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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' RESPONSE TO PLAINTIFF'S JANUARY 20, 2011 OBJECTIONS TO MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION [DKT. NO. 33]**

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CASES

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REGULATIONS

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

Pursuant to Federal Rule of Civil Procedure 72(b)(2), Federal Defendants hereby respond to Plaintiff's January 20, 2011 "Objections to Magistrate Judge's Proposed Findings and Recommended Disposition," Dkt. No. 33 (hereinafter, "Pl. Obj."), as follows:

INTRODUCTION

The Honorable Alan C. Torgerson, United States Magistrate Judge, correctly recommends that Plaintiff's Complaint should be dismissed based on the doctrine of prudential mootness.[1] In this litigation, Plaintiff seeks to interject itself and the Court into the ongoing administrative agency review of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility ("CMRR-NF") at Los Alamos National Laboratory ("LANL") in New Mexico being conducted by the Department of Energy/National Nuclear Security Administration ("DOE/NNSA" or "NNSA") in accordance with the National Environmental Policy Act ("NEPA"). Plaintiff's improper attempt to interpose itself and this Court into the middle of a federal agency's ongoing NEPA decision-making process renders Plaintiff's claims infirm under a host of constitutional, statutory, and jurisprudential doctrines, including prudential mootness.

The record before the Court details an orderly--and ordinary--decision-making process conducted in full compliance with NEPA: (1) CMRR-NF was approved in a 2004 unchallenged Record of Decision ("ROD") following completion of a comprehensive environmental impact statement ("EIS") in 2003; (2) pursuant to the 2004 ROD, NNSA partially excavated the CMRR-NF site in 2006 to allow for site characterization and seismic mapping; (3) new information developed from this excavation and corresponding new building safety requirements led to evolving design

[1] See January 6, 2011 "Magistrate Judges's Proposed Findings and Recommended Disposition," Dkt. No. 25 (hereinafter "F&R").

changes for CMRR-NF; (4) as a result of these design changes, NNSA began reviewing whether it should prepare a supplemental EIS ("SEIS"), prior to this lawsuit; (5) while the draft "Supplement Analysis" concluded that the potential environmental impacts from construction of CMRR-NF in accordance with the evolving design changes were adequately bounded and addressed in the 2003 EIS, NNSA nonetheless decided to prepare an SEIS; (6) on October 1, 2010, NNSA published a Notice of Intent in the Federal Register to prepare an SEIS; and (7) NNSA committed that it would make no irreversible and irretrievable commitment of resources to CMRR-NF, including construction, until the SEIS process was completed through issuance of a new decision.[2] In the middle of this decision making process, Plaintiff filed its Complaint. Dkt. No. 1. Although Plaintiff's papers lack factual and legal support for a claim that NNSA was required to have prepared a new EIS sooner, the Magistrate Judge rightly determined that NNSA's commitment to preparing an SEIS and to foregoing construction until NNSA completed the reopened NEPA decision-making process was a significant event that left Plaintiff's claims moot under the doctrine of prudential mootness.

In short, NNSA has been in compliance with NEPA throughout its development of CMRR-NF. Its decision to approve CMRR-NF construction and operation in the 2004 ROD was made more than six years ago, and thus is unassailable pursuant to the applicable statute of limitations. See Mot. to Dismiss, Dkt. No. 9 at 10. To the extent that Plaintiff claims that NNSA must complete additional NEPA analysis as a result of new information and changes in CMRR-NF design, the Magistrate Judge correctly concluded that NNSA's commitment to prepare an SEIS and to delay

[2] See Declaration of Donald L. Cook, NNSA Deputy Administrator for Defense Programs, Dkt. No. 9-1 (hereinafter, "Cook Decl.") ¶¶ 9, 10, 12, 15, 16, 21.

construction of CMRR-NF until that process is complete prudentially moots Plaintiff's Complaint. See F&R ¶¶ 24-29. As the Magistrate Judge found, the doctrine of prudential mootness sweeps broadly enough to encompass Plaintiff's subservient claims about what that new NEPA process must involve because "Plaintiff will have ample opportunity to renew its complaint if it finds it necessary when the SEIS is filed and before any construction begins." Id. ¶ 29. Alternatively, and in addition to the prudential mootness grounds for dismissal found by the Magistrate Judge, Plaintiff's claims do not survive on ripeness and constitutional mootness grounds, because until NNSA completes the SEIS process, the Court cannot find fault with that process or proscribe what it must entail in an advisory opinion. For any or all of these reasons, the Court should grant Federal Defendants' October 4, 2010 Motion to Dismiss and dismiss Plaintiff's Complaint in its entirety.

ARGUMENT

I. THE DOCTRINE OF PRUDENTIAL MOOTNESS BARS PLAINTIFF'S CLAIMS

Plaintiff's criticism of the Magistrate Judge's findings and recommendation asserts that the doctrine of prudential mootness only applies to NEPA cases when the project in question is substantially complete. See Pl. Obj. at 3-6.[3] This criticism is misplaced.

[3] Relying on Blue Ocean Preservation Society v. Watkins, 767 F. Supp. 1518, 1523-24 (D. Haw. 1991), Plaintiff states that "it is emphatically not the law that a NEPA case becomes moot when an agency states that it hopes, in the future, to fulfill its NEPA obligations." Pl. Obj. at 3. Federal Defendants previously distinguished Plaintiff's improper reliance on this case. Dkt. No. 11 at 11-12. In Blue Ocean, a *constitutional* mootness case, DOE had never prepared an EIS for a proposed geothermal power plant, so there was no EIS to supplement and the Court found it compelling that the agency had not committed to preparing an EIS by publishing a Notice of Intent in the Federal Register. See 767 F. Supp. at 1523 and n.3 ("This is not a case in which the government has already prepared an EIS, or even commenced such preparation [with the publication of a notice in the Federal Register]."). As the Magistrate Judge finds in this case, NNSA completed an EIS in 2003 for the proposed CMRR-NF and, based on new information and changes to the original design, commenced preparation of an SEIS by publishing Notice in the Federal Register. F&R ¶¶ 7-14; Cook Decl. ¶¶ 9, 12, 16.

As Plaintiff itself recognizes and then ignores, the central inquiry asked by the doctrine of prudential mootness is whether circumstances have changed since the beginning of litigation that forestall any occasion for meaningful relief. Pl. Obj. at 4 (citing S. Utah Wilderness Alliance v. Smith, 110 F.3d 724, 727 (10th Cir. 1997) and Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation, 601 F.3d 1096, 1121 (10th Cir. 2010)). The doctrine of prudential mootness is one of remedial discretion that has particular applicability where, as here, the relief sought is an injunction against the government. Chamber of Commerce v. U.S. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980) (prudential mootness addresses "not the power to grant relief but the court's discretion in the exercise of that power"); Bldg. & Constr. Dep't v. Rockwell Int'l Corp., 7 F.3d 1487, 1492 (10th Cir. 1993) ("We have expressly recognized the doctrine of prudential mootness, and have stated that it has particular applicability in cases . . . where the relief sought is an injunction against the government.").

Plaintiff makes the leap of logic that the *circumstances* examined in the prudential mootness inquiry equate to project *completion*, Pl. Obj. at 4-5, but nothing in the relevant case law suggests such a narrow standard. Plaintiff extrapolated this incorrect interpretation of the doctrine of prudential mootness from a constrained reading of three out-of-circuit cases and its repeated--and plainly wrong--assertion that construction of CMRR-NF has begun. Plaintiff first cites to Sierra Club v. U.S. Army Corps of Engineers as "the only case found by plaintiff where the court applied prudential mootness to dismiss a NEPA claim" and then argues that the project's near completion is what rendered that case prudentially moot. Pl. Obj. at 4 (citing 277 Fed. Appx. 170, No. 06-4887, 2008 WL 2048359, at *1-2 (3d Cir. May 14, 2008)). In Sierra Club, the court could not offer plaintiff's members any meaningful relief because the subject matter of the litigation (a parcel of

wetlands) had been destroyed. In this case, prudential mootness likewise counsels in favor of dismissal because construction of CMRR-NF will not occur at least until NNSA renders a new decision based on the SEIS, not on the existing 2004 ROD that is the source of Plaintiff's claims and alleged injuries. Because there will be no construction or irreversible commitment of resources until NNSA issues a new decision pursuant to NEPA, there is no meaningful relief that this Court can grant Plaintiff, as in Sierra Club.

While Plaintiff insinuates that Sierra Club somehow is an aberration, Pl. Obj. at 4, Federal Defendants note that a quick search on Westlaw uncovered at least one published case within this circuit where a court dismissed a NEPA claim based on prudential mootness. In Willow Creek Ecology v. U.S. Forest Service, the court applied the doctrine of prudential mootness to a NEPA claim where the agency voluntarily withdrew a Decision Notice for an Environmental Assessment. 225 F. Supp. 2d 1312, 1318 (D. Utah 2002). The court in Willow Creek Ecology reasoned that the withdrawal of the underlying NEPA authorization document meant that "the challenged practice has 'undergo[ne] significant modification so that its ultimate form cannot be predicted.'" Id. (citing A.L. Mechling Barge Lines v. United States, 368 U.S. 324, 331 (1961)). Similarly, in this case, the circumstances surrounding Plaintiff's challenge to NNSA's prior approval of the proposed CMRR-NF have changed with the official reopening of the NEPA process, and the outcome of that process cannot be predicted. The preparation of an SEIS likely will address many, if not all, of Plaintiff's concerns about the possible environmental effects of the proposed CMRR-NF and, given NNSA's demonstrated responsiveness to new information in modifying CMRR-NF's design, the SEIS process cannot be said to be a meaningless endeavor. Plaintiff is obligated to participate in the process to ensure that its perspectives are heard. As in Willow Creek, there will be no construction

of the challenged project until the federal agency issues a new decision based on the SEIS, so there is no possibility of irreparable harm to the environment and nothing for the Court to enjoin.

Plaintiff next cites Crutchfield v. U.S. Army Corps of Engineers, 192 F. Supp. 2d 444 (E.D. Va. 2001), for Plaintiff's flawed contention that project completion is the measure courts use to determine whether prudential mootness applies. Pl. Obj. at 4-5. In Crutchfield, the court found that the doctrine of prudential mootness did not apply because the defendant county continued with construction on a wastewater treatment plant component prior to obtaining the necessary permit from the Army Corps of Engineers to dredge and destroy wetlands impacted by the project. 192 F. Supp. 2d at 448, 466. Here, not only did NNSA approve construction and operation of the CMRR-NF in a 2004 ROD in full satisfaction of NEPA, but construction on the proposed CMRR-NF will not occur until after the SEIS is completed and a new ROD issued. Cook Decl. ¶ 21. Plaintiff also cites Sierra Club v. Babbitt, but in that case, the court based its prudential mootness finding not on the construction status of a highway running through Yosemite National Park, but on the fact that effective relief was still available to plaintiff. 69 F. Supp. 2d 1202, 1244 (E.D. Cal. 1999). In Babbitt, there was no indication that the defendant had changed its NEPA decision-making process, in contrast to the circumstances here.

Even if the Court were to adopt Plaintiff's flawed requirement of "substantial completeness," such an incorrect standard would not apply to this case. Construction on the proposed CMRR-NF is not underway, nor will any occur until the completion of the SEIS and issuance of the new ROD. F&R ¶¶ 17, 29; Cook Decl. ¶ 21. Moreover, the proposed CMRR-NF is not expected to be operational until 2022, more than a decade from now. F&R ¶¶ 17, 29; Cook Decl. ¶ 23. The instant situation of more than a decade to construct and outfit the challenged facility is therefore quite

unlike the projects cited by Plaintiff that were, or could have been, rapidly completed. See Sierra Club, No. 06-4887, 2008 WL 2048359 at *1-2 (fill of a 7.69 acre parcel of wetland); Crutchfield, 192 F. Supp. 2d at 448, 466 (construction of one component of a wastewater treatment plant); Babbitt, 69 F. Supp. 2d at 1207 (construction of a portion of highway running through national park).

Plaintiff also faults the Magistrate Judge's findings and recommendation for failing to cite any NEPA case law supporting discretionary dismissal under the doctrine of prudential mootness. Pl. Obj. at 3. This argument is a red herring. Courts routinely apply prudential mootness where relief sought is an injunction against the government. Bldg. & Constr. Dep't, 7 F.3d at 1492. This includes cases involving statutes that provide their own right of action as well as those, such as NEPA, that are brought pursuant to the Administrative Procedure Act ("APA"). See, e.g., Rio Grande Silvery Minnow, 601 F.3d 1096 (prudential mootness applied to claim brought under Endangered Species Act's citizen suit provision); Smith, 110 F.3d 724 (same); Willow Creek, 225 F. Supp. 2d 1312 (NEPA claim brought pursuant to APA).

The Magistrate Judge applied the appropriate legal standards and correctly recognized that the SEIS that is currently underway presents changed circumstances in this ligation. It is likely that the SEIS will address Plaintiff's concerns about the proposed CMRR-NF, which is not expected to become operational for more than ten years. F&R ¶¶ 25, 26, 27. The Magistrate Judge correctly applied these standards and found that the doctrine of prudential mootness counseled against a court-issued injunction, F&R ¶¶ 28, 29, and his findings and recommendation should be adopted by the Court.

II. PLAINTIFF'S CLAIMS ARE NOT RIPE FOR JUDICIAL REVIEW

Plaintiff next asserts that the Magistrate Judge's well-reasoned findings and recommendation erred in its consideration of whether the present case is ripe for adjudication. Pl. Obj. at 6-10, 15-16. The Magistrate Judge's findings and recommendation, however, did not recommend dismissal of Plaintiff's complaint on the grounds of ripeness. See generally F&R. To the extent that the Court considers ripeness as an alternative grounds for dismissal of this case, Plaintiff's objections should be overruled because ripeness examines factors similar to prudential mootness, and both doctrines are applicable to bar Plaintiff's ill-founded NEPA claims. See Mot. to Dismiss, at 11-20; Reply, Dkt. No. 11 at 3-9.

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, 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). 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). "[I]f 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 Mgmt., 459 F. Supp. 2d 1102, 1116-1117 (D.N.M. 2006) (vacated in part and reversed in part on other grounds, 565 F.3d 683 (10th Cir. 2009).

In this case, Plaintiff's claims are not ripe because NNSA is in the process of completing an SEIS to analyze the potential environmental impacts associated with the construction of the proposed CMRR-NF. Cook Decl. ¶ 16. The NNSA's environmental analysis of the proposed CMRR-NF is ongoing and is not expected to be complete until June 2011. Cook Decl. ¶ 25.

Despite these incontrovertible facts, Plaintiff contends that its claims are ripe because, according to Plaintiff, the purpose and need of the proposed CMRR-NF have changed. Pl. Obj. at 6-7. Plaintiff's allegation directly contradicts the sworn declaration of Dr. Donald Cook, which states "the purpose and need for the CMRR Project have not changed, nor has the scope of operations to be carried out in the proposed CMRR-NF. The quantity of special nuclear material that could be handled and stored in the CMRR-NF would remain constant at six metric tons." Cook Decl. ¶ 14. The CMRR-NF will replace and relocate mission-critical capabilities that currently take place in the CMR building, which is almost 60 years old. Cook Decl. ¶¶ 6, 8. Plaintiff's allegation of a changed purpose and need rests upon the fact that the projected cost and materials for the proposed CMRR-NF have increased and that the project now includes a nebulous "hotel concept." Pl. Obj. at 6. The increase in projected cost and expected materials necessary for construction result from changes to the structural aspects of the original design, not from any changes to the mission or purpose. Cook Decl. ¶¶ 12, 13. The "hotel concept" does not represent an expansion of the purpose and need for the proposed CMRR-NF, which is to replace the mission critical capabilities of the aging CMR Building.

In any event, whether the purpose and need for the CMRR-NF have changed does not affect whether Plaintiff's claims are ripe for judicial review. The SEIS process is ongoing, and it is well-settled that until that process is complete, there is no ripe "final agency action" pursuant to the

Administrative Procedure Act ("APA"), 5 U.S.C. § 704, for this Court to review. See Coal. for Sustainable Res., Inc. v. U.S. Forest Serv., 259 F.3d 1244, 1250 (10th Cir. 2001) (holding that ripeness test includes whether there is "final agency action" under the APA). "[I]t appears well-established that a final EIS or the ROD issued thereon constitute the 'final agency action' for the purposes of the APA." Sierra Club v. Slater, 120 F.3d 623, 631 (6th Cir. 1997) (citing Or. Natural Res. Council v. Harrell, 52 F.3d 1499, 1504 (9th Cir. 1995)).

Here, NNSA issued a scoping notice and conducted a 45-day public scoping process that included two public scoping meetings. This scoping process will be followed by no less than the publication of a draft SEIS and a 45-day public comment period on the draft SEIS. The comments received on the draft SEIS will be considered in preparing and issuing a final SEIS, and a new ROD containing the decision on how NNSA intends to proceed with the CMRR-NF. Plaintiff's complaints now, before the draft SEIS is even published for comment, are simply premature. Scoping "mark[s] the infancy, not the termination, of the NEPA process." Muhly v. Espy, 877 F. Supp. 294, 300 (W.D. Va. 1995).

> This is clear when one considers what remains to be done. Among the stages left to be completed are: the issuance of a [draft EIS]; public comment during a compulsory forty-five day waiting period; and the issuance of a [final EIS]. All of these stages require substantial input from the public, during which, the Plaintiffs could conceivably cure any of the defects in the NEPA process they believe have taken place so far.

Id.; see also Bennett Hills Grazing Ass'n v. United States, 600 F.2d 1308, 1309 (9th Cir. 1979) (finding that a draft EIS was not a final agency action subject to judicial review).[4] Until NNSA

[4] Plaintiff cites Catron County Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1434 (10th Cir. 1996), for the proposition that "Defendants have engaged in a 'final agency action' by implementing the 2010 CMRR-NF in violation of NEPA." Pl. Obj. at 7. Catron County, however, involved a challenge to a final agency rule that had been promulgated without an EIS being completed because the agency did not believe that NEPA applied to the

completes the final SEIS and issues a new ROD, there will be no final agency action for purposes of judicial review under the APA. See, e.g., Center for Marine Conservation v. Brown, 917 F. Supp. 1128, 1150 (S.D. Tex. 1996) ("Of course, any challenge to the supplemental EIS itself is not ripe for review, because there is no final agency action to review until the EIS is actually issued."); Coliseum Square Ass'n, Inc. v. Dep't of Housing and Urban Dev., 2003 WL 715758, at *6 (E.D. La. 2003) (holding that judicial review of NEPA claims was "inappropriate in light of the reopened [NEPA] reviews"), aff'd, 465 F.3d 215 (5th Cir. 2006).[5]

Plaintiff next contends that its claims are ripe because NNSA is engaged in an irretrievable commitment of resources. Pl. Obj. at 7-8. 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).

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final rule, which is plainly a "final agency action." See 75 F.3d at 1432. In this case, NNSA is conducting a NEPA process by preparing an SEIS, and its final decision of whether and how to proceed with CMRR-NF will be made following completion of that SEIS. This case therefore falls in the ordinary category of NEPA cases in which there is no final agency action, and thus no judicial review, until NNSA issues a new ROD based on the SEIS. See, e.g., Goodrich v. United States, 434 F.3d 1329, 1335 (Fed. Cir. 2006) (collecting "case law from our sister circuits holding that, for purposes of the [APA] a ROD is a 'final agency action'"); Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 187 (4th Cir. 1999) (holding that the "designation of the ROD as final agency action under the APA is generally recognized"); Utah v. U.S. Dep't of the Interior, 210 F.3d 1193, 1196 (10th Cir. 2000) (holding that "judicial review of final agency action under the [APA] . . . provides the proper procedure to challenge the sufficiency of an EIS.").

[5] See also Puget Sound Energy, Inc. v. United States, 310 F.3d 613, 624-25 (9th Cir. 2002) ("The Supreme Court has held in other contexts, [and so has the Ninth Circuit], that if an initial agency action may be modified or reversed during administrative reconsideration or review it is rendered non-final while such review is pending.") (citing I.C.C. v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 284-85 (1987)).

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).

Here, NNSA has not reached a critical stage of the decision because it 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. Cook Decl. ¶ 20. No CMRR-NF construction is underway, and none will occur while the SEIS is being prepared. Id. ¶ 21. 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. See, e.g., 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"). See also Mot. to Dismiss, at 15-16; Reply, at 5.

Plaintiff's spurious allegations of what it perceives as irretrievable commitments of resources are easily dismissed. Citing to a comment from a DOE employee at a June 16, 2010 presentation, prior to the reopening of the NEPA process, Plaintiff contends that NNSA will finalize the design of the project and begin construction in March 2011. Pl. Obj. at 7-8. As set forth in the October 4, 2010 sworn declaration of Dr. Donald Cook, the Deputy Administrator for Defense Programs who

oversees the Los Alamos National Laboratory and all of its infrastructure, "[n]o CMRR-NF construction is underway, nor will any occur as long as the SEIS is being prepared." Cook Decl. ¶ 21. The SEIS is not expected to be complete until June 2011, after which NNSA will decide how best to proceed. Id. ¶¶ 23, 25. Plaintiff's contention that construction will begin in March 2011 rests on outdated hearsay that predates the decision to prepare the SEIS and a sworn declaration from a member of NNSA's leadership.

Plaintiff next contends that its Complaint is ripe because NNSA is engaged in more than design of the CMRR-NF. Pl. Obj. at 8-10. Plaintiff first distorts the Magistrate Judge's finding on the Radiological Laboratory Utility Office Building ("RLUOB"). The Magistrate Judge found that the CMRR Project consisted of the CMRR-NF and the "separate but adjacent" RLUOB, an administrative office and support functions building. F&R ¶ 8. Construction of the RLUOB is complete, and building outfitting is currently underway. Cook Decl. ¶ 22; see also Compl. ¶ 14 ("The RLUOB structure is physically complete and is being outfitted."). Plaintiff contends that the completion of RLUOB is an example of ongoing or partial construction of the CMRR-NF. Pl. Obj. at 8-9. This nonsensical and novel argument ignores the fact that Plaintiff's Complaint challenges the separate *nuclear facility*, not the CMRR *Project*, and that construction on the CMRR-NF has not begun. Although analyzed together with CMRR-NF in the 2004 EIS, RLUOB has independent utility for servicing the existing CMR and the PF-4 facilities, as demonstrated by RLUOB's anticipated beginning operation date for radiological operations in 2013, almost a decade before CMRR-NF. See Cook Decl. ¶ 22. Therefore it and CMRR-NF are not connected actions, even though one will benefit the other. See, e.g., Sylvester v. U.S. Army Corps of Eng'rs, 884 F.2d 394, 400 (9th Cir. 1989) (holding federal agency was not required to consider both the

effects of a proposed golf course and the accompanying proposed resort in the same EIS because "each could exist without the other, although each would benefit from the other's presence").

Construction of RLUOB was authorized in the 2004 ROD, completed consistent with that ROD (and Plaintiff does not allege otherwise), and any challenge to this aspect of the CMRR Project is time barred and moot. 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)). The fact remains that the CMRR-NF, the subject of Plaintiff's Complaint, is still undergoing design. Cook Decl. ¶¶ 20, 21. Plaintiff concedes as much in its Complaint. See Compl. ¶¶ 19-20 (alleging that CMRR-NF "has never progressed through defendants' 'preliminary design' stage" and that "Defendants have not made what they call 'Critical Decision 2' or 'Critical Decision 3,' which formally allow detailed design and construction, respectively, and Congress has never authorized or appropriated funds for the actual construction of the proposed [CMRR-NF]").

Plaintiff cites an unpublished case for the proposition that an agency cannot continue activity while an EIS is being prepared. Pl. Obj. at 9-10 (citing Los Alamos Study Group, et al. v. O'Leary, No. 94-1306-M (D.N.M. Jan 26, 1995) (unpub.), attached as Dkt. No. 33-1). In O'Leary, the Court granted a preliminary injunction on the DOE's Dual-Axis Radiographic Hydrotest ("DARHT") facility. O'Leary, at 33-34. O'Leary is easily distinguishable from the present action. In O'Leary, DOE had not conducted an EIS for the challenged DARHT project, but had completed one phase of the project *and was currently constructing the second and third phases of the project without completing an EIS*. Id. at 2. The O'Leary court found that the lack of an EIS for the project violated NEPA, and was faced with the question of whether to enjoin ongoing construction. And, contrary

to Plaintiff's assertions, O'Leary did not address or enjoin planning and design of the project.

In this case, the 2003 EIS and 2004 ROD authorized construction of the CMRR-NF and, in light of new information resulting in design changes to the proposed building, NNSA has opted to prepare an SEIS, in full and continuing compliance with NEPA. Unlike the DAHRT project at issue in O'Leary, here NNSA has taken no action that was not analyzed and approved in the 2003 EIS and 2004 ROD, and no CMRR-NF construction is occurring, nor will any occur until after the SEIS is completed and a new decision issued. Cook Decl. ¶ 21. As the Magistrate Judge accurately found, "No CMRR-NF construction is underway, and none will occur while the SEIS is being prepared." F&R ¶ 16. Thus, unlike O'Leary, in this case NNSA has followed the proper procedure of approving CMRR-NF pursuant to the 2003 EIS and 2004 ROD and then delaying construction while it analyzes potential design changes in the SEIS.[6]

Plaintiff characterizes its case as alleging that NNSA must (1) prepare an "applicable" EIS and ROD, (2) address "cumulative impacts," (3) develop a "mitigation plan," (4) integrate the NEPA analysis into its decision-making process, and (5) include "public participation" in that process. Pl. Obj. at 5. As the Magistrate Judge correctly determined, all of these claims are prudentially mooted

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[6] As it has in prior filings, Plaintiff again erroneously relies on Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002), for the proposition that "[t]he Magistrate [sic] erroneously concluded that defendants are merely engaged in what the Magistrate [sic] considered benign design activities, which the Magistrate [sic] somehow believed do not prejudice their selection of alternatives." Pl. Obj. at 9 But in Davis the Tenth Circuit--even after finding a NEPA violation that is not present here--remanded only "for entry of a preliminary injunction barring further road construction pending resolution of this case on the merits." 302 F.3d at 1126. Notably, the remand did not require an injunction against further planning and design, only construction of the challenged project, and therefore, like O'Leary, Davis does not support Plaintiff's proposition. See also Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 202 (4th Cir. 2005) (rejecting as overly broad a district court injunction, following the finding of a NEPA violation, that enjoined planning and development, in addition to construction, of a Navy aircraft landing training field, pending preparation of an SEIS).

by preparation of the SEIS, which will address all of these issues. For the same reasons, these claims are not ripe until NNSA completes that SEIS and issues a new ROD, which Plaintiff may choose to challenge in a new lawsuit if its concerns are not addressed.

III. PLAINTIFF'S CLAIMS ARE CONSTITUTIONALLY MOOT

In a rhetorical flourish, Plaintiff next contends that its claims are not moot because the "SEIS is a smokescreen to fend off an injunction." Pl. Obj. at 11. As with ripeness, the Magistrate Judge's findings and recommendation did not recommend dismissal of Plaintiff's complaint on the grounds of mootness. See generally F&R. To the extent that the Court considers constitutional mootness as grounds for dismissal of the action, Plaintiff's objections should be overruled. See Mot. to Dismiss, at 20-24; Reply, at 9-12.

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 in the case 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 v. Thompson, 187 F.3d 1213, 1216 (10th Cir. 1999). 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, 110 F.3d at 728 ("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."). Thus, for example, when a new agency decision supersedes an older decision, challenges to the older decision are moot. See Rio Grande Silvery Minnow, 601 F.3d at 1113 (challenge to a Biological Opinion is moot when that opinion has been superseded by a later

Biological Opinion); 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 id. (holding that review of earlier decision document "would be especially inappropriate" because it had been superseded).

Plaintiff contends that its claims are not moot because circumstances of the case have not changed. Pl. Obj. at 11. This is flatly contradicted by the fact that NNSA is preparing an SEIS to analyze the potential environmental impacts of the updated and ongoing design of the proposed CMRR-NF. Cook Decl. ¶¶ 15, 16. The central claim of Plaintiff's Complaint is that NNSA must prepare a NEPA analysis for the CMRR-NF as presently proposed. Compl. ¶ 4. Because NNSA is doing just that--preparing an SEIS and issuing a new decision based on that SEIS--Plaintiff's Complaint is moot. 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."). Any complaints about what the new NEPA process must be or how it must progress, or what must be included in the new NEPA analysis, are premature until NNSA renders a new final decision, as discussed above.

Plaintiff next contends that its action is not moot because the SEIS is merely voluntary cessation of a challenged practice. Pl. Obj. at 11-12. Where, as here, the conduct at issue is highly fact- and context-specific, and not likely to "recur" under similar circumstances, the voluntary cessation doctrine is inapplicable. Unified Sch. Dist. No. 259, Sedgwick County, Kan. v. Disability Rights Ctr. of Kan., 491 F.3d 1143, 1150 (10th Cir. 2007). Any future decision to construct the CMRR-NF will be informed by the SEIS. Cook Decl. ¶ 18. NNSA's decision to prepare an SEIS,

and inform future decisions based on the SEIS, is no "mere informal promise," but a concrete, intervening event that moots Plaintiff's claims. Rio Grande Silvery Minnow, 601 F.3d at 1118; see also id. at 1117 n.15 (noting that "courts have expressly treated governmental officials' voluntary conduct 'with more solicitude' than that of private actors") (internal citation omitted).

Plaintiff then proceeds to attack the adequacy of the SEIS process, contending that it identifies only three alternatives. Pl. Obj. at 12-13. NNSA's Notice of Intent to prepare an SEIS appeared in the Federal Register. 75 Fed. Reg. 60745 (Oct. 1, 2010); see Dkt. 9-2, Decl. Ex. 2. The SEIS process has already included a scoping process and two public meetings, and will also include 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. Id.; Cook Decl. ¶ 17. It is during this public participation process where the members of the public, including Plaintiff's members, have had and will have the opportunity to submit input on the SEIS, such as on the range of alternatives. See, e.g., Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1117 (9th Cir. 2002) (stating that scoping "begin[s] a meaningful dialogue with members of the public about a proposed action"). Again, questions such as whether the NEPA process being undertaken now analyzes a reasonable range of alternative pursuant to NEPA are not properly before the Court, and must await another day.

The SEIS is not, as Plaintiff contends, "only a device to deflect injunctive relief." Pl. Obj. at 15. It is an integral part of NNSA's continuing compliance with NEPA that will further analyze the potential environmental impacts of the proposed CMRR-NF that was authorized in the 2004 ROD. Because NNSA is conducting further environmental review of the Project, Plaintiff's claims are moot.

CONCLUSION

For the forgoing reasons, the Court should overrule Plaintiff's objections and adopt the Magistrate Judge's well-reasoned findings and recommendation as those of this Court.

Respectfully submitted on this 7th day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2011, 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 Filing to the following CM/ECF registrants:

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