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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP, Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, et al. Federal Defendants.	Case No. 1:10-CV-0760-JH-ACT FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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

INTRODUCTION

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

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

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

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

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

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

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

BACKGROUND

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

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

STANDARDS OF REVIEW

I. PRELIMINARY INJUNCTIONS ARE EXTRAORDINARY REMEDIES

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

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

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

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

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

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

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

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

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

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

ARGUMENT

I. PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS

A. This Court Lacks Subject Matter Jurisdiction

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

B. NNSA Is Preparing an SEIS in Satisfaction of NEPA

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

SEIS to address design changes since CMRR-NF was approved in the 2004 ROD. No such requirement exists. The relevant regulations governing NEPA compliance state that agencies:

> (1) Shall prepare *supplements* to either draft or final environmental impact statements if: (i) The agency makes *substantial* changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.
>
> (2) May also prepare *supplements* when the agency determines that the purposes of the Act will be furthered by doing so.

40 C.F.R. § 1502.9(c) (emphasis added); accord 10 C.F.R. §§ 1021.103, 1021.314. These provisions establish that an SEIS is an appropriate vehicle for updating the 2003 EIS based on changes in the design of the proposed CMRR-NF. Marsh, 490 U.S. at 374 (stating that an SEIS furthers NEPA purposes by requiring agencies to "take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval.").

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiff asserts that Federal Defendants failed to prepare a single EIS to evaluate other projects at LANL. Pl. Br. at 15. Specifically, Plaintiff contends that the Radioactive Liquid Waste Treatment Facility ("RLWTF"), the TRU Waste Facility, the Technical Area ("TA")-55 Revitalization Project, and the Nuclear Materials Safety and Security Upgrades ("NMSSUP") barrier should have been considered in a single EIS because they are "connected actions" with respect to the CMRR-NF. Id. Under NEPA, "connected actions" are those that "(i) automatically trigger other actions which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; (iii) are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). In the Tenth Circuit, "[r]eviewing courts apply an independent utility test to determine whether multiple actions

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

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

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

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

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

D. Plaintiff's Allegation of Predetermination Has No Merit

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

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

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

underlying federal proposal. Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 712 (10th Cir. 2010) ("NEPA does not require agency officials to be subjectively impartial. An agency can have a preferred alternative in mind when it conducts a NEPA analysis.") (citations and internal quotations omitted). "[P]redetermination occurs only when an agency irreversibly and irretrievably commits itself to a plan of action that is *dependent upon the NEPA environmental analysis producing a certain outcome*, before the agency has completed that environmental analysis." Id. at 714 (emphasis altered from original). Predetermination is not "present simply because the agency's planning, or internal or external negotiations, seriously contemplated, or took into account, the *possibility* that a particular environmental outcome would be the result of its NEPA review of environmental effects." Id. at 715 (emphasis in original). Nor is predetermination present when an agency enters into a series of agreements that are contingent upon the completion of NEPA requirements. Lee v. U.S. Air Force, 354 F.3d 1229, 1240 (10th Cir. 2004). "A petitioner must meet a high standard to prove predetermination." Forest Guardians, 611 F.3d at 714.

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

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

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

II. PLAINTIFF CANNOT DEMONSTRATE IRREPARABLE INJURY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. PLAINTIFF IS REQUIRED TO POST A BOND

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

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

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

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

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

CONCLUSION

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

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

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2010 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Fling to the following CM/ECF registrants:

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