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

THE LOS ALAMOS STUDY GROUP,

Plaintiff,

v. Case No. 1:10-CV-0760-JH-ACT

UNITED STATES DEPARTMENT OF ENERGY; THE HONORABLE STEVEN CHU, in his capacity as SECRETARY, DEPARTMENT OF ENERGY; NATIONAL NUCLEAR SECURITY ADMINISTRATION; THE HONORABLE THOMAS PAUL D'AGOSTINO, in his Capacity as ADMINISTRATOR, NATIONAL NUCLEAR SECURITY ADMINISTRATION,

Defendants.

PLAINTIFF'S REPLY ON MOTION FOR INJUNCTION PENDING APPEAL

Preliminary Statement

This memorandum is submitted on behalf of plaintiff Los Alamos Study Group ("LASG") in reply to Federal Defendants' Response in Opposition to Plaintiff's Motion for Injunction Pending Appeal ("D.Br."), Docket ("Dkt.") No. 66, served on August 8, 2011.

Statement

This motion respectfully requests that the Court consider the prospect of irreparable injury to the environment, members of LASG, to defendants, and to the NEPA process,

established by Congress to avoid such harms, if defendants are allowed to proceed on the basis of the current Supplemental Environmental Impact Statement process, which is wholly and incurably deficient, and thereby commit themselves and the nation's resources to a multi-billion-dollar construction project that will ill serve the nation's interests. Such an outcome may be avoided, but only if defendants are ultimately required to consider "all reasonable alternatives" (40 C.F.R. § 1502.14(a)) to the proposed CMRR-NF with a clean slate, unimpaired by the interim commitments that defendants continue to make.

Defendants promise to carry out no construction pending preparation of a final Supplemental Environmental Impact Statement ("SEIS"), but defendants clearly do intend to continue with the completion of construction of Phase I of the CMRR project, the CMRR-RLUOB; they do intend to continue with the outfitting of the CMRR-RLUOB;, and they do intend to continue to expend millions of dollars, employ hundreds of people under contract, to continue with their detailed and final design of CMRR-NF (*See* D.Br. 18). There are 283 people now working on that design. (*id.*) Moreover, when they issue a SEIS and a Record of Decision ("ROD"), defendants plan to continue with construction of CMRR-NF. (*See* D.Br. 3) All of these actions can or will occur before the Court of Appeals rules on the pending appeal. It is beyond doubt that the continuation of detailed design for one project alternative only (with two design variations) will tip the balance of decisionmaking toward that alternative:

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

Gregory Mello Testimony Exhibit Binder ("Mello Binder"), introduced at April 27, 2011 Hearing (Transcript filed as Dkt. No. 57), Tab 52 at 4. And it cannot be doubted that completion of the CMRR-RLUOB and its outfitting with specialized equipment tends to push the decision toward construction of the CMRR-NF. As the Tenth Circuit said in *Davis v. Mineta,* 302 F.3d 1004 (10th Cir. 2002), to permit a construction project to go forward to any extent skews NEPA analysis and decisionmaking in its favor:

> "If construction goes forward on Phase I, or indeed if any construction is permitted on the Project before the environmental analysis is complete, a serious risk arises that the analysis of alternatives required by NEPA will be skewed toward completion of the entire project. *See Marsh,* 872 F.2d at 504; *Md. Conservation Council, Inc. v. Gilchrist,* 808 F.2d 1039, 1042 (4th Cir. 1986). *See generally* 40 C.F.R. § 1506.1 (prohibiting an agency from taking action concerning a proposal that would limit the choice of reasonable alternatives, until the NEPA process is complete.)" *Davis v. Mineta,* 302 F.3d 1104, 1115 n. 7 (10th Cir. 2002).

In *Davis,* the court reversed and remanded for entry of a preliminary injunction. In this case also interim actions should be enjoined pending appeal to prevent the failure of the NEPA process.

Plaintiff's opening brief sets forth the necessity for a stay pending appeal; defendants' response is confined to a few specific points, which plaintiff addresses herein:

a. The assertion that the Court lacks jurisdiction to rule upon a motion for stay.

Defendants assert that the Court lacks jurisdiction to issue a stay, since it dismissed the case on grounds of mootness and ripeness. However, prudential mootness, which the Court invoked, is not a jurisdictional objection. *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1121-23 (10th Cir. 2010). Ripeness implicates jurisdictional and prudential concerns, *Stolt-Nielsen S.A. v. Animal Feeds International Corp.,*130 S.Ct. 1758, 1765 n. 2 (2010), and the Court did not state which ground it relied upon. Thus, it is incorrect to argue that the Court has found that it lacks jurisdiction.

b. The argument that no NEPA violations are shown.

Defendants contend that no NEPA violations are shown. However, no valid EIS exists for the CMRR project, and defendants have constructed and are equipping the CMRR-RLUOB, which is Phase I of the CMRR project. Thus, they have made an irreversible commitment of resources to the CMRR project, and NEPA has been violated. *Davis v. Mineta,* 302 F.3d 1104, 1115 n. 7 (10th Cir. 2002); *Sierra Club v. U.S. Department of Energy,* 287 F.3d 1256, 1263-65) (10th Cir. 2002). Moreover, they have contracted with Los Alamos National Security, LLC ("LANS") to execute construction contracts for CMRR-NF, again violating NEPA.[1] *Forest Guardians v. U.S. Fish & Wildlife Service,* 611 F.3d 692, 714 (10th Cir. 2010); *Davis v. Mineta,* 302 F.3d at 1112-13; *Metcalf v. Daley,* 214 F.3d 1135, 1143 (9th Cir. 2000).

c. The claim that CMRR-RLUOB and CMRR-NF are not "connected actions."

Defendants argue that CMRR-RLOUB and CMRR-NF are not connected actions. (D.Br. 8). Connected actions are "closely related and therefore should be discussed in the same impact statement" because they "cannot and will not proceed unless other actions are taken previously or simultaneously" or "are interdependent parts of a larger action and depend on the larger action

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[1]Defendants point out (D.Br.9) that the contract states that CMRR schedules assume appropriate NEPA documentation is completed prior to March 30, 2011. Thus only the schedule for performance, and not construction itself, assumed NEPA documentation. Further, at the time of the contract (August 24, 2010), a Supplement Analysis had been prepared, and no NEPA process was ongoing. (See Defendants' Motion to Dismiss, Dkt. No. 9 (Oct. 4, 2010), Cook Affidavit ("Aff.") at ¶ 16; Plaintiff's Motion for Preliminary Injunction, Dkt. No. 13, Mello Aff. 2 at ¶¶ 12a, 12b, 12g, 12h, 24, 26 (showing Aug. 17, 2010 as date of Supplemental Analysis). When a NEPA process was begun, on September 21, 2010, it was clearly inadequate, incorporating no analysis of alternatives; thus, the contract was not conditioned upon lawful NEPA compliance. (Draft SEIS at v., introduced by Defendants at Apr. 27, 2011 Hearing). In any case, the Administration directive to construct CMRR-NF was in no way conditioned upon NEPA compliance.

for their justification" (40 C.F.R. § 1508.25(a); see also § 1502.4(a)). However, these two buildings clearly are clearly interdependent, and commitments of resources to the CMRR-RLUOB constitute commitments of resources to the entire CMRR project. The 2003 EIS and 2004 Record of Decision included both CMRR-RLUOB and CMRR-NF—because they are connected. The ROD initiated a project to build "[t]he new CMRR facility [which] would include two buildings (one building for administrative and support functions, and one building for Hazard Category 2 SNM laboratory operations)" (ROD at 6972). The purpose of the CMRR-RLUOB is to support, and function in tandem with, the CMRR-NF. Mello Binder, Tabs 18, 43, and 47; Plaintiff's Reply in Support of Motion for Preliminary Injunction, Dkt. No. 30 (Jan. 14, 2011) Mello Aff. 3 at ¶ 19, ref. 20, 21a, 21b, 21c, 21d, 21e. The CMRR-RLUOB is the "first replacement component" of the "multi-phased, two-building project" (Mello Binder, Tab 18). The CMRR-NF is the "second replacement component." (*id.*). Thus, the CMRR-RLUOB is "phase one of the planned Chemistry and Metallurgy Research Replacement (CMRR) at Technical Area 55." (Dkt. No. 30, Ex. 8). Other documents call it Phase A. (Dkt. No. 30, Ex. 7). While defendants contend that CMRR-NF and CMRR-RLUOB are not connected projects, they are actually two phases of the same project and have been consistently presented to Congress, managed, and analyzed under NEPA as such.

d. The asserted need for certain proof of injury to plaintiff.

It hardly requires detailed proof that a massive construction project will cause injuries to nearby persons. *Greater Yellowstone Coalition v. Flowers,* 321 F.3d 1250, 1260-61 (10th Cir. 2003). However, defendants continue to insist that to plaintiff must be "certain, great, actual, and not theoretical," citing *Heideman v. South Salt Lake City,* 348 F.3d 1182, 1189 (10th Cir.

2003) (D.Br. 12). But under NEPA, "plaintiffs need only establish a sufficient likelihood of harm. . . . Proof that significant effects on the human environment will in fact occur is not essential." *Los Alamos Study Group v. O'Leary,* No. 94-1306-M Civil (Jan. 26, 1985)(slip opinion at 21).[2] Thus, the "irreparable harm requirement is met if a plaintiff demonstrates a *significant risk* that he or she will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone,* 321 F.3d at 1258. "The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury the [NEPA] was designed to prevent." *Comm. to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 448-49 (10th Cir. 1996). *See also Nulankeyutmonen Nkihtaqmikon v. Impson,* 503 F.3d 18, 28 (1st Cir. 2007); *Sierra Club v. U.S. Army Corps of Engineers,* 446 F.3d 808, 816 (8th Cir. 2006).

e. The supposed need to show short-term injury.

Neither is it pertinent that some of the injuries may not occur for some years into the future. *Cf.* (D.Br. 12-13) NEPA cases recognize that, if a project is allowed to go forward in violation of NEPA, it may cause injury many years hence. "In the context of a NEPA claim, the harm itself need not be immediate, as the federal project complained of may not affect the concrete interest for several years." *Sierra Club,* 287 F.3d at 1265. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573 n.7 (1992)(NEPA plaintiff need not show that injury from failure to issue EIS is certain or immediate). Nevertheless, near-term commitments of resources are likely

[2] Thus, the Supreme Court in *Winter v. Natural Resources Defense Council,* 129 S.Ct. 365 (2008), confirmed that the "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." (at 376). The occurrence of an increased risk of harm constitutes such injury. *Sierra Club v. Marsh,* 872 F.2d 497, 500-01 (1st Cir. 1989)("the harm consists of the added risk to the environment that takes place when government decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision on the environment.")

to dictate the course of construction and operation for many years. *See Davis v. Mineta,* 302 F.3d at 1115, n. 7. Thus defendants' statement that, upon a remand, "any irreparable injury attributable to predetermination would already have occurred" (D.Br. 13) underscores the need for an injunction pending appeal.

f. Relevance of environmental injury to LASG's purposes.

Defendants are also incorrect when they say that construction impacts are outside plaintiff's charter. (D.Br. 15) Plaintiff's mission "seeks nuclear disarmament, environmental protection and enhancement, social justice, and economic sustainability." (LASG Mission and Method, www.lasg.org, August 25, 2011). Prevention of environmental disturbance from construction and contamination from plutonium facilities is clearly "germane to the organization's purpose." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 181 (2000).

g. Claimed lack of right to a new EIS.

Defendants argue that plaintiff has no right to a new EIS. (D.Br. 10-12) The title of the document makes no difference. However, the Court has acknowledged that "the scope of the CMRR-NF project has changed significantly since the 2003 EIS and 2004 ROD." (Judge Herrera's Memorandum Opinion and Order, Dkt. No. 55 (May 23, 2011), at 11. Plaintiff need not recite all the changes; clearly the materials, the duration, and the cost of the CMRR-NF have ballooned, some by two orders of magnitude. The estimated operational impacts of the new project are much greater than before. The rule concerning supplemental EISs calls for a supplemental EIS 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." 40 C.F.R. § 1502.9(c)

Even following this rule, as defendants demand (D.Br. 10-11), defendants must rewrite the EIS from start to finish, addressing the massively greater impacts of the proposed CMRR-NF and analyzing in detail all reasonable alternatives to the new preferred alternative. Defendants have no intention of doing so. (Draft SEIS at v.) To argue that there is no right to a "new EIS" is merely a quibble.

h. The asserted injury to the national interest.

Defendants resist an injunction pending appeal based upon supposed dangers to national security (D.Br. 16-18). They offer statements of opinion about the importance of the CMRR-NF to national security. Defendants' Response in Opposition to Motion for Preliminary Injunction (Dkt. No. 23) (Dec. 20, 2010), Snyder Aff. At ¶¶ 25-32. Under Rule 702, opinion testimony may be presented by

> "a witness qualified as an expert by knowledge, skill, experience, training, or education, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." (Rule 702, Fed R. Evidence)

Mr. Snyder's education is in civil engineering. (Dkt. No. 23, Snyder Aff. ¶ 1) He lacks training or experience in national or international security policy. There is no explanation of how he evaluates risks to national security. The evidence is inadmissible. *103 Investors v. Square D Co.*, 470 F.3d 985, 990-91 (10th Cir. 2006); *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 884-86 (10th Cir. 2005).

Moreover, the stated conclusions are unsupported. The congressional commission report, America's Strategic Posture (May 2009), relied upon by defendants (D.Br. 16), does not say

when CMRR-NF is needed (at 49-51). The Nuclear Posture Review (April 2010) calls for "increased funding" for the CMRR-NF (at 25) and states that the CMRR-NF must be completed by 2021 (at 42); however, the reasons supporting this date are not stated. DOE/NNSA started this project in approximately 2003, and the completion date is now 2023. The JASON committee says that plutonium pits will last 100 years (Dkt. No. 30, Mello Aff. 3, ¶ 52), and the Nuclear Posture Review says that pit production is not currently needed. (Dkt. No. 10, Mello Aff. 1, ¶ 19, ref. 4) Bob Peurifoy, experienced in nuclear weapons for almost four decades and under whom most of the country's nuclear arsenal was built, has stated that CMRR-NF is not needed to maintain U.S. nuclear weapons for decades to come. Dkt. No. 13 (Nov. 12, 2010), (Peurifoy Aff. ¶¶ 10, 11).[3] Against this evidence, defendants give no explanation of why a year or two of further work on the CMRR-NF project will raise a security threat. "The lack of explanation drastically weakens, if not eliminates, any authority behind the conclusions reached by DOE," *see LASG v. O'Leary* (slip op. at 17).

Defendants' assertion that their construction schedule is "critical to fulfilling our Nation's international commitments" (D.Br. 17) and their supposed fears for our "leadership . . . on the international stage" (*id.*) are unexplained. The New START Treaty has been ratified, and no other treaty will soon come before the Senate. The supposed "connection" between CMRR-NF and the Non-Proliferation Treaty or the Comprehensive Test Ban Treaty is simply speculation. In fact, the Non-Proliferation Treaty was renewed indefinitely in 1995 and requires no further Senate action.

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[3] Thus, this is not an instance of an agency relying on the valid opinions of its own experts (D.Br. 19), because the opinions here are neither admissible under Rule 702 nor can they pass the arbitrary and capricious test, being stated without factual basis or explanation.

Defendants' misplaced reliance upon *Winter v. NRDC,* 129 S.Ct. 365 (2008)(D.Br. 18), confuses specific military training needs with speculative talk about international prestige. It is not true that, in a debate over NEPA compliance, the defense agency always wins. (*Winter,* 129 S.Ct. at 378). Rather, the Court must scrutinize "specific, predictive judgments about" risks to defense interests. (*id.*) Here, the facts and reasoning of NNSA are not stated and its conclusions cannot be sustained.[4] Such determinations fail the test for "reasoned decisionmaking." *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 378 (1989).

Defendants complain of the economic impacts of halting this project. (D.Br. 18) Thus, they object to plaintiff questioning their right to spend $5 billion or more of the public funds without analyzing the project and comparing it with "all reasonable alternatives" in accordance with law. But NEPA is a condition of all federal action having a significant impact on the environment and is intended to facilitate "informed decision-making." *New Mexico ex rel. Richardson v. Bureau of Land Management,* 565 F.3d 683, 703 (10th Cir. 2009). Moreover, self-inflicted injuries carry no equities. *Davis v. Mineta,* 302 F.3d at 1116. .

i. No bond should be required.

An injunction here should carry at most a nominal bond. In fact, a bond is unnecessary in the absence of proof showing a likelihood of compensable harm to the enjoined party. *Coquina Oil Corp. v. Transwestern Pipeline Co,* 825 F.2d 1461, 1462 (10th Cir. 1987). Defendants have

[4] As Judge Mechem put it in the DARHT case, "Although completing an EIS will delay moving the program into full operation, DOE has not presented the court with enough evidence amounting to a reason to fear that the delay has threatened or will threaten national security by endangering plans for the Comprehensive Test Ban Treaty. There is also no reason to believe that a delay resulting from a NEPA review will result in a loss of intellectual resources, as defendants allege." *LASG v. O'Leary* (slip op. at 30).

neglected their NEPA responsibilities, making the likelihood of plaintiff's success high and the likelihood of recovery on the bond correspondingly low. (*id.*)

Moreover, *Davis v. Mineta,* 302 F.3d at 1126, holds that a minimal bond should be considered where a party seeks to vindicate the public interest served by NEPA. That is plaintiff's role. In *LASG v. O'Leary,* this Court held:

> Posting a substantial bond on non-profit environmental groups might chill the private mechanisms of enforcement NEPA has traditionally encouraged. *See Natural Resources Defense Council v. Morton,* 337 F. Supp. 167, 169 (D.C.D.C. 1971); *Wilderness Soc'y v. Tyrrel,* 701 F. Supp. 1473, 1492 (E.D. cal. 1988), *rev'd on other grounds,* 918 F.2d 813 (9th Cir. 1990). (slip op. at 34)

Accord: People ex rel. van de Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325-26 (9th Cir. 1985). A bond must not be so high as to deny plaintiff its right to present its claims. *Utahns for Better Transportation v. U.S. Department of Transportation,* 2001 WL 1739458 (10th Cir. 2001). *See also Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 1113, 1126 9th Cir. 2005). A bond of any significant amount would make it impossible for a nonprofit organization like plaintiff to enforce NEPA.

Conclusion

For the reasons set forth herein, the Court should enter its order, directing the defendants, pending appeal, to cease any activities that have the effect of advancing the CMRR-NF project, including construction of the CMRR-NF or any projects primarily planned as support facilities for the CMRR-NF (*e.g.,* CMRR-RLUOB or its outfitting, NMSSUP), detailed or final design of the CMRR-NF, and any contracting for the construction or final design of the CMRR-NF.

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

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Certificate of Service

I hereby certify that on this 25th day of August, 2011, I filed the foregoing PLAINTIFF'S REPLY ON MOTION FOR INJUNCTION PENDING APPEAL electronically through the CM/ECF System, which caused the following parties or counsel of record to be served by electronic means as more fully reflected in the Notice of Electronic Filing.

John P. Tustin

Andrew A. Smith

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