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 MEMORANDUM IN SUPPORT OF MOTION AND REQUEST FOR A CONFERENCE OF THE PARTIES UNDER RULE 26(f)(1) AND FOR THE ISSUANCE OF A SCHEDULING ORDER UNDER RULE 16 [ECF NO. 14]

Plaintiff Los Alamos Study Group submits this Reply Memorandum in response to contentions contained in the defendants' opposition brief dated January 6, 2012 (Docket ("Dkt.") No. 16) ("D.Br."). Plaintiff filed its motion for a scheduling order to facilitate an orderly discovery process for this challenge to defendants' failure to conduct an appropriate analysis of reasonable alternatives before committing themselves irreversibly to building the current multi-

billion dollar version of the new Chemical Metallurgy Research Replacement project (hereinafter the "2010-11 CMRR-NF" or "Nuclear Facility").

Defendants assert that this matter involves judicial review of an agency action under the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"), and that the Court may not receive evidence outside a yet-to-be-compiled administrative record, so that there is no need to schedule discovery to obtain such evidence. Therefore, they maintain, there is no need for a meeting of counsel under Rule 26(f)(1) and no need for a scheduling order under Rule 16. (D.Br. at 2).

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

final EIS, no Record of Decision based on any valid EIS, and no Administrative Record compiled by the agency to show the basis for its decision.

Plaintiff alleges that:

1. Defendants have no applicable EIS and are not following any valid Record of Decision. They have committed to the 2010-11 version of the CMRR-NF project without conducting any analysis of reasonable alternatives, despite the fact that, by their own admission – the only version of the Nuclear Facility that has been through a full NEPA process – the 2004 CMRR – cannot and will not be built.

2. Defendants have not analyzed the cumulative impacts of connected actions of the 2010-11 CMRR.

3. Defendants have failed to integrate NEPA analyses into their decision-making process for the 2010-11 CMRR.

4. Defendants have failed to provide the required timely opportunities for meaningful participation by other federal agencies, state and local government, tribes, or the public in the production of a valid EIS.

To determine the lawfulness of the agency actions in issue, the Court will need to pursue the following inquiries that can be vetted only through the discovery process:

a. What decision has been made by the agency? Defendants represented to the Court in the prior litigation, *Los Alamos Study Grp. v. U.S.Dep't of Energy, et al.*, 1:10-CV-0760-JH-ACT ("LASG I"), that no decision to build the 2010-11 version of the CMRR-NF had actually been made, that they were still considering various alternatives, including not building the CMRR-NF at all. Defendants' Response in Opposition to Motion for Preliminary Injunction

in LASG I at 8 n. 2, 13-14 (Dec. 20, 2010) (ECF No. 23) ("D. Opp. MPI"). At other times, and at all times before Congress, they insist that the Nuclear Facility is "critical" (D. Opp. MPI at 8) and essential for national security—language that describes a policy firmly adopted.

b. Contrary to those representations, defendants issued a Supplemental Environmental Impact Statement ("SEIS") (now at issue in this case), which considered no realistic alternatives other than building the 2010-11 CMRR, the very project to which defendants disclaimed any irretrievable commitment in LASG I. Thus, discovery is necessary to reveal the bases for the agency's decision why no alternatives to the 2010-11 CMRR were considered, and why defendants made contrary representations in LASG I in order to escape injunctive relief.

c. Moreover, discovery will reveal the precise purposes and needs the agency assumed would be met. How might these change if funding for all of NNSA's proposed projects is not available, or if some purposes turn out to entail larger expenses in connected actions than previously understood? When defendants made their decisions to drastically increase the scope of the CMRR project, why did they fail to consider alternatives? Moreover, what impacts were considered for the project now going forward or for alternative projects?

d. What commitments of resources have been made toward the construction of the 2010-11 CMRR, despite the absence of an EIS authorizing it? Defendants claim none; they say that their partial excavation of the Nuclear Facility site, the construction of the CMRR-RLUOB to serve the new Nuclear Facility, and their ongoing expenditure of millions of dollars in detailed final design work signify no prejudicial commitment.

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

f. What decisions have been predetermined in disregard of NEPA requirements for analysis of environmental impacts and alternatives? Plaintiff contends that defendants have decided to construct the 2010-11 CMRR and, by their contractual arrangements and planning commitments, have placed their agency on a one-way track to build the Nuclear Facility, despite their claims in LASG I that they were keeping an open mind.

These and other questions clearly require investigation by document production and other discovery methods. They will not and cannot be resolved by defendants' unilateral preparation of some administrative record to support decisions made out of the public eye. Further, time is

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

of the essence, since defendants are unquestionably proceeding—in violation of their own guidance[2]—to complete detailed design, and they plan to commence construction later this year.[3]

In such a situation, courts routinely receive evidence outside the administrative record to determine NEPA issues. Nor do courts hesitate to call for discovery, either to determine the proper extent of the administrative record or to allow extra-record evidence to be obtained. The Tenth Circuit has listed some of the circumstances calling for consideration of extra-record materials:

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

Am. Mining Cong. v. Thomas, 772 F.2d 617, 626 (10th Cir. 1985); *see also Lee v. U.S. Air Force,* 354 F.3d 1229, 1242 (10th Cir. 2004). The District of Columbia Circuit has noted that extra-record evidence is particularly necessary where an agency action is attacked as

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[2] Defendants' guidance bars continuing with detailed design pending completion of NEPA studies. Guidance Regarding Actions That May Proceed During the National Environmental Policy Act (NEPA) Process: Interim Actions, DOE Memorandum, Office of NEPA Policy and Compliance, June 17, 2003. Defendants have never addressed this issue of noncompliance with their own guidance.

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

procedurally defective, and it similarly cataloged occasions calling for receipt of such evidence. One category includes all NEPA litigation:

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

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

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

> But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the action was justifiable under the applicable standard.

Id. at 420; *see also Camp v. Pitts,* 411 U.S. 138, 143 (1973). Thus, a court may take extra-record evidence to explain an unclear administrative record. Such evidence may either explain the

nature of the decision made by the agency or clarify the factors considered by the agency. Mandelker, D.R., NEPA Law and Litigation § 4:36, at 4-138 through 4-139 and notes 21, 22 (2010). Numerous decisions uphold the practice. *Sierra Club v. Marsh,* 976 F.2d 763, 774 (1st Cir. 1992).

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

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

> a NEPA case is inherently a challenge to the adequacy of the administrative record. That is why, in the NEPA context, 'courts generally have been willing to

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

> look outside the record when assessing the adequacy of an EIS or a determination that no EIS is necessary."

Ohio Valley Envtl. Coal Co. v. Aracoma Coal Co., 556 F.3d 177, 201 (4th Cir. 2009). The Second Circuit has explained that NEPA litigation often requires the court to conduct an extra-record investigation:

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

Nat'l 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, by contrast, a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of the environmental effects and alternatives . . . which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored.
>
> A suit under NEPA challenges the adequacy of part of the administrative record itself the EIS. Glaring sins of omission may be evident on the face of the statement, other defects may become apparent when the statement is compared with other parts of the administrative record . . . . Generally, however, allegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept 'stubborn

> problems or serious criticisms . . . under the rug' . . . raise issues sufficiently important to permit the introduction of new evidence by the district court, including expert testimony with respect to technical matters, both in challenges to the sufficiency of an environmental impact statement and in suits attacking an agency determination that no such statement is necessary.

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

These recognized bases for admitting extra-record evidence apply directly to this case. No administrative record has been assembled, time is passing quickly, and important environmental interests are at stake. Most fundamentally, this is a NEPA case, and "a NEPA case is inherently a challenge to the adequacy of the administrative record." *Ohio Valley Envtl. Coal Co. v. Aracoma Coal Co.,* 556 F.3d 17, 201 (4th Cir. 2009). Here, there are fundamental questions as to the nature of the decisions made and the bases for the decision or decisions. There are serious claims that, in electing to proceed with its much-expanded 2010-11 CMRR, defendants failed to consider alternatives that are reasonable—especially in light of the massive budget of the current plan. Matters that defendants failed to consider can only be demonstrated by extra-record evidence.

Discovery is proper in this situation to enable the extra-record evidence to be obtained. Thus, in *Pub. Power Council v. Johnson,* 674 F.2d 791 (9th Cir. 1982), on review of agency

actions, petitioners requested discovery to obtain evidence outside the administrative record. The court recognized that "even when judicial review is confined to the record of the agency, as in reviewing informal agency actions, there may be circumstances to justify expanding the record or permitting discovery." *Id.* at 793. It cited the instances discussed above, *i.e.,* evidence necessary to explain agency action, to show whether the agency considered all relevant factors, to show reliance upon documents or materials not included in the record, to explain technical terms or agency interpretations, and when agency bad faith is claimed. *Id.* at 793-95. Such circumstances were presented, and the court directed that deposition and document production take place in aid of judicial review. *Id.* at 796. Other courts recognize that the "administrative record may be 'supplemented, if necessary, by affidavits, depositions, or other proof of an explanatory nature.'" *Sierra Club v. Marsh,* 976 F.2d at 772; *accord Arkla Exploration Co. v. Texas Oil & Gas Corp.,* 734 F.2d 347, 357 (8th Cir. 1984); *Harrisonville Tel. Co. v. Ill. Commerce Comm'n,* 472 F. Supp. 2d 1071, 1075-76 (S.D. Ill. 2006); *Pension Benefit Guar. Corp. v. LTV Steel Corp.,* 119 F.R.D. 339, 341-43 (S.D.N.Y. 1988).

It would be fundamentally unfair for the Court to refuse to require a discovery conference, and to shut the door on discovery in this case. Such action would prevent the application of case law allowing the obtaining and presentation of extra-record evidence, and it would reject decades of practice under NEPA and frustrate its fundamental purpose of requiring a transparent analysis of defendants' failure to consider alternatives to the 2010-11 CMRR-NF.

Conclusion

For the reasons set forth herein, the Court should direct the parties to confer in accordance with Rule 26(f)(1) and to complete all subsequent procedures called for by the Civil Rules and by the Court's Scheduling Order [ECF No. 18].

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

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Certificate of Service

I hereby certify that on this 23rd day of January, 2012, I filed the foregoing *Plaintiff's Reply Memorandum in Support of Motion and Request for a Conference of the Parties Under Rule 26(f)(1) and for the Issuance of a Scheduling Order Under Rule 16 [ECF No. 14]* electronically through the CM/ECF System, which caused the following parties or counsel of record to be served by electronic means as more fully reflected in the Notice of Electronic Filing.

John P. Tustin
Andrew A. Smith

/s/ Thomas M. Hnasko
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