMR for a decade longer than described in the 2003 CMRR EIS, or other compensatory interim actions.

m. Construction of the 2010-11 CMRR-NF now requires construction of a craft worker facility, office and support trailers, as well as personnel security and training facilities, which were not part of the project analyzed in the 2003 CMRR EIS.

n. The 2010-11 CMRR-NF construction now requires an electrical substation, as well as installation of overhead and/or underground power lines which were not part of the project analyzed in the 2003 CMRR EIS.

o. The 2010-11 CMRR-NF construction now requires traffic modifications, including the realignment of Pajarito Road, construction of a new one-half-mile road, turning lanes, intersections and other traffic flow measures, as well as the construction and use of 18 acres of additional car and bus parking areas in four technical areas. These impacts and actions were not analyzed in the 2003 CMRR EIS.

p. The 2010-11 CMRR-NF construction now requires installation and use of up to two additional concrete batch plants (for a total of three), which were not part of the project analyzed in the 2003 CMRR EIS.

q. The 2010-11 CMRR-NF construction now requires construction of a warehouse, which was not part of the project analyzed in the 2003 CMRR EIS.

r. The 2010-11 CMRR-NF construction now requires construction equipment and building materials storage areas, which were not part of the project analyzed in the 2003 CMRR EIS.

s. The 2010-11 CMRR-NF construction now requires 19.1 acres of excavation spoils storage areas in three technical areas and 2.5 acres for five stormwater detention ponds, which were not part of the project analyzed in the 2003 CMRR EIS. The 2010-

11 CMRR-NF construction now requires construction of an Office Complex in TA-48, which was not part of the project analyzed in the 2003 CMRR EIS. The 2010-11 CMRR-NF construction now requires laydown and support areas in six technical areas, which were not part of the project analyzed in the 2003 CMRR EIS.

t. The 2010-11 CMRR-NF is twice as large in terms of gross square footage and would contain roughly 74 times as much structural concrete as the CMRR-NF described in the 2003 CMRR EIS, as well as larger quantities of ducts, piping, partitions, and other internal components. Final disposition of the CMRR-NF, which would become contaminated during use with plutonium and other toxic substances, was not analyzed in the 2003 CMRR EIS and upon information and belief, would be significantly more difficult and expensive to achieve for the 2010-11 CMRR-NF.

u. The 2010-11 CMRR-NF will dramatically increase trucking of concrete components and excavation spoils, which were not analyzed in the 2003 CMRR EIS. Between 29,000 to 38,000 heavy truck trips to and from Los Alamos County, and within LANL, would be required for concrete components and for storage and disposal of excavation spoils alone, not including all other deliveries and services. Trucking impacts will extend to three to five counties, depending on sources, routes, and quantities.

43. The impacts summarized above will be exacerbated by the cumulative impacts of other Pajarito Construction Corridor construction activities planned for the area at more or less the same time, which were not included in the 2003 CMRR EIS.

44. Annual operations of the 2003 CMRR-RLUOB and CMRR-NF were expected to consume about 10.4 million gallons of water and 19,300 megawatt hours of electricity. The

2010-11 CMRR-NF are now estimated to require about 16 million gallons of water, 161,000 megawatt hours of electricity, and 58 million cubic feet of natural gas. (SEIS at S-31). The electrical load created by the 2010-11 CMRR-NF cannot be serviced without the addition of a third transmission line or re-conductoring two existing transmission lines to Los Alamos County. (*id.*)

45. The 2010-11 CMRR-NF would be by far the largest single federal or state capital project in the history of New Mexico. The CMRR-NF has experienced an approximately ten-fold cost escalation since 2003 and is now expected to cost \$4 to \$6 billion to build, if not more, more than ten times as much as CMRR-RLUOB, which is currently estimated to cost \$363 million. By comparison, inflation-corrected costs for three of the state's largest public construction projects, Elephant Butte Dam, Cochiti Dam, and the "Big I" highway interchange project in Albuquerque, are approximately \$231 million, \$358 million, and \$401 million, respectively. Of all government-funded projects undertaken in New Mexico, only the interstate highway system, built from many smaller separately-contracted projects, is of comparable cost.

46. A \$6 billion CMRR-NF is comparable in cost to the inflation-corrected costs of building and operating all of LANL for approximately its first decade and a half (1943-1957), including all facilities and activities of the Manhattan Project in New Mexico, the post-World War II CMR building, and all other post-WW II projects and facilities, including the design and development of the first deployed thermonuclear weapons, through approximately 1957.

K. Administration Commitment to CMRR-NF

47. The Vice President, in a letter dated September 15, 2010 to the Senate Foreign Relations Committee, declared the Administration's "unequivocal support" for the CMRR-NF.

He spoke of the President's "commitment to an immediate start to his modernization initiatives," including the CMRR-NF: "I write to assure the Committee of the Administration's strong support for this program." Further:

This Administration has expressed its unequivocal commitment to recapitalizing and modernizing the nuclear enterprise, and seeks to work with Congress on building a bipartisan consensus in support of this vital project.

48. A White House Fact Sheet dated November 17, 2010 expressly states its commitment to CMRR-NF. It promised to

Increase funding by \$4.1 billion increase over the next five years relative to the plan provided to Congress in May—including an additional \$315 million for the Uranium Processing Facility (Tennessee) and the Chemistry and Metallurgy Research Replacement (CMRR) facility (New Mexico);

and:

The Administration is committed to requesting the funds necessary to ensuring completion of these facilities. . .

49. NNSA management has said that "The Modified CMRR-NF is a unique facility, central to LANL's mission and critical to the national security of the United States." Deputy Administrator Cook swears to the "importance of the CMRR Project to our national defense." Administrator D'Agostino said on October 28, 2010 that "it is critical that we complete the design and construction of key facilities," including CMRR-NF.

M. Predetermination of the Outcome of NEPA Reviews

50. Based on their public statements and presentations, DOE/NNSA internally decided in 2009 or 2010 to construct the 2010-11 CMRR-NF at LANL TA-55 and therefore

predetermined the outcome of any NEPA analysis. Since then, DOE/NNSA have been making irrevocable commitments of resources to the construction of that version of the CMRR-NF. Such commitments include construction and equipping of the CMRR-RLUOB, contractual commitments to construct CMRR-NF, and continued detailed design and other preparations for construction of the CMRR-NF. No valid consideration of NEPA reasonable alternatives has taken place, or could take place, while DOE/NNSA continue to pursue their predetermined course.

51. The process that gave rise to the 2011 SEIS was fatally defective, since DOE/NNSA were predisposed to pursue and complete the 2010-11 CMRR-NF project to the exclusion of any other alternatives. That predisposition, and that fatally defective process, continue to this date. DOE/NNSA are committed to the objective of constructing the 2010-11 CMRR-NF as an organizational goal.

52. The history of DOE/NNSA's wholesale commitment to the CMRR-NF project casts great doubt upon their ability to prepare an EIS that evaluates the reasonable alternatives, and to weigh the alternatives objectively and make a choice objectively and in good faith, as NEPA requires. While that commitment persists, they are unable to take the "clear-eyed hard look" at the environmental consequences of the proposal and its alternatives that is required by law,¹ and NEPA is rendered a meaningless formality. To enable DOE/NNSA to comply in good faith with NEPA, the Court should give preliminary relief so that NEPA can function in this situation as Congress intended.

¹ *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000).

N. Unlawful Interim Action: Construction and Equipping of the CMRR-RLUOB

53. DOE/NNSA have constructed the CMRR-RLUOB and have been equipping it prior to the issuance of the SEIS. Construction and equipping of the CMRR-RLUOB is an unlawful interim action, undertaken without NEPA compliance as to the CMRR project, of which CMRR-RLUOB is an important part. Such action constitutes a major investment in the CMRR project and will prejudice any attempt objectively to consider alternatives to that project.

54. The CMRR-RLUOB was planned and analyzed along with the CMRR-NF as part of the unitary CMRR project in the 2003 CMRR EIS, and in the 2004 CMRR ROD DOE/NNSA decided upon its construction simultaneously with the decision to build the CMRR-NF. The CMRR-RLUOB is described by DOE as “the first building of the two-building CMRR Facility” (2011 CMRR-NF ROD, 76 Fed. Reg. 64344), the “First Replacement Component” of the “multi-phased, two-building project,” and the CMRR-NF is the “Second Replacement Component.” The CMRR-RLUOB is “phase one of the planned Chemistry and Metallurgy Research Replacement (CMRR) at Technical area 55.” It is also called “Phase A.” Several elements of the CMRR-RLUOB serve the CMRR-NF. CMRR-RLUOB contains:

- a. a radiological lab section,
- b. a central utility building of 20,998 sq. ft., serving both CMRR buildings,
- c. offices to accommodate 350 people in both CMRR buildings.
- d. a personnel entrance control facility serves both CMRR buildings;
- e. a training center with laboratories serving all of TA-55;
- f. a parking lot for both CMRR buildings;

g. fuel oil storage and backup electrical generation for both CMRR buildings;

h. a facility incident command center for CMRR-NF and other nearby plutonium facilities;

i. an operations center for both CMRR buildings.

55. NNSA broke ground for the CMRR-RLUOB in January 2006 and proceeded with construction. In May 2007 LANL's new seismic analysis made clear that seismic challenges would require redesign of the CMRR-NF. Work continued on the CMRR-RLUOB without interruption. Final design of equipment was authorized in 2007. The 2010 Congressional Budget Request stated that DOE/NNSA would proceed with final design and installation of special facility equipment for the CMRR-RLUOB. Capital appropriations for the CMRR-RLUOB would continue through FY 2013. Approximately \$329 million has been appropriated for its construction. In October 2010 about three years of equipment manufacture and installation remained, for which an additional \$108 million was sought. The CMRR-RLUOB is expected to be operational in 2013.

56. Thus, NNSA proceeded to build and equip CMRR-RLUOB, despite knowing from 2007, at the very latest, that seismic and other challenges meant that the CMRR-NF would not be built as stated in the 2004 CMRR ROD, and that the 2003 CMRR EIS did not describe the environmental impacts of any possible version of the CMRR-NF. But by constructing CMRR-RLUOB, at a cost to date of \$329 million, NNSA invested deeply in construction of the entire CMRR project, making it far more likely that NNSA would construct the CMRR-NF.

57. In the 2011 SEIS, discussed below, DOE/NNSA found it persuasive in evaluating alternative sites that “RLUOB (which contains a training facility, incident control center, and radiological laboratories, as well as offices for personnel who would work in the CMRR-NF) has already been constructed at TA-55.” (at S-23).

58. Defendants have been constructing the Nuclear Materials Safety and Security Upgrades (“NMSSUP”), a security structure, segments of which are designed to serve the 2011 CMRR-NF. Such construction likewise makes it more likely that Defendants will continue and construct the 2011 CMRR-NF.

59. In addition, the footprint of the CMRR-NF has been excavated in part, removing approximately 175,000 cubic yards, a large parking lot for both CMRR buildings and part of a tunnel to CMRR-NF has been built, and temporary field offices for CMRR-NF engineering staff have been built.

O. DOE/NNSA Contractual Commitments

60. NNSA has an annually-updated contract with LANS. LANS is the prime contractor for the CMRR project. For FY 2011 NNSA contracted with LANS for the issuance and execution of initial construction contracts for the CMRR-NF and continued finalizing of its design:

Measure 18.3 Delivery of CMRR and NMSSUP II

Expectation Statement:

LANS will accelerate and/or complete key Nuclear Materials Safety and Security Upgrades (NMSSUP) Phase II and CMRR milestones as well as integration and planning of the Pajarito Road corridor:

Completion Target:

This measure has been achieved when the Contractor has by September 30, 2011:

....

B. CMRR

Actions necessary to issue and execute construction contracts for Infrastructure Packages in FY 2011 are achieved on schedule.

Nuclear Facility basemat and structural design achieve planned maturity and schedule goals.

Demonstrate acceleration of the RLUOB REI scheduled completion from FY 2013 to FY 2012.

61. NNSA directed LANS to complete CMRR-NF construction by 2020 and to begin operation by 2022. The FY 2010 agreement calls upon LANS to develop integrated planning to support Pajarito Corridor construction:

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

LANS is to produce planning tools for:

- laydown, staging and warehousing.
- concrete batch plant strategy.
- parking and workforce transportation.
- security strategy.
- scope or schedule conflicts.
- master integrated schedule.
- multi-year staffing plan.
- FY 2011 and FY 2012 budgets.

If LANS meets each measure, it will receive an additional \$300,000.

P. Final design of CMRR-NF

62. DOE/NNSA presentations from 2010 show detailed final design being carried out of the Infrastructure Package, Pajarito Road Relocation, and Basemat Package prior to the issuance of the 2011 SEIS. The presentations show that construction will immediately follow design. Further, they state: “Design deliverables include all products necessary to construct.”

Steve Fong, CMRR Project Manager, has stated that the infrastructure package is ready for design-build contracting. The CMRR-NF project is divided into five phases or “chunks,” so that early chunks can get started before later ones have completed the design phase.

63. NNSA’s appropriations and obligations for final design of the CMRR-NF were \$39.4 million in FY 2008, \$92.2 million in FY 2009, and \$57 million in FY 2010. By the end of FY 2011, Defendant NNSA had been appropriated \$458 million for the CMRR-NF.

64. DOE regulations state that, while DOE is preparing a required EIS,

DOE shall take no action concerning the proposal that is the subject of the EIS before issuing an ROD, except as provided at 40 CFR 1506.1. 10 C.F.R. § 1021.211.

65. A specific DOE regulation requires completion of NEPA review before preparation of detailed design:

(b) DOE shall complete its NEPA review for each DOE proposal before making a decision on the proposal (e.g., normally in advance of, and for use in reaching, a decision to proceed with detailed design) . . . 10 C.F.R. § 1021.210(b)(emphasis supplied).

66. In accordance with this regulation, DOE NEPA guidance cautions against carrying out detailed design before completing NEPA compliance:

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

DOE/NNSA have, nevertheless continued with detailed design of the CMRR-NF, thereby limiting the choice of alternatives in any subsequent NEPA analysis.

Q. DOE/NNSA continuing commitment to CMRR-NF

67. DOE/NNSA have not wavered from their commitment to construct and operate the 2010-11 CMRR-NF, despite the massive and material changes in the CMRR-NF project, and the lack of any NEPA analysis of the 2010-11 CMRR-NF and its reasonable alternatives. The April 15, 2011 FY 2012 Stockpile Stewardship and Management Plan (“SSMP”), issued by DOE long before completion of the 2011 SEIS and subsequent amended ROD, confirms that DOE and NNSA are committed to construct the CMRR-NF at LANL TA-55 according to their current plans, regardless of their NEPA noncompliance. In the SSMP:

a. DOE states that its capacity to produce pits will be a capability of up to 80 pit per year and that, to ensure this future capacity, it must “Construct CMRR-NF.” (Table 2 at 35).

b. DOE reaffirms its commitment to construction of CMRR-NF:

The Administration is committed to fully funding the construction of the Uranium Processing Facility (UPF) and the Chemistry and Metallurgy Research Replacement-Nuclear Facility (CMRR-NF), and doing so in a manner that does not redirect funding from the core mission of managing the stockpile and sustaining the science, technology, and engineering foundation. The resources for CMRR and UPF in the FY 2012 budget will increase funding over the FY 2012 number in the 2011 FYNSP.” (at 38)(See also 62, to the same effect)

c. DOE firmly predicts completion of CMRR-NF:

Based on the current pace of design, the NNSA expects construction of the nuclear facility buildings to be completed by 2020 for both projects and anticipates operational functionality on or before 2023 for CMRR-NF and 2024 for UPF. (at 39)

- d. DOE's "Defense Programs Integrated Priority List—Capital Projects"

(Fig. 6 at 40-41) carries the CMRR-NF at the very top of the list.

- e. Discussing future budgets, DOE again confirms its commitment to

CMRR-NF:

Readiness in Technical Base and Facilities (RTBF)—UPF and CMRR-NF Construction. These two nuclear capabilities are required to ensure the United States can maintain a safe, secure, and reliable arsenal over the long term. . . . The capability for processing uranium and plutonium research are critical functions required through the 21st century regardless of the size of the stockpile. The 2010 NPR Report concluded that the United States needed to build these facilities; the Administration remains committed to their construction. (at 63)

- f. DOE states that the CMRR-NF project "will be funded" with a cost range of \$3.7 to \$5.9 billion. (at 65)

- g. DOE summarizes the status of the CMRR-NF project:

Construction is scheduled to complete by 2020; the facility is scheduled to be fully operational by 2023. The updated cost range is estimated (based on 45 percent design maturity) at \$3.7 billion to \$5.86 billion. (at 147)

R. 2011 CMRR-NF SEIS

68. On September 2, 2011, EPA published notice of the availability of the 2011 SEIS (76 Fed. Reg. 54768). The SEIS stated, as had the Draft SEIS, that DOE/NNSA would not consider whether to build the CMRR-NF:

Because NNSA decided in the 2004 ROD to build the CMRR . . . this SEIS is not intended to revisit that decision.” (SEIS at v-vi).

69. The 2011 SEIS analyzes three so-called alternatives: (1) the construction of the CMRR-NF pursuant to the 2004 CMRR ROD, termed the “no action alternative,” (2) the construction of the 2010-11 CMRR-NF, and (3) continued use of the existing CMR Building, with minor upgrades and repairs. (*id.*). However, DOE/NNSA eliminated the 2004 design from consideration:

Based on new information learned since 2004, the 2004 CMRR-NF would not meet the standards for a Performance Category 3 (PC-3) structure as required to safely conduct the full suite of NNSA AC and MC mission work. Therefore, the 2004 CMRR-NF would not be constructed. (at S-8).

The patent infeasibility of this design was the reason it was so greatly changed, and the *raison d’être* of the SEIS itself.

70. DOE/NNSA also stated that continued use of the CMR without upgrades would not meet their needs, thereby eliminating that supposed alternative:

This alternative does not completely satisfy NNSA’s stated purpose and need to carry out AC and MC operations at a level to satisfy the entire range of DOE and NNSA mission support functions. However, this alternative is analyzed in the CMRR-NF SEIS as a prudent measure in light of possible future fiscal constraints. (at S-23).

The infeasibility and lack of safety of this alternative (together with the cost of CMR upgrades, then considered high) was the reason for the CMRR project in the first place.

71. Since DOE/NNSA had eliminated from consideration alternative (1), to construct the 2004 CMRR-NF, and alternative (3), to continue use of the CMR, they left only alternative (2), to construct the 2010-11 CMRR-NF. DOE/NNSA listed some possible other alternatives

with cursory explanations of why they were rejected prior to analysis. (at S-23 through S-26). All alternatives to the preferred action were rejected for environmental (*i.e.*, NEPA) analysis.

72. In fact, numerous alternatives to the 2010-11 CMRR-NF, not considered in the SEIS, are reasonable and should be analyzed for environmental impact, cost, and efficiencies, especially since the CMRR budget has increased by a factor of approximately ten. Alternatives include upgrading parts of the existing CMR; constructing one or more smaller CMRR-NF buildings by eliminating elements such as a large vault, below-ground construction, or construction over a weak substrate; use of the Plutonium Facility, PF-4, for certain operations; postponement of decision pending better assessment of mission need; use of existing facilities at Savannah River Site, Idaho National Laboratory, or Lawrence Livermore National Laboratory; or relocating specific functions within the pit manufacturing process. Defendants' NEPA documents fail to analyze these alternatives.

73. DOE/NNSA issued the 2011 amended ROD, reflecting their determination to construct the Preferred Alternative, construction of the 2010-11 CMRR-NF. (76 Fed. Reg. 54344)(Oct. 18, 2011).

74. The SEIS is the only final NEPA document issued by DOE/NNSA that discusses the 2010-11 CMRR-NF. The analysis in the SEIS contains several major deficiencies:

a. The discussion of alternatives is a critical part of an EIS, since the purpose of an EIS is to inform decisionmakers of the impacts and available alternatives. (40 C.F.R. §1502.1). Regulations require an EIS to explore "all reasonable alternatives." (40 C.F.R. § 1502.14). However, there is no discussion or analysis of reasonable alternatives to the 2010-11 CMRR-NF.

b. NEPA regulations require projects that constitute a single course of action to be evaluated in a single EIS. (40 CFR § 1502.4). The SEIS does not discuss or analyze the other planned and ongoing projects that form part of a single course of action to modernize nuclear weapons production at LANL.

c. An EIS must contain a description of the affected environment for each alternative. (40 C.F.R. § 1502.15). This discussion is omitted from the SEIS, because there is no analysis of reasonable alternatives.

d. Regulations (40 C.F.R. § 1502.16) call for discussion of the environmental consequences of all the alternatives considered. This includes short-term versus long-term impacts, irreversible or irretrievable commitments of resources, direct and indirect impacts, impacts of alternatives and mitigation measures, possible conflicts with existing land use plans, energy requirements, resource requirements, conservation potential, urban quality impacts, and mitigation means. Since DOE/NNSA have not introduced any alternatives, the SEIS does not meet this NEPA requirement.

e. Under 40 C.F.R. § 1502.23, DOE/NNSA must attach any cost-benefit analysis relevant to the choice among alternatives. Since DOE/NNSA do not discuss any alternatives in the SEIS, no such analyses are attached.

75. NEPA regulations state that the ROD must identify all alternatives considered by the agency and identify and discuss all factors weighed by the agency in considering alternatives and explain how they entered into its decision. (40 C.F.R. § 1505.2). Since DOE/NNSA have narrowed the range of alternatives to one, the 2011 amended ROD avoids such detailed consideration of alternatives.

76. The 2011 amended ROD includes no commitments to mitigation measures even as to the selected alternative, the 2010-11 CMRR-NF. Under applicable regulations, a ROD must “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and if not, why they were not.” The 2011 amended ROD states only that a Mitigation Action Plan will be issued in the future and, thus, fails to meet this requirement. (76 Fed. Reg. at 64347).

S. Connected actions

77. Defendants are pursuing several connected actions which are geographically proximate, functionally related, roughly contemporaneous, and which have cumulative impacts. These connected and cumulative actions include the following construction projects:

- a. The Nuclear Materials Safeguards and Security Upgrade Project (NMSSUP);
- b. The TA-55 Revitalization Project (TRP);
- c. The Radioactive Liquid Waste Treatment Facility (RLWTF);
- d. The TRU Waste Facility (TRU);
- e. Construction of an adequate electrical supply for the CMRR project and

Los Alamos County as a whole, which apparently must now far exceed the capacity predicted in the SWEIS just three years ago.

78. Defendants have characterized the first four of these projects as “major projects” which are “near-concurrent” parts of a coordinated “Pajarito Construction Corridor” project nexus. These projects are components of Defendants’ program to modernize and increase nuclear weapons production capacity, and they are functionally related and interdependent with

one another and with the CMRR-NF. None of these five was analyzed in the 2003 CMRR EIS or the 2011 SEIS, or otherwise in the context of decisions regarding alternatives to the CMRR-NF.

79. In addition, Defendants are pursuing the following actions, which will have impacts that are cumulative with the impacts of the CMRR-NF and the other projects listed above:

- a. Material Disposal Area C Closure;
- b. Material Disposal Area G Closure;
- c. The Waste Disposition Project.

80. Defendants have described the above programs and projects, including the proposed Nuclear Facility, as subprojects within a “Pajarito Construction Corridor.” On other occasions Defendants have described the same or similar projects, including the CMRR-NF, as subprojects within “Integrated Nuclear Planning.” On yet other occasions Defendants have described the same or similar projects as elements within a “Consolidated Plutonium Center” and a “Consolidated Nuclear Production Center.” The close affinity of these projects underscores the necessity of including the impacts all these proposed facilities as connected or cumulative actions within the “full and fair discussion of significant environmental impacts” required by 40 CFR § 1502.1.

CLAIMS FOR RELIEF

CLAIM I

Failure To Analyze Alternatives In An EIS

81. Plaintiff incorporates by reference the allegations in paragraphs 1 through 80 with the same force and effect as if fully set forth.

82. Defendants' decision contained in the February 12, 2004 CMRR ROD to construct and operate the CMRR project constitutes a decision to undertake major federal action "significantly affecting the quality of the human environment" within the meaning of 42 U.S.C.A. §§ 4332(2)(C), 40 C.F.R. § 1508.3, 40 C.F.R. § 1508.14, 40 C.F.R. § 1508.18, and 40 C.F.R. § 1508.27.

83. Defendants' reported decision contained in the October 1, 2011 CMRR-NF amended ROD, to construct and operate the 2010-11 CMRR-NF reports a prior internal decision to undertake a major federal action "significantly affecting the quality of the human environment" within the meaning of 42 U.S.C.A. §§ 4332(2)(C), 40 C.F.R. § 1508.3, 40 C.F.R. § 1508.14, 40 C.F.R. § 1508.18, and 40 C.F.R. § 1508.27.

84. Defendants are implementing a 2010-11 CMRR-NF proposal which differs substantially from, and has significantly much greater environmental impacts than, any alternative analyzed in the 2003 CMRR EIS. In short, the 2003 CMRR EIS is inapplicable to the current project and obsolete.

85. Defendants have been aware, since early 2005, of the strong likelihood of substantial changes in the proposed federal action to build and operate the CMRR project that are relevant to environmental concerns, the significant new circumstances relevant to environmental concerns, and the significant and expansive changes in "the scope of the proposed action...since the original EIS was prepared." Defendants are also aware of the "importance, size, [and]

complexity of the proposal,” all which warrant preparation of a new EIS. (40 C.F.R. § 1502.9(c); 10 C.F.R. § 1021.314).

86. The substantial and fundamental changes proposed for the 2010-11 CMRR-NF mandate, in substance, an entirely new EIS, preceded by the required scoping process. DOE has described the circumstances which warrant a new EIS and a new scoping process, as opposed to a SEIS, in the Preamble to DOE’s NEPA regulations (April 24, 1992, at 57 Fed. Reg. 15122) and in its NEPA guidance (Revised “Frequently Asked Questions on the Department of Energy’s (DOE’s) National Environmental Policy Act (NEPA) Regulations,” August 1998, at 10b). As stated by DOE:

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

87. It is incontrovertible that “the scope of the proposed action has ...changed since the original EIS was prepared” and that “the importance, size, or complexity of the proposal warrant” re-examination of the scope of the EIS, including re-examination of reasonable alternatives.

88. However, Defendants have never analyzed their substantially changed 2010-11 CMRR-NF project, with its additional project elements, its greatly expanded environmental impacts, and its newly enlarged range of reasonable alternatives, in any EIS. Defendants have

been and are continuing to implement a novel CMRR-NF project alternative which differs substantially from, and has significantly different environmental impacts than, any alternative analyzed in any EIS, including the 2003 CMRR EIS.

89. Pursuant to 42 U.S.C.A. § 4332(2)(C) and the implementing CEQ regulations, Defendants must prepare an EIS “before decisions are made and before actions are taken,” and “at the earliest possible time.” 40 C.F.R. §§ 1500.1, 1501.2. An EIS is required to “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. The regulations state:

In this section agencies shall:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency. 40 C.F.R. § 1502.14.

90. Further, Defendants are prohibited from taking any action that has an adverse environmental impact, limits reasonable alternatives to the proposed action, or prejudices agency decisions in the absence of an applicable EIS and subsequent final decision (40 C.F.R. § 1502.2(f), 40 C.F.R. § 1506.1).

91. Despite these regulatory requirements, Defendants have failed to prepare an EIS that analyzes the 2010-11CMRR-NF and all reasonable alternatives, considering all in detail, including alternatives outside agency jurisdiction. The 2003 CMRR EIS does not consider the

2010-11 CMRR-NF and does not consider any currently-reasonable alternatives to it. The 2011 SEIS does not consider any alternatives to the 2010-11 CMRR-NF, listing only the 2003 CMRR-NF and the existing CMR as alternatives but expressly stating that they are not acceptable. Numerous reasonable alternatives exist to the 2010-11 CMRR-NF, but they have not been analyzed as required by NEPA and NEPA regulations. Defendants' failure to do so is arbitrary and capricious and a violation of NEPA.

CLAIM II

Failure To Include Current Information About "Purpose And Need"

92. Plaintiff incorporates by reference the allegations in paragraphs 1 through 91 with the same force and effect as if fully set forth.

93. NEPA regulations require that the EIS "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. The SEIS states that "[t]he purpose and need for NNSA action has not changed since the issuance of the 2003 CMRR EIS." (at 1-11). That statement and the discussion of purpose and need in the SEIS are misleading and inaccurate in that, in the years since the 2003 CMRR EIS, Defendants have received additional information concerning the anticipated life of plutonium pits and stockpile requirements and additional policy directions concerning pit manufacture that materially change the purpose and need for a facility such as CMRR-NF. The SEIS is incomplete and inaccurate for failure to include such information. Defendants' failure to do so is arbitrary and capricious and a violation of NEPA.

CLAIM III

Failure To Include “No Action” Alternative

94. Plaintiff incorporates by reference the allegations in paragraphs 1 through 93 with the same force and effect as if fully set forth.

95. Defendants’ reported decision contained in the October 1, 2011 CMRR-NF amended ROD, to construct and operate the 2010-11 CMRR-NF reports a prior internal decision to undertake a major federal action “significantly affecting the quality of the human environment” within the meaning of 42 U.S.C.A. §§ 4332(2)(C), 40 C.F.R. § 1508.3, 40 C.F.R. § 1508.14, 40 C.F.R. § 1508.18, and 40 C.F.R. § 1508.27.

96. Pursuant to 42 U.S.C.A. § 4332(2)(C) and the implementing CEQ regulations, Defendants must prepare an EIS “before decisions are made and before actions are taken,” and “at the earliest possible time.” 40 C.F.R. §§ 1500.1, 1501.2. An EIS is required to “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. The regulations state: “In this section agencies shall . . . (d) Include the alternative of no action.” 40 C.F.R. § 1502.14.

97. In violation of this regulation, Defendants have failed to include the alternative of no action in the SEIS that analyzes the 2010-11 CMRR-NF. Moreover, the alternative of no action is a reasonable alternative, because analyses conducted by Defendant agencies show that there is no current need for pit production capacity in excess of that now available. Defendants’ failure to include the no-action alternative is arbitrary and capricious and a violation of NEPA.

CLAIM IV

Predetermination Of Outcome Of NEPA Analyses

98. Plaintiff incorporates by reference the allegations in paragraphs 1 through 97 with the same force and effect as if fully set forth.

99. By their statements and actions it is apparent that Defendants have predetermined the outcome of agency NEPA analyses before those analyses have been conducted. At present, despite the issuance of the SEIS, Defendants have not prepared an EIS concerning the 2010-11 CMRR-NF that complies with NEPA and its regulations. Nevertheless, Defendants have already decided that NEPA analyses would lead them to decide to construct that facility.

100. Defendants' decision is shown, among other things, by their repeated statements of the necessity to construct CMRR-NF, their recurrent announcements during 2009, 2010, and 2011 of their decision and plans to construct the 2010-11 CMRR-NF and of the specific scheduled steps that will be involved in such construction, their contracting with LANS and others to carry out construction, their construction and equipping of the CMRR-RLUOB, their continuation of detailed design of the 2010-11 CMRR-NF, and the explicit statements by high-level Administration figures of their commitment to build the 2010-11 CMRR-NF in New Mexico.

101. Defendants have made irrevocable commitments of resources to the project to build the 2010-11 CMRR-NF by (a) constructing CMRR-RLUOB, with common parking lot and partial tunnel to CMRR-NF, which constitutes the first phase of the CMRR project and is designed to serve as a support facility for the planned CMRR-NF, (b) contracting with LANS to enter into construction contracts to build the 2010-11 CMRR-NF, and (c) pressing forward with

detailed design of the 2010-11 CMRR-NF, which is the final design stage needed before construction begins. On information and belief, having issued the amended ROD based on the SEIS, Defendants now plan and intend to carry out construction of the 2010-11 CMRR-NF.

102. Defendants' predetermination violates 40 C.F.R. § 1505.1, which requires agencies to adopt procedures "[r]equiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions." Predetermination, in which agency decisions precede preparation of NEPA documents, renders the NEPA process irrelevant and invalid. Defendants' action based on predetermination is arbitrary and capricious and a violation of NEPA.

CLAIM V

Failure To Issue A Record Of Decision

103. Plaintiff incorporates by reference the allegations in paragraphs 1 through 102 with the same force and effect as if fully set forth.

104. Defendants decided to build the 2010-11 CMRR-NF sometime in 2009 or 2010. Under NEPA regulations, an agency is required to "prepare a concise public record of decision." 40 C.F.R. § 1505.2. The record of decision is required to "[s]tate what the decision was" and to "[i]dentify all alternatives considered by the agency in reaching its decision." (*id.*). No public record of the 2009-2010 agency decision was made or issued, nor did Defendants state what the decision was or identify the alternatives considered, in violation of NEPA and 40 C.F.R. § 1505.2. Defendants' failure to do so is arbitrary and capricious and a violation of NEPA.

CLAIM VI

Failure To Select From Among Alternatives Analyzed In EIS

105. Plaintiff incorporates by reference the allegations in paragraphs 1 through 104 with the same force and effect as if fully set forth.

106. In 2009 or 2010, Defendants decided to construct the 2010-11 CMRR-NF, which is an entirely different project from the 2003 CMRR-NF alternative selected in the 2004 CMRR ROD. NEPA regulations require that the alternative selected by the agency must come from among those analyzed in NEPA documentation. Thus, 40 C.F.R. § 1505.1 mandates the adoption of agency procedures:

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents . . .

Further, 40 C.F.R. § 1502.2(e) requires that:

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

107. Moreover, Defendants must publish a decision which selects an alternative “encompassed by the range of alternatives discussed in the relevant environmental documents and . . . described in the environmental impact statement” in a ROD (40 C.F.R. § 1505.1(e); 10 C.F.R. § 1021.210(d); 40 C.F.R. § 1505.2). Defendants ultimately chose to attempt to implement an alternative not included within the range of alternatives analyzed in the 2003 CMRR EIS, let alone one selected or even mentioned in the 2004 CMRR ROD.

108. However, the 2010-11 CMRR-NF is not analyzed in the 2003 CMRR EIS. The selection of an alternative that was not analyzed in that EIS is a NEPA violation. Defendants' selection of that alternative in 2009 or 2010 is arbitrary and capricious and a violation of NEPA.

CLAIM VII

Failure To Integrate NEPA Analyses With Decisionmaking

109. Plaintiff incorporates by reference the allegations in paragraph 1 through 108 with the same force and effect as if fully set forth.

110. NEPA requires that environmental analyses be completed prior to agency decision-making, so that the NEPA process and its resulting documents can influence federal decisions. Consequently, agencies must “include in every recommendation or report on proposals for...major federal actions...a detailed [EIS]...” (42 U.S.C.A. § 4332(C)). The purpose of NEPA’s implementing regulations is to foster “excellent action” and “better decisions.” For this reason NEPA requires that EISs be prepared and available prior to federal decisions and actions (40 C.F.R. § 1500.1). EISs assess “proposed agency actions, rather than justifying decisions already made.” (40 C.F.R. § 1502.2(g)). The primary purpose of an EIS is to serve as an action-forcing device to insure that the policies and goals defined in NEPA are infused into the ongoing programs and actions of the Federal Government.

111. Consequently, federal agencies are required to integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively. (40 C.F.R. § 1500.2). NEPA’s implementing regulations also require EISs to be explicitly linked with management and cost analyses prior to agency decision-making. Cost-benefit analyses and any related “important qualitative considerations” which are “relevant and important” to decisions must be indicated, included by reference, or appended to EISs. (40 C.F.R. § 1502.23).

112. Defendants' decision-making regarding the nature and scope of the CMRR-NF, and Defendants' choices significantly affecting expected environmental impacts and costs, did not stop with the 2004 ROD. These processes continued, leading to selection of alternatives that lie far outside the range of choices and impacts discussed in the 2003 EIS, in violation of NEPA and applicable regulations. (40 C.F.R. § 1502.2(e), 40 C.F.R. § 1505.1(e); 10 C.F.R. § 1021.210 (d). Upon information and belief, the scope, scale, and impacts of the CMRR-NF are subjects of current decision-making, uninformed by a NEPA scoping process and without any applicable EIS. Defendants' continued failure to integrate NEPA with their decision-making processes is an arbitrary and capricious abuse of agency discretion.

CLAIM VIII

Interim Actions Prejudicial To NEPA Process

113. Plaintiff incorporates by reference the allegations in paragraphs 1 through 112 with the same force and effect as if fully set forth.

114. The objective "hard look" required by NEPA processes can be thwarted by interim actions that influence the agency decisionmaking process. Therefore, Defendants are prohibited from taking any interim action that prejudices NEPA decisionmaking:

- (a) Until an agency issues a record of decision as provided in § 1505.2 . . . no action concerning the project shall be taken which would:
 - (1) Have an adverse environmental impact; or
 - (2) Limit the choice of reasonable alternatives. 40 C.F.R. § 1506.1.

In addition, regulations state:

- (f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision. 40 C.F.R. § 1502.2(f).

115. Further, a specific DOE regulation requires completion of NEPA review before preparation of detailed design (10 C.F.R. § 1021.210(b)), and DOE NEPA guidance cautions against carrying out detailed design before completing NEPA compliance.

116. Notwithstanding these regulatory requirements, Defendants have taken several interim actions that are prejudicial to the final decision whether to construct the 2010-11 CMRR-NF. These include:

- a. construction and equipment of the CMRR-RLUOB, which is a \$329 million support facility for the CMRR-NF;
- b. construction of a large parking lot, sized to support the future CMRR-NF;
- c. construction of part of the tunnel leading from CMRR-RLUOB to the future CMRR-NF;
- d. construction of those portions of the NMSSUP II project that are designed to protect a future CMRR-NF;
- e. detailed design of the 2010-11 CMRR-NF, which is continuing and proceeds in violation of specific DOE NEPA regulations.
- f. contracting with LANS for the completion of CMRR-NF construction contracts; and
- g. contracting with LANS for assistance, with the irreversible federal commitment of hundreds of millions of dollars, in coordinating a complex construction effort.

117. These interim actions, taken before the completion of NEPA analyses, constitute investments by Defendants in the completion of the 2010-11 CMRR-NF, create a schedule advantage for that CMRR-NF compared to reasonable alternatives, lend momentum to

Defendants' commitment to construct that CMRR-NF, wrongfully influence Defendants' decisionmaking process, violate NEPA regulations and constitute NEPA violations. Defendants' taking of these interim actions is arbitrary and capricious and a violation of NEPA.

CLAIM IX

Denial Of Review And Comment Opportunities

118. Plaintiff incorporates by reference the allegations in paragraphs 1 through 117 with the same force and effect as if fully set forth.

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

120. To enable meaningful comment and participation, regulations provide detailed requirements for agency, tribal, and public involvement. Agencies shall "make diligent efforts to involve the public in preparing and implementing their NEPA procedures" (40 C.F.R. § 1506.6(a)), beginning with a Notice of Intent published in the Federal Register and proceeding to the scoping process (40 C.F.R. § 1501.7) and to the preparation of the EIS itself (40 C.F.R. § 1503.1).

121. In contravention of these requirements, Defendants provided no notice or comment process involving the public, relevant agencies, and tribes concerning the 2010-11

CMRR-NF, reasonable alternatives to it, or the likely impacts of that project and its alternatives. Defendants reached their decision to construct the 2010-11 CMRR-NF in 2009 or 2010, before any public processes involving the SEIS. The public processes involving the SEIS were fundamentally inadequate, since the scope of the SEIS omitted any consideration of reasonable alternatives to the 2010-11 CMRR-NF. Defendants' artificially limited public process is arbitrary and capricious and a violation of NEPA.

CLAIM X

Failure To Discuss Impacts Of Connected Actions

122. Plaintiff incorporates the allegations in paragraphs 1 through 121 with the same force and effect as if fully set forth.

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

124. Defendants must analyze in an EIS the full suite of impacts of the 2010-11 CMRR-NF and its subprojects and elements, the connected actions with which the proposed CMRR-NF is functionally interdependent, and the actions which will have cumulative impacts. Defendants' failure to do so is arbitrary and capricious and a violation of NEPA.

CLAIM XI

The 2011 SEIS Relies Upon An Analysis And A Decision That Has Been Rejected

125. Plaintiff incorporates by reference the allegations in paragraphs 1 through 124 with the same force and effect as if fully set forth.

126. The 2011 SEIS states that the Defendants will not “revisit” the decision to maintain CMR capabilities at LANL, because that decision was made in the 2004 CMRR ROD and in the 2008 Complex Transformation SPEIS ROD. (SEIS at 1-15, 1-16). In fact, the 2004 CMRR ROD and the 2008 CTSPEIS ROD decided not merely to “maintain CMR capabilities” at LANL but to construct a specific facility—the 2003 version of the CMRR-NF—at LANL. See 69 Fed. Reg. 6967, 6972; 73 Fed. Reg. 77644. The No Action alternative in the SEIS is to construct the 2003 CMRR-NF, and Defendants state in the SEIS:

Under the No Action Alternative, NNSA would implement the decisions made in the 2004 CMRR EIS ROD, the Complex Transformation SPEIS ROD, and the 2008 LANL SWEIS RODs.” (SEIS at 1-12)

127. The SEIS proceeds to describe the 2003 CMRR-NF. (*id.*). However, the SEIS states that, after further investigation, the decision to build the 2003 CMRR-NF has been rejected:

As it was envisioned to be constructed in the CMRR EIS, the 2004 CMRR-NF could not satisfy current facility seismic and nuclear safety requirements. Therefore, the 2004 CMRR-NF would not be able to safely function at a level sufficient to fully satisfy DOE and NNSA mission support needs, and thus would not fully meet DOE’s stated purpose and need for taking action. The 2004 CMRR-NF would not be constructed. (SEIS at 1-12).

128. Moreover, key data in the 2003 CMRR EIS was clearly in error as to the requirements for principal materials, such as concrete and steel, required for construction of the CMRR project, as then envisioned. Such data were important to the determination of the environmental impacts of the project discussed in the 2003 CMRR EIS. Therefore, the analyses in the 2003 CMRR EIS could not be relied upon for any relevant purposes.

129. With the analyses and decision contained in the 2004 CMRR ROD and the 2008 CTSPEIS ROD being clearly unreliable, and now being rejected, Defendants are in no position to premise their 2011 SEIS and amended ROD upon those rejected RODs.

130. Defendants seek to portray the sequence of NEPA analyses as though they were following a “tiering” process, in which a programmatic EIS and ROD are followed by a site-specific EIS and ROD. (40 C.F.R. § 1502.20). But tiering requires that the previous EIS and ROD be valid and in force. Here, Defendants have rejected the analyses and decisions concerning CMRR-NF that are contained in the previous RODs. Therefore, Defendants cannot premise their 2011 SEIS upon such RODs. By doing so, Defendants have violated NEPA by failing, *inter alia*, to analyze the proposed 2010-11 CMRR-NF and all reasonable alternatives, failing to examine the direct and indirect impacts of all such alternatives, and failing to identify mitigation methods for all such alternatives. Defendants' action in basing their SEIS upon RODs that Defendants have rejected is arbitrary and capricious and a violation of NEPA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

A. Issue a preliminary and permanent injunction, directing Defendants to halt all further investment in and contractual obligations for the CMRR-NF, including but not limited to

any portion of final design or construction of any project phase, portion or element, until Defendants have fully complied with NEPA's EIS requirements, including scoping, on the 2010-11 CMRR-NF and its alternatives in full compliance with NEPA and its implementing regulations;

B. Issue a declaratory judgment declaring that Defendants have violated NEPA by:

1. failing to prepare an applicable EIS for the 2010-11 CMRR-NF, including failing to consider reasonable alternatives to the project overall, its design concept, and its construction strategy;

2. failing to include current information about purpose and need in the 2011 SEIS;

3. failing to include the "no action" alternative in the 2011 SEIS;

4. predetermining the outcome of NEPA analyses concerning the CMRR-NF;

5. failing to issue a ROD stating the 2009-10 decision to build the 2010-11 CMRR-NF;

6. failing to select a CMRR-NF alternative from among the alternatives analyzed in the 2003 EIS;

7. failing to integrate NEPA analyses with agency decisionmaking concerning the CMRR-NF;

8. taking interim actions prejudicial to the NEPA process concerning the CMRR-NF;

9. denying notice and comment opportunities to the Study Group, citizens, and the State of New Mexico, tribes, local governments, and other agencies;

10. failing to analyze connected and cumulative actions and cumulative impacts in any EIS pertaining to the 2010-11 CMRR-NF;

11. relying in the 2011 SEIS and amended ROD upon CMRR-NF analyses that had been rejected.

C. Issue a declaratory judgment declaring that Defendants have violated the Administrative Procedure Act by attempting to implement a project alternative not chosen in any ROD.

D. Issue a mandatory injunction requiring Defendants to comply with all provisions of NEPA;

E. Issue a mandatory injunction requiring Defendants to:

1. prepare a new and applicable EIS for the 2010-11 CMRR-NF, beginning with the scoping process and following all provisions of NEPA and its implementing CEQ and DOE regulations;

2. conduct a de novo EIS preceded by an open scoping process, one aim of which is to delineate connected actions and cumulative impacts meriting inclusion and analysis;

3. take no further actions which may prejudice federal decisions to be made with respect to the 2010-11 CMRR-NF pending the completion of a new EIS, preceded by the required scoping process and followed by issuance of a new ROD;

4. (1) withdraw their 2004 CMRR ROD that determined to build CMRR-NF at LANL TA-55, (2) withdraw DOE/NNSA "Critical Decision 1," which records their decision

to build CMRR-NF at LANL TA-55, (3) suspend any expenditures on the CMRR-NF, including expenditures for detailed design of the 2010-11 CMRR-NF, completion of CMRR-RLUOB, and equipping of CMRR-RLUOB, (4) carry out a preparatory analysis of the purpose and need of the CMRR-NF, and (5) conduct business case analyses of all reasonable alternatives, to provide basic information for a new EIS.

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

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

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