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 STEPHEN CHU, in his capacity as SECRETARY, DEPARTMENT OF ENERGY; NATIONAL NUCLEAR SECURITY ADMINISTRATION; THE HONORABLE THOMAS PAUL D'AGOSTINO, in his Capacity as ADMINSTRATOR, NATIONAL NUCLEAR SECURITY ADMINISTRATION,

Defendants.

PLAINTIFF'S RESPONSE TO
FEDERAL DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Defendants have been pursuing their plan to construct a Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF" or "Nuclear Facility") building since 2001, and their efforts continue unabated and have recently intensified—still without any adequate environmental impact statement ("EIS") or any lawful Record of Decision ("ROD") authorizing the CMRR-NF. Through September 30, 2010, defendants received $289 million in appropriations for this project. In a dramatic increase, defendants have now received an additional $169 million for fiscal year 2011, which amount was obtained on an emergency basis last month. Some 283 employees or contractors are now at work on the project. Despite defendants' assertions that construction has not begun, it is clear to anyone observing from

Pajarito Road that a major construction program is under way at the site. This major federal effort is also part of an integrated and connected suite of projects—each of which affects the design of every other one—on which construction has already begun. The Nuclear Facility is by far the largest project in this suite.

Defendants' motion, seeking dismissal on jurisdictional grounds, seriously misconstrues the basis for this lawsuit. The Nuclear Facility is not covered by *any* EIS under the National Environmental Policy Act ("NEPA"), although the law clearly requires it. The 2003 EIS did not purport to address the current project, nor did the 2004 ROD approve it. Rather, the 2003 EIS concerned what amounts to a very different project with much smaller environmental impacts, and alternative versions of that project, but it did not address the massive venture now in progress, which was conceived later. Plaintiff Los Alamos Study Group has sued to require defendants to comply with NEPA and cease all design, planning, and construction activity before the project goes any further. Defendants assert that the Court has no jurisdiction, because they promise to create some more NEPA paperwork, which they say will retroactively legitimize the massive project. Defendants' strategy would prevent NEPA from guiding agency decision-making and relegate it to a meaningless *post-hoc* role.

By their motion, defendants inconsistently argue that this lawsuit comes too late—and also comes too soon. They assert that the statute of limitations has passed, because this case involves inapplicable NEPA documents issued more than six years ago. They also argue that this case comes too soon, because it should await defendants' next set of NEPA documents, which they promise for next year. They argue that the CMRR-NF project is critical to national security—and simultaneously assert that they have not really decided whether they want to build the CMRR-NF at all.

None of defendants' arguments has any credible basis, as we show herein. This project, to which the defendants are clearly committed, is undeniably a major federal action significantly affecting the quality of the human environment and is required to be preceded by an environmental impact statement ("EIS") under 42 U.S.C. § 4332(2)(C). Under NEPA, that EIS must be prepared and reviewed by the decision makers *before* they make a decision whether to proceed. 42 U.S.C. § 4332(2)(C). Defendants have caused a breakdown in that statutorily-mandated process. They purported to decide in 2004 to construct the simpler CMRR described in the 2003 EIS—but since then defendants have changed their plans out of the public eye, and plunged forward with a massive new CMRR-NF project that departs wholesale from the 2004 decision and far exceeds, in the resources it requires and the impacts it will create, anything contemplated by the 2003 EIS. The extent of their departure has only become public this year, and plaintiff promptly brought suit to enforce NEPA.

We show herein that the case is not time-barred and is ripe for decision, and that defendants' claim of mootness is merely another ploy to avoid scrutiny and maintain the project's momentum until scrutiny becomes pointless. Contrary to defendants' arguments, this case is well within the Court's jurisdiction and presents a problem calling for the Court's prompt attention.

LEGAL STANDARD

Defendants' Motion to Dismiss is appropriately denied where a preponderance of the evidence demonstrates that the Court has subject matter jurisdiction in this case. *Port City Properties v Union Pacific R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008); *Lindstrom v. United States*, 510 F.3d 1191, 1193 (10th Cir. 2007); *Clark v. Meijer, Inc.*, 376 F.Supp.2d 1088, 1093 (D.N.M. 2005). Justiciability is demonstrated by "alleging the facts essential to show

jurisdiction and supporting those facts with competent proof." *U.S. ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 797-98 (10th Cir. 2002). The Court has broad discretion to freely weigh affidavits and other documents in resolving the jurisdictional issue. *Begay v. Public Serv. Co. of N.M.*, 2010 WL 1781900, at *7 (D.N.M. 2010); *Pettit v. New Mexico*, 375 F.Supp.2d 1140, 1145 (D.N.M. 2004). In the following Response and documenting submittals, plaintiff has provided significantly more than a preponderance of evidence that this Court has subject matter jurisdiction over this litigation.

FACTUAL BACKGROUND

Plaintiff is the Los Alamos Study Group, a citizen organization which seeks to determine the facts surrounding Department of Energy ("DOE") programs, including those at Los Alamos National Laboratory ("LANL") and to educate the public and persons in public office about those programs and policy questions. Plaintiff has about 2,691 members within 50 miles of LANL and about 2,341 within 30 miles of LANL. Plaintiff's members stand to be adversely affected by the short and long-term environmental impacts of the CMRR-NF project and related projects.

The CMRR project involves two new buildings at LANL Technical Area 55 whose purpose will involve operations with Plutonium. These are the Radiological Laboratory, Utility, and Office Building ("RLUOB"), which has been constructed and is now being outfitted, and the Nuclear Facility ("NF"), which is a subject of this litigation. Defendants are required to comply with NEPA in planning and carrying out federal projects, including the CMRR-NF project.

The CMRR-NF, as now planned, will store, manage, and process plutonium in quantities amounting to several metric tons. Actions planned for the CMRR-NF include analytical chemistry and materials characterization in aid of nuclear weapons design and

fabrication. The Nuclear Facility will increase LANL's capacity to manufacture new plutonium "pits," which are the core of the primary section of a nuclear weapon. Defendants have sought $225 million for the CMRR-NF project from Congress for Fiscal Year 2011, which began on October 1, 2010. Congress has passed, and the President signed, a Continuing Resolution that provides the full amount requested for nuclear weapons programs, including the CMRR-NF. The total includes $169 million for the proposed Nuclear Facility. (The FY 2011 amount may be compared with the FY 2010 appropriation of $58.2 million.) Total appropriations for the Nuclear Facility since 2000 have been $296 million.[1] Mello Affidavit, pp. 24-25, 35.

The 2003 EIS—the purported NEPA support for the construction of the CMRR-NF—analyzes certain construction alternatives, each of which includes largely similar facilities at one of two nearby technical areas. The facilities considered were "above-ground" structures, *i.e.*, construction would go no deeper than 50 feet, or "below ground," to 75 feet deep. There was no discussion of excavation deeper than this, and no acknowledgment that "below ground" construction would entail penetrating to a layer of poorly-consolidated volcanic ash and would thus generate extensive additional project requirements, costs, and environmental impacts. The 2004 ROD selected an alternative involving "above ground" construction, which was described as providing an upper bound on environmental impacts.[2] (69 Fed. Reg. 6967-72)(Feb. 12, 2004).

Defendants advised Congress in 2002 that *both* buildings of the CMRR-NF project could be constructed for approximately $350-500 million plus administrative costs. In 2003, they advised that the total for both buildings, with administrative costs, would be $600 million. In

[1] The $296 million includes an initial $7 million in an account that defendants were using, until 2002, to provide much-needed safety upgrades in the existing CMR building. Those safety upgrades were abruptly halted in favor of the CMRR project, described to Congress in 2002 as costing one-tenth as much as it actually will cost and requiring a decade less to complete. *See* Mello Affidavit, pp. 5-6, 10-11.

[2] Previously, in 1997, Defendants' NEPA analysis found that construction of a new Nuclear Facility would be too expensive, take too long, present too many risks to ongoing programs, and have too many environmental impacts. Environmental Assessment for the Proposed CMR Building Upgrades at the Los Alamos National Laboratory, Los Alamos, New Mexico, prepared February 4, 1997.

February of 2010, defendants estimated total costs of just the CMRR-NF at $3.4 billion. Authoritative press reports state that defendants are now using estimates significantly exceeding $5 billion. Mello Affidavit, pp. 10-11.

Defendants advised Congress in 2003 that both buildings of the CMRR-NF project would be completed in 2010, and the 2003 EIS estimated that the completion of construction would occur in 2009. Defendants now expect construction of the CMRR-NF to extend until 2020, with operations commencing in 2022. The delay of more than ten years has its own impacts, which must be analyzed, and creates the need for interim use of the existing CMR Building and, therefore, interim safety and efficiency measures that also are not discussed in the 2003 EIS. *Id.* at 11, 18.

After the issuance of the 2003 EIS, defendants changed the "design basis threat" standard for nuclear facilities so that above-ground facilities are now disfavored. Thereafter, defendants abandoned the selected "above-ground" design for the Nuclear Facility and moved to a design calling for excavation to 75 feet. Later, defendants decided that ground conditions require them to excavate to a depth of 125 feet. These changes fundamentally altered the facility design problem from that on which the 2003 EIS was premised and caused and will continue to cause major cost increases and environmental impacts.

In 2008, NNSA issued a Site Wide EIS ("SWEIS") for LANL. The SWEIS incorporated the publicly announced plan of 2003 for the CMRR-NF, without change or updating. Also in 2008, DOE's Complex Transformation Supplemental Programmatic EIS ("CTSPEIS") was issued. Again, DOE's EIS included the publicly announced plan of 2003 for the CMRR-NF, without change or updating. DOE then stated that "because there will be no change to what has already been analyzed, no further facility NEPA analysis is planned." In December 2008, NNSA

issued two RODs pursuant to the CTSPEIS which included a decision to proceed with design, construction, and operation of a Nuclear Facility at LANL—as analyzed in the 2003 EIS, and included, but not analyzed, in the SWEIS, and CTSPEIS.

Since 2003, new information has raised questions about the configuration and the very mission of the CMRR-NF. DOE's JASON advisory group issued a public report in 2006, stating that plutonium pits have a lifetime in excess of 100 years and will not need replacement within the lifetime of the CMRR-NF. Mello Affidavit, p. 8.

In 2007, a new Probabilistic Seismic Hazard Analysis was issued for LANL, containing a significantly increased estimate of the seismic hazard in probability and acceleration. The seismic information directly affects the engineering design, imposes significant additional demands for concrete and steel, and raises to great significance the thick layer of poorly consolidated volcanic ash beneath the site.

The current design for the CMRR-NF uses a "hotel concept," which incorporates large unsupported floor areas to accommodate different missions. *Id.* at 9. Under the newly-discovered seismic circumstances, this approach requires large increases in structural concrete and steel from amounts assumed in the 2003 EIS, with consequent environmental impacts.

The Defense Nuclear Facilities Safety Board ("DNFSB") in 2008 expressed concern about the CMRR-NF design from the viewpoints of seismic and other safety issues. In early 2009, the combination of seismic and safety issues had become so intractable that defendants stated that meeting industry-standard safety criteria might not be economically feasible. Congress subsequently required NNSA and DNFSB to certify that the questions had been resolved. *Id.* Certification was made in September 2009, based upon several major design

changes, including excavation of the layer of unconsolidated ash beneath the site and its replacement with concrete. Mello Affidavit, p. 9.

In May 2009, the Obama Administration formally ended the Reliable Replacement Warhead program, which had been the only large-scale pit production mission intended for the CMRR-NF. *Id.* at 9. Defendants then stated to Congress that they had not yet determined whether to proceed with the CMRR-NF project. *Id.* at 9-10.

In September 2009, DOE's JASON advisory group reported to NNSA that new pit production was not necessary for the indefinite maintenance of the nuclear weapons stockpile. *Id.* at 10. Defendants thereafter advised Congress that they planned to end pit production in FY 2011. *Id.* Defendants adopted a policy of managing the stockpile without pit manufacturing, which would recommence only at the direction of the President and Congress. Defendant NNSA in February 2010 began a review of the CMRR-NF project. In May 2010, the Senate Armed Services Committee noted that the question of project size of the CMRR-NF was an open one and reported its concern that defendants follow DOE Order 413.3, requiring the preparation of a complete project baseline, including an accurate cost estimate.

A public meeting in June 2010 revealed new aspects of the CMRR-NF project, including additional project elements, some of the impacts of these new elements, and several closely-connected projects on Pajarito Road and their impacts. The scope of the CMRR-NF and its direct and indirect environmental impacts have changed as follows:

1. The acreage required for construction or operations has increased significantly for construction yards and office space, parking lots, concrete plants, utilities, security, spoil disposal, storm water retention, housing of construction workers, and road realignment. *Id.* at 16-17.

2. Construction impacts will extend beyond TA-55 to TA-48, T-63, TA-66, TA-46, TA-50, and TA-54 or TA-36. Mello Affidavit, p. 17.

3. Concrete and soil/grout requirements have increased from 6,255 cubic yards to 347,000 cubic yards. *Id.* Production of the increased amount of cement and delivery of aggregate is likely to generate more than 100,000 MT of carbon dioxide in addition to mining impacts and other transport impacts. *Id.*

4. Steel requirements have increased from 558 tons to approximately 13,000 tons. *Id.* at 7-8, 17.

5. Construction employment has increased from a peak of 300 to 844. The increase will have impacts on local housing and infrastructure. *Id.* at 17.

6. The construction period has increased from 34 months to 144 months. *Id.* at 18.

7. Excavation spoils to be stored and disposed have increased from the vicinity of 100,000 cubic yards to the vicinity 400,000 cubic yards. *Id.* at 16, 18. The increase will have transport, storage, and disposal impacts, raising environmental, traffic, aesthetic and cultural issues. Defendants may use spoil to cap some of the LANL material disposal areas for radioactive and hazardous waste that will be undergoing closure (*id.* at 18), an action requiring its own environmental analysis.

8. The completion date of CMRR-NF construction has moved from 2009 to 2020, with operations beginning in 2022 at the earliest. *Id.* Interim facilities to be used in 2010 through 2022 have not been identified, nor have the impacts of interim use been analyzed.

9. Ancillary facilities now required for the CMRR-NF include a craft worker facility, an electrical substation, a truck inspection facility, and a warehouse. *Id.*

10. Pajarito Road is expected to be closed for two years; temporary or permanent bypasse(s) may be built. Mello Affidavit, pp. 16, 18.

11. Operations in other facilities along Pajarito Road may be displaced during construction, causing additional impacts. *Id.* at 18.

12. The expanded nature of the CMRR-NF calls for additional analysis of the impacts of decontamination and demolition of the facility. *Id.* at 7-8, 16-18, 36.

Thus, there are major aspects of the expanded-scope CMRR-NF that were not and could not have been mentioned, let alone analyzed, in the 2003 EIS, because the project has changed so greatly from the one analyzed then. Further, NNSA's willingness to proceed with a project of this much-enlarged scale means that there is a range of unexamined alternative projects of similar or lesser magnitude, cost, and duration that should be analyzed in NEPA documentation.

Despite their NEPA noncompliance, defendants are wholly committed to the CMRR-NF project in its current form. The project is now going forward, full steam ahead. Approximately 100 craft employees were at work on the CMRR-NF during Fiscal Year 2010, just ended, and in FY 2011 the number will rise to an estimated 125. (Bretzke presentation, slide 4) Support services are at 150 to 200 people. (*id.*, slide 5) Design projects now ongoing are the Infrastructure Package, the Pajarito Road Relocation, and the Basemat Package. (*id.*, slide 7). The Infrastructure Package Construction may begin in March 2011 and at a minimum includes:

1. A concrete batch plant—one of two;
2. Temporary utility installation;
3. Site preparation lay down;
4. Site utility relocation;
5. Site excavation; and

6. Soil stabilization.

DOE will issue Requests for Proposals for construction contracts in mid-2011 to cover:

7. Temporary utilities;

8. Nuclear Facility Utilities Relocation;

9. Nuclear Facility Site Excavation and Storm Pond;

10. Nuclear Facility Construction Offices; and

11. Elevators (late 2011).

Other project elements continue in FY 2012, including DOE's plans to award 35 separate construction packages. (McKinney presentation, slide 8)

NNSA headquarters has directed that LANL personnel plan for completion of the CMRR-NF by 2020, with operations to commence in 2022. (Holmes presentation slide 4). The Technical Safety Strategy is ready for the Definitive Design stage, consistent with NNSA and DNFSB validation. (*id.*) The plan is sufficiently complete that NNSA has completed a Documented Safety Analysis and a Preliminary Safety Analysis Report. (*id.*, slide 15) Technical baseline documents were scheduled for completion in summer of 2010.

The Obama Administration has made public its commitment to the CMRR-NF. Its position is stated in an exchange of letters with certain Republican Senators, whose support is sought in ratification of the strategic arms limitation treaty with Russia. To be explicit: In exchange for Senatorial promises to support New START, the Administration has committed to a nuclear weapons modernization program, of which the CMRR-NF is a major part. Thus, when NNSA personnel assert that NNSA is still considering whether to go forward with the CMRR-NF proposal (*e.g.*, D.Br. 2, 13, 16, 18, affidavit of D. Cook), such statements must be greeted

with disbelief: The Administration, at a very high level, has declared the project to be critical and is acting accordingly, in every way. Defendants may not pretend that it is an open question.

ARGUMENT

A. No Period of Limitations Supports Dismissal of this Case

Defendants seriously misapprehend the applicable statute of limitations and the fundamental nature of NEPA enforcement. Plaintiff is not challenging the 2003 EIS as inadequate in the abstract; rather, defendants are implementing a major federal action that has no NEPA support because the present iteration of the project was neither analyzed in the 2003 EIS, nor selected in the 2004 ROD. Thus, to the extent the 2003 EIS and the 2004 ROD are deficient, they have been rendered so by the federal defendants' 2009-10 decisions not to follow them. Consequently, plaintiff is not merely complaining about a deficient NEPA document, but because defendants are carrying out "major federal actions significantly affecting the quality of the human environment" without first basing their decisions upon a "detailed statement by the responsible official on (i) the environmental impact of the proposed action, (ii) the adverse impacts . . . (iii) alternatives," and other required analyses. 42 U.S.C. § 4332(C).

The continuing NEPA violations consist of defendants' programs of on-going design and construction—that were supposed to be analyzed in NEPA documentation but were not. Under NEPA, the period of limitations commences not from the issuance of NEPA documentation, but from the time the federal action fails to comply with the NEPA determination. Thus, in *Or. Natural Res. Council v. U.S. Forest Serv.,* 445 F.Supp.2d 1211 (D. Or. 2006), citizen groups sued under the APA, alleging that the Forest Service failed to comply with NEPA in awarding six timber sales. The Forest Service argued that the claims were barred under 28 U.S.C. § 2401(a). The court rejected the argument, stating the following:

> The Forest Service argues that the six year statute of limitations in 28 U.S.C. § 2401(a) bars the claims in the Third Amended Complaint, which ONRC filed on August 2, 2004. The agency claims that because the EAs which ONRC challenges in Count Two of the Third Amended Complaint were prepared more than six years before the filing of that amended complaint, the statute of limitations applies. However, the actions targeted in ONRC's claims in its Third Amended Complaint are the Forest Service's decisions to award the timber sales based on the original, inadequate EAs and then to proceed with the timber sales after preparing the SEAs. ONRC claims that these decisions were arbitrary and capricious because they were based on EAs and SEAs which, taken together, were flawed and inadequately supplemented and, as a result, violated NEPA. The Forest Service decisions to award five of the six timber sale contracts, the decisions to allow some logging of reduced areas to proceed on all six sales after the preparation of the SEAs in April 2004, and the alleged failure to supplement the EAs, all occurred within the six years prior to the filing of ONRC's Third Amended Complaint. Accordingly, the six-year statute of limitations does not bar ONRC's claims. 445 F.Supp.2d at 1230-31.

The same rule applies here. The original, now inadequate, EIS was issued in 2003 and the ROD in 2004, but the actions targeted in plaintiff's complaint are NNSA's present decisions to go forward with the construction of the drastically modified CMRR-NF, based on the now-inadequate EIS. As in *ONRC,* plaintiff contends that these decisions were based upon an EIS which has been rendered deficient and inapplicable by defendants' subsequent actions. NNSA's actions were all taken within six years of the filing of the complaint. Accordingly, the six-year statute of limitations does not bar plaintiff's claims. *Accord: Mont. Wilderness Ass'n v. Fry,* 310 F.Supp.2d 1127, 1143 (D. Mont. 2004) (NEPA claim is not limited by a statute of limitations as long as the final agency action that requires the NEPA process is within that period).

Moreover, if defendants' illogical theory applied, an agency could issue an EIS and, after a six-year wait, proceed with an entirely different project whose impacts had never been analyzed in that EIS. Thus, the period of limitations cannot begin to run until the plaintiff has had an opportunity to learn of the defendant's decision to proceed with a project that has not

been analyzed in an EIS or selected in any ROD. As stated by Mandelker, D.R., in NEPA Law and Litigation at 4-134 (West 2010):

> [A] court may not apply the statute if the plaintiff had no way of discovering the existence of a cause of action until some time after it arose. In those cases, the cause of action accrues when a plaintiff knows or had reason to know of the injury that is the basis of the complaint.

Here, the Mello Affidavit makes clear that plaintiff was unable to learn of all of the changes in the CMRR-NF program, or the magnitude of the entire Pajarito Corridor program, until earlier in 2010, when NNSA began to make public the extent of the changes. Mello Affidavit, pp. 2-3, 19-23. These are closely guarded projects involving nuclear weapons production. There was no way plaintiff could have learned of the scope and nature of planned changes unless defendants announced them. That did not happen until early 2010, and any period of limitations began to run at that time.

In addition, the statute of limitations does not apply to continuing NEPA violations. Mandelker at 4-134. The violation here is undeniably a continuing one. Defendants have not complied with NEPA, but they show no inclination to pause, analyze the post-2004 changes to the CMRR-NF project, and reconsider their decision to build the CMRR-NF in light of presently viable alternatives. Instead, they rush forward to complete construction by an arbitrary deadline imposed by the Administration, regardless of the environmental consequences. Such action is a continuing violation of NEPA and the statute of limitations is not applicable to foreclose a remedy for that violation.

B. The Case is Ripe for Consideration.

In contrast to their untimeliness argument, defendants also ask the Court to dismiss this action for lack of ripeness. The doctrine of ripeness exists to protect agencies from "judicial interference until an administrative decision has been formalized and its effects felt in a concrete

way by the challenging parties," lest the Court adjudicate "abstract disagreements over administrative policies," *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-49 (1967). This is not an abstract dispute.

Defendants claim that there can be no judicial review until there is "final agency action" (5 U.S.C. § 704), citing *Bennett v. Spear,* 520 U.S. 154 (1997), and that there has been no such action on the updated CMRR-NF project until defendants issue a pre-ordained SEIS in an attempt to legitimize their action.[3] (D.Br. 12). But defendants are clearly proceeding with the CMRR-NF based upon an agency decision, and have not followed NEPA-mandated procedures in doing so. "The result of that process is one that will directly affect the parties." *Franklin v. Massachusetts,* 505 U.S. 788, 797 (1992). The Supreme Court has emphasized the difference between NEPA and other statutes, stating that a NEPA case is ripe at this stage: "Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 733 (1998). Here, defendants' "irreversible and irretrievable commitments of resources" (D.Br. 15), without required NEPA compliance, are underscored by the fact that defendants have already spent on the CMRR-NF the *entire amount* that was estimated in 2003 to pay for the *entire* CMRR facility. *See* Mello Affidavit, pp. 5-6, 24.

Defendants seek to distract the Court from their NEPA failures by calling attention to a different, and future, NEPA process, stating that "NNSA had not completed its decision-making process," that "the decision-making process on the updated proposed CMRR-NF will not be complete until the SEIS is finished and a new ROD is issued" (D.Br. 13), and that NNSA is "still evaluating the aspects of relative sizing and layout" (D.Br. 16). But defendants are well down

[3] Of course, a ROD issued in 2004 authorized the CMRR-NF as originally planned. Normally, review may take place when a ROD is issued. (40 CFR § 1500.3) However, Defendants have not followed that ROD and may not elevate their departure from the terms of the 2004 ROD into a device to escape judicial review.

the road in executing a major federal action without NEPA support. Moreover, defendants' claims that their plans are uncertain are disingenuous in light of their statements that the CMRR-NF is critical to the national security (D.Br. 1), their headlong rush to carry out construction, and public commitments from high-level members of the Administration. Mello Affidavit, pp. 26-30.

Further, defendants have already decided the outcome of the forthcoming NEPA process. It is a NEPA violation for defendants to predetermine the result of the future NEPA process before the NEPA documentation is complete. *See: Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010); *Silverton Snowmobile Club v. U.S. Forest Serv.,* 433 F.3d 772, 780-81 (10th Cir. 2006); *Lee v. U.S. Air Force,* 354 F.3d 1229, 1240 (10th Cir. 2004); *Davis v. Mineta,* 302 F.3d 1104, 1112 (10th Cir. 2002); *See Metcalf v. Daley,* 214 F.3d 1135, 1143 (9th Cir. 2000); *Int'l Snowmobile Manufacturers' Ass'n v. Norton,* 340 F.Supp.2d 1249, 1260 (D. Wyo. 2004). Since defendants have predetermined the question and have already decided to build the CMRR-NF in accordance with their internal plans, a NEPA violation is occurring now, and there is no point in waiting for new documents and a supposed new decision that merely rubber-stamps that which is already in motion.

If the CMRR project goes forward as defendants intend, the process will make it increasingly certain that the CMRR will be constructed as defendants plan and that plaintiff's members will undergo the pains and risks of that project. When and if NEPA compliance is achieved, the project may have gone so far that irreparable injury will be sustained, *see Highway J Citizens Grp. v. U.S. Dep't of Trans.,* 656 F.Supp.2d 868, 878 (E.D. Wis. 2009), merely reducing NEPA to an empty formality. Consequently, NNSA's action in proceeding with its

CMRR project itself "predetermines the future" (Mandelker at 4-113) by limiting the choices available. *See Laub v. U.S. Dep't of the Interior,* 342 F.3d 1080, 1091 (9th Cir. 2003).

It is recognized that "the hardship to the parties of withholding court consideration," *Abbott Laboratories,* 387 U.S. at 149, is a critical consideration in determining ripeness. (D.Br. 17) Defendants state that there is no "concrete agency action that harms or threatens to harm Plaintiff's interests." (D.Br. 14) But the hardship is real. Members of the plaintiff organization are exposed to:

A. Immediately forthcoming impacts of the construction effort, including the closure of Pajarito Road to all but construction workers; the onset of large-volume truck traffic as massive quantities of concrete and other construction materials are brought to the site; years of dust, noise, fumes, and air pollution attendant upon major construction work; the visual impact of removal and relocation of huge volumes of excavated spoil; and the destruction of large swaths of vegetation, impacting vistas and native wildlife;

B. Short-term risks of the continued operation of the existing CMR Building, which defendants have failed to maintain in condition that meets current standards for seismic risk and for risk of nuclear accident and release of radionuclides;

C. Fifty years of enhanced risks of installation and operation of an enlarged plutonium storage, research, and fabrication facility in Los Alamos, containing at least twice the plutonium capacity of the current CMR building, and capable of carrying out large volume plutonium pit refurbishment and production, operations that entail significant risks of nuclear accident and release of radionuclides; and

D. Risks of releases of radioactivity and hazardous substances in the demolition of the existing CMR Building and the ultimate demolition of the CMRR-NF Building, when its life is concluded.

Cases in the Tenth Circuit confirm that plaintiff's NEPA claim is ripe. *Friends of Marolt Park v. U.S. Dep't of Trans.,* 382 F.3d 1088, 1095(10th Cir. 2004), holds that a claim that an agency violated NEPA's procedural requirements becomes ripe when the alleged procedural violation occurs, assuming the plaintiff has standing to bring the claim.[4] Again, in *Sierra Club v. U.S. Dep't of Energy,* 287 F.3d 1256, 1264-65 (10th Cir. 2002), the case was ripe where DOE, without NEPA analysis, granted a road easement that might be used to construct a mine, even though a further NEPA analysis might be required before a road is built, and the harm to plaintiff might not occur until years in the future: "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,'" at 1265, *quoting from Comm. to Save Rio Hondo v. Lucero,* 102 F.3d 445, 449 n.4 (10th Cir. 1996). *See also Catron County Bd. of Commissioners v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1433 (10th Cir. 1996) (ripeness found where plaintiff County asserted that agency action would in the future prevent the diversion and impoundment of water by the county, in case of future flooding). Here, the harm is both immediate and prospective, since construction is ongoing and the CMRR will have a 50-year life.

Another factor is the "fitness of the issues for judicial decision," *Abbott Laboratories,* 387 U.S. at 149. This is, in essence, a classic NEPA case. The NEPA analysis supposedly

[4] *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573 n. 7 (1992): "There is much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for rederessability and immediacy. Thus, under our case law one living adjacent to the site for the proposed construction of a federally licensed dam has standing to challenge the licensing authority's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years."

supporting the defendants' actions is clear: it is the 2003 EIS and 2004 ROD. No other basis exists for the defendants' current activities. And the nature of the defendants' "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C), can readily be made clear.

It does not defeat ripeness that additional, albeit hollow, NEPA analyses may be promised. In *Sierra Club,* where additional NEPA analyses would be required in the future, the Tenth Circuit said that the dispute was nevertheless ripe. (287 F.3d at 1264). Here, likewise, defendants assert that further NEPA processes show that the dispute is unripe. (D.Br. 12-20) But, contrary to their intimations to this Court, defendants do not propose to cease the planning, design, and construction of the CMRR-NF while they carry out belated NEPA efforts. No precedent supports dismissal of a NEPA case where the defendant agency has failed to comply with NEPA, makes no offer to suspend its NEPA-unsupported federal action, and merely proposes to issue new NEPA documents in another year.

To dismiss this case would only cause yet more delay in the legally-required NEPA processes, a delay which would only add to the project's momentum and further entrench defendants' resolve, unsupported by NEPA analysis, to carry out the CMRR-NF project, creating several certain environmental harms and raising a serious risk of other such harms.

C. This Case is Presently Justiciable.

Defendants assert that plaintiff's claim is moot, because defendants intend to conduct additional NEPA inquiries. Importantly, "the burden to prove mootness is on the defendant" Mandelker, at 4-123. A party asserting mootness has the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.,* 528 U.S. 167, 189 (2000).

There is no mootness here. Defendants (a) do not propose to discontinue their ongoing planning, design, and construction activities pursuant to their internal and nonpublic decision to enlarge the CMRR-NF project far beyond the alternatives discussed in the 2003 EIS, and (b) do not propose to prepare a new EIS consistent with DOE regulations; rather, they propose to prepare a supplement to the 2003 EIS, which they hope to complete some time in 2011 to rubber-stamp the on-going project and as a pretext designed to avoid meaningful examination of alternatives to the behemoth CMRR-NF project. The schedule for the SEIS, of course, cannot be guaranteed.

Defendants state that a case is moot when an agency is no longer relying on an old decision. (D.Br. 21) But, the CMRR project has no NEPA foundation except for the 2003 EIS—on which the defendants have relied in obtaining multi-million dollar appropriations from Congress and are currently relying to continue with planning and construction activities. Defendants do not even propose to stop their unlawful conduct of proceeding with the CMRR-NF project as a *fait accompli*. Instead, defendants intend to continue with the CMRR-NF project in its current much-expanded form for the foreseeable future and certainly while the SEIS is in preparation. It is beyond dispute that the 2003 EIS is wholly inadequate and that defendants have predetermined the outcome of any further analyses to support their current undertakings. The CMRR-NF project is, therefore, an ongoing NEPA violation, and one that causes significant injury to plaintiff and its members. Plaintiff has sued to stop that project. That claim is not moot by any possible standard.

The Tenth Circuit explained circumstances giving rise to mootness in *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096 (10th Cir. 2010). There, a challenged biological opinion issued pursuant to 50 CFR § 402.14(g)(4) by the Fish and Wildlife Service

had been succeeded by a new, and apparently compliant, biological opinion. The court determined that litigation challenging the prior opinion had become moot. (*Id.* at 1111-15). However, *Silvery Minnow* explains that a defendant's "voluntary cessation" of an illegal practice does not normally render the case moot. (*Id.* at 1115). Such cessation can only result in mootness if "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." (*id., quoting from City of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979)); *see also Chihuahuan Grasslands Alliance v. Kempthorne,* 545 F.3d 884 (10th Cir. 2008); *Wyoming v. U.S. Dep't of Agriculture,* 414 F.3d 1207, 1212 (10th Cir. 2005); *Colo. Off-Highway Vehicle Coal. v. U.S. Forest Serv.,* 357 F.3d 1130, 1135 (10th Cir. 2004).

Clearly, defendants' proposal to *keep going* with their unlawful CMRR-NF project, causing continuing damage to the environment and to plaintiff and its members, fails to meet that test. Just as plainly, defendants' plan to issue a SEIS next year gives no reasonable prospect of repairing the NEPA violation; instead, defendants have merely sought to, in small degree, "change[] course simply to deprive the court of jurisdiction." *Nat'l Adver. Co. v. City of Miami,* 402 F.3d 1329, 1333 (11th Cir. 2005). Most basically, the violations have not been corrected, and there is no reason to expect that they will be.

Thus, defendants cannot render this case moot simply by saying that they will generate additional documents. To promise more paperwork does not "heal[] any injuries" (D.Br. 22), nor may it equate to ceasing the challenged conduct. (D.Br. 23). Indeed, a defendant may not render a case moot simply by voluntarily ceasing the challenged activities. But defendants do not even propose to cease their illegal activities. Thus, there is no question of "resuming" the challenged

conduct (D.Br. 23), because defendants do not propose to stop even for a moment. Their actions are a continuing violation, and the suit is not moot.

In addition, defendants propose to prepare only a SEIS—not a new EIS. But defendants have chosen to carry out a CMRR project that far exceeds in scope, budget, and duration any of the alternatives in the 2003 EIS. By defendants' actions the range of reasonable alternatives (40 CFR § 1500.2) has been dramatically enlarged. Yet defendants propose to achieve NEPA compliance by preparing, in effect, an addendum to the 2003 EIS, without making any commitment to examine the alternatives that are presently available to fit the reality of their decision.

Defendants do not even agree that they are legally required to prepare a SEIS. "It has long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct." *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 43 (1944). *See also Alton & S. Ry. v. Int'l Assoc. of Machinists and Aerospace Workers,* 463 F.2d 872, 879 n.13 (D.C. Cir. 1972)("a deliberate and persistent official interpretation is more likely to identify a 'recurring controversy' situation.").

Of course, when and if defendants achieve full NEPA compliance–by completing a new EIS examining all alternatives for the new project–claims as to the unlawfulness of action taken on the basis of the 2003 EIS may become moot. *See Greater Yellowstone Coal. v. Tidwell,* 572 F.3d 1115, 1121 (10th Cir. 2009). That has not yet happened. The hope or expectation of future compliance does not defeat this Court's jurisdiction over the present failure of compliance:

> 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 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

> 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 Board,* 665 F.2d 1280 (D.C. Cir. 1981); *Upper Pecos Association v. Stans,* 500 F.2d 17 (10th Cir. 1974). Here, of course, the EIS process is not only unfinished, it has not begun. *Blue Ocean Preservation Society v. Watkins,* 767 F.Supp. 1518, 1523-24 (D. Haw. 1991) (*footnotes omitted*).

A defendant's "assertion that it hopes to fulfill, or even will fulfill, its NEPA obligations in the future does not address its current failures to act." *S. Utah Wilderness Alliance v. Norton,* 301 F.3d 1217, 1239 (10th Cir. 2002). There is a continuing and live controversy here that requires adjudication.

Finally, defendants invoke the doctrine of "prudential mootness." (D.Br. 24-26). But there is no indication that the defendants have "already changed or [are] in the process of changing [their] policies." (D.Br. 25) Since the central inquiry is, "have circumstances changed since the beginning of litigation that forestall any occasion for meaningful relief" (*Silvery Minnow* , 601 F.3d at 1122), and, specifically, "the likelihood that defendants will recommence the challenged, allegedly offensive conduct" (*id.*), and since defendants' unlawful conduct continues unabated, prudential mootness is inapplicable.

CONCLUSION

For the reasons set forth above and in the affidavit and exhibits submitted in support of this response, plaintiff respectfully requests that the Court enter an order denying the motion to dismiss.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 21st day of October, 2010, I filed the foregoing *Plaintiff's Response to Federal Defendants' Motion to Dismiss* electronically through the CM/ECF System, which caused the following parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

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