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. Defendants.	Case No. 1:10-CV-0760-JH-ACT FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL RULE 26(f) CONFERENCE AND SCHEDULING ORDER [DKT. NO. 46]

INTRODUCTION

On August 16, 2010, Plaintiff Los Alamos Study Group initiated this litigation by filing a "Complaint for Declaratory and Injunctive Relief," Dkt. No. 1. In its Complaint, Plaintiff alleges Federal Defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-

4370(f), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, for actions related to the approval and design of the Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") at the Los Alamos National Laboratory in northern New Mexico. Compl. ¶¶ 52-95.

Federal Defendants filed a motion to dismiss Plaintiff's claims on the grounds of exhaustion, ripeness, and mootness. Dkt. Nos. 9, 11. On January 6, 2011, the Magistrate Judge recommended that this Court grant Federal Defendants' motion to dismiss on the basis of prudential mootness. Dkt. No. 25. The Parties filed objections, see Dkt. Nos. 32, 33, 39, which this Court will consider at the April 27, 2011 hearing, in conjunction with Plaintiff's fully-briefed motion for a preliminary injunction. See Dkt. Nos. 13, 23, 30, 45.

On March 11, 2011, approximately seven months after filing its Complaint, Plaintiff filed the instant motion seeking "an order compelling counsel for the defendants to confer as soon as practicable to formulate a discovery plan and other matters required under Fed. R. Civ. P. 26(f), and for the issuance of a scheduling order under Fed. R. Civ. P. 16(b)(1)." Pl. Mot. at 1.

If Plaintiff's claims are subject to judicial review at all, such review is governed by the provisions of the APA and the procedure set forth in Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560 (10th Cir. 1994). If Plaintiff's case survives Federal Defendants' motion to dismiss, the path forward for this Court would be to determine the merits of Plaintiff's claims based on a review of an Administrative Record that would be compiled and lodged by the United States. Pursuant to the express admonition of the Tenth Circuit in Olenhouse, the Federal Rules of Civil Procedure cited by Plaintiff governing pretrial procedure do not apply to this litigation. There can be no trial in this case and, hence, no basis for applying the pretrial procedures that Plaintiff seeks to impose. Plaintiff's motion to compel therefore is misplaced and should be denied.

ARGUMENT

I. THE APA AND OLENHOUSE LIMIT JUDICIAL REVIEW OF AGENCY ACTIONS AND INACTION TO THE ADMINISTRATIVE RECORD

Each of the claims raised in Plaintiff's Complaint is subject to judicial review, if at all, pursuant to the scope and standards for judicial review set forth in the APA. See Compl. ¶¶ 52-64 (alleging violations under NEPA and the APA), id. ¶¶ 65-94 (alleging violations under NEPA); Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125, 1134 (10th Cir. 2006) ("Because none of the statutory or regulatory provisions in question [including NEPA] provide for a private cause of action, the judicial review provisions of the APA govern this suit."); State of Utah v. Babbitt, 137 F.3d 1193, 1203 (10th Cir. 1998) ("Because [NEPA does not] provide for a private right of action, Plaintiffs rely on the judicial review provisions of the APA in bringing their claims."); Catron County v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1434 (10th Cir. 1996) ("Because NEPA does not provide a private right of action for violations of its provisions, the County claims a right to judicial review under the APA.").

Section 706 of the APA imposes a narrow and deferential standard of review of agency action or inaction, and the courts' role is solely to determine whether the challenged actions or inactions meet this standard based on a review of the administrative record that the agency provides to the court. Camp v. Pitts, 411 U.S. 138, 142 (1973). See Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977) (review of an action brought pursuant to the APA is "based on the full administrative record that was before the Secretary at the time he made his decision"); Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 972-73 (10th Cir. 1992) (*en banc*); Lodge Tower Condominium Ass'n v.

Lodge Properties, Inc., 880 F. Supp. 1370, 1374 (D. Colo. 1995). The APA expressly directs that, in reviewing final agency action or agency inaction, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The Supreme Court has held that "in cases where Congress has simply provided for review [under the APA], . . . [judicial] consideration is to be confined to the administrative record and . . . no *de novo* proceedings may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citations omitted).

"The complete administrative record consists of all documents and materials directly or indirectly considered by the agency." Bar MK Ranches v. Yeutter, 994 F.2d 735, 739 (10th Cir. 1993). The Supreme Court has held that the agency determines what constitutes the record and that courts are to base their review on that record. "The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the court." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (citations omitted). The agency's designation of an administrative record is entitled to a presumption of regularity. "The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." Bar MK Ranches, 994 F.2d at 740.

The Tenth Circuit recognized the unique procedures for judicial review of challenges to federal agency actions and inactions in the landmark case of Olenhouse, 42 F.3d at 1580. In Olenhouse, a class of farmers sought review under the APA of a decision by the Agriculture Stabilization and Conservation Service concerning wheat crop payments. Id. at 1572. The farmers asserted claims that, *inter alia*, the agency's action failed to comply with applicable laws and regulations, was unsupported by the record, and violated the farmers' rights under the Fifth Amendment of the United States Constitution. Id. The Tenth Circuit determined that judicial review

of this informal agency action was subject to judicial review pursuant to Section 706 of the APA. Id. at 1573. The Court found that informal agency action[1]/ must be "set aside if it fails to meet statutory, procedural or constitutional requirements or if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. at 1573-74 (quoting Overton Park, 401 U.S. at 413-14).

The Tenth Circuit in Olenhouse expressly stated that:

> A district court is not exclusively a trial court. In addition to its *nisi prius* functions, it must sometimes act as an appellate court. Reviews of agency action in the district court must be processed *as appeals*. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure.

Id. at 1580 (emphasis in original). The Tenth Circuit found that the process employed by the district court in reviewing the case, which included the use of pretrial motions practice, allowing discovery, and a motion for summary judgment, is, "at its core . . . inconsistent with the standards for judicial review of agency action under the APA [and] invites (even requires) the reviewing court to rely on evidence outside the administrative record." Id. at 1579-80. The Olenhouse court held, in no uncertain terms, that when a district court is reviewing agency action or inaction, it acts as a court of appeal and "it is improper for a district court to use methods and procedures designed for trial." Id. at 1564, 1580. See also Lodge Tower Condominium Ass'n, 880 F. Supp. at 1374 (district court does not sit as a finder of fact because agency action is "reviewed, not tried," rather, "the issue is not whether the material facts are disputed, but whether the agency properly dealt with the facts"). The principles of judicial review outlined in Olenhouse apply to both a petition to compel agency action unlawfully held or unreasonably delayed under 5 U.S.C. § 706(1) and to a petition to hold unlawful

---

[1]/ For a distinction between formal and informal agency action, see Olenhouse, 42 F.3d at 1574 n.22.

or set aside agency action under 5 U.S.C. § 706(2). See Kane County Utah v. Salazar, 562 F.3d 1077, 1086 (10th Cir. 2009); Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167, 1170 (10th Cir. 1997); Sierra Club v. U.S. Dep't of Energy, 26 F. Supp. 2d 1268, 1271 (D. Colo. 1998) ("The judicial review provisions of the APA do not distinguish between a claim that an agency unlawfully failed to act and a claim based on an action taken. In both cases, the court's review of the defendant agencies' action is generally confined to the administrative record.").[2/]

As in Olenhouse, Plaintiff's claims here seek judicial review of Federal Defendants' actions, or alleged inactions. These claims are thus subject to judicial review, if at all, pursuant to judicial review provisions of the APA, 5 U.S.C. § 706. Indeed, Plaintiff states that the APA provides a basis for the Court's jurisdiction of these actions. See Compl. ¶ 5. Olenhouse requires actions such as this one brought pursuant to the APA to proceed as appeals, not using methods and procedures designed for trial. Plaintiff's invocation of Federal Rules of *Civil* Procedure 16 and 26(f), which govern pretrial procedures, is therefore misplaced, and Plaintiff cannot compel either Federal Defendants or this Court to act pursuant to these rules. See also, e.g., Colo. Wild v. Vilsack, 713 F. Supp. 2d 1235, 1237, 1242-43 (D. Colo. 2010) (stating that, pursuant to Olenhouse, the court would "apply the Federal Rules of Appellate Procedure and, generally, limit [its] review to the evidence relied upon by the [federal agency] in reaching the challenged decision," and holding that reviewing whether the plaintiffs waived issues by inadequately noticing them in the district court was properly based on the

---

[2/] While Olenhouse outlines the principles of judicial review of final agency action or inaction under the APA, "nothing in Olenhouse (or, for that matter, other controlling case law or the APA itself) precludes an APA-based complaint from being summarily dismissed pursuant to Federal Rule of Civil Procedure 12(b)." Kane County, 562 F.3d at 1086.

Federal Rules of Appellate Procedure, not the Federal Rules of Civil Procedure).[3]/

II. COMPILING THE ADMINISTRATIVE RECORD NOW WOULD BE PREMATURE, WOULD INTERFERE WITH THE ONGOING AGENCY DECISION-MAKING PROCESS, AND MAY ULTIMATELY BE UNNECESSARY

In its motion, Plaintiff alleges that "there is no administrative record concerning defendants' implementation of the current iteration" of the CMRR-NF and that "there is no administrative record available that supports defendants' current actions." Pl. Mot. ¶¶ 4, 5. Plaintiff's assertion that there is no administrative record is simply wrong.

The U.S. Department of Energy/National Nuclear Security Administration ("DOE/NNSA") has already completed extensive environmental review of the proposed CMRR-NF in accordance with NEPA. The original review culminated in a November 2003 Environmental Impact Statement ("EIS") and a February 12, 2004 Record of Decision ("ROD") that approved construction of CMRR-NF and the associated Radiological Laboratory Utility Office Building ("RLUOB"). Since the 2004 ROD, new developments and information have necessitated modifications in the design of the proposed CMRR-NF. In continuing compliance with NEPA, DOE/NNSA elected to prepare a Supplemental EIS ("SEIS") to further analyze potential environmental impacts as DOE/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. The documents and decisions supporting the 2003 EIS, 2004 ROD, and soon to be issued SEIS all

---

[3]/ In addition to being contrary to clear admonitions of the Tenth Circuit in Olenhouse, Plaintiff's motion for a pretrial scheduling conference and order also fails under the plain language of Rule 26(f) itself, which expressly exempts actions for review on an administrative record from initial disclosure and conference of the parties. Fed. R. Civ. P. 26(f)(1) (requiring a conference of the parties "[e]xcept in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)"); Fed. R. Civ. P. 26(a)(1)(B)(i) (exempting "an action for review on an administrative record").

exist and would be compiled, certified, and lodged as an Administrative Record at a time designated by the Court should this case proceed beyond a ruling on Federal Defendants' pending motion to dismiss.

The compilation of an Administrative Record for such a complex and lengthy ongoing administrative decision-making process, which dates back well more than a decade, is an expensive and time-intensive process. Importantly, the same DOE/NNSA personnel who would be tasked with compiling this Administrative Record are also involved with preparation of the SEIS. As a result, unnecessarily and prematurely compiling an Administrative Record for Plaintiff's claims would not only come at substantial taxpayer expense, but would also divert resources and personnel dedicated to advancing the NEPA process for the CMRR-NF. While a delay in the decision-making process may serve Plaintiff's avowed interests in obstructing this project, it would plainly prejudice the United States' significant national security and international policy interests in reaching a timely decision as to how to move forward with this critical facility. Indeed, the same considerations that dictate that this appeal should be dismissed on mootness and/or ripeness grounds dictate that Plaintiff's request to proceed with the merits portion of this case is premature and potentially unnecessary, and should be denied to prevent interference with the ongoing federal agency administrative proceedings and compliance with NEPA.

Plaintiff baldly asserts that "as a consequence of the absence of a scheduling order and defendant's refusal to confer, Plaintiff has been constrained to rely solely upon publicly-available information to support its motion for injunctive relief." Pl. Mot. ¶ 4. Plaintiff, however, did not request a Rule 26(f) conference *until March 8, 2011*, just three days before filing the motion to compel, and almost four months after Plaintiff filed its motion for preliminary injunctive relief and two

months after it filed its reply in support of injunctive relief. See Dkt. No. 13 (filed Nov. 12, 2010), Dkt. No. 30 (filed Jan. 14, 2010). Thus, even if Federal Defendants had immediately agreed to Plaintiff's request to engage in pretrial procedures that the Tenth Circuit in Olenhouse called "illicit," see 42 F.3d at 1579,[4]/ it would not have obtained any additional materials in the three days prior to its filing of its motion to compel. Plaintiff's attempt to fault Federal Defendants for its unsubstantiated and unexplained claim that it did not have enough materials to support its motion for a preliminary injunction--which Plaintiff supported with a deluge of hundreds of pages of exhibits--is contrived, at best.

CONCLUSION

For the foregoing reasons, Plaintiff's motion to compel should be denied. If Plaintiff's appeal should survive Federal Defendants' motion to dismiss, the Parties can confer on a time line for Federal Defendants to the expense and time of compiling and producing the Administrative Record for Plaintiff's claims, and a schedule can be developed for briefing Plaintiff's claims on the merits. Until that time, Plaintiff's attempt to compel inapplicable pretrial procedural requirements is both misplaced and premature.

---

[4]/ See id. ("The District Court's reliance on arguments, documents and other evidence outside the administrative record is due, at least in part, to the *illicit procedure* it employed to determine the issues for review [which included] process[ing] the . . . appeal as a separate and independent action, initiated by a complaint and subjected to discovery and a 'pretrial' motions practice.") (emphasis added); see also id. at 1579-80 ("This process, at its core, is inconsistent with the standards for judicial review of agency action under the APA. The use of [dispositive motions practice based on discovery and other pretrial procedures] permits the issues on appeal to be defined by the appellee and invites (even requires) the reviewing court to rely on evidence outside the administrative record. Each of these impermissible devices works to the disadvantage of the appellant. We have expressly disapproved of the use of this procedure in administrative appeals in the past, and explicitly prohibit it now.") (footnotes omitted).

Respectfully submitted on this 28th day of March, 2011.

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

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

/s/ Andrew A. Smith
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

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2011, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, which transmitted a Notice of Electronic Fling to the following CM/ECF registrants:

THOMAS M. HNASKO
DULCINEA Z. HANUSCHAK
P.O. Box 2068
Santa Fe, NM 87504
Phone: (505) 982-4554/Fax: (505) 982-8623
thnasko@hinklelawfirm.com
dhanuschak@hinklelawfirm.com

DIANE ALBERT
2108 Charlevoix St NW
Albuquerque, NM 87104
Phone: (505) 842-1800
diane@dianealbertlaw.com

LINDSAY A. LOVEJOY, JR.
Law Office of Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road #1001A
Santa Fe, NM 87507
Phone: (505) 983-1800/Fax: (505) 983-4508
lindsay@lindsaylovejoy.com

Attorneys for Plaintiff

/s/ Andrew A. Smith
ANDREW A. SMTH
U.S. Department of Justice