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 OBJECTIONS TO MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

Pursuant to 28 U.S.C. § 636(b)(1)(c), plaintiff the Los Alamos Study Group ("plaintiff") respectfully objects to the Proposed Findings and Recommended Disposition of the Honorable Alan C. Torgerson, filed January 6, 2011, (Docket No. 25) recommending dismissal of plaintiff's complaint based on the doctrine of prudential mootness (the "Magistrate's Report"): ¶ 5, 15, 16, 17, 25, 26, 27, and 29.

Specific Findings and Conclusions

Pursuant to 28 U.S.C. § 636(b)(1)(c), plaintiff is entitled to *de novo* review of the findings and conclusions to which plaintiff objects. Plaintiff respectfully objects to the description of the District Judge's consideration of the Magistrate's Report as "appellate

review," which is incorrect. Plaintiff objects to the following Findings and Conclusions in the Magistrate's Report and identifies separately the section of legal argument directed to each finding and conclusion.

Introduction

The Magistrate's Report incorrectly employs the seldom-used doctrine of "prudential mootness" to dismiss claims of ongoing violations by defendants of the National Environmental Policy Act ("NEPA"). Plaintiff's suit is based on the well-known principle that NEPA, as our most important national environmental statute, imposes an obligation on all federal agencies to comply with and analyze all reasonable alternatives *before* implementing a major federal action. Although defendants have clearly not complied with this requirement, they have announced that they plan to do further NEPA analyses and issue a Supplemental Environmental Impact Statement ("SEIS"). Based on defendants' assurance, the Magistrate recommends that the Court apply the doctrine of "prudential mootness" and that this case be dismissed as moot. *See* Magistrate's Report ¶ 5. But established case law holds that a NEPA claim cannot be held moot on the ground that the defendant agency promises to issue further NEPA documents. It is easy to promise to issue a new NEPA analysis. Plaintiff respectfully submits that the Magistrate's mistaken application of "prudential mootness" could easily be used to nullify any NEPA claim – overriding NEPA's direction to federal agencies to analyze all alternatives prior to decision-making – and would render the NEPA a paperwork nuisance whose substance can easily be avoided.

The Magistrate's Report misapplies the doctrine of prudential mootness because defendants are engaged in ongoing NEPA violations. There is no basis to find that the

defendants have in any way changed their commitment to the federal project that is in dispute, and meaningful relief can be afforded to plaintiff.

The Magistrate's Report disregards the record evidence demonstrating that the construction of the CMRR-NF and interconnected components has begun in direct contravention of NEPA. It incorrectly sanctions an irretrievable commitment to further detailed design in violation of defendants' own departmental guidance for the NEPA process. The Magistrate's Report also misapprehends the limited role of a SEIS, which does not include a consideration of currently available and realistic alternatives and may prevent judicial review of defendants' failure to consider those alternatives. Plaintiff submits that the Court's *de novo* review of this matter should result in rejection of the Magistrate's Report in its entirety.

I. The Magistrate's Report Misconstrues and Misapplies the Doctrine of Prudential Mootness.

The Magistrate's Report does not cite any NEPA case supporting discretionary dismissal under the doctrine of prudential mootness. Since NEPA requires agency analysis of environmental impacts *before* committing to a project, NEPA cases (discussed below) generally become moot only when the project is substantially completed. It is emphatically not the law that a NEPA case becomes moot when an agency states that it hopes, in the future, to fulfill its NEPA obligations. *Blue Ocean Preservation Soc'y v. Watkins,* 767 F. Supp. 1518, 1523-24 (D. Haw. 1991) so explains:

> This is not a case in which the government has already prepared an EIS, or even commenced such preparation. Plaintiffs cite numerous cases for the proposition that a suit to compel a future action is moot only after it has been 'fully and irrevocably carried out.' *E.g., Univ. of Tex. V. Camenisch,* 451 U.S. 390, 398 (1981). To the court, this seems axiomatic. Accordingly, a suit to compel an EIS is rendered moot *when the EIS is completed* and filed. *Romero-Barcelo v. Brown,* 643 F.2d 835, 862 (1st Cir. 1981); *City of Newport Beach v. Civil Aeronautics Bd.,* 665 F.2d 1280 (D.C. Cir. 1981); *Upper Pecos*

Ass'n v. Stans, 500 F.2d 17 (10th Cir. 1974). Here, of course, the EIS process is not only unfinished, it has not begun.

Thus, a defendant's plan to carry out future NEPA analyses does not excuse its current violations. *Portland Audubon Soc'y v. Babbitt,* 998 F.2d 705, 709 (9th Cir. 1993).

The doctrine of prudential mootness applies only when "circumstances have changed since the beginning of litigation that forestall meaningful relief." *Southern Utah Wilderness Alliance v. Smith,* 110 F.3d 724, 727, 729-30 (10th Cir. 1997) (defendants satisfied Endangered Species Act consultation requirement after lawsuit was filed). For prudential mootness, the court must determine that circumstances have so changed that injunctive relief can serve no purpose; then the court may stay its hand and withhold the relief it has the *power* to grant. *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation,* 601 F.3d 1096, 1121 (10th Cir. 2010) (emphasis in original) (citing *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997). No such situation is presented here.

Prudential mootness may occur in a NEPA case if circumstances change so that the project is essentially completed. In *Sierra Club v. U.S. Army Corps of Eng'r*, 2008 W.L. 2048359, at *1-2 (3d Cir. 2008), the only case found by plaintiff where the court applied prudential mootness to dismiss a NEPA claim, the plaintiff's NEPA, APA, and Clean Water Act claims challenging a permit to fill wetlands were held prudentially moot. *Id.* During the litigation, all but 0.12 acres of 7.69 acres of the wetlands had been filled. Since the project had been completed, no opportunity existed for "meaningful relief." *Id.* In contrast, in *Crutchfield v. U.S. Army Corps of Eng'r*, 192 F.Supp. 2d 444 (E.D. Va. 2001), the plaintiff's NEPA, Clean Water Act, and National Historic Preservation Act claims *were not* prudentially moot because work *remained to be done on defendant's project.* Similarly, in *Sierra Club v. Babbitt*, 69 F.

Supp. 2d 1202 (E.D. Cal. 1999), the court rejected defendant's contention that plaintiff's NEPA and Wild and Scenic River Act claims were prudentially moot, even though defendant had already constructed most of the highway project. As to the remaining percentage that was not substantially complete, meaningful relief could be accorded under NEPA, and plaintiffs were entitled to a preliminary injunction. *Id.*

The facts here are wholly inconsistent with application of prudential mootness. The project has not been completed, nor has it progressed to the point where injunctive relief based on NEPA would be meaningless. To the contrary, injunctive relief could not be more timely to prevent an outcome like that in *Sierra Club v. U.S. Army Corps of Eng'r*, or even in *Sierra Club v. Babbitt*, where substantial completion of their respective projects rendered injunctive relief meaningless.

And, contrary to the Magistrate's recommended findings, defendants have consistently been, and remain, committed to construction of the CMRR-NF project as currently proposed. There has been no change in that agency policy. But the principles of prudential mootness ask whether the defendants have so changed the policies assailed by the plaintiff that there is no purpose to an injunction. Plaintiff's complaint seeks an injunction against the implementation of the CMRR-NF project, based upon (1) lack of an applicable EIS or ROD, (2) failure to address cumulative impacts, (3), lack of a mitigation plan, (4) failure to integrate NEPA analysis into decision making, and (5) lack of public participation. These are the claims that defendants argue are moot, but they are clearly not moot. Here, plaintiff's claims, and the demonstrable facts, are that defendants have plunged forward with design and construction of the CMRR-NF without

doing the analysis called for by NEPA, and there is nothing to show that defendants have slackened in the slightest in their determined implementation of the project.

II. Plaintiff's Claims for Injunctive Relief are Timely and Ripe for Consideration.

Although the Magistrate's Report speaks in terms of prudential mootness, the findings and conclusions suggest, albeit incorrectly, that is the suit is not ripe for consideration. Plaintiff's claims are clearly ripe. The NEPA violations cannot be disputed. The CMRR-NF budget has exploded from $350-$500 million to $3.7-$5.8 billion, both because of geological conditions, and because the "purpose and need" of the facility have greatly expanded to include the so-called "hotel concept," which was not mentioned, analyzed, or even considered in the 2003 EIS. There has been an increase in concrete requirements from 3,194 cubic yards to 371,000 cubic yards, an increase in steel requirements from 242 tons to 18,539 tons, and the use of more steel than the Eiffel Tower. These massive changes and the current alternatives to them have never been analyzed in any EIS, nor have they been compared to any reasonable alternatives that presently exist in view of the exponential cost increases for the project. The Magistrate's Report suggests that the SEIS will address ordinary "design modifications that came to light after the completion of the 2003 EIS," which were precipitated by "newly discovered geological information." But the changes are much greater than this statement suggests. The 2003 EIS analyzed an entirely different design from the present CMRR-NF, with the only similarities being (i) the name of the facility, (ii) the location of the facility, and (iii) the general purpose of the facility.[1] That eight-year old EIS clearly does not support construction of the

[1] Even the purpose of the facility has changed dramatically. The current iteration of the CMRR-NF is based on the "hotel concept" to accommodate future unknown missions.

present CMRR-NF, and there is no claim that the subsequent SWEIS or the CTSPEIS, adequately analyzes the planned CMRR-NF and its reasonable alternatives.

Defendants have made and are continuing to make an "irretrievable commitment of resources" to the CMRR-NF, in plain violation of NEPA. 42 U.S.C. § 4332(2)(C)(v). Defendants have engaged in "final agency action" by implementing the 2010 CMRR-NF in violation of NEPA. *Catron Cnty. Bd. of Comm'rs v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996) ("alleged failure to comply with NEPA constitutes 'final agency action,' see 5 U.S.C. § 551(13)"). *See New Mexico, ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009) ("assessment of all 'reasonably foreseeable' impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made."). Consequently, the continued construction of the CMRR-NF and related facilities creates a claim that is undeniably ripe for adjudication.

Defendants' own conduct demonstrates an irrevocable commitment to the present iteration of the CMRR-NF. Under DOE Order 413.3B (November 29, 2010), DOE has scheduled Critical Decisions 2 and 3 ("CD 2-3") – establishment of a project baseline and start of construction/execution – for the infrastructure package for March 2011. Plaintiff's Response to Motion to Dismiss, Mello Aff. 1, ¶ 71 citing Bretsky presentation, June 16, 2010 at 7 (Docket No. 10). DOE acknowledges that, at this time, and even before completion of the SEIS, the "project scope should be finalized and changes . . . should be permitted only for compelling reasons . . . ." Plaintiff's Reply in Support of Preliminary Injunction (Order 413.3B, at C-6) (Docket No. 30). This is not "preliminary" design activity pending the completion of the SEIS, as concluded in the Magistrate's Report. *See* Magistrate's Report, ¶ 29. On the contrary, by

March 2011, the design of the infrastructure package will be fixed, as a compliment to other already-constructed aspects of the CMRR-NF, including the RLUOB. Moreover, the design of successive packages, Pajarito Road, basemat, structure package, would become fixed in order. In this process there certainly is no room for the consideration of "reasonable alternatives," including a placement of CMRR-NF functions in another location or elsewhere in the NNSA weapons complex, or the management of existing space and facilities at LANL to suit NNSA's needs.

The fact that construction of the CMRR-NF has been and remains ongoing is underscored by the nature of the construction that the 2004 ROD authorized. The Magistrate's Report correctly notes, in Finding No. 8, as follows:

> The 2004 ROD announced that the *CMRR project would consist of two buildings*: a single, above-ground consolidated special material-capable, hazardous category 2 laboratory building (the CMRR-NF), and a separate but adjacent administrative office and support building, the radiological laboratory utility office building ("RLUOB"). [Doc. 9-1 at ¶ 10.]

Magistrate Report ¶ 8 (emphasis added). Thus, the CMRR-RLUOB and the CMRR-NF were designed to operate as a single facility, and construction of the CMRR-RLUOB amounts to partial construction of the CMRR-NF. The CMRR-NF excavation has been dug, and the joint facilities contained within the CMRR-RLUOB have been built. The tunnel connecting both buildings has already been built halfway to the CMRR-NF site. The utilities for both buildings, and the offices for personnel in both buildings, are all contained within the RLUOB, which as a structure is finished. Thus, the Magistrate incorrectly states that these "on-going activities . . . are *preliminary.*" Magistrate's Report ¶ 29 (emphasis added). His statement that the "actual construction of the CMRR-NF will not occur until after the SEIS is completed and a new ROD

issued" (*id.*) is also clearly incorrect. The Magistrate's remark that the defendants may continue with the infrastructure package in March 2011 without judicial intervention[2] is not supported by the law: Construction has begun on the interconnected projects, and it is inappropriate to allow any further implementation without NEPA compliance.

The Tenth Circuit addressed the issue of project implementation in *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002), and reached a conclusion directly contrary to the Magistrate' Report in the present case. In *Davis*, defendants opposed a preliminary injunction of Phase I of a project, arguing that plaintiffs would be injured only by long-term damages from Phase II. Contrary to the Magistrate Report's recommendation in the present case, the Tenth Circuit in *Davis* ruled that an injunction was required, because allowing *any part* of the project to go forward would make injury more likely:

> 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.

Davis v. Mineta, 302 F.3d at 1115, n. 7.

The Magistrate erroneously concluded that defendants are merely engaged in what the Magistrate considered benign design activities, which the Magistrate somehow believed do not prejudice their selection of alternatives. However, "under NEPA regulations, it is illegal for an agency to continue an activity while an EIS is being prepared unless such action 'will not

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[2] The Magistrate's Report criticized plaintiff for suggesting that the infrastructure construction package for CMRR-NF may begin in March 2011, although counsel was being candid because plaintiff does not have access to DOE and NNSA documents demonstrating the exact date of infrastructure activities. It also is very unlikely that defendants would voluntarily relinquish that information.

prejudice the ultimate decision on the program.' 40 C.F.R. § 1506.1(c); *see also* 10 C.F.R. § 1021.211." *Los Alamos Study Group v. O'Leary* (Slip Op. at 19). Defendants have asserted, and the Magistrate's Report apparently accepted, that "advancing planning and design" of the CMRR-NF before NEPA analysis will not "limit or prejudice the choice of reasonable alternatives or result in any irreparable injury." (Defendants' Brief in Opposition to Motion for Preliminary Injunction at 21, n. 13) (Docket No. 23). This statement flatly contradicts DOE's own NEPA guidance. Plaintiff's Reply in Support of Motion for Preliminary Injunction (Guidance Regarding Actions That May Proceed During the National Environmental Policy Act (NEPA) Process: Interim Actions, DOE, Office of NEPA Policy and Compliance, June 17, 2003) (Docket No. 30). The DOE guidance prohibits interim design work pending NEPA compliance because it tends to exclude other alternatives and to give a schedule advantage to the project under design, *i.e.,* the CMRR-NF as currently proposed:

> Proceeding with detailed design under DOE 0413.3, 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. (at 4).

Thus, detailed design work, which defendants misleadingly promote as "aid[ing] the SEIS decision-making process," and "helping to identify and clarify potential environmental impacts in furtherance of the NEPA process" (*id.* 13 n. 6; *see id.* 20 n. 12), here will *only* involve the CMRR-NF, not any alternatives, and will only entrench defendants' commitment to that project and increase the likelihood of constructing the CMRR-NF as presently proposed. It should not be permitted, consistently with defendants' own guidance.

III. The SEIS is a smokescreen to fend off an injunction.

Defendants point to their plan to prepare a SEIS as somehow mooting the dispute over their unquestionable NEPA violations and the appropriate remedy. One who claims mootness bears the "heavy burden of persuad[ing] the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Env't Serv.,* 528 U.S. 167, 189 (2000). Defendants in this case do not claim that they have stopped *any* of the conduct in issue. Even voluntary cessation of an alleged illegal practice, which defendant is free to resume, does not cause mootness. *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1115 (10th Cir. 2010). Voluntary cessation of the challenged conduct does not moot litigation unless it is clear that "defendant has not changed course simply to deprive the court of jurisdiction," *Nat'l Adver. Co. v. City of Miami,* 402 F.3d 1329, 1333 (11th Cir. 2005). Here, defendants have stopped nothing of the challenged conduct. *A fortiori* there is no mootness. *See Cnty. of Los Angeles v. Davis,* 440 U.S. 625, 632 (1979). Even where there is a cessation of illegal actions, there is no mootness unless there is "no reasonable expectation that the alleged violation will recur." *Los Angeles,* 440 U.S. at 631. Here, the illegalities are recurring daily as defendants move forward with design and construction. Neither is there even an inadequate "informal promise or assurance" to cease implementing the project, *Silvery Minnow,* 601 F.3d at 1118; instead, defendants are openly proceeding to implement by design and construction. It cannot be concluded that plaintiff's claims are moot based on the prospect of a SEIS.

According to the Magistrate's Report, the future SEIS will cure all NEPA deficiencies and thus "circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief." *See* Magistrate's Report ¶ 25 (citing *Southern Utah Wilderness*

Alliance v. Smith, 110 F.3d at 727). But the promise of future compliance, here without a cessation of illegalities, does not moot an existing dispute. The SEIS is merely a smokescreen to blind the Court to the present and actual NEPA violations. This Court stated, in *Los Alamos Study Group v. O'Leary,* No. 94-CV-D1306 (ELM) (D.N.M. January 26, 1985) (Exhibit A), that DOE violated NEPA by beginning construction of the Dual-Access Radiographic Hydrodust Test (DARHT) project before it completed NEPA compliance and that an injunction must issue, regardless of DOE's promises to prepare further NEPA documentation:

> The decision by DOE to begin an EIS at this point does little to ameliorate the fact that it was not done before the DARHT project began. *See Weinberger v. Romero-Barcelo,* 4056 U.S. 305, 317 n. 12 (the cessation of violations does not bar issuance of an injunction (citations omitted); *see also Public Serv.,* 825 F.Supp. at 1503-04 (agency's statements that it will perform the required NEPA analysis is not sufficient to invoke voluntary cessation exception to mootness doctrine). Indeed, some of the damage NEPA seeks to prevent may already have been done. Biases toward one alternative or another may already exist as construction was allowed to start and progress without public input.

Thus, in *Los Alamos Study Group*, Judge Mechem preliminarily enjoined DOE from all further construction of the DARHT facility, "or from taking any other actions in furtherance thereof" where DOE had failed to issue an EIS analyzing the environmental impacts of the proposed facility and the reasonable alternatives to it.

Here, defendants' promise to prepare a SEIS comes with no commitment to pause the project while they prepare a SEIS and then weigh the results of their analysis. Indeed, the analysis promises very little, because defendants' Notice of Intent to prepare a SEIS identifies only three alternatives: the CMRR as originally selected in the 2004 ROD, the existing CMR building without renovation, or some unspecified upgrade of the existing CMR building

Plaintiff's Reply in Support of Motion for Preliminary Injunction (Ex. 21: 75 Fed. Reg. 60745 (Oct. 1, 2010)) (Docket No. 30). No one disputes that the CMRR as analyzed in the 2003 EIS is no longer a viable alternative and will not be built. Use of the existing CMR was already rejected by defendants in the 2004 ROD, so that alternative is likewise off the table. Finally, upgrading the CMR building may be feasible, but there are clearly many other reasonable alternatives. There is not likely to be consideration of a range of fresh alternatives, including those comparable to the multi-billion dollar scale and decade long schedule for the new CMRR-NF and others smaller in scale, such as usage and renovation of other existing facilities, utilization of poorly-used capacity at LANL, and the distribution of functions to locations other than LANL. Thus, the SEIS can play little role, because it will exclude the analysis of all reasonable alternatives that would be contained in a new EIS, and it will only further entrench defendants in their decision to continue implementing the CMRR-NF without NEPA compliance.

The Magistrate's finding is incorrect that the preparation of the SEIS "includes a public scoping process which involves alternatives." *See* Magistrate's Report ¶ 15. The alternatives proposed by defendants are hollow. And plaintiff surely cannot "participate in determining the scope of the environmental analysis," as the scope has been pre-determined to include the three unrealistic choices. Such limitations reduce the SEIS to a ceremonial nod to the idea of NEPA compliance.

Defendants' additional paperwork—the unsigned and unissued supplement analysis (which concludes that no further NEPA studies whatsoever are required for the 2010 CMRR-NF), and defendants' supposed "prudential decision" to conduct a SEIS – shows no promise of

having the slightest influence on defendants' announced implementation of their decision to build the CMRR-NF. Any finding that defendants have changed their policy to implement the CMRR-NF project would be clear error. And it is wholly implausible for the Magistrate to state that "the SEIS may very well address the plaintiff's concerns about the CMRR-NF," because the presently-proposed facility and its alternatives have never been analyzed under an EIS, and the Notice of Intent gives no reason to hope that such analysis will ever happen. Magistrate's Report ¶ 27. It follows that the statement that "Plaintiff will have ample opportunity to renew its complaint if it finds it necessary when the SEIS is filed and before any construction begins," Magistrate's Report ¶ 29, is either wrong or irrelevant.

Moreover, the Magistrate's Report misapprehends the nature and purpose of a SEIS. Magistrate's Report ¶¶ 25, 29. It repeatedly refers to the SEIS as "superseding" the archaic 2003 EIS. The SEIS, however, would do no such thing. The SEIS is designed to supplement the 2003 EIS based on changed circumstances. Therefore, CEQ regulations on a SEIS do not require additional scoping, *i.e.*, the examination of a fresh suite of alternatives. Rather, the SEIS need only address the incremental environmental impacts of changed circumstances on the already-chosen project. Thus, the Magistrate's Report has provided a recipe for defendants to avoid judicial review altogether: Defendants prepared an EIS eight years ago, and issued a ROD based on scoping and consideration of all reasonable alternatives at that time. Eight years later, defendants abandoned the previously-approved project altogether, save for the name (CMRR-NF), the location of the project (Los Alamos, New Mexico), and the general purpose (support for pit manufacturing). Defendants then dramatically changed the entire project and transmuted it into a $6 billion endeavor that bears no relationship to the project approved eight years earlier.

They then issued a Notice of Intent to prepare a SEIS to analyze alternatives that are mostly impracticable, implausible, and illusory. After the SEIS is issued, an injured party cannot complain about the failure to examine reasonable alternatives because the CEQ regulations do not require the SEIS to include any scoping whatsoever.

Plaintiff has valid NEPA claims *now,* and the SEIS is only a device to deflect injunctive relief. The Magistrate's Report, if accepted by the Court, would eviscerate NEPA's fundamental purpose of scrutinizing alternatives for federal action "before they get off the planning board." Plaintiff's Reply in Support of Preliminary Injunction (Statement of Sen. Jackson, Chairman of Senate Interior and Insular Affairs Committee at the time of NEPA enactment, 115 Cong. Rec. S 29055 (1969)) (emphasis added) (Docket No. 30). The Report should be rejected.

IV. Plaintiff's Claims for Injunctive Relief are Ripe for Consideration.

Although the Magistrate's Report speaks in terms of prudential mootness, the findings and conclusions suggest, albeit incorrectly, that is the suit is not ripe for consideration. Thus, the Magistrate's Report seems to turn on some concept of prematurity, stating that "because defendants are currently conducting a SEIS which has not yet been completed, it is *premature* for the Court to order defendants to prepare a new EIS." Magistrate's Report ¶ 27. The Report also accepts as fact defendants' claims that they have not decided whether to build the proposed CMRR-NF, and that their decision would be based on the SEIS. It states, "If, after completion of the SEIS, NNSA *decides to proceed* with the construction of the proposed CMRR-NF, the building is not expected to be occupied and operational until 2022." Magistrate's Report ¶ 17 (emphasis added). It states that NNSA will decide, "based on that [SEIS], *how best to proceed* with the proposed CMRR-NF." Magistrate's Report ¶ 25. It also states that "Construction of the

CMRR-NF will not occur until *after* the SEIS is completed and a new ROD issued." Magistrate's Report ¶ 29 (emphasis in original). These statements stand in direct contrast to the incontrovertible evidence that defendants have already committed to build the CMRR-NF, that irretrievable commitments of resources have been made, and that construction is proceeding. The case is ripe for decision, and the Court should exercise of its jurisdiction accordingly

Conclusion

Plaintiff respectfully submits that it has established the existence of NEPA violations and the need for a new environmental analysis of the 2010 CMRR-NF, which has never received consideration under any environmental study. The proposed SEIS and the notice of intent to prepare it give no promise of future NEPA compliance and are designed to entrench defendants' predetermination for the 2010 CMRR-NF. Most importantly, the possibility of future NEPA documents does not moot a suit about defendants' existing NEPA violations.

If, as defendants suggest, the present iteration of the CMRR-NF is the best alternative among those available, then surely there should be no concern that the CMRR-NF would emerge as the successful candidate in a record of decision based on a new EIS. To issue a new EIS would comply with the stated purpose of our country's most important environmental statute, which is to inform federal agencies in the decision-making process, by analyzing currently available alternatives and associated environmental impacts.

Plaintiff has demonstrated, in its memorandum in opposition to defendants' motion to dismiss and in plaintiff's motion and memoranda in support of preliminary injunctive relief, that defendants have been and remain in violation of NEPA. The Magistrate's recommendation would condone those violations in circumstances that no court has ever termed mootness. There

can be no doubt that the case is ripe for consideration. Plaintiff respectfully requests that the Court reject the Magistrate's Report in its entirety and proceed expeditiously to the preliminary injunction stage of this case.

Respectfully submitted,
[*Electronically Filed*]

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Certificate of Service

I hereby certify that on this 20th day of January, 2011, I filed the foregoing PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION electronically through the CM/ECF System, which caused the following parties or counsel of record to be served by electronic means as more fully reflected in the Notice of Electronic Filing.

John P. Tustin

Andrew A. Smith

/s/ Thomas M. Hnasko
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