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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v. Case No. 1:11-CV-0946-JEC-WDS

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 IN SUPPORT OF
MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

INTRODUCTION

Plaintiff The Los Alamos Study Group ("plaintiff") submits this reply in support of its Motion to Supplement the Administrative Record [ECF Doc. No. 26] ("Motion"). In defendants' response in opposition to the Motion ("Response") [ECF Doc. No. 27], defendants mistakenly assert that the Motion is premised on a characterization of the President's Budget Request to Congress dated February 13, 2012 (attached as Exhibit 1 to plaintiff's Motion) as a new "final agency action" subject to challenge under the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq*. ("APA"). *See* Response at 10. However, plaintiff is challenging defendants' National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. ("NEPA") compliance with respect to their decision to build the Chemistry and Metallurgy Research Replacement ("CMRR") project at Los

Alamos National Laboratory ("LANL"), as described in the 2003 environmental impact statement ("EIS"), 2004 record of decision ("ROD"), 2011 supplemental environmental impact statement ("SEIS") and the 2011 amended record of decision ("AROD") – a decision that defendants insist is still in effect. Response at 10. Plaintiff, therefore, seeks, through its Motion, to supplement the administrative record ("AR") with documents bearing upon defendants' failure to consider reasonable alternatives in connection with their NEPA evaluation of the project.

Defendants insist that plaintiff must pursue its challenge based on the record that defendants choose to provide to the Court. To the contrary, in NEPA litigation the Court requires a full record, supplemented by materials that show "gaps or inadequacies in the NEPA process," including alternatives that the defendants should have included in their NEPA analysis but did not, in violation of NEPA. *Colorado Wild v. Vilsack*, 713 F.Supp.2d 1235, 1241 (D. Colo. 2010).

To this end, plaintiff seeks supplementation of the AR to include documents relevant to alternatives ignored or discarded by defendants in issuing the 2011 SEIS and subsequent AROD that purport to support defendants' ongoing implementation of the 2010-11 CMRR project. Plaintiff seeks supplementation of the AR with specifically-described documents, including (a) documents dated subsequent to the AROD that pertain to alternatives that the defendants are now considering -- and should have considered during the NEPA process -- and (b) redacted versions of confidential documents that have been withheld from the AR. *See* Motion at 3-6.

ARGUMENT

A. In a NEPA Case, Courts Receive Evidence in Addition to the Administrative Record Prepared by Defendants to Establish Relevant Facts.

Courts are not reluctant to receive evidence outside the AR to determine NEPA issues. The District of Columbia Circuit has noted that extra-record evidence is particularly necessary where an agency action is attacked as procedurally defective:

> [T]he courts have developed a number of exceptions countenancing use of extra-record evidence . . . . [E]xceptions 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) (emphasis added). [1] For example, the AR "properly consists of all relevant documents before the agency at the time of the decision, not

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[1] These exceptions have also been articulated by the Tenth Circuit. In *Am. Mining Cong. v. Thomas,* 772 F.2d 617, 626 (10th Cir. 1985), the court listed some of the circumstances calling for consideration of extra-record materials under the APA:

> [O]n 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

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); *see Nat'l Audubon Soc'y v. Hoffman,* 132 F.3d 7, 14 (2d Cir. 1997); *see also Pub. Power Council v. Johnson,* 674 F. 2d 791, 794 (9th Cir. 1982); *see also* Mandelker, D.R., NEPA Law and Litigation, at 4-136.5 through 4-137 note 14.

Since the APA requires that review be based on the "whole record" (5 U.S.C. § 706), the reviewing court should accept supplementary evidence to explain the agency's decision:

> [S]ince 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.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); *see also Camp v. Pitts,* 411 U.S. 138, 143 (1973). 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). *See also Sierra Club v. Marsh,* 976 F.2d 763, 774 (1st Cir. 1992). 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); *Mo. Coal. for the Env't v. U.S. Army Corps of Engr's,* 866 F.2d 1025, 1031 (8th Cir. 1989).

> issues, . . . and (5) that evidence coming into existence after the agency acted demonstrates that the actions were right or wrong.

Id. (citing Stark & Wall, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action,* 36 Ad. L. Rev. 333, 335 (1984)); *see also Lee v. U.S. Air Force,* 354 F.3d 1229, 1242 (10th Cir. 2004).

Most importantly in this case, extra-record evidence is frequently admitted in NEPA cases 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." *Ohio Valley Envtl. Coal Co. v. Aracoma Coal Co.,* 556 F.3d 177, 201 (4th Cir. 2009). 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." *Id.* The Second Circuit has explained that NEPA litigation often requires the court to conduct an extra-record investigation:

> [B]ecause 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.

Nat's 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:

> In NEPA cases . . . 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.

Cnty. of Suffolk v. Sec'y of the Interior, 562 F.2d 1368, 1384-85 (2d Cir. 1977).

The Tenth Circuit noted in *Citizens for Alts. to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007) that 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." (quoting *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004) (*emphasis added*); *see also* Mandelker, D.R., NEPA Law and Litigation § 4:36 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 here. Most fundamentally, "a NEPA case is inherently a challenge to the adequacy of the administrative record." *Ohio Valley Envtl. Coal Co. v. Aracoma Coal Co.,* 556 F.3d 17, 201 (4th Cir. 2009). As demonstrated by the defendants' present consideration of alternatives, defendants have failed to consider, during the NEPA process, alternatives that are reasonable. Matters that defendants

failed to consider can *only* be demonstrated by extra-record evidence and plaintiff's Motion to supplement the AR should be granted.

B. The Defendants Have Adopted Interim Alternatives to CMRR that Have Never Been Analyzed under NEPA.

Plaintiff has shown that the Administration has announced a deferral of completion of construction of the CMRR for "at least" five years, having determined that "existing infrastructure in the nuclear complex has the inherent capacity to provide adequate support for these [CMRR] missions." Motion, Exhibit 1. Supplemental budget process information states that:

> NNSA will request LANL conduct detailed analysis to determine the most effective options to provide CMRR-NF capabilities using existing infrastructure, including:
> - optimized analytical chemistry equipment and processes within the new RLUOB, using recently approved NNSA guidance that allows up to four times the quantity of special nuclear material in the RLUOB,
> - consideration for sharing material characterization workload between PF-4 and the use of Building 332 at Livermore (Superblock) as a Hazard Category 2, Security Category 3 nuclear facility, and
> - consideration for staging bulk quantities of plutonium needed for future use in the Device Assembly Facility at the Nevada National Security Site.

Reply, Exhibit 1, Revised Plutonium Strategy. Pursuant to NNSA's direction, LANL has carried out studies and made a recommendation to NNSA as to an interim strategy for plutonium missions. A LANL briefing addressing proposed CMRR-NF alternatives focuses on: "[m]oving forward with a flexible capability-based solution that can be expanded to a reasonable capacity through several different means." Reply, Exhibit 2, LANL Laboratory Director Update, June 2012 (excerpt). This new "Plan B" strategy has never been subjected to NEPA analysis.

Moreover, various different configurations for "Plan B" have been, and are now being, considered—again, without the public process that NEPA requires. Defendants' failure to consider these reasonable alternatives in their NEPA process demonstrates that the NEPA process was inadequate and unlawful. Plaintiff's Motion to supplement the record with materials bearing upon the defendants' procedural violation of NEPA should be granted.

C. The Specified Materials Should Be Added to the Administrative Record.

A situation similar to this case arose in *Colorado Wild v. Vilsack*, 713 F.Supp.2d 1235 (D. Colo. 2010), within the Tenth Circuit. The District Court fully explored the application of *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994), to review of NEPA compliance under the APA. The plaintiff in *Colorado Wild* sought to supplement the record with additional materials, probative of the inadequacy of the defendant agency's NEPA process. The court recognized that it is necessary to add such materials under established rules for judicial review:

> In accordance with my role in reviewing agency action under § 706 I begin my review of the sufficiency of the submitted Administrative Record by applying a "presumption of regularity" to the record as it is designated by the agency. In order to ensure a "probing inquiry" and a "thorough, probing, in-depth review," however, I also consider the exceptions by which Petitioners may prove the insufficiency of a record as designated by the agency and introduce additional documentation and evidence. Though courts differ in their formulation and application of these exceptions, such documentation and evidence generally takes two distinct, yet often confused, forms: (1) materials which were actually considered by the agency, yet omitted from the administrative record ("completing the record"); and (2) materials which were not considered by the agency, but which are necessary for the court to conduct a substantial inquiry ("supplementing the record").

Id. at 1239. The court pointed out that, particularly where the plaintiff challenges the *procedural* regularity of the agency's process, courts should admit materials which demonstrate matters that the agency failed to consider:

> [B]y its very nature Petitioners' NEPA challenge is based not on the substantive accuracy of the Forest Service's environmental assessment, but on a procedural failure -- the failure to consider the impacts of the spruce budworm. As noted above, the distinction between the procedural and the substantive is significant in this context. Though Respondents argue that Petitioners are merely "attempt[ing] to create a 'battle of the experts' regarding the budworm," they fail to recognize the importance of extra-record evidence in the NEPA context where a party challenges not the merits of the agency's decision, but the *sufficiency of the process followed in reaching it*.

Id. at 1241 (emphasis added). The court in *Colorado Wild* explained that the additional information would "tend to show whether the agency's analysis was clearly inadequate or that the agency improperly failed to set forth opposing views widely shared in the relevant scientific community." *Id.* Notably, in *Colorado Wild*, the court did *not* find that its decision to supplement the administrative record was at odds in any way with *Olenhouse*. *See Colorado Wild*, 713 F.Supp.2d at 1237, 1241-42. Thus, the court directed that the supplemental material be added to the administrative record.

That decision is directly on point in this case, where plaintiff contends that numerous reasonable alternatives—including those now contained in defendants' Plan B—were never analyzed in the NEPA process. The materials that plaintiff seeks to add to the AR here are directly pertinent to those alternatives. The fact that they were never considered in the NEPA process establishes a NEPA violation.

Contrary to defendants' argument that blurs the distinction between discovery and supplementation of the AR (*see e.g.*, Response at 6), plaintiff's Motion seeks only to fill the undeniable "gaps and inadequacies" in defendants' NEPA process, specifically with regard to defendants' consideration of alternatives. As the Budget Request demonstrates, defendants are considering new alternatives not previously analyzed in any NEPA document. *See* Motion, Exhibit 1. The AR lodged by defendants consistently fails to include documents pertinent to the project alternatives that defendants are now contemplating. In its Motion, plaintiff provided a specific list of documents and categories of documents that would show whether defendants violated NEPA's procedural requirements by failing to consider reasonable alternatives to the CMRR project. Defendants should be required to supplement the record with the specifically-described documents.

Further, plaintiff seeks to supplement the record with specific confidential documents that will demonstrate defendants' failure to consider all reasonable alternatives to the CMRR project. Motion at 6. Defendants argue that plaintiff should show that these documents were considered by the decision makers. *See* Response at 8. However, these requested documents are cited in the Budget Request (Motion, Exhibit 1) with the notation that "[r]equirements for these plutonium missions are discussed in the following documents." Because defendants' own document states that the materials are relevant to the defendants' decision-making process, it evident that the defendants considered them. Plaintiff is constrained to state "upon information and belief" that these materials were pertinent to defendants' decision-making process, because their confidential status has precluded plaintiff from obtaining these documents. Under these circumstances, the AR should be supplemented to include specifically-described documents relevant to the

defendants' failure to consider all reasonable alternatives to the project. Plaintiff's Motion should be granted.

CONCLUSION

WHEREFORE, plaintiff respectfully requests that the Court enter an order requiring defendants to supplement the AR with the documents listed in plaintiff's Motion as well as any other documents on which defendants relied in deciding to deviate from the course of action described in the SEIS and AROD.

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

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Certificate of Service

I hereby certify that on this 16th day of August, 2012, I filed the foregoing *Plaintiff's Reply in Support of Motion to Supplement the Administrative Record* electronically through the CM/ECF System, which caused the following parties or counsel of record to be served by electronic means as more fully reflected in the Notice of Electronic Filing.

John P. Tustin

Andrew A. Smith

/s/ Dulcinea Z. Hanuschak
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