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

THE LOS ALAMOS STUDY GROUP, Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, et al., Federal Defendants.	Case No. 1:10-CV-0760-JH-ACT FEDERAL DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

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LIST OF ACRONYMS

APA	Administrative Procedure Act
CMR	Chemistry and Metallurgy Research Building
CMRR	Chemistry and Metallurgy Research Replacement
CMRR-NF	Chemistry and Metallurgy Research Replacement Nuclear Facility
DOE	Department of Energy
EIS	Environmental Impact Statement
LANL	Los Alamos National Laboratory
NEPA	National Environmental Policy Act
NNSA	National Nuclear Security Administration
RLUOB	Radiological Laboratory Utility Office Building
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION

Despite the Federal Defendants' good faith efforts to dissuade it, Plaintiff has insisted on bringing and continuing a premature challenge to the adequacy of the Department of Energy/National Nuclear Security Administration's ("DOE/NNSA" or "NNSA") analysis of potential environmental impacts from construction and operation of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") at Los Alamos National Laboratory ("LANL") in New Mexico. Plaintiff's Complaint should be dismissed.

The proposed CMRR-NF is a unique facility, central to LANL's mission and critical to the national security of the United States. The proposed facility, which will provide capabilities for special nuclear material analytical chemistry, materials characterization, and research and development, is critically necessary as a replacement for the 60-year-old Chemistry and Metallurgy Research Building ("CMR") at LANL that presently houses most of these activities. The CMR is outmoded and sits on a seismic fault trace.

NNSA has already completed extensive environmental review of the proposed CMRR-NF in accordance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(f). This 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. But, for NEPA purposes, the purpose and need for the proposed CMRR Project have not changed, nor has the scope of operations to be carried out in the proposed CMRR-NF. The laboratory space in which key mission operations will be performed within the proposed facility has

actually *decreased* in the new design. Nonetheless, given the design modifications to the building structure, NNSA has decided for prudential reasons to conduct further environmental review pursuant to NEPA. NNSA will prepare a Supplemental EIS ("SEIS"). Upon completion of the SEIS, a process that will include two public scoping meetings and a 45-day public comment period on the Draft SEIS, NNSA will prepare a new ROD.

In a July 1, 2010, letter, counsel for Plaintiff, a New Mexico-based activist group that advocates nuclear disarmament, asserted that the 2003 EIS for the proposed CMRR-NF was inadequate. Plaintiff never challenged the 2004 ROD. On July 30, 2010, NNSA informed Plaintiff in writing that NNSA was still evaluating the potential environmental impacts of the proposed CMRR-NF and would be preparing a Supplement Analysis pursuant to DOE's NEPA regulations. In other words, NNSA informed Plaintiff that it was not finished considering the environmental impacts of its proposals. Knowing that, but without waiting to learn the results of NNSA's Supplement Analysis, Plaintiff filed this lawsuit. In September 2010, Federal Defendants again notified Plaintiff that the environmental analysis of the proposed CMRR-NF was ongoing (and would include preparation of a full SEIS that would provide Plaintiff with additional opportunities to air its concerns) and respectfully requested that it withdraw the Complaint. Plaintiff refused to do so, thus forcing Federal Defendants to seek relief from this Court.

Federal Defendants bring this motion to dismiss because the Complaint suffers from at least three obvious and fatal jurisdictional flaws. First, Plaintiff's challenges to the adequacy of the original 2003 EIS and 2004 ROD are time-barred by the six-year statute of limitations applicable to NEPA claims. Second, Plaintiff's challenges to the sufficiency of the SEIS would not be ripe until NNSA completes the SEIS and issues a ROD. Third, Plaintiff's challenges to the 2003 NEPA

analysis of the proposed CMRR-NF are moot, since NNSA will conduct further environmental analysis through an SEIS.

NNSA has been, and is, complying with its obligations under NEPA, so that it can make an informed decision on how to proceed. Despite Federal Defendants' repeated efforts to inform Plaintiff of the jurisdictional defects in its Complaint, Plaintiff has refused to withdraw the action. The Court should dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

FACTUAL BACKGROUND

I. THE PROPOSED CMRR-NF

NNSA is a semi-autonomous agency within DOE. Declaration ("Decl.") of Dr. Donald L. Cook, Deputy Administrator for Defense Programs, DOE/NNSA (Exhibit A hereto) ¶ 3. NNSA is responsible for the management and security of the nation's nuclear weapons, nuclear nonproliferation, and naval reactor programs. Id.; see 50 U.S.C. § 2401(b). NNSA is also responsible for administration of LANL. Decl. ¶ 4.

In the mid-1990s, in response to direction from the President and Congress, DOE developed the Stockpile Stewardship and Management Program to provide a single, integrated technical program for maintaining the continued safety and reliability of the nuclear weapons stockpile. Decl. ¶ 4. Work conducted at LANL is essential to this mission. Id. A particularly important facility is CMR, which has unique capabilities for performing special nuclear material analytical chemistry, materials characterization, and actinide[1] research and development. Id. ¶ 5. CMR

[1] "Actinide" refers to the members of a series of elements that encompasses the 14 elements with atomic numbers from 90 to 103. Uranium and plutonium are actinides.

supports a number of critical national security missions, including nuclear nonproliferation programs; the manufacturing, development, and surveillance of pits;[2] life extension programs; dismantlement efforts; waste management; material recycle and recovery; and research. Id.

The CMR Building is almost 60 years old and near the end of its useful life. Decl. ¶ 6. Many of its utility systems and structural components are aged, outmoded, and deteriorated. Id. Recent geological studies identified a seismic fault trace located beneath two of the wings of the CMR Building, which raised concerns about the structural integrity of the Hazard Category 2 nuclear facility.[3] Id. Over the long term, NNSA cannot continue to operate the mission-critical CMR support capabilities in the existing CMR Building at an acceptable level of risk to worker safety and health. Id. NNSA has already taken steps to minimize the risks associated with continued operations at CMR. Id. ¶ 7. To ensure that NNSA can fulfill its national security mission for the next 50 years in a safe, secure, and environmentally sound manner, NNSA proposes to construct a replacement facility, known as the CMRR-NF. Id. ¶ 8. The CMRR-NF would replace and relocate CMR capabilities. Id.

On July 23, 2002, the NNSA published a Notice of Intent to prepare the CMRR EIS and invited public comment on the CMRR EIS proposal. Decl. ¶ 9. NNSA also hosted two public scoping meetings on the proposed CMRR in August of 2002. Id. NNSA published a Draft EIS and provided a 45-day public comment period. After thoroughly analyzing the potential environmental impacts of the proposed CMRR and considering public comments, NNSA issued a Final EIS in November 2003. Id. NNSA published its ROD on the 2003 EIS in the Federal Register on

[2] A "pit" is the fissile core of a nuclear warhead.

[3] A "Hazard Category 2" nuclear facility has the potential for significant on-site consequences.

February 12, 2004. Id. ¶ 10; 69 Fed. Reg. 6967 (Feb. 12, 2004). The 2004 ROD announced that the CMRR Project would consist of two buildings: a single, above-ground consolidated special nuclear material-capable, Hazard Category 2 laboratory building (the CMRR-NF), and a separate but adjacent administrative office and support building, the RLUOB. Id. ¶ 10. Construction of the RLUOB is complete and building outfitting is currently underway. Id. ¶ 22. Radiological operations are scheduled to begin in 2013. Id.

Since NNSA completed the 2003 EIS and 2004 ROD, new developments have arisen that required changes to the proposed CMRR. Decl. ¶ 12. Specifically, a site-wide analysis of the geophysical structures that underlay the area occupied by LANL was prepared. Id. In light of this new geologic information regarding seismic conditions at the site, and more detailed information on the various support functions, actions, and infrastructure needed for construction, changes were made to the proposed design of the CMRR-NF. Id. In addition, design modifications have been incorporated to ensure the facility implements DOE's nuclear safety management design requirements for increased facility engineering controls to ensure protection of the public, workers, and the environment. Id. These changes relate to the structural aspects of the building, not its purpose. Id. ¶ 13. The scope of operations remains the same, as does the quantity of special nuclear material that can be handled and stored in the proposed CMRR-NF. Id. ¶ 14. The laboratory space where key mission operations would be performed is significantly reduced from what was contemplated prior to the design modification. Id.

II. PLAINTIFF'S CRITICISM OF CMRR-NF AND COMPLAINT

Given the design changes, NNSA decided to prepare a Supplement Analysis pursuant to 10 C.F.R. § 1021.314(c)(2) to assist it in determining whether the 2003 EIS should be supplemented,

a new EIS should be prepared, or no further NEPA document is required. Decl. ¶ 15.

On July 1, 2010, counsel for Plaintiff wrote to Dr. Steven Chu, Secretary of the Department of Energy, and Thomas P. D'Agostino, Administrator of the NNSA, expressing concerns about the cost and adequacy of NNSA's NEPA analysis for the CMRR-NF. Decl. ¶ 15. Plaintiff requested that DOE halt any and all CMRR-NF design activities, make no further contractual obligations, and seek no further funding until NNSA completes a new EIS for the CMRR-NF. Id. On July 30, 2010, NNSA informed Plaintiff that NNSA was preparing a Supplement Analysis to determine whether the 2003 EIS should be supplemented, a new EIS should be prepared, or no further NEPA document is required. Id.

Shortly after NNSA's response, and without waiting to learn the results of NNSA's Supplement Analysis, Plaintiff filed its Complaint. Despite being fully aware that the NEPA analysis of the CMRR-NF was still in progress, Plaintiff apparently prejudged that any NEPA analysis that NNSA would prepare would be inadequate. On September 21, 2010, NNSA's Deputy Administrator for Defense Programs determined that the NNSA will complete an SEIS to address the ways in which the potential environmental effects of the proposed CMRR-NF may have changed since the project was first analyzed in the 2003 EIS. Decl. ¶ 16; see Decl. Ex. 1. The Notice of Intent to prepare the SEIS has already appeared in the Federal Register. 75 Fed. Reg. 60745 (Oct. 1, 2010); see Decl. Ex. 2. Development of the SEIS includes a scoping process, public meetings, and a comment period on a draft SEIS to ensure that the public has a full opportunity to participate in review of the proposed CMRR-NF under NEPA. Decl. ¶ 17. The results of the SEIS will assist DOE and NNSA in determining how best to proceed. Id. ¶ 18. Nonetheless, even when NNSA informed Plaintiff of the full SEIS on the CMRR-NF, including a scoping period, Plaintiff

prejudged the adequacy of a yet-to-be-completed SEIS and persisted with its lawsuit.

LEGAL BACKGROUND

The purpose of NEPA, 42 U.S.C. §§ 4321-4370(f), is to foster better decision making and informed public participation for federal agency actions that affect the environment. See 42 U.S.C. § 4321; 40 C.F.R. § 1501.1.[4] NEPA imposes procedural rather than substantive requirements. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978). Under NEPA, federal agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA regulations contemplate supplementation of an EIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). Agencies also may prepare an SEIS "when the agency determines that the purposes of [NEPA] will be furthered by doing so." Id. at § 1502.9(c)(2).

Because NEPA does not provide for a private cause of action, the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, govern judicial review of Plaintiff's claims. See Marsh, 490 U.S. at 377 n.23; Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125, 1134 (10th Cir. 2006). Under the APA, a reviewing court may, under limited circumstances, "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); accord Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004). The APA also imposes a narrow and highly deferential standard of review limited to a determination whether

[4] Specific guidance for complying with NEPA is provided by regulations promulgated by the Council on Environmental Quality. See 40 C.F.R. §§ 1500-1508.

a federal agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law." 5 U.S.C. § 706(2)(A); see Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971). An agency's action is entitled to a presumption of validity, and the petitioner challenging that action bears the burden of establishing that the action is arbitrary or capricious. Citizens' Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169, 1176 (10th Cir. 2008).

RULE 12(b)(1) MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may file a motion to dismiss based on the court's "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1).[5] A complaint must be dismissed for lack of subject matter jurisdiction if the action: "does not 'arise under' the Federal Constitution, laws, or treaties (or fall within one of the other enumerated categories of [Article III, Section 2, of the Constitution], or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute." Baker v. Carr, 369 U.S. 186, 198 (1962).

Because federal courts are courts of limited jurisdiction, "the presumption is that they lack jurisdiction unless and until a plaintiff pleads sufficient facts to establish it." Celli v. Shoell, 40 F.3d 324, 327 (10th Cir. 1994) (citations omitted). "Mere conclusory allegations of jurisdiction

[5] Under the APA, Plaintiff's NEPA claims are governed by reference to the Federal Rules of Appellate Procedure pursuant to Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1580 (10th Cir. 1994). In reviewing motions to dismiss, however, the Tenth Circuit applies the same standards of review as the district courts, and therefore reference to the Federal Rules of Civil Procedure is appropriate here. See, e.g., Ordinance 59 Ass'n v. U.S. Dep't of the Interior, 163 F.3d 1150, 1152 (10th Cir. 1998) ("We review *de novo* the trial court's decision to dismiss under either Fed. R. Civ. P. 12(b)(1) or 12(b)(6) . . . [and o]ur independent determination of the issues uses the same standard employed by the district court." (citations omitted)); accord Kane County v. Salazar, 562 F.3d 1077, 1086 (10th Cir. 2009).

are not enough; the party pleading jurisdiction 'must allege in his pleading the facts essential to show jurisdiction.'" Id. (citing Penteco Corp. Ltd. P'ship-1985A v. Union Gas Sys., Inc., 929 F.2d 1519, 1521 (10th Cir. 1991) (quoting McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936))).

Motions to dismiss pursuant to Rule 12(b)(1) may take two forms. In the first form, the movant asserts that the allegations in the complaint on their face fail to establish the court's subject matter jurisdiction. "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995) (citation omitted). In the second form, the movant may present evidence challenging the factual allegations in the complaint "upon which subject matter jurisdiction depends." Id. at 1003 (citation omitted). "When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations . . . [but] reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion." Id. (citations omitted). Here, Federal Defendants challenge jurisdiction of this latter form of review.

ARGUMENT

Plaintiff's Complaint must be dismissed because it does not meet several jurisdictional requirements. First, Plaintiff's challenges to aspects of the 2003 EIS and 2004 ROD are time-barred because NNSA issued the ROD more than six years ago. Second, Plaintiff's challenges to the sufficiency of issues and analyses that may be addressed in the 2011 SEIS will not be ripe for review until NNSA completes the SEIS and issues a new ROD. Third, Plaintiff's attempt to compel NNSA to perform further environmental analysis of the CMRR Project is moot because NNSA is already in the process of preparing an SEIS. For these reasons, Plaintiff's Complaint should be dismissed

in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(1).

I. SOME OF PLAINTIFF'S CHALLENGES ARE TIME-BARRED BY THE SIX-YEAR STATUTE OF LIMITATIONS

It is well-established that NEPA claims are subject to a six-year statute of limitations that accrues upon the completion of administrative proceedings. 28 U.S.C. § 2401(a) ("Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); see Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army, 111 F.3d 1485, 1494-95 (10th Cir. 1997) (recognizing that NEPA claims are subject to the APA's general six-year limitations period under 28 U.S.C. § 2401(a)); Greater Yellowstone Coal. v. Tidwell, 572 F.3d 1115, 1123 n.3 (10th Cir. 2009) (same).

Plaintiff was required to raise any challenge to the 2003 EIS prior to February 12, 2010, which is six years after NNSA published the 2004 ROD in the Federal Register. Specifically, Count II (¶¶ 65-71) alleges the 2003 EIS failed to address connected actions and cumulative environmental impacts. Count III (¶¶ 72-79) alleges that the 2003 EIS failed to provide required mitigation measures and a mitigation action plan. Count IV (¶ 90) challenges the quality of the information present in the 2003 EIS. The facts in dispute for these claims *all* arise from the 2003 EIS and thus any such claims accrued on February 12, 2004, the date of publication of the 2004 ROD. Because Plaintiff waited more than six years to bring these claims, they are time-barred and should be dismissed pursuant to Rule 12(b)(1). 28 U.S.C. § 2401(a); accord Chem. Weapons Working Group, 111 F.3d at 1494-95.

II. PLAINTIFF'S CLAIMS WILL NOT BE RIPE FOR REVIEW UNTIL NNSA ISSUES A DECISION ON THE SEIS

Any claims that the SEIS for the updated proposed CMRR-NF will be deficient are not yet ripe for judicial review.

A. Plaintiff's Claims Fail the Test for Ripeness

Whether a claim is ripe for review "bears on a court's subject matter jurisdiction under the case or controversy clause of Article III of the United States Constitution." New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1498-99 (10th Cir. 1995). Accordingly, a ripeness challenge, "like [most] other challenges to a court's subject matter jurisdiction, is treated as a motion to dismiss under Rule 12(b)(1)." Id. at 1499. Ripeness is a doctrine of justiciability intended to "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 807-08 (2003) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977)); Utah v. U.S. Dep't of the Interior, 535 F.3d 1184, 1191- 92 (10th Cir. 2008) (same); F.T.C. v. Standard Oil Co. of Cal., 449 U.S. 232, 244 n.11 ("one of the principal reasons to await the termination of agency proceedings is to obviate all occasion for judicial review.") (internal citation omitted); Nevada v. Dep't of Energy, 457 F.3d 78, 84 (D.C. Cir. 2006) ("[T]he ripeness doctrine takes into account questions regarding the institutional capacities of, and the relationship between, courts and agencies.") (internal quotation and citation omitted).

A claim is not ripe when it rests "upon contingent future events that may not occur as

anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998) (quotation marks and citation omitted). "If there is still a real possibility that the agency will conduct further environmental analysis, the NEPA claim is not yet ripe." N.M. ex rel. Richardson v. Bureau of Land Mgt., 459 F. Supp. 2d 1102, 1116-1117 (D.N.M. 2006) (vacated in part and reversed in part on other grounds by 565 F.3d 683 (10th Cir. 2009) (citing Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 50 (D.C. Cir. 1999)). Courts determine whether an agency decision is ripe for judicial review by "examining the fitness of the issues for judicial decision and the hardship caused to the parties if review is withheld." Park Lake Res. Ltd. Liab. Co. v. U.S. Dep't of Agric., 197 F.3d 448, 450 (10th Cir. 1999). These two factors are sufficient to guide a decision on ripeness. Friends of Marolt Park v. U.S. Dep't of Transp., 382 F.3d 1088, 1094 n.2 (10th Cir. 2004).

B. The Challenged Issues Are Not Fit for Judicial Decision

1. There is No Final Agency Action on the Updated CMRR Project

Plaintiff's Complaint is not fit for judicial decision because there has been no "final agency action" on the updated CMRR-NF Project. Under the APA, judicial review of an agency action is limited to "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704; accord Utah Envtl. Cong. v. Bosworth, 443 F.3d 732, 749 (10th Cir. 2006) ("Under the APA, a case may only be ripe for review if the federal conduct at question constitutes a final agency action."); Marolt Park, 382 F.3d at 1093-94 ("Ordinarily, whether the issues are fit for review depends on whether the plaintiffs challenge a final agency action.").

The APA defines "agency action" as an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). An agency action is "final"

under the APA if it satisfies two criteria: (1) "the action must mark the consummation of the agency's decision making process – it must not be of a merely tentative or interlocutory nature"; and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted); Franklin v. Massachusetts, 505 U.S. 788, 797 (1992) (the "core question" in evaluating if there is final agency action "is whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties"); Ctr. for Native Ecosystems v. Cables, 509 F.3d 1310, 1329 (10th Cir. 2007) (same). Plaintiff bears the burden of demonstrating that the agency action challenged is final. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990); Colo. Farm Bureau Fed'n v. U.S. Forest Serv., 220 F.3d 1171, 1173 (10th Cir. 2000).

The actions challenged in Plaintiff's Complaint clearly fail to satisfy either element of finality as described in Bennett, 520 U.S. at 177-78. First, it was clear to Plaintiff even before it filed this lawsuit that NNSA had not completed its decision-making process: NNSA informed Plaintiff in July 2010 that it was preparing a Supplement Analysis to help it determine what, if any, further NEPA documentation was necessary for the CMRR-NF Project. Decl. ¶ 15. Although the Supplement Analysis concluded that an SEIS was not necessary, NNSA decided to prepare an SEIS for prudential reasons. Id. ¶ 16. Thus, 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. The SEIS will address the ways in which potential environmental effects of the CMRR Project may have changed since the project was first analyzed under the 2003 EIS. Additionally, because the SEIS process provides for public participation, id. ¶ 17, Plaintiff and other members of the public will have an

opportunity to assist in establishing the scope of the issues to be analyzed in the SEIS and to comment on the draft SEIS. Because Plaintiff challenges a process that is still ongoing, Plaintiff has failed to challenge an action that marks the completion of NNSA's decision-making process. Bennett, 520 U.S. at 177-78 (final agency action "must mark the consummation of the agency's decision making process – it must not be of a merely tentative or interlocutory nature" (internal citations and quotations omitted)); see Texas, 523 U.S. at 300 ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (citations and internal quotations omitted)); Dine Citizens Against Ruining Our Env't v. Klein, 676 F. Supp. 2d 1198, 1214-15 (D. Colo. 2009) (challenge seeking supplementation of NEPA review dismissed as unripe because administrative actions were ongoing, judicial intervention would interfere with proceedings, and completion of administrative process would benefit court).

Second, Plaintiff's claims fail to challenge a final agency action that determines rights or obligations, or from which legal consequences will flow. Bennett, 520 U.S. at 177. As discussed in the preceding paragraph, NNSA decided to prepare an SEIS that provides for a scoping period for public review and comments. Decl. ¶¶ 16, 17. Because the public has the opportunity to assist NNSA in establishing the scope of the issues to be analyzed in the SEIS and to comment on the draft SEIS, there is no concrete agency action that harms or threatens to harm Plaintiff's interests. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-33 (1998) (the purpose of the ripeness doctrine is "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties") (citations omitted).

Plaintiff filed its Complaint before NNSA's decision-making process was complete and before any rights or obligations have been determined, or from which legal consequences will flow.

Bennett, 520 U.S. at 177-78; Ctr. for Native Ecosystems, 509 F.3d at 1329. The Complaint therefore fails to challenge a final agency action and is not fit for judicial decision. Utah Envtl. Cong., 443 F.3d at 749; Marolt Park, 382 F.3d at 1093-94.

2. DOE Has Not Made an Irretrievable Commitment of Resources

Another factor demonstrating that Plaintiff's claims are not fit for judicial decision is that DOE has not made an irretrievable commitment of resources to the CMRR-NF.

An agency's NEPA obligations mature only once it reaches a "critical stage of a decision which will result in irreversible and irretrievable commitments of resources to an action that will affect the environment." Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466, 480 (D.C. Cir. 2009) (internal citations and quotations omitted). An irreversible and irretrievable commitment is made when the government fails to reserve the "absolute right to prevent the use of the resources in question." Friends of the Se.'s Future v. Morrison, 153 F.3d 1059, 1063 (9th Cir. 1998) (internal quotations and citation omitted). Cases presented with this question typically have focused on the commitment of natural resources, not necessarily the agency's financial resources. See, e.g., id. at 1063-64 (no irreversible and irretrievable commitment of timber resources through the development of a tentative schedule "because the government retain[ed] absolute authority to decide whether any such activities will ever take place on the lands" (internal quotation and alteration omitted; citation omitted)); Pennaco Energy, Inc., v. U.S. Dep't of the Interior, 377 F.3d 1147, 1160 (10th Cir. 2004) (issuance of certain oil and gas leases constituted irreversible commitment by agency). Where financial resources are concerned, however, even the expenditure of substantial amounts of money is not an irretrievable commitment of resources. WildWest Inst. v. Bull, 547 F.3d 1162, 1169 (9th Cir. 2008) (holding that "the Forest

Service's pre-marking of [hazard] trees did not irretrievably commit it to a particular course of action" notwithstanding the fact that the Forest Service had expended over $200,000 to mark the trees); Haw. County Green Party v. Clinton, 124 F. Supp. 2d 1173, 1198 (D. Haw. 2000) (finding no irretrievable commitment of resources even though the Navy had allegedly spent $350 million over 20 years on a weapons system because "doing research and building a ship do not mark the consummation of agency decision making on deployment").

NNSA has not reached the "critical stage of a decision which will result in irreversible and irretrievable commitments of resources." Ctr. for Biological Diversity, 563 F.3d at 480 (internal quotations and citation omitted). NNSA is still evaluating the aspects of relative sizing and layout of the proposed CMRR-NF, and the overall project design is less than 50 percent complete. Decl. ¶ 20. No CMRR-NF construction is underway, and none will occur while the SEIS is being prepared. Id. ¶ 21. Between October 2010 and June 2011, the expected SEIS period, the overall design is expected to advance by only approximately 15 percent. Id. ¶ 25. If, after completion of the SEIS, NNSA decides to proceed with construction of the proposed CMRR-NF, the building is not expected to be operational until 2022. Id. ¶ 23. Although NNSA has expended money over the course of six years for building design of the proposed CMRR-NF, id. ¶ 19, the expenditure of even substantial amounts of money is not an irretrievable commitment of resources. WildWest Inst., 547 F.3d at 1169; Haw. County Green Party, 124 F. Supp. 2d at 1198. This absence of an irretrievable commitment of resources to the CMRR-NF means that Plaintiff's challenge to the SEIS is not fit for judicial decision because planning for the facility has not reached a critical stage. Ctr. for Biological Diversity, 563 F.3d at 480.

C. Hardship Imposed by Judicial Review Seriously Harms Defendants

Another factor courts examine to determine whether a claim is ripe is the hardship caused to the parties if review is withheld. Park Lake Res., 197 F.3d at 450. Plaintiff will suffer no hardship if judicial review of NNSA's compliance with NEPA is withheld until the completion of the SEIS. To show hardship, Plaintiffs must show adverse effects of a strictly legal kind. Ohio Forestry Ass'n, 523 U.S. at 733. The "inquiry into harm takes into account financial, operational, and legal consequences flowing from the agency action." Park Lake Res., 197 F.3d at 452. Cases where courts have afforded significant weight to the hardship element generally fall into one of two categories: (1) where "parties would have faced significant costs, financial or otherwise, if their disputes were deemed unripe for adjudication"; and (2) where "the defendant had taken some *concrete action* that threatened to impair – or had already impaired – the plaintiffs' interests." Utah, 535 F.3d at 1197-98 (citations omitted) (emphasis in citation).

Here, Plaintiff cannot identify any such hardship. There are no financial, operational, or legal consequences to Plaintiff flowing from NNSA's decision to prepare an SEIS. Nor is there any concrete action that threatens to impair Plaintiff's interests. As discussed in Part II.B.2, supra, NNSA has not made an irretrievable commitment of resources to the CMRR-NF. Plaintiff and other members of the public will have an opportunity to assist in establishing the scope of the issues to be analyzed in the SEIS and to comment on the draft SEIS. Decl. ¶ 17. Additionally, construction of the CMRR-NF will not occur until after the SEIS is completed and a new ROD issued. Decl. ¶ 21. Construction will take more than a decade, and the facility is not expected to be occupied and operational until 2022. Decl. ¶ 23. Plaintiff thus cannot show hardship because it "will have ample opportunity later to bring its legal challenge at a time when harm is more imminent

and more certain." Ohio Forestry Ass'n, 523 U.S. at 734; accord San Juan Citizens Alliance v. Norton, 586 F. Supp. 2d 1270, 1296 (D.N.M. 2008) (finding no hardship from delayed review, in part, because no concrete legal rights were created or destroyed).

On the other hand, Federal Defendants would suffer serious hardship. NNSA has identified certain aspects of the project, such as new geologic information, that merit further analysis of possible environmental effects. Decl. ¶ 12. As NNSA informed Plaintiff on three separate occasions, NNSA has initiated an SEIS and will examine these and other possible environmental effects. Id. ¶¶ 15, 16. This further factual development of the issues will benefit both the public interest and the Court. Sierra Club v. U.S. Dep't of Energy, 287 F.3d 1256, 1262-63 (10th Cir. 2002) (citing Ohio Forestry Ass'n, 523 U.S. at 733). Further review will allow NNSA, on its own and without court involvement, to "correct its own mistakes," if such mistakes exist. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 242 (1980). NNSA should be allowed to reconsider its own decisions, especially in light of new information and to further the purposes of NEPA; "[o]therwise judicial review is turned into a game in which an agency is 'punished' for procedural omissions by being forced to defend them well after the agency has decided to reconsider." Citizens Against the Pellissippi Parkway Extension v. Mineta, 375 F.3d 412, 416 (6th Cir. 2004).

D. Any Contention That a "New" EIS Is Required Must Wait for a New ROD Based on the SEIS

To the extent that Plaintiff contends a "new" EIS is required and that an SEIS is insufficient to remedy alleged NEPA violations of the 2003 CMRR EIS (see Compl. ¶ 57), this contention has no basis in law and must, in any event, wait until NNSA issues a new ROD based on the SEIS. The relevant regulations governing NEPA compliance for the DOE state that agencies:

> (1) Shall prepare *supplements* to either draft or final environmental impact statements if:
>
> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.
>
> (2) May also prepare *supplements* when the agency determines that the purposes of the Act will be furthered by doing so.

40 C.F.R. § 1502.9(c) (emphasis added); accord 10 C.F.R. §§ 1021.103, 1021.314. The plain language of the governing regulations and well-established case law make it clear that an SEIS is sufficient to remedy any alleged deficiencies of the 2003 EIS. Id.; Marsh, 490 U.S. at 374 (SEIS furthers the purposes of NEPA by requiring agencies to "take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval."); Citizens' Comm., 513 F.3d at 1178 (NEPA "requires only that an agency take a 'hard look' at the environmental consequences before taking a major action.").

NNSA based its determination to prepare an SEIS on the discretionary aspect of the relevant regulation. See 40 C.F.R. § 1502.9(c)(1), (2). Because elements of the proposed CMRR-NF design have changed since the 2004 ROD was issued, NNSA decided for prudential reasons to prepare an SEIS. Decl. ¶ 16. The planned SEIS will provide a "hard look" for the updated proposed CMRR Project and will inform the decision makers at DOE and NNSA on how best to proceed with the Project. Plaintiff's attempt to distort the provisions for an SEIS into a requirement for a "new" EIS has no basis, and any challenge to the adequacy of the SEIS is not ripe until NNSA issues a new ROD based on the SEIS.

Based on the foregoing, it is evident that Plaintiff's claims are not ripe for judicial review. The challenged issues are not fit for judicial decision at this time because there is no final agency action for the updated CMRR-NF, and NNSA has not made an irretrievable commitment of resources. The hardship imposed by judicial review at this time would harm NNSA's decision-making process, while Plaintiff would suffer no injury. Plaintiff's Complaint should therefore be dismissed pursuant to Rule 12(b)(1) as unripe for review.

III. PLAINTIFF'S REQUEST FOR FURTHER ENVIRONMENTAL ANALYSIS OF THE PROPOSED CMRR PROJECT IS MOOT

Plaintiff's requested relief of further environmental analysis of the proposed CMRR Project has been satisfied by NNSA's determination to prepare an SEIS. Plaintiff's Complaint is therefore moot and should be dismissed.

A. NNSA's Decision to Prepare an SEIS Removed Any Live Case or Controversy That May Have Been Present When Plaintiff Filed Its Complaint

A federal court's jurisdiction must persist throughout all stages of the litigation. Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review." (quotations and citation omitted)); Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990) (same) McAlpine v. Thompson, 187 F.3d 1213, 1216 (10th Cir. 1999) (same). A federal court lacks jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue before it." Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (quotations and citation omitted). If an order in plaintiff's favor would do no good or serve no purpose, the appeal is moot. McAlpine, 187 F.3d at 1216. See also Horstkoetter v. Dep't of Pub. Safety, 159 F.3d 1265, 1277 (10th Cir. 1998) (holding that challenge to regulation was moot because "any injunction that we

might issue in this case . . . would be meaningless"); S. Utah Wilderness Alliance v. Smith, 110 F.3d 724, 728 (10th Cir. 1997) ("If an event occurs while a case is pending that heals the injury and only prospective relief has been sought, the case must be dismissed."); Cent. Wyo. Law Assocs. v. Denhardt, 60 F.3d 684, 687-88 (10th Cir. 1995) (holding that challenge to warrant was moot where warrant had expired). "The crucial question is whether 'granting a present determination of the issues offered . . . will have some effect in the real world.'" Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1182 (10th Cir. 2000) (quoting Kennecott Utah Copper Corp. v. Becker, 186 F.3d 1261, 1266 (10th Cir. 1999)) (omission in citation).

Thus, for example, when a new agency decision supersedes an older decision, challenges to the older decision are moot. See Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1113 (10th Cir. 2010) (challenge to a Biological Opinion is moot when that opinion has been superseded by a later Biological Opinion); see also Aluminum Co. of Am. v. Bonneville Power Admin., 56 F.3d 1075, 1078 (9th Cir. 1995) (challenge to an agency decision is moot when current actions are being undertaken pursuant to a new, superseding decision). When an agency is no longer relying on an old decision, any challenges to that old decision do not present a live controversy. See Aluminum Co. of Am., 56 F.3d at 1078 (holding that review of earlier decision document "would be especially inappropriate" because it had been superseded); Ramsey v. Kantor, 96 F.3d 434, 445- 46 (9th Cir. 1996) (claim is moot when an agency "will be basing its rulings on different criteria or factors in the future"); Spencer v. Kemna, 523 U.S. 1, 18 (1998) ("[Federal courts] are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong."). "[I]f extra-record evidence shows that an agency has rectified a NEPA violation after the onset of legal proceedings, that evidence is relevant to the

question of whether relief should be granted." Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560-61 (9th Cir. 2000) (claim that Forest Service failed to prepare an SEIS mooted when the federal agency subsequently prepared the document).

Plaintiff's case is moot because the constitutionally required "case or controversy" that provides federal court jurisdiction over the case is no longer live. U.S. Const. art. III, § 2. See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000). The Complaint alleges that NNSA failed to conduct a new analysis of the proposed CMRR-NF Project under the requirements of NEPA. Plaintiff, with full knowledge that NNSA was in the process of preparing a Supplement Analysis to evaluate the need for further consideration of the updated CMRR Project pursuant to NEPA, filed suit to compel further environmental analysis. Shortly after Plaintiff's premature initiation of its action, NNSA decided to prepare an SEIS complete with a public scoping process. Decl. ¶¶ 16, 17. NNSA's decision rendered Plaintiff's Complaint moot because it healed any alleged injuries set forth thereafter in the Complaint. S. Utah Wilderness Alliance, 110 F.3d at 727; Coliseum Square Ass'n, Inc. v. Jackson, 465 F.3d 215, 246 (5th Cir. 2006) ("Corrective action by an agency can moot an issue."). In the future, when NNSA decides how best to proceed with the proposed CMRR-NF Project, the SEIS will serve as the basis for that new decision. Decl. ¶ 18. Any relief granted by this Court with respect to the continued sufficiency of the 2003 EIS therefore would be meaningless, and would have no "effect in the real world." See Citizens for Responsible Gov't, 236 F.3d at 1182 (quotations and citation omitted). Plaintiff's case is moot and should be dismissed for lack of jurisdiction. McAlpine, 187 F.3d at 1216.

B. Neither of the Narrow Exceptions to the Mootness Doctrine Apply

Neither of the two recognized extraordinary exceptions to the mootness doctrine applies to the present situation. The first exception provides that the voluntary cessation of a challenged practice does not necessarily render a case moot because the defendant would then be free to resume the challenged activity after the dismissal of the litigation. Laidlaw, 528 U.S. at 189 (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)). If a defendant can show that there is no reasonable expectation that it will resume the challenged conduct, the case is moot. Comm. for the First Amendment v. Campbell, 962 F.2d 1517, 1524 (10th Cir. 1992) (voluntary cessation does not moot a case "unless defendants can establish no reasonable expectation of the wrong's recurrence" (citation omitted)). See also Camfield v. City of Okla. City, 248 F.3d 1214, 1223-24 (10th Cir. 2001) (voluntary cessation exception not applicable where no evidence defendant intends to return to challenged conduct).

Here, the case became moot because NNSA decided to prepare an SEIS, complete with a public involvement process. Decl. ¶¶ 16, 17. NNSA initiated this process in the ordinary course of business in accordance with its procedures for determining whether to prepare an SEIS. NNSA will not "resume" any actions because any future decision on the updated CMRR Project will be based upon the results of the SEIS and new ROD. Id. ¶ 18.

The second exception, that a case is not moot when it is "capable of repetition, yet evading review," also does not apply. Under this narrow exception, an action is not moot when (1) the type of action challenged is too short in duration "to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. McAlpine, 187 F.3d at 1216 (citing Spencer, 523 U.S. at 17) (alteration omitted).

This exception to the mootness doctrine applies only in "exceptional situations." Id. at 1216 (quoting Los Angeles v. Lyons, 461 U.S. 95, 109 (1983)). Because there will be an SEIS, there is no reasonable expectation that the NNSA will approve the CMRR-NF Project based on an environmental analysis identical to the 2003 EIS and 2004 ROD. This case does not present the type of "exceptional situation" where this narrow exception applies.

NNSA's independent determination to prepare an SEIS of the proposed CMRR-NF moots Plaintiff's request for further environmental analysis of the facility. Neither of the two recognized exceptions to the mootness doctrine apply. The Court should therefore dismiss Plaintiff's Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

C. Plaintiff's Claims Should Be Dismissed Under the Doctrine of Prudential Mootness

Even if this Court were to find that Plaintiff's claims were not moot under Article III, this Court should exercise its discretion and dismiss Plaintiff's claims under the doctrine of prudential mootness. Prudential mootness is "closely related to Article III mootness" and arises from the doctrine of remedial discretion. S. Utah Wilderness Alliance, 110 F.3d at 727. Prudential mootness addresses "not the power to grant relief but the court's discretion in the exercise of that power." Chamber of Commerce v. U.S. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980). In some circumstances, a controversy, though not moot in the Article III sense, is "so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." S. Utah Wilderness Alliance, 110 F.3d at 727 (quoting Chamber of Commerce, 627 F.2d at 291).

The doctrine of prudential mootness applies to requests for prospective equitable relief by

declaratory judgment or injunction. See, e.g., id.; Bldg. & Constr. Dep't v. Rockwell Int'l Corp., 7 F.3d 1487, 1492 (10th Cir. 1993). Courts routinely decline declaratory or injunctive relief where it appears that a defendant, usually the government, has already changed or is in the process of changing its policies or where it appears that any repeat of the actions in question is otherwise highly unlikely. See United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). Thus, prudential mootness arises out of a court's general discretion in formulating prospective equitable remedies, especially with regard to cases involving the United States as a defendant, where "considerations of . . . comity for coordinate branches of government." Chamber of Commerce, 627 F.2d at 291.

NNSA has already taken action that changes the context of Plaintiff's claims. In July 2010, when Plaintiff complained about the environmental analysis in the 2003 EIS, NNSA was well underway in preparing a Supplement Analysis to assess how new geologic information and design modifications might require further environmental analysis in accordance with NEPA. Decl. ¶¶ 12, 13, 15. Although the purpose of the CMRR-NF has not changed, given the changes in design and newly available information, NNSA determined that the prudent course of action would be to prepare an SEIS, complete with a public participation process. Id. ¶¶ 16, 17. Once the SEIS is complete, NNSA will decide how best to proceed with the proposed CMRR-NF. Id. ¶ 18. It is very likely that the SEIS will address Plaintiff's concerns about the CMRR-NF; if it does not, Plaintiff may choose to bring a new suit, after exhausting administrative remedies and satisfying other requirements of justiciability, to challenge the adequacy of the SEIS and new ROD. Such a challenge would be based on a more developed administrative record of the CMRR-NF for the Court's review.

Accordingly, this Court should exercise its discretion under the doctrine of prudential

mootness and dismiss Plaintiff's claims. NNSA is preparing an SEIS for the updated proposed CMRR-NF, and any repeat of the circumstance under which Plaintiff brought its claims is highly unlikely. W.T. Grant Co., 345 U.S. at 633. Moreover, the exercise of discretion in dismissing Plaintiff's claims is particularly appropriate here, where Plaintiff cannot demonstrate that the award of equitable relief would redress any injury, and considerations of comity for DOE and NNSA come into play. Chamber of Commerce, 627 F.2d at 291.

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

Respectfully submitted on this 4th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2010 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Fling to the following CM/ECF registrants:

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