IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

JOHN P. TUSTIN, Trial Attorney
Natural Resources Section
P.O. Box 663
Washington, D.C. 20044-0663
Phone: (202) 305-3022/Fax: (202) 305-0506
john.tustin@usdoj.gov

ANDREW A. SMITH, Trial Attorney
Natural Resources Section
c/o U.S. Attorney's Office
P.O. Box 607
Albuquerque, NM 87103
Phone: (505) 224-1468/Fax: (505) 346-7205
andrew.smith6@usdoj.gov

Attorneys for Federal Defendants

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' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTION PENDING APPEAL [ECF NO. 64]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REGULATIONS

RULES

MISCELLANEOUS

TABLE OF ACRONYMS

CMRR	Chemistry and Metallurgy Research Replacement
CMRR-NF	Chemistry and Metallurgy Research Replacement Nuclear Facility
DOE	Department of Energy
EIS	Environmental Impact Statement
LANL	Los Alamos National Laboratory
LASO	Los Alamos Site Office
NEPA	National Environmental Policy Act
NMSSUP	Nuclear Materials Safety and Security Upgrades Perimeter
NNSA	National Nuclear Security Administration
NPT	Nuclear Non-Proliferation Treaty
PEP	Performance Evaluation Plan
RLUOB	Radiological Laboratory Utility Office Building
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION

Plaintiff seeks the extraordinary remedy of an injunction pending appeal in a case that this Court dismissed almost three months ago on two independent, alternative jurisdictional grounds.[1] The Court first found that Plaintiff's premature challenge to the adequacy of the Department of Energy/National Nuclear Security Administration's ("DOE/NNSA" or "NNSA") analysis of potential environmental impacts from construction and operation of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") at Los Alamos National Laboratory ("LANL") in New Mexico was prudentially moot. Los Alamos Study Group v. U.S. Dep't. of Energy, et al., – F. Supp. 2d –, 2011 WL 2580354, at *8 (D. N.M. 2011). In the alternative, the Court found that Plaintiff's claims were not ripe for judicial review. Id.

In its latest attempt to thwart this important project, Plaintiff merely repeats some of the same arguments it made in its briefs on the motion for preliminary injunction and during oral argument on April 27 and May 2, 2011. Even if this Court has jurisdiction to consider the motion, Plaintiff cannot meet its heavy burden of establishing, through clear and unequivocal evidence, any of the four requirements for the drastic remedy of an 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). Federal Defendants addressed those arguments in depth, and incorporate by reference their response to Plaintiff's motion for preliminary injunction. See ECF No. 23.

Plaintiff cannot show that it is likely to succeed on the merits. In addition to having to establish that this Court erred in its detailed analyses and conclusions regarding both prudential

[1] In contravention of D.N.M.LR-Civ. 7.1(a), counsel for Plaintiff made no effort to determine prior to filing whether Federal Defendants oppose the instant motion. The motion omits the required recitation of a good-faith request for concurrence.

mootness and ripeness, Plaintiff would have to demonstrate that it is likely to prevail on its claims that DOE/NNSA violated NEPA. The 2003 CMRR environmental impact statement ("EIS") (which is barred from judicial review pursuant to the applicable statute of limitations) comprehensively reviewed potential environmental impacts of CMRR-NF, and NNSA is analyzing all relevant environmental impacts associated with proposed changes in the supplemental EIS ("SEIS"). As this Court noted, preparation of an SEIS does not require NNSA to "start over from scratch," Los Alamos Study Group, – F. Supp. 2d –, 2011 WL 2580354, at *11, and ignore that it had already properly analyzed and approved CMRR-NF in the 2003 EIS and 2004 record of decision ("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. NNSA has followed an ordinary and orderly process for responding to new information, and at no time has the agency been out of compliance with NEPA.

Plaintiff's claims of irreparable injury are equally untenable. To be cognizable as an irreparable injury for 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. NNSA will not enter into any contracts for final design, and no construction will be undertaken until the SEIS is completed and a new ROD issued. Declaration ("Decl.") of Dr. Donald L. Cook, Deputy Administrator for Defense Programs,

DOE/NNSA, ECF No. 9-1 ¶¶ 20-21; Decl. of Roger E. Snyder, Deputy Site Manager at the Los Alamos Site Office ("LASO")/NNSA, ECF No. 23-2 ¶ 12. The CMRR-NF will not be operational until at least 2022. Cook Decl. ¶ 23. Any of Plaintiff's alleged (but speculative) harms might occur only *after* construction restarts *after* NNSA completes the new SEIS and issues a new ROD, and thus are not cognizable in this proceeding because they would be the result of a *new* agency decision, which would be subject to judicial review in a new proceeding.

Plaintiff also cannot show that the balance of harms and public interest favor an injunction. 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. Snyder Decl. ¶ 25. CMRR-NF implicates international policy concerns because it supports the United States' commitment to renew, strengthen, and implement the Nuclear Non-Proliferation Treaty and to enter into new treaty obligations. Id. ¶¶ 26, 27. Even a short preliminary injunction could result in 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. Decl. of Herman LeDoux, Federal Project Director for the CMRR Project at LASO/NNSA, ECF No. 23-8 ¶¶ 16-19.

In short, not only does this Court lack jurisdiction over Plaintiff's Complaint, Plaintiff cannot meet any of the four prerequisites for injunctive relief. This Court should therefore deny Plaintiff's motion for an injunction pending appeal.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 62(c) provides: "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c). Like any injunction, however, an injunction pending

appeal 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 at 129-30 (2d ed. 1995)) (emphasis in original); Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 376 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right.").

The standards for reviewing motions for injunctions pending appeal, stays pending appeal, and preliminary injunctions are all similar.[2] Although stays pending appeal and injunctions pending appeal are distinct, Nken v. Holder, 129 S. Ct. 1749, 1758 (2009), "[t]here is substantial overlap between [the requirements for a stay pending appeal] and the factors governing preliminary injunctions." Id. at 1761 (citing Winter, 129 S. Ct. at 376-77). To qualify for such an injunction in the Tenth Circuit, the applicant must show that "(1) he is likely to prevail on the merits of the appeal; (2) he will be irreparably harmed in the absence of a stay; (3) other parties will not be substantially harmed by the entry of a stay; and (4) the public interest favors a stay." United States v. Various Tracts of Land in Muskogee & Cherokee Cntys., 74 F.3d 197, 198 (10th Cir. 1996); McClendon v. City of Albuquerque, 79 F.3d 1014, 1020 (10th Cir. 1996). The district court applies the same standard when the petition is presented in the district court. See, e.g., United States v. Austin, 614 F. Supp. 1208, 1219 n.79 (D. N.M. 1985).

"A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result. . . .'" Nken, 129 S. Ct. at 1757. "[T]he applicant must meet a heavy burden of showing not only that the

[2] See Christopher Goelz, et al., Federal Ninth Circuit Civil Appellate Practice § 6:267 (2011) ("The standard for a stay or injunction pending appeal is comparable to that used by a district court in evaluating a motion for preliminary injunction."); Tribal Vill. of Akutan v. Hodel, 859 F.2d 662, 663 (9th Cir. 1988); Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983); accord Humane Soc'y of U.S. v. Gutierrez, 558 F.3d 896, 896 (9th Cir. 2009).

judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." Id. at 1763-64 (Justice Kennedy, concurring; quotations omitted). If a plaintiff fails to meet its burden on any of the four requirements for injunctive relief, its request must be denied. See, e.g., Winter, 129 S. Ct. 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, Inc. v. U.S. Dep't of the Army, 111 F.3d 1485, 1489 (10th Cir. 1997) (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. See Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982).

ARGUMENT

I. AS THIS COURT HAS ALREADY HELD, THE COURT LACKS JURISDICTION OVER PLAINTIFF'S COMPLAINT

After a thorough consideration of the briefs and materials submitted by the Parties and two days of hearing and oral argument, this Court determined that it did not have jurisdiction to consider Plaintiff's Complaint. Specifically, the Court found that the doctrine of prudential mootness counseled against judicial intervention where "[t]he final form and conclusion of the SEIS [of the CMRR-NF] cannot currently be known." Los Alamos Study Group, – F. Supp. 2d –, 2011 WL

2580354, at *8. In addition to dismissing Plaintiff's complaint under the doctrine of prudential mootness, the Court found that lack of ripeness "would have been an equally valid ground for dismissal." Id. The Court stated that it "is not reviewing a final agency decision. Thus, the issue of whether Defendants conducted an adequate analysis in compiling their SEIS, of which the question of predetermination is a component, is not ripe at this point." Id. at *11.

As one court noted, there is an inherent inconsistency in a district court ruling on an injunction pending appeal after finding the absence of subject matter jurisdiction, and the Tenth Circuit has not yet ruled on how a district court should handle this scenario. Peak Medical Okla. No. 5, Inc. v. Sebelius, No. 10-CV-597-TCK-PJC, 2010 WL 4809319, at *1 n.2 (N.D. Okla. Nov. 18, 2010). Some courts – including the D.C. Circuit – have found a court lacks authority to consider relief under Rule 62(c) once it has dismissed a case for lack of subject matter jurisdiction. "[A] court without jurisdiction over an underlying case cannot issue [an injunction], or enforce it by civil contempt." Barwood, Inc. v. Dist. of Columbia, 202 F.3d 290, 294-95 (D.C. Cir. 2000); see also McCammon v. United States, 584 F. Supp. 2d 193, 196 (D.D.C. 2008) ("[H]aving already determined that it lacks subject matter jurisdiction over the Petitioner's Petition to Quash, the Court also lacks the authority to provide injunctive relief to Petitioner pending appeal."); Nat'l Athletic Trainers' Ass'n, Inc. v. U.S. Dep't of Health and Human Servs., No. Civ.A.3:05CV1098-G, 2005 WL 1923566, at *2 (N.D. Tex. Aug. 11, 2005) (stating it "lack[ed] the authority to provide injunctive relief once it [had] determined that it lack[ed] jurisdiction over the underlying case."). Other courts, however, have found that a court may consider relief under Rule 62(c) even though the court lacks jurisdiction over the underlying complaint. See Pentax Corp. v. Myhra, 72 F.3d 708, 709 (9th Cir. 1995) ("The district court later granted Customs' motion to dismiss for lack of jurisdiction. The court, at Pentax's request, entered an injunction pending appeal preventing

Customs from withholding prior disclosure status."); Dakota, Minn., & E. R.R. Corp. v. Schieffer, 742 F. Supp. 2d 1055, 1060-64 (D. S.D. 2010) (considering merits of motion for injunction pending appeal after dismissing case for lack of subject matter jurisdiction); Alaska Cent. Express, Inc. v. United States, 51 Fed. Cl. 227, 229 (2001) (stating that although it dismissed case for lack of subject matter jurisdiction, the "[c]ourt does retain certain limited powers given to it under the rules to . . . aid the resolution of post-judgment proceedings.").

Without jurisdiction over the underlying case, it is difficult to discern if this Court has jurisdiction to grant an injunction in aid of that case. But even if this Court were to entertain Plaintiff's request for relief under Rule 62(c) in the absence of subject matter jurisdiction, the Court's determinations that Plaintiff's claims are prudentially moot or, in the alternative, not ripe, demonstrate that Plaintiff cannot justify an injunction pending appeal. Plaintiff's claims failed at the threshold of jurisdiction, and to succeed on the merits Plaintiff must both obtain a reversal of both of this Court's alternative jurisdictional determinations *and then* prevail on its dubious NEPA claims. Plaintiff has done nothing to undermine this Court's detailed and sound reasoning on the alternative, and equally dispositive, jurisdictional determinations. On this basis alone, the Court should deny Plaintiff's motion for an injunction pending appeal.

II. PLAINTIFF CANNOT ESTABLISH ANY OF THE REQUIREMENTS NECESSARY FOR AN INJUNCTION PENDING APPEAL

A. Plaintiff Is Not Likely to Succeed on the Merits

1. Plaintiff Cannot Show that the Court Has Jurisdiction to Hear Its Complaint

The basis for Plaintiff's argument that it is likely to succeed on appeal is a rehash of its argument that NNSA has predetermined the outcome of the SEIS process – an argument this Court found was not ripe for adjudication. Plaintiff's Motion for Injunction Pending Appeal (hereinafter,

"Mot."), ECF No. 64, at 6-9; Los Alamos Study Group, – F. Supp. 2d –, 2011 WL 2580354, at *7-8.[3] Plaintiff does not address the Court's other reasons for dismissing Plaintiff's complaint on jurisdictional grounds, which included the findings that: NNSA was not required to undertake a new EIS from scratch; Federal Defendants were not moving forward with final design and construction; there is no final agency action; and there was no irretrievable commitment of resources. Los Alamos Study Group, – F. Supp. 2d –, 2011 WL 2580354, at *5, 9; see Mot. at 6-9.

To support its argument that Federal Defendants have predetermined the outcome of the SEIS process, Plaintiff contends that the construction of the Radiological Laboratory Utility Office Building ("RLUOB") and Nuclear Materials Safety and Security Upgrades Perimeter ("NMSSUP") limits the range of alternatives considered by NNSA. Mot. at 6-7. The projects identified by Plaintiff are not "connected actions." Rather they will directly support existing operations at LANL 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 RLUOB is a separate administrative office and support building for the CMRR-NF and other plutonium facilities in TA-55, and was constructed consistent with the 2003 EIS and 2004 ROD. Cook Decl. ¶ 10, 11. Both the NMSSUP and RLUOB have independent utility, and their construction does not support Plaintiff's allegation that these projects are evidence of NNSA predetermining the result of the SEIS process for the CMRR-NF. See Utahns for Better Transp. v.

[3] In addition to determining that Plaintiff's allegation of predetermination was not ripe for adjudication, the Court also carefully considered and rejected Plaintiff's erroneous interpretations and application of case law Plaintiff reasserts here. See Mot. at 6-8 (citing Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002), New Mexico ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683 (10th Cir. 2009), Forest Guardians v. U.S. Fish and Wildlife Serv., 611 F.3d 692 (10th Cir. 2010), Catron Cnty. Bd. of Comm'rs v. U.S. Fish and Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996), Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000)); Los Alamos Study Group, – F. Supp. 2d –, 2011 WL 2580354, at *8-10 (citing same cases). Plaintiff presents no new argument and cannot show that the Court misinterpreted any of these cases.

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.").

Plaintiff further asserts that "Defendants have also made commitments by contract." Mot. at 7. In support, Plaintiff excerpts a single clause of an outdated, 109-page performance evaluation plan ("PEP") from August 24, 2010, and characterizes the PEP as an "agreement [that] constitutes a contractual commitment to carry out construction." Id. This PEP is *not* a contract, and there is no contractual agreement to proceed with construction as Plaintiff alleges. Plaintiff's excerpt is taken out of context because it omits the qualification that "CMRR schedules assume appropriate NEPA documentation is completed prior to March 30, 2011." Excerpts of FY2011 Performance Evaluation Plan, attached hereto as Exhibit A at 102. Moreover, the language from the PEP was modified once NNSA decided to undertake an SEIS. The version of the PEP conformed as of December 9, 2010, states that the contractor will take "actions necessary to support S-EIS alternatives development and position for infrastructure execution." Excerpts of Conformed FY2011 Performance Evaluation Plan, attached hereto as Exhibit B at 102. The conformed PEP assumes that "CMRR provides project documentation to support a draft CMRR S-EIS for public review and final CMRR S-EIS." Id. Plaintiff's excerpt of an outdated document in no way constitutes a commitment by contract as Plaintiff alleges. Additionally, the Court previously considered Plaintiff's arguments about a contract and found that Plaintiff did not present any evidence of any binding agreement evincing predetermination. Los Alamos Study Group, – F. Supp. 2d –, 2011 WL 2580354, at *10 ("Plaintiff has come forward with no evidence of any such agreement in this case."); see id., at *1, n.2 (stating that "Plaintiff presented the Court with three binders of materials . . . . The Court considered them in making its ruling.").

Finally, Plaintiff appears to argue that the Court erred in exercising its discretion in applying the doctrine of prudential mootness because Federal Defendants could resume the challenged conduct at any time. Mot. at 8-9. Where, as here, the conduct at issue is highly fact- and context-specific, and not likely to "recur" under similar circumstances, the voluntary cessation doctrine is inapplicable. Unified Sch. Dist. No. 259, Sedgwick Cnty., Kan. v. Disability Rights Ctr. of Kan., 491 F.3d 1143, 1150 (10th Cir. 2007). The precise alleged violations on which Plaintiff bases its Complaint are no longer extant because the SEIS will address the potential environmental effects of the proposed design changes to the CMRR-NF. Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1119 (10th Cir. 2010). Any future decision on the updated CMRR-NF will be informed by the results of the SEIS. Cook Decl. ¶ 18. NNSA's decision to prepare an SEIS, and inform future decisions on the analysis contained in the SEIS, is no "mere informal promise"; in fact, NNSA has already published a draft SEIS, accepted comments on the draft, and is currently reviewing those comments and preparing a final SEIS for release. NNSA's decision to prepare an SEIS is a concrete, intervening event that moots Plaintiff's claims. Rio Grande Silvery Minnow, 601 F.3d at 1118; see id. at 1117 n.15 (opining on the treatment of governmental officials' voluntary conduct when compared to private actors).

This Court correctly found that Plaintiff's allegations of predetermination were prudentially moot and not ripe for adjudication, and dismissed Plaintiff's action for lack of subject matter jurisdiction. The instant motion presents neither new evidence nor argument to challenge that finding.

2. Plaintiff Has Not Shown that It Is Likely to Succeed on the Merits of Its Claims

Even if Plaintiff were to succeed on its appeal of this Court's dismissal on jurisdictional grounds, it will not succeed on the merits of its claims. 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 v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989) (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."). As this Court found, "whether [preparing an SEIS] was voluntary or mandatory, Defendants are currently preparing a supplement to the initial EIS in response to changed circumstances, exactly as the NEPA regulations contemplate." Los Alamos Study Group, – F. Supp. 2d –, 2011 WL 2580354, at *6.

NNSA's decision to supplement the 2003 EIS instead of preparing an entirely "new" EIS is neither arbitrary nor capricious. It was and remains true that "Plaintiff has come forward with no legal support for its claim that Defendants are in violation of NEPA for not having prepared a new EIS in the face of the project's modifications." Id. at *5. As this Court noted,

> Plaintiff's interpretation of NEPA would condemn agencies to the role of the mythical Sisyphus, forever advancing projects up a hill, only to be forced to start over from scratch when they encounter new information that results in design challenges. This is not what NEPA requires. Instead, the NEPA regulations contemplate that agencies will address significant new circumstances through the

issuance of an SEIS, just as Defendants are in the process of doing in this case. Id. at *11. Plaintiff has not shown that the Tenth Circuit is likely to reverse this Court on both of its jurisdictional determinations and, even if Plaintiff could do so it has not demonstrated that it is likely to succeed on the merits of its claims, and its motion for injunction pending appeal should be denied.

B. Plaintiff Cannot Demonstrate Irreparable Injury

Because Plaintiff's claims are without merit, the Court may end its inquiry here. 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.

Here, Plaintiff alleges that it will be harmed because design and construction on the CMRR-NF may proceed (after issuance of the SEIS and associated ROD) before the Tenth Circuit considers Plaintiff's appeal of this Court's dismissal on jurisdictional grounds. Mot. at 10. According to Plaintiff, if this Court fails to issue an injunction and the Tenth Circuit then remands for preparation

of an EIS, Federal Defendants will be unable to make an objective selection and equities will then favor a partially completed project. Id. These conclusory allegations of an irreparable injury fail to satisfy the requirements for an injunction on several grounds. First, Plaintiff's allegation of a procedural violation of NEPA, without more, does not compel the issuance of an injunction. Fund for Animals v. Norton, 281 F. Supp. 2d 209, 222 (D.D.C. 2003) ("[T]he procedural harm arising from a NEPA violation, is insufficient, standing alone, to constitute irreparable harm justifying issuance of a preliminary injunction.") Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992) ("Merely establishing a procedural violation of NEPA does not compel the issuance of a preliminary injunction."). Second, this Court rejected Plaintiff's arguments that NNSA has made an irreversible and irretrievable commitment of resources or predetermined the result of the SEIS process. Los Alamos Study Group, – F. Supp. 2d –, 2011 WL 2580354, at *9-10 (citing Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692 (10th Cir. 2010) and Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2004)). Third, even if Plaintiff's allegation that NNSA has somehow predetermined the result of the SEIS process were true, any irreparable injury attributable to predetermination would have already occurred and therefore issuing an injunction would serve no purpose.

Plaintiff argues further that it has been injured because Federal Defendants are spending public money. The expenditure of public funds is also insufficient to establish an irreparable injury. See Hawaii Cnty. Green Party v. Clinton, 124 F. Supp. 2d 1173, 1199 (D. Haw. 2000) (rejecting "Plaintiff's claim that 'irreversible and irretrievable commitments in excess of $350 million' made by the Navy 'could well result in irreparable injury to the environment and plaintiffs' interests'" as "conclusory and speculative."). Even if the Court were to find that Federal Defendants' NEPA analysis was inadequate, the likely result would be for Federal Defendants to remedy those aspects

of the existing NEPA analyses that the Court found deficient, prior to beginning construction, and to consider those analyses with an open mind in determining whether to move forward with the project. There is a presumption that federal agencies will comply with the law and court orders. Pit River Tribe v. U.S. Forest Serv., 615 F.3d 1069, 1082 (9th Cir. 2010); N. Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1988). There is no reason for the Court to presume otherwise here. Thus, even if this case were to proceed to the merits, and even if Plaintiff was to prevail on one or more of those claims, Plaintiff's alleged injuries from construction would not have occurred and could be addressed by the Court at that time. See e.g., Winter, 129 S. Ct. at 375-76 (stating that an applicant for interim injunctive relief "must demonstrate that in the absence of a preliminary injunction, the applicant is likely to suffer irreparable harm *before a decision on the merits can be rendered*," and that "*a preliminary injunction will not be issued simply to prevent the possibility of some remote future inquiry*.") (emphases added; quotations and citations omitted); Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1260 (10th Cir. 2003) ("In order to determine whether this satisfies the irreparable harm requirement, however, we must further decide whether such harm is likely to occur *before the district court rules on the merits*. Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm *before a decision on the merits can be rendered*. . . .") (emphases added; quotations and citations omitted).

The expenditure of money on planning and design in no way affects Plaintiff, but would only be a loss to Federal Defendants that Federal Defendants would not be allowed to consider if they were ordered to conduct a new or different NEPA that could lead to a different outcome than the proposed CMRR-NF. Indeed, even without judicial intervention, DOE/NNSA has forestalled finalizing design and proceeding with construction, pending the outcome of the SEIS process.

> The CMRR-NF has not established a performance baseline, as design uncertainties continue to be addressed. A timeline for Critical Decision 2 (Approve Performance Baseline) has not yet been finalized. The Performance Baseline will provide Congress with the definitive cost and schedule for the CMRR-NF Project. In light of the SEIS, a definitive path forward will not be established until issuance of a ROD by NNSA. Critical Decision 2 is required prior to Critical Decision 3 (Approve Start of Construction). There thus can be no irreparable injury to Plaintiff from the expenditure of federal funds prior to construction, and Plaintiff's alleged injuries from construction are not cognizable for purposes of an interim injunction because construction is not occurring and would begin only pursuant to a new agency decision for the project – subject to judicial review at that time – following completion of the SEIS.

Snyder Decl. ¶ 15.

Plaintiff's alleged injuries are not of the severity or certainty necessary to establish irreparable harm. Heideman, 348 F.3d at 1189.[4] Nor has Plaintiff ever established that the alleged injuries of its members from construction are germane to its organizational purposes. See ECF No. 23 at 14-15. Plaintiff cannot demonstrate that the evolving design activities associated with the proposed CMRR-NF, even if they arguably did rise to the level of an irretrievable commitment of resources, present a credible threat of imminent, irreparable injury. See, e.g., Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 202 (4th Cir. 2005) (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).

[4] Citing Flowers, Plaintiff has wrongly asserted that there is a different irreparable standard for NEPA cases than stated in Heideman. ECF No. 30, at 12. Winter, which rejects Plaintiff's assertion that an applicant need not establish imminent, non-speculative irreparable in NEPA cases, is itself a NEPA case. And Heideman relies on Flowers in enunciating the correct irreparable injury standard applicable to all cases. There is no different, relaxed test for establishing irreparable injury in NEPA cases.

C. The Balance of Harms and Public Interest Weigh Heavily Against a Preliminary Injunction

1. 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 an 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) ("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, 296 (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 and the Comprehensive Test Ban Treaty. 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 in nuclear non-proliferation 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, consistent with NEPA, 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 would arise 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, an 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.

2. 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, or when the proposed CMRR-NF becomes operational in 2022. See Part II.B, supra. Denial of the requested injunction therefore will not harm Plaintiff.

Plaintiff's statement that "[t]here is no credible argument that national security forbids postponement of the project," Mot. at 11, is flatly contradicted by the 2009 Strategic Posture Report and the 2010 Nuclear Posture Review 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. Likewise, Plaintiff's reliance on the testimony of Dr. von Hippel is entitled to no weight. Mot. at 11. Dr. von Hippel's testimony not only mischaracterizes the CMRR-NF as a "pit production facility," but presents only one opinion from a scientist who has not had a security clearance for more than three years. (ECF No. 57, Tr. 94:16 - 94:18, Apr. 27, 2011). Plaintiff's conclusory assertion and reliance on the von Hippel testimony 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 (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.").

Plaintiff also cites to a June 2011 committee report by the House of Representatives for the

proposition that "Congress has found that NNSA is in an unseemly rush to construct the CMRR-NF and will not support such action." Mot. at 12. Not only does one report from one committee of the legislative branch not represent a statement by Congress, but Plaintiff's characterization of the reduction in funds as a statement of disapproval is simply inaccurate. The committee stated that it "fully supports the Administration's plan to modernize the infrastructure" and that NNSA "must first resolve major seismic issues with its design, complete its work to revalidate which capabilities are needed, and make a decision on its contracting and acquisition strategies." Mot. at 11 (citing H.R. Report, FY 2012 Energy and Water Bill, at 131). These statements show that the House Committee on Appropriations understands the importance of proceeding with the design work on the CMRR-NF while the SEIS is underway, which is precisely what Plaintiff seeks to enjoin.

Plaintiff's real purpose, it seems, is to advance its political agenda of complete nuclear disarmament. As this Court noted in its opinion dismissing Plaintiff's action on jurisdictional grounds,

> the Court has not considered any of the policy considerations raised in this action, such as whether the proposed new nuclear facility is necessary for national security, whether a delay in construction will be detrimental to research, or whether the existing facility can be modified sufficiently to serve LANL's needs thereby eliminating the need for a new facility. Such policy debates are not relevant to this litigation.

Los Alamos Study Group, – F. Supp. 2d –, 2011 WL 2580354, at *11; see also Metro. 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.").

III. PLAINTIFF IS REQUIRED TO POST A BOND

Rule 62(c) permits a court to "suspend, modify, restore, or grant an injunction on terms for

bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c). In the context of a preliminary injunction, a plaintiff must post a compensatory security bond. Fed. R. Civ. P. 65(c) ("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."). Environmental plaintiffs are not exempt from this requirement. 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., No. 01-4216, 01-4217, 01-4220, 2001 WL 1739458, at *5 (10th Cir. Nov. 16, 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 II.C, supra. Plaintiff does not allege that it cannot post a bond, nor does Plaintiff provide any specific figures on the amount of bond that it could post. See Mot. In accordance with Rule 62(c), any injunction must be contingent on Plaintiff posting security in the amount that the Court considers proper to secure Federal Defendants's rights 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 overcome the Court's determination that it lacks jurisdiction over this case and has failed to establish any of the requirements for injunctive relief. Accordingly, the Court should deny Plaintiff's motion for injunction pending appeal.

Respectfully submitted on this 8th day of August, 2011.

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

/s/ John P. Tustin
JOHN P. TUSTIN, Trial Attorney
Natural Resources Section
P.O. Box 663
Washington, D.C. 20044-0663
Phone: (202) 305-3022/Fax: (202) 305-0506
john.tustin@usdoj.gov

ANDREW A. SMITH, Trial Attorney
Natural Resources Section
c/o U.S. Attorney's Office
P.O. Box 607
Albuquerque, NM 87103
Phone: (505) 224-1468/Fax: (505) 346-7205
andrew.smith6@usdoj.gov

Attorneys for Federal Defendants

OF COUNSEL:

JANET MASTERS
MATTHEW F. ROTMAN
Office of the General Counsel
U.S. Department of Energy

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2011, 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 all counsel of record.

Dated: August 8, 2011.

/s/ John P. Tustin
JOHN P. TUSTIN
Attorney for Defendants